

Commentary
on the Additional Protocols
of 8 June 1977
to the Geneva Conventions
of 12 August 1949

International Committee of the Red Cross

Commentary
on the Additional Protocols to the Geneva Conventions

Reading Committee

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(Protocol I)

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Commentary on the Additional Protocols

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of 12 August 1949

Editors

Yves SANDOZ · Christophe SWINARSKI ·
Bruno ZIMMERMANN

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Table of contents

Foreword	xiii
Signatures	xv
Abbreviations	xvii
Editors' note	xxv
General introduction	xxix
 Protocol I	 3
Table of contents	5
Signatures	9
Abbreviations	11
 Title of the Protocol	 19
 Preamble	 23
 Part I	
– <i>General provisions</i>	31
Article 1 – <i>General principles and scope of application</i>	33
Article 2 – <i>Definitions</i>	57
Article 3 – <i>Beginning and end of application</i>	65
Article 4 – <i>Legal status of the Parties to the conflict</i>	71
Article 5 – <i>Appointment of Protecting Powers and of their substitute</i>	75
Article 6 – <i>Qualified persons</i>	91
Article 7 – <i>Meetings</i>	103
 Part II	
– <i>Wounded, sick and shipwrecked</i>	107
Section I – <i>General protection</i>	111
Article 8 – <i>Terminology</i>	113
Article 9 – <i>Field of application</i>	137
Article 10 – <i>Protection and care</i>	145
Article 11 – <i>Protection of persons</i>	149
Article 12 – <i>Protection of medical units</i>	165
Article 13 – <i>Discontinuance of protection of civilian medical units</i> .	173

Article 14	– <i>Limitations on requisition of civilian medical units</i> . . .	181
Article 15	– <i>Protection of civilian medical and religious personnel</i> . . .	189
Article 16	– <i>General protection of medical duties</i>	197
Article 17	– <i>Role of the civilian population and of aid societies</i> . . .	209
Article 18	– <i>Identification</i>	221
Article 19	– <i>Neutral and other States not Parties to the conflict</i> . . .	237
Article 20	– <i>Prohibition of reprisals</i>	241
Section II	– <i>Medical transportation</i>	245
Article 21	– <i>Medical vehicles</i>	249
Article 22	– <i>Hospital ships and coastal rescue craft</i>	253
Article 23	– <i>Other medical ships and craft</i>	261
Article 24	– <i>Protection of medical aircraft</i>	279
Article 25	– <i>Medical aircraft in areas not controlled by an adverse Party</i>	283
Article 26	– <i>Medical aircraft in contact or similar zones</i>	287
Article 27	– <i>Medical aircraft in areas controlled by an adverse Party</i> . . .	293
Article 28	– <i>Restrictions on operations of medical aircraft</i>	299
Article 29	– <i>Notifications and agreements concerning medical aircraft</i>	307
Article 30	– <i>Landing and inspection of medical aircraft</i>	315
Article 31	– <i>Neutral or other States not Parties to the conflict</i> . . .	325
Section III	– <i>Missing and dead persons</i>	339
Article 32	– <i>General principle</i>	343
Article 33	– <i>Missing persons</i>	349
Article 34	– <i>Remains of deceased</i>	365
Part III	– <i>Methods and means of warfare – Combatant and prisoner-of-war status</i>	381
Section I	– <i>Methods and means of warfare</i>	387
Article 35	– <i>Basic rules</i>	389
Article 36	– <i>New weapons</i>	421
Article 37	– <i>Prohibition of perfidy</i>	429
Article 38	– <i>Recognized emblems</i>	445
Article 39	– <i>Emblems of nationality</i>	461
Article 40	– <i>Quarter</i>	473
Article 41	– <i>Safeguard of an enemy hors de combat</i>	479
Article 42	– <i>Occupants of aircraft</i>	493
Section II	– <i>Combatant and prisoner-of-war status</i>	503
Article 43	– <i>Armed forces</i>	505
Article 44	– <i>Combatants and prisoners of war</i>	519
Article 45	– <i>Protection of persons who have taken part in hostilities</i>	543
Article 46	– <i>Spies</i>	561
Article 47	– <i>Mercenaries</i>	571

Part IV	– <i>Civilian population</i>	583
Section I	– <i>General protection against effects of hostilities</i>	585
Article 48	– <i>Basic rule</i>	597
Article 49	– <i>Definition of attacks and scope of application</i>	601
Article 50	– <i>Definition of civilians and civilian population</i>	609
Article 51	– <i>Protection of the civilian population</i>	613
Article 52	– <i>General protection of civilian objects</i>	629
Article 53	– <i>Protection of cultural objects and of places of worship</i>	639
Article 54	– <i>Protection of objects indispensable to the survival of the civilian population</i>	651
Article 55	– <i>Protection of the natural environment</i>	661
Article 56	– <i>Protection of works and installations containing dangerous forces</i>	665
Article 57	– <i>Precautions in attack</i>	677
Article 58	– <i>Precautions against the effects of attacks</i>	691
Chapter V	– <i>Localities and zones under special protection</i>	697
Article 59	– <i>Non-defended localities</i>	699
Article 60	– <i>Demilitarized zones</i>	707
Chapter VI	– <i>Civil defence</i>	713
Article 61	– <i>Definitions and scope</i>	717
Article 62	– <i>General protection</i>	737
Article 63	– <i>Civil defence in occupied territories</i>	745
Article 64	– <i>Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations</i>	759
Article 65	– <i>Cessation of protection</i>	769
Article 66	– <i>Identification</i>	779
Article 67	– <i>Members of the armed forces and military units assigned to civil defence organizations</i>	791
Section II	– <i>Relief in favour of the civilian population</i>	805
Article 68	– <i>Field of application</i>	809
Article 69	– <i>Basic needs in occupied territories</i>	811
Article 70	– <i>Relief actions</i>	815
Article 71	– <i>Personnel participating in relief actions</i>	831
Section III	– <i>Treatment of persons in the power of a Party to the conflict</i>	837
Chapter I	– <i>Field of application and protection of persons and objects</i>	839
Article 72	– <i>Field of application</i>	841
Article 73	– <i>Refugees and stateless persons</i>	845
Article 74	– <i>Reunion of dispersed families</i>	857
Article 75	– <i>Fundamental guarantees</i>	861
Article 76	– <i>Protection of women</i>	891
Article 77	– <i>Protection of children</i>	897

Article 78	– <i>Evacuation of children</i>	907
Article 79	– <i>Measures of protection for journalists</i>	917
Part V	– <i>Execution of the Conventions and of this Protocol</i> . . .	925
Section I	– <i>General provisions</i>	927
Article 80	– <i>Measures for execution</i>	929
Article 81	– <i>Activities of the Red Cross and other humanitarian organizations</i>	935
Article 82	– <i>Legal advisers in armed forces</i>	947
Article 83	– <i>Dissemination</i>	959
Article 84	– <i>Rules of application</i>	969
Section II	– <i>Repression of breaches of the Conventions and of this Protocol</i>	973
Article 85	– <i>Repression of breaches of this Protocol</i>	989
Article 86	– <i>Failure to act</i>	1005
Article 87	– <i>Duty of commanders</i>	1017
Article 88	– <i>Mutual assistance in criminal matters</i>	1025
Article 89	– <i>Co-operation</i>	1031
Article 90	– <i>International Fact-Finding Commission</i>	1037
Article 91	– <i>Responsibility</i>	1053
Part VI	– <i>Final provisions</i>	1059
Article 92	– <i>Signature</i>	1067
Article 93	– <i>Ratification</i>	1071
Article 94	– <i>Accession</i>	1075
Article 95	– <i>Entry into force</i>	1079
Article 96	– <i>Treaty relations upon entry into force of this Protocol</i>	1083
Article 97	– <i>Amendment</i>	1093
Article 98	– <i>Revision of Annex I</i>	1099
Article 99	– <i>Denunciation</i>	1107
Article 100	– <i>Notifications</i>	1113
Article 101	– <i>Registration</i>	1117
Article 102	– <i>Authentic texts</i>	1119
Annex I		1125
Table of contents		1127
Abbreviations		1129
General introduction to the Commentary on Annex I		1137

Chapter I	– <i>Identity cards</i>	1151
Article 1	– <i>Identity card for permanent civilian medical and religious personnel</i>	1153
Article 2	– <i>Identity card for temporary civilian medical and religious personnel</i>	1161
Chapter II	– <i>The distinctive emblem</i>	1167
Article 3	– <i>Shape and nature</i>	1173
Article 4	– <i>Use</i>	1179
Chapter III	– <i>Distinctive signals</i>	1185
Article 5	– <i>Optional use</i>	1199
Article 6	– <i>Light signal</i>	1205
Article 7	– <i>Radio signal</i>	1215
Article 8	– <i>Electronic identification</i>	1247
Chapter IV	– <i>Communications</i>	1257
Article 9	– <i>Radiocommunications</i>	1261
Article 10	– <i>Use of international codes</i>	1265
Article 11	– <i>Other means of communication</i>	1269
Article 12	– <i>Flight plans</i>	1273
Article 13	– <i>Signals and procedures for the interception of medical aircraft</i>	1279
Chapter V	– <i>Civil defence</i>	1283
Article 14	– <i>Identity card</i>	1285
Article 15	– <i>International distinctive sign</i>	1289
Chapter VI	– <i>Works and installations containing dangerous forces</i>	1295
Article 16	– <i>International special sign</i>	1295
Annex II		1301
Protocol II		1307
Table of contents		1309
Abbreviations		1311
General introduction to the Commentary on Protocol II		1319
Preamble		1337
Part I	– <i>Scope of this Protocol</i>	1343
Article 1	– <i>Material field of application</i>	1347
Article 2	– <i>Personal field of application</i>	1357
Article 3	– <i>Non-intervention</i>	1361

Part II	– <i>Humane treatment</i>	1365
Article 4	– <i>Fundamental guarantees</i>	1367
Article 5	– <i>Persons whose liberty has been restricted</i>	1383
Article 6	– <i>Penal prosecutions</i>	1395
Part III	– <i>Wounded, sick and shipwrecked</i>	1403
Article 7	– <i>Protection and care</i>	1407
Article 8	– <i>Search</i>	1413
Article 9	– <i>Protection of medical and religious personnel</i>	1417
Article 10	– <i>General protection of medical duties</i>	1423
Article 11	– <i>Protection of medical units and transports</i>	1431
Article 12	– <i>The distinctive emblem</i>	1437
Part IV	– <i>Civilian population</i>	1443
Article 13	– <i>Protection of the civilian population</i>	1447
Article 14	– <i>Protection of objects indispensable to the survival of the civilian population</i>	1455
Article 15	– <i>Protection of works and installations containing dangerous forces</i>	1461
Article 16	– <i>Protection of cultural objects and of places of worship</i>	1465
Article 17	– <i>Prohibition of forced movement of civilians</i>	1471
Article 18	– <i>Relief societies and relief actions</i>	1475
Part V	– <i>Final provisions</i>	1483
Article 19	– <i>Dissemination</i>	1487
Article 20	– <i>Signature</i>	1491
Article 21	– <i>Ratification</i>	1493
Article 22	– <i>Accession</i>	1495
Article 23	– <i>Entry into force</i>	1497
Article 24	– <i>Amendment</i>	1499
Article 25	– <i>Denunciation</i>	1501
Article 26	– <i>Notifications</i>	1505
Article 27	– <i>Registration</i>	1507
Article 28	– <i>Authentic texts</i>	1509

Resolutions adopted at the fourth session of the Diplomatic Conference 1511

Resolution 17	1513
Resolution 18	1515
Resolution 19	1519
Resolution 20	1523

Resolution 21	1525
Resolution 22	1527
Resolution 24	1529
Extracts from the final Act	1531
 Instruments	 1533
Signatures, ratifications, accessions and successions to the major relevant treaties	1549
 Resolutions of the Red Cross and of the Diplomatic Conferences	 1563
 Resolutions adopted by international bodies	 1569
 Bibliography	 1579
 Index	 1597

Foreword

With the publication of this Commentary, I am pleased to welcome the completion of a long task which is of particular importance to the ICRC. All those who made this achievement possible receive here the ICRC's sincere gratitude.

From its experience of the Commentary on the Geneva Conventions the ICRC was not unaware of the magnitude of the assignment facing the authors, but it did not hesitate to undertake it. It invited its Honorary Vice-President, Jean Pictet, to preside over the Reading Committee so that it could benefit from his wide experience, as well as ensure the smooth transition from the Commentary on the Conventions, and it asked several members of its staff to devote a great deal of time to this work.

However, the ICRC also allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC.

The ICRC decided to support this undertaking and publish the Commentary because it is conscious of its role as a guardian of international humanitarian law and is convinced of the importance of this work for those entrusted with implementing the Protocols or ensuring that they are widely disseminated, particularly among government and academic circles, and in Red Cross and Red Crescent circles. The Commentary on the Geneva Conventions gave ample proof in this respect of the value of such a work.

It is well known that without this work of implementation and dissemination, humanitarian law would remain a dead letter and would not be able to achieve its essential objective: the protection of the victims of armed conflicts. In this sense the publication of this Commentary is essentially considered by the ICRC as an effort on behalf of such victims.

Alexandre Hay
President of the ICRC

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<i>Ch.S.</i>	Christophe Swinarski
<i>C.F.W.</i>	Claude F. Wenger
<i>B.Z.</i>	Bruno Zimmermann

Abbreviations

AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
Annuaire IDI	<i>Annuaire de l'Institut de droit international</i>
ASDI	<i>Annuaire suisse de droit international</i>
ATS	Air Traffic Services
BYIL	<i>British Year Book of International Law</i>
CCD	Conference of the Committee on Disarmament
CCIR	International Radio Consultative Committee (Comité consultatif international des radiocommunications)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés), 1974-1977
CE	Conference of Government Experts
CE/1b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, I, Introduction, Submitted by the ICRC, Geneva, January 1971</i>
CE/2b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, II, Measures intended to reinforce the implementation of the existing law, Submitted by the ICRC, Geneva, January 1971</i>
CE/3b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, III, Protection of the civilian population against dangers of hostilities, Submitted by the ICRC, Geneva, January 1971</i>

- CE/4b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, IV, Rules relative to behaviour of combatants, Submitted by the ICRC, Geneva, January 1971*
- CE/5b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, V, Protection of victims of non-international armed conflicts, Submitted by the ICRC, Geneva, January 1971*
- CE/6b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VI, Rules applicable in guerrilla warfare, Submitted by the ICRC, Geneva, January 1971*
- CE/7b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VII, Protection of the wounded and sick, Submitted by the ICRC, Geneva, January 1971*
- CE/8b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VIII, Annexes, Submitted by the ICRC, Geneva, January 1971*
- CE 1972, Basic Texts** *Conference of Government Experts on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May-3 June 1972 (second session), I, Texts, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1972, Commentaries** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), II, Commentaries, part one and part two, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1971, Report** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, Report on the work of the Conference, ICRC, Geneva, August 1971*

- CE 1972, Report** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Report on the work of the Conference, volume I and volume II (Annexes), Geneva, July 1972*
- CE 1972, Technical Memorandum** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Technical memorandum (Questionnaire and Commentary) on Medical Marking and Identification, Documentary material submitted by the ICRC, Geneva, January 1972*
- CIE** *International Commission on Illumination (Commission internationale de l'éclairage)*
- Commentary I** *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952*
- Commentary II** *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960*
- Commentary III** *Geneva Convention relative to the Treatment of Prisoners of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960*
- Commentary IV** *Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1958*
- Commentary Drafts** *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentaries, ICRC, Geneva, October 1973*
- COSPAS/SARSAT** *Cosmos Spacecraft / Search and Rescue Satellite Aided Tracking*
- CRCE 1971, Report** *Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, 1-6 March 1971), Report on the Works of the Conference, Geneva, April 1971*

CRCE 1972, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vienna, 20 March-24 March 1972, second session), Report on the Works of the Conference, Geneva, April 1972</i>
CTA	Central Tracing Agency
Draft(s)	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, June 1973</i>
Draft Rules	<i>Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956 (first ed.), 1958 (second ed.)</i>
Government Replies	<i>Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments, ICRC, Geneva, April 1972 (first ed.), 1973 (second ed.)</i>
GYIL	<i>German Yearbook of International Law</i>
Hague Recueil	<i>Recueil des cours de l'Académie de droit international</i>
ICAO	International Civil Aviation Organization
ICDO	International Civil Defence Organization
ICRC	International Committee of the Red Cross
ICRC Memorandum	<i>Memorandum, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, to the Governments Parties to the 1949 Geneva Conventions for the Protection of War Victims and to the IVth Hague Convention of 1907 concerning the Laws and Customs of War on Land, ICRC, Geneva, May 1967</i>
IEC	International Electrotechnical Commission
IFALPA	International Federation of Air Line Pilots Associations
IFF	Identification Friend or Foe
IFRB	International Frequency Registration Board
ILC	International Lifeboat Conference
IMCO	Inter-Governmental Maritime Consultative Organization

IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
IRRC	<i>International Review of the Red Cross</i>
ISO	International Organization for Standardization
ITU	International Telecommunication Union
<i>Law Reports</i>	<i>Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, 15 vols., London, HMSO, 1948-1949</i>
<i>Lucerne Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons, (Lucerne, 24.9-18.10.1974), Report, ICRC, Geneva, 1975</i>
<i>Lugano Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons (second session – Lugano, 28.1-26.2.1976), Report, ICRC, Geneva, 1976</i>
<i>O.R.</i>	<i>Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977</i>
<i>RBDI</i>	<i>Revue Belge de Droit International</i>
<i>RDPMDG</i>	<i>Revue de droit pénal militaire et de droit de la guerre</i>
<i>Reaffirmation</i>	<i>XXIst International Conference of the Red Cross, Istanbul, 1969, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report submitted by the ICRC, Geneva, May 1969</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RICR</i>	<i>Revue internationale de la Croix-Rouge</i>
<i>XXIst Int. Conf. RC, Report</i>	<i>XXIst International Conference of the Red Cross, Istanbul, September 1969, The Protection of Civilian Medical and Nursing Personnel in Time of Conflict (Item 4 d of the Draft Agenda of the Commission on International Humanitarian Law and Assistance to Civilian Population in the event of Armed Conflict), Report submitted by the ICRC, Geneva, February 1969 (D.S. 4d/1)</i>

XXIInd Int. Conf. RC, Report	<i>Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, January 1974</i>
SIF	Selective Identification Features
SSR	Secondary Surveillance Radar
<i>Studies and Essays in Honour of Jean Pictet</i>	<i>Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, Ch. Swinarski (ed.), ICRC-Nijhoff, Geneva-The Hague, 1984</i>
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WARC 79	World Administrative Radio Conference, 1979
WARCMob-83	World Administrative Radio Conference for the Mobile Services, 1983
WHO	World Health Organization
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Editors' note

The **English version** of the Commentary is taken from the French original published in 1986. The translation was undertaken by Martinus Nijhoff Publishers' team of translators: **Mr. Tony Langham** and **Ms. Plym Peters**, and **Mr. Paul Peters**. **Ms. Suzanne Rossington** translated Annex I to Protocol I. The important task of a thorough revision of the text as a whole was undertaken by **Ms. Louise Doswald-Beck**, presently member of the ICRC Legal Division.

The present Commentary is essentially concerned with explaining the provisions of the 1977 Protocols, primarily on the basis of the work of the Diplomatic Conference (CDDH) and other preparatory work. The authors were guided by existing international humanitarian law, general international law and legal literature.

If, nevertheless, the interpretation of the texts gives rise to some uncertainty, the opinions put forward are legal opinions, and not opinions of principle: it is not a question of saying what is just, but of stating the facts. Admittedly, more general considerations or points of principle have been put forward in some cases, but these have been presented as such and can clearly be identified. The responsibility for the text of this work essentially lies with its **authors**.

The **ICRC** contributed to this Commentary first of all by inviting Mr. Jean Pictet, its Honorary Vice-President, and several of its staff to devote a great deal of their time to it, and secondly, by the support of its Legal Commission, whose advice was sought on several points of law. However, strictly speaking, it is not a commentary of the ICRC.

These opening remarks would not be complete without a tribute to the memory of **Mr. Claude Pilloud**. Former Director at the ICRC, Mr. Claude Pilloud retired after serving the Institution for more than forty years. Nevertheless, he very generously agreed to participate in the drawing up of this work. The contribution of his experience and dynamic approach was of great value up to the time of his death in November 1984.

As a collective work the Commentary was prepared within a framework of structures and procedures approved by the ICRC on the proposal of persons entrusted with that mandate.

Most of the authors participated in the work of the Diplomatic Conference (CDDH) as members of the ICRC delegation.

The first version, drafted by each author, was discussed, article by article, in the **Reading Committee**. Taking into account the remarks made during the sessions of that Committee, each author submitted a second version of his text. This second version was then examined by those responsible for **editing** and also **coordination** of the whole, and was then discussed with the author so that the substance – and to some extent, the form – could be harmonized with the other texts so as to ensure the greatest possible uniformity of the work. This discussion allowed the author to draft a third version of the text, which is in principle that contained in the work. During the **revision of the English version** some modifications and corrections were introduced to the text.

The texts bear the **signature** of their authors. After the premature death of Mr. Claude Pilloud the texts were taken over by Mr. Jean Pictet, who submitted the second and third versions.

The **editorial layout** of the work allows some parts to be made into separate volumes without the necessity of resetting.

The **accompanying texts** are aimed at collecting together all the references given in the body of the Commentary and to provide additional information for the user. With a few exceptions these references go up to 31 December 1984.

In the context of the Commentary, **references to writings on international humanitarian law** were only made to elucidate the texts being commented upon without claiming to reflect in any complete way the whole of existing literature; similarly, the authors chose to include only the most essential writings on general international law.

Each text is preceded by a collection of **references to the preparatory work** of and to the CDDH, and to the most important documents for finding the origin of the texts which were finally adopted.

In the same vein, the **Index** common to the two Protocols allows in particular the identification of their common features, as well as the relationship which existed during the drafting of these instruments, especially during the CDDH.

The **continuous numbering** of paragraphs in the work permits easy reference to a particular passage without necessarily having to give other information.

It is our pleasant duty to **thank** all those who contributed to the publication of the Commentary.

Our thanks go in the first place to **Ms. Eliane Goy-Voyame**, whose dedicated participation in the work of producing and editing the texts made it possible to complete the work in time. For a period she was aptly seconded by **Ms. Mari-Carmen Jan Dechamps**.

Ms. Sylvie Valaizon, editorial assistant, made a substantial contribution to editing the work.

Finally, our thanks go to Martinus Nijhoff Publishers, and in particular to **Mr. Alan D. Stephens, Ms. Hannelore Brown-Knauff** and **Mr. Peter A. Schregardus** for their efficient involvement.

* * *

For the purposes of this Commentary it seems useful to recall and define some expressions generally used throughout the work.

Protocol I defines the expression **rules of international law applicable in armed conflict** as “the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict” (Article 2, sub-paragraph (b)).

This expression covers all rules specifically intended to apply during armed conflict. In this Commentary it is abbreviated in some cases to the expression **law of armed conflict**.

In the present Commentary the expression **international humanitarian law applicable in armed conflict** means international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression “international humanitarian law applicable in armed conflict” is often abbreviated to **international humanitarian law** or **humanitarian law**.

In the legal literature, the expression **Geneva law** is used fairly commonly to designate the rules of humanitarian law laying down the right of victims to protection, and the expression **Hague law** to designate the rules of humanitarian law governing the conduct of hostilities.

Nowadays this is a rather artificial distinction as the Protocols contain rules of both types. Nevertheless, these expressions are used several times in the Commentary in the sense defined here.

The Conventions and the Protocols mention the three **distinctive emblems** of red cross, red crescent and red lion and sun. The latter has only ever been used by Iran.

According to a notification by the Swiss Federal Council acting as depositary of these treaties, dated 20 October 1980, the Islamic Republic of Iran notified it of its adoption of the red crescent emblem.

Taking this decision into account, the present Commentary restricts itself in principle, depending on the context, to using the expressions “distinctive emblem”, “red cross” and “red crescent”, or a combination of the three.

In accordance with the above-mentioned decision of the Islamic Republic of Iran, the Iranian Red Lion and Sun Society changed its name to “Iranian Red Crescent”.

In principle the present Commentary will restrict itself, depending on the context, to the expressions **National Societies**, **National Red Cross Societies**, and **National Red Cross and Red Crescent Societies**.

On 12 October 1983 the League of Red Cross Societies changed its name to the **League of Red Cross and Red Crescent Societies**.

Thus in principle the present Commentary will use that name or simply the expression **League**.

Since 8 November 1986 the International Red Cross has the name of the **International Red Cross and Red Crescent Movement** (although it may continue to be named the International Red Cross). This is composed of the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the League of Red Cross and Red Crescent Societies. At the same date, new Statutes of the Movement entered into force; this entailed some changes in the numbering of these Statutes' Articles. As the Commentary generally gives information valid up to December 1984, none of these changes is reflected in the text.

Y.S.

Ch.S.

B.Z.

General introduction

The task of the development of humanitarian law

From its inception, the International Committee of the Red Cross (ICRC) has taken the initiative, which has by now become a long-standing practice, of working for the development of international humanitarian law, which regulates the conduct of hostilities in order to mitigate their severity. Thus it was responsible for initiating the process which led to the conclusion, and later the revision of the Geneva Conventions for the protection of the victims of war of 1864, 1906, 1929 and 1949, while the Government of Switzerland, the depositary State of these basic instruments, convened and organized diplomatic conferences which brought into being these Conventions.

The Geneva Conventions, which have saved innumerable lives, were considerably enlarged in 1949: the three Conventions existing prior to that date relative to wounded and sick soldiers, to the shipwrecked and to prisoners of war, were reviewed and improved, and the Fourth Convention, which was almost entirely new and related to civilians, bridged a gap which was keenly felt during the Second World War. Yet this last mentioned Convention only protects civilians against arbitrary enemy action, and not – except in the specific case of the wounded, hospitals and medical personnel and material – against the effects of hostilities.

However, although humanitarian law had been developed and adapted to the needs of the time in 1949, the Geneva Conventions did not cover all aspects of human suffering in armed conflict. Moreover, by the 1970's even these were already a quarter of a century old and on some points had exposed gaps and imperfections.

In addition, the law of The Hague, which is concerned with developing rules on hostilities and the use of weapons, had not undergone any significant revision since 1907. Consequently, in agreement with the Government of the Netherlands, two subjects arising from the Hague Regulations Respecting the Laws and Customs of War on Land were placed on the agenda for future development: the conduct of combatants and, even more important, the protection of the civilian population from the effects of hostilities.

On the latter point, which it considered essential, the ICRC had already presented Draft Rules to the XIXth International Conference of the Red Cross, which convened in New Delhi in 1957. Though these draft rules were approved in principle at the time, they did not achieve support from governments, mainly because they tackled directly the controversial question of nuclear weapons.

Subsequently the XXth International Conference of the Red Cross, which took

place in Vienna in 1965, laid down in its resolution XXVIII four principles relating to the protection of the civilian population against the dangers of indiscriminate warfare. In addition, it urged “the ICRC to pursue the development of International Humanitarian Law”.

Considering this to be an encouraging sign, the ICRC then decided to move a stage further in trying to develop humanitarian law. It did not allow itself to become discouraged by the enormity and the difficulty of this task. In fact, it soon became apparent that this task was much more arduous than in 1949, when a single session of the Diplomatic Conference had been sufficient. This time, four were needed. As we have seen, the matter was more problematic with regard to some aspects, such as the protection of the civilian population against the effects of hostilities, a matter which the ICRC had previously decided not to include.

Soon thereafter, following the wishes of that Conference, the ICRC addressed a memorandum dated 19 May 1967 to all States Parties to the Geneva Conventions, raising the question of further developing the law of armed conflicts and including a list it had drawn up of the written and customary rules which could be considered to still be in force.

In May 1968 the International Conference on Human Rights, held in Teheran on the initiative of the United Nations, revealed its interest in this question and invited the United Nations Secretary-General to establish contact with the ICRC with a view to cooperating in a joint study. Consultations took place on this matter, and since then the ICRC has maintained close links with the Organization. Thus representatives of the UN have participated in the two sessions of the Conference of Government Experts called by the ICRC. Similarly, delegates from the ICRC have closely followed the debates of the UN General Assembly, which, after taking cognisance of extensively documented reports of the Secretary-General, adopted at each session resolutions on “respect for human rights in armed conflict”, strongly encouraging the ICRC to continue in this task. In fact, it soon became apparent that by adopting the same method which so far had made the development of the Geneva Conventions possible i.e. resorting to the ICRC for the preparatory stage, then the Swiss government for convening the Conference – the best conditions for success would once more be created; by undertaking the task on neutral ground it was hoped to avoid, at least to some extent, that the discussions become politicized.

In September 1968 the ICRC put its plans to the National Societies of the Red Cross and the Red Crescent which were present at Geneva. There was no intention of trying to rewrite the Geneva Conventions, nor even of completely revising them, which would have entailed the risk of weakening them. When they are fully applied, these Conventions provide effective guarantees for the victims of conflicts. Thus it would be sufficient to extend them so as to cover certain supplementary matters and to clarify some important points. Consequently, since then, one has referred to “reaffirming and developing” humanitarian law. Similarly, the idea of adopting the form of protocols additional to the Geneva Conventions was soon conceived, and later approved by governments.

In September 1969 the XXIst International Conference of the Red Cross, held in Istanbul, was presented with an important report from the ICRC on this subject. It unanimously passed a Resolution of major importance, No. XIII, which gave the undertaking a decisive stimulus. In the terms of this resolution the

ICRC was urged to actively pursue its efforts with a view to “proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law” and to invite experts for this purpose.

In order to carry out this task, the ICRC employed its usual method of collecting all the necessary documents, demonstrating on which points the law needed to be confirmed, supplemented or improved, and then drawing up draft treaties with the aid of government experts, National Societies and other humanitarian institutions.

Thus, with valuable cooperation from the Netherlands Red Cross, it convened experts from the National Societies in The Hague in March, 1971, and had the benefit of their views.

The ICRC next convened the *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* from 24 May to 12 June 1971. About forty governments were invited to send participants to the Conference and these numbered almost 200. For this meeting the ICRC had drawn up documentation in eight volumes, numbering over 800 pages. As it was not able to cover the entire agenda, this meeting required a second session. This time it was open to all the States Parties to the Geneva Conventions.

In November 1971, the ICRC gathered the opinions of various non-governmental organizations. In March 1972, it once again consulted the National Societies, who had been cordially invited to convene in Vienna by the Austrian Red Cross, and submitted the first draft texts to them.

The second session of the Conference of Government Experts was held in Geneva from 3 May to 3 June 1972. It comprised over 400 experts sent by 77 governments. This extensive participation, the sustained work carried out in several committees, and the constructive atmosphere in which the discussions took place made it possible to achieve significant progress.

Following these sessions the ICRC drew up the complete text of two draft Protocols additional to the Geneva Conventions, one for cases of international armed conflict, the other for conflicts which were not of an international nature. These were to serve as a basis for discussion in the future Diplomatic Conference which the Swiss Government had decided to convene.

The drafts took into account most of the views given by those consulted, though they did not follow them entirely, as the ICRC could not agree with them on all points. In some cases proposals put forward were contradictory, and it was necessary to make a choice. In other cases, when the requirements of the Red Cross so dictated, the ICRC had to take the initiative itself and assume full responsibility. In elaborating the basic texts, the ICRC endeavoured to remain true to the spirit in which it had always sought guarantees for the benefit of victims of conflicts, ever since 1864, as required by humanitarian considerations, but also, in order to be realistic, taking into account military and political constraints.

The drafts were sent to all governments in June 1973, accompanied by a detailed commentary and a report of the Conference which contained, in particular, the various proposals put forward by government experts. These were again presented at the XXIInd International Conference of the Red Cross, which was held in Teheran in November of the same year. Resolution XIII of this

Conference welcomed the draft Protocols, wished the forthcoming Diplomatic Conference every success, and recommended that governments should do all they could for the texts to become applicable worldwide.

Thus the texts passed out of the hands of the Red Cross to enter a new phase in which States would have the power of decision. It is States which conclude international conventions and take on obligations thereunder.

In the introduction to the draft Protocols the ICRC had stated that: "Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems."

As regards so-called "conventional" weapons which cause superfluous injury or unnecessary suffering or strike indiscriminately civilian population and combatants alike, the ICRC did not include in the drafts any prohibitions or specific limitations as this subject seemed to be such a delicate one. It limited itself to reiterating the fundamental principles of The Hague and St. Petersburg, which had in fact become customary law. However, on the initiative of the Swedish delegation, during the second session of the Conference of Government Experts, a group of experts requested that the question of conventional weapons should also be considered.

The ICRC carried out this request and convened two sessions of a Conference of Government Experts, in Lucerne in 1974, and in Lugano in 1976. However, the results achieved at that stage did not make it possible to draw up draft treaty provisions or even to arrive at agreement on the main points, so that this subject remained one step behind the Protocols. All the documentation gathered on this important question was presented to the Diplomatic Conference, which set up an *ad hoc* committee to examine it. This committee met at each session. It did not deal with the basic aspects of the problem in any detail, but the discussions resulted in a resolution of the Conference (No. 22), expressing the wish that the matter should be dealt with within the framework of the United Nations, and calling for a special diplomatic conference "with a view to reaching agreements on prohibitions or restrictions on the use of specific conventional weapons".

This procedure was successful, and it led, on 10 October 1980, under the auspices of the United Nations, to the adoption of the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

The Diplomatic Conference from 1974 to 1977

The *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* was convened and organized by the Swiss Government in its capacity as the depositary of the Geneva Conventions and in accordance with a hundred year-old tradition. The Conference met in Geneva at the International Conference Centre in four sessions. The first session was held from 20 February to 29 March 1974, the second from 3 February to 18 April 1975, the third from 21 April to 11 June 1976 and the fourth from 17 March to 10 June 1977.

All States which were Parties to the Geneva Conventions or Members of the United Nations were invited to attend, in all numbering 155 nations. The number of those participating in the Conference varied from 107 to 124 in the various sessions. In addition, 11 national liberation movements and 51 intergovernmental or non-governmental organizations participated as observers, so that the total number of delegates fluctuated around 700.

Under the terms of the Rules of Procedure, the ICRC representatives were involved in the work of the Conference as experts and called upon to participate continuously, in particular to orally present the articles of the draft Protocols which the ICRC had drawn up, and which were used as a basis for discussion.

The presidency of the Diplomatic Conference was held by Pierre Graber, Federal Councillor, Head of the Federal Political Department, and in 1975 President of the Swiss Confederation. He presided over the plenary meetings of the Conference and the meetings of the bureau. Jean Humbert (Switzerland) held the office of Secretary-General. The Conference also appointed 19 vice-presidents.

The Conference was sub-divided into three main plenary committees, one *ad hoc* committee on "conventional weapons", also plenary, to which were added the Credentials Committee and the Drafting Committee, as well as numerous working groups. Each committee appointed its own chairman, viz., Edvard Hambro (Norway) and Einar-Frederik Ofstad (Norway) for Committee I; Tadeusz Mallik (Poland) and Stanisław-Edward Nahlik (Poland) for Committee II; Hamed Sultan (Egypt) for Committee III; Diego Garcés (Colombia) and Héctor Charry Samper (Colombia) for the *Ad Hoc* Committee; Abu Sayed Chowdhury (Bangladesh) and Iqbal Abdul Quarim Al-Fallouji (Iraq) for the Drafting Committee. The Rapporteurs were: Miguel Marin Bosch (Mexico) and Antonio Eusebio de Icaza (Mexico) for Committee I; Djibrilla Maiga (Mali) and El Hussein El Hassan (Sudan) for Committee II; Richard Baxter (United States of America) and George H. Aldrich (United States of America) for Committee III; Frits Kalshoven (Netherlands), Robert J. Akkerman (Netherlands), John G. Taylor (United Kingdom of Great Britain and Northern Ireland) and Martin R. Eaton (United Kingdom of Great Britain and Northern Ireland) for the *Ad Hoc* Committee.

The Rules of Procedure reflect the rules of procedure generally accepted in codification conferences. All decisions on matters of substance taken by the plenary Assembly, and particularly the definitive adoption of articles, were subject to a two-thirds majority whenever there was no consensus. In the Committees only a simple majority was required.

The languages of the Conference were English, French, Russian, Spanish, as well as Arabic (from the third session) and Chinese (for the first session).

The Protocols were adopted on 8 June 1977, and the Diplomatic Conference ended two days later with the formal signature of the Final Act. Almost all delegations signed this. The Final Act contains in an Annex the text of the two Protocols Additional to the Geneva Conventions of 12 August 1949, representing the results of the Conference. Some resolutions were added.

Following the ratification deposited by Ghana, and the accession by Libya, these instruments, which are of such fundamental importance for humanity, entered into force on 7 December 1978.

The 1977 codification is surely an achievement comparable to the revisions achieved in 1949. Supplemented in this way, borrowing copiously from the Hague law – which itself had been in great need of updating since 1907 – the Geneva Conventions henceforth constitute an impressive monument of 600 articles of which almost 150 are new. This codification brings great hope to so many victims, as the Powers have agreed to reaffirm and develop their obligations arising from the conduct of hostilities. It will allow the national and the international Red Cross to save even more lives and to help those in distress who would otherwise have remained unassisted. Finally, throughout the world it will spread an ideal of mutual aid and cooperation, and in this way it will advance the cause of peace – the wish of all men of goodwill.

Although the aim was only described as “reaffirming and developing humanitarian law” in order to emphasize the “additional” and complementary character of the Protocols, there is no doubt that on certain points the 1977 instruments modify previous law and sometimes even introduce fairly bold innovations.

Despite all efforts, it was not possible to entirely avoid some politics being brought into the debates. This should not come as a great surprise, for, though treaties of this nature have humanitarian aims, their implementation raises political and military problems, to begin with, that of the survival of the State. Thus it was not possible to escape this tension between political and humanitarian requirements. Such tension is in the nature of the law of armed conflict, which is based, as we know, on compromise.

However, the legislative work is accomplished, and this represents an achievement of great significance. It is also remarkable that almost all the provisions were adopted by consensus. In fact, of the 150 articles on matters of substance contained in the two Protocols, only 14 required a formal vote, not counting of course those draft articles, proposals and amendments that were rejected after a vote.

It should be a matter of great satisfaction that for the first time, all the nations of the world participated in this codification. Thus it reflects a universal sentiment which is not merely a façade, but is very real and founded on a feeling of solidarity. This should encourage all States who have not yet done so to ratify the instruments produced by such representative sessions in the very near future, or to accede to them.

It is too early to assess the true value of these new instruments – a period of time will be necessary to do this. However, there is every reason to think that they will follow the course of the Geneva Conventions, that they will be worthy of this long tradition, and that they will allow safeguards for human beings to be improved, which is their *raison d'être*.

In the final analysis, Protocol I very largely meets the concerns and wishes of the Red Cross. Amongst the results achieved, we should like to mention first the protection of the civilian population against the dangers of hostilities. The reaffirmation and development of norms in this field, which had been neglected since 1907, was the primary reason for the Diplomatic Conference, and the Conference would have been considered a failure if the legislative work had not been successful on this point.

Civilian medical personnel and the personnel of civil defence services will in

future enjoy safeguards comparable to those which military medical personnel have enjoyed for a long time. The medical service has acquired a better status, and there is hope that immunity will be achieved for medical aviation, thanks to modern identification techniques.

A major area is constituted by the complex subject of wars of liberation and guerrilla fighters; this has raised difficult questions and has led to a number of controversies, but it is probably because of the solutions that were finally adopted, which pay great attention to humanitarian considerations, that many contemporary conflicts will be governed by law.

Another noteworthy chapter relates to the conduct of combatants, a subject which was dealt with in the Hague law. This field was in great need of updating, and most of the customary rules have now been codified. The provisions for the reinforcement of the supervision over the application of the Conventions are also significant. They include the development of sanctions and a stronger position of the Red Cross; it is not possible to mention all the provisions here.

As regards Protocol II, relating to non-international armed conflicts, this was adopted by consensus and represents considerable progress, despite its rather restricted field of application.

At the close of the Diplomatic Conference of 1974-1977, the ICRC made a point of once more expressing its profound gratitude to all those who, either in public or in private, had encouraged it in its determination, had given it their trust and had helped it to carry out a task which required many years of work.

It has been said that the texts drawn up in Geneva are often complex and difficult. Thus it is all the more necessary to explain them and ensure that they are understood at all levels, and most of all, by those who will be responsible for putting them into practice. It is to be hoped that the present Commentary, which is intended primarily as a working tool, may be a useful contribution to this task.

J.P.

Commentary on Protocol 1

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Commentary
on the Protocol Additional
to the Geneva Conventions
of 12 August 1949,
and relating to the Protection of Victims
of International Armed Conflicts
(Protocol I)

Editors

Yves SANDOZ · Christophe SWINARSKI ·
Bruno ZIMMERMANN

International Committee of the Red Cross

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Table of contents of Commentary on Protocol I (except Annexes I and II)

Signatures	9
Abbreviations	11
Title of the Protocol	19
Preamble	23
Part I	
– <i>General provisions</i>	31
Article 1	
– <i>General principles and scope of application</i>	33
Article 2	
– <i>Definitions</i>	57
Article 3	
– <i>Beginning and end of application</i>	65
Article 4	
– <i>Legal status of the Parties to the conflict</i>	71
Article 5	
– <i>Appointment of Protecting Powers and of their substitute</i>	75
Article 6	
– <i>Qualified persons</i>	91
Article 7	
– <i>Meetings</i>	103
Part II	
– <i>Wounded, sick and shipwrecked</i>	107
Section I	
– <i>General protection</i>	111
Article 8	
– <i>Terminology</i>	113
Article 9	
– <i>Field of application</i>	137
Article 10	
– <i>Protection and care</i>	145
Article 11	
– <i>Protection of persons</i>	149
Article 12	
– <i>Protection of medical units</i>	165
Article 13	
– <i>Discontinuance of protection of civilian medical units</i>	173
Article 14	
– <i>Limitations on requisition of civilian medical units</i>	181
Article 15	
– <i>Protection of civilian medical and religious personnel</i>	189
Article 16	
– <i>General protection of medical duties</i>	197
Article 17	
– <i>Role of the civilian population and of aid societies</i>	209
Article 18	
– <i>Identification</i>	221
Article 19	
– <i>Neutral and other States not Parties to the conflict</i>	237
Article 20	
– <i>Prohibition of reprisals</i>	241
Section II	
– <i>Medical transportation</i>	245
Article 21	
– <i>Medical vehicles</i>	249

Article 22	– <i>Hospital ships and coastal rescue craft</i>	253
Article 23	– <i>Other medical ships and craft</i>	261
Article 24	– <i>Protection of medical aircraft</i>	279
Article 25	– <i>Medical aircraft in areas not controlled by an adverse Party</i>	283
Article 26	– <i>Medical aircraft in contact or similar zones</i>	287
Article 27	– <i>Medical aircraft in areas controlled by an adverse Party</i>	293
Article 28	– <i>Restrictions on operations of medical aircraft</i>	299
Article 29	– <i>Notifications and agreements concerning medical aircraft</i>	307
Article 30	– <i>Landing and inspection of medical aircraft</i>	315
Article 31	– <i>Neutral or other States not Parties to the conflict</i>	325
Section III	– <i>Missing and dead persons</i>	339
Article 32	– <i>General principle</i>	343
Article 33	– <i>Missing persons</i>	349
Article 34	– <i>Remains of deceased</i>	365
Part III	– <i>Methods and means of warfare – Combatant and prisoner-of-war status</i>	381
Section I	– <i>Methods and means of warfare</i>	387
Article 35	– <i>Basic rules</i>	389
Article 36	– <i>New weapons</i>	421
Article 37	– <i>Prohibition of perfidy</i>	429
Article 38	– <i>Recognized emblems</i>	445
Article 39	– <i>Emblems of nationality</i>	461
Article 40	– <i>Quarter</i>	473
Article 41	– <i>Safeguard of an enemy hors de combat</i>	479
Article 42	– <i>Occupants of aircraft</i>	493
Section II	– <i>Combatant and prisoner-of-war status</i>	503
Article 43	– <i>Armed forces</i>	505
Article 44	– <i>Combatants and prisoners of war</i>	519
Article 45	– <i>Protection of persons who have taken part in hostilities</i>	543
Article 46	– <i>Spies</i>	561
Article 47	– <i>Mercenaries</i>	571
Part IV	– <i>Civilian population</i>	583
Section I	– <i>General protection against effects of hostilities</i>	585
Article 48	– <i>Basic rule</i>	597
Article 49	– <i>Definition of attacks and scope of application</i>	601
Article 50	– <i>Definition of civilians and civilian population</i>	609
Article 51	– <i>Protection of the civilian population</i>	613
Article 52	– <i>General protection of civilian objects</i>	629
Article 53	– <i>Protection of cultural objects and of places of worship</i>	639

Article 54	– <i>Protection of objects indispensable to the survival of the civilian population</i>	651
Article 55	– <i>Protection of the natural environment</i>	661
Article 56	– <i>Protection of works and installations containing dangerous forces</i>	665
Article 57	– <i>Precautions in attack</i>	677
Article 58	– <i>Precautions against the effects of attacks</i>	691
Chapter V	– <i>Localities and zones under special protection</i>	697
Article 59	– <i>Non-defended localities</i>	699
Article 60	– <i>Demilitarized zones</i>	707
Chapter VI	– <i>Civil defence</i>	713
Article 61	– <i>Definitions and scope</i>	717
Article 62	– <i>General protection</i>	737
Article 63	– <i>Civil defence in occupied territories</i>	745
Article 64	– <i>Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations</i>	759
Article 65	– <i>Cessation of protection</i>	769
Article 66	– <i>Identification</i>	779
Article 67	– <i>Members of the armed forces and military units assigned to civil defence organizations</i>	791
Section II	– <i>Relief in favour of the civilian population</i>	805
Article 68	– <i>Field of application</i>	809
Article 69	– <i>Basic needs in occupied territories</i>	811
Article 70	– <i>Relief actions</i>	815
Article 71	– <i>Personnel participating in relief actions</i>	831
Section III	– <i>Treatment of persons in the power of a Party to the conflict</i>	837
Chapter I	– <i>Field of application and protection of persons and objects</i>	839
Article 72	– <i>Field of application</i>	841
Article 73	– <i>Refugees and stateless persons</i>	845
Article 74	– <i>Reunion of dispersed families</i>	857
Article 75	– <i>Fundamental guarantees</i>	861
Article 76	– <i>Protection of women</i>	891
Article 77	– <i>Protection of children</i>	897
Article 78	– <i>Evacuation of children</i>	907
Article 79	– <i>Measures of protection for journalists</i>	917
Part V	– <i>Execution of the Conventions and of this Protocol</i>	925
Section I	– <i>General provisions</i>	927
Article 80	– <i>Measures for execution</i>	929
Article 81	– <i>Activities of the Red Cross and other humanitarian organizations</i>	935

Article 82	– <i>Legal advisers in armed forces</i>	947
Article 83	– <i>Dissemination</i>	959
Article 84	– <i>Rules of application</i>	969
Section II	– <i>Repression of breaches of the Conventions and of this Protocol</i>	973
Article 85	– <i>Repression of breaches of this Protocol</i>	989
Article 86	– <i>Failure to act</i>	1005
Article 87	– <i>Duty of commanders</i>	1017
Article 88	– <i>Mutual assistance in criminal matters</i>	1025
Article 89	– <i>Co-operation</i>	1031
Article 90	– <i>International Fact-Finding Commission</i>	1037
Article 91	– <i>Responsibility</i>	1053
Part VI	– <i>Final provisions</i>	1059
Article 92	– <i>Signature</i>	1067
Article 93	– <i>Ratification</i>	1071
Article 94	– <i>Accession</i>	1075
Article 95	– <i>Entry into force</i>	1079
Article 96	– <i>Treaty relations upon entry into force of this Protocol</i>	1083
Article 97	– <i>Amendment</i>	1093
Article 98	– <i>Revision of Annex I</i>	1099
Article 99	– <i>Denunciation</i>	1107
Article 100	– <i>Notifications</i>	1113
Article 101	– <i>Registration</i>	1117
Article 102	– <i>Authentic texts</i>	1119

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Abbreviations

AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
Annuaire IDI	<i>Annuaire de l'Institut de droit international</i>
ASDI	<i>Annuaire suisse de droit international</i>
ATS	Air Traffic Services
BYIL	<i>British Year Book of International Law</i>
CCD	Conference of the Committee on Disarmament
CCIR	International Radio Consultative Committee (Comité consultatif international des radiocommunications)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés), 1974-1977
CE	Conference of Government Experts
CE/1b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, I, Introduction, Submitted by the ICRC, Geneva, January 1971</i>
CE/2b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, II, Measures intended to reinforce the implementation of the existing law, Submitted by the ICRC, Geneva, January 1971</i>
CE/3b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, III, Protection of the civilian population against dangers of hostilities, Submitted by the ICRC, Geneva, January 1971</i>

CE/4b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, IV, Rules relative to behaviour of combatants, Submitted by the ICRC, Geneva, January 1971</i>
CE/5b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, V, Protection of victims of non-international armed conflicts, Submitted by the ICRC, Geneva, January 1971</i>
CE/6b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VI, Rules applicable in guerrilla warfare, Submitted by the ICRC, Geneva, January 1971</i>
CE/7b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VII, Protection of the wounded and sick, Submitted by the ICRC, Geneva, January 1971</i>
CE/8b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VIII, Annexes, Submitted by the ICRC, Geneva, January 1971</i>
CE 1972, Basic Texts	<i>Conference of Government Experts on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May-3 June 1972 (second session), I, Texts, Documentary material submitted by the ICRC, Geneva, January 1972</i>
CE 1972, Commentaries	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), II, Commentaries, part one and part two, Documentary material submitted by the ICRC, Geneva, January 1972</i>
CE 1971, Report	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, Report on the work of the Conference, ICRC, Geneva, August 1971</i>

CE 1972, Report	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Report on the work of the Conference, volume I and volume II (Annexes), Geneva, July 1972</i>
CE 1972, Technical Memorandum	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Technical memorandum (Questionnaire and Commentary) on Medical Marking and Identification, Documentary material submitted by the ICRC, Geneva, January 1972</i>
CIE	International Commission on Illumination (Commission internationale de l'éclairage)
Commentary I	<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952</i>
Commentary II	<i>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary III	<i>Geneva Convention relative to the Treatment of Prisoners of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary IV	<i>Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1958</i>
Commentary Drafts	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentaries, ICRC, Geneva, October 1973</i>
COSPAS/SARSAT	Cosmos Spacecraft / Search and Rescue Satellite Aided Tracking
CRCE 1971, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, 1-6 March 1971), Report on the Works of the Conference, Geneva, April 1971</i>

CRCE 1972, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vienna, 20 March-24 March 1972, second session), Report on the Works of the Conference, Geneva, April 1972</i>
CTA	Central Tracing Agency
Draft(s)	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, June 1973</i>
Draft Rules	<i>Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956 (first ed.), 1958 (second ed.)</i>
Government Replies	<i>Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments, ICRC, Geneva, April 1972 (first ed.), 1973 (second ed.)</i>
GYIL	<i>German Yearbook of International Law</i>
Hague Recueil	<i>Recueil des cours de l'Académie de droit international</i>
ICAO	International Civil Aviation Organization
ICDO	International Civil Defence Organization
ICRC	International Committee of the Red Cross
ICRC Memorandum	<i>Memorandum, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, to the Governments Parties to the 1949 Geneva Conventions for the Protection of War Victims and to the IVth Hague Convention of 1907 concerning the Laws and Customs of War on Land, ICRC, Geneva, May 1967</i>
IEC	International Electrotechnical Commission
IFALPA	International Federation of Air Line Pilots Associations
IFF	Identification Friend or Foe
IFRB	International Frequency Registration Board
ILC	International Lifeboat Conference
IMCO	Inter-Governmental Maritime Consultative Organization

IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
IRRC	<i>International Review of the Red Cross</i>
ISO	International Organization for Standardization
ITU	International Telecommunication Union
<i>Law Reports</i>	<i>Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, 15 vols., London, HMSO, 1948-1949</i>
<i>Lucerne Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons, (Lucerne, 24.9-18.10.1974), Report, ICRC, Geneva, 1975</i>
<i>Lugano Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons (second session – Lugano, 28.1-26.2.1976), Report, ICRC, Geneva, 1976</i>
<i>O.R.</i>	<i>Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977</i>
<i>RBDI</i>	<i>Revue Belge de Droit International</i>
<i>RDPMDG</i>	<i>Revue de droit pénal militaire et de droit de la guerre</i>
<i>Reaffirmation</i>	<i>XXIst International Conference of the Red Cross, Istanbul, 1969, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report submitted by the ICRC, Geneva, May 1969</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RICR</i>	<i>Revue internationale de la Croix-Rouge</i>
<i>XXIst Int. Conf. RC, Report</i>	<i>XXIst International Conference of the Red Cross, Istanbul, September 1969, The Protection of Civilian Medical and Nursing Personnel in Time of Conflict (Item 4 d of the Draft Agenda of the Commission on International Humanitarian Law and Assistance to Civilian Population in the event of Armed Conflict), Report submitted by the ICRC, Geneva, February 1969 (D.S. 4d/1)</i>

<i>XXIInd Int. Conf. RC, Report</i>	<i>Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, January 1974</i>
SIF	Selective Identification Features
SSR	Secondary Surveillance Radar
<i>Studies and Essays in Honour of Jean Pictet</i>	<i>Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, Ch. Swinarski (ed.), ICRC-Nijhoff, Geneva-The Hague, 1984</i>
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WARC 79	World Administrative Radio Conference, 1979
WARC Mob-83	World Administrative Radio Conference for the Mobile Services, 1983
WHO	World Health Organization
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Protocol I

Title of the Protocol – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Documentary references

Official Records

O.R. I, Part I, p. 115; Part III, p. 3. *O.R.* VII, p. 52, CDDH/SR.48, paras. 9-11. *O.R.* VIII, p. 7, CDDH/I/SR.2, para. 3. *O.R.* IX, p. 363, CDDH/I/SR.67, para. 49; pp. 478-479, CDDH/I/SR.76, paras. 35-38. *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 4, 6 and 11-12; p. 206, paras. 158-165; p. 257, *id.*, Annex IV.

Other references

CE 1971, Report, p. 24, para. 43. *CE 1972, Basic Texts*, p. 5. *CE 1972, Commentaries*, Part I, p. 1. *Commentary Drafts*, p. 3¹.

Commentary

General remarks

- 1 The title of a treaty does not have a substantial juridical function, but primarily a practical one. If it is properly worded, it will enable all those concerned, first of all to find a particular treaty easily and logically from the many existing treaties, and subsequently it will enable them to see at a glance whether it really is the treaty being sought. The title of the Protocol is worded in such a way as to satisfy these requirements, and for practical purposes a short title, but still an official title, is added in parentheses. This is common practice, particularly in national legislation.
- 2 With the exception of the addition of this short title, the wording adopted by the Conference is the same as that used in the draft.² No amendments were

¹ There is no commentary on the draft title.

² Except that the word "draft", which was the first word, was of course deleted. In English the date was worded according to normal modern usage, as in Articles 1, para. 3; 2, sub-para. (a); 53.

officially proposed and it was adopted by consensus, both in Committee I and in the plenary Conference.³

“Additional Protocol”

- 3 This Protocol is unquestionably a treaty, i.e., according to the Vienna Convention on the Law of Treaties of 23 May 1969, “an international agreement concluded between States in written form and governed by international law, [...] whatever its particular designation” (Article 2, paragraph 1(a)).⁴
- 4 The expressions “additional protocol” or “protocol” are widely used to refer to a treaty supplementing an already existing treaty, and it is in this sense that the word “additional” is used in the title here.⁵ Nevertheless, for the sake of completeness, it should be noted that there are supplementary treaties which are not termed “protocols”, as well as independent protocols.
- 5 The additional character of the Protocol means that it is not an independent instrument. Apart from what is said below about its relation to the 1949 Conventions, this is clearly demonstrated by the fact that it is impossible to become a Party to the Protocol without already being a Party to the Conventions – or without becoming a Party to the Conventions simultaneously.⁶

“to the Geneva Conventions of 12 August 1949”

- 6 The relationship with the Geneva Conventions is fundamental and is structural in nature. Essentially the Protocol supplements the four Geneva Conventions of 12 August 1949 for the protection of war victims.⁷ It supplements their substantive rules and their implementation mechanisms. In turn it is governed by those of their provisions which are relevant and which it has not amended, particularly the general and final provisions, as well as by their general principles.
- 7 Two points must be clarified: some of the provisions of the Protocol supplement all four Conventions, some supplement only one or some of them; the Protocol also reaffirms and develops other treaty norms, and it reaffirms and elucidates customary rules. Such questions will be dealt with in greater detail in the discussion of Article 1 (*General principles and scope of application*) and Article 96 (*Treaty relations upon entry into force of this Protocol*), and particularly with regard to other provisions concerned.

³ O.R. IX, p. 478, CDDH/I/SR.76, para. 35. O.R. VII, pp. 52-53, CDDH/SR.48, para. 11. After it had been adopted by the Committee, the Drafting Committee retained the present wording in all languages, although the English version had previously started with the words “*First Protocol Additional*”, and did not have a short title.

⁴ As P. Reuter remarks: It is well-known that there is no precise terminology to designate international treaties, and that terms such as: *treaty, convention, agreement, protocol* can be used interchangeably (*Introduction au droit des traités*, Paris, 1972, p. 69, para. 62).

⁵ Cf. General introduction, *supra*, on the reasons which led to a preference for the choice of protocols additional to the Conventions rather than a revision of the Conventions.

⁶ Cf. in particular, commentary Arts. 92, 94 and 96, para. 2, *infra*, pp. 1068-1069, 1076 and 1087, note 19, respectively.

⁷ “The Conventions”, according to the definition of Article 2, sub-para. (a).

“and relating to the Protection of Victims of International Armed Conflicts”

- 8 Each of the four Conventions for the protection of war victims has its own title.⁸ The wording used here qualifies the Protocol⁹ and shows that it supplements the whole of the four Conventions, while Protocol II supplements Article 3 common to the Conventions and relating to non-international armed conflicts.¹⁰
- 9 As regards the expression “armed conflicts”, this was preferred because of its more objective character to the term “war”, which is still used, for example, in the title of some of the Conventions and in Article 2, common to the Conventions.¹¹

B.Z.

⁸ Cf. Art 2, sub-para. (a).

⁹ To avoid any ambiguity in this respect the English version uses the conjunction “and”.

¹⁰ As explicitly stated in the Preamble, first paragraph, and in Art. 1, para. 1, of Protocol II.

¹¹ For the title of the Conventions, cf. *infra*, commentary Art. 2, sub-para. (a), p. 59. Para. 2 of Art. 2, common to the Conventions, provides that: “the present Convention shall apply to all cases of declared war or of any other armed conflict”. Cf. also *infra*, commentary Art. 1, para. 3, p. 39.

Protocol I

Preamble

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

Have agreed on the following:

Documentary references

Official Records

O.R. I, Part I, p. 125; Part III, p. 3 (Preamble). *O.R.* III, pp. 3-4 and 153-154. *O.R.* VII, pp. 165-170, CDDH/SR.54, paras. 1-43. *O.R.* VIII, p. 49, CDDH/I/SR.6, para. 29. *O.R.* IX, pp. 362-363, CDDH/I/SR.67, paras. 45-47 and 49; pp. 384-385, CDDH/I/SR.69, paras. 24-25; p. 473, CDDH/I/SR.76, para. 1; pp. 475-476, paras. 11-15; p. 497, CDDH/I/SR.77, Annex (Cyprus). *O.R.* X, pp. 3-4, CDDH/48/Rev. 1, paras. 2, 5.E and 6; p. 17, *id.*, Annex (Philippines); p. 64, CDDH/219/Rev.1, Annex (Philippines); p. 139, CDDH/234/Rev.1, Annex (Preamble); pp. 181-182, CDDH/405/Rev.1, paras. 4, 6 and 11-12; pp. 206-207, paras. 166-171; pp. 237-239, *id.*, Annex III, paras. 1-3; p. 248, paras. 33-36; p. 294, Annex IV (Preamble). *O.R.* XIV, pp. 146-147, CDDH/III/SR.17, paras. 25-26.

Other references

CE 1971, Report, p. 24, para. 44; p. 29 (Preamble). *CE 1972, Basic Texts*, p. 5 (Preamble). *CE 1972, Commentaries*, Part I, pp. 2-3 (Preamble). *CRCE 1972, Report*, p. 67. *CE 1972, Report*, vol. I, p. 198, para. 4.204; pp. 200-201, paras. 4.212-4.216 and 4.219; vol. II, p. 108, CE/COM IV/51; p. 110, CE/COM IV/62; p. 114, CE/COM IV/77-78. *Commentary Drafts*, p. 5 (Preamble).

Commentary**General remarks**

- 10 The Conventions do not have a preamble as such, but an introductory paragraph indicating for which particular task of revision or drafting the plenipotentiaries met. This was not due to any lack of ideas regarding what a preamble might have contained: in fact, it was the existence of contradictory proposals and the impossibility of reconciling them that led the Diplomatic Conference to abandon the idea of a real preamble in 1949.¹
- 11 Even though a preamble does not always contain rules that can be applied as such, it often constitutes an explanatory memorandum that can be used as guidance in the interpretation of the treaty and to cover any gaps.² These two objectives formed the basis of the draft preamble of the Protocol submitted to the Conference.
- 12 Presented with three amendments and with proposals formulated by the Working Group,³ the Conference retained therefrom what is now laid down in the second, fourth and fifth paragraphs, so that the Preamble is undoubtedly more substantial than the draft had been.
- 13 The Committee decided by consensus that the so-called “Martens clause”, which had meanwhile become paragraph 2 of Article 1 (*General principles and scope of application*), no longer needed to be contained in the Preamble, as it had been in the draft, and subsequently it adopted the Preamble by consensus.⁴ The plenary Conference adopted the same text by consensus after amendments to the second to fifth paragraphs had been rejected or withdrawn.⁵

¹ *Commentaries I-IV, ad Preamble*, pp. 18-23, 19-23, 12-16, 11-14, respectively.

² *Ibid*, pp. 20, 20, 14, 12, respectively. Vienna Convention on the Law of Treaties of 23 May 1969, Art. 31 (General rule of interpretation), para. 2.

³ *O.R. III*, pp. 3-4, CDDH/I/56, CDDH/I/337, and Add. 1, and CDDH/439. *O.R. X*, p. 248, CDDH/405/Rev.1, Annex III (CDDH/I/350/Rev.1), paras. 33-36.

⁴ *O.R. IX*, p. 476, CDDH/I/SR.76, para. 15.

⁵ *O.R. III*, p. 4, CDDH/439. *O.R. VII*, pp. 165-170, CDDH/SR.54, paras. 1-43.

“The High Contracting Parties”

- 14 The Conventions and the Protocol regularly use the expression “High Contracting Parties” to refer to the Parties to these treaties. This unquestionably refers to the States for which these treaties are in force in accordance with their relevant provisions, i.e., for the Protocol, Article 95 (*Entry into force*).
- 15 Thus this expression should not be given the meaning which the Vienna Convention on the Law of Treaties of 23 May 1969, for its own purposes, gives to a similar expression, “contracting State”, namely “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force” (Article 2, Use of terms, paragraph 1(f)). On the contrary, “High Contracting Parties” must be understood in the Conventions and the Protocol in the sense given by the same Vienna Convention to the word “Party”, namely “a State which has consented to be bound by the treaty, and for which the treaty is in force”. (Article 2, paragraph 1(g)).
- 16 Finally the expression only directly covers the Parties in a strict sense, i.e., such Parties as have given their consent to be bound by those treaties through ratification, accession or notification of succession. Nevertheless, this rule also applies, like the Conventions and the Protocol, to a Party to a conflict which, without being bound by one of such methods, accepts and applies these treaties.⁶ The same applies, in relation to the conflict concerned, with regard to an authority representing a people engaged in a conflict of the type mentioned in paragraph 4 of Article 1 (*General principles and scope of application*) against a High Contracting Party, and which has made a declaration as laid down in Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, in which subparagraph (b) does not leave any room for doubt in this respect. The same also applies, at least in a conflict to which a newly independent State is a Party, to that State if, instead of giving notification of succession, it has made a declaration on the provisional application of treaties covering humanitarian law, in the sense of the Vienna Convention on the Succession of States in respect of Treaties of 23 August 1978.⁷

First paragraph

- 17 This paragraph is inspired by the Preamble of the United Nations Charter, which starts with the words: “We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war”. The Diplomatic Conference of 1949 had already expressed a similar aim in its Resolution 8 when it formulated “its earnest hope [...] that, in the future, Governments may never have to apply the Geneva Conventions” and that “peace shall reign on earth forever”.
- 18 This touches upon the central problem, which also underlies the following three paragraphs, regarding the justification and the aims of international humanitarian law. What is the purpose of having, and even developing the laws

⁶ Cf. Art. 2, para. 3, common to the Conventions, and Art. 96, para. 2, Protocol I, respectively.

⁷ On ratification, accession, succession and provisional application by a newly independent State, cf. commentary Arts. 93, *infra*, pp. 1071-1072; and 94, *infra*, p. 1077.

of armed conflict, and how should this be done when the threat or use of force has actually been prohibited in international relations by the Charter of the United Nations ?⁸ For the sake of brevity, we refer hereafter only to the *use* of force, although the *threat* of such use is by no means irrelevant since this may involve the application of the Conventions and the Protocol depending on the security measures taken in conjunction with such a threat.

- 19 First, the United Nations itself may decide to use force, though this is only a marginal issue.⁹ Next, there is the inherent right of individual or collective self-defence when an armed attack occurs against a State – which presupposes that the prohibition has been violated.¹⁰ Finally, and above all, it cannot be denied that, despite the Charter, the phenomenon of international armed conflict has by no means disappeared.
- 20 In short, as the prohibition on the use of force is not absolute, and is not immune to violation, it is necessary and justified to develop a body of law to govern international armed conflicts: the violation of the law of peace, which includes certain exceptions (*jus ad bellum*) to the general prohibition of the use of force, neither prevents nor exempts any Party to a conflict from respecting the law applicable in such a situation (*jus in bello*).¹¹ A moral and humanitarian argument can be added to this legal aspect: just as the dissemination of humanitarian law contributes to the promotion of humanitarian ideals and of a spirit of peace among nations,¹² the faithful application of such law can contribute to reestablishing peace, by limiting the effects of hostilities.
- 21 Thus there is no contradiction between expressing a desire for peace on the one hand and developing a law of armed conflicts on the other, as both actions proceed from the same “faith in fundamental human rights, in the dignity and worth of the human person”.¹³ The second aim takes into account the realities of life, so that those situations where legal regulation is essential are not in a legal vacuum on the pretext that they arise from a violation of law; it results from the general wish of the contemporary international community that relations between States in their totality should be regulated by law.

⁸ Apart from the second and fourth paragraphs, the Charter of the United Nations is mentioned in Arts. 1, para. 4, 89, and 101, para. 1; the Organization is mentioned in Arts. 38, para. 2, 89, 101, paras. 1 and 2; the signs, emblems and uniforms of the Organization are mentioned in Arts. 37, para. 1 (d), and 38, para. 2.

⁹ Charter of the United Nations, Chapter VII (Action with respect to threats to the peace, breaches of the peace and acts of aggression), especially Art. 42; *cf.* also commentary Art. 89, *infra*, pp. 1034-1035.

¹⁰ Charter of the United Nations, Art. 51. For armed struggles against colonial domination and alien occupation and against racist régimes in the exercise of the right of peoples to self-determination, *cf. infra*, p. 43, *ad* Art. 1, para. 4.

¹¹ On the relationship between *jus ad bellum* and *jus in bello*, *cf. infra*, *ad* fourth and fifth paragraphs.

¹² O.R. I, Part I, p. 214, resolution 21, second preambular paragraph.

¹³ Charter of the United Nations, Preamble. The principles of humanity and respect for the human person are expressed with different wording particularly in the following articles of the Conventions and the Protocol: Conventions, Arts. 12/12/13, 14/16, 27; Protocol, Arts. 1 (para. 2), 10, 11, 75 (para. 1).

Second paragraph

- 22 This point was added by the Conference, establishing a logical connection between the preceding and the following paragraphs. In the words of one of the co-sponsors, it correctly underlined the point that in our time the maintenance of peace should not simply be the wish of the contracting Parties – it is actually a peremptory norm of international law (*jus cogens*).¹⁴
- 23 In this respect the question was raised whether the reference to the Charter of the United Nations was necessary and sufficient for the second and fourth paragraphs of the Preamble, as not all the nations of the world are Members of the United Nations.¹⁵ The opinion prevailed that this reference had the advantage of being specific, and that States not Members of the United Nations were subject to the same obligations under principles of international law which correspond to the provisions of the Charter of the United Nations.¹⁶
- 24 Thus, by referring to the Charter of the United Nations, the Conference adopted a text repeating almost word for word Article 2, paragraph 4, of the Charter, though adding the word “sovereignty”.¹⁷ Moreover, paragraph 6 of the same Article 2 lays down that the United Nations shall ensure that States which are not Members shall “act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”.

Third paragraph

- 25 This point was accepted by the Conference without any objections, once the new second paragraph had been introduced, expressing the context more logically. The Conference preferred to retain the reference made in the draft to “provisions protecting the victims of armed conflicts”, rather than referring only to the Geneva Conventions, as was proposed in an amendment.¹⁸ In fact, a formulation in general terms, which also covers, in particular, the Hague

¹⁴ O.R. III, p. 3, CDDH/I/337 and Add. 1. O.R. IX, p. 385, CDDH/I/SR.69, para. 25. The complete text of Art. 53 of the Vienna Convention on the Law of Treaties, in which the second sentence defines the expression *jus cogens*, is as follows:

“Art. 53 – *Treaties conflicting with a peremptory norm of general international law (jus cogens)*.

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

¹⁵ O.R. III, p. 4, CDDH/439. O.R. VII, p. 165, CDDH/SR.54, para. 3.

¹⁶ *Ibid*, pp. 166-170, paras. 7, 9, 14, 25, 28-29, 36 and 38.

¹⁷ This word was not included in the initial proposal and was added by the Working Group; neither the report of the latter, nor the discussions in the Committee and the plenary Conference explain it. The inclusion of this concept, which is in the Charter of the United Nations (e.g., Art. 2, para. 1), and in particular in the definition of aggression (Art. 1, *cf. infra*, ad fourth paragraph *in fine*) does not modify the scope of the present paragraph, which, after all, serves only as a reminder.

¹⁸ O.R. III, p. 4, CDDH/439.

Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land, was more appropriate.¹⁹

- 26 It is actually this paragraph which provides the *raison d'être* of the two aspects of the entire undertaking to reaffirm and develop humanitarian law: to supplement the substantive rules, and to reinforce the measures ensuring their application.²⁰

Fourth paragraph

- 27 This point supplements the second paragraph and actually stems from the same proposal.²¹ Its aim is more specifically to prevent any interpretation of humanitarian law that could serve to legitimize any use of force inconsistent with the Charter of the United Nations: humanitarian law cannot set aside the rules of *jus ad bellum* which are in force. The same idea also appears in Articles 4 (*Legal status of the Parties to the conflict*) and 5 (*Appointment of Protecting Powers and of their substitute*), paragraph 5, of the Protocol.
- 28 Just as the second paragraph only serves as a reminder, the fourth paragraph results from a concern for prudence, and not from real necessity. Such an interpretation would in any case be incompatible with Article 103 of the Charter of the United Nations and – the prohibition on the use of force, as formulated in the Charter of the United Nations, being *jus cogens* – by Article 53 of the Vienna Convention on the Law of Treaties.²²
- 29 The Conference decided not to include a specific reference to the Definition of aggression adopted in 1974 by the United Nations General Assembly.²³

Fifth paragraph

- 30 The fourth paragraph states that *jus in bello* cannot affect *jus ad bellum*; this point confirms the reverse.
- 31 The Conventions and the Protocol contain numerous prohibitions on making any adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.²⁴

¹⁹ O.R. VII, pp. 167-168, CDDH/SR.54, paras. 17-23.

²⁰ For a general review of the requirements and the results of these two points of view, *cf. supra*, General introduction.

²¹ *Cf.* references to *Official Records*, *supra*, note 14.

²² Vienna Convention: *cf. supra*, note 14. The text of Article 103 of the Charter of the United Nations reads as follows: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

²³ Resolution 3314 (XXIX), Annex.

²⁴ Enumeration of Art. 75, para. 1. *Cf.* also, for the Conventions, common Art. 3 (internal conflicts) and Art. 12, para. 2, First Convention; Art. 12, para. 2, Second Convention; Art. 16, Third Convention, and Arts. 13 and 27, para. 3, Fourth Convention. For the Protocol, Arts. 9, para. 1; 69, para. 1; 70, para. 1; 75, para. 1. The non-exhaustive list of prohibited criteria is not given in each case and varies in accordance with the requirements of the context.

- 32** This is a reaffirmation that humanitarian law should apply in all circumstances to all persons (and objects) protected by it, without taking into account the nature or origin of the conflict, or the causes actually espoused by or attributed to the Parties to the conflict. The fact of being the aggressor or the victim of aggression, of espousing a just or an unjust cause, does not absolve anyone from his obligations nor deprive anyone of the guarantees laid down by humanitarian law, even though it may be relevant and have an effect in other fields of international law.

B.Z.

Protocol I

Part I – General provisions

Introduction

- 33 The main aim of this Part is to define general principles and the temporal and material scope of application of the Protocol. These two aspects of the scope of application are not simply defined by reference to the Conventions – which could have been done, given the fact that the Protocol is an additional instrument;¹ the scope was made more specific and broader in comparison with that of the Conventions, and as far as the Contracting Parties² are concerned, this new definition applies for the Conventions as well as for the Protocol.
- 34 This Part is closely related to Part V (*Execution of the Conventions and of this Protocol*), particularly its Section I, which bears the same title; thus the present Part also contains provisions relating to the implementation of the Conventions and of the Protocol. These articles, relating to Protecting Powers, qualified persons and meetings of Contracting Parties, are preceded by an unequivocal confirmation that the application of the Conventions and the Protocol will not affect the legal status of the Parties to the conflict. Such a clause should prevent any reticence to fully apply the Protocol for fear of humanitarian law having untoward consequences beyond its own field.

B.Z.

¹ On this feature of the Protocol, *cf. supra*, commentary on the title of the Protocol (pp. 20-21) and *infra*, commentary Art. 1, para. 3 (p. 39) and Art. 96, para. 1, pp. 1085-1086.

² On the meaning of the expression “High Contracting Parties”, *cf.* commentary Preamble, *supra*, p. 25.

Protocol I

Article 1 – General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Documentary references

Official Records

O.R. I, Part. I, p. 126; Part III, p. 3 (Art. 1); pp. 13-14 (Art. 42). *O.R.* III, pp. 5-9. *O.R.* V, p. 91, CDDH/SR.10, para. 4; p. 94, para. 18; p. 96, paras. 34-35; p. 99, para. 50; p. 105, CDDH/SR.11, para. 23; pp. 107-108, para. 36; pp. 109-110, paras. 46-47; p. 111, para. 53; pp. 112-113, paras. 60-62; p. 114, para. 68; pp. 115-116, paras. 75-76; p. 118, CDDH/SR.12, para. 7; p. 120, paras. 16-17; p. 121, para. 23; p. 123, para. 32; p. 124, para. 39; p. 128, CDDH/SR.13, para. 5; p. 129, para. 12; p. 130, para. 19; pp. 131-132, para. 26; p. 134, para. 37; p. 135, para. 39; pp. 136-137, para. 46; p. 139, para. 62; p. 146, CDDH/SR.14, para. 26; p. 183, CDDH/SR.18, para. 3; p. 185, para. 10; p. 186, para. 19; pp. 189-190, para. 31-32, 37; p. 191, para. 42; p. 195, CDDH/SR.19, paras. 3-5; p. 196, para. 8; p. 197, para. 18; p. 200, para. 38; p. 202, para. 47; pp. 204-205, para. 60; pp. 227-229, CDDH/SR.22, paras. 9-23. *O.R.* VI, pp. 39-57, CDDH/SR.36, paras. 39-129; pp. 59-64, *id.*, Annex (Australia, Federal Republic of Germany, Guatemala, Holy See, Indonesia, New Zealand, Spain). *O.R.* VII, p. 323, CDDH/SR.58, Annex (Mauritania); pp. 324-326 (Mozambique). *O.R.* VIII,

pp. 7-15, CDDH/I/SR.2; pp. 17-23, CDDH/I/SR.3; pp. 25-32, CDDH/I/SR.4; pp. 33-41, CDDH/I/SR.5; pp. 43-49, CDDH/I/SR.6; p. 87, CDDH/I/SR.12, paras. 1-8; pp. 97-103, CDDH/I/SR.13; pp. 105-113, CDDH/I/SR.14; pp. 116-121, CDDH/I/SR.15, paras. 8-52; p. 123, CDDH/I/SR.16, paras. 1-3; pp. 127-128, paras. 31-38; p. 129, paras. 54-55. *O.R. IX*, pp. 369-370, CDDH/I/SR.68, paras. 1-2; p. 375, para. 32. *O.R. X*, pp. 4-7, CDDH/48/Rev.1, paras. 8-14; p. 13, paras. 36-37.

Other references

CE/5b, pp. 23-24. *CRCE 1971, Report*, pp. 45-50. *CE 1971, Report*, pp. 52-56, paras. 312-356; p. 61, *CE/COM II/3*. *CE 1972, Basic Texts*, p. 5 (Art. 1); pp. 14-15 (Art. 38). *CE 1972, Commentaries*, Part I, pp. 8-9 (Art. 1); pp. 72-73 (Art. 38). *CE 1972, Report*, vol. I, pp. 133-135, paras. 3.53-3.69; pp. 174-176, paras. 4.20-4.33; pp. 200-202, paras. 4.215-4.224; vol. II, p. 23; p. 99, *CE/COM IV/6-7*; p. 105, *CE/COM IV/32*; p. 114, *CE/COM IV/74*. *Commentary Drafts*, pp. 6-7 (Art. 1); pp. 47-52 (Art. 42). *XXIIInd Int. Conf. RC, Report*, pp. 13-46, paras. 38-46 (Art. 42).

Commentary

General remarks

- 35 This article lays down two general principles (paragraphs 1 and 2) and defines the material scope of application of the Protocol (paragraphs 3 and 4). Because of the diversity of the nature and historical background of these four paragraphs it seems justified to discuss them for each one separately, rather than for all paragraphs together. The article was adopted by roll call, both in Committee I and in the plenary Conference.¹

Paragraph 1

- 36 This paragraph literally repeats Article 1 common to the Conventions, in which only the words “the present Convention” have been replaced by “this Protocol”. As the Protocol is subject to the general provisions and principles of the Conventions, by virtue of the fact that it is an instrument additional to the Conventions, this general principle would have applied for the Protocol even if it had not been stated in so many words; for this reason the draft Protocol did not repeat Article 1 of the Conventions, following the opinion of the majority of

¹ Vote in Committee: 70-21-13, *cf. O.R. VIII*, p. 102, CDDH/I/SR.13, para. 42; vote in plenary Conference, 87-1-11, *cf. O.R. VI*, pp. 40-41, CDDH/SR.36, para. 58.

experts.² Nevertheless, the sponsors of the relevant proposal,³ followed by the Conference, considered that it was appropriate to include a reminder of this principle.

- 37 The commentary on Article 1 of the Conventions⁴ continues to apply fully, and the reader is referred to it. We will merely reiterate the essential points below, adding a few new elements.

“The High Contracting Parties undertake to respect”

- 38 For the meaning of the expression “the High Contracting Parties”, which, in the present context, differs from the usual meaning, reference should be made to the commentary on this expression in the Preamble.⁵
- 39 The mere fact of becoming a Party to a treaty implies the obligation to apply it in good faith from the moment that it enters into force. This fundamental rule of international law originated in customary law, expressed in the maxim *pacta sunt servanda*, and is now set out in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 which uses this maxim by way of a title; it reads: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.
- 40 Thus the import of this paragraph does not lie in the first part, but in the two elements which will be discussed below. As regards the word “undertake”, which appears only occasionally in the Protocol,⁶ this is a more solemn turn of phrase than the normal usage of “shall”.

“to ensure respect”

- 41 At first sight this might seem to be superfluous: the duty to respect implies that of ensuring respect by civilian and military authorities, the members of the armed forces, and in general, by the population as a whole. This means not only that preparatory measures must be taken to permit the implementation of the Protocol, but also that such implementation should be supervised. In this respect, the phrase “to ensure respect” essentially anticipates the measures for execution and supervision laid down in Article 80 (*Measures for execution*).
- 42 Though the preceding obligation is in fact already included in *pacta sunt servanda*, or the words “to respect”, the phrase “to ensure respect” should also be considered to reflect another aspect, which is described in the Commentary on the Conventions as follows:

² O.R. VIII, p. 48, CDDH/I/SR.6, para. 28. On the additional character and its consequences, cf. mainly *infra*, commentary para. 3 (p. 39) and Art. 96, para. 1 (pp. 1085-1086) and *supra*, commentary on the title (pp. 20-21) and the Preamble, third paragraph (p. 27).

³ O.R. III, p. 6, CDDH/I/12 and Corr.1 and Add.1.

⁴ The best researched study of Article 1 of the Conventions and of this paragraph is by L. Condorelli and L. Boisson de Chazournes, “Quelques remarques à propos de l’obligation de ‘respecter et faire respecter’ le droit international humanitaire ‘en toutes circonstances’”, in *Studies and Essays in Honour of Jean Pictet*, Geneva-The Hague, 1984, p. 18.

⁵ *Supra*, p. 25.

⁶ In addition to this article, cf. Arts. 83, para. 1; 89 and 96, para. 3.

“In the event of a Power failing to fulfil its obligations, each of the other Contracting Parties, (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.”⁷

- 43 This interpretation was not contested⁸ and it is on this interpretation that the ICRC has taken a number of steps, confidentially or publicly, individually or generally, to encourage States, even those not Party to a conflict, to use their influence or offer their cooperation to ensure respect for humanitarian law.⁹ Leaving aside any bilateral or multilateral measures taken by States, which rarely become known, it should be pointed out that the organized international community has frequently and emphatically manifested its concern that humanitarian law should be respected.¹⁰
- 44 Finally, and most importantly, the Diplomatic Conference fully understood and wished to impose this duty on each Party to the Conventions, and therefore reaffirmed it in the Protocol as a general principle, adding in particular to the already existing implementation measures those of Articles 7 (*Meetings*) and 89 (*Co-operation*).
- 45 In this way the Conference clearly demonstrated that humanitarian law creates for each State obligations towards the international community as a whole (*erga omnes*); in view of the importance of the rights concerned, each State can be considered to have a legal interest in the protection of such rights.¹¹
- 46 Neither the Diplomatic Conferences which drafted the Conventions and the Protocol, nor these instruments, defined very closely the measures which the Parties to these treaties should take to execute the obligation to “ensure respect”

⁷ *Commentary III*, p. 18 (Art. 1).

⁸ The International Conference on Human Rights (Teheran, 1968) adopted it in Resolution XXIII. The Preamble of this resolution reminds States Parties to the Geneva Conventions of their responsibility “to take the necessary measures to ensure respect for such rules of humanitarian law by other States in all circumstances, even if they are not themselves directly involved in armed conflict”. The same applies to almost all governments which made a statement on this subject during the reaffirmation and development procedure; cf. *Government replies*, 2nd ed., pp. 19-33 (“Question 2”). For recent literature, cf. L. Condorelli and L. Boisson de Chazournes, *op. cit.*, pp. 26-32 and K. Obradović, “Que faire face aux violations du droit humanitaire? Quelques réflexions sur le rôle possible du CICR”, in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 483, especially pp. 487-490.

⁹ For the policy of the ICRC on its action in the event of breaches of humanitarian law, see *IRRC*, March-April 1981, pp. 76-83. For a diplomatic appeal by the ICRC to all the Parties to the Conventions, cf. *ibid.*, July-August 1983, pp. 220-223. This same appeal is examined in the study of L. Condorelli and L. Boisson de Chazournes, *op. cit.*, p. 28, and K. Obradović, *op. cit.*, p. 493, and also by Y. Sandoz, “Appel du CICR dans le cadre du conflit entre l’Irak et l’Iran”, 29 *AFDI*, 1983, p. 161.

¹⁰ See also commentary Art. 89, *infra*, p. 1034.

¹¹ For a general description of these norms which formed the inspiration for this passage, cf. the judgment of the International Court of Justice in the *Barcelona Traction* case, second phase, *ICJ Reports*, 1970, p. 32; reference is made to this case in the studies by L. Condorelli and L. Boisson de Chazournes, *op. cit.*, p. 29, and K. Obradović, *op. cit.*, p. 489.

by the other Parties, other than by means of the examples quoted above of Articles 7 (*Meetings*) and 89 (*Co-operation*). The limitations to such actions are obviously those imposed by general international law, particularly the prohibition on the use of force.¹² Even if the United Nations were to take coercive measures involving the use of armed force¹³ in order to ensure respect for humanitarian law, the limitation would be that of the very respect due to this law in all circumstances. It suffices to say that whenever such measures are necessary, each Party to humanitarian law instruments should examine the wide range of diplomatic or legal measures which can be taken to ensure respect for that law.

“in all circumstances”

- 47 The expression “in all circumstances” does not mean that the Protocol as a whole applies at all times: for the distinction between provisions applicable at all times and those which become so only in the situations referred to in paragraphs 3 and 4 of this article, reference should be made to the commentary on Article 3 (*Beginning and end of application*).¹⁴
- 48 “In all circumstances” prohibits all Parties from invoking any reason not to respect the Protocol as a whole, whether the reason is of a legal or other nature. The question whether the war concerned is “just” or “unjust”, one of aggression or of self-defence, should not affect the application of the Protocol – this type of discrimination is explicitly prohibited by the fifth paragraph of the Preamble.¹⁵
- 49 Any idea of reciprocity should also be discarded, viz., a Party should be prevented from claiming to be exempt from the obligation to respect a particular provision, or the Protocol as a whole, because an adversary had not respected this provision or the Protocol as whole. As the Commentary to the Conventions states, treaties of humanitarian law do not constitute:

“an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties”.¹⁶

- 50 Thus reciprocity invoked as an argument not to fulfil the obligations of humanitarian law is prohibited, but this does not apply to the type of reciprocity which could be termed “positive”, by which the Parties mutually encourage each other to go beyond what is laid down by humanitarian law. Further, the concept of reciprocity on which the conclusion of any treaty is based also applies to the Conventions and the Protocol: they apply between the Parties which have

¹² Including “humanitarian intervention”, generally considered to be covered by this prohibition; on this subject, cf. U. Beyerlin, “Humanitarian Intervention”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Instalment 3, 1982, p. 211.

¹³ On this subject, cf. commentary Art. 89, *infra*, pp. 1034-1035.

¹⁴ *Infra*, pp. 66-67.

¹⁵ Cf. the commentary thereon, *supra*, pp. 28-29.

¹⁶ *Commentary I*, p. 25 (Art. 1).

consented to be bound by them¹⁷ – and only in exceptional cases to a Party's own nationals, or to the nationals of a Party which is not bound.¹⁸

- 51 The prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law is absolute. This applies irrespective of the violation allegedly committed by the adversary. It does not allow the suspension of the application of the law either in part or as a whole, even if this is aimed at obtaining reparations from the adversary or a return to a respect for the law from him.¹⁹ This was confirmed quite unambiguously in Article 60 of the Vienna Convention on the Law of Treaties, which lays down under what conditions a material breach of a treaty can permit its suspension or termination; that article specifically exempts treaties of a humanitarian character.²⁰

Paragraph 2

- 52 Except for a few details, this paragraph is taken from the famous clause, known as the “Martens clause”, after the Russian diplomat who had proposed it; it was included by unanimous decision in the Preamble of the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land.²¹
- 53 The 1949 Conventions did not contain a preamble,²² and it was therefore considered appropriate to include a similar clause in their article on denunciation, in order to underline in a succinct fashion that even denunciation could not result in a legal void.²³ The draft of the Protocol provided for a reaffirmation of this clause in the Preamble,²⁴ but the Conference supported a proposal to include it in Article 1.²⁵
- 54 In the initial context of 1899 and 1907, the Martens clause was obviously justified, as the Peace Conferences were aware that the Conventions that had been adopted had left a number of questions unanswered.²⁶ We referred above to the reason why it was taken up in the 1949 Conventions.
- 55 There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in the number of

¹⁷ For the meaning of the expression “the High Contracting Parties”, cf. commentary Preamble, *supra*, p. 25. Also see the study by J. de Preux, “The Geneva Conventions and Reciprocity”, *IRRC*, January-February 1985, p. 25, especially pp. 25-26.

¹⁸ Cf. in particular, Fourth Convention, Part II (Art. 13 in contrast with Art. 4), and Protocol I, Art. 75.

¹⁹ Cf. the passage relating to reprisals, introduction to Part V, Section II, *infra*, pp. 981-987.

²⁰ Cf. para. 5 and also para. 4, which has a more general scope, of this article, entitled “Termination or suspension of the operation of a treaty as a consequence of its breach”.

²¹ On the subject of this clause, cf. H. Strebel, “Martens’ clause”, in R. Bernhardt (ed.), *op. cit.*, Instalment 3, pp. 252-253 (and references cited); S. Miyazaki, “The Martens Clause and International Humanitarian Law”, in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 433.

²² Cf. commentary Preamble, *supra*, p. 24.

²³ Cf. para. 4 of common Art. 63/62/142/158 and the commentary thereon, on pp. 413, 282, 648 and 625-626 respectively.

²⁴ *Commentary Drafts*, p. 5 (Preamble, third paragraph).

²⁵ Cf. *supra*, note 3. The 1980 Convention on conventional weapons also reaffirms this clause (Preamble, fifth paragraph).

²⁶ Cf. H. Strebel, *op. cit.*, p. 252, and F. Kalshoven, *Belligerent Reprisals*, Leyden, 1971, p. 58.

subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted.²⁷ Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.²⁸

- 56 In conclusion, the Martens clause, which itself applies independently of participation in the treaties containing it, states that the principles of international law²⁹ apply in all armed conflicts,³⁰ whether or not a particular case is provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict.

Paragraph 3

- 57 This paragraph corresponds to the draft of Article 1 of the ICRC: the “additional” character of the Protocol justifies the definition of its scope of application in terms referring back to Article 2, common to the Conventions. As regards the term “supplements”, this reveals that there is a relation, though also a limitation imposed upon the Diplomatic Conference which, by reason of its own title, had the task of reaffirming and developing the pre-existing law, and not of endangering it.³¹
- 58 The wording of this paragraph did not raise any difficulties in itself, but there was heated and lengthy debate regarding extending its scope to the conflicts referred to in paragraph 4. We will therefore deal separately with this aspect, including the question whether its inclusion represented a development or a codification of law (consequently whether or not such conflicts were already covered by Article 2, common to the Conventions, referred to by this paragraph). With this reservation we will base our arguments below essentially on the commentary on this common Article 2.³²
- 59 *Common Article 2, paragraph 1*, reads: “[...] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”
- 60 War which has been declared, or otherwise recognized as such, entails the application of humanitarian law; even in the absence of hostilities it can offer

²⁷ Cf. H. Strebel, *op. cit.*; also O.R. VIII, p. 18, CDDH/I/SR.3, para. 11.

²⁸ Cf. H. Strebel, *op. cit.*, p. 252, and S. Miyazaki, *op. cit.*, p. 441.

²⁹ Similar to the expression “general principles of law” used in Art. 38, para. 1(c) of the Statute of the International Court of Justice.

³⁰ It should be noted that Protocol II uses different wording (*cf.* its Preamble, fourth paragraph, and the commentary thereon, *infra*, p. 1341).

³¹ *Commentary Drafts*, p. 6 (Art. 1). On the general relationship between the Conventions and the Protocol, *cf.* commentary on the title and on the Preamble, third paragraph, *supra*, pp. 20-21 and 27, and in particular, commentary Art. 96, para. 1, *infra*, pp. 1085-1086.

³² Pp. 27-33, 26-29, 19-23, and 17-22 respectively (without para. 3, which corresponds to Art. 96, para. 2, of the Protocol).

valuable guarantees, in particular to enemy nationals in the territory of a State at war.

- 61 Nevertheless, despite their title (“for the protection of war victims”), the Conventions are not applicable only in cases of declared war: the institution of the declaration of war³³ has been disregarded too often to make the application of humanitarian law dependent on this act. It is not necessary either that the existence of war be legally proved, as this concept is too prone to discussion, and too many armed conflicts would therefore be at risk of eluding humanitarian law.³⁴
- 62 Thus, as will most often be the case in practice, humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it.³⁵
- 63 The Conventions cover the case in which one of the Parties to an armed conflict contests the state of war. The object and purpose of humanitarian law mean that this rule must be given a wider scope: even if the two Parties – or all the Parties, if there are more than two – deny that there is a state of war, this cannot enable them to impede the application of the law. It is aimed, above all, at protecting individuals, and not at serving the interests of States.³⁶
- 64 *Common Article 2, paragraph 2*, reads: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”
- 65 In fact, cases of occupation occurring in a war that has been declared or in another armed conflict are already covered by paragraph 1, as the declaration of war or the commencement of hostilities has rendered the humanitarian law applicable. The inhabitants of occupied territory become protected persons as they fall into the power of the enemy. Despite its wording, paragraph 2 only addresses itself to cases of occupation without a declaration of war, and without hostilities.³⁷

³³ Required by the Hague Convention Relative to the Opening of Hostilities (Convention III of 1907).

³⁴ For definitions of “war” and “armed conflict”, *cf.* in particular D. Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, 163 *Hague Recueil*, 1979/II, p. 128; K.J. Partsch, “Armed Conflict” in R. Bernhardt (ed.), *op. cit.*, Instalment 3, p. 25; K. Skubiszewski, “Peace and War”, *ibid.*, Instalment 4, p. 74; W. Meng, “War”, *ibid.*, p. 282; Ch. Rousseau, *Le droit des conflits armés*, Paris, 1983, pp. 2-16.

³⁵ *Cf. Commentaries I, II, III and IV*, pp. 34, 27-28, 22-23 and 21 respectively.

³⁶ *Cf. Commentaries III and IV*, pp. 22-23 and 21 respectively.

³⁷ *Cf. Commentary IV*, pp. 21-22. It should be noted that the definition of occupation given in Article 42 of the Hague Regulations of 1907 Concerning the Laws and Customs of War on Land reads:

“Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.”

Paragraph 4*Origins of this rule*

- 66 Because the Protocol is additional to the Conventions, it was logical, as we saw above with regard to paragraph 3, to define the scope of application of the Protocol by reference to Article 2, common to the Conventions. On the other hand, the explicit inclusion within this scope of application of what is commonly known as “wars of national liberation”, by means of the present paragraph 4 (*cf.* the word “included”), gave rise to heated controversy. A number of different aspects arose with regard to this question.
- 67 Would the Protocol cover only the treatment of persons engaged in such a conflict and captured by the adverse Party, or would it generally clarify the status of such conflicts and the status of persons participating in them? The fact that international humanitarian law provides rules in two separate parts, depending on whether it concerns a situation limited to the territory of a single State or, on the contrary, affecting two or more States, in itself already gives rise to problems of interpretation in quite a number of specific situations. What sort of problems would arise if this distinction, based on a more or less objective criterion – whether or not the conflict is between States – were suppressed, or if it were made dependent also on factors which were considered by some to be objective and by others to be subjective?
- 68 The 1949 Conference did not take up the idea of the ICRC which had been adopted by the XVIIth International Conference of the Red Cross (Stockholm, 1948) that the four Conventions as a whole should be declared applicable in all armed conflicts, whether internal or international.³⁸ For internal conflicts it retained only Article 3, common to the Conventions, which still created an unprecedented inroad into the exclusive competence of governments to deal with their internal affairs, in that they bound themselves in advance to comply with certain fundamental rules. Gradually, however, what had generally constituted a remarkable achievement at the time, turned out to be incomplete (which led to the efforts resulting in Protocol II), and above all, for political and legal reasons, unsuited to the type of conflict which has characterized recent decades, i.e., wars of national liberation.

*Right of self-determination**1. Before the Charter of the United Nations*

- 69 The concept of the right of self-determination of peoples only gradually emerged during the course of the nineteenth and twentieth centuries under a variety of names. Thus, at an early stage, what was known as the right of nationalities was created only for the benefit of peoples who described themselves

³⁸ *Cf. infra*, p. 46.

as “civilized”. Similarly it was considered that colonization and the domination exercised over entire continents should permit them to be brought within the orbit of “civilization”, though without disguising the economic or military interests at stake.

- 70 The principle, which was proclaimed by the French Revolution, and was subsequently often denied, has from the outset constantly come up against the legal order;³⁹ this did not prevent it from being applied with increasing frequency and from growing in strength. It acquired a universal importance during the course of the First World War and narrowly missed becoming incorporated in the Covenant of the League of Nations on the proposal of the President of the United States, Woodrow Wilson. Even without being explicitly mentioned in this Covenant, the principle acquired the twofold value of a guiding principle in politics and of a rule of exception in international law.⁴⁰

2. *The Charter of the United Nations*

- 71 After a preamble laying down in particular “the equal rights [...] of nations large and small”, the Charter defines the purposes of the United Nations in Article 1. The wording of paragraph 2 is as follows: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”. The same principle is affirmed in Article 55 of the Charter.
- 72 The progress achieved by the Charter of the United Nations therefore consisted of turning this principle of self-determination of peoples into a right established in an instrument of universal application, in which almost all States participate today.
- 73 The right of self-determination has been evoked a great many times, in the United Nations General Assembly, in Human Rights Commission and in other bodies. We will restrict ourselves here to the most important stages.⁴¹

3. *The Declaration on the Granting of Independence*

- 74 A document which is considered as one of the most important is Resolution 1514 (XV) of 14 December 1960, entitled “Declaration on the Granting of Independence to Colonial Countries and Peoples”.

³⁹ S. Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes*, Brussels, 1973, p. 11.

⁴⁰ *Ibid.*, p. 11; K.J. Partsch, “Fundamental Principles of Human Rights, Self-Determination, Equality and Non-Discrimination”, in *The International Dimensions of Human Rights*, Paris, 1982, pp. 63-64, gives some examples.

⁴¹ For a more detailed historical background, cf. i.a., A. Cristescu, *The Right to Self-Determination – Historical and Current Development on the Basis of United Nations Instruments*, United Nations publication, 1981, paras. 14-87.

- 75 Following Resolutions 545 (VI) and 637 (VII)⁴² in particular, this document reaffirms the right of all peoples and all nations to self-determination, including Non-Self-Governing and Trust Territories.⁴³

4. *The concept of the legitimate struggle*

- 76 With Resolution 2105 (XX) of 20 December 1965 the General Assembly recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination and independence, and it invited all States to provide material and moral support to national liberation movements in colonial territories.
- 77 These views were to be reiterated, in particular in Resolution 2621 (XXV) of 12 October 1970, claiming prisoner-of-war treatment under the Third Convention for freedom fighters under detention.

5. *The Human Rights Covenants*

- 78 In a series of successive resolutions relating to the drafts of International Covenants on Human Rights, the General Assembly requested that an article should be included on the right of peoples to self-determination, which would also provide that all States should contribute to ensuring the exercise of this right: in fact, the right to self-determination is a precondition for the enjoyment of all fundamental human rights.⁴⁴
- 79 The International Covenants on Human Rights, viz., the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights complied with this request.⁴⁵

⁴² Cf. *infra*, point 5.

⁴³ The last preambular paragraph and operative paras. 1 and 4 of this resolution read as follows: "[...] all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."

"1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."

"4. All armed action and repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected."

⁴⁴ Cf. in particular, Resolutions 545 (VI) and 637 (VII) mentioned above.

⁴⁵ Adopted by Resolution 2200 (XXI) of the General Assembly of 16 December 1966, the Covenants have been in force since 1976, binding 80 and 83 States respectively as of 31 December 1984. Their common Article 1 reads as follows:

"1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

6. Human Rights Conference

- 80 The International Conference on Human Rights held in Teheran in 1968 under the auspices of the United Nations considered in its Resolution XXIII that persons fighting against minority racist régimes or colonial régimes should, if they were detained, be treated as prisoners of war or as political prisoners, in accordance with international law.⁴⁶

7. Friendly Relations Declaration⁴⁷

- 81 On 24 October 1970, on the occasion of the 25th anniversary of the United Nations, the General Assembly adopted by consensus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁴⁸ The preparatory negotiations on this declaration had taken place in the General Assembly and a Special Committee,⁴⁹ and contained, in particular, the examination of the principle of equal rights and self-determination of peoples. From the beginning the General Assembly was concerned with tackling the progressive development and codification of principles already contained in the Charter in order to ensure that they would be applied more effectively.
- 82 In the eight paragraphs devoted to “the principle of equal rights and self-determination of peoples”, the Declaration states in particular that:
- a) all peoples have the right freely to determine their political status;
 - b) every State has the duty to respect this right and to promote its realization;
 - c) every State has the duty to refrain from any forcible action which deprives peoples of this right;
 - d) in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter;

⁴⁶ The same Conference had formerly adopted Resolution VIII in which, with particular reference to two specific cases, it claimed similarly that captured freedom fighters should be treated as prisoners of war in the sense of the Third Geneva Convention of 1949. The objectives of Resolution XXIII were reiterated in Resolution 2444 (XXIII) of the General Assembly, the first of a long series devoted to the “Respect for human rights in armed conflicts” (*cf. infra*, pp. 1573-1576).

⁴⁷ Resolution 2625 (XXV), Annex.

⁴⁸ For an account of the preparatory work of this Declaration and its evaluation, *cf.* in particular, M. Šahović, “Codification des principes du droit international des relations amicales et de la coopération entre les États”, 137 *Hague Recueil*, 1972/III, p. 243; G. Arangio-Ruiz, “Codification of the Principles of International Law on Friendly Relations and Co-operation Between States”, *ibid.*, p. 419.

⁴⁹ *Cf.* Resolution 1815 (XVII), based on Article 13 of the Charter. The Special Committee on the principles of international law on friendly relations and co-operation among States, created pursuant to Resolution 1966 (XVIII), and reconstituted pursuant to Resolution 2103A (XX), met for seven sessions. The idea of a declaration on this subject was suggested by the Second Conference of Heads of State or Government of Non-Aligned Countries, held in Cairo in 1964 (*cf.* the fifth preambular paragraph of Resolution 2103 A (XX)).

- e) under the Charter, the territory of a colony or other non-self-governing territory has a status separate and distinct from that of the State administering it.⁵⁰

8. *The basic principles*

- 83 The last resolution adopted by the United Nations General Assembly before the opening of the CDDH was Resolution 3103 (XXVIII) of 12 December 1973 entitled “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes.”⁵¹
- 84 The preamble referred to a large number of previous statements on this issue⁵²; it states in particular that:
- combatants struggling for freedom and self-determination are entitled to the application of the provisions of the Third and Fourth Geneva Conventions of 1949 (the resolutions referred to were formulated in more precise terms, requiring, on the one hand, the application of the Third Convention to combatants, and on the other hand, compliance with the Fourth Convention relative to the protection of civilians);
 - it is necessary to draft “additional instruments and norms envisaging, *inter alia*, the increase of the protection of persons struggling for freedom against colonial and alien domination and racist régimes”.
- 85 The principles laid down in the operative paragraphs of the resolution, though this was to be “without prejudice to their elaboration in future within the framework of the development of international law applying to the the protection of human rights in armed conflicts”, may be summarized as follows:

⁵⁰ The 7th paragraph is quoted in full: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

⁵¹ It was adopted with 83 votes for, 13 against and 19 abstentions.

⁵² The contents of the Resolutions mentioned are briefly outlined here: 2383 (XXIII): Third Convention, Southern Rhodesia; 2508 (XXIV): Third and Fourth Conventions, Southern Rhodesia; 2547 (XXIV): Third and Fourth Conventions, Southern Rhodesia, territories under Portuguese administration, Namibia; 2652 (XXV): Third and Fourth Conventions, Southern Rhodesia; 2678 (XXV): Third and Fourth Conventions, Namibia; 2707 (XXV): Third and Fourth Conventions, territories under Portuguese administration; 2795 (XXVI): Third and Fourth Conventions, territories under Portuguese administration; 2796 (XXVI): Third and Fourth Conventions, Southern Rhodesia; 2871 (XXVI): Third and Fourth Conventions, Namibia. Amongst other relevant resolutions not mentioned above, but alluded to by the words “*inter alia*”, we would recall, for example, Resolution 2396 (XXIII) which demands that the population of South Africa as a whole should be able to exercise its right of self-determination and that, as their struggle is legitimate, the freedom fighters there should be treated as prisoners of war under the terms of international law, particularly the Third Geneva Convention of 1949.

- the struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination is legitimate;⁵³
- any attempt to suppress such a struggle is incompatible with the Charter, the Friendly Relations Declaration, the Universal Declaration of Human Rights, and the Declaration on the Granting of Independence, and constitutes a threat to international peace and security;
- armed conflicts resulting from such a struggle are international armed conflicts in the sense of the Geneva Conventions;
- combatants engaged in such struggles should enjoy prisoner-of-war status in the sense of the Third Convention;
- violation of such status entails the full responsibility of those committing it.

Historical background of this paragraph

1. The 1949 Conventions

- 86 Article 2 of the draft Conventions, adopted by the XVIIth International Conference of the Red Cross (Stockholm, 1948), provided that the Conventions would apply in all cases of armed conflict which did not have an international character, and which arose in the territory of one or more of the High Contracting Parties. This was stated in the text of the draft submitted to the Conference by the ICRC, except that one phrase relating to “cases of civil war, colonial conflicts, or wars of religion” had been deleted; this enumeration was intended to be illustrative, not exhaustive.
- 87 After lengthy debates, the Diplomatic Conference adopted common Article 3 to deal with conflicts not of an international character. This article enumerates a restricted number of rules applicable in all conflicts of this kind. In accordance with the intention of its authors, common Article 3 would cover all armed conflicts not of an international (inter States) character, i.e., in accordance with the ideas prevailing at the time, particularly colonial wars. The main arguments advanced against the mandatory application of the Conventions as a whole to all conflicts were less concerned with the practical impossibility of such a task than with the risk, in conflicts not of an international character, of granting such rebels a degree of recognition *de facto*, or of undermining government action aimed at defending the existing structure of the State.⁵⁴

⁵³ On 14 December 1974, viz., after the adoption of Article 1 by the relevant Committee of the CDDH, the General Assembly once again confirmed its views with regard to the concept of aggression. Article 7 of the Definition of Aggression, adopted by consensus (Resolution 3314 (XXIX), Annex) reserves the right of peoples forcefully deprived of their right to self-determination to struggle to that end; the right to self-determination is also mentioned in the Preamble to this definition.

⁵⁴ For further information on the historical background to common Art. 3, and on its scope, see *Commentaries I, II, III and IV*.

2. *Evolution until 1969*

88 The progressive development of the concept of the right of self-determination and its various consequences took place essentially within the framework of the United Nations, given the responsibilities of this organization. For its part, the Red Cross movement evinced its concern for the fate of victims of armed struggles for self-determination. In this respect resolution XVIII of the XXIst International Conference of the Red Cross (Istanbul, 1969) should be noted. This gave priority to pragmatic measures but also expressed the need for a thorough legal examination of the question.

3. *Reaffirmation and development – preliminary discussions*

89 During the various meetings of experts devoted specifically to the reaffirmation and development of international humanitarian law applicable in armed conflicts, whether these were consultations in groups with restricted participation or the Conferences of Government Experts or Red Cross experts, the majority of experts considered that wars of national liberation were conflicts not of an international character. Indeed, although they all recognized the need for improving the protection provided by humanitarian law to victims of the armed conflicts for self-determination – and those of other conflicts qualified as not having an international character – only a minority advocated the extension of the mandatory legal application of the whole of the Conventions and of Protocol I to such conflicts.

90 The following trends can be discerned from the many different views:⁵⁵

- a) common Article 2 can, and should be interpreted as covering wars of liberation, since, although they do not take place between States, they are certainly of an international character, according to the United Nations; thus the term “Power” does not refer only to States, but also to non-State entities which enjoy the right to self-determination;⁵⁶
- b) the international character of wars of liberation should be proclaimed by the Preamble or by Article 1 of Protocol I;⁵⁷
- c) it is not possible to dismiss the fundamental distinction between international conflicts (in the sense of inter-State conflicts) and conflicts not of an international character, i.e., the sole distinction that rests on the basis of objective and legal criteria, in order to take into account the reasons underlying the armed conflict;⁵⁸

⁵⁵ The first two trends underlined the need for preventing the creation of two separate legal orders, United Nations law and humanitarian law, as there can only be one international law. With respect to the negotiations as a whole, this view was upheld particularly by the representative of the United Nations Secretary-General: *CE 1971, Report*, p. 119, para. 601.

⁵⁶ Cf. for example, *CE 1972, Report*, Vol. I, p. 175, para. 4.25.

⁵⁷ Cf. for example, *Preliminary Report on the Consultation of Experts concerning Non-International Conflicts and Guerilla Warfare*, Geneva, 1970, 1st part, pp. 19-20; *CE 1971, Report*, p. 35, para. 113; p. 36, para. 133, *CE 1972, Report*, Vol I, p. 175, para. 4.26; p. 200, para. 4.215; p. 205, para. 5.22.

⁵⁸ Cf. for example, *CE 1972, Report*, Vol. I, p. 64, para. 2.26; p. 66, para. 2.38.

- d) wars of national liberation are conflicts not of an international character, but some of these conflicts should involve the application of the law of armed conflicts as a whole because of their intensity or because of certain other characteristics.⁵⁹

91 The various successive proposals of the ICRC can be summarized as follows:

- a) In 1969 the ICRC reaffirmed, on the one hand, that when hostilities were such that they resembled a war, it has always attempted to obtain in actual practice treatment for captured combatants as similar as possible to that accorded prisoners of war under the Third Convention; on the other hand, it noted resolutions of the United Nations General Assembly proclaiming the right of “freedom fighters” to be treated as prisoners of war in case of capture, and the international character of their struggle. The ICRC suggested that an attempt should be made to obtain the treatment, but not the status of prisoner of war. This solution seemed to have the best chances of being accepted, as it operated on a strictly humanitarian basis, without political or legal repercussions.⁶⁰
- b) The ICRC was aware of the fact that, if the struggle for self-determination were to be declared international, the problem would still arise how to establish whether any particular conflict should be designated as such a struggle; the ICRC in 1971 therefore proposed developing rules of humanitarian law that would apply in situations where the law of armed conflicts as a whole would not automatically and incontrovertibly apply.⁶¹
- c) In 1972 the question of the struggle for self-determination was broached in two ways:
 - Article 1 of the draft of Protocol I defined the scope of the Protocol by referring to Article 2 of the Conventions, but Article 38 laid down prisoner-of-war treatment for combatants of organized independence movements, provided in particular that they belonged to a Party to the conflict, even if this were a government or an authority not recognized by the Detaining Power;⁶²
 - a preliminary draft of a Declaration on the Application of International Humanitarian Law in Armed Struggles for Self-Determination proclaimed that international humanitarian law as a whole should apply to such struggles; failing which, the Parties involved in such struggles should at least

⁵⁹ Cf. for example, *CRCE 1971, Report*, p. 43 (para. 2); *CE 1971, Report*, pp. 48-50, paras. 282-289; *CE 1972, Report*, Vol. I, pp. 97-100, Chapter VIII.

⁶⁰ *Protection of Victims of Non-International Conflicts*, Report submitted at the XXIInd International Conference of the Red Cross (Istanbul, 1969), ICRC, Geneva, pp. 7-8.

⁶¹ *CE/5b*, pp. 30-35 (Conclusions and proposals).

⁶² *CE 1972, Report*, Vol. II, p. 1 (Art. 1, para. 2) and p. 6 (Art. 38, para. 1) of the draft Protocol I of the ICRC. The French text reads “non reconnue”, using the feminine form of the adjective, which may seem to refer only to the authority; this seems to be an error; the report does not refer to any discussion on this point, but the 1973 draft uses the plural adjective “non reconnus” (Art. 42), as indeed does Art. 4 A(3) of the Third Convention.

apply by analogy Article 3, common to the Conventions, and Protocol II, or otherwise they should comply with a set of special rules which were to be annexed to the Declaration.⁶³

4. *The Diplomatic Conference*

92 The draft of Article 1 submitted by the ICRC to the CDDH, though worded differently, repeated the substance of the 1972 draft: the Protocol would apply in the situations referred to in Article 2 common to the Conventions. The commentary on this draft reveals that the majority of experts were opposed to the inclusion of a paragraph to the effect that the situations referred to in the said common Article 2 would include armed struggles by peoples for the exercise of their right to self-determination. The opposition was based on various different and contradictory reasons: a refusal to qualify specific conflicts; the desire to retain this type of conflict within the scope of application of common Article 3, and of the draft of Protocol II; a preference for other solutions, such as the proclamation of the international character of such conflicts in the Preamble, or by mentioning members of movements struggling for self-determination in draft Article 42 (New category of prisoners of war). One remark relating to this draft article, as well as the commentary thereon, suggested that if the CDDH wished to comply with the desire of numerous governments, it should add a third paragraph covering members of organized liberation movements; this was intended to grant them prisoner-of-war treatment, and not prisoner-of-war status, so as to avoid the problem of qualifying specific conflicts.

93 The problem of struggles for self-determination was raised mainly with respect to four questions:

- during the initial plenary meetings of the CDDH the question arose whether national liberation movements should be invited to participate in the Conference.⁶⁴ In its resolution 3 (I) the CDDH decided by consensus⁶⁵ “to

⁶³ For the text of this preliminary draft of the Declaration, cf. *CE 1972, Report*, Vol. II, p. 23. The great majority of experts were opposed to such a declaration for various contradictory reasons, some considering it to be insufficient, while others considered that the cases covered came under common Art. 3 and the draft of Protocol II; for the text of the preliminary draft and the report on the discussions, cf. *ibid.*, Vol. I, pp. 200-201, paras. 4.216-4.224.

⁶⁴ The wish to invite them had been expressed by the XXIInd International Conference of the Red Cross (Teheran, 1973) in its Resolution XIII, operative para. 3; similarly, the United Nations General Assembly in its Resolution 3102 (XXVIII), operative para. 2.

⁶⁵ *O.R.* V, p. 65, CDDH/SR.7, para. 4. The list of movements invited for this purpose can be found in *O.R.* V, p. 56, CDDH/SR.6, para. 11; the list of movements that participated can be found in *O.R.* II, pp. 351-358; the list of movements which signed the Final Act is in *O.R.* VII, p. 336, CDDH/SR.59, para. 5; the status of these movements in the Conference was governed by Chapter X of the Rules of Procedure: cf. *O.R.* II, p. 15, CDDH/2/Rev. 3, Art. 58.

invite the national liberation movements, which are recognized by the regional intergovernmental organizations concerned, to participate fully in the deliberations of the Conference and its Main Committees”;⁶⁶

- a close relationship linked the rules on such struggles to Part III of Protocol I;
- if liberation struggles were to fall under Protocol I, it would be appropriate to lay down how liberation movements could undertake to apply this Protocol and the Conventions; the solution adopted is Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3;⁶⁷
- finally, and this was a fundamental point, it had to be determined whether such struggles were international conflicts, and as such required the application of the Conventions and of Protocol I as a whole. This is the point with which we are concerned here.

94 After its introduction by the ICRC,⁶⁸ the draft of Article 1 formed the object of various proposals for amendments.⁶⁹ Most of these proposals were more or less directly linked to paragraph 4, and it was because of this paragraph that the article was adopted by a vote and not by consensus.⁷⁰

Analysis of paragraph 4

95 In describing the historical background of this paragraph it was not possible to give a detailed account of each of the arguments advanced for and against the wording that was finally adopted, or of each of the proposals submitted in the Conference: the sum total would have been out of proportion. The same applies with regard to the extent of information found in legal and other literature, either

⁶⁶ Para. 1, cf. *O.R.* I, Part II, p. 5, CDDH/55, Resolution 3 (I).

⁶⁷ Paragraph added to draft Art. 84.

⁶⁸ *O.R.* VIII, p. 7, CDDH/I/SR.2, paras. 2-6.

⁶⁹ *O.R.* III, pp. 5-9, CDDH/I/5, and Add.1-2 (withdrawn in favour of document CDDH/I/41), CDDH/I/11 and Add.1-3, CDDH/I/12 and Corr. 1 and Add.1, CDDH/I/13 (withdrawn in favour of document CDDH/I/41), CDDH/I/41 and Add.1-7, CDDH/I/42, CDDH/I/71. A draft resolution requesting that an intersessional working group should be entrusted with examining the question was not passed (CDDH/I/78, not reproduced in the *Official Records*; introduction: *O.R.* VIII, pp. 97-98, CDDH/I/SR.13, paras. 1-5). The text finally adopted for paragraph 4 is that of paragraph 2 of CDDH/I/71, a revision of the corresponding paragraph of CDDH/I/41, which was itself a merger of CDDH/I/5 and 11. The order of paragraphs was modified by the Drafting Committee: paras. 1 and 2 became 3 and 4, and paras. 3 and 4 became 1 and 2. In the French text, “populations” was replaced by “peuples”, and “de leur droit à l’autodétermination” by “du droit des peuples à disposer d’eux-mêmes”: cf. *O.R.* VIII, p. 100, CDDH/I/SR.13, paras. 19-20. In all the versions “colonial and alien occupation” was replaced by “colonial domination and alien occupation”; cf. *ibid.*, paras. 18 and 20.

⁷⁰ Cf. *supra*, note 1.

in general on the right of peoples to self-determination, or on the struggles conducted in exercising this right.⁷¹

- 96 Despite the many instruments and texts available, it should be noted that some discrepancies remain, and that the general character of texts which were unanimously approved does not always lead to undisputed conclusions.

1. *International instruments invoked*

- 97 The majority of delegations emphasized the need for ensuring the unity of international law and refused to accept or to maintain a humanitarian law which did not take into account existing general international law. In this respect reference was made to the Charter of the United Nations, the International Covenants on Human Rights, and to resolutions of the United Nations General Assembly, especially to Nos. 1514 (XV), 2625 (XXV), and 3103 (XXVIII). Recommendations were made to adapt the law expressly, without prejudice to an interpretation of existing instruments in the light of the subsequent development of the law and the entire legal system in force at the time of interpretation, in accordance with the principles expressed by the International Court of Justice with regard to Namibia.⁷² For one delegation the adaptation of humanitarian law was essential: it could not remain an isolated branch of law, and had to conform to general international law, including *jus cogens*.⁷³

⁷¹ For further details, reference may be made in the first place to the bibliographies of S. Calogeropoulos-Stratis, *op. cit.*, and of H. Gros Espiell, *The Right to Self-Determination – Implementation of United Nations' Resolutions*, United Nations publication, 1979. The numerous publications relating to paragraph 4 include: W.T. Mallison and S.V. Mallison, "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 concerning International Conflicts", 62 *Law and Contemporary Problems* 2, Duke University, 1978, p. 10; W.D. Verwey, "Decolonization and *Ius ad Bellum*: A Case Study on the Impact of the United Nations General Assembly on International Law", in *Declarations of Principles – A Quest for Universal Peace*, Leyden, 1977, p. 121; J.J.A. Salmon, "Les guerres de libération nationale", in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, 1979, p. 55; D. Schindler, "The Different Types of Armed Conflicts...", *op. cit.*, pp. 118-119, 132-145, 152-157; G. Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", 165 *Hague Recueil*, 1979/IV, p. 357; E. Kussbach, "Die Rechtsstellung nationaler Befreiungsbewegungen im humanitären Völkerrecht", in *Ius Humanitatis, Festschrift zum 90. Geburtstag von Alfred Verdross*, Berlin, 1980, p. 499; J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *Hague Recueil*, 1983/I, p. 239; A. Cassese, "Wars of National Liberation and Humanitarian Law", in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 313.

⁷² Cf. "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), Advisory Opinion", *ICJ Reports*, 1971, p. 16 (particularly pp. 31-32, para. 53). Similarly the Vienna Convention on the Law of Treaties, Art. 31 (General rule of interpretation), para. 3, particularly sub-para. (c).

⁷³ O.R. VIII, p. 21, CDDH/I/SR.3, para. 30. For H. Gros Espiell, *op. cit.*, paras. 70-87, the right of peoples to self-determination is *jus cogens*, even though this view still meets with some opposition.

- 98 In contrast, some delegations intervened to claim that the right of peoples to self-determination was not a right but a principle;⁷⁴ some contested that one could properly refer to instruments which were not treaties, such as resolutions, even those which had been adopted unanimously.⁷⁵

2. *The meaning of the right of peoples to self-determination*

- 99 As shown above, this right is, according to the International Covenants on Human Rights, the right of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development”.⁷⁶
- 100 The struggle of peoples against any forcible action aimed at depriving them of their right to self-determination is legitimate; in this case they are entitled to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations.⁷⁷
- 101 Any non-self-governing territory possesses a status separate and distinct from that of the territory of the State administering it.⁷⁸

3. *Those entitled to the right of peoples to self-determination*

- 102 The only unanimously agreed certainty is that those who are entitled to this right are “all peoples”, but what is uncertain is the definition of the term “people”. For some, the term is defined in the Charter and the International Covenants on Human Rights;⁷⁹ for others it is an elastic concept, as various examples have shown.⁸⁰
- 103 In international law there is no definition of what constitutes a people; there are only instruments listing the rights it is recognized all peoples hold. Nor is there an objective or infallible criterion which makes it possible to recognize a group as a people: apart from a defined territory, other criteria could be taken into account such as that of a common language, common culture or ethnic ties. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic groups. The essential factor is a common sentiment of forming a people, and a political will to live together as such. Such a sentiment and will are the result of one or more of the criteria indicated, and are generally highlighted and reinforced by a common history. This means simultaneously that there is a bond between the persons belonging to this people and something that separates them from other peoples: there is a common element and a distinctive element.

⁷⁴ O.R. VIII, pp. 13-14, CDDH/I/SR.2, para. 46; pp. 28-29, CDDH/I/SR.4, para. 25.

⁷⁵ For example, *ibid.*, p. 26, CDDH/I/SR.4, para. 7; p. 28, para. 21; p. 39, CDDH/I/SR.5, para. 43.

⁷⁶ Art. I, para. 1; *cf. supra*, p. 43, point 5.

⁷⁷ Resolutions 2105 (XX), 2625 (XXV), and 3103 (XXVIII), *cf. supra*, pp. 43 and 44, points 4, 7 and 8.

⁷⁸ Resolution 2625 (XXVIII), *cf. supra*, p. 44, point 7.

⁷⁹ For example, O.R. VIII, p. 15, CDDH/I/SR.2, para. 53.

⁸⁰ For example, *ibid.*, pp. 13-14, para. 46.

- 104 The definition of a group as a people does not arise from a decision by a regional or worldwide intergovernmental organization: by their declarations such organizations can take note of and proclaim the existence of peoples, but they cannot create them. While a group of population declared to be a “people” by an intergovernmental organization may in fact be considered to be such, the contrary conclusion does not necessarily follow from the absence of such a declaration, as the reasons for the absence may vary.⁸¹
- 105 The idea that a national liberation movement must be recognized by the regional intergovernmental organization concerned⁸² for paragraph 4 to apply was advanced but was not adopted.⁸³
- 106 It should be noted that, under the Charter and the Covenants, only peoples have the right to self-determination as defined by these instruments. This is not the case for ethnic, religious or linguistic minorities which, for example, under the Covenant on Civil and Political Rights, are merely entitled to enjoy their own culture, to profess and practise their own religion, or to use their own language (Article 27). Thus it is clear that the difficulty in individual cases lies entirely in the qualification that is chosen: is the case in question one of a people, with a right to self-determination and all the attendant consequences, or is it a minority entitled to protection, but not to self-determination?

4. *The peoples covered by paragraph 4*

- 107 A twofold requirement results from the merging of the various amendments proposed, for the paragraph to apply:
- there must be an armed conflict in which a people is struggling against colonial domination, alien occupation or a racist régime;

⁸¹ Chapter III (paras. 251-261) in H. Gros Espiell, *op. cit.*, is entitled “Specific situations concerning the right of peoples under colonial and alien domination to self-determination which have been or are being dealt with the United Nations”. Here is the list of States and territories in alphabetical order: Algeria, American Samoa, Angola, Antigua, Bahamas, Barbados, Belize, Bermuda, Botswana, British Virgin Islands, Brunei, Burundi, Cambodia, Cameroon, Cape Verde, Cayman Islands, Central African Republic, Chad, Cocos (Keeling) Islands, Comoro Archipelago, Congo, Cook Islands, Cyprus, Dahomey, Djibouti, Dominica, Equatorial Guinea, Eritrea, Falkland Islands (Malvinas), Fiji, Gabon, Gambia, Ghana, Gibraltar, Gilbert and Ellis Islands, Grenada, Guam, Guinea, Guinea-Bissau, Guyana, Hungary, Ifni, Indonesia, Ivory Coast, Jamaica, Kenya, Laos, Lesotho, Libya, Madagascar, Malaysia, Malawi, Mali, Malta, Mariana Islands, Mauritania, Mauritius, Montserrat, Morocco, Mozambique, Namibia, Nauru, New Hebrides, Niger, Nigeria, Niue, Oman, Palestine, Papua New Guinea, Pitcairn, Puerto Rico, Rwanda, St. Kitts-Nevis-Anguilla, St. Helena, St. Lucia, St. Vincent, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Southern Rhodesia, Southern Yemen, Suriname, Swaziland, Tanzania, Tibet, Timor, Togo, Tokelau Islands, Trinidad and Tobago, Tunisia, Turks and Caicos Islands, Tuvalu, Uganda, United States Virgin Islands, Upper Volta, Western Sahara, Western Samoa, West New Guinea (West Irian), Zaire, Zambia.

⁸² Criterion used for inviting liberation movements to the CDDH, *cf. supra*, pp. 49-50, and note 66. Cf. also commentary Art. 96, *infra*, p. 1089 and note 29.

⁸³ *O.R.* III, p. 8, CDDH/I/42, quoted above. In favour of this proposal, in addition to its sponsor: *O.R.* VI, pp. 62-63, CDDH/SR.36, Annex (Indonesia); *O.R.* VII, p. 324, CDDH/SR.58, Annex (Mauritania) (after adoption in the Plenary Conference); against: *cf. O.R.* VIII, p. 105, CDDH/I/SR.14, para. 4 (after adoption by Committee I).

- the struggle of that people must be in order to exercise its right to self-determination.

- 108** However, one delegation considered that in interpreting the word “include” literally, the list following it is not exhaustive.⁸⁴ In contrast, another delegation expressed regret that the paragraph remained selective and does not cover all situations entering the concept of the right of peoples to self-determination.⁸⁵
- 109** As no delegation had specified what armed conflicts for self-determination would be implicitly included or excluded (depending on which of the two above-mentioned interpretations is chosen) by the formulation of the paragraph, it is necessary to study the paragraph and the texts on which it is based.
- 110** The Charter of the United Nations and the Friendly Relations Declaration, which were examined above, grant the right to self-determination to all peoples equally and in every respect.
- 111** As regards the wording of the paragraph, what meaning should be ascribed to the word “include”? We consider that it should be interpreted as introducing an exhaustive list of cases which are considered to form part of the situations covered by the preceding paragraph.
- 112** However, do the cases listed essentially cover all possible circumstances in which peoples are struggling for the exercise of their right to self-determination? The expression “colonial domination” certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free itself from the domination of another people; it is not necessary to explain this in greater detail here. The expression “alien occupation” in the sense of this paragraph – as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State⁸⁶ – covers cases of partial or total occupation of a territory which has not yet been fully formed as a State.⁸⁷ Finally, the expression “racist régimes” covers cases of régimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas. It should be added that a specific situation may correspond simultaneously with two of the situations listed, or even with all three.⁸⁸
- 113** In our opinion, it must be concluded that the list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference

⁸⁴ *O.R.* V, p. 228, CDDH/SR.22, para. 14.

⁸⁵ *O.R.* VII, p. 246, CDDH/SR.56, Annex (Syria). Other declarations can also be noted which are less conclusive with regard to the question whether the paragraph covers only one of the aspects of the right of peoples to self-determination: *O.R.* VIII, p. 11, CDDH/I/SR.2, para. 34; p. 20, CDDH/I/SR.3, para. 21; p. 106, CDDH/I/SR.14, para. 8.

⁸⁶ A situation already covered by the law of The Hague and Geneva; *cf.* commentary para. 3, *supra*, p. 40.

⁸⁷ *Cf.* for example, *O.R.* V, pp. 314-315, CDDH/SR.27, paras. 5 and 14, with regard to resolution 7 (II).

⁸⁸ In this sense, *cf.* *O.R.* VI, p. 53, CDDH/SR.36, para. 114.

of another people, or against a racist régime. On the other hand, it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international.

5. *The application of humanitarian law*

- 114 At what moment does humanitarian law as a whole become applicable in pursuance of this paragraph? This is not stated here, but the preceding paragraph, which it supplements, refers to Article 2 common to the Conventions in this respect. The latter is as concise as it is clear: application is required in all cases of armed conflict which may arise between two or more High Contracting Parties, or in case of the total or partial occupation of the territory of a High Contracting Party – even if it meets with no armed resistance. The same rule applies here, in accordance with Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, which provides for the way in which an authority representing a people engaged in a struggle may undertake to apply the Conventions and the Protocol and make them applicable to the conflict.
- 115 Although some considered that in the absence of a definition of the concept of armed conflict, reference should be made to Article 1 of Protocol II⁸⁹ (*Material field of application*), which could be applied by analogy, or a certain degree of intensity should be required,⁹⁰ this is not expressed in either paragraph 4 or the Conventions: according to the Conventions and the Protocol, the only real requirements for the correct application of the law when persons in such a conflict are protected persons within the meaning of these instruments are an authority representing the people engaged in the struggle and an organized structure of its armed forces, including a responsible command, in accordance with the requirements of Article 43 (*Armed forces*).⁹¹
- 116 The objection that only States would be capable of applying such heavy norms⁹² was not taken into account for the same reasons: apart from the innovations introduced in Part III, the only requirement considered truly necessary was the setting up in Article 96 (*Treaty relations upon entry into force of this Protocol*) of an *ad hoc* mechanism by which an authority representing a people engaged in a struggle may make an undertaking.⁹³

⁸⁹ *Ibid.*, p. 47, CDDH/SR.36, paras. 87-88; such a requirement was formulated in a declaration made by the United Kingdom upon signing the Protocol.

⁹⁰ *Cf.* O.R. VI, pp. 59-60, CDDH/SR.36, Annex (Australia).

⁹¹ *Cf.* the comparison with organized resistance movements in totally occupied countries: O.R. VIII, p. 34, CDDH/I/SR.5, para. 7; O.R. VI, p. 354, CDDH/SR.46, para. 77.

⁹² Amongst other statements, *cf.* O.R. VIII, p. 11, CDDH/I/SR.2, para. 32; pp. 28-29, CDDH/I/SR.4, para. 25; after the adoption of Art. 1 in plenary: O.R. VII, p. 217, CDDH/SR.56, para. 114.

⁹³ *Cf.* the indication that an unofficial working group in which all the regional groups were represented unanimously arrived at this conclusion during the second session, while studying the repercussions of Art. 1: O.R. VI, pp. 43-44, CDDH/SR.36, para. 69.

- 117 The actual adoption of this last provision, and of the paragraph under consideration here, suffices to entail the obligation in the situations referred to of interpreting certain criteria used in humanitarian law, such as that of nationality, in a new way. In fact, to insist on the “official” nationality would result in depriving these provisions of a large part of their purpose, and it is therefore necessary to resort to concepts such as “belonging” or “allegiance”.
- 118 One thing is certain: the characteristics of a conflict, especially its intensity or its length, may justify the application of the Conventions and of the Protocol as a whole, or a part of these instruments, but this is merely a question of common sense, which also applies to any conflict between States. It should also be emphasized that contrary to the fears expressed by certain delegations,⁹⁴ all the Parties to the conflict will have the same obligations and enjoy the same rights,⁹⁵ without any adverse distinction: neither the fifth paragraph of the Preamble nor paragraph 3 of Article 96 (*Treaty relations upon entry into force of this Protocol*) leaves any room for doubt on this point. As regards the crucial question of the inevitable disputes regarding the qualification of a specific conflict, one must assume that the Parties concerned will carry out their obligations in good faith, and count on the positive influence of all the High Contracting Parties.⁹⁶

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⁹⁴ For example *O.R.* V, p. 101, CDDH/SR.11, para. 5; pp. 109-110, paras. 46-47.

⁹⁵ For example *O.R.* VIII, p. 32, CDDH/I/SR.4, para. 45; *O.R.* VI, p. 354, CDDH/SR.46, paras. 76-77.

⁹⁶ *Cf.* in particular Art. 1, common to the Conventions, para. 1 of this article, as well as Art. 89 of Protocol I.

Protocol I

Article 2 – Definitions

For the purposes of this Protocol:

- (a) “First Convention”, “Second Convention”, “Third Convention” and “Fourth Convention” mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; “the Conventions” means the four Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) “rules of international law applicable in armed conflict” means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;
- (c) “Protecting Power” means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;
- (d) “substitute” means an organization acting in place of a Protecting Power in accordance with Article 5.

Documentary references

Official Records

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CDDH/405/Rev.1, paras. 4-5 and 13-16; p. 257, *id.*, Annex IV (Art. 2). *O.R.* XI, p. 148, CDDH/II/SR.16, para. 40. *O.R.* XIV, p. 80, CDDH/III/SR.10, para. 18; p. 86, CDDH/III/SR.11, para. 11; pp. 294-298, CDDH/III/SR.30, paras. 35-52. *O.R.* XV, pp. 91-99 *passim*, CDDH/III/SR.47, paras. 34-35 and 38-80 *passim*; p. 101, CDDH/III/SR.48, para. 2; p. 264, CDDH/215/Rev.1, paras. 6-8; p. 266, para. 16; pp. 389-390, CDDH/236/Rev.1, paras. 41-45; p. 414, *id.*, Annex (Art. 41); p. 425, CDDH/III/338; p. 432 (Art. 41).

Other references

CE/6b, pp. 14-17. *CRCE 1971, Report*, p. 56; p. 08, Annex II. *CE 1971, Report*, p. 24, para. 46 (Art. 2); p. 29 (Art. 2). *CE 1972, Basic Texts*, pp. 5-6 (Art. 2); p. 15 (Art. 39). *CE 1972, Commentaries*, Part I, pp. 9-10 (Art. 2); pp. 73-74 (Art. 39). *CRCE 1972, Report*, p. 41 (Art. 39). *CE 1972, Report*, vol. I, p. 135, paras. 3.70-3.72 (Art. 39); pp. 176-177, paras. 4.34-4.42 (Art. 2); vol. II, p. 1 (Art. 2); pp. 54-55, *CE/COM III/C 19. Commentary Drafts*, pp. 7-9 (Art. 2); p. 47 (Art. 41). *XXIIInd Int. Conf. RC, Report*, p. 7 (Art. 2).

Commentary

General remarks

- 119 Article 31 (General rule of interpretation) of the Vienna Convention on the Law of Treaties of 23 May 1969 provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (paragraph 1); it adds that: “A special meaning shall be given to a term if it is established that the parties so intended” (paragraph 4).
- 120 Thus the object of definitions is essentially to help the interpretation in cases of possible doubt regarding the meaning of terms in a treaty; it may also simply be to prevent the use of lengthy formulations by replacing them with more concise expressions; finally, a definition can itself contain a substantive rule. Whatever the case, the definitions laid down in a treaty for the purposes of that treaty bind the Parties with regard to its interpretation.
- 121 During the Diplomatic Conference the question was raised whether all the definitions given in the Protocol should be grouped together in Article 2, or whether it should include only definitions of expressions used throughout the Protocol, as in the case of the draft. The latter solution was chosen, and other definitions were retained in parts, sections or chapters particularly concerned with them.¹

¹ Thus other definitions or similar provisions can be found in the following articles: 8; 26, para. 2; 37; 41, para. 2; 43; 46, paras. 2-3; 47, para. 2; 49, para. 1; 50; 51, paras. 4-5; 52; 56, para. 1; 59, paras. 2-3; 60, para. 3-4; 61; 85, para. 5; 90, para. 1.

- 122 Two major modifications were made to the draft. Sub-paragraph (b) was inserted in Article 2 although it had been developed and adopted by Committee III as an integral part of Article 43 (*Armed forces*). In addition, in view of the difficulty of establishing a general definition of such expressions as “protected persons” and “protected objects”, Committee I decided not to provide definitions of these expressions; in fact, as these two expressions were to be used only in Articles 11 (*Protection of persons*) and 85 (*Repression of breaches of this Protocol*), it seemed best to include the appropriate information in these provisions.
- 123 The article was adopted by consensus by the Committee² and in plenary.³

Opening sentence

- 124 The six words preceding the sub-paragraphs are the standard wording also found in Articles 8 (*Terminology*) and 61 (*Definitions and scope*). Even though this might be considered to be self-evident, it means that the definitions given do not in any way affect another meaning that the expressions defined could have, for example, in another treaty⁴ or in the domestic law of a State.
- 125 Nevertheless, with regard to sub-paragraph (c), it is clear that the definition given here applies not only to the Protocol but also to the Conventions.

Sub-paragraph (a)

- 126 The expressions “First Convention” etc. have become current usage for practical reasons, though up to now there has been no official recognition.⁵ The same considerations applied for adopting the terms “Protocol I” and “Protocol II”, this time as an official abbreviated title.
- 127 The expression “for the protection of war victims” had already been officially approved in the resolutions of the Diplomatic Conference of 1949; subsequently it was used particularly by their depositary and by the United Nations.⁶ Moreover, it is contained in Article 1 (*General principles and scope of application*), paragraph 3, of the Protocol.

² O.R. VIII, p. 53, CDDH/I/SR.7, paras. 18-23; pp. 247-248, CDDH/I/SR.26, para. 4; O.R. XV, p. 91, CDDH/III/SR.47, para. 35 (cf. also *ibid.*, p. 390, CDDH/236/Rev. 1, para. 43).

³ O.R. VI, p. 57, CDDH/SR.36, para. 129.

⁴ Along the same lines, cf. commentary Art. 35, para. 3, *infra*, pp. 415-420, for the different meanings of almost identical expressions in two treaties.

⁵ One or other of the expressions defined is used in the following arts. of the Protocol: 2-9, 12, 15, 16, 18, 21-23, 30, 33, 34, 38, 41, 43-46, 49, 50, 58-60, 68-70, 72, 75, 79-83, 85-100, 102, and Art. 1 of Annex I.

⁶ *United Nations Treaty Series*, 1950, Nos. 970-973.

Sub-paragraph (b)

- 128 The expression “rules of international law applicable in armed conflict” is used in a number of articles of the Protocol.⁷ Other references relating generally or specifically to international law,⁸ or to specific instruments,⁹ can also be found.
- 129 The object of Article 43 (*Armed forces*), for which this definition was drafted, was not so much to list all the rules but to extend the fundamental obligation laid down in Article 1 of the Hague Convention IV of 1907 to the Protocol¹⁰, and to all the armed forces. The commentary on the Draft specified that the expression related to customary law, as well as to treaty law, the latter comprising mainly the Hague Conventions of 1907, the Geneva Protocol of 1925, the Geneva Conventions of 1949, and the Hague Convention of 1954.¹¹ Since then, this Protocol and the Convention of 1980 on conventional weapons *inter alia* have been added to these.
- 130 As the Conference did not draw up a list of treaty rules or customary rules covered by this sub-paragraph either in Committee III or in plenary meetings, reference should be made to the various articles containing this formula to know to which rules each of them is referring.¹²
- 131 Essentially the treaty rules are contained in instruments especially intended to apply in armed conflicts, including the law of neutrality. The expression “applicable to armed conflict” used at the end of the sub-paragraph should not be interpreted to cover *jus ad bellum* as well, in the context of the Protocol.¹³ On the other hand, the definition does cover instruments of more general applicability that continue to apply wholly or partially in a situation of armed conflict.

⁷ Arts. 31, 37, 43, 44, 57, 59 and 60.

⁸ Art. 1, para. 2: “principles of international law”; Art. 5: “rules of international law relating to diplomatic relations”; Art. 36: “any other rule of international law applicable to the High Contracting Party”; Art. 39, para. 3: “existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea”; Art. 49, para. 3: “rules of international law applicable in armed conflict at sea or in the air”; Art. 49, para. 4: “other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities”; Art. 51, para. 1: “other applicable rules of international law”; Art. 56, para. 3: “international law”; Art. 72: “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”; Art. 75, para. 7(a), and para. 8: “applicable rules of international law”.

⁹ Preamble, second and fourth paragraphs: “Charter of the United Nations”; Art. 89: *idem*; Art. 102: *idem*; Annex I, Art. 7, para. 3: “International Telecommunication Convention”; Art. 8, para. 1: “Chicago Convention on International Civil Aviation of 7 December 1944”; Art. 10: “standards [...] established by [the ITU, ICAO and IMCO]”; Art. 11: “International Code of Signals”, above-mentioned Chicago Convention; Art. 13: same Convention.

¹⁰ “The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations Respecting the Laws and Customs of War on Land, annexed to the present Convention”. For this Protocol various provisions of Parts I and V have the same aim.

¹¹ *Commentary Drafts*, p. 47 (Art. 41).

¹² Also see *supra*, Editors’ Note (definitions).

¹³ In this respect, *cf.* commentary Preamble, first, fourth and fifth paras., *supra*, pp. 26 and 28.

- 132 Finally it should be noted that the limitation to “international agreements to which the Parties to the conflict are Parties” has no effect with regard to rules which have validity as customary law, whether or not they form part of a treaty.

Sub-paragraph (c)

- 133 The expression “Protecting Power”, used in the Geneva Conventions since 1929, can be found in sub-paragraph (d) of this article, as well as in various other articles of the Protocol.¹⁴
- 134 The main particulars given in the Protocol on the characteristics and activities of the Protecting Power are given in the other articles of the Protocol referred to above. However, this sub-paragraph does contain some elements.
- 135 First, the Protecting Power means “a neutral or other State not a Party to the conflict”. Only the term “neutral” is used by the Conventions in a number of their provisions. The draft Protocol used the wording “not engaged in the conflict” instead of the word “neutral”. In fact, other forms of non-participation in a conflict have been added to neutrality as defined by treaty¹⁵ and customary law. Undoubtedly it would have sufficed to use the expression “not engaged in the conflict” or “not Party to the conflict” for the purposes of this sub-paragraph and other articles of the Protocol containing the same wording.¹⁶
- 136 Nevertheless, while assigning them equal significance, the Conference considered it appropriate to make a separate mention of non-participation in the conflict in general, and of neutrality in the true sense of the word – whether this is neutrality in a particular conflict, or permanent neutrality. The fact that the Protocol thus gave a restrictive meaning to the term “neutral” by using this new wording, does not affect the meaning of the term in the Conventions, where it should be interpreted as covering non-participation in conflicts in general, as well as neutrality in the proper sense of the word.¹⁷
- 137 The rest of the sub-paragraph expressly formulates what the concept of a Protecting Power means: to appoint such a Power there must be agreement between the State approached to be the Protecting Power and each of the two Parties to the conflict concerned. Although the consent of the two first is mentioned in Article 5 (*Appointment of Protecting Powers and of their substitute*),

¹⁴ Arts. 5, 33, 45, 70, 78 and 84.

¹⁵ Essentially the Hague Conventions V and XIII of 1907.

¹⁶ Art. 9, para. 2(d); 19; 22, para. 2(a); 30, para. 3; 31; 37, para. 1(a); 39, para. 1; 64, paras. 2-3.

¹⁷ On the theme of the CDDH and neutrality, cf. in particular, E. Kussbach, “Protocol I and Neutral States”, *IRRC*, September-October 1980, p. 231; J. Monnier, “Développement du droit international humanitaire et droit de la neutralité”, a study presented at the Tenth Round Table of the International Institute of Humanitarian Law (San Remo, September, 1984) in *Quatre études du droit international humanitaire*, Geneva, 1985, p. 5. On neutrality in a more general sense, cf. D. Schindler, “Aspects contemporains de la neutralité”, 121 *Hague Recueil*, 1967/II, p. 221; Bernhardt (ed.), *op. cit.*, Instalment 4: R. Bindschedler, “Neutrality, Concept and General Rules” (p. 9); K.J. Madders, “Neutrality in Air Warfare” (p. 14); K. Zemanek, “Neutrality in Land Warfare” (p. 16); Y. Dinstein, “Neutrality in Sea Warfare” (p. 19); E. Kussbach, “Neutrality Laws” (p. 28); R. Bindschedler, “Permanent Neutrality of States” (p. 133).

the latter is not; although this does not matter, it would have been more logical if the third consent had also been mentioned.¹⁸

- 138 Finally, the mention of “functions assigned [...] under the Conventions and this Protocol” results from the distinction established in Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraph 6, between the “Vienna mandate” and the “Geneva mandate” – as the same Protecting Power should not necessarily take upon itself both of these two mandates.¹⁹

Sub-paragraph (d)

- 139 The term “substitute” is used only in Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraphs 4 and 7. Paragraph 7 specifically dispenses with the need to mention the substitute each time reference is made to Protecting Powers. Although the term did not appear in the text itself of the Conventions, it had been used in the marginal notes (which were not adopted by the Conference in 1949), and it was widely used in practice.
- 140 Nevertheless, we will see below with regard to the above-mentioned Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraphs 4 and 7, that the relevant article of the Conventions provides for various possible types of substitute – a neutral State, an organization which offers every guarantee of impartiality and efficacy, a humanitarian organization such as the ICRC. As regards the Protocol, it refers only to the ICRC or any other organization which offers all guarantees of impartiality and efficacy.
- 141 The draft envisaged that a substitute might replace a Protecting Power “for the discharge of all or part of its functions”. The Working Group decided to delete this expression. According to the commentary of the draft Protocol the words “all or part” in the draft referred to two possible situations: that in which the Protecting Power and the substitute shared the tasks, in accordance with the wishes of the designated Protecting Power and with the agreement of the Parties to the conflict; and that in which the substitute was prepared to assume only part of such activities, in the absence of a Protecting Power and with the agreement of the Parties to the conflict. The possibility of having several different substitutes at the same time had already been envisaged by the Commentary to the Conventions.²⁰
- 142 Although the Conference did not retain the words “all or part” in this sub-paragraph – just as it did not adopt a proposal to use “substitutes” in the plural instead of “a substitute” in Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraph 7 – neither the summary records nor the reports of the Committee reveal any strong opposition to the notion of a possible division of

¹⁸ In this sense, cf. *O.R.* VIII, p. 56, CDDH/I/SR.7, para. 45.

¹⁹ Cf. commentary Art. 5, para. 6, *infra*, pp. 87-88.

²⁰ E.g., *Commentary I*, pp. 134-135 (Art. 10, para. 3).

tasks.²¹ On the contrary, several speakers argued in its favour,²² and other proposed amendments did not affect the draft in this respect.

- 143 It must be concluded that the Conference did not wish to encourage the division of responsibilities between a Protecting Power and a substitute, or between a number of substitutes, by explicitly referring to such a possibility. However, neither did it wish to prohibit such a solution in exceptional cases where it was necessary for the sake of the victims, whose interests must prevail over practical considerations in favour of a unified approach.²³

B.Z.

²¹ Even in the introduction of the amendment proposing deleting the words “all or part”; *cf.* O.R. III, p. 11, CDDH/I/44, and Corr.1; O.R. VIII, p. 85, CDDH/I/SR.11, para. 49.

²² O.R. VIII, p. 84, CDDH/I/SR.11, paras. 41 and 46; p. 162, CDDH/I/SR.18, paras. 45 and 46 *in fine*.

²³ *Cf.* also *infra*, pp. 87-88, commentary Art. 5, para. 6, regarding the possibility of having one or two Protecting Powers for the “Vienna mandate” and the “Geneva mandate”.

Protocol I

Article 3 – Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

- (a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;
- (b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

Documentary references

Official Records

O.R. I, Part I, p. 127; Part III, p. 3 (Art. 3). *O.R.* III, pp. 15-18. *O.R.* V, p. 95, CDDH/SR.10, para. 24. *O.R.* VI, p. 57, CDDH/SR.36, para. 129; p. 60, *id.*, Annex (Cyprus). *O.R.* VIII, p. 60, CDDH/I/SR.8, paras. 9-14; p. 62, para. 28; p. 63, para. 35; pp. 67-68, CDDH/I/SR.9, paras. 1-7; pp. 71-75, CDDH/I/SR.10; pp. 193-198, CDDH/I/SR.21, paras. 18-53; p. 209, CDDH/I/SR.22, para. 38; pp. 247-248, CDDH/I/SR.26, para. 4. *O.R.* X, pp. 3-4, CDDH/48/Rev.1, paras. 2, 5A, 7; pp. 9-10, paras. 25-26; p. 21, CDDH/219/Rev.1, paras. 4-6; p. 23, paras. 12 and 15; pp. 26-27, paras. 28-31; p. 68, CDDH/I/235/Rev.1 (Art. 3). *O.R.* XV, pp. 384-385, CDDH/236/Rev.1, para. 25.

Other references

CE/7b, p. 4 (Art. 1). *CRCE 1971, Report*, p. 08, Annex II (Art. 1). *CE 1971, Report*, p. 27 (Art. 1). *CE 1972, Basic Texts*, p. 6 (Art. 5). *CE 1972, Commentaries*, Part I, pp. 13-14 (Art. 5). *CE 1972, Report*, vol. I, pp. 178-179, paras. 4.52-4.55 (Art. 5); vol. II, p. 99, *CE/COM IV/8. Commentary Drafts*, pp. 9-10 (Art. 3).

Commentary**General remarks**

- 144 The material scope of application of the Protocol is laid down in Article 1 (*General principles and scope of application*), and it may therefore seem self-evident at first sight that the application would extend from the beginning to the end of such situations as are referred to in that article.
- 145 The real situation is more complicated: some provisions apply at all times; various types of situation require separate rules; finally, some persons may find themselves in a different situation from the general situation.
- 146 The draft, which was extensively modified as regards its form, was also improved by the Conference with regard to its substance. First, as it also governs the Conventions and replaces their relevant provisions,¹ it avoids any discrepancy, simplifies the law and represents tangible progress with regard to occupied territories.
- 147 On the other hand, the Protocol includes a provision which was already contained in the Conventions in order to extend the benefits thereof to the new categories of persons whom it protects: all protected persons will continue to enjoy the relevant provisions of the Conventions and the Protocol until their final release, repatriation or re-establishment – that is to say, even after the general close of military operations or the termination of occupation. It should be noted that a similar clause is contained in paragraph 6 of Article 75 (*Fundamental guarantees*), which has a particular scope of application as regards the persons it covers.
- 148 The article was adopted by consensus in Committee I² and in the plenary Conference.³

Opening sentence

- 149 The provisions which apply at all times can actually be divided into various degrees or groups:
- a) the Final Provisions (and Article 90 – *International Fact-Finding Commission*), some of which necessarily apply even before the Protocol enters into force;
 - b) provisions which apply as soon as the Protocol enters into force, such as Articles 6 (*Qualified persons*), 36 (*New weapons*), 43 (*Armed forces*), 80 (*Measures for execution*), 81 (*Activities of the Red Cross and other*

¹ Article 2 common to the Conventions and Arts. 5/-/5/6. The absence of an article on when the Second Convention ceases to apply to persons remaining in the power of the enemy after the general close of military operations is justified, because such long-lasting detention would take place on land, which means that, depending on the situation, the First, Third or Fourth Conventions would apply (*cf. Commentary II*, p. 41).

² O.R. VIII, pp. 247-248, CDDH/I/SR.26, para. 4.

³ O.R. VI, p. 57, CDDH/SR.36, para. 129.

- humanitarian organizations*), 82 (*Legal advisers in armed forces*), 83 (*Dissemination*) and 84 (*Rules of application*);
- c) provisions which may apply from the entry into force of the Protocol, such as Article 7 (*Meetings*), and articles which give grounds for taking preparatory measures (for example, Articles 18 – *Identification*, 56 – *Protection of works and installations containing dangerous forces*, 58 – *Precautions against the effects of attacks*, 66 – *Identification*, 79 – *Measures of protection for journalists*, and Annexes I and II);
- d) articles whose application in relation to a conflict may continue beyond the termination of this conflict, such as Articles 33 (*Missing persons*), 34 (*Remains of deceased*), 74 (*Reunion of dispersed families*), 78 (*Evacuation of children*), 85 (*Repression of breaches of this Protocol*), 86 (*Failure to act*), 87 (*Duty of commanders*), 88 (*Mutual assistance in criminal matters*), 89 (*Co-operation*), 90 (*International Fact-Finding Commission*) and 91 (*Responsibility*), in addition to the case of persons with whom sub-paragraph (b) of Article 3 is especially concerned.

Sub-paragraph (a)

- 150 Reference should be made to the commentary on Article 1 (*General principles and scope of application*), paragraphs 3 and 4, for the description of situations covered by the said article, including the time at which the beginning of such situations may be considered to take place. It is self-evident that the occurrence of such situations makes the Conventions and the Protocol applicable only for Parties bound by these instruments.⁴

Sub-paragraph (b)

- 151 This sub-paragraph takes up its various aspects of the provisions relating to the end of the application of the First Convention (Article 5), Third Convention (Article 5) and Fourth Convention (Article 6). It replaces these provisions and its main effect is to extend the application in occupied territory beyond what is laid down in the Fourth Convention.

Territory of Parties to the conflict

- 152 “Military operations” means the movements, manœuvres and actions of any sort, carried out by the armed forces with a view to combat. “The general close of military operations” is the same expression as that used in Article 6 of the Fourth Convention, which, according to the commentary thereon, may be deemed in principle to be at the time of a general armistice, capitulation or just when the occupation of the whole territory of a Party is completed, accompanied

⁴ Cf. remarks relating to the expression “High Contracting Parties”, commentary Preamble, *supra*, p. 25.

by the effective cessation of all hostilities, without the necessity of a legal instrument of any kind.⁵ When there are several States on one side or the other, the general close of military operations could mean the complete cessation of hostilities between all belligerents,⁶ at least in a particular theatre of war.

- 153 The general close of military operations may occur after the “cessation of active hostilities” referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations. Whatever the moment of the general close of military operations, repercussions of the conflict may continue to affect some persons who will be dealt with below.

Occupied territories

- 154 Article 6 of the Fourth Convention provided that its application in occupied territory would cease one year after the general close of military operations, except for some articles to the extent that the Occupying Power continued to exercise the functions of government in such territory.
- 155 The extension of the application up to the termination of occupation, as laid down in this sub-paragraph (b), actually takes up again the draft which the Diplomatic Conference in 1949 rejected.⁷ However good the reasons advanced against this solution at that time may have been, despite the possible extension of the application for some articles as just mentioned, and despite the existence in Article 6 of the Fourth Convention of a clause corresponding to that to be studied below under the next heading, obvious progress has been made and any future controversy regarding the exact moment of the general close of military operations will be pointless.
- 156 The termination of occupation may occur a long time after the beginning of that occupation, and can come about in various ways, *de facto* or *de jure*, depending on whether it ends in the liberation of the territory or in its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination.⁸ The occupation as such does not affect the legal status of the occupied territory, as confirmed by Article 4 (*Legal status of the Parties to the conflict*).

Continued application to particular persons

- 157 Taking up a clause from the above-mentioned articles of the First, Third and Fourth Conventions for the purposes of the Protocol, the end of the first sentence and the second sentence fulfil a necessary function. In fact, no matter at what

⁵ Some of the literature refers to this situation as *debellatio*, but this is a narrower interpretation of the term than other publicists ascribe to it. On the concept of *debellatio* and the various definitions of this term, cf. K.U. Meyn, “*Debellatio*”, in R. Bernhardt (ed.), *op. cit.*, Instalment 3, p. 145.

⁶ *Commentary IV*, p. 62.

⁷ *Ibid.*, pp. 61-63.

⁸ Cf. commentary Art. 1, para. 4, *supra*, pp. 44 and 52, and Art. 4, *infra*, pp. 72-73.

time humanitarian law may cease to apply generally, the situation of a number of people requires that they should continue to benefit from such application beyond that time.

- 158 The expression “final release” means the end of captivity, detention or other measures restricting a person’s liberty as a result of armed conflict or occupation; “repatriation” refers to the return to the country of which a person is a national, or in some cases, to the country where he was normally resident; “re-establishment” means being established in another country, for whatever reason.⁹
- 159 The provision refers mainly to persons in a situation requiring continued protection after the Conventions and the Protocol have ceased to be applied generally. It also covers of course persons who do not get into a situation requiring protection until after the end of the period when humanitarian law applies generally.¹⁰
- 160 Finally, it should be noted again that Article 75 (*Fundamental guarantees*), paragraph 6, contains a provision similar to the present one, for the purposes of that article alone.¹¹

B.Z.

⁹ For these various situations, *cf.* mainly Art. 118, Third Convention and Arts. 133-135, Fourth Convention; for grave breaches relating to these situations, *cf.* Art. 147, Fourth Convention (“unlawful confinement”) and 85, para. 4(b), of this Protocol (a delay, which is unjustifiable, wilful and in violation of the law, in the repatriation of prisoners of war or civilians).

¹⁰ This question was raised in relation to Art. 41 (then 38 *bis*) by Committee III, which considered that such persons were effectively covered by the present wording; *cf.* O.R. XV, pp. 384-385, CDDH/236/Rev.1, para. 25, and commentary Art. 41, *infra*, p. 438.

¹¹ Some thought that Art. 75, para. 6 (Art. 65, para. 5, of the draft), could render the corresponding part of Art. 3, sub-para. (b), superfluous. This view was, justifiably, not maintained; *cf.* O.R. VIII, p. 60, CDDH/SR.8, para. 11; pp. 67-68, CDDH/I/SR.9, paras. 1 and 4; see also O.R. III, p. 17, CDDH/I/49, para. 2 and note.

Article 4 – Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Documentary references

Official Records

O.R. I, Part I, p. 127; Part III, p. 4 (Art. 4). *O.R.* III, pp. 19-21. *O.R.* VI, p. 57, CDDH/SR.36, para. 129. *O.R.* VIII, pp. 60-65, CDDH/I/SR.8, paras. 15-46; pp. 69-70, CDDH/I/SR.9, paras. 14-18; pp. 166-167, CDDH/I/SR.18, paras. 69-72; pp. 199-200, CDDH/I/SR.21, paras. 54-63; pp. 248-250, CDDH/I/SR.26, paras. 5-21. *O.R.* X, pp. 3-4, CDDH/48/Rev.1, paras. 2-3, 5.A, 6-7; pp. 10-11, paras. 27-28; pp. 21-23, CDDH/219/Rev.1, paras. 4, 6, 9-10, 12, 15; pp. 27-28, paras. 32-36; pp. 67, 69, 74, CDDH/I/235/Rev.1 (Art. 4).

Other references

CE 1972, Basic Texts, p. 6 (Art. 3). *CE 1972, Commentaries*, Part I, pp. 10-11 (Art. 3). *CE 1972, Report*, vol. I, pp. 177-178, paras. 3.43-3.50. *Commentary Drafts*, pp. 10-11 (Art. 4). *XXIInd Int. Conf. RC, Report*, p. 7, para. 13 (Art. 4).

Commentary

General remarks

- 161** Article 4 is essentially the affirmation, for international armed conflict, of a rule which had only been explicitly formulated in the Conventions for armed conflict not of an international character.¹ Though this had seemed necessary in

¹ "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict" (common Art. 3, para. 4).

1949 only with regard to the latter category of conflicts, experience has shown that Parties to an armed conflict of which the international character is disputed may fear – though this would be unjustified – that the application of the law of international armed conflict could have a detrimental effect on their legal status or that of another Party to the conflict. To prevent such fears from affecting the application of the Conventions and the Protocol it was therefore necessary to state unequivocally that their sole aim is a humanitarian one.

162 The Conference considered it appropriate to reaffirm in the same article the undisputed principle of international law that the occupation of a territory does not affect its status. With this exception the Conference retained the draft, though the form was changed to avoid any incorrect interpretation.

163 The draft and the proposed amendments² were examined by Committee I, and then by its Working Group A; the latter failed to come to a unanimous agreement, and in its report³ it put forward two possible texts. The Committee chose one of these by voting, and then adopted the article as a whole by consensus.⁴ The article was adopted by consensus in the plenary Conference.⁵

Text of the article

164 In fact, this article deals with two separate, though related, questions: on the one hand, with the application of humanitarian law in both sentences; on the other hand, with occupation, in the second sentence. Up to this time the first question had only been codified for conflicts not of an international character; the second had already been codified outside humanitarian law.

Application of humanitarian law

165 As stated in the Commentary to the Conventions,⁶ paragraph 4 of common Article 3 is essential; without it, neither Article 3 nor any other in its place would ever have been adopted, because it was necessary to indicate in the clearest possible way that the article is exclusively of a humanitarian nature, and cannot confer any special protection or immunity on a Party, or increase its authority or power in any way.⁷

166 A corresponding provision was not considered necessary in 1949 for international armed conflict, but from the time of the Conference of Government Experts, those concerned have revised their views. In fact, it is possible for a Party to contest the international character of a conflict, because it considers that the other Party to the conflict is neither a State, nor a people referred to in Article

² O.R. III, pp. 19-21.

³ O.R. X, pp. 67 and 69, CDDH/I/235/Rev.1 (Art. 4).

⁴ 46 votes in favour, 11 against and 14 abstentions; cf. O.R. VIII, pp. 248-250, CDDH/I/SR.26, paras. 5-21.

⁵ O.R. VI, p. 57, CDDH/SR.36, para. 129.

⁶ For example, *Commentary I*, pp. 60-61.

⁷ As regards Powers not taking part in the conflict, reference should also be made to Resolution 10 of 1949.

- 1 (*General principles and scope of application*), paragraph 4. It is also possible that, without contesting the fact that the conflict is of the type described in Article 1 (*General principles and scope of application*), paragraph 4, a Party to the conflict would contest the quality of an authority claiming to represent a people engaged in fighting in the sense of Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3.⁸
- 167 In such situations a Party to the conflict could fear that by applying humanitarian law – no matter how justified this might actually be – it could imply, or seem to imply recognition of the very quality it is contesting with regard to the adverse Party. Fears of this nature will in future be quite unfounded because of the explicit wording of this provision.
- 168 Thus, as humanitarian law has no effects beyond those it has itself prescribed on the legal status of Parties to the conflict, two situations may arise. In the first case, the application of humanitarian law does not change the legal status of the State, of a people fighting for self-determination, or of an authority representing such a people, this being the status which the contested Party effectively possessed; in the other case, it neither creates nor reinforces a quality which did not exist. Such a change does not result from the application of humanitarian law.
- 169 The validity of this rule was not doubted by anyone as far as the principle is concerned, but there were difficulties in its formulation. And this was not with regard to the Parties to the conflict themselves, but, according to the terms of the draft, regarding the “territories over which they exercise authority”.⁹ This will be dealt with in the following section.

Occupation of a territory

- 170 The experience of a number of specific situations had led the ICRC to formulate a draft according to which the principle of the absence of legal effect of the application of humanitarian law should not only apply for the Parties to the conflict, but also for the “territories over which they exercise authority”,¹⁰ in particular, occupied territories.
- 171 Though there was no opposition to this either, two remarks were made. On the one hand, according to some interpretations, this wording could lead to the idea that humanitarian law would sanction situations conflicting with international law;¹¹ on the other hand, the majority wished to reiterate the principle that occupation does not affect the legal status of occupied territory beyond what is laid down in the Hague Regulations, the Fourth Convention and the present Protocol for the duration of the occupation.
- 172 Everyone recognized this principle as an uncontested principle of international law which was, moreover, underlying both the Hague Regulations and the Fourth Convention. Nowadays it follows from the inadmissibility of the use of force, as laid down in the Charter of the United Nations, and elaborated in the Declaration

⁸ On the meaning of the expression “a government or an authority not recognized by an adverse Party”, contained in Article 43, para. 1, *cf.* the commentary thereon, *infra*, pp. 506-508.

⁹ *Cf.* in particular *O.R.* VIII, pp. 60-65, CDDH/I/SR.8, paras. 15-46.

¹⁰ *Ibid.*, p. 61, para. 19.

¹¹ *Cf.* in particular *ibid.*, p. 62, para. 25; pp. 199-200, CDDH/I/SR.21, paras. 55 and 61.

on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Resolution 2625 (XXV) of the United Nations General Assembly). The only question that was disputed by a minority was whether it was appropriate and necessary to repeat this principle in the present article.¹²

- 173 It should be recalled at this point that with regard to persons protected by it in occupied territory, Article 47 of the Fourth Convention prohibits any deprivation of protection which could be the consequence, in particular, of “any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory”, or from the annexation by the Occupying Power of the whole or part of the occupied territory.¹³

Conclusion of agreements

- 174 The Conventions and the Protocol provide that a certain number of questions should be resolved by agreements to be concluded between Parties to the conflict; some may also be concluded outside a conflict situation or, in relation to a conflict, may equally concern neutral States or other States not Party to the conflict.¹⁴
- 175 The statement that the conclusion of agreements provided for by the Conventions and the Protocol does not have any effect either on the legal status of those concerned, should be considered to be superfluous: the conclusion of such agreements actually represents no more than one aspect of the application of these instruments. This becomes all the more significant because while the Conference has elaborated the present text using two sentences instead of the one sentence contained in the draft, it did not explicitly refer to the conclusion of such agreements in the second sentence. That does not alter the fact that the rule as a whole applies to the two sentences of the article.
- 176 Common Article 6/6/6/7 of the Conventions states that, apart from the agreements expressly provided for, the Contracting Parties “may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision”. There is no doubt that this possibility also exists for matters more specifically governed by the Protocol, and that the same restriction applies: no special agreement can adversely affect the situation of protected persons as regulated by the Conventions and this Protocol.¹⁵

B.Z.

¹² *Ibid.*, p. 63, CDDH/I/SR.8, para. 34; pp. 166-167, CDDH/I/SR.18, para. 72; p. 199, CDDH/I/SR.21, para. 58; pp. 248-250, CDDH/I/SR.26, paras. 10-21.

¹³ The mention of such situations in Article 47 of the Fourth Convention has the aim of preventing them more effectively and in no way of legitimizing acts which are contrary to international law; cf. *Commentary IV*, pp. 272-276.

¹⁴ In the Protocol the following articles should be noted in this respect: 6, para. 4; 26, para. 1; 27, paras. 1-2; 28, para. 4; 29; 30, paras. 3 (c) and 4 (c); 31, paras. 1-4; 33, para. 4; 34, paras. 2-3; 56, para. 4; 59, paras. 5-7; 60, paras. 1-3 and 5-7; 66, para. 5; 90, paras. 2 (d) and 3 (a); Annex I, Arts. 6, para. 3; 7, para. 3; 8, paras. 1-2; 12.

¹⁵ The rule of this common article is repeated for occupied territories in the above-mentioned Article 47 of the Fourth Convention.

Protocol I

Article 5 – Appointment of Protecting Powers and of their substitutes

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including *inter alia* the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.
2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, *inter alia*, ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.
4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.
5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.
6. The maintenance of diplomatic relations between Parties to the conflict or

the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Documentary references

Official Records

O.R. I, Part I, pp. 127-128; Part III, p. 4 (Art. 5). *O.R.* III, pp. 23-27. *O.R.* IV, p. 165, CDDH/I/9. *O.R.* VI, pp. 65-68, CDDH/SR.37, paras. 1-20; pp. 75-77, *id.*, Annex (Belgium, Egypt); p. 78 (Greece); p. 80 (Nigeria). *O.R.* VII, p. 302, CDDH/SR.58, para. 115; p. 311, para. 154. *O.R.* VIII, pp. 77-85, CDDH/I/SR.11; pp. 88-95, CDDH/I/SR.12, paras. 9-60; pp. 142-154, CDDH/I/SR.17, paras. 11-69; pp. 155-169, CDDH/I/SR.18; pp. 171-175, CDDH/I/SR.19, paras. 1-22; pp. 250-251, CDDH/I/SR.26, paras. 22-23; pp. 253-270, CDDH/I/SR.27; pp. 271-297, CDDH/I/SR.28, paras. 1-63; pp. 434-437, CDDH/I/SR.41, paras. 23-37. *O.R.* X, pp. 3-4, CDDH/48/Rev.1, paras. 2, 5, 7; pp. 11-12, paras. 31-32; pp. 21-23, CDDH/219/Rev.1, paras. 4-5, 9, 12, 14-15; pp. 28-35, paras. 37-73; pp. 69-71, CDDH/I/235/Rev.1 (al. 4 *bis*).

Other references

CE/2b, pp. 10-31. *CRCE 1971, Report*, pp. 29-31. *CE 1971, Report*, pp. 107-108, paras. 532-538; p. 109, paras. 551-555; pp. 113-115, Annex, paras. 7-9, 17, 19, 22-25; pp. 115-116, CE/COM IV/2-3. *CE 1972, Basic Texts*, pp. 6-7 (Art. 6). *CE 1972, Commentaries*, Part I, pp. 14-19 (Art. 6). *CRCE 1972, Report*, pp. 45-48 (Art. 6). *CE 1972, Report*, vol. I, p. 174, paras. 4.11-4.16; pp. 179-183, paras. 4.56-4.87; p. 187, paras. 4.115-4.117; p. 205, para. 5.24; pp. 207-208, para. 5.46; vol. II, pp. 97-98, CE/COM IV/1-4; pp. 98-99, CE/COM IV/5, CE/COM IV/9; pp. 99-100, CE/COM IV/10-11; pp. 101-102, CE/COM IV/15, p. 103, CE/COM IV/20-22; p. 104, CE/COM IV/25-26, CE/COM IV/28. *Commentary Drafts*, pp. 11-14 (Art. 5). *XXIIInd Int. Conf. RC, Report*, pp. 7-9, paras. 14-19 (Art. 5).

Commentary

General remarks

- 177 The question of supervising the application of the rules, together with the question of the scope of application, was the subject that gave rise to most discussion in Part I. At all stages of the procedure of reaffirmation and

development, the need not only for developing the rules of protection, but also for strengthening the already existing but under-used mechanisms for application and the supervision of application was recognized. The usefulness of Protecting Powers and their substitutes was not called into question.¹ Nevertheless, it was to be noted that, since the conclusion of the Conventions, there had only been Protecting Powers in three conflicts, and even then it was not for all the Parties concerned, nor to carry out all the tasks provided for in the Conventions.²

178 Various reasons had been advanced to explain the absence of Protecting Powers or of their substitutes in the majority of conflicts. Apart from the fact that many conflicts were not subjected to the system of Protecting Powers because their character was either exclusively or predominantly non-international, the following explanations are given amongst those which were put forward:³

- the Parties to the conflict in some cases abstained from appointing Protecting Powers because they had not broken off diplomatic relations;
- in some cases States did not designate a Protecting Power for fear that this might be interpreted as a recognition of the statehood of an adversary which they refused to recognize as a State;
- the prohibition of the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations means that States only rarely recognize the existence of an armed conflict;
- the relatively limited number of States acceptable to both Parties to the conflict concerned in each set of bilateral relations; the problem of directing the belligerents' attention to designating and accepting Protecting Powers at a time when hostilities are raging; the burden imposed on States called upon to act as Protecting Powers in terms of material and human resources, as well as the risk of political difficulties vis-à-vis the Parties to the conflict concerned.

179 The present article has endeavoured to deal with such difficulties, by clarifying the compulsory character of the system of Protecting Powers (paragraphs 1 and 2), by proposing practical methods for their appointment (paragraph 3), dealing with the question of a substitute (paragraph 4), and finally by clarifying special aspects (paragraphs 5 and 6). All this relates solely to the appointment of Protecting Powers and of their substitute defined in Article 2 (*Definitions*), sub-

¹ The functions of the Protecting Powers are outlined below in the discussion of para. 1. In the preparatory work particular note should be made of the document *Government Replies*, 2nd ed., pp. 6-18, (question 1), pp. 34-130, (questions 3-13), and 01-010 (Annexes I and II).

² O.R. VIII, p. 165, CDDH/ISR.18, para. 62. Cf. J. Pictet, *Humanitarian Law and the Protection of War Victims*, Geneva-Leyden, 1975, p. 66, which mentions the Suez conflict (1956), that in Goa (1961) and the conflict between India and Pakistan (1971-1972). A more recent case is that of the conflict between Argentina and the United Kingdom in 1982, in which two States exercised functions of an intermediary and communicated information as laid down by the Conventions (cf. S.-S. Junod, *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands* (1982). *International Humanitarian Law and Humanitarian Action*, Geneva, 1984, p. 20).

³ We repeat in simplified form the relevant passages of CE/2b, pp. 16-17, and Report A/7720 of the United Nations Secretary-General of 20 November 1969, para. 213, quoted *ibid.*, p. 24, note 62.

paragraphs (c) and (d), without changing the system of supervision established by the Conventions.⁴

- 180** Why did the Conventions not deal with the appointment of Protecting Powers? This is because customary law governed their appointment and their mandate in general, which is currently known as “the Vienna mandate”, as will be seen with regard to paragraph 6; hence the Conventions confined themselves to entrusting the supervision of their application under their common Article 8/8/8/9 to an already existing institution which, in view of the experience of the two World Wars, could be expected to be used and available in every situation of international armed conflict. As regards the substitutes of Protecting Powers, the concept was defined by the Conventions and their appointment was also governed by them in common Article 10/10/10/11.
- 181** Finally, a brief comment about the wording of the article: the title refers to “appointment”, while paragraphs 1, 2, 3, 5 and 6 use the word “designate”. The meaning of the latter word is not always exactly the same. In general, designation means the act by which a Party to the conflict chooses a neutral or other State not Party to the conflict⁵ to safeguard its interests vis-à-vis the adverse Party; this act on the part of the designator must be supplemented by the consent of the Power chosen as a Protecting Power, and by the acceptance of the adverse Party in question, if the institution is to function: the conclusion to this end, in accordance with Article 2 (*Definitions*), sub-paragraph (c), of two mutually corresponding bilateral agreements or of one tripartite agreement means that the Protecting Power is “appointed”. The use of the word “appointment” in the title of the article refers to this last stage.⁶
- 182** The present article, which was discussed together with Article 2 (*Definitions*), sub-paragraphs (c) and (d), was adopted in Committee I, first of all paragraph by paragraph, and subsequently as a whole, by consensus; it was then adopted by consensus in the plenary Conference.⁷

Paragraph 1

- 183** This paragraph contains valuable clarifications with regard to Article 8/8/8/9 common to the Conventions, which reads in part as follows: “The present Convention shall be applied with the co-operation and under the scrutiny of the

⁴ The Protecting Powers or their substitute are mentioned in the Protocol in Articles 2 (sub-paras. (c) and (d)), 6 (para. 1) 11 (para. 6), 33 (para. 3), 45 (paras. 1-2), 60 (para. 2), 70 (para. 3 (b)), 78 (para. 1), and 84. In addition, the Parties to the conflict may resort to Protecting Powers for notifications, agreements and communications of information, as laid down in Articles 12 (para. 3), 22 (para. 3), 23 (para. 4), 25, 26 (para. 1), 27 (para. 1), 28 (para. 4), 29 (paras. 1-4), 33 (paras. 1 and 4), 34 (paras. 2-3), 43 (para. 3), 56 (para. 6), 57 (para. 2(c)), 59 (paras. 2, 4-6), 60 (para. 5), 64 (paras. 1-2), 65 (para. 1), 66 (para. 5), 85 (para. 4(d)), 90 (paras. 2(d) and 3(a)), 96 (para. 2), Annex I, Arts. 1 (para. 2), 6 (para. 3), 7 (para. 3), 8, and 12.

⁵ On the meaning of this expression, *cf.* commentary Art. 2, sub-para. (c), *supra*, p. 61.

⁶ In fact, the same word “désignation” is used in the French version in the title and in the article itself.

⁷ *Cf.* O.R. VIII, p. 264, CDDH/1/SR.27, para. 70; pp. 266-267, paras. 87, 91; pp. 268-269, paras. 98 and 101-103; O.R. VI, p. 65, CDDH/SR.37, para. 1, respectively.

Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict” (paragraph 1, first sentence).

- 184 First, there remains no doubt at all that the Parties to the conflict should not only turn to the Protecting Powers if any exist, but also that they must appoint such Protecting Powers for the purposes defined by this paragraph. Secondly it is clear that this duty exists from the very moment that a situation referred to in Article 1 (*General principles and scope of application*) arises.⁸ This is emphasized by various expressions which subsequently stress the need to act urgently (“from the beginning of a situation referred to in Article 1”; “without delay”; “within two weeks”). The explicit mention in this paragraph of the designation and acceptance is in the same vein, and serves to underline the fact that it is not sufficient to facilitate the task of the Protecting Powers once they have been appointed: the same duty to be diligent already exists to provide each Party to the conflict with a Protecting Power vis-à-vis every adverse Party.
- 185 In the situation where there are not merely two but several Parties to a conflict, each should have a Protecting Power vis-à-vis each of its adverse Parties; depending on each individual case, this could be a single Protecting Power or several different ones. In the following we will limit ourselves to the case in which only two Parties confront each other.
- 186 The aim assigned to the system of Protecting Powers – to ensure the supervision and implementation of the Conventions and the Protocol – adds a new element to the terms of the above-mentioned paragraph 1 of Article 8/8/8/9 common to the Conventions. Thus, if Article 1 common to the Conventions, and Article 1 (*General principles and scope of application*), paragraph 1, of the Protocol are taken into account, the main responsibility of respecting the Conventions and the Protocol falls on each individual Contracting Party,⁹ in particular the Parties to the conflict; moreover, the duty of “ensuring respect” for these instruments, i.e., doing all in their power to prevent or put an end to failures of another Contracting Party, falls upon all Contracting Parties jointly.¹⁰ For their part, the Protecting Powers act simultaneously as messengers and guardians: they serve as an intermediary between the adverse Parties and supervise the application of the law.¹¹

⁸ The difference between the wording of this paragraph (“from the beginning of that conflict”) and paragraph 2 (“from the beginning of a situation referred to in Article 1”) is not the result of a difference of substance: the term “conflict”, as used particularly in the title of the Protocol itself, also covers all forms of occupation, including the case where it does not meet any armed resistance (cf. Art. 1, paras. 3 and 4, of the Protocol and Art. 2 common to the Conventions, paras. 1-2).

⁹ On the meaning of the expression “High Contracting Parties”, cf. commentary Preamble, *supra*, p. 25.

¹⁰ For further details, cf. commentary Art. 1, para. 1, *supra*, pp. 35-37.

¹¹ On Protecting Powers before 1949, cf. A. Janner, *La Puissance protectrice en droit international*, Basle, 1st ed., 1948, 2nd ed., 1972; W.M. Franklin, *Protection of Foreign Interests*, Washington, D.C., 1946.

On Protecting Powers and their substitutes in the Conventions, both for the historical background and for an analysis of their functions, cf. F. SiorDET, *The Geneva Conventions of 1949. The Question of Scrutiny*, ICRC, 1953. *Commentaries I-IV ad Arts. 8/8/8/9 and 10/10/10/11*.

(continued on next page)

- 187 These two aspects of their function form the object of a number of special provisions of the Conventions and the Protocol,¹² but they are not limited to these provisions. The Diplomatic Conference of 1949 replaced the expression “their mission as defined in the present Convention” (draft) by the expression “their mission under the present Convention” in paragraph 3 of the above-mentioned common article precisely in order to show clearly that the function is not limited to those special provisions.¹³ The reference of Article 2 (*Definitions*), sub-paragraph (c), to “functions assigned [...] under the Conventions and this Protocol” is not exhaustive either, since it refers back to the general definition of the function of Protecting Powers given in Article 5, paragraph 1.
- 188 To supervise the application of the law undeniably entails the right to demand that violations shall cease and, if necessary, reparations are made. However, the Conference did not consider that the Protecting Power was an organ entrusted with investigating and reporting on violations, as this was dealt with by other organs and other provisions.¹⁴
- 189 The Conference did not determine or discuss in general what functions, if any, Protecting Powers might have to exercise in the combat zone, as supervision of the application of Part III, Section I (*Methods and means of warfare*), or of Part IV, Section I (*General protection against effects of hostilities*), might imply. According to the commentary to the draft¹⁵ on this, it may be said that the Conventions and the Protocol have not significantly altered the traditional functions of the Protecting Powers and have therefore not envisaged that such Powers should be present during the combat stage itself.
- 190 Finally, in referring to the interests of the Parties to the conflict, the second sentence of this paragraph is less concerned with the political interests of Parties than with the humanitarian interests of their nationals, having regard to the

Covering the Conventions and the Protocol, cf. M. Takemoto, “The Scrutiny System under International Humanitarian Law – An Analysis of Recent Attempts to Reinforce the Role of Protecting Powers in Armed Conflicts”, *Japanese Annual of International Law*, 1975, p. 1; D.P. Forsythe, “Who Guards the Guardians: Third Parties and the Law of Armed Conflict”, 70 *AJIL* 1, 1976, p. 41; F. Bugnion, “Le droit humanitaire applicable aux conflits armés internationaux – Le problème du contrôle”, 8 *Annales d’Etudes internationales*, 1977, p. 29; C. Dominicé, “The Implementation of Humanitarian Law”, in *The International Dimensions of Human Rights*, Paris, 1982, p. 507; C. Dominicé et J. Patrignoc, “Les Protocoles additionnels aux Conventions de Genève et le système des Puissances protectrices”, 28 *Annales de droit international médical*, 1979, p. 24; G.I.A.D. Draper, “The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978 [sic]”, 164 *Hague Recueil*, 1979/III, pp. 13-19, 29; G. Abi-Saab, “The Implementation of Humanitarian Law”, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, 1979, pp. 310-341, 345-346; J. de Preux, “Protecting Power”, *IRRC*, March-April 1985, p. 86.

¹² For the Protocol, cf. *supra*, note 4, first sentence. For the Conventions, cf. F. Siordet, *op. cit.*, pp. 73-80. *Commentaries I-IV*, ad Art. 8/8/8/9, para. 1, pp. 26, 60, 98 and 99-100 (note 2), 87 (note 1) respectively.

¹³ Cf. for example, *Commentary I*, pp. 96-98.

¹⁴ Cf. commentary Art. 90, particularly para. 2 (e), which mentions the relevant Article common to the Conventions. For the *travaux préparatoires*, cf. particularly O.R. III, p. 35, CDDH/I/83, para. 2; O.R. X, p. 69, CDDH/I/235/Rev.1 (para. 4 bis); O.R. VIII, p. 254, CDDH/I/SR.27, para. 8; pp. 261-262, paras. 54-55; *Commentary Drafts*, p. 9 (Art. 2, sub-para. (d), *in fine*).

¹⁵ *Commentary Drafts*, p. 9 (Art. 2, sub-para. (d), *in fine*).

humanitarian character of the Protocol.¹⁶ Safeguarding the interests of the State itself is covered by the rules of international law concerning diplomatic relations, which we shall consider below with respect to paragraph 6. It should be noted that the wording of that paragraph is more comprehensive, covering the interests of the Parties to the conflict as well as those of their nationals.

Paragraph 2

- 191 Paragraph 1 laid down the principles and paragraph 2 specifies the twofold obligation of each Party, emphasizing the urgency of carrying out this obligation.
- 192 For the passage “From the beginning of a situation referred to in Article 1”, reference should be made to the commentary on paragraphs 3 and 4 of Article 1 (*General principles and scope of application*) and on Article 3 (*Beginning and end of application*). It gives the necessary indications regarding the scope of application and its beginning.
- 193 The concept of fixing a period within which the obligations had to be fulfilled emerged several times, particularly in relation to the possibility that a substitute might appear on the scene in due course: thus periods of thirty or sixty days¹⁷ were proposed, after which the use of a substitute was to have become compulsory in the absence of a Protecting Power. The wish to impose a requirement as firm in principle as it was adaptable to various circumstances prevailed, and the Parties are summoned to do all they can in the circumstances, bearing in mind the interests of the victims to be protected. A fixed period of a certain number of days appears only in paragraph 3 *in fine*.
- 194 Regarding the method of appointing Protecting Powers, the paragraph repeats two of the three necessary steps listed in Article 2 (*Definitions*), sub-paragraph (c). In the first place, each of the Parties to the conflict must designate a neutral or other State not Party to the conflict as its Protecting Power vis-à-vis the adverse Party; as far as possible, it will endeavour to reconcile its own preferences with the likelihood of the adverse Party accepting its choice. In the second place, it must permit the activities of the Protecting Power of the adverse Party (the neutral or other State not Party to the conflict, designated as a Protecting Power by the adverse Party and accepted by it as such).
- 195 A given State may accept the role of Protecting Power with which a Party to the conflict wishes to entrust it, at various points during the procedure. However, it is desirable for the State in question to have accepted the role, or at least to have replied in principle in a positive fashion before its name is proposed to the adverse Party. In any event, the first function of a State proposed as a Protecting Power might well consist of communicating to each Party to the conflict the choice made by the other. In this respect it should be noted that two opposing Parties may choose one and the same State as the respective Protecting Power of each of them. This has occurred in many cases in a perfectly effective fashion.

¹⁶ O.R. VIII, p. 280, CDDH/I/SR.28, para. 50.

¹⁷ O.R. III, p. 28, CDDH/I/64; p. 34, CDDH/I/205 (*ad paras. 3 and 3 bis*). Cf. also *Commentary III*, p. 121, and *Commentary IV*, pp. 109-110.

- 196 The acceptance as a Protecting Power of a State designated by the adverse Party and prepared to assume such functions, implies that the accepting Party will permit its activities. In fact, by mentioning the acceptance and the permission to act separately, this paragraph does not intend to describe two separate operations; on the contrary, it stresses the fact that these two aspects of a single act are inseparable, with at most the reservation that certain practical questions must have been settled.

Paragraph 3

- 197 This deals with the case in which one or other of the Parties to the conflict, or both, do not have a Protecting Power from the beginning of a situation referred to in Article 1 (*General principles and scope of application*) for whatever reason this may be.

First sentence

- 198 Although the ICRC must intervene under the terms of this paragraph from the beginning of a situation referred to in Article 1 (*General principles and scope of application*), it will of course decide on the principle and the moment of its intervention in the light of several factors. In particular, it will take into account the chances of appointing the Protecting Power or Powers which are lacking without its acting as an intermediary, the time when the appointment is likely to occur, as well as the importance and urgency of the need for a Protecting Power. The ICRC will use its best judgment, without interfering when it gets positive information on the contacts undertaken, but also without any indecision if a failure or deadlock seems more probable.
- 199 What does the term “good offices” mean? This refers to the assistance which the ICRC would offer to the Parties to the conflict to find one or two Protecting Powers to which they would agree; the forms such assistance could take are not specified, with the exception of the example given in the second sentence. The good offices are limited to the role of intermediary, as in principle only a mediator can propose a solution. This rather theoretical distinction, judging from international practice and legal literature,¹⁸ should not unduly limit the possibilities open to impartial humanitarian organizations in the present context.
- 200 The paragraph does not only prescribe action by the ICRC, it grants it a degree of priority by mentioning it expressly and entrusting it with a mandate. However, it does not prohibit the right of any other impartial humanitarian organization to act in the same manner. In fact, this solution is not intended to encourage harmful

¹⁸ Cf. L. Oppenheim, *International Law: A Treatise*, vol. 2: Disputes, War and Neutrality, 7th ed., London, 1952, pp. 8-11 (§7-11); P. Reuter, *Droit international public*, 4th ed., Paris, 1973, pp. 326-327; Ch. Rousseau, *Droit international public*, vol. V, Paris, 1983, pp. 261-271 (paras. 253-264). The Hague Convention for the Pacific Settlement of International Disputes deals with the subject of good offices and mediation, though without defining the former or establishing a clear distinction between them (Convention I of 1899 and 1907, Arts. 2-8).

competition of parallel but contradictory action, but, if necessary, provides a possibility of resorting to a number of different channels to increase the chances of success.

- 201 Thus in certain circumstances there might be several organizations acting in parallel, and in the final analysis the assessment of their humanitarian merits and the degree of their impartiality falls upon the Parties concerned.¹⁹ The objective which prevails by far over questions of priority or monopoly is of course the appointment of the one or two Protecting Powers which are lacking, with the least possible delay.

Second sentence

- 202 As shown by the words “*inter alia*”, this is an example of the good offices which the ICRC or another impartial humanitarian organization might render.
- 203 Each Party to the conflict which has no Protecting Power is required to provide, within two weeks from the receipt of the request, a list of at least five States which that Party considers acceptable to act as a Protecting Power on its behalf in relation to an adverse Party. Similarly each Party for which the adverse Party did not have a Protecting Power would be required to provide a list of at least five States which would be acceptable to it as a Protecting Power. The ICRC or other organization making the request would compare for each of the Parties the two lists of States acceptable as a Protecting Power submitted respectively by the first-mentioned Party and by its adverse Party, and would seek the agreement of each State contained on the two lists.
- 204 If only one State appeared on both lists, its agreement would suffice for its appointment as a Protecting Power, given the fact that the two Parties concerned have already accepted. If several States appeared on both lists, a choice would have to be made after seeking their agreement. If no State appeared simultaneously on both lists, this would require either a continuation of the good offices or recourse to paragraph 4, depending on the circumstances.

Paragraph 4

The system of the Conventions

- 205 The question of substitutes of Protecting Powers is dealt with in Article 10/10/10/11 common to the Conventions.²⁰ The three possibilities contained in this article actually exceed the definition of the substitute given in Article 2 (*Definitions*), sub-paragraph (d), of the Protocol, and the provisions of this paragraph.

¹⁹ On the concepts of “humanitarian” and “impartial”, cf. for example *Commentary I*, pp. 109-110 (Art. 9).

²⁰ For more complete information on the origin and contents of this common article, cf. the commentary thereon or F. Sordet, *op. cit.*

- 206 According to *paragraph 1* of the common article: “The High Contracting Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.”
- 207 This possibility, which is open to two, or any other number of Contracting Parties, has never been used. It was intended to allow for the designation of an existing organization or the creation of a new one.²¹
- 208 According to *paragraph 2* of the common article, when protected persons do not benefit from the activities of a Protecting Power or of an organization provided for in paragraph 1, the Detaining Power must request a neutral State²² or such an existing organization, to undertake the functions of a Protecting Power.
- 209 Though the functions are indeed the same as those of a Protecting Power – or of an organization in accordance with paragraph 1 – this substitute is appointed without the intervention of the Power of origin of the protected persons. Such a mechanism should only be used in exceptional cases, for example, where the Power of origin was not, or was no longer recognized by the adverse Party, or otherwise where it was impossible for whatever reason to appoint a Protecting Power or to replace a Protecting Power which is no longer able to act.²³
- 210 *Paragraph 3* of the common article offers the ultimate remedy in case none of the previous provisions has been applied: what has been called a quasi-substitute or a humanitarian substitute. In this eventuality the Detaining Power must request a humanitarian organization such as the ICRC to assume the humanitarian functions of a Protecting Power, or it must accept an offer of services by such an organization.
- 211 Here again, appointment can take place without the agreement of the Power of origin necessarily being required, as it is for Protecting Powers, or the organization referred to in paragraph 1. There is an additional difference in that the activities of the quasi-substitute are limited to the *humanitarian* functions that fall upon Protecting Powers. This means that the quasi-substitute must take upon himself at least and as a matter of priority such functions as bring directly and immediately to protected persons the care and relief which their condition demands.²⁴ Yet the ICRC has made it known that in its view all tasks that fall upon Protecting Powers under the Conventions are in fact humanitarian tasks.²⁵
- 212 *Paragraph 4* of the common article, which is directly linked with the preceding paragraph, requires that the organization concerned furnishes sufficient assurances that it is in a position to undertake its functions and to discharge them impartially.

²¹ The study of the possibility of a new body as recommended by resolution 2 in 1949 has not led to any result.

²² To be interpreted in the terminology of the Protocol as “a neutral or other State not Party to the conflict”; cf. commentary Art. 2, sub-para. (c), *supra*, p. 61.

²³ Cf. for example *Commentary I*, pp. 120-121. For an assessment of the reservations formulated by a number of States with regard to paras. 2 and 3, cf. C. Pilloud, “Reservations to the Geneva Conventions of 1949”, *IRRC*, March 1976, pp. 117-121 (pp. 13-16 of the offprint).

²⁴ Cf. for example, *Commentary I*, p. 122.

²⁵ *CE 1971, Report*, p. 109, paras. 552-553.

Purpose of paragraph 4 of Article 5

213 Two problems had been identified with regard to the substitutes provided for by the Conventions:

- paragraph 1 of the relevant common article had never resulted either in the designation of an existing organization or in the creation of a new body;
- paragraphs 2 and 3 had never been used either; the main drawback imputed to them, and which had actually led to reservations being made with regard to this article,²⁶ was concerned with the fact that the Power of origin was not consulted. For many the qualities and conduct required from such substitutes did not offer the same assurances for the Power of origin as the requirement of its consent. In contrast, a less strongly held view considered that it was desirable that in the absence of a Protecting Power the appointment of a substitute should take place almost or entirely automatically. The present text was the result of lengthy discussion and endeavoured to reconcile these two tendencies on this important point.

First sentence

214 The present paragraph is relevant only “if, despite the foregoing, there is no Protecting Power”. The normal procedure described above (paragraph 2) and the good offices (paragraph 3) have therefore failed. The recognized need for still ensuring the implementation of a system of supervision over the application justifies the right granted here to the ICRC or any other organization offering all guarantees of impartiality and efficacy to enter into consultation with the Parties to the conflict. The draft only mentioned the ICRC, but it was soon agreed that while only mentioning this organization explicitly, the same right should be granted to any other organization with the required characteristics; by way of example, the delegations named the United Nations – in particular, the High Commissioner for Refugees –, the Organization of African Unity, the Order of Malta.²⁷ As regards the ICRC, it should be emphasized that any functions that might be attributed to it pursuant to this paragraph do not affect the specific tasks with which it is entrusted by the Conventions and the Protocol, nor its right of initiative granted by Article 9/9/9/10 common to the Conventions, and Article 81 (*Activities of the Red Cross and other humanitarian organizations*), paragraph 1, of the Protocol.²⁸

215 The object of such consultations will be to determine how an organization of this type could assume the tasks which fall upon Protecting Powers. Depending on each individual case, it may be a question of making allowances for the fact

²⁶ Cf. *supra*, note 23, second sentence.

²⁷ The United Nations was mentioned several times in respect of this article, either as a designating authority for Protecting Powers or substitutes, or to play the role of substitute itself. The Order of Malta let it be known that it was prepared to assume a mandate as a substitute (cf. *O.R.* VII, p. 317, CDDH/SR.58, paras. 185-187, and notification by the depositary of 2 May 1980).

²⁸ The ICRC stated its views on the various aspects of this paragraph shortly before it was adopted by the competent Committee; cf. *O.R.* VIII, pp. 264-265, CDDH/I/SR.27, paras. 71-81.

that one or two Protecting Powers are missing between two Parties to the conflict. In some circumstances, the consultations could also take place between the Parties to the conflict and two or more organizations. For the appointment of a substitute, as for the good offices referred to in paragraph 3, there is nothing against the parallel examination of a number of candidates to increase the chances of a positive result. The important thing is to establish the qualities of impartiality and efficacy of the organizations willing to act with the least possible delay and the view of the Parties concerned is certainly decisive in this respect.

- 216 The organizations referred to should take into account the results of such negotiations, but does this mean they are bound by the results? Although the text does not necessarily state that this is the case, from the point of view of the efficacy of an organization, the chances of its success and its credibility are probably reduced if it does not enjoy the trust of the Power of origin, and these will be virtually nil if the trust of the other Party to the conflict is lacking. Bearing these considerations in mind, the ICRC declared that for its part it would only offer to act as a substitute if it had the consent of the Parties to the conflict – as it had already stated in connection with paragraph 3 of Article 10/10/10/11 common to the Conventions. It considers that it can only act with complete efficacy if this consent is forthcoming. In fact, such consent significantly affects the weight of its interventions and its acceptability in the eyes of protected persons. In addition, it should certainly not be forgotten that it also affects the possibility of finding the necessary resources both as regards personnel and financial means.
- 217 Thus an offer could be made despite a negative result of the negotiations, but its only effect would probably be to exacerbate or at least to block a situation which is already delicate. In our view, this is the only reason – and a sufficient one – for a clause which at first sight might seem to create a double hurdle given the requirement in the following sentence of the consent of the Parties to the conflict.
- 218 In the conduct of negotiations those concerned should make every effort to find and appoint a suitable substitute quickly. If the Parties to the conflict have clearly failed in this obligation, the ICRC would doubtless attempt to remind them of their obligations. Finally, although such consultations obviously have to be undertaken without publicity, when all was said and done, the ICRC should certainly state whether or not any offer it may have made to act as a substitute had been accepted.
- 219 We recall once again what was said with regard to Article 2 (*Definitions*), sub-paragraph (*d*); without explicitly providing for such action or encouraging it, the Protocol does not prohibit sharing out the tasks of the Protecting Power between a State and a substitute, or between two or more substitutes, if this seems appropriate in a particular case.

Second sentence

- 220 The exercise of its functions by a substitute is subject to the consent of the Parties to the conflict: this should be understood in relation to the preceding sentence. Once the Parties have accepted an offer, the specific practical details of the substitute's activities in the context of the Conventions and the Protocol

remain to be determined. This should certainly not mean that the acceptance may be called into question, or that it may be deprived of significance by not following it up.

- 221 Any hesitation in this respect is removed by the end of the second sentence, which states that: “every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks”.

Relationship with the Conventions

- 222 The examination undertaken of Article 10/10/10/11 common to the Conventions and of this paragraph 4 provides the key to their relationship.
- 223 Based as it is on the agreement of the two Parties to the conflict, which is desirable whenever possible, the present paragraph overrides paragraphs 2 and 3 of the article common to the Conventions. However, in the last resort, these paragraphs may still play a role, despite their imperfections.²⁹
- 224 As regards the possibility laid down in paragraph 1 of the same article, this remains open to the High Contracting Parties without being affected by the new provision.

Paragraph 5

- 225 Parties to a conflict have sometimes feared that recourse to the system of Protecting Powers might have an effect on the legal status of another Party to the conflict or of a particular territory. For this reason the Conference considered that it was appropriate to repeat here the general rule of Article 4 (*Legal status of the Parties to the conflict*).
- 226 The wording is more concise than that of Article 4 (*Legal status of the Parties to the conflict*) because it refers specifically to the general rule and because of the nature of the present provision, which merely serves as a reminder. Moreover the fact that this is a reminder has a particular importance as far as substitutes are concerned, as we will see with respect to paragraph 7.

Paragraph 6³⁰

Maintenance of diplomatic relations

- 227 This paragraph first affirms that the maintenance of diplomatic relations between the Parties to the conflict is no obstacle to the designation of Protecting Powers in the sense of the Conventions and the Protocol.

²⁹ Many explicit statements were made that the provisions of the Conventions relating to substitutes are not cancelled by the present paragraph, for example, *O.R.* VIII, p. 145, CDDH/I/SR.17, para. 24; pp. 271-272, CDDH/I/SR.28, paras. 3-6; p. 273, para. 11; p. 276, para. 21; p. 279, para. 43.

³⁰ Despite its wording, and as will be seen below in the commentary on paragraph 7, that paragraph also applies to paragraph 6.

- 228** In response to the wish of the majority of governments and experts who expressed their view on this matter, the rule requires that the circumstances of each particular case are assessed. For a long time there was a general feeling that the maintenance of diplomatic relations between Parties to the conflict prevented the latter from appointing Protecting Powers. However, this view of the matter could prove to be extremely harmful to the interests of protected persons if diplomatic relations were maintained without functioning normally.
- 229** On the other hand, the Diplomatic Conference did not follow the advocates of the opposite solution, which was to the effect that the appointment of Protecting Powers should be mandatory, even in cases where diplomatic relations were maintained.
- 230** Thus, in the light of the efficacy of existing diplomatic relations, and in particular their ability to ensure the necessary supervisory and liaison functions for the application of the Conventions and the Protocol, the Parties to the conflict may be exempted from appointing Protecting Powers.

“Geneva mandate” and “Vienna mandate”

- 231** After a brief discussion, the Conference allowed each Party to the conflict the possibility of having in certain cases two different Protecting Powers to safeguard its interests. One would be appointed in accordance with the rules of international law concerning diplomatic relations; this might be termed the “Vienna mandate”, after the Vienna Conventions on diplomatic and consular relations.³¹ The other would be appointed for the purposes of the Conventions and the Protocol, which explains the expression “Geneva mandate”.
- 232** The choice open to the Parties to the conflict should be aimed at the greatest possible efficacy. In principle it seems that the best solution remains that of a single Protecting Power, provided that the State which has already been entrusted with the “Vienna mandate” is prepared and capable of adding the “Geneva mandate”.
- 233** Whatever solution is chosen, the Parties to the conflict should specify their intentions and make them known as quickly as possible. In particular, to ensure that the system begins functioning as soon as possible, a Party to the conflict should only refuse for grave reasons the cumulation of both mandates where this is the wish of the adverse Party and has the agreement of the State already exercising for the latter Party the “Vienna mandate”.

³¹ Convention on Diplomatic Relations of 18 April 1961, Art. 45; Convention on Consular Relations of 24 April 1963, Art. 27. On 31 December 1984 these Conventions had 142 and 109 States Parties, respectively.

Paragraph 7

- 234 No commentary ought to be required for such a straightforward provision, which is aimed only at avoiding repetition in the text of the Protocol. Nevertheless, two comments should be made.
- 235 First, the word “subsequent”: it would perhaps have been surprising if the indication that every mention of the Protecting Power also includes the substitute applied to paragraphs 2 and 3 of this article. On the other hand, the word “subsequent” limits the application of the paragraph to subsequent articles, while it really also ought to apply to paragraphs 5, 6, and possibly 1 of Article 5.
- 236 This is only seemingly an omission: paragraph 5 in any case serves only as a reminder; paragraphs 1 and 6, for their part, refer to the Protecting Powers themselves because it is only in the case that they fail to be appointed that substitutes appear on the scene as a subsidiary form of the same system of supervision.
- 237 As regards the meaning of the word “substitute”, this can be found in Article 2 (*Definitions*), sub-paragraph (*d*): “an organization acting in place of a Protecting Power in accordance with Article 5”. This definition, which in any case turns out only to serve for the present paragraph, has one omission: it fails to cover substitutes in the sense of the Conventions, while paragraph 1 of the common Article 10/10/10/11 is not affected by the present article, and paragraphs 2 and 3 of the same common article remain as ultimate solutions. This should be seen as an error and it may be taken as granted that a substitute such as provided by these provisions of the common article could also invoke the provisions of the Protocol relating to Protecting Powers.

B.Z.

Protocol I

Article 6 – Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.
2. The recruitment and training of such personnel are within domestic jurisdiction.
3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Documentary references

Official Records

O.R. I, Part I, p. 128; Part III, p. 4 (Art. 6). *O.R.* III, pp. 36-38. *O.R.* VI, p. 68, CDDH/SR.37, para. 20. *O.R.* VIII, pp. 84-85, CDDH/I/SR.11, paras. 46-48; p. 164, CDDH/I/SR.18, para. 59; pp. 175-181, CDDH/I/SR.19, paras. 23-59; p. 186, CDDH/I/SR.20, paras. 7 and 9; pp. 251-252, CDDH/I/SR.26, paras. 24-31; p. 437, CDDH/I/SR.41, paras. 38-40. *O.R.* X, pp. 35-36, CDDH/219/Rev.1, paras. 74-78; p. 72, CDDH/I/235/Rev.1 (Art. 6).

Other references

CE/2b, p. 34. *CRCE 1971, Report*, pp. 28-29. *CE 1971, Report*, p. 108, paras. 539-541; p. 112, para. 579; p. 114, paras. 10-11, 14; p. 116, *CE/COM IV/4. CE 1972, Basic Texts*, p. 7 (Art. 7). *CE 1972, Commentaries*, Part I, pp. 19-20 (Art. 7). *CRCE 1972, Report*, p. 48 (Art. 7). *CE 1972, Report*, vol. I, pp. 183-184, paras. 488-497; vol. II, p. 2 (Art. 7); p. 101, *CE/COM IV/13-14*; p. 105, *CE/COM IV/30-33*; p. 106, *CE/COM IV/35. Commentary Drafts*, pp. 14-15 (Art. 6). *XXIInd Int. Conf. RC, Report*, p. 9, para. 20 (Art. 6).

Commentary

- 238 The XXth International Conference of the Red Cross (Vienna, 1965) adopted Resolution XXII, which stated that it was essential to make available – in the event of an armed conflict – to the Protecting Powers and their possible substitutes a sufficient number of persons capable of impartially carrying out the scrutiny of the application of the Conventions. It therefore invited States Parties to the Conventions to set up groups of competent persons to discharge these functions and expressed the wish that the International Committee of the Red Cross should contribute to the training of such persons.
- 239 This proposal had been put forward by the Principality of Monaco, on the basis of an initiative of the Commission médico-juridique de Monaco, taken up again by the International Committee for the Neutrality of Medicine, created in Paris in 1959, which gave its name to it.¹ The idea was taken up again in 1971 in various forms during the first session of the Conference of Government Experts.² On the basis of these preliminary discussions and the replies given on this point by governments to the “Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949”, which the ICRC had addressed to them,³ a first proposal was presented at the second session of the Conference of Government Experts in 1972.⁴ In fact, the idea that States could train personnel with a view to facilitating the application of the Conventions and the future Protocol seemed to meet with more or less general approval. Several amendments to the ICRC proposal were suggested by the participants to the Conference,⁵ in the light of which the Drafting Committee drew up a text⁶ which, having gained a large measure of agreement, was finally incorporated as Article 6 in the draft submitted by the ICRC to the Diplomatic Conference.
- 240 In Committee I of the Conference, the fundamental principles which form the basis of this text were again unanimously agreed. However, several amendments provoked a discussion⁷ which resulted in some drafting changes, and the

¹ The resolution presented in this respect in 1964 at the Second International Conference on Medical Neutrality draws to the attention of States Parties to the Geneva Conventions that it is possible and timely to enter into negotiations on a model agreement. By such an agreement the said States would undertake to take the necessary measures to train, in their respective territories, *groups of persons* able to carry out the functions of implementation and supervision laid down in the four Conventions. These persons will be appointed by their respective governments on the recommendation of the most representative organizations concerned, taking into account their moral reputation and their ability to assist in enforcing the scrupulous compliance with the rules of the Conventions. Lists of persons established and kept up to date for this purpose will be the subject of periodic communications, particularly to the ICRC, which will be invited to contribute to their training. Exchanges between national groups will also be arranged for this purpose. See *Government replies*, Annex 2, p. 09.

² *CE 1971, Report*, p. 108, paras. 539-541; p. 113, Annex I, sub-para. 7(c); p. 114, paras. 10-11 and 14; p. 116, CE/COM IV/4.

³ *Government replies*, particularly p. 4 and pp. 65-73.

⁴ *CE 1972, Report*, Vol. I, pp. 183-184.

⁵ *CE 1972, Report*, Vol. II, pp. 101 and 105-106, *ad* draft Article 7; for the discussion, *ibid.*, Vol. I, pp. 183-184, paras. 4.88-4.95.

⁶ *Ibid.*, pp. 184-185, paras. 4.96-4.97.

⁷ *O.R. III*, pp. 36-38, and *O.R. VIII*, pp. 175-181, CDDH/I/SR.19; pp. 251-252, CDDH/I/SR.26.

incorporation in paragraph 1 of a clause concerning National Red Cross (and Red Crescent) Societies⁸ which was not contained in the original draft. The article was then adopted by consensus, both in the Committee⁹ and in the plenary meeting.¹⁰ It will also be noted that Resolution 21 entitled “Dissemination of knowledge of international humanitarian law applicable in armed conflicts”, annexed to the Protocol, also refers to this problem. In fact it invites the signatory States (and not only the Contracting Parties) to undertake the training of the personnel named in Article 6.¹¹

Paragraph 1 – Functions of qualified personnel

- 241 This paragraph relates to the training of personnel “to facilitate the application of the Conventions and of this Protocol”, and in particular the activities of the Protecting Powers. As stated above, the wording is identical to that which resulted from the second session of the Conference of Government Experts. At the Diplomatic Conference the participants had little to say on this part of the sentence. Yet thirty-two governments had expressed themselves at length on this point in their replies to the above-mentioned “Questionnaire” addressed to them by the ICRC, following a motion adopted by the first session of the Conference of Government Experts, and it is possible to draw a number of conclusions from these statements, which preceded the second session of the Conference of Government Experts.
- 242 It should be recalled, first of all, that in the mind of those who had taken the initiative, the members of the International Committee for the Neutrality of Medicine, it was a question of promoting

“the creation in each country of a corps of volunteers, doctors, lawyers, paramedical personnel who could be made available to belligerent countries, Protecting Powers, and the ICRC whenever necessary.”¹²

It was more particularly:

“to create in each country national committees bringing together persons who, by virtue of their professional and moral qualities could contribute to the dissemination and implementation of the Geneva Conventions and bring relief to the victims of conflicts [...]”¹³

⁸ Since July 1980 there has been no Society with the name “Red Lion and Sun”, nor any Party to the Conventions using this sign.

⁹ O.R. VIII, p. 252, CDDH/1/SR.26.

¹⁰ O.R. VI, p. 68, CDDH/SR.37.

¹¹ On this subject, see *infra*, para. 2, point 2, p. 99.

¹² Translated by the ICRC; original text: “la création, dans chaque pays, d’un corps de volontaires, de médecins, de juristes, d’auxiliaires médicaux qui pourraient être mis à la disposition des pays belligérants, des Puissances protectrices, du CICR, chaque fois que cela serait nécessaire”, Second International Congress on the Neutrality of Medicine, *Compte rendu analytique des débats*, Paris, Institut Pasteur, 12-14 November 1964, p. 40.

¹³ Translated by the ICRC; original text: “de créer dans chaque pays des “Comités nationaux” groupant des personnalités qui, en raison de leurs qualités professionnelles et morales, pourraient contribuer à la diffusion et à l’application des Conventions de Genève tout en portant secours aux victimes de conflits [...]” *Ibid.*

On the point of “national committees” the Diplomatic Conference took a position by the explicit mention of National Red Cross and Red Crescent Societies to which this paragraph refers. Moreover, this question is linked to that of the recruitment and training of the personnel concerned; this will be examined in the context of paragraph 2. As regards the function of this personnel, the above-mentioned initiative was concerned as much with the dissemination “at all times”¹⁴ of the Conventions, which means, already during peacetime and in national territory, as with supervising their implementation in time of conflict, as we have seen. Thus it is appropriate to try and ascertain if the wording of this paragraph can cover these two aspects of the matter, and to what extent.

1. *Activities of qualified personnel in peacetime*

- 243 The text of this paragraph does not state explicitly that the qualified personnel will carry out its activities even in peacetime, but that the Contracting Parties will endeavour to train them also in peacetime. On the other hand, Resolution 21 annexed to the Protocol is more explicit since it

“invites the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts [...] is effectively disseminated, particularly by [...] undertaking in peacetime the training of suitable persons to teach international humanitarian law [...] in accordance with Articles 6 and 82 of the Protocol [...]”

There is little doubt that Article 6, paragraph 1, applies equally to dissemination during peacetime. However, its scope can be interpreted in an even wider sense. The measures for the execution of obligations under the Conventions and the Protocol which must be taken without delay by the High Contracting Parties under the terms of Article 80 (*Measures for execution*) cannot be improvised. The implementation of the Conventions and the Protocol raises numerous questions which must be broached or resolved in peacetime in the military and technical fields (for example, on the question of weaponry), in the legal field, particularly in criminal law, in the health and medical fields, in administration, as well as in the organization of relief for victims, and the solution of these problems requires the participation of highly qualified personnel. No doubt these are tasks which are incumbent in the first place on the authorities, as one delegation pointed out,¹⁵ but it is quite conceivable that in order to carry out these tasks satisfactorily, they will rely on consultative groups, possibly even private groups consisting of qualified persons in the sense of Article 6. It is even possible that without such competent personnel within the government administration or outside it, the application of Article 80 of the Protocol (*Measures for execution*), which enjoins the High Contracting Parties to take all necessary measures for the execution of their obligations without delay, might be held up.

¹⁴ Resolution of the Second Congress mentioned above.

¹⁵ O.R. VIII, p. 180, CDDH/I/SR.19, para. 51.

2. Activities of qualified personnel in time of armed conflict

244 The activities of qualified personnel in time of armed conflict can be approached under the terms of this paragraph from two different points of view. If the State on which such qualified personnel depends is itself engaged in the conflict, the personnel can make a contribution to the implementation of the Conventions and the Protocol by the State in conflict. If the State is not engaged in conflict, it may be called upon to play the role of a Protecting Power or to make its qualified personnel available to a Protecting Power or its substitute.

a) Contribution by qualified personnel to implementation of the Conventions and the Protocol by the State on which such personnel depends

245 The Conventions and the Protocol apply in full from the beginning of an armed conflict, which means in particular that the hostilities must be conducted in accordance with all the rules contained therein from the very first shots that are fired, or from the moment that one Party penetrates the territory of the adversary. The principal measures laid down in the Protocol for guaranteeing compliance with the rules are the intense dissemination of the applicable rules at all levels of the army, the attachment of legal advisers to military commanders and the giving of appropriate orders and instructions; in addition, the observation of the rules must be supervised. In view of the countless problems of all kinds resulting from the commencement of a conflict, the many different constraints burdening the authorities and military commanders, and the concern for military necessity which is all too likely to outweigh humanitarian considerations, it is self-evident that the existence of qualified personnel exclusively devoted to the proper application of the Conventions and the Protocol can at such a time be absolutely invaluable to every High Contracting Party engaged in armed conflict. Such is the primary aim of this paragraph. It is true that the phrase which states “the High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national [...] Societies” to train such personnel, is an obligation as regards conduct, and not as regards results. It is an undertaking to do all that is possible to ensure that such personnel is available. However, while taking into account national particularities, it reveals the concern of the Conference that every Contracting Party should establish a system of self-control capable of guaranteeing respect for the obligations entered upon, under the best possible conditions.

b) Contribution by qualified personnel to the activities of the Protecting Powers

246 As we have seen, the proposal to train personnel so as to be qualified to assist the activities of the Protecting Powers was the main concern of Resolution XXII of the XXth International Conference of the Red Cross, which forms the basis of the article under consideration here. This idea is clearly reflected in the Protocol, even though it is only one of the options: the qualified personnel is called upon “to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers”.

- 247 One general remark contained in a government reply to the “Questionnaire” seems to correspond closely to a fairly commonly held opinion on this matter. This remark was to the effect that:

“Since the system of supervision laid down by the Geneva Conventions has not proved satisfactory in practice, it would be better to improve it, but in doing so it would be essential to maintain that which already exists. The innovations should essentially consist of creating supplementary supervision mechanisms in such a way as to offer the Parties to the conflict a greater choice.”¹⁶

- 248 One of the main reasons, though by no means the only one, for the fact that the choice is limited, is that most States do not have qualified personnel available to play the role of a Protecting Power, and would consequently not even be able to lend their services. This is a question which primarily applies to the training of diplomatic personnel and which is raised by paragraph 2. Whether or not it is in relation to this aspect of the problem, the original purpose, as revealed by the resolution of the International Conference of the Red Cross adopted in Vienna, was certainly “to make available – in the event of a conflict – to the Protecting Powers and their possible substitutes a sufficient number of persons capable of carrying out this scrutiny impartially”. The underlying idea is clearly present in the wording of this paragraph. However, the ambition of the second session of the Conference of Government Experts revealed even more specific objectives. Inspired particularly by the Regulations for the Execution of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, some delegations recommended the training of teams consisting of doctors and lawyers¹⁷ or even of officers, administrators, specialists in relief activities and other humanitarian activities.¹⁸ In the event of armed conflict these teams would be called upon, either in their own territory, or as nationals of neutral States, in the territory of belligerent States, to facilitate the work of the delegates of Protecting Powers or their substitutes.¹⁹ These specific points are not contained in the text of the Protocol, but there is nothing to stop the High Contracting Parties from interpreting the scope of the paragraph under consideration here in this sense.

- 249 As regards the functions with which such teams would be charged, these are not precisely defined either, as the phrase “to facilitate [...] the activities of the Protecting Powers” opens the door to a wide range of possibilities. These may be the tasks expressly assigned to the Protecting Powers or their substitutes, by the

¹⁶ Translated by the ICRC; original text: “Du moment que, dans la pratique, le système de contrôle prévu par les Conventions de Genève ne s’est pas avéré satisfaisant, il y aurait avantage à introduire certaines innovations, mais ce faisant, il faudrait à tout prix maintenir ce qui existe déjà. Les innovations devraient essentiellement consister à créer des possibilités de contrôle supplémentaire, de manière à offrir un plus grand choix aux Parties au conflit.” *Government replies*, p. 17.

¹⁷ *Ibid.*, p. 70.

¹⁸ *CE 1972, Report*, Vol. II, p. 101, *ad draft Art. 7*.

¹⁹ *Government replies*, p. 70.

Conventions²⁰ or by the Protocol,²¹ or resulting directly from these instruments,²² in which case the teams would probably be attached to the personnel belonging to the institutions concerned. They may be new tasks resulting from the Protocol which the Protecting Powers or their substitutes are reluctant, for one reason or another, to assume.

- 250 In this context it should be recalled that, at least in the eyes of the ICRC, the mandate of Protecting Powers regarding the application of the Conventions and of the Protocol should not be extended to include enquiries on violations of these instruments, of which the results would be made available in a public report, or would be brought to the attention of intergovernmental organizations. Moreover, the Conventions make it explicitly clear that the supervision to be exercised by Protecting Powers should not be confused with an enquiry into violations, as they have laid down a procedure for such an enquiry in a separate article (Article 52/53/132/149).²³ It is probably because it was aware of these limitations that the Government of Monaco had annexed draft regulations to its reply to the above-mentioned “Questionnaire” addressed to it by the ICRC. This draft had been elaborated by the Commission médico-juridique de Monaco, and was directly linked to the object of Article 6.²⁴ Article 7 of this draft included, amongst the tasks assigned to the qualified personnel, establishing any violations of international humanitarian law, making enquiries relating to such violations, and any necessary steps to stop them. There is nothing left of this draft in the Protocol, but nevertheless the Protocol does indeed extend the field of application of international humanitarian law to the conduct of hostilities in the true sense, and the question of problems of supervision which result or may result from this, remains open. Thus it is not possible to exclude *a priori* from the scope of application of Article 6, supervisory duties which, without falling under the competence of the Protecting Powers, could facilitate or even guarantee the activities of the latter. However, it is self-evident that such an extension of the mandate of qualified personnel referred to in this article is subject to the conclusion of special agreements in accordance with paragraph 4, if such personnel is to operate outside its own national territory.

²⁰ See *Commentary I*, Art. 8; *Commentary II*, Art. 8; *Commentary III*, Art. 8; *Commentary IV*, Art. 9. A complete list can also be found in F. Siordet, *op. cit.* See also *RICR*, March-April 1985, pp. 86-95.

²¹ See commentary Art. 5, *supra*, p. 75.

²² For example, confirming the civilian character of works or installations containing dangerous forces (Art. 56, para. 1) or confirming that a declared non-defended locality fulfils the conditions laid down (Art. 59). For other examples also see United Nations General Assembly, Report of the Secretary-General, A/8052, p. 78, para. 247.

²³ *Commentary Drafts*, p. 9. It should be noted that the two amendments to the draft Art. 79 *bis* (present Art. 90, “International Fact-Finding Commission”) explicitly laid down that the Commission could appoint qualified persons as mentioned in Art. 6 as experts assisting it (*O.R. III*, p. 339, CDDH/I/241, and Add. 1; p. 341, CDDH/I/267). However, these proposals found hardly any support and are therefore not contained in the final wording of Art. 90.

²⁴ *Government replies*, Annex 1, Draft regulation for the execution of the Geneva Conventions of 12 August 1949 for the protection of the victims of war, pp. 01-08.

Paragraph 2 – Recruitment and training

251 The problem of the recruitment and training of people so as to have qualified personnel is obviously closely linked to the functions the Contracting Parties envisage assigning such personnel – for the text of paragraph 1 is primarily addressed to such Parties. These various possibilities have already been analysed and it should be recalled that they may cover military, legal, medical, technical, administrative and relief matters etc. The provisions of the Conventions and of the Protocol, which require the participation of such personnel for their proper application, define the task to be carried out. Governments are responsible for ensuring this, at a national level, and National Red Cross and Red Crescent Societies are required to assist governments as appropriate.

1. Recruitment

252 In principle suitable personnel can be recruited from persons employed by the State or from the population in general. The degree to which various professions are controlled by the State in the country concerned plays an important role in this respect. If the exercise of the medical profession is restricted to State employees, it is self-evident that qualified medical personnel can be recruited only from such State employees. In fact, this will always be the case with regard to training magistrates, diplomatic personnel or military commanders, though not necessarily in recruiting military experts. It will be noted that under the terms of Article 8/8/8/9 of the Conventions, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers (or from another State not Party to the conflict). Thus in this field too, the recruitment can take place from outside the public sector. In military matters it may be possible to recruit personnel from the ranks of officers, particularly from military colleges who are able, for example, to provide instruction on the methods and means of attack, as well as from personnel who do not belong to the military administration and who are specialized in legal, technical and scientific fields etc.

253 The aid of the National Red Cross and Red Crescent Societies is probably most useful for the recruitment of suitable personnel outside the public sector, although the text, taken literally, only mentions their assistance for the training of the personnel concerned. When the National Society's competence to assist in recruitment is accepted, it will provide lists of persons of a high moral quality and indisputable impartiality,²⁵ who are competent in the field in question, and are chosen either from its own members, or, though always at a national level, from

²⁵ *Ibid.*, p. 04, Art. 6.

the ranks or through the mediation of another appropriate institution.²⁶ For State employees, whether these be military personnel, diplomats, magistrates or other categories, the recruitment only seems to depend on the government itself.

2. Training

254 In the field of training, though the primary responsibility certainly lies with the High Contracting Parties, the assistance of the National Red Cross or Red Crescent Society is required without restriction, i.e., both for personnel belonging to the public sector and for personnel belonging to the private sector. However, as for recruitment, competence lies at a national level. It is complementary in the sense that it applies to persons who must already be extremely competent in their expert area, whether this is in the military, legal, medical, technical, administrative or any other field. It is not up to the Protocol to ensure instruction in the military tactics, law, medicine, the sciences or business management, but to see that these areas of expertise are available, even in peacetime, for the purpose of dissemination, implementation and enforcement, and once hostilities have broken out, for the purpose of applying the rules, so as to meet the requirements of international humanitarian law.

255 In this context the National Societies should, first of all, independently inculcate the “qualified personnel” with a knowledge of the fundamental principles of the Red Cross. “Technical” training should be geared to the Conventions and the Protocol, since it is a matter of facilitating the application of these instruments. Although competence is expressly centred at a national level, there is nothing to prevent national Societies, or even Contracting Parties, from resorting to the assistance of the International Committee of the Red Cross in this field. Resolution 21 annexed to the Protocol, entitled “Dissemination of knowledge of international humanitarian law applicable in armed conflicts”, in fact invites the authorities of the signatory States

“to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities in a manner suited to national circumstances”.

²⁶ A proposal presented at the first session of the Conference of Government Experts envisaged the establishment of teams consisting of one representative of the national Red Cross, one international lawyer, one representative from an international non-governmental organization, of high international standing, of which this proposal mentions, by way of example, Amnesty International, the International Association of Democratic Lawyers, Friends World Committee for Consultation (Quakers), the International Commission of Jurists and the World Veterans Federation (*CE 1971, Report*, pp. 115-116, CE/COM IV/4). In its report to the Second International Congress on the Neutrality of Medicine, the Commission médico-juridique de Monaco proposed in this respect to consult the World Medical Association, the national groups of the Institut de droit international and the International Law Association, as well as the national committees of the International Committee on the Neutrality of Medicine, *op. cit.*, p. 120.

It will be noted that the Resolution is addressed to the “signatory States”, while the text of the Protocol itself is always aimed at the Contracting Parties. This means that States which are called to become Contracting Parties are encouraged to implement this resolution, and consequently to apply this Article 6 without waiting for ratification. This objective is all the more understandable as it is clear that, as indicated above, it will actually facilitate the ratification process.

- 256 The National Red Cross and Red Crescent Societies are expressly invited by the above-mentioned resolution to offer their assistance to their respective governmental authorities with the aim of contributing in particular to the good understanding of international humanitarian law, which is obviously an essential prerequisite for the training of qualified personnel. From the ICRC, the resolution expects the publication of the necessary material for instruction, as well as organization or cooperation in establishing and running appropriate courses and seminars.
- 257 However, this task, which is expected of the ICRC, and which it carries out to the best of its ability,²⁷ is intended to support the activities of the High Contracting Parties and the signatory States, and not to take the place of such activities. It is to be hoped that National Societies will encourage setting up permanent inter-departmental committees in every country, as some of them have done already. These would be responsible in particular for organizing the training of the personnel covered by this article, with the cooperation of the National Societies.

Paragraph 3 – Transmission of lists

- 258 The transmission through the ICRC of lists of persons trained in accordance with Article 6 is basically intended to be of help in case of armed conflicts. This provision supplements that contained in paragraph 3 of Article 5 (*Appointment of Protecting Powers and of their substitute*). Under the terms of that provision, if a Protecting Power has not been designated or accepted, the ICRC may ask each Party to provide it with a list of at least five States which that Party considers acceptable to act on its behalf, and another list of at least five States which it would accept as the Protecting Power of the other Party. The ICRC will compare them and seek the agreement of any proposed State named on both lists.
- 259 If this procedure fails because there is no common ground between the proposals of the one side and the conditions imposed by the other, the ICRC may try another approach, either in conjunction with Article 6, or not. It may offer its own services in accordance with paragraph 4 of Article 5 (*Appointment of Protecting Powers and of their substitute*), or transmit any lists of qualified personnel which the Contracting Parties have communicated to it. Furthermore,

²⁷ In cooperation with the League of Red Cross and Red Crescent Societies, the ICRC encourages the instruction of international humanitarian law, particularly in faculties of law and political science, military academies, and faculties of medicine and social sciences. It carries out enquiries in universities on the current position of this instruction in conjunction with the National Societies of the countries concerned.

it is not impossible that a State which is a prospective Protecting Power or has already been accepted as such may wish to receive the same lists, for example in the case where it considered that it lacked qualified personnel. Admittedly the text confines itself to stating that the ICRC will keep the lists available for the Contracting Parties. However, since under the provisions of paragraph 4 of Article 5 (*Appointment of Protecting Powers and of their substitute*), the obligation to accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, is subject to prior consultation and to the result of such consultations, the transmission to the Parties to the conflict or to other States which are prospective Protecting Powers of the above-mentioned lists, may in some cases fall under these consultations.

Paragraph 4 – Special agreements

- 260 This paragraph provides that the employment of the qualified personnel covered by this article outside national territory shall, in each case, be the subject of special agreements between the Parties concerned. A number of different cases can be envisaged.
- 261 Under the terms of Article 8/8/8/9 of the Conventions, Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. Such delegates may be chosen from amongst qualified personnel trained in accordance with the provisions of this article. However, as they have no diplomatic or consular status, they must receive an *ad hoc* approval which will grant them a status likely to correspond to that of the diplomatic and consular staff of the Protecting Power. Such a clause was implied in the Conventions. It is self-evident that in such a case the mandate of the qualified personnel cannot exceed that of the Protecting Power itself.
- 262 If such teams are called upon to exercise their activities under the authority of the ICRC, they must receive special approval, in the same way as the delegates of the ICRC itself. Their mandate will be defined either by the terms of the mission of the ICRC, as they result, in the case in question, from the Conventions and the Protocol, or through the consultations which the ICRC has carried out in accordance with the provisions of paragraph 4 of Article 5 (*Appointment of Protecting Powers and of their substitute*). Their status will probably be the same as that of ICRC delegates.
- 263 Finally, if qualified personnel covered by this article were to act independently of the Protecting Power or the ICRC, it would be all the more important to have a special agreement. This agreement would be concluded either between the country making qualified personnel available (or countries, if the teams are multinational) and the Parties to the conflict concerned, or between the organization representing them, on an *ad hoc* basis or otherwise, and the same Parties to the conflict. It should include in particular a list of the accredited delegates, define their functions, especially with regard to establishing whether violations have been committed and carrying out enquiries, if such is the wish of

the Contracting Parties. The agreement should, furthermore, determine their status and the allocation of expenses. The Parties concerned could be guided by the draft regulations established by the Commission médico-juridique de Monaco.²⁸

J. de P.

²⁸ *Government replies*, Annex I, pp. 01-08.

Protocol I

Article 7 – Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

Documentary references

Official Records

O.R. I, Part I, p. 128; Part III, p. 4 (Art. 7). *O.R.* III, pp. 39-41. *O.R.* VI, p. 68, CDDH/SR.37, para. 20; p. 80, *id.*, Annex (Spain¹). *O.R.* VIII, p. 159, CDDH/I/SR.18, para. 30; pp. 181-184, CDDH/I/SR.19, paras. 60-76; pp. 185-189, CDDH/I/SR.20, paras. 2-28; pp. 283-284, CDDH/I/SR.28, paras. 64-73. *O.R.* X, pp. 21-23, CDDH/219/Rev.1, paras. 4, 6, 9, 12, 14-15; pp. 36-38, paras. 79-86; pp. 67, 72-74, CDDH/I/235/Rev.1 (Art. 7).

Other references

CE/2b, p. 11 (note 35). *CE 1971, Report*, p. 107, paras. 527-528; p. 109, para. 547; p. 114, Annex I, paras. 9, 18; pp. 115-116, CE/COM IV/3. *CE 1972, Basic Texts*, p. 7 (Art. 9). *CE 1972, Commentaries*, Part I, pp. 23-24 (Art. 9). *CRCE 1972, Report*, p. 49 (Art. 9); p. 71, Annex I, para. 14. *CE 1972, Report*, vol. I, pp. 186-188, paras. 4.109-4.114; vol. II, pp. 99-100, CE/COM IV/10; p. 103, CE/COM IV/18; p. 107, CE/COM IV/40, CE/COM IV/42. *Commentary Drafts*, pp. 15-16 (Art. 7). *XXIInd Int. Conf. RC, Report*, p. 9, para. 21; p. 42, Annex I (Art. 7).

¹ This written statement was erroneously placed under Article 7: in fact, it concerns the draft article (now Art. 89) "to be inserted before or after Article 70"; cf. moreover *O.R.* VI, pp. 348-349, CDDH/SR.46, paras. 53 and 60, and the Annex to this same summary record in which the statement referred to is omitted.

Commentary

General remarks

- 264 This article offers the community of States Parties to the Protocol a specific method of improving the application of this instrument. It is inspired by a comparable provision in the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict.² This article lays down the possibility for Parties to the Protocol to meet in order “to consider general problems concerning the application of the Conventions and of the Protocol”. It is closely linked to Articles 1 (*General principles and scope of application*), paragraph 1, and 80 (*Measures for execution*), paragraph 1. It is also related to Article 11/11/11/12 common to the Conventions,³ Resolution 1 of 1949,⁴ and Article 97 (*Amendment*) of the Protocol.⁵
- 265 After voting on three particular points, the article was adopted in Committee I by consensus; it was also adopted by consensus in the plenary Conference.⁶

The right to request a meeting

- 266 The request of one Contracting Party is sufficient to start the procedure. A meeting may also take place in the event of requests from two or more Parties acting together or separately. The expression “High Contracting Parties” refers to Parties to the Protocol:⁷ only such Parties, and not Parties to the Conventions which are not Parties to the Protocol, have the right to request a meeting in accordance with this article, to be consulted about a request, and to participate in a meeting.
- 267 This does not prevent those which are only Parties to the Conventions from being informed regarding any action undertaken in accordance with this article, or at least the result of such action. Neither Article 7 nor Article 100

² Art. 27, which differs from the present article essentially with regard to the method of convening the meeting. On this subject, *cf.* S.E. Nahlik, “La protection internationale des biens culturels en cas de conflit armé”, 120 *Hague Recueil*, 1967/II, pp. 133, 142-143; J. Toman, “La protection des biens culturels dans les conflits armés internationaux: cadre juridique et institutionnel” in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 579.

³ The good offices of Protecting Powers, particularly in the case of disagreement about application or interpretation.

⁴ This resolution recommends that any dispute relating to the interpretation or application of the Conventions which cannot be settled by other means should be submitted to the International Court of Justice.

⁵ Reference could also be made to Art. 98. With regard to its object and specific provisions, see commentary, *infra*, p. 1099.

⁶ *Cf.* O.R. VIII, pp. 283-284, CDDH/I/SR.28, paras. 64-73; and O.R. VI, p. 68, CDDH/SR.37, para. 20, respectively.

⁷ On this subject, *cf.* commentary Preamble, *supra*, p. 25. This article might be considered not to cover Parties to which the Protocol applies only in pursuance of Article 96, paras. 2 or 3, unless the general problem to be examined is linked to the conflict in which they are engaged.

(*Notifications*) requires the depositary to do this,⁸ but it might increase the interest of such States in the Protocol and extend participation in this instrument. In support of such views, it should be noted that a meeting may lead to an amendment procedure in the sense of Article 97 (*Amendment*). This provides that the Parties to the Conventions which are not Parties to the Protocol may participate in any conference called to examine a proposed amendment. The Conference made no rules on the question of information to be furnished to such States, nor did it raise any question about this or about whether such States might be invited as observers. It would seem that the depositary could submit proposals on such matters to the Contracting Parties in the context of the consultation which will be dealt with below.⁹

Consultation of Contracting Parties

- 268 Even though the text does not explicitly state this, it is in accordance with the functions of a depositary that such a consultation is carried out by it.¹⁰ Thus if one or several requests are submitted, the depositary will consult all the Contracting Parties on the subject of such requests.
- 269 When an appropriate period, determined by the depositary and advised to the Parties, has elapsed, the depositary will take note of the result of the consultation and notify it to all the High Contracting Parties. If the majority have stated that they are in favour of the meeting, notification of the result and notice of the meeting may be sent concurrently or successively.
- 270 The wording that was used refers to the majority of the Parties to the Protocol, and not only of those who expressed their views. This is meant to ensure that a meeting is held only with the requisite representation, and only if there is sufficient interest. Since there is no qualification, it is a simple majority.¹¹
- 271 Determining whether there is such a majority will be more difficult if there are two or more simultaneous requests for a meeting and these are not concerned with the same problem. Only if a majority decides that a problem should be

⁸ The depositary of the Protocol is the same as that of the Conventions, namely, the Swiss Federal Council; for the functions of the depositary as a whole, cf. commentary Art. 100, *infra*, p. 1114. The Swiss delegate said that his country was prepared to play the role with which it would be entrusted, if Article 7 were adopted (*O.R.* VIII, p. 188, CDDH/I/SR.20, para. 22).

⁹ The above-mentioned article of the Hague Convention (*supra*, note 2) also remains silent on these two questions. Nevertheless, States not Parties to the Convention were invited as observers to the only meeting held so far, under that article (cf. S.E. Nahlik, "La protection internationale des biens culturels...", *op. cit.*, p. 142, and J. Toman, *op. cit.*, p. 579). In our opinion, this is even more justified for Parties to the Conventions not Parties to the Protocol, in the case of a meeting in the sense of this article, given the "additional" character of the Protocol.

¹⁰ In addition to the general statement quoted *supra*, note 8, the depositary subsequently confirmed that its obligations arising from this article involve the consultation of Parties and the sending of invitations; cf. *Message concernant les Protocoles additionnels aux Conventions de Genève* of 18 February 1981, addressed by the Swiss Federal Council to the Federal Parliament, Chap. 211.1 *in fine*.

¹¹ Committee I adopted this solution with a vote, in preference to a two-thirds majority of the Contracting Parties proposed in the draft; cf. *O.R.* VIII, p. 284, CDDH/I/SR.28, para. 71.

discussed, a meeting may be held with that problem on its agenda: the requirement of a majority applies for every single problem, even when a number of requests are submitted simultaneously. However, it is conceivable that some of the Parties consulted might consider that the discussion of a given problem does not by itself justify a meeting, though they might be prepared to discuss it if in the end a meeting were convened to deal with another problem; to remove any doubt on this point, their conditional approval should therefore be clearly indicated in their response.

- 272 The two points relating to the question of majority – that it should be a majority of all Parties and that it applies separately to each question proposed – should be reiterated by the depositary every time it consults the Parties, as should the possibility of conditional acceptance. Similarly, it should specify whether the approval must be explicitly given or whether there may be tacit approval in certain cases.

Object and purpose of the meeting

- 273 The agenda resulting from the consultation procedure described above will contain the discussion of one or more general problems relating to the application of the Conventions and the Protocol.
- 274 With the expression “general problems”, the Conference wished to exclude the discussion of specific situations, to which other provisions apply.¹² Despite the wording of the text, such general problems could equally relate to interpretation or preliminary measures for execution, as well as to the application as such. Similarly they could be submitted either in advance as a result of reflection, or in the light of experience.
- 275 The scope of the discussions covers the Conventions as well as the Protocol, this resulting from the “additional” character of the latter. A significant proportion, if not the majority of problems of application of the Protocol, will therefore also relate to the Conventions themselves, at least indirectly.¹³
- 276 The article does not indicate the nature of the conclusions to which a meeting can lead, nor the procedures to be applied. As the meeting must be limited to general problems, and as amendments are governed by Article 97 (*Amendment*), conclusions will have the character of recommendations. They will not have a compulsory character, but may contain a common interpretation of specific provisions, practical means of application or draft amendments.

B.Z.

¹² In addition to the articles quoted above at the beginning of the general remarks, this certainly refers to Part V, Section II. The insertion of the word “general” in the reference to problems was also decided by a vote in Committee I; cf. *O.R.* VIII, p. 284, CDDH/1/SR.28, para. 70.

¹³ However, the insertion of the words “of the Conventions and” was also voted on in Committee I; cf. *ibid.*, p. 284, para. 72.

Part II – Wounded, sick and shipwrecked

Documentary references

Official records

O.R. I, Part I, pp. 129-141; Part III, pp. 5-11 (Art. 8-32). *O.R.* III, pp. 44-152. *O.R.* VI, pp. 68-72, CDDH/SR.37, paras. 21-39; pp. 75-81, *id.*, Annex; pp. 83-91, CDDH/SR.38 and Annex; pp. 94-99, CDDH/SR.39, paras. 7-46; p. 114, *id.*, Annex (Egypt). *O.R.* XI, CDDH/II/SR.1-55. *O.R.* XII, pp. 13-51, CDDH/II/SR.56-59; p. 201, CDDH/II/SR.73, paras. 22-24; pp. 205-206, paras. 44-53; pp. 217-259, CDDH/II/SR.75-79, para. 17; pp. 267-279, CDDH/II/SR.80; pp. 460-468, CDDH/II/SR.98-99, para. 18; pp. 473-496, CDDH/II/SR.100-101. *O.R.* XIII, pp. 3-34, CDDH/49/Rev.1 and Annexes; pp. 59-118, CDDH/221/Rev.1, paras. 1-128; pp. 134-158, paras. 184-258; p. 165, *id.*, Annex I; pp. 166-190, *id.*, Annex II, Art. 9-30; pp. 199-215, CDDH/II/266-CDDH/III/255 and Annexes; pp. 221-223, CDDH/II/272; p. 225, CDDH/II/286; pp. 231-235, CDDH/II/296; pp. 237-239, CDDH/II/306; pp. 241-242, CDDH/II/314; pp. 249-259, CDDH/235/Rev.1, paras. 1-37; pp. 275-293, *id.*, Art. 8-32; pp. 323-326, CDDH/II/333; p. 327, CDDH/II/334; pp. 329-330, CDDH/II/350; pp. 331-333, CDDH/II/376; p. 335, CDDH/II/377; pp. 337-340, CDDH/II/379; pp. 341-342, CDDH/II/380; pp. 343-344, CDDH/II/381; pp. 345-347, CDDH/II/386; pp. 358-361, CDDH/406/Rev.1, paras. 21-33; pp. 389-399, *id.*, Annex (Art. 8-23).

Other references

CE/7b as a whole. *CRCE 1971, Report*, pp. 23-26. *CE 1971, Report*, pp. 1-2, 23-32 and 117-121. *CE 1972, Basic Texts*, pp. 37-38. *CE 1972, Commentaries*, Part I, pp. 27-59. *CRCE 1972, Report*, pp. 23-30. *CE 1972, Report*, vol. I, pp. 1-2, 26-60, paras. 0.1-1.110 and Annex; pp. 203-209, paras. 5.1-5.54; vol. II, pp. 2-5; pp. 24-31, *CE/COM I/1-15*; pp. 115-116. *Commentary Drafts*, pp. 17-40 (Arts. 8-32). *XXIInd Int. Conf. RC, Report*, pp. 9-11, paras. 22-28.

Introduction

- 277 The Fourth Convention contains only a few basic provisions on civilian medical personnel whose fate was therefore dealt with only in a very incomplete manner

by the 1949 Conference. Since then a number of humanitarian institutions have concerned themselves with this question, and a working group was set up¹ which has been engaged in numerous “Entretiens consacrés au droit international médical”.

278 The XXth International Conference of the Red Cross (Vienna, 1965) approved the basic elements of “Draft Rules for the Protection of Wounded and Sick and Civil Medical and Nursing Personnel in Time of Conflict”, which the ICRC had prepared on the basis of the “Entretiens...”, and requested that the whole question should be the object of a more thorough study, particularly with regard to the possibility of extending to civilian medical personnel the right to display the distinctive emblem for the purpose of protection.

279 The XXIst International Conference of the Red Cross (Istanbul, 1969) declared that it was in favour of an extension of the right to distinctive emblem on certain conditions, and requested “the ICRC to submit concrete proposals to Governments along these lines with a view to a rapid conclusion of an additional protocol to the First and Fourth Geneva Conventions” (Res. XVI).

280 In view of the increased importance attached to these matters, the ICRC considered it necessary to increase the number of institutions participating in the “Entretiens...”² Government enquiries were carried out and two draft Protocols were established, which took up to a large extent the contents of the Draft Rules submitted to the International Conferences of the Red Cross. They differed, however, materially on two points:

- 1) Whilst the Draft Rules were conceived to apply both to international conflicts and to non-international conflicts, the establishment of two draft Protocols permitted a distinction to be made between these two types of conflict, one Protocol (which at that time elaborated only the Fourth Convention) being applicable to the former, while the other, developing Article 3 common to the Conventions, applied to the latter.
- 2) The Draft Rules still favoured the use of a different emblem for civilian medical personnel. In accordance with the above-mentioned resolution formulated in Istanbul, the draft Protocols suggested an extension of the right to emblem of the red cross (red crescent, red lion and sun), while maintaining the use of a different emblem – the red Staff of Aesculapius, on a white background – for medical personnel which does not form part of the medical service organized by the State.

281 The work of the first session of the Conference of Government Experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts, held in Geneva from 24 May to 12 June 1971, permitted the

¹ In 1955 the International Committee of the Red Cross set up this working group with the two large international associations representing the medical profession, the World Medical Association, which had 700,000 members, and the International Committee of Military Medicine and Pharmacy, which included the health services of eighty-one countries, and with an observer representing the World Health Organization.

² The group was enlarged by taking in as observers experts from the League of Red Cross Societies, the International Law Association, the Commission médico-juridique de Monaco, and the International Committee for the Neutrality of Medicine.

ICRC to establish two new draft Protocols which retained the two above-mentioned new features.

282 When a second session of this Conference of Government Experts became necessary, it met again in Geneva from 3 May to 3 June 1972.³

283 The drafts of the ICRC served as a basis for the work of this second session. The experts introduced certain modifications and added a new chapter consisting of only one article entitled “National Red Cross organizations and other humanitarian organizations”. Apart from this, the only major change was in the chapter dealing with medical transportation. This was fundamentally amended, notably by the addition of three articles to the ICRC draft.⁴

284 The drafts used by the CDDH as a basis for its work follow very closely, with regard to the subject matter with which we are concerned here, the drafts presented at the 1972 session and the work of this session.

285 Part II (*Wounded, sick and shipwrecked*) is divided into two sections, one entitled “*General Protection*”, and the other, “*Medical transportation*”. The question of the “National Red Cross organizations and other humanitarian organizations” being once more withdrawn.

286 Only the second section is subdivided into two chapters, the first deals with “common provisions”, the second with “medical transportation by air”.

287 The essential element of the 1973 draft of this Part II can be found in the Protocol which was finally adopted. However, a few refinements and additions have been introduced, at first by Committee II of the CDDH, which was responsible for examining it, and later by the CDDH as a whole during the final plenary sessions.

288 In the commentary to each article we will see the various modifications to which they have been submitted. In the context of this introduction we will limit ourselves to a description of the structural modifications which the CDDH has introduced to Part II. There are three of these:

- 1) all the definitions concerning Part II have been listed in the first article of this Part (Article 8 – *Terminology*), while the definitions concerning medical transportation were to be found in the draft at the beginning of Section II, which deals with this subject matter;
- 2) the draft subdivided Section II (*Medical transportation*) into two chapters, one dealing with the common provisions (five articles), the other with medical transportation by air (seven articles). The problem of medical transportation by air still forms the larger part of Section II, but it now no longer has a chapter to itself, as Section II is no longer subdivided and deals successively with medical transportation on land (one article), by sea (two articles) and by air (eight articles);

³ On the basis of the work of the 1971 Conference, and after various subsequent consultations, the ICRC had already formulated the structure which was finally adopted, i.e., two Additional Protocols to the Geneva Conventions, one applicable to international conflicts (supplementing all four Conventions), the other to non-international conflicts (supplementing Article 3, common to the Conventions).

⁴ Moreover, it was during the course of this session that a Sub-Committee on the marking and identification of medical transports was set up. This Sub-Committee in particular drew up draft Annexes to Protocol I, which were later adopted (on this subject, *cf.* in particular, the commentary on Annex I to Protocol I, *infra*, p. 1137).

- 3) a new section, not included in the 1973 draft, was added at the end of Part II by the CDDH. This Section III deals with missing and dead persons and was first adopted by Committee II, and later at the plenary meetings of the CDDH. The Committee had discussed this subject on the basis of numerous amendments presented by various States at the first, second and third sessions. A number of these amendments recommended the adoption of a new article, while others were in favour of a new section. This last formula was finally adopted, the new Section (*Missing and dead persons*) containing three articles entitled respectively “*General principle*”, “*Missing persons*”, and “*Remains of deceased*”.

289 Finally, let us summarize the points which seem to reflect the essence of the contribution of Part II of Protocol I to the Geneva Conventions:

- 1) the wounded, sick and shipwrecked, whether civilian or military, are only considered as such during an initial period;
- 2) recognized civilian medical personnel, as well as civilian medical units, will henceforth receive the same protection as that formerly reserved for military medical personnel and units;
- 3) medical activities as such are better protected;
- 4) the role of the civilian population and of relief societies is confirmed and extended;
- 5) the protection of maritime medical transportation, and above all, of medical transportation by air, has been developed by extending the scope of the right to protection and by increasing the flexibility of the procedures required to invoke this right;
- 6) the principle that families have the right to be informed of the fate of their relatives has been introduced, and the provisions concerning missing persons and the remains of the deceased have been developed.

Y.S.

Part II, Section I – General Protection

Introduction

- 290 This Section gives general information regarding the protection of the wounded, sick and shipwrecked, particularly by defining the terms – which was not done in the First Convention – and by indicating the scope of application of Part II.
- 291 It is important in that it develops the protection of *civilian* medical personnel and units by the distinctive emblem, in this way enabling all those capable of caring for the wounded and sick in time of armed conflict to be mobilized more efficiently. This development can only be welcomed: the wounded and sick have all too often suffered from deficient medical services, inadequately equipped as regards personnel and materials (*matériel*).¹
- 292 Protection of *medical duties*, of aid societies and of the civilian population collecting the wounded or coming to their aid has the same purpose.
- 293 The improvement in identification and the introduction of technical means of identification are an essential complement to this development, for it is all too true that protection granted medical personnel and medical objects is pointless if such personnel and objects are not identified in time.
- 294 Finally, it should be noted that emphasis is put on the protection of persons in the power of the enemy or detained for reasons related to the armed conflict. As they are often ill-treated or even affected in their physical or mental well-being, such people are in particular need of protection: the text is unambiguous in specifying the principles to be observed with respect to them, as well as on practices which are to be forbidden. This is a welcome step forward, though it should not be forgotten that a tremendous effort must still be made to ensure strict application of these rules.

Y.S.

¹ The corresponding word in the Protocol and also used in the commentary by the author is *matériel*.

Protocol I

Article 8 – Terminology

For the purposes of this Protocol:

- (a) “wounded” and “sick” means persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;
- (b) “shipwrecked” means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;
- (c) “medical personnel” means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under subparagraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:
 - (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
 - (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
 - (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;
- (d) “religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:
 - (i) to the armed forces of a Party to the conflict;
 - (ii) to medical units or medical transports of a Party to the conflict;
 - (iii) to medical units or medical transports described in Article 9, paragraph 2; or
 - (iv) to civil defence organizations of a Party to the conflict.The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph (k) apply to them;

- (e) “medical units” means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;
- (f) “medical transportation” means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;
- (g) “medical transports” means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;
- (h) “medical vehicles” means any medical transports by land;
- (i) “medical ships and craft” means any medical transports by water;
- (j) “medical aircraft” means any medical transports by air;
- (k) “permanent medical personnel”, “permanent medical units” and “permanent medical transports” mean those assigned exclusively to medical purposes for an indeterminate period. “Temporary medical personnel”, “temporary medical units” and “temporary medical transports” mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms “medical personnel”, “medical units” and “medical transports” cover both permanent and temporary categories;
- (l) “distinctive emblem” means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;
- (m) “distinctive signal” means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Documentary references

Official Records

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CDDH/II/SR.37, paras. 1-37; p. 552, CDDH/II/SR.49, para. 9; pp. 553-554, paras. 17-26; pp. 560-561, para. 68. *O.R. XII*, p. 24, CDDH/II/SR.57, paras. 28-30; p. 25, para. 37; pp. 217-220, CDDH/II/SR.75, paras. 1-28; pp. 237-241, CDDH/II/SR.77, paras. 1-27; pp. 460-461, CDDH/II/SR.98, paras. 35-44. *O.R. XIII*, pp. 6-10, CDDH/49/Rev.1, paras. 19-44; pp. 19-21, *id.*, Annex I; pp. 65-66, CDDH/221/Rev.1, paras. 19-23; pp. 134-139, paras. 184-189; pp. 199-201, CDDH/II/266-CDDH/III/255; p. 232, CDDH/II/296, para. 7; p. 235, *id.*, Annex; pp. 252-253, CDDH/235/Rev.1, paras. 14-20; p. 335, CDDH/II/377; pp. 337-340, CDDH/II/379; pp. 358-359, CDDH/406/Rev.1, paras. 21-23; pp. 389-391, *id.*, Annex (Art. 8).

Other references

CE/7b, pp. 42-43. *CE 1971, Report*, p. 24, para. 46; p. 29 (Art. 2). *CE 1972, Basic Texts*, p. 8 (Art. 11). *CE 1972, Commentaries*, Part I, pp. 28-29 (Art. 11); pp. 49-50 (Art. 23). *CRCE 1972, Report*, pp. 23-24 and 60 (Art. 11). *CE 1972, Report*, vol. I, pp. 32-33, paras. 1.9-1.12 (Art. 11); pp. 43-44, paras. 1.69-1.76 (Art. 23); vol. II, p. 24, *CE/COM I/1*; pp. 26-27, *CE/COM I/2*; p. 27, *CE/COM I/3*; pp. 31-32, *CE/COM I/15. Commentary Drafts*, pp. 17-19 (Art. 8); pp. 29-30 (Art. 21). *XXIInd Int. Conf. RC, Report*, pp. 9-10 (Art. 8).

Commentary

General remarks

295 The idea of defining the most widely used terms of this Part arose during the second session of the Conference of Government Experts in 1971.¹ Following numerous discussions regarding the terms to be defined, and with regard to where these definitions should come in the Protocol,² the ICRC introduced an article of definitions at the beginning of Part II, and another at the beginning of the second Section of Part II devoted to medical transportation.

296 These definitions were examined by Committee II of the CDDH, which introduced some modifications and, in particular, decided to add two:

- 1) On the initiative of the Holy See, which presented an amendment,³ remarking that “religious personnel and medical personnel were mentioned together in a number of articles in the Geneva Conventions of 1949” and that “it was desirable that the former should be defined in order to avoid any misunderstanding”,⁴ the definition of the expression “religious personnel”

¹ Cf. in particular *CE 1971, Report*, p. 24, para. 46.

² Cf. in particular *ibid.*, p. 24, para. 46; p. 32, para. 90; *CE 1972, Report*, Vol. I, p. 33, para. 1.11; p. 209, para. 5.48.

³ *O.R. III*, p. 51, CDDH/II/58.

⁴ *O.R. XI*, p. 50, CDDH/II/SR.7, para. 6.

was inserted in Article 8. This initiative was supported by a number of other delegations which presented a new amendment together with the Holy See.⁵

- 2) The Drafting Committee of Committee II had noted that the notion “permanent” or “temporary” was applicable in a number of the expressions defined, and on the basis of a draft amendment,⁶ it proposed the insertion in Article 8 of a definition of these terms⁷ to avoid repetitions. This proposal was accepted.

- 297 Moreover, the Drafting Committee of the CDDH decided to group together all the definitions of Part II in Article 8, and therefore to transfer to this article the definitions of terms used in Section II devoted to medical transportation, which had formerly been placed at the beginning of this Section.⁸

Opening sentence

- 298 The definitions were given “for the purposes of the present Part” in the draft presented to the CDDH.

- 299 At the first session an amendment was presented with a view to substituting the words “the terms used in the present Part have the following meaning” for “for the purposes of the present Part”.⁹ The purpose of this amendment was to prevent

“an unduly restrictive interpretation being placed on the provisions of draft Protocol I, which did not exist as an independent instrument, but merely represented a supplement to the Geneva Conventions of 1949 and to international law on armed conflicts as a whole”.¹⁰

Some doubts were expressed regarding the competence of the Conference to modify the Geneva Conventions, and this amendment was referred to the Drafting Committee of Committee II, which provisionally accepted the expression “for the purposes of the present Protocol”. This choice was confirmed by the Drafting Committee of the CDDH, which, although it decided to keep the definitions in different places in the Protocol, and to group the definitions relating in particular to Part II, at the beginning of Part II, did not wish to restrict their scope to this Part, particularly because some of the terms defined are also found outside Part II.

Sub-paragraph (a)

- 300 The 1973 draft had defined the expression “the wounded and sick”, bringing together in a single category persons entitled to strictly identical protection. The

⁵ *O.R.* III, p. 53, CDDH/II/374.

⁶ *Ibid.*, p. 52, CDDH/II/239.

⁷ *Cf.* CDDH/II/240/Add. 1, p. 1.

⁸ *Cf.* CDDH/CR/RD/13/Rev.i, p. i, note i.

⁹ *O.R.* III, p. 46, CDDH/II/17.

¹⁰ *O.R.* XI, p. 21, CDDH/II/SR.3.

existence of a single category of persons is not put into question now. The reason it was decided to separate the terms was to enable them to be used more flexibly with various conjunctions (such as, for example, “to the wounded and to the sick”). The fact that persons who are neither wounded nor sick are included in this category shows that there is indeed only a single category: for example, new-born babies are included in the category “wounded” and “sick”, even when they are neither wounded nor sick.

301 Thus, when the Protocol mentions the wounded and sick, it is not concerned with the wounded and sick according to the ordinary meaning of these words, but with the persons defined here. The definition of the “wounded” and the “sick” is at the same time wider and narrower than the more common definition of these terms. It is wider in that it encompasses, as we have pointed out, persons who are not wounded or sick in the usual sense of these words, but narrower in that it does not protect such persons as a whole (i.e., also the wounded and sick according to the usual meaning) unless they abstain from all hostile acts.

302 These two elements are examined below.

1. *Persons benefitting from protection*

a) *The wounded in the usual sense of the word*

b) *The sick in the usual sense of the word, whether the sickness is physical or psychological*

303 The criterion for such persons is that they *are in need of medical care*. However, this first element is very difficult to assess in the heat of action, and it is above all with regard to the requirement made of such persons that they refrain from any act of hostility that a combatant must determine his attitude, if he is faced with a person who does not seem to have any obvious characteristics of injury or sickness. At this stage it is not significant for the combatant whether the person concerned falls under the category of the “wounded” and “sick”, or whether he is a soldier who “clearly expresses an intention to surrender” (Article 41 – *Safeguard of an enemy hors de combat*): he must respect both because they are *hors de combat*. It is after the event, if such persons are captured, that a decision is made as to whether or not they are in need of medical care, and thus whether or not they fall under the category of the “wounded” and “sick”.

304 Moreover, it should be noted that this criterion – being in need of medical care – is the only valid one for determining whether a person is “wounded” or “sick” in the sense of the Protocol (insofar as the second condition – *infra*, 2 – is fulfilled). The persons concerned may be either civilians or soldiers and the Protocol does not retain the distinction made between these two categories by the Conventions as regards the wounded and sick. On this basis a wounded soldier and a wounded civilian are entitled to identical protection, even though, at the same time, there would be a significant difference in the status which applies to the one and the other if they fell into enemy hands (particularly that of prisoner of war for a combatant).

c) *Persons who, although neither wounded nor sick in the usual sense of these words, may be in need of immediate medical care*

305 These are persons who are not necessarily in urgent need of medical care at the time, as the persons described above in a) and b) are, but whose condition may at any moment necessitate immediate medical care. A list of such persons is given, though only by way of example. It includes:

- maternity cases;
- new-born babies;
- invalids;¹¹
- expectant mothers.

2. The necessity of refraining from any act of hostility

306 Although the status of “wounded” and “sick” can therefore be given to persons who are not wounded or sick in the usual sense of these words, it may on the other hand be refused to those who are: to benefit from this status it is necessary *to refrain from any act of hostility*. A person who has broken his leg is not wounded in the sense of the Protocol if he continues to shoot. This is a logical conclusion: it would be unreasonable to ask a soldier to spare someone who is threatening him, or, otherwise, who is attempting to escape.¹²

307 If they wish to benefit from the status of “wounded” and “sick”, those entitled to this status must therefore meet this requirement, though obviously only to the extent that it applies to them (naturally this problem does not arise for an unconscious wounded person or a new-born baby).

Sub-paragraph (b)

308 Two essential elements mentioned with regard to the definition of the “wounded” and “sick” are repeated with regard to the definition of the “shipwrecked”: those who are not shipwrecked in the strict sense of the word may be covered by the definition, but anyone shipwrecked, even if he is shipwrecked in the usual sense of the word, is only considered as such if he refrains from any act of hostility.

¹¹ This obviously refers to infirmity of some seriousness, which has in principle justified exemption from military service. However, the fact of knowing exactly how serious the infirmity covered here is, is not very important. If his infirmity was not considered sufficient and the invalid was enlisted as a combatant, he has in any case no right to any special treatment as long as he engages in combat. On the other hand, if his condition obviously prevents him from continuing to engage in combat, or if he wishes to surrender and clearly shows his intention of refraining from hostile acts, he must be spared by the combatant who has him in his power, either in accordance with Article 10 or in accordance with Article 41. Only when he is captured should it be determined whether his infirmity is considered sufficiently serious – i.e., may require immediate medical care to warrant classifying him in the category of the “wounded” and “sick”.

¹² For further details on the concept of an “act of hostility”, cf. commentary Art. 41, *infra*, pp. 488-489.

309 A particularly difficult question with regard to the protection given shipwrecked persons is also dealt with, namely, the duration of the “shipwrecked” status. We will consider these three elements in succession, devoting most attention to the third.

1. *Persons benefitting from protection*

- 310 The condition laid down here is that the person concerned is in peril “at sea or in other waters”. The Second Convention only mentions those shipwrecked “at sea”. The 1973 draft also followed this restricted definition. One delegation regretted that persons in peril in inland waters (lakes, rivers etc.) seemed to be excluded and Committee II finally decided to broaden the definition by using the expression “at sea or in other waters”. On the other hand, it did not adopt a proposal made by the ICRC, and taken up by several delegations at the beginning of the CDDH, to put those in peril *on land* (for example, in the desert) on a par with the shipwrecked.
- 311 The definition was also widened in comparison with the original draft, in that it is not concerned only with the shipwrecked in a strict sense, i.e., those in distress as a result of a shipwreck or damage to a vessel, but with any person in peril, including in particular persons who have fallen into the sea, even when the vessel transporting them has not been damaged. Moreover, those who have fallen into the sea from or with an aircraft are also explicitly included.
- 312 As in the case of the “wounded” and “sick”, no distinction is made between civilians and soldiers as long as they are considered to be shipwrecked. This constitutes an important innovation in relation to the Conventions.
- 313 The fact that the “shipwrecked” covered here must be in peril *as a result of misfortune* does not mean that the field of those concerned should be excessively restrained. Persons who are in distress as a result of their inexperience or their recklessness, are also protected. The aim was to exclude those who voluntarily put themselves in peril in order to accomplish a mission, such as military commandos or individual frogmen of the military commandos.
- 314 However, it should be noted that if such men are in difficulties or in distress, and they give up their mission and all other acts of hostility, they will also enjoy the status of the “shipwrecked”.

2. *The necessity of refraining from any act of hostility*

- 315 In the exceptional case where someone who would normally be entitled to the protection given to the “shipwrecked” by the Protocol continues to fight, and in particular to fire shots, he would obviously lose his right to protection and would not even be defined as “shipwrecked”, in the sense of the Protocol. The observations made in this respect with regard to the “wounded” and “sick” also apply here.¹³

¹³ Cf. *supra*, p. 118.

3. *Duration of the status of “shipwrecked”*

- 316** First, it should be clarified that the status of “shipwrecked”, which is only given, as we saw above, to persons who refrain from any act of hostility, is automatically lost by those who, having enjoyed such status, commit an act of hostility: committing such an act of hostility is incompatible with the “shipwrecked” status throughout its duration.
- 317** It remains to be determined how long persons who are entitled to “shipwrecked” status and who continue to refrain from any act of hostility can enjoy such status. Without specifying this period exactly, the Second Convention implies that a shipwrecked person continues to be considered as such throughout the rescue operation, i.e., until he has been safely returned to land. This is shown, for example, in Article 14 of the Convention, which refers to the “shipwrecked on board military hospital ships”.
- 318** The Protocol specifies that the shipwrecked “shall be considered shipwrecked during their rescue”, which means that they retain their status until they are returned to land. However, they can lose this status earlier if they acquire another status under the Conventions or the Protocol.
- 319** For the sake of clarity, it is necessary to list the possibilities which may arise. A distinction is made between the case in which the shipwrecked person is a soldier and the case in which he is a civilian.

3.1. *The shipwrecked person is a soldier*

a) *He is rescued by his own armed forces*

- 320** In this case there are two possibilities:
- He was not wounded or traumatized by his experience (which, it must be noted, is exceptional), and can quickly assume an active role again. From this moment he again becomes a combatant and loses his “shipwrecked” status.
 - He is wounded or traumatized. As a result he acquires the status of “wounded” or “sick”, which gives him the same rights as the “shipwrecked” status. This means that if the vessel is attacked, he will be spared as far as possible (i.e., in practical terms, that he will be spared in the event – though admittedly exceptional these days – that the vessel is boarded and taken by force).¹⁴ He will enjoy the status of “wounded” and “sick” if the vessel which has rescued him is seized (and he becomes, moreover, a prisoner of war).

b) *He is rescued by enemy armed forces*

- 321** Such a shipwrecked person becomes a prisoner of war. He loses his “shipwrecked” status as soon as he is on board, but in addition to his prisoner of war status, becomes “wounded” or “sick” in the case that his condition means that he falls in this category and he remains so as long as his condition justifies this.
- 322** Anyone shipwrecked who has participated in hostilities, but is not entitled to prisoner-of-war status,¹⁵ will be considered shipwrecked throughout the duration

¹⁴ However, see also Art. 28, Second Convention.

¹⁵ Cf. in particular Art. 45, para. 3, and Art. 47, para. 1.

of the rescue operation, i.e., in principle until he is taken back to land, unless his condition means he falls under the category of the wounded and sick (which actually assures him identical protection). This also applies to persons whose status has not been clearly determined.¹⁶

c) *He is rescued by a neutral warship*¹⁷

323 In this case he will be considered throughout the rescue operation to be either wounded or sick if his condition warrants this, or shipwrecked, if not.¹⁸

d) *He is rescued by a hospital ship, a coastal rescue craft or other medical ship or craft belonging to his own Party to the conflict*

324 He will be considered as either wounded or sick, or as shipwrecked, depending on his condition, until he lands. This does not give him any rights while he is on the vessel which rescued him,¹⁹ but it is important for him and for the vessel if the latter is boarded and searched: if his transfer to an enemy warship is ordered, he is to be treated as though he had been directly picked up by such a vessel (cf. *supra*, b)). Moreover, the vessel transporting him shall not be accused of transporting a combatant.

325 In the case that a wounded, sick or shipwrecked person is not transferred to another vessel, the vessel which rescued him will most likely take him to his own Party to the conflict, unless it has to land him in a neutral port. In this case he will retain the status of “wounded” and “sick”, if his condition warrants this,²⁰ and in any case, Article 17 of the Second Convention will apply to him.

e) *He is rescued by a hospital ship, coastal rescue craft or other medical vessel or craft belonging to the adverse Party*

326 He will enjoy either the status of “wounded” and “sick”, if his condition justifies this, or “shipwrecked” status, until he has landed. If he is transferred onto a warship of his own Party to the conflict, after it has boarded and searched the vessel which rescued him, he will be considered to have been rescued directly by the former (cf. *supra*, a)). If he remains on the first vessel until he lands, he will be treated as a prisoner of war (and will, moreover, continue to enjoy the status of “wounded” and “sick”, if his condition justifies this), in case he lands in a port of the adverse Party; if he lands in a neutral port, Article 17 of the Second Convention will apply to him, and the status of “wounded” and “sick” will still be granted him, provided that his condition justifies this, in accordance with Article 19 of the Protocol (*Neutral and other States not Parties to the conflict*).

¹⁶ Cf. in particular Art. 45, paras. 2 and 3.

¹⁷ I.e., from a State which is not a Party to the conflict; on this subject, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61.

¹⁸ Cf. also Protocol I, Art. 19, and Second Convention, Art. 15.

¹⁹ Cf., however, commentary Art. 11, *infra*, pp. 152-154.

²⁰ Cf. Protocol I, Art. 19.

f) *He is rescued by a non-medical civilian vessel*

327 The comments under letters d) and e) apply to a shipwrecked person rescued respectively by a civilian vessel belonging to his own Party, or to the adverse Party, even though, in this case, the vessel itself can also be seized.

328 If it is a civilian vessel belonging to a State which is not a Party to the conflict, the solution mentioned under letter c) applies to him, but the vessel may be boarded and searched and in this case, either the solution mentioned under letter a) (if the searching vessel belongs to the shipwrecked person's Party to the conflict), or the solution mentioned under letter b) (if it belongs to the adverse Party), will apply.

3.2. *The shipwrecked person is a civilian*

a) *He is rescued by a military vessel belonging to his own Party to the conflict*

329 He enjoys the status of "wounded" and "sick", or "shipwrecked", depending on his condition, until he lands. Such status does not give him any rights in relation to his own Party to the conflict.²¹ On the other hand, it is important if the vessel is seized: a person not wearing uniform on a warship could be suspected of espionage. In the case of such a seizure, solution b) described below applies.

b) *He is rescued by a military vessel belonging to the adverse Party*

330 He enjoys the status of "wounded" and "sick" or "shipwrecked", depending on his condition, until he has landed in a neutral port. In any case he will then no longer be considered to be shipwrecked, as the rescue operation has been completed, but will still be covered by Article 19 of the Protocol (*Neutral and other States not Parties to the conflict*) if he still falls under the category "wounded" and "sick".

331 If he is taken to the territory of the adverse Party, which is probably usually the case, he will lose his "shipwrecked" status as soon as he lands, as the rescue operation has been completed by that time, but will enjoy the status of "protected person" in the sense of Article 4 of the Fourth Convention. This will apply to him, particularly Section II (Aliens within the territory of a Party to the conflict) of Part III. In addition, he will enjoy the status of "wounded" and "sick", if his condition justifies this.

c) *He is rescued by a neutral warship*

332 He will enjoy the status of "wounded" and "sick" or "shipwrecked", depending on his condition, until he has landed. After he has landed in the neutral country, he will continue to enjoy the status of "wounded" and "sick", if he meets the necessary conditions.²² If not, he will lose his "shipwrecked" status and no longer fall under the scope of application of the Conventions and the Protocol.

²¹ Cf., however, commentary Art. 11, *infra*, pp. 152-154.

²² Cf. Protocol I, Art. 19.

d) *He is rescued by a hospital ship, coastal rescue craft or other medical craft or vessel belonging to his own Party to the conflict*

333 He will have the status of “wounded” and “sick” or “shipwrecked”, depending on his condition, until he has landed. This does not give him any specific rights, as he is in the hands of personnel of his own Party to the conflict,²³ but it is important to justify his presence in case the vessel is submitted to an inspection. In principle he should not be transferred to a vessel belonging to the adverse Party.²⁴

e) *He is rescued by a hospital ship, coastal rescue craft or other medical craft or vessel belonging to the adverse Party*

334 He has the status of “wounded” and “sick” or “shipwrecked”, depending on his condition, until he has landed.

335 If he lands in a port of the adverse Party, he becomes a protected person in the sense of Article 4 of the Fourth Convention, and this Convention then applies to him. In addition, he retains the status of “wounded” and “sick”, if his condition justifies this.

336 If he lands in a neutral port, the Conventions and the Protocol no longer apply to him, unless his condition justifies the status of “wounded” and “sick”, which should be respected by the State where he has landed, in accordance with Article 19 of the Protocol (*Neutral and other States not Parties to the conflict*).

337 If the vessel is boarded and searched by a military vessel of his own Party to the conflict, and he is transferred onto the latter, the solution mentioned under letter a) applies.

f) *He is rescued by a non-medical civilian vessel belonging to a neutral State*

338 The solution mentioned under letter c) applies.

339 Even if a military vessel were to board and search the neutral civilian vessel, it should not require the transfer of the shipwrecked person.

g) *He is rescued by a civilian vessel belonging to his own Party*

340 In principle there is no problem if he arrives safe and sound. However, if his own Party has to retain him for reasons related to the armed conflict (treason, desertion etc.), he should at least be granted the benefits of Article 75 (*Fundamental guarantees*)²⁵, as well as the status of “wounded” or “sick”, if his condition justifies this.

341 In the case that the vessel is seized by a military vessel of the adverse Party, the solution mentioned under letter b) applies.

²³ Cf., however, commentary Art. 11, *infra*, pp. 152-154.

²⁴ Cf. Protocol I, Art. 22, para. 1, *in fine* and Art. 23, para. 6. On this subject, cf. also *infra*, commentary Arts. 22 and 23, p. 253.

²⁵ Cf. commentary Art. 75, *infra*, p. 866.

h) *He is rescued by a civilian vessel belonging to the adverse Party*

- 342 He will have the status of “wounded” and “sick” or “shipwrecked”, depending on his condition, until he has landed.
- 343 If he lands in a port of the adverse Party, he will have the status of “protected person” in the sense of Article 4 of the Fourth Convention. This Convention will apply to him, particularly Section II (Aliens within the territory of a Party to the conflict) of Part III. In addition, he will enjoy the status of “wounded” and “sick”, if his condition justifies this.
- 344 If he lands in a neutral port, he will continue to enjoy the status of “wounded” and “sick”, if his condition justifies this, in accordance with Article 19 of the Protocol (*Neutral and other States not Parties to the conflict*). If not, he will no longer be within the scope of the Conventions and the Protocol.
- 345 If the vessel is seized by a military vessel of the Party to the conflict to which he belongs, the solution mentioned under letter a) applies.

Sub-paragraph (c)

- 346 The ICRC draft mentioned the categories of persons covered by the expression “medical personnel”, without first defining the expression. On the basis of an amendment presented by seven countries,²⁶ Committee II decided to define the expression before listing the categories of persons that it covers.

1. Definition of medical personnel

- 347 Medical personnel covers such persons as are assigned to particular tasks necessary for the well-being of the wounded and sick. In fact the protection of medical personnel is a subsidiary protection granted to ensure the protection of the persons primarily concerned, namely, the wounded and sick.
- 348 A number of modifications of greater or lesser importance were made to the protection of medical personnel as laid down in the Conventions.
- 349 First of all, civilian medical personnel are also covered, provided that they are assigned to medical tasks by a Party to the conflict, in order to ensure in a better way the protection of all the wounded and sick, whether civilian or military.
- 350 Furthermore, it is specified that only such persons as are *exclusively* assigned to medical tasks are covered, which is the case in the Conventions only for the permanent personnel, even if it is implied for the temporary personnel. The *duration* of such an exclusive assignment is a vexed question. We shall discuss it with respect to sub-paragraph (k), where the concept of permanent and temporary medical personnel was also modified.²⁷
- 351 Finally, the distinction which was made in the Conventions between the identification of different categories of medical personnel has disappeared. All medical personnel of any sort must be identifiable as easily as possible.²⁸

²⁶ *O.R.* III, pp. 46-47, CDDH/II/19 and Corr.1.

²⁷ *Cf. infra*, pp. 132-133.

²⁸ *Cf. commentary Art. 18, infra*, p. 221.

352 A number of points which require elucidation are dealt with below.

1.1. *Medical personnel must be assigned to one of the following tasks:*

- a) The medical purposes enumerated in sub-paragraph (e). On this subject *cf. infra*, sub-paragraph (e).
- b) The administration of medical units. On the meaning of the expression “medical units”, *cf. infra*, sub-paragraph (e). Administration must be considered here in a wide sense. It includes all persons who ensure the functioning of the units without directly caring for the wounded and sick: thus they include the administrators as such, as well as many other persons, such as, for example, hospital cooks and cleaners.²⁹
- c) The operation or administration of medical transports. On the meaning of the expression “medical transports”, *cf. infra*, sub-paragraph (g). Here again we are concerned with persons who, without caring directly for the wounded and sick, are nevertheless essential components in the system of protection. They include, in particular, persons who drive or pilot medical transports, as well as persons assisting in this task (co-pilot or navigator in medical aircraft, crew of a medical ship, etc.), persons who are responsible for the maintenance of medical transports (mechanics, personnel required for the maintenance of medical ships etc.), or finally, persons who plan the employment of medical transports. All such persons are essential for the proper functioning of the system.

1.2. *Medical personnel must be assigned exclusively to these tasks*

353 This means that protected medical personnel cannot spend any time on different activities as long as they are assigned to medical tasks. This is a necessary precaution to prevent abuses of the emblem for commercial purposes, for example, or above all for military purposes.

1.3. *They must be assigned to such tasks by a Party to the conflict*

354 The problem does not arise with military medical personnel, as military personnel are assigned *ex officio* by the competent authority. On the other hand, this clause is important for civilian medical personnel. Not every civilian doctor is protected by the Conventions. Indeed, there is no *a priori* reason why a plastic surgeon, for example, should be protected. On the other hand, if the Party to the conflict in the territory in which he works assigns him to tasks mentioned above, i.e., if he becomes useful for the protection of the wounded and sick, he deserves to be protected. This is an example of the derivative character of the protection of medical personnel, which is relevant only when such personnel is engaged in

²⁹ It should be noted that Committee II included in its report at the end of the 3rd session of the CDDH an explanation – in line with what was said above – of the phrase commented upon here (*cf. O.R. XIII*, pp. 253-254, CDDH/235/Rev.1, para. 20).

the protection of the wounded and sick. Moreover, it is essential that the Party to the conflict, which is responsible for preventing the misuse of the protective emblem, retains the power to decide who is entitled to the protection reserved for medical personnel.

1.4. *The assignment may be either permanent or temporary*

355 For the meaning of these terms, *cf. infra*, sub-paragraph (k).

2. *Categories covered by the expression “medical personnel” (sub-paragraphs (c) (i), (ii), (iii))*

356 Three categories are mentioned by the Protocol.

2.1. *Sub-paragraph (c)(i)*

357 The first category comprises the medical personnel of a Party to the conflict, *viz.:*

- military medical personnel already protected by the First and Second Conventions (although the States Parties to the Protocol should review the organization of their medical service, and in particular, the problem of temporary medical personnel, in relation to the Protocol);
- civilian medical personnel, *viz.* civilian personnel exclusively assigned by a Party to the conflict to one of the tasks listed above;
- medical personnel assigned to civil defence organizations. In principle this is civilian personnel, although it could include military personnel.³⁰ For such personnel the status of medical personnel continues, despite their assignment to civil defence organizations. This is clearly shown by the fact that they must continue to be identifiable by means of the distinctive emblem of the red cross or the red crescent.³¹

2.2. *Sub-paragraph (c)(ii)*

358 This is personnel already covered by Article 26 of the First Convention. The societies concerned must fulfil three conditions:

- they must be *national* societies, *i.e.*, societies established in the territory of the Party to the conflict concerned;
- these societies must be *recognized* by the Party to the conflict concerned, which, in the most usual case where this Party is a State, means that the society must at least have been regularly constituted in accordance with national legislation. Therefore this excludes clandestine societies;

³⁰ *Cf.* commentary Art. 67, *infra*, p. 791.

³¹ *Cf.* also commentary Art. 66, para. 9, *infra*, pp. 788-789.

- these societies must be *authorized* by the Party to the conflict concerned, i.e., the latter must agree that personnel of these societies are employed as medical personnel.

2.3. Sub-paragraph (c)(iii)

359 This third category covers medical personnel who have been made available to a Party to the conflict without belonging to this Party, together with permanent medical units and medical transports (with the exception of hospital ships which are subject to a separate régime, regulated by Article 24 of the Second Convention). It should be noted that only certain States, societies or organizations may make such personnel available, and then only under certain conditions.³²

Sub-paragraph (d)

360 The original draft of the Protocol did not contain a definition of religious personnel, but it is appropriate to recall that chaplains attached to armed forces were covered by the proposed definition of medical personnel. This actually comprised military medical personnel as defined in the First and Second Conventions, and these chaplains fall under the definition of such personnel.

361 However, this seemed inadequate to some delegations. Largely as a result of two amendments, the present paragraph was added to define religious personnel explicitly (*cf. supra*, p. 115).

362 The persons concerned here must fulfil two conditions:

- They are exclusively devoted to their ministry. Thus they could not fulfil functions other than their religious functions, though carrying out medical tasks could obviously not be considered an infringement of this rule. On the other hand, the religion to which they belong is immaterial. Thus it has been said that the term “chaplain”, which is actually used only by way of example, does not refer exclusively to Christian religious personnel.³³ They do not have to be themselves incorporated into the army: it does not matter whether they are military or civilian.
- They have a specific attachment which presumes the agreement of the Party to the conflict concerned, to one of the four categories listed.

Sub-paragraph (d)(i)

363 This is the personnel covered by Article 24 of the First Convention.

³² On this subject, *cf.* commentary Art. 9, para. 2, *infra*, pp. 140-143.

³³ *Cf. O.R. XII*, p. 220, CDDH/II/SR.75, para. 20.

Sub-paragraph (d)(ii)

- 364** On the meaning of the expressions “medical units” and “medical transports”, *cf. infra*, sub-paragraphs (e) and (g) respectively.

Sub-paragraph (d)(iii)

- 365** On this subject, *cf. infra*, commentary on Article 9, paragraph 2, pp. 140-143.

Sub-paragraph (d)(iv)

- 366** On this subject, *cf. infra*, commentary on Article 61, sub-paragraph (b), pp. 732-735.

- 367** Like medical personnel, religious personnel may be assigned either permanently or temporarily. One delegate expressed the opinion that the temporary assignment of religious personnel has no effect on the type of status of religious personnel which, by its very nature, is permanent.³⁴ However, the Protocol does not prohibit the temporary assignment of laymen for religious purposes, and the possibility that they may be protected as religious personnel during the fulfilment of these tasks remains open. On the meaning of the terms “permanent” and “temporary”, *cf.*, apart from this, *infra*, sub-paragraph (k).

Sub-paragraph (e)

- 368** In order to simplify and clarify matters, a single expression was chosen to cover the entire range of medical establishments and other medical units.
- 369** As in the case of medical personnel, medical units may be either military or civilian and when the expression is used without the qualifying adjective “military” or “civilian”, it covers both categories.
- 370** Medical units are protected whether they are fixed or mobile, i.e., whether they consist of buildings built to remain where they are, or whether they are structures or establishments which can be moved according to needs. Moreover, they can be permanent or temporary (on the subject of these expressions, *cf. infra*, sub-paragraph (k)).
- 371** The only decisive condition which is imposed upon these establishments or other units to qualify as medical units is this: they must be “organized for medical purposes” and exclusively assigned to these purposes.
- 372** Irrespective of the reason for which the unit was established, it is the use at the relevant moment which counts. A hospital which is used as a barracks is not a medical unit, while a barracks equipped as a makeshift hospital becomes one.

³⁴ O.R. XII, p. 217, CDDH/II/SR.75, para. 3.

- 373 The medical purposes envisaged here are broad. The search for, evacuation and transportation of the wounded, sick and shipwrecked, particularly concern mobile units. Some confusion may arise between these units and medical transports (the transport element in principle prevails in the latter, the possibility of administering care in the former). In any case such confusion is not particularly important, as medical transports are entitled to a similar protection to that accorded mobile medical units. Moreover, the protection of medical transports also implies that of fixed units such as the garages where these vehicles are parked, and the workshops where they are repaired.
- 374 The diagnosis and treatment of injuries and sickness are usually carried out in fixed establishments, but may also be done in mobile establishments such as field hospitals.
- 375 The degree of care to be given is not a determining element: a simple first-aid post improvised near the battlefield is considered to be a medical unit.
- 376 Similarly establishments which do not directly care for victims, namely, the wounded, sick and shipwrecked, but attempt to reduce the number of these by preventing diseases, are also considered to be medical units. This applies in particular to vaccination centres or other preventive medicine centres and institutes, and blood transfusion centres.
- 377 In addition it is clear that a surgeon without instruments and medicine cannot do a great deal: for this reason, places where medicines, surgical instruments and in general any medical supplies are stored also qualify as medical units, whether these are simple depots attached to a hospital, for example, or centres where these can obtain supplies.
- 378 Finally, it should be noted that Committee II of the CDDH, which dealt with this article, wished to mention in its report drawn up at the end of the third session, that dental treatment is included in the medical purposes mentioned here.³⁵ Thus establishments where dental care is administered have also to be considered as medical units. It also mentioned that hospitals and other medical units include “rehabilitation centres providing medical treatment”.³⁶
- 379 Thus it is clear that the assignment for medical purposes must be interpreted very flexibly. However, as mentioned above, such assignment has to be made to the exclusion of any other for a unit to qualify as a medical unit. This does not follow from the paragraph under consideration here, but from the definition given below of the terms “permanent” and “temporary”.³⁷ As for medical personnel, this condition is perfectly logical for obvious reasons: it would not be possible to ask a Party to the conflict to spare a hospital, even if it contains a large number of wounded, if it is also sheltering an arsenal in the cellar or an army headquarters in one of the wings.
- 380 The list of establishments covered by the expression “medical units” mentioned in this paragraph, is by way of example. It does not require any further commentary.

³⁵ Cf. *O.R. XII*, p. 238, CDDH/II/SR.77, para. 8 and *O.R. XIII*, pp. 253-254, CDDH/235/Rev.1, para. 20.

³⁶ *O.R. XIII*, *ibid.*

³⁷ Cf. commentary sub-para. (k), *infra*, pp. 132-133.

Sub-paragraph (f)

- 381** This is a definition of medical transportation as such, independently of the means used. All movement is intended to be covered, which explains the specific mention of transportation by land, water or air. The expression “by water” was preferred to the expression “by sea” used in the initial draft, to emphasize that it concerned not only transportation across the seas or oceans, but also transportation across inland waters, such as rivers and lakes.
- 382** Thus the concept of transportation aims to cover the whole range of transportation: any form of transportation may be medical. However, to qualify as *medical* transportation, it obviously has to fulfil another condition, that of being linked directly or indirectly to the wounded, sick and shipwrecked protected by the Conventions and the Protocol. There is a direct link when the persons being transported are the wounded, sick or shipwrecked themselves, an indirect link when these are medical or religious personnel, or medical equipment and supplies. The terms or expressions “wounded”, “sick” or “shipwrecked”, “medical personnel” and “religious personnel” are defined elsewhere and we will not reconsider this question here. As regards the expression “medical equipment or medical supplies”, this should be interpreted broadly. It includes any equipment and supplies necessary for medical care – particularly surgical equipment – but also heavier equipment (for example, the equipment for an operating theatre or even an entire field hospital), or even, quite simply, medicines themselves.
- 383** It is indeed sufficient that one of these categories of persons, equipment or supplies are transported for it to qualify as medical transportation. On the other hand, it is quite clear that no category of persons, equipment or supplies other than these should be included in the transportation, if it is to retain its status of medical transportation. The transportation of wounded with able-bodied soldiers or the transportation of medical equipment and armaments is not medical transportation in the sense of the Protocol.

Sub-paragraph (g)

- 384** The transportation of specific persons, equipment or supplies, irrespective of the means used, was defined in sub-paragraph (f); the means themselves are defined here. They are defined in a very broad sense. Whether they are designated for civilian or military use is of no importance: like the wounded, sick and shipwrecked, medical transports are considered as such, irrespective of such designation. Moreover, they may be permanent or temporary.³⁸ Finally, this provision covers *any* means of transportation: none is excluded, from the ox-drawn cart to the supersonic jet, or any future means of transportation; the absence of an exhaustive list leaves the field open for the latter.

³⁸ On the exact meaning to be given to these terms, *cf.* commentary sub-para. (k), *infra*, pp. 132-133.

385 However, two conditions have been laid down for any means of transportation to qualify as *medical* transports:

- 1) It must be assigned *exclusively* to medical transportation. In practical terms, this means first of all that the means of transportation must only contain such categories of persons, equipment and supplies as fall under the definition of medical transportation.³⁹ As we saw above, without such a restriction there would not be any medical transportation. However, exclusive assignment also means that a means of transportation may not be used for purposes other than medical transportation, as long as it is assigned to this. Let us examine the example of a medical convoy consisting of trucks ordered to transport the wounded a considerable distance from the front. The trip takes a week and the lodging of the wounded is organized every evening. The trucks could not be said to be assigned exclusively to medical transportation if, during the night, they were used to transport weapons or for other military purposes. However, this is a knotty problem centred on the definition of *temporary* assignment. It will be further considered below with the definition of the terms “permanent” and “temporary”.⁴⁰
- 2) It has to be placed under the control of a competent authority of a Party to the conflict. As the Party to the conflict is responsible for any abuse which could be committed, it is natural, as in the case of medical personnel, that it exercises control over the persons, equipment or supplies which are entitled to bear the protective sign, which is the case for medical transports. For such transports, there is, moreover, a more direct control than for personnel. The Party to the conflict exercises its control not only when it makes the assignment, but it does so constantly. In fact, such transports should be used under the control of a competent authority of the Party to the conflict, i.e., an authority dependent, ultimately, on the highest authority of that country.

Sub-paragraphs (h), (i) and (j)

386 As the transports have been defined, the particular names of these means of transportation by land, by water and by air, i.e., medical vehicles, medical ships and craft and medical aircraft, require very little further commentary.

387 It suffices to note that the expression “medical vehicle” is used here in a wide sense, as it covers all means of transportation by land. For example, railway vehicles may count as medical vehicles, just as motor cars do.

388 Moreover, it should be noted that the expression “medical ships and craft” covers all means of medical transportation by water, and that any means of transportation by water may become a medical transport. This was not the case in the Second Convention, which only protected hospital ships and coastal rescue craft. In the context of the Protocol, merchant ships, for example, assigned for a particular period to medical transportation may enjoy protection, as may barges

³⁹ Cf. commentary sub-para. (f), *supra*, p. 130.

⁴⁰ Cf. commentary sub-para. (k), *infra*, pp. 132-133.

used to transport the wounded on navigable canals outside the context of war at sea.

- 389** Finally, it is appropriate to mention, for the three categories of medical transports, that the fact that a means of transportation comes within the definition of a “medical vehicle”, “medical ships and craft” or “medical aircraft”, does not automatically imply protection. To enjoy protection, such transports must be used in accordance with certain well-established rules (*cf.* Articles 21-31).

Sub-paragraph (k)

- 390** In the Protocol a development can be discerned, when compared with the Conventions, with regard to the protection of permanent and temporary medical personnel and equipment or supplies (in the general sense of anything that is not personnel). As regards medical personnel, there is a tendency to reduce the difference between the protection granted permanent personnel and that granted temporary personnel, and to increase the possibility for all medical personnel to be employed on a temporary basis, while on the other hand, strictly insisting on the obligation of temporary personnel to be exclusively assigned to medical tasks during their assignment. For equipment and supplies the tendency is to be more flexible with regard to accepting their temporary use for medical purposes.

- 391** To be considered permanent, medical personnel, medical units and medical transports must be “assigned exclusively to medical purposes for an indeterminate period”.

- 392** We saw above what was meant by exclusive assignment.⁴¹ However, it is appropriate to note the explanation given by the Drafting Committee of Committee II for using the word “assign”, when the personnel, units and medical transports are permanent and the word “devote” when they are temporary:

“These different words have been chosen in order to make it clear, that the protection of permanent units or personnel starts at the time of the order, assignment or similar act creating the unit or giving a medical task to the personnel. The protection of temporary units or personnel, however, commences only when they have in fact ceased to do other than medical work”.⁴²

- 393** We will not reconsider the expression “medical purposes”, which has already been analysed.⁴³

- 394** On the other hand, it is appropriate to ascertain what is meant by the expression “for an indeterminate period”. This expression was also used in the original ICRC draft. The exact meaning to be given to this expression was not discussed in depth, but it is actually quite clear. It covers persons or objects which can be expected to be assigned definitively to medical purposes. Thus, if a hospital is

⁴¹ *Cf.* commentary sub-para. (c), *supra*, p. 125 and sub-para. (g), *supra*, p. 131.

⁴² *O.R.* XIII, p. 338, CDDH/II/379.

⁴³ *Cf.* commentary sub-para. (e), *supra*, pp. 128-129.

built with operating theatres and all the necessary equipment, this is certainly with a view to using it solely and definitively as a hospital. Similarly, if a soldier is assigned to the medical troops, it is to function in a medical capacity whenever he is called up. Obviously it may happen that a new hospital is built and the old one is converted into a school, or even into an arsenal or a barracks. It is also possible that as a result of a lack of combatants, the army is obliged to change the assignment of medical soldiers and to transfer them to active combat duty. However, this is dependent on unforeseeable elements. If at the outset the idea is to make the assignment of personnel, units or transports to medical purposes definitive (i.e., without imposing any time limit), they are permanent.

395 The qualification of the word “temporary” is more delicate. As the Drafting Committee of Committee II explained, as shown above, the protection of temporary personnel begins only when these units have in fact ceased to perform other tasks than medical work. Does this mean that protection ceases the moment they are no longer carrying out a medical task? This would render the protection too uncertain. The criterion to adopt is rather that of the new assignment or use. From the moment that medical personnel or medical objects concerned are devoted or assigned to other purposes, they lose their right to protection. However, the real question to be resolved is that of the minimum time that must be observed for the assignment or use to be termed “exclusive”. There is no doubt that by putting the emphasis on the exclusive character of use, a choice has been made in the Protocol for a certain guarantee. No time limit was fixed, but common sense dictates that to the greatest possible extent, there should be no change in the assignment of medical personnel or medical objects during an operation, as we tried to show above with the example of the medical convoy.⁴⁴ If the medical assignment is too short and changes too often, this could only serve to introduce a generally harmful mistrust regarding the protection of medical personnel and medical objects, particularly as the identification of such personnel and objects will in future be the same as that for permanent medical personnel and objects.

396 Nevertheless, it is important not to be dogmatic in this field as the contributory role of temporary medical personnel, sometimes for a very short period of time, may constitute a considerable source of aid. Sometimes it has even happened that soldiers who do not belong to the medical personnel have spontaneously acted as stretcher bearers and were respected while they were carrying out this task. It is therefore essential to find *in practice* an equilibrium between the flexibility necessary to ensure the greatest possible aid for the wounded, and strict rules regarding the exclusive character of medical assignment which is indispensable to the survival of this system of protection, based as it is, on trust.

397 The last sentence of the paragraph does not require a great deal of commentary. It explains that the rules of the Protocol relate to medical personnel, medical units and medical transports, irrespective of their permanent or temporary character, unless it is explicitly specified in the rule that only one of these categories is intended.

⁴⁴ Cf. commentary sub-para. (g), *supra*, pp. 130-131.

Sub-paragraph (I)

- 398 There is no real definition of the distinctive emblem in the Conventions. On the other hand, a description is given of “the emblem and distinctive sign of the Medical Service of armed forces” in Article 38 of the First Convention, which is then referred to as “the emblem”, “the distinctive emblem”, “the distinctive emblem of the Convention”, or even “the distinctive emblem conferring the protection of the Convention”. Mention is also made of “the distinctive flag of the Convention” or “the flag of the Convention”.
- 399 In passing, it should be noted that the expression “distinctive sign” is sometimes used to designate a sign which is not that of the red cross, as evidenced by the reference to a “fixed distinctive sign recognizable at a distance”, which should be displayed by members of the militia who do not form part of the armed forces of a Party to the conflict, and other volunteer corps, in order that their wounded and sick members may be covered by the First Convention.⁴⁵
- 400 The advantage of having a simple, clearly defined expression which is thereafter used throughout the Protocol, was soon admitted during the discussions for the formulation of the Protocols.⁴⁶
- 401 Committee II of the CDDH did not waste time on this problem, and with a slight modification of form, it retained the definition proposed in the 1973 draft. The three signs currently recognized in the Conventions and the Protocols, i.e., the red cross, the red crescent and the red lion and sun⁴⁷, displayed on a white ground, are thus covered by the expression “distinctive emblem” as used in the Protocol. Article 18 of the Protocol (*Identification*) also deals with the use of this emblem, while Annex I to the Protocol broaches the technical problems of identification.⁴⁸
- 402 At the Drafting Committee’s suggestion, the Committee nevertheless added a phrase to the definition of the original draft specifying that each of the emblems described is only covered by the expression “distinctive emblem” when “used for the protection of medical units and transports or medical and religious personnel, equipment or supplies”. This addition is justified by the fact that the use of the emblem of the red cross, the red crescent or the red lion and sun is only laid down in the Protocol for the purposes of protection.⁴⁹ The question of the use of the emblem purely as an “indicatory” sign, to indicate that a person or object is linked

⁴⁵ Cf. Art 13, para. 2, of the First Convention.

⁴⁶ The Committee given the task of examining a draft Protocol on the protection of the wounded and sick in international armed conflicts during the Conference of Government Experts in 1971 had already included the “distinctive emblem” among the definitions which it proposed introducing at the beginning of the Protocol.

⁴⁷ On the subject of the emblem of the red lion and sun, cf. moreover *supra*, Editors’ note.

⁴⁸ On this subject, cf. commentary Art. 18, *infra*, p. 221, and commentary Annex I, *infra*, p. 1137.

⁴⁹ However, on this subject, cf. Art. 18, para. 7, *infra*, pp. 233-234.

with the Red Cross institution, without either being able or intending to place it under treaty protection, is not actually broached in the Protocol.⁵⁰

- 403 In short, when reference is made in the Protocol to the distinctive emblem, this always refers to the use of the emblem for the purposes of protection: the addition made to the definition by Committee II of the CDDH removes any ambiguity in this respect.

Sub-paragraph (m)

- 404 It had already become clear, even during the first session of the Conference of Government Experts in 1971, that the problem of the security of medical transports could only be resolved by finding solutions adapted to “modern means of marking, pinpointing and identification”.⁵¹ In fact it is no longer possible today to base effective protection solely on a visual distinctive emblem. This inevitable development has led to the adoption of an Annex to the Protocol which introduces light signals which are visible over longer distances than emblems painted in red, and above all, signals which are not solely visual (radio signals, electronic means of identification etc.).
- 405 It would have been very complicated to have provided precise technical descriptions of the distinctive signals every time they are mentioned in the Protocol. It was therefore considered useful to adopt a definition of the “distinctive signal” which is given in Chapter III of Annex I to the Protocol, which contains these technical descriptions.⁵²
- 406 Moreover, the definition of the distinctive signal mentions the object of such signals: i.e., of permitting the identification of medical units and transports. In addition, it is specified that such use must be exclusive. This point is essential: the use of signals laid down in Chapter III of Annex I for other purposes would very probably lead to a great mistrust with respect to these signals and this would entail the risk of seriously weakening the system of protection provided for in the Protocol.

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⁵⁰ On the subject of the distinction to be made between the emblem used for the purposes of protection and the emblem used as an indicative sign, *cf. Commentary I*, pp. 323 ff. See also the Regulations on the Use of the Emblem of the Red Cross (Red Crescent and Red Lion and Sun) by National Societies, adopted by Resolution XXXII of the XXth International Conference of the Red Cross (Vienna, 1965).

⁵¹ *CE 1971, Report*, p. 28, para. 91.

⁵² On this subject, *cf. commentary Annex I, infra*, pp. 1185-1255.

Protocol I

Article 9 – Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.
2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:
 - (a) by a neutral or other State which is not a Party to that conflict;
 - (b) by a recognized and authorized aid society of such a State;
 - (c) by an impartial international humanitarian organization.

Documentary references

Official Records

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Other references

CE/7b, pp. 9-10. *CE 1971, Report*, p. 24, paras. 43-45. *CE 1972, Report*, vol. I, pp. 31-32, para. 1.7; p. 51, para. 1.103. *Commentary Drafts*, pp. 19-20 (Art. 9). *XXIIInd Int. Conf. RC, Report*, p. 10, para. 25; Annex, p. 45, DH/4/Corr.10.

Commentary

General remarks

- 407 In 1972, during the debates of the second session of the Conference of Government Experts, Committee I of this Conference, which was dealing with Part II, decided to add an article to the ICRC draft which extended the scope of Article 27 of the First Convention to medical aircraft.
- 408 As this extension concerned only Part II of the draft, the ICRC considered that it was necessary to insert an article concerning the scope of this Part only, right at the beginning (the specific scope of Part IV also in fact being defined at the beginning of that Part). This article, entitled “Field of application”, follows immediately upon the article devoted to the definitions at the beginning of Part II of the draft presented to the CDDH, where it becomes Article 9.
- 409 It was again debated at length by Committee II during the CDDH. The result of these debates included in particular the extension of the field of application mentioned in paragraph 1, which was considered to be too restrictive in the draft, and the amalgamation of paragraphs 2 and 3 of the draft into a single paragraph.

Paragraph 1

- 410 Although the article is simply entitled “Field of application”, the purpose is also mentioned in passing.
- 411 Thus there is no doubt that the essential objective of the whole Part is certainly the protection of the wounded, sick and shipwrecked. This is stated unequivocally at the beginning of paragraph 1.
- 412 On the other hand, it seemed too restrictive to limit the application of this Part to the wounded, sick and shipwrecked, and to medical personnel, units and transports. Even if this is not the principal objective, Part II does actually concern persons who are not included in these categories. Article 11 (*Protection of persons*) in particular, as noted at the time when Article 9 was presented, also deals with “persons in good health, prisoners of war and civilians”.¹
- 413 Then, *ratione loci*, it was noted during the CDDH discussions that it was too restrictive to limit the field of application of Part II only to the territory of the Parties to the conflict (the Protocol also being applicable on the high seas, in particular, and in disputed territory). It was therefore decided to delete any reference to application *ratione loci*, because it was considered that the application *ratione personae* in itself determined the field of application of the Protocol in a sufficiently clear manner. For reasons given in the preceding paragraph it was clearly not possible to exclude from this field of application any of the persons covered by the Protocol as a whole. As a result the field of application of Part II could be determined simply by referring to Article 1 of the

¹ O.R. XI, p. 55, CDDH/II/SR.7, para. 42.

Protocol (*General principles and scope of application*), and this solution was finally adopted. Some wondered whether it was necessary to retain this paragraph, which, they considered, did not provide any additional clarity. The precise definition of the field of application *ratione personae* (which is not given in Article 1 – *General principles and scope of application*), the reference to the purpose of Part II and the general balance of the article, from which paragraph 2 could not be omitted, justified the fact that it was retained.

414 According to Article 9, paragraph 1, Part II therefore applies “to all those affected by a situation referred to in Article 1”.²

415 The expression “all those who are affected by a situation referred to in Article 1” is, however, insufficiently precise to determine exactly the field of application *ratione personae* of Part II. Only an examination, article by article, of the whole of this Part, makes it possible to provide a more precise list of the persons to whom it applies in various circumstances. We will not attempt to draw up this list here, as it is of virtually no interest in that the scope of the provisions varies considerably, depending on the categories of persons concerned. Thus it is with regard to each one of these provisions that we will examine, whenever necessary, which categories of persons are covered.

416 Furthermore, it is significant that paragraph 1 does not mention the application of Part II to material elements such as medical units or transports. We will also examine these various material elements in the context of the provisions which directly concern them.

417 Finally, paragraph 1 of Article 9 refers to a fundamental principle of application which applies not only to Part II, but to all the Conventions and Protocols, namely, the fact that this Part applies to persons concerned *without any adverse distinction*. This principle was already formulated in each of the four Conventions,³ and it is also referred to in the fifth paragraph of the Preamble of the Protocol. It means that not all distinctions are prohibited, but only those designed to prejudice certain persons or categories of persons. Thus it is not contrary to the principle to give more care to seriously wounded persons, special food to persons whose state of health requires this, or an extra blanket to persons staying in particularly cold premises, or even to persons who are less able to tolerate the cold than others, for example, as a consequence of their place of origin. On the other hand, it is obviously incompatible with this principle to refuse a blanket, to reduce food rations, or to disadvantage any persons or categories of persons in any way solely because they belong to a particular race or practise a particular religion. In fact, a list is provided of the criteria on which no adverse distinction should be based. However, the list is not exhaustive, as it concludes: “or on any other similar criteria”. The criteria mentioned in this list include those which were mentioned in the Conventions,⁴ and a few others are added. As the debate on this list took place at the time of the discussion of the

² With regard to what exactly constitutes “a situation referred to in Article 1”, cf. commentary Art. 1, paras. 3 and 4, *supra*, pp. 39-56, and with regard to the persons “affected” by such a situation, cf. commentary Art. 75, para. 1, *infra*, p. 866.

³ Cf. in particular on this subject *Commentary I*, pp. 137 ff.

⁴ Cf. Art. 12, First and Second Conventions; Art. 16, Third Convention and Art. 13, Fourth Convention.

present Article 75 (*Fundamental guarantees*) by Committee III, this question is further dealt with in the commentary on Article 75.⁵

- 418 Furthermore, it is appropriate to underline the fact that on the basis of these criteria, it is only adverse distinctions that are prohibited and that accordingly certain fundamental distinctions may not be incompatible with the principle, such as, for example, the distribution of Korans to Muslims or Bibles to Christians. However, there is a need for considerable caution. Any distinction should always have a humanitarian and rational cause.

Paragraph 2

- 419 According to the First Convention, recognized organizations of neutral countries can make their medical personnel and units available to the Parties to the conflict in accordance with the procedure and rules laid down in Article 27 of this Convention. The aim of paragraph 2 is to extend this possibility to two other categories.
- 420 Reference was simply made in the draft to the “provisions of Article 27”, but in Article 9, paragraph 2, there is a mention of the *relevant* provisions. This amendment can be justified for a number of reasons.
- 421 The first relate to terminology. The terms “medical establishment and medical unit” have been replaced in the Protocols by the expression “medical unit”,⁶ while the expression “neutral State” has been replaced by the expression “neutral or other State not a Party to the conflict”.⁷
- 422 Finally, in the French original text, the expression “adverse Party” is used with a lower case letter in the Conventions but with an upper case letter in the Protocol.
- 423 However, there is also a substantive reason. In the Conventions there is a mention of “the State” which accepts the assistance of the aid society while the Protocol also considers entities which are not States as being possible Parties to the conflict.⁸ The reference to the *relevant* provisions of Articles 27 and 32 of the First Convention makes it possible to overcome this difference and to read the articles of the Conventions to which reference is made, within the meaning of the Protocol. Furthermore it is clear that, at any rate for the States which are Parties to the Protocol, Article 27 of the First Convention will itself apply to the Parties to the conflict within the meaning of the Protocol, and not only to States, even if the text of the Protocol may seem to indicate the contrary. Even though the Conventions have not been formally revised, the Protocol has modified the whole system on certain points.
- 424 On the other hand, it should be noted that the draft referred only to Article 27 of the First Convention, but Committee II of the CDDH quite logically decided to add a reference to Article 32 of this Convention, which deals with the fate of persons covered by Article 27 if they fall into the hands of an adverse Party.

⁵ Cf. *infra*, p. 870. See also commentary Art. 2 of Protocol II, *infra*, p. 1358.

⁶ In this respect, cf. commentary Art. 8, sub-para. (e), *supra*, pp. 128-129.

⁷ In this respect, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61.

⁸ In this respect, cf. commentary Art. 1, para. 4, *supra*, pp. 41-56.

- 425 Now let us read Article 9, paragraph 2, of the Protocol, in conjunction with Articles 27 and 32 of the First Convention in order to understand exactly what the Protocol adds here.
- 426 According to the First Convention, “medical personnel and units”, and according to the Protocol, “permanent medical units and transports [...] and their personnel”, can be made available to the Parties to the conflict.
- 427 The medical units mentioned in the Conventions now apply to both mobile medical units and to the means of transport referred to in the Protocols: thus it is quite clear, on the one hand, that only *mobile* medical units can be made available because it is essential that they can be transported, while on the other hand, the expression “medical units” in the Conventions covers the means of medical transport, these transports being by definition, mobile medical services.⁹ The insertion of the term “permanent” in the Protocol does not, moreover, constitute a restriction compared with the Conventions. The latter only use the concepts “permanent” and “temporary” with regard to medical personnel, but not with regard to equipment. However, it is clear that it would be contrary to the Conventions to use the medical units lent by a national aid society for purposes other than medical purposes. Thus units which are exclusively destined for medical purposes during the entire period of their use in the conflict meet the qualification “permanent” as understood in the Protocol.¹⁰ Finally, the question of hospital ships used by societies or private persons of neutral or other States not Parties to the conflict is dealt with elsewhere in the Conventions,¹¹ and has not been included in the Protocol as is expressly mentioned in the brackets in this paragraph.
- 428 On the other hand, the text of the Protocol is slightly more restrictive than that of the First Convention with regard to the personnel that may be made available. In fact the Convention permits the authorized society to give the assistance of its personnel independently from that of its medical units, while the Protocol only envisages making available the personnel attached to medical units and transports which have themselves been put at the disposal of one of the Parties to the conflict. However, this restriction will obviously not apply to the societies authorized by Article 27 of the First Convention, which retain the possibility of sending medical personnel independently of sending medical units or transports; this follows from this article and the conditions which it lays down. Moreover, the commentary to the initial draft of this article,¹² which has not been changed on this point, indicates that there was no intention of being more restrictive than the Conventions were, and one can hope that as a result some flexibility will be retained in practice.
- 429 However, as has been shown, the purpose of paragraph 2 is to extend to other categories than the recognized societies of neutral or other States not Parties to the conflict the possibility of making available to the Parties to the conflict medical personnel, units and transports. According to the Protocol, the following categories may be so authorized:

⁹ *Commentary I*, p. 280.

¹⁰ With regard to this definition, cf. commentary Art. 8, sub-para. (k), *supra*, pp. 132-133.

¹¹ In Art. 25 of the Second Convention.

¹² Cf. commentary Art. 9, paras. 2 and 3, of the Draft, *Commentary Drafts*, p. 20.

1. *Neutral and other States not Parties to the conflict*

430 This permits the States themselves to take the initiative with regard to making available the personnel and equipment in question, obviously to the extent that they are not Parties to the conflict.

431 The following conditions are imposed on this:

- a) authorization by the Party to the conflict concerned (Article 27, First Convention);
- b) notification of this consent to the adverse Party of the Party mentioned under a);
- c) supplying the medical personnel with identification, as laid down in Article 40 of the First Convention, as supplemented by Articles 1 and 2 of Annex I to the Protocol;
- d) control of the Party to the conflict concerned over the personnel and equipment put at its disposal;
- e) notification by the Party to the conflict concerned to the adverse Party, of any use made of this personnel and equipment, prior to their use.

432 The condition laid down in Article 27 regarding the consent of the government of the State on which the aid society depends is obviously irrelevant as the present initiative is taken by the State itself.

2. *The recognized and authorized aid societies of the States mentioned under point 1*

433 This concerns the category already covered by Article 27 of the First Convention. Admittedly this article did not mention *aid* societies, but as the commentary on Article 27 reveals, the societies referred to are the same as those mentioned in Article 26, namely, the National Red Cross, Red Crescent and Red Lion and Sun Societies, as well as the other voluntary aid societies.¹³ In practice, this “will always, or nearly always, be a society which has already been authorized to assist the Medical Service of its own armed forces”.¹⁴

434 Conditions a) to e) enumerated above under point 1 have also to be fulfilled by the societies concerned, with the additional condition of having the consent of their own government as mentioned explicitly in Article 27 of the First Convention, and repeated in Article 9, paragraph 2, of the Protocol, to ensure that the societies are “authorized”.

¹³ Cf. *Commentary I*, p. 230 and p. 232, para. 3.

¹⁴ *Ibid.*, p. 230.

3. *The impartial international humanitarian organizations*

- 435 The 1973 draft referred to organizations with an international character in a broader sense. It adopted a suggestion made during the Conference of Government Experts which, in accordance with the author's intention, was to have permitted international airlines in particular to make aircraft available for the purposes of medical transportation.¹⁵
- 436 Following a proposal of its Drafting Committee, Committee II added two supplementary characteristics required of the organizations concerned, viz., their impartiality and their humanitarian character.
- 437 This reference to impartial international humanitarian organizations, which can be either governmental or non-governmental organizations, amounts to an open invitation, though it is not currently possible to designate the organizations which comply with the required criteria and are ready to make medical personnel, units and transport available.
- 438 The conditions required of the international organization are the conditions listed under a) to e) above, with regard to point 1. The consent of the government of the country where the organization is established is irrelevant here as it is an international organization. On the other hand, it must comply with the two characteristics mentioned in the Protocol: i.e., it must be impartial and have a humanitarian character.
- 439 An organization can be described as being "impartial" when it "fulfils the qualifications of being genuinely impartial".¹⁶ This implies that it observes the principle of non-discrimination in its activities and, when providing medical aid as laid down in Article 9, does not make

"any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria".

In other words, the organization must respect the principle of impartiality, which is one of the fundamental principles of the Red Cross.

- 440 With regard to the organization's "humanitarian character", it is necessary first of all that its activities in the context of the armed conflict retain a purely humanitarian character. However, it is equally essential that the organization *itself* has a humanitarian character, and as such, follows only humanitarian aims. This restriction excludes organizations with a political or commercial character. Nevertheless, it is not possible to designate precisely all the organizations covered by the definition,¹⁷ and it will be necessary to examine every case independently.

Y.S.

¹⁵ Cf. O.R. XII, p. 224, CDD/II/SR.75, para. 42.

¹⁶ In this respect, see O.R. VI, p. 68, CDDH/II/SR.37, para. 22.

¹⁷ Cf. Art. 10/10/10/11 common to the four Conventions. Besides, on the meaning of this expression, cf. *Commentary I*, pp. 118 and 109-110.

Article 10 – Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Documentary references

Official Records

O.R. I, Part I, p. 131; Part III, p. 6 (Art. 10). *O.R.* III, pp. 57-59 (Art. 10). *O.R.* VI, p. 69, CDDH/SR.37, para. 22 *in fine*. *O.R.* XI, pp. 64-79, CDDH/II/SR.8, para. 33-SR.10, para. 41; p. 222, CDDH/II/SR.23, para. 20 *in fine*; pp. 327-334, CDDH/II/SR.32, paras. 1-43. *O.R.* XIII, pp. 13-16, CDDH/49/Rev.1, paras. 59-74; p. 67, CDDH/221/Rev.1, paras. 27-29; p. 167, *id.*, Annex II.

Other references

CE/7b, pp. 10-11 (Art. 2). *CE 1971, Report*, p. 24, para. 47. *CRCE 1971, Report*, p. 24 (Art. 12). *CE 1972, Basic Texts*, pp. 8-9 (Art. 12). *CE 1972, Commentaries*, Part I, pp. 29-30 (Art. 12). *CE 1972, Report*, vol. I, p. 33, paras. 1.13-1.15 (Art. 12); vol. II, p. 3 (Art. 12); p. 26, *CE/COM I/2*; p. 27, *CE/COM I/3. Commentary Drafts*, p. 20 (Art. 10).

Commentary

General remarks

- 441 The final version of the text of Article 10 that was adopted is close to the first draft.
- 442 The proposal to add shipwrecked persons to those persons already covered by the article was adopted. On the other hand, the proposal discussed above with

regard to Article 8 (*Terminology*)¹ to treat persons who are in a dangerous situation on land, in a hostile environment, particularly the jungle or the desert, in the same way as the shipwrecked, was not finally adopted. Similarly, the proposal to add two paragraphs relating to the search, accommodation and exchange of the wounded, sick, shipwrecked and dead, was rejected, as many delegates considered that these matters were sufficiently provided for in the Conventions. However, it is worthy of note that they were included in Articles 32-34, though only to a very limited extent.

- 443 The question of the consent required from the patient to any surgical intervention was the subject of an amendment which was discussed, though it was finally dealt with under Article 11 (*Protection of persons*), paragraph 5.

Paragraph 1

- 444 This paragraph repeats one of the fundamental principles of international humanitarian law applicable in cases of armed conflict. It was not absolutely necessary to mention this in the context of the Protocol as, clearly, it is already prominently stated in the Conventions.² The reason for nonetheless repeating the principle was to clearly emphasize its importance, for almost all the obligations arising from Part II follow from it and the protection granted to medical personnel is justified only by reference to this principle. Thus the repetition of this principle at the beginning of this Part was indispensable for its harmonious structure, particularly as the Protocol covers all wounded, sick and shipwrecked persons, with no distinction between military and civilian persons.

- 445 In the context of an international armed conflict this paragraph concerns all the wounded, sick and shipwrecked in the sense given to these terms in the Protocol.³ Committee II considered that it was appropriate to add the expression “to whichever Party they belong” to the text of the 1973 draft in order to emphasize this point. In this way it is clearly stated that every Party to the conflict must respect and protect its own wounded, sick and shipwrecked – which may seem self-evident, though it is perhaps a useful reminder – and above all, that the wounded, sick and shipwrecked of the adverse Party are entitled to the same treatment. As we well know, this element of respect and protection of persons in the power of the enemy is certainly one of the essential characteristics of international humanitarian law.

- 446 The concepts of “respect” and “protection” are taken from the Conventions. The first concept was introduced as far back as the 1906 revision, the second at the time of the 1929 revision. *Respect* means “to spare, not to attack”, while *protect* means “to come to someone’s defence, to lend help and support”. Thus it is prohibited to attack the wounded, sick or shipwrecked, to kill them, maltreat them or injure them in any way, and there is also an obligation to come to their rescue.⁴

¹ Cf. commentary Art. 8, sub-para. (b), *supra*, p. 118.

² Art. 12, First and Second Conventions; Art. 16, para. 1, Fourth Convention.

³ On this subject, cf. commentary Art. 8, sub-paras. (a) and (b), *supra*, pp. 116-124.

⁴ On the subject of these ideas, see also *Commentary I*, pp. 134-135.

Paragraph 2

447 The principle introduced in the first sentence of this paragraph regarding the humane treatment of the wounded, sick and shipwrecked, is also taken from the Conventions.⁵

448 As stated in the Commentary to the First Convention:

“It is not sufficient to respect the wounded. They require *care*. If a soldier who is *hors de combat* is respected and protected against injury of any kind, but is at the same time left to struggle alone against the effects of his wound or his sickness, he runs a great risk of succumbing. There is therefore a positive, as well as a negative, obligation: the wounded and sick must be given such care as their condition requires. This fundamental principle has remained unchanged since 1864.”⁶

449 Moreover, humane treatment does not refer only to medical treatment, but applies “to all aspects of a man’s existence”.⁷ It is required under *all circumstances* from the moment that one comes across a wounded, sick or shipwrecked person.

450 In practice, this requirement of humane treatment will generally be observed after the requirement for respect and protection. The latter requirement should already be taken into account during the battle, but only afterwards when it is possible to come and take care of the wounded, can they be treated humanely and cared for.

451 The second stipulation was added by Committee II from a concern for the reality of the situation. The care required by the condition of the wounded, sick and shipwrecked shall be given them *to the fullest extent practicable*. This is again an expression of the maxim “no one is expected to do the impossible”, and one might say that this addition to the text of the first draft was already implicit in it. It is obvious that some wounded or sick persons could be saved, or at any rate be better cared for, in the clinics of wealthy countries which have the most advanced resources at their disposal. However, the requirement imposed here relates to the material possibilities existing in the place and at the time that the wounded person is cared for. What is required is that everyone does his utmost. If, because there is no doctor, an orderly is left to care for the wounded on his own, he must do so to the best of his ability. If there is no well-equipped clinic and the wounded must be cared for in an antiquated hospital, an attempt should nevertheless be made to use it to the maximum of its capacity.

452 An additional requirement is imposed with regard to the performance of these duties vis-à-vis the wounded, sick and shipwrecked in the second sentence of paragraph 2: *There shall be no distinction among them founded on any grounds other than medical ones*.

⁵ Cf. Art 12, para. 2, First and Second Conventions.

⁶ *Commentary I*, pp. 136-137.

⁷ *Ibid.*, p. 137.

- 453** Article 12 of the First and Second Conventions contains a non-exhaustive list of the discriminatory criteria which cannot be applied with regard to the victims. As we have seen, this list was adopted and developed in Article 9 (*Field of application*), paragraph 1, which determines the field of application *ratione personae* of Part II. The principle laid down there applies to the Part as a whole and there was no need to repeat it in Article 10. Thus the sentence which was finally included was not indispensable. Nevertheless it is useful, as it emphasizes a particular application of the principle which was stated in different words in Article 12, paragraph 3, of the First and Second Conventions: “Only urgent medical reasons will authorize priority in the order of treatment to be administered”. This is a reminder to the personnel taking care of the wounded that they shall ignore the nationality or uniform of the person they are taking care of. The only reason for treating one patient before another shall be because his wounds require more urgent care, independently of any non-medical considerations.
- 454** On the other hand, neither the Conventions nor the Protocols specify which medical criteria should be observed. For example, should an overburdened doctor launch into a long and hazardous operation on an extremely seriously wounded patient, or should he “sacrifice” this patient for the benefit of other patients whose chances of survival are better? It is above all medical ethics and the doctor’s own conscience which must provide the answer to such a question.⁸

Y.S.

⁸ On the subject of medical ethics, *cf.* commentary Art. 16, para. 1, *infra*, pp. 200-202.

Protocol I

Article 11 – Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
 - (a) physical mutilations;
 - (b) medical or scientific experiments;
 - (c) removal of tissue or organs for transplantation,except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Documentary references

Official Records

O.R. I, Part I, pp. 131-132; Part III, p. 6 (Art. 11). *O.R.* III, pp. 60-62. *O.R.* VI, p. 69, CDDH/SR.37, paras. 23-27; p. 75, *id.*, Annex (Australia); p. 78, (Israel); p. 81 (United States of America). *O.R.* XI, pp. 68-71, CDDH/II/SR.9, paras. 11-12, 15 and 23; pp. 79-82, CDDH/II/SR.10, paras. 42-58; pp. 121-126, CDDH/II/SR.14, paras. 15-58; p. 149, CDDH/II/SR.16, para. 43; p. 152, paras. 58-64; p. 183, CDDH/II/SR.19, para. 59; pp. 222-226, CDDH/II/SR.23, paras. 21-48; pp. 294-302, CDDH/II/SR.29, paras. 6-46; p. 305, CDDH/II/SR.30, paras. 3-4; pp. 327-335, CDDH/II/SR.32, paras. 1-44; pp. 419-422, CDDH/II/SR.39, paras. 2-20. *O.R.* XII, pp. 463-464, CDDH/II/SR.98, paras. 58-61; p. 465, CDDH/II/SR.99, paras. 1-5. *O.R.* XIII, pp. 16-17, CDDH/49/Rev.1, paras. 75-81; pp. 67-70, CDDH/221/Rev.1, paras. 30-37; pp. 168-169, *id.*, Annex II (Art. 11); pp. 221-223, CDDH/II/272; p. 359, CDDH/406/Rev.1, para. 27; pp. 393-394, *id.*, Annex (Art. 11).

Other references

CE/7b, pp. 11-12 (Art. 3). *CRCE 1971, Report*, p. 23. *CE 1971, Report*, p. 24, para. 48; p. 29 (Art. 4). *CE 1972, Basic Texts*, p. 9 (Art. 13). *CE 1972, Commentaries*, Part I, p. 31 (Art. 13). *CE 1972, Report*, vol. I, pp. 33-34 (Art. 13); vol. II, p. 26, *CE/COM I/2*; p. 27, *CE/COM I/3*; p. 31, *CE/COM I/15, Commentary Drafts*, pp. 20-21 (Art. 11).

Commentary

General remarks

- 455 The foremost aim of draft Article 11 was to clarify and develop the protection of persons protected by the Conventions and the Protocol against medical procedures not indicated by their state of health, and particularly against unlawful medical experiments.¹
- 456 This aim is certainly achieved by the article as it was finally adopted. However, numerous modifications or nuances were incorporated in the original draft and various elements were added. The most important modification concerns the categories of persons covered by the article. As regards the additions, these are mainly concerned with the possible derogations from explicit prohibitions on

¹ Cf. Art. 12, para. 2, First and Second Conventions; Art. 13, para. 1, Third Convention; Art. 32, Fourth Convention.

particular acts, the breaches of the rules formulated at the beginning of the article, the possibility of refusing surgical operations and the keeping of medical records. We will examine these rules in greater detail in the analysis of each paragraph.

- 457 Nevertheless, it is appropriate to point out a more general question which was raised in Committee II, i.e., the place of this article. Some considered that it would be more logical to place it in Section III of Part IV of the Protocol, entitled “Treatment of persons in the power of a Party to the conflict”. In fact, the similarity between Article 11 and Article 75 (*Fundamental guarantees*), which is in Part IV, Section III, cannot be denied. Article 75 (*Fundamental guarantees*) covers “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol”, and “in so far as they are affected by a situation referred to in Article 1 of this Protocol”.
- 458 The connection with a situation referred to in Article 1 of the Protocol (*General principles and scope of application*)² exists for both articles.
- 459 Furthermore, certain persons covered by Article 11 are also covered by Article 75 (*Fundamental guarantees*), and although the latter endeavours to cover fundamental guarantees as a whole, and not merely guarantees relating to medical abuses, these are included. To some extent the field of application *ratione personae* of the two articles thus overlap, and the field of application *ratione materiae* also seems to do so. Thus, for example, the question of mutilation, which a Party to the conflict is prohibited from committing, even on its own nationals who are detained for a reason related to the conflict, seems to fall under Article 11, as well as Article 75 (*Fundamental guarantees*). However, we have deliberately used the word “seems”, as there is a difficulty here which did not go unnoticed by the authors of the Protocol. Paragraph 1 of Article 75 (*Fundamental guarantees*) indicates that the provisions of this article apply only to persons covered by it to the extent that they “do not benefit from more favourable treatment under the Conventions or under this Protocol”. With regard to the persons covered by the two articles, it is therefore the provisions of Article 11 which apply to the matters dealt with by that article, while the provisions of Article 75 (*Fundamental guarantees*) relating to other matters also apply to them.³
- 460 However, there are basically two reasons why Article 11 was finally retained in Part II, viz.:
- a) this article concerns, above all, as regards the rights which it grants, the wounded, sick and shipwrecked, both civilian and military, who are protected by Part II as a whole;
 - b) the obligations which it lays down are primarily addressed to medical personnel whose rights and duties are also essentially defined in Part II.

² With regard to this expression, *cf. infra.*, pp. 153-154.

³ On this subject, *cf. also* commentary Art. 75, para. 1, *infra*, pp. 866-869.

Paragraph 1*First sentence*

461 This sentence expresses the principle of the article and determines the persons to whom this principle applies in the context of the Protocol.

462 First of all, health and integrity must not be endangered. Physical health is endangered, for example, if a wound is allowed to become infected through lack of hygiene or care, or because there is no medication, whether this is because of a harmful intention or gross negligence in the light of the local conditions and circumstances. Endangering physical integrity could be, for example, the amputation of an arm for no reason, or allowing a wound to become infected to the point where amputation becomes necessary. Thus these two elements – health and integrity – are often related, though this is not necessarily always the case. Matters affecting health may not be dangerous to a person's integrity, and experimental surgical operations can be performed with all possible precautions to ensure that the health of the patient undergoing the operation is not affected. This is why it is important to prohibit endangering both of these elements.

463 In addition, it is also prohibited to endanger mental health and integrity. This refers to medical experiments which affect the mental equilibrium of persons subjected to them, as well as, for example, the practice of leaving a person in complete isolation for a very long period of time. In addition, mental health and integrity can be particularly endangered by the practice known as "brainwashing", i.e., the massive injection of propaganda by more or less scientific means. Here too, mental health and mental integrity generally go together, although this is not always the case, and the prohibition on endangering both makes any loopholes impossible.

464 The original draft referred to acts and omissions "harmful to the health or to the physical or mental well-being". The article, as it is now, goes further when it states that health and integrity *shall not be endangered*. Indeed, it is possible to endanger health, for example, by leaving a contagious patient together with another detainee, without this necessarily having any effect.⁴

465 Moreover, the text refers to acts or omissions. The traditional term used in continental criminal law is "acts of commission or omission".

466 In fact, it is just as possible to endanger a person's health or integrity, for example, by removing an organ unnecessarily, as by depriving him of food or drink, or leaving unattended a wound which is becoming infected. Moreover, an omission may be voluntary (intent to harm his health), or be the result of gross negligence (failure to take care of persons for whom one is responsible).

467 These acts or omissions which endanger health or integrity must be *unjustified*. This term was discussed in Committee II, and some delegations requested that it be deleted. The reason that it was finally retained was that some justified acts or omissions can in fact endanger health. This is the case in particular when a doctor decides to operate in an almost hopeless case. This operation may result in the patient dying even sooner, but it may also save his life. It is impossible to exclude

⁴ On this subject, *cf.* also *infra*, p. 159 and note 16.

such a risk in all cases, and it did not seem wise to paralyse doctors' actions by an excessively strict provision on this point. Moreover, it should be noted that the act or omission must obviously be "justified" on medical and ethical grounds, with two exceptions: this article is not intended to prevent the execution of persons who have been lawfully condemned to death, and the omission of a surgical operation which is justified by the refusal of the person who has to undergo this operation.⁵

468 Secondly, this first sentence defines the persons covered by the application of the principle in the context of the Protocol. These are primarily all persons in the power of the adverse Party, i.e., prisoners of war, civilian internees, persons who have been refused authorization to leave the territory of this adverse Party, and even all persons belonging to a Party to the conflict who simply find themselves in the territory of the adverse Party. The term "territory of the adverse Party" is used here to mean the territory in which this Party exercises public authority *de facto*. However, enemy aliens need not necessarily have anything to do directly with the authorities: the simple fact of being in the territory of the adverse Party, as defined above, implies that one is "in the power" of the latter. In other words, as specified in the commentary on the Fourth Convention, the expression "in the power" should not necessarily be taken in the literal sense; it simply signifies that the person is in the territory under control of the Power in question.⁶ Finally, the inhabitants of territory occupied by the adverse Party are also in the power of this adverse Party.

469 Moreover, other persons are also covered by the article: persons "interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1". Thus these are persons who do not come under the authority of the adverse Party. In fact, as we have just seen, the latter (i.e., those who are subject to the authority of the adverse Party) benefit from a very wide protection because of the broad concept covered by the expression "in the power". Obviously such a wide protection was not justified for others: for example, there is no reason to protect *a priori* a national of a State not Party to the conflict⁷ who is in the territory of a Party to the conflict. On the other hand, it seemed appropriate to protect any person from the moment his freedom of movement is denied because of hostilities or, more specifically, because of a situation referred to in Article 1 of the Protocol (*General principles and scope of application*).

470 Apart from the nationals of the adverse Party, all persons in territory controlled by a Party to the conflict may therefore be covered. Obviously the article is primarily concerned with persons protected *stricto sensu* by the Conventions and the Protocol, but it is also concerned with persons who are not, viz.:

- nationals of neutral States or other States not Parties to the conflict which have normal diplomatic relations with this Party to the conflict, who are in the territory of the latter (in occupied territory they are protected persons in the sense of the Fourth Convention);

⁵ On this subject, *cf.* commentary para. 5, *infra.*, pp. 160-161.

⁶ *Commentary IV*, p. 47; *cf.* also commentary Art. 75, para. 1, *infra*, p. 866.

⁷ On the exact meaning of the expression "neutral or other States not Parties to the conflict", *cf.* commentary Art. 2, sub-para. (c), *supra*, p. 61. For the purpose of simplification, we refer here to "States not Parties to the conflict".

- nationals of a co-belligerent State;
- persons who have become refugees after the outbreak of hostilities;⁸
- nationals of States not Parties to the Protocol (whether or not these States are engaged in the conflict);
- the nationals of the Party to the conflict.

However, all these persons are covered only if two conditions are met:

- a) they have been deprived of liberty in one way or another, whether they are detained in prison, hospital or any other place, interned in a camp or even simply confined to a designated residence;
- b) they are deprived of liberty as a result of a situation described in Article 1. The draft stated more simply: “as a result of hostilities”. However, it was justifiably noted that the Conventions and the Protocol also apply in cases of occupation where there is no military resistance (*cf.* Article 2, paragraph 2, common to the four Conventions). The formula which was finally adopted removes any ambiguity by referring to Article 1 (*General principles and scope of application*), which defines the situations in which the Protocol applies, and which in turn refers to Article 2 of the Conventions.⁹

471 However, it is also necessary to define the relationship which must exist between the persons concerned and such a situation, since these persons must be deprived of liberty *as a result* of such a situation.¹⁰

472 Finally, it should be noted that the principle laid down in Article 11 is quite generally accepted, even outside armed conflict, in the context of human rights. However, it is not immaterial whether or not a person is covered by the Protocol, as the system of supervision and of sanctions is more strict than with regard to the rules for the protection of human rights.

Second sentence

473 As mentioned above, Article 11 is basically aimed at preventing medical procedures not indicated by the state of health of the persons concerned. The principle laid down in the first sentence goes beyond the context of medical procedures. For example, the fact that a prison warden deprives detainees of food cannot be considered to be a medical procedure; though the principle covers such acts or omissions. However, in the second sentence of paragraph 1 the concern which is at the root of the article is revealed again, and as a result of the general principle contained in the first sentence, is applied to medical procedures.

474 A medical procedure must be understood to mean any procedure which has the purpose of influencing the state of health of the person undergoing it. Obviously this refers to any surgical operation, but it also covers medication or even diets or courses of treatment prescribed for medical reasons. If a negligent warden fails

⁸ On this subject, *cf.* Art. 73. It is to be noted in this respect that stateless persons, even if they were not considered as such until after the commencement of hostilities, are protected by Article 4, para. 1, of the Fourth Convention. *Cf.* commentary Art. 73, *infra*, p. 845.

⁹ *Cf.* commentary Art. 1, paras. 3 and 4, *supra*, pp. 39-56.

¹⁰ On this subject, *cf.* commentary Art. 75, para. 1, *infra*, pp. 866-867.

to provide adequate food for the detainees for whom he is responsible, this could not be considered as a medical procedure. On the other hand, a doctor who prescribes a diet is certainly performing a medical procedure. The French text uses the word “acte”, which, however, must not be given a more restricted meaning than the broader term “procedure” used in the English text.

475 In order to be authorized, a medical procedure must fulfil two (cumulative) conditions:

- a) It must be indicated by the state of health of the person concerned. If this condition had been laid down outside the context of the article, and in particular without being accompanied by a second condition, it would have been inadequate and could even have justified the worst forms of abuse: it is conceivable that a tyrannical régime would seek to justify the physical elimination of the chronically sick or mentally retarded with arguments relating to the state of health of the persons concerned. However, there is no room for doubt here. The reason for a medical procedure must be the improvement of the state of health of the person concerned: this is obviously a humanitarian perspective. Thus this reason may be either to improve the health of the person to whom the procedure is applied, or to relieve his suffering. As health also covers physical well-being, it can be argued that the relief of suffering amounts to a short-term improvement in health. Obviously a knotty problem would arise if this short-term improvement is at the expense of the patient's health in the long term. This problem becomes even more acute in cases of active or passive euthanasia aimed at terminating the intolerable suffering of persons whose death is inevitable. The condition laid down here is certainly not aimed at answering this type of problem which belongs to medical ethics. It is limited to prohibiting medical procedures which are not performed for the benefit of the person concerned. The medical norms mentioned under the second condition must provide the answers to such questions.
- b) Secondly, the medical procedure must be consistent with generally accepted medical standards which the Party responsible for the procedure would apply under similar medical circumstances to its own nationals who are at liberty. This second condition contains a universal element – generally recognized medical standards – tempered by an element related to local medical conditions.

476 Unfortunately “generally accepted medical standards” have not been assembled in a universally adopted international instrument, and it is certainly beyond the scope of this commentary to attempt to list these standards. At most it is possible to mention certain instruments which give some indications of this matter.¹¹ However, it is clear that some standards are undeniable, such as that

¹¹ In this respect we refer in particular to the *Declaration of Geneva* (modern version of the Hippocratic Oath) (1948), the *International code of medical ethics* (1949), the *Rules of medical ethics in time of war* (1962) and the *Rules to ensure aid and care for the wounded and sick, particularly in time of armed conflict* (1962). All these instruments were adopted by the World Medical Association, the latter two jointly with the International Committee of Military Medicine and Pharmacy and the ICRC. For a thorough study of this question and accompanying bibliography, cf. in particular, M. Torrelli, *Le Médecin et les droits de l'homme*, Paris, 1983.

expressed above, which requires that medical procedures are performed in the interests of the patient. Thus, although the reference to generally accepted medical standards is insufficient to precisely define the field which it covers, it does allow for certain lines to be drawn. There is no doubt that there are “minimum standards”, though it is certainly necessary to define these better. The humanitarian perspective from which we must consider the state of health of a person on whom a medical procedure is performed, as in the case quoted above, is a good example.

- 477 However, there are also norms which, even though they are generally accepted, cannot be universally applied, because of insufficient means. This applies, for example, to the norms concerning the minimum medical environment for a given population, or the training of medical personnel. It would be pointless to ignore reality and require the strict application of standards by impecunious States which cannot observe such standards in peacetime with regard to their own population. Thus the criterion which has been used is the following: the medical personnel of a Party to the conflict must treat the persons referred to in this article in accordance with the criteria that it would apply in similar medical circumstances – i.e., having regard to the severity of the case concerned and the availability of medical personnel and means – to the nationals of the Party to the conflict itself who are *in no way deprived of liberty*. This last condition is appropriate to the extent that, as we saw above, the persons who are nationals of the Party to the conflict and are deprived of liberty by that Party, can be amongst the persons covered by the article. Thus reference is not made here to such persons or to any other detainees, but to the population as a whole. In other words, the Parties to the conflict are required not to make any discrimination in the application of medical standards between the persons covered by the present article and their own population as a whole.

Paragraph 2

- 478 This paragraph supplements the preceding paragraph. Without purporting to enumerate the procedures prohibited by paragraph 1 – the text states: “it is, in particular, prohibited” – it highlights a certain number of medical procedures which can easily give rise to abuse and which are in principle prohibited. These are:

- a) physical mutilations, i.e., particularly amputations and injury to limbs;
- b) medical or scientific experiments. Indeed, the persons concerned here are especially vulnerable in this field. Thus it was important to specify the prohibition against using them as guinea-pigs;
- c) removal of tissue or organs for transplantation. The possibility of transplanting organs for therapeutic purposes is relatively new, but it is obviously essential to observe very strict ethical rules with regard to the donor. The risk of abuse with regard to the persons concerned here is clear, and this explains the specific mention of operations such as the removal of tissue, especially skin, and of blood – which are prohibited for the same reasons.

- 479 However, there are some logical exceptions if the procedures are “justified in conformity with the conditions provided for in paragraph 1”, i.e., essentially, as

we have seen, if they are conducive to improving the state of health of the person concerned.

480 In this sense it is clear that some mutilations may be indispensable, such as the amputation of a gangrenous limb.

481 On the other hand, it is far less common for medical or scientific experiments to conform with the criteria of paragraph 1. Experiments carried out purely for scientific purposes are in any case categorically excluded. The only case in which such an experiment might be allowed if it could be considered as a medical experiment might be if a doctor tried out a new cure on a person who definitely could not be cured through the known methods. However, this is a marginal case which once again raises questions of medical ethics more than anything else.

482 With regard to the removal of organs for transplantation, this is prohibited in any case because this cannot be justified by referring to the state of health of the person donating the organ. Such practices are not completely out of the question in time of peace (as in the case of a father donating a kidney to his son), but it was essential to prohibit them totally with regard to the persons concerned here, as the danger of abuse would have been too great. However, this obviously does not prevent removals carried out for therapeutic purposes, as in the case of appendicitis or cancerous organs.

483 The removal of diseased tissue is also permitted for therapeutic purposes. The transplantation of healthy tissue is not excluded either if this is carried out on one and the same person (for example, the removal of skin to repair a badly burned face). As regards the removal of tissue for transplantation on other persons, this is prohibited in principle by paragraph 1, as it is not carried out for the benefit of the person whose tissue is removed. However, we will see below that a derogation has been made to this rule.¹²

484 If they are not justified by paragraph 1, and apart from the minor derogation permitted in paragraph 3 with regard to the removal of tissue, the acts mentioned in paragraph 2 are absolutely prohibited. In this sense it is explicitly stated that such acts could not be justified even with the consent of the person concerned. This rule applies in any case to all medical acts which are not performed in the interests of the person undergoing the treatment. This unequivocal statement is intended to prevent any possibility of justification on such grounds, and to prevent pressure being improperly exerted on the persons concerned here to obtain their consent.

Paragraph 3

485 This paragraph permits a slight exception to the strict prohibition, contained in paragraphs 1 and 2, to subject the persons concerned here to medical procedures which are not solely undertaken for their own benefit. It only concerns the withdrawal of blood for transfusion and the removal of skin for grafting. In both cases such removal may be invaluable from the medical point of view, and of considerable practical importance. Large numbers of the wounded may die for

¹² Cf. commentary para. 3, *infra*.

lack of blood for transfusions and skin grafts can also save lives, especially in cases of severe burns. Thus it seemed to be going too far to totally prohibit donations of blood and skin from persons covered by Article 11, particularly as the risk of abuse in such cases is not as great. Besides, the article itself imposes very rigorous rules on such removals.

- 486 First, the removals must be *donations*. It is therefore strictly prohibited to *impose* the taking of blood or skin. To prevent any ambiguity it is stipulated that such donations must be voluntary, which may seem tautologous, but clearly indicates that the donor must be capable of expressing his will (in this way taking blood or skin from unconscious persons or those incapable to make a decision is prevented). Moreover, it is specified that the will must be expressed voluntarily and any coercive measures (threats, discriminatory measures, punishments etc.) and even inducements (promises of important advantages, pressure on those who hold out etc.) were explicitly prohibited.
- 487 Secondly, there can only be two sorts of donations: donations of blood and donations of skin, which each have a specific purpose, i.e., blood transfusions and grafts respectively. Moreover, such transfusions or grafts must obviously be intended to improve the state of health of the recipient. Simple experiments are strictly prohibited, as is clearly specified: the donations must be “for therapeutic purposes”.
- 488 In addition, they must be carried out “under conditions consistent with generally accepted medical standards”. This refers in particular to conditions of hygiene and safety needed to provide guarantees for the donor’s health.¹³
- 489 Finally, taking blood for transfusion or skin for grafts must be done with adequate controls prior to and during the operation, “designed for the benefit of both the donor and the recipient”. This means, in particular, that it should be clearly established that taking the blood or skin does not present any special danger to the donor’s health, and that the transfusions or grafts are necessary for the improvement of the health of the recipient. These controls should also be exercised during and after the operation.
- 490 In short, the exception allowed in paragraph 3 is justified in that it makes it possible to help many wounded and sick, and because all the guarantees are given in its application to prevent abuse.

Paragraph 4

- 491 The problem broached in this paragraph is that of establishing the degree of gravity of any breaches of the provisions of the preceding paragraphs, with a view to sanctions. The repression of breaches of the Conventions and the Protocol is dealt with in Section II of Part V of this Protocol.¹⁴ However, to understand the paragraph under examination here, it is important to recall the main distinction made in the Conventions and the Protocol between *breaches* and *grave breaches* of these instruments. Although the Parties to the conflict are under the obligation

¹³ *cf.* moreover, *supra*, pp. 154-156.

¹⁴ For an analysis of the problems raised in this Section, refer to the commentary thereon, *infra*, p. 973.

to take measures necessary for the suppression of all acts contrary to the provisions of the Conventions and Protocol I, they are only bound to bring to court persons having committed grave breaches of these treaties, which are in any case considered to be war crimes.

492 Paragraph 4 qualifies as “grave breaches” some of the breaches which may be committed with respect to paragraphs 1, 2 and 3, with all the attendant consequences.

493 For a breach of these paragraphs to be considered grave breach, it must fulfil the following conditions cumulatively:

- a) it must be a *wilful* act or omission. Thus it is not possible to commit a grave breach through negligence, even though this may constitute a breach of paragraphs 1, 2 and 3, as we have seen. Moreover, the adjective “wilful” also excludes persons with an immature or greatly impaired intellectual capacity (children, mentally retarded persons etc.) or persons acting without knowing what they are doing (e.g., under the influence of drugs or medication). On the other hand, the concept of recklessness that may come into play – the person in question accepts the risk in full knowledge of what he is doing – must also be taken to be part and parcel of the concept of *wilfulness*.¹⁵
- b) The act or omission must “seriously endanger the physical or mental health or integrity” of the persons concerned. This does not go as far as the principle contained in paragraph 1 which prohibits acts or omissions which “endanger health”.¹⁶ The scope of the acts or omissions covered by paragraph 4 is therefore more restricted. However, the health does not necessarily have to be affected by the act or omission, but it must be clearly and significantly endangered. It is difficult to be more specific on this point. To know whether a person’s health has or has not been seriously endangered is a matter of judgment and a tribunal should settle this on the basis not only of the act or omission concerned, but also on the foreseeable consequences having regard to the state of health of the person subjected to them.
- c) Moreover, the act or omission must *violate any of the prohibitions in paragraphs 1 and 2 or fail to comply with the requirements of paragraph 3*. The very broad principle expressed in the first sentence of paragraph 1 certainly covers all acts and omissions complying with the above condition (*cf.* letter b)). Thus this is not really an additional condition, but merely a reminder that the transgression of any of the prohibitions and conditions mentioned in the preceding paragraphs may constitute a grave breach of the Protocol, given that they only constitute a grave breach if the other conditions (letters a), b) and d)) are also fulfilled.

¹⁵ In the French text of this commentary and of Art. 85 the term “intentionnel” is used. This is the legal term generally used, particularly in the context of penal law. The French text of Art. 11, para. 4, however, uses the term “volontaire”, which is another translation of “wilful”. As the latter term being used in the English text both in Art. 11, para. 4, and in Art. 85, paras. 3 and 4, it is clear that there is no difference of meaning.

As to recklessness, the concept used in Civil Law systems “dol éventuel” can also be translated in English as “malice prepense”.

¹⁶ The French text uses the expressions “compromettre” and “mettre en danger” where the English text uses the single verb “endanger”, revealing that the two French terms have the same meaning. On the other hand, the addition of the adverb “seriously”, both in the English and French texts, is significant.

- d) Finally, the act or omission concerned must be committed against a “person who is in the power of a Party other than the one on which he depends”. Thus acts or omissions committed in connection with deprivation of liberty imposed by a Party to the conflict on its own nationals are not considered as grave breaches, even if they are wilful and seriously endanger their physical or mental health or integrity, and even if they are deprived of liberty “as a result of a situation referred to in Article 1”.¹⁷ At first sight this restriction hardly seems logical. The same acts prohibited by the Protocol with regard to different categories of persons which it defines are not considered as grave breaches if they are committed against one of these categories. This does not seem fair, but it is not the purpose of this provision to arbitrarily exempt some persons from a just punishment.¹⁸

Paragraph 5

- 494 This paragraph lays down a principle and determines the way in which this principle is to be applied.

First sentence

- 495 The principle is that of the right of persons concerned to refuse any surgical operation. We have seen that acts or omissions endangering the physical health or integrity of the persons concerned are prohibited, unless they are justified, and that the justification must generally be of a medical and ethical nature. This paragraph is therefore an exception, as the rule laid down is unrestricted: the person concerned may refuse an operation, even if the surgeon considers it to be essential for his survival and therefore perfectly justified at a medical level. This question actually raises a problem of medical ethics for which we have not yet come up with a clear and universal solution in time of peace. However, the principle contained here in the context of the Protocol is unequivocal. Nevertheless, it is admitted that the surgeon is only bound by such a refusal if the person expressing it has reached a high enough age to be capable of judgement and his intellectual capacities are unimpaired.
- 496 One question remains open: if a patient who has refused a surgical operation falls into a coma, should the surgeon consider this to be a new situation and operate anyway, or should he consider himself bound by the patient’s refusal. Again this raises a delicate problem of medical ethics which the doctor will have

¹⁷ It could be noted that the word “Party”, used here on its own, actually means “Party to the conflict”; there can be no doubt on this point.

¹⁸ In fact, this restrictive clause was introduced as a result of an amendment during the last session of the CDDH because of a concern to preserve the sovereignty of States. According to the authors of the amendment, only the State is responsible in all circumstances for the repression of breaches, no matter how grave, committed by one of its nationals upon another. It was also stated that these might be crimes against humanity, but that it was important to distinguish them from war crimes. Cf. *O.R.* III, p. 62, CDDH/II/438; *O.R.* XII, pp. 463-464, CDDH/II/SR.98, para. 58, and p. 465, CDDH/II/SR.99, paras. 3 and 4.

to deal with to the best of his conscience and without incurring the risk of being accused of committing a breach of the Protocol, whatever solution he has chosen. However, in one case it is clear that the surgeon must act: *viz.*, when the operation required by the comatose condition is unrelated to the operation the patient had previously refused.

Second sentence

- 497 As mentioned above, the second sentence determines the way in which the principle is to be applied. In case of refusal, medical personnel¹⁹ should endeavour to obtain a written statement. Every effort should be made to obtain such a statement, but if the person refusing the operation also refuses to make a statement, medical personnel cannot be expected to waste a lot of time in trying to persuade him, especially when they are overworked, which is often the case in time of war.
- 498 The word “endeavour” also clearly indicates the secondary importance of the statement in relation to the refusal: the fact that a person refuses to make the statement does not mean that his refusal of the surgical operation can be ignored.
- 499 However, this statement may also be important to the medical personnel, who, without such a statement, might be afraid of being accused of having endangered the patient’s health by omitting to carry out the necessary medical treatment. Thus in the case of a double refusal – refusing a necessary surgical operation and refusing to acknowledge this first refusal in a statement (actually a very rare occurrence) – it is in the interests of the medical personnel concerned to compile a case history containing, if at all possible, evidence from third parties of the patient’s double refusal.
- 500 Finally, paragraph 5 stipulates a technical point with regard to the declaration to be made by the patient: it should be “signed or acknowledged” by him. The patient may be prevented from signing the declaration for two reasons: either because he does not know how to write, or because he is physically prevented from signing. If he does not know how to write, he can be asked to add an identification mark such as his thumbprint, to the statement, after the text has been read to him. If he is physically disabled, as in the case of a completely paralysed person, the best solution would be to read the statement to him in front of witnesses who could then sign it, certifying that the statement is in accordance with the patient’s wishes.

Paragraph 6

- 501 This paragraph deals with the problem of supervision. If proper supervision regarding the application of the Protocol by the Protecting Powers or their substitute is to be guaranteed, in accordance with the system established by the

¹⁹ As defined in Art. 8, sub-para. (c), *cf. supra*, pp. 124-127.

Conventions and the Protocol,²⁰ it is essential, or at any rate very useful to keep medical records with a view to the supervision of acts covered by this article.

- 502 The wording of the paragraph was proposed by the Drafting Committee of Committee II, before being approved by the latter, on the basis of oral proposals presented during the Conference. It makes a distinction between two cases: one in which keeping records is compulsory; the other in which it is not necessarily so. Finally, it explains the reason for keeping records: they must be available for inspection by the Protecting Power.

First sentence

- 503 There is an absolute obligation to keep records concerning donations of blood for transfusion or skin for grafting, i.e., for the operations carried out in accordance with paragraph 3. This strict obligation is justified by the fact that it covers the only operations that can be lawfully carried out on a person covered by this article, without it being in his own interest. The compulsory keeping of records constitutes an additional means of preventing abuses. The record will contain not only the details of the procedure (place, date, nature, etc.), but also the agreement of the patient, signed or acknowledged by him.
- 504 Moreover, it is specified that this obligation on the Party to the conflict exists only if the donation “is made under the responsibility of that Party”. This clarification was added in order to absolve an Occupying Power from this obligation for acts accomplished in hospitals (or other places) in occupied territory where it does not exercise control, particularly when it leaves the management of a hospital to the staff established there before the occupation. On the other hand, it will be bound by the obligation if, for example, it collects blood itself in the occupied territory.

Second sentence

- 505 The scope of this sentence is much broader, since it is concerned with keeping records of “all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1”. This does not include procedures undertaken with respect to all persons in the power of an adverse Party covered by the rest of the article. In fact, it would have been going too far to request keeping medical records for all persons in the power of an adverse Party and particularly for all the inhabitants of an occupied territory. In general, an Occupying Power will allow the medical services in place to continue functioning to take care of the health of the inhabitants of occupied territory. To ask them to keep medical records for the procedures undertaken with respect to such inhabitants would lead to the establishment of an extremely cumbersome administrative system, which would not be justified.

²⁰ On this subject, cf. in particular commentary Art. 5, *supra*, p. 75.

- 506 Obviously the case of persons deprived of liberty as a result of a situation referred to in Article 1 (*General principles and scope of application*)²¹ is different, as they are more vulnerable, being much more dependent on the Party to the conflict. Thus we are concerned here with medical procedures undertaken on them.
- 507 Bearing in mind the practical impossibilities some Parties to the conflict may encounter, the obligation to keep such records was not made in an unrestricted fashion. Each Party to the conflict *shall endeavour* to keep such records. Thus there is no absolute obligation, but nor is it simply a matter of choice left up to the Parties to the conflict. They must keep such records if they have the means to do so, and if not, they must be able to justify the fact that they genuinely could not keep them.
- 508 Finally, the records concerned are for all *medical procedures* undertaken with respect to the persons concerned. Thus they are not kept only for surgical operations, but also for various types of treatment (cures, radiation, medication taken, etc.) or care which has been given. On the other hand, the simple administration of a light sedative or sleeping pill by non-medical staff could not be described as a *medical* procedure.

Third sentence

- 509 Such records are certainly useful in themselves, particularly at a medical level. It is important for a doctor to be aware of wounds and illnesses suffered by a patient, and the treatment that has been given.
- 510 However, the obligation to keep records in the context of the Protocol is intended rather to prevent abuse and to detect breaches committed with regard to the provisions of this article. It is true that the records do not constitute a foolproof means of supervision. In particular, they do not allow for any control on omissions endangering the health of persons concerned. Nevertheless, they form a by no means negligible means of supervision if they can be consulted without warning, which allows the inspector to supervise the way in which they are kept and the truthfulness of the entries.
- 511 Paragraph 6 certainly provides that the records shall be available at all times for inspection, and the role of inspector is played by the representative of the Protecting Power or its substitute.²² The latter can compare the contents of the records with the statements of the protected persons whom he is able to visit, and should therefore be able to form a fairly clear picture of the situation.

Y.S.

²¹ Enumerated in the commentary on para. 1, *supra*, pp. 153-154.

²² On the subject of the role of the Protecting Power or its substitute, *cf.* also commentary Art. 5, *supra*, p. 75.

Protocol I

Article 12 – Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - (a) belong to one of the Parties to the conflict;
 - (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
 - (c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.
3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Documentary references

Official Records

O.R. I, Part I, p. 132; Part III, p. 6 (Art. 12). *O.R.* III, pp. 63-65. *O.R.* VI, p. 70, CDDH/SR.37, paras. 28-30; p. 79, *id.*, Annex (Madagascar). *O.R.* XI, pp. 115-118, CDDH/II/SR.13, paras. 19-43; pp. 119-121, CDDH/II/SR.14, paras. 3-14; p. 226, CDDH/II/SR.23, para. 49. *O.R.* XII, p. 466, CDDH/II/SR.99, paras. 6-7. *O.R.* XIII, pp. 72-73, CDDH/221/Rev.1, paras. 38-43; p. 170, *id.*, Annex II; p. 360, CDDH/406/Rev.1, para. 28; p. 395, *id.*, Annex.

Other references

CE/7b, pp. 5 and 12-14. *CE 1971, Report*, pp. 24-25, paras. 49-51; p. 29 (Art. 5). *CRCE 1971, Report*, pp. 23-25. *CE 1972, Basic Texts*, p. 9 (Art. 14). *CE 1972, Commentaries*, Part I, pp. 31-34 (Art. 14). *CRCE 1972, Report*, p. 24 (Art. 14). *CE 1972, Report*, vol. I, pp. 34-35, para. 1.20-1.27; vol. II, pp. 26-27, *CE/COM I/2*; p. 28, *CE/COM I/5*; p. 31, *CE/COM I/13. Commentary Drafts*, pp. 21-22 (Art. 12).

Commentary

General remarks

- 512 The principal aim of this article is to extend to all civilian medical units the protection which hitherto applied to all military medical units on the one hand (*cf.* Article 19, First Convention), but only to civilian hospitals on the other (*cf.* Article 18, Fourth Convention).
- 513 Thus, paragraphs 1, 3 and 4 concern all medical units, whether military or civilian. As certain rules have been introduced which have no equivalent in the Conventions (even with regard to military units) with the object of increasing the protection of these units, it was obviously important that all units were covered, not just the civilian units.
- 514 Paragraph 2 lays down three conditions, and all civilian medical units must comply at least with one of them to benefit from the right to respect and protection. Each of these conditions implies a certain degree of control by the authorities over these units, which is essential for the prevention of any form of abuse.

Paragraph 1

- 515 This paragraph lays down the three principles for all medical units which were already imposed in the Conventions for military medical units (or, according to the terminology of the Conventions, fixed establishments and mobile medical units). These units:
- shall be protected;
 - shall be respected;
 - shall not be the object of attack.
- 516 These principles are taken from the Conventions. We have examined the general definition of the terms “to respect” and “to protect” above.¹
- 517 In the present context the term “to respect” the units means, first of all, that it is prohibited to attack or harm them in any way. This also means that there should be no interference with their work (for example, by preventing supplies from getting through) or preventing the possibility of continuing to give treatment to the wounded and sick who are in their care, as long as this is necessary.
- 518 To protect these units is “to ensure that they are respected, that is to say to oblige third parties to respect them. It also means coming to their help in case of need”.² It is no longer only a matter of not preventing supplies from reaching these units, to take the example given above, but, if necessary, to help to ensure the delivery of these supplies (for example, by providing a vehicle) or even to make sure that they are not jeopardized by third parties (looting etc.).

¹ *Cf.* commentary Art. 10, para. 1, *supra*, p. 146.

² *Commentary I*, p. 196.

- 519 Finally, medical units should not be the object of attack.³ The usefulness of this third point is not obvious, as the *respect* of the medical units implies the obligation not to attack them. However, this provision was explicitly formulated even in the Conventions in view of “the increasing scale of aerial bombardment”.⁴ The inclusion of this provision also means that an attack on a medical unit which is undertaken by commandos in enemy territory is unambiguously forbidden, even if the purpose of the attack is not to hinder the proper functioning of the unit, but, for example, to exert pressure or gain an advantage at a military level. Finally, it should be noted that even though an attack cannot be lawfully directed against medical units as such, it is not totally out of the question for them to be damaged during attacks on military objectives, even though various precautions must be taken during these attacks.⁵ The rules laid down in paragraphs 3 and 4 of this article are aimed at preventing as far as possible the risks incurred by medical units during such attacks.
- 520 These three principles should be observed *at all times*, i.e., even when the units have not yet received any wounded and sick, or when no more wounded and sick are with them at the time.⁶ Obviously this only applies while the units continue to be *assigned exclusively to medical purposes*. However, it was not necessary to make this specific point in Article 12, as the definition of medical units itself, whether permanent or temporary, requires that they are used exclusively for medical purposes.⁷ If they are used for other purposes, they are no longer considered to be medical units within the meaning of the Protocol, and thus they lose their right to the use of the emblem, as well as the right to respect and protection if they are used in such a way that they could be categorized as military objectives.⁸
- 521 The fact that a unit is assigned exclusively to medical purposes does not mean that it should be used at all times to care for the wounded and sick. For example, a first aid post, even if it is temporary, does not lose its rights merely because there are no wounded or sick patients there. It is sufficient that the post is intended to care for the wounded and sick and that it is not assigned for any other purpose, particularly a military purpose, for it to remain covered by the three above-mentioned principles.

Paragraph 2

- 522 As shown above, this paragraph lays down three conditions, with one of which civilian medical units must comply to be covered by the principles described in paragraph 1. These conditions all imply a certain degree of control by the Party to the conflict over the units, to ensure that they are strictly and exclusively used

³ The expression “attacks” is defined in Art. 49, para. 1. On this subject, see *infra*, pp. 602-603.

⁴ *Commentary I*, p. 196.

⁵ On this subject, *cf.*, in particular, commentary Art. 57, *infra*, pp. 680-687.

⁶ The expression “at all times” was introduced in 1906, but was not included in the Convention of 1864. On this subject, *cf.* *Commentary I*, p. 196.

⁷ *Cf.* commentary Art. 8, sub-para. (e), *supra*, pp. 128-129.

⁸ On this subject, *cf.* commentary Art. 52, *infra*, pp. 635-637; *cf.* also commentary Art. 13, *infra*, p. 173.

for the intended purposes. This control is of paramount importance, for if a Party to the conflict discovers that the adverse Party has seriously and repeatedly been guilty of abuse, this could lead to a loss of confidence and cast doubt on the entire system of protection aimed at by the Conventions and the Protocols, which is based precisely on confidence.

523 On the other hand, there was no need to impose similar conditions for military medical units as these, being part of the army, are subject to military hierarchy and discipline. The conditions are as follows:

a) *To belong to one of the Parties to the conflict*

524 This concerns particularly hospitals or ambulance services of the State. The Party to the conflict is itself responsible for the administration of these units and therefore control is easy. The persons in charge of these units are appointed directly by the competent authority of the Party to the conflict, who can also remove them from this position.

b) *To be recognized and authorized by the competent authority of one of the Parties to the conflict*

525 In the first place, this concerns medical units of the National Red Cross Society or a Society of a State not Party to the conflict.⁹ It may also concern private medical units, such as private clinics or ambulance services. In addition, this category can also include units belonging to public bodies at a level below that of the State, and which have a certain degree of independence vis-à-vis the central government. For example, these could include, in particular, units belonging to the different States constituting a federal State.

526 It is up to the competent authority of the Party to the conflict (i.e., in the case of a federal State, the central government) to recognize and authorize these units. Thus there are two elements: the *recognition* implies that the competent authority agrees that this unit is a medical unit within the meaning of the Protocol; the *authorization* is the right conferred upon this unit by the Party to the conflict to exercise the prerogatives granted to civilian medical units by the Protocol. In exceptional circumstances it may happen that a Party to the conflict recognizes a medical unit without granting this authorization (which the Protocol leaves to the Party's discretion). However, the authorization implies preliminary recognition of the unit.

527 The control in this case is less direct than in the case of units belonging to one of the Parties to the conflict. For example, the latter cannot replace the director of a private medical unit who has been guilty of abuses, as it can in the case of units that belong to it. It can threaten to withdraw its authorization if this replacement is not carried out, and as a last resort can actually withdraw its authorization.

⁹ Cf. Art. 27, First Convention.

- c) *To be authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention*

528 This refers to the civilian medical units placed at the disposal of a Party to the conflict for humanitarian purposes by a neutral State or another State not Party to the conflict, by an aid society recognized and authorized by a neutral State or another State not Party to the conflict, or by an impartial international humanitarian organization.¹⁰

Paragraph 3

First sentence

- 529** This concerns a simple recommendation to the Parties to the conflict, aimed at reinforcing the security of medical units. The Conventions do not contain an equivalent provision. However, it should be noted that the notification of hospital zones is prescribed in the Draft Agreement annexed to the First Convention.¹¹
- 530** For obvious practical reasons the medical units concerned here are only fixed medical units. There is clearly no question of keeping the adverse Party constantly informed about all the movements of mobile units (although there is nothing to prevent a Party to the conflict from informing the adverse Party about an important movement of these units).
- 531** Some delegations would have preferred to restrict this recommendation to *civilian* medical units, but the opinion which finally prevailed was that there was no reason why the location of military medical units should not also be communicated with a view to reinforcing the protection of these units.
- 532** On the other hand, it was widely agreed that this provision should not have a mandatory character, but should retain the form of a recommendation to the Parties to the conflict, as it was in the draft.¹²

Second sentence

- 533** This sentence was not contained in the draft and is the result of an amendment submitted in Committee II. In fact, it is not really a modification of the draft, but a clarification. It was not considered to be indispensable by the authors of the draft, but it clearly expresses their intention.
- 534** As notification is only recommended, it is clear that the right to protection does not depend on it and exists independently of it. Failure to notify increases the risk of the units being damaged incidentally during an attack on military objectives,

¹⁰ For further details on this subject, cf. commentary Art. 9, para. 2, *supra*, pp. 140-142.

¹¹ Cf. Draft Agreement relating to hospital zones and localities, Art. 7.

¹² All those who spoke on this subject in Committee II agreed that this was a matter to be decided in the last resort by the authorities of the Parties to the conflict. Cf. O.R. XI, pp. 115-118, CDDH/II/SR.13, paras. 19-43.

but it in no way impairs the obligation to respect, protect and refrain from attacking the units, nor that of taking the necessary precautions to prevent, as far as possible, inflicting any damage on them during an attack on military objectives.

- 535 The clarification given in the second sentence of paragraph 3 removes any ambiguity which might have existed on this point.

Paragraph 4

- 536 This paragraph is in a way the corollary to the principles described in paragraph 1. The right to protection also implies certain obligations on the part of the Parties to the conflict with regard to their own units – or the units which have fallen into their hands – which benefit from it. Certainly the most important obligation is to refrain from making improper use of the signs and signals of protection described in the Conventions and the Protocol, as laid down in Article 38 of the Protocol (*Recognized emblems*). This is complemented by the two rules contained in paragraph 4, one of which contains an unequivocal prohibition, while the other contains a more flexible provision: to comply with “whenever possible”. The aim of these rules is, on the one hand, to make it possible for an adverse Party to carry out its duty to respect medical units, and on the other hand, and above all, to increase the security of medical units and their occupants, which should never become the object of any form of moral blackmail.

First sentence

- 537 The aim of this first sentence is precisely to prohibit what we have qualified as blackmail.
- 538 It may happen that medical units are sited on the periphery of military objectives,¹³ and it is probably impossible to avoid this in all cases, as will be seen with regard to the rule laid down in the second sentence of this paragraph. However, it is not admissible that a Party to the conflict should intentionally place medical units on the periphery of military objectives in the hope that the adverse Party would hesitate to attack these objectives for humanitarian reasons. This would completely distort the spirit of humanitarian law and devalue both the victims being cared for in these units and the medical personnel who would be knowingly exposed to very grave danger. Thus this type of action constitutes a breach of the Protocol and can be justified “under no circumstances”.
- 539 One may certainly wonder whether such an action could release the adverse Party from its obligation to respect the medical units sited in this way. With regard to this question, see Article 51 of the Protocol (*Protection of the civilian population*). The second sentence of its paragraph 7 contains a similar rule to that given here for medical units, relating to the movement of the civilian population or civilian persons. Paragraph 8 of the same article explains that a violation of

¹³ On the meaning of the expression “military objective”, cf. commentary Art. 52, para. 2, *infra*, pp. 635-637.

this prohibition (as of any other prohibitions laid down in the article) does not release the Parties to the conflict from taking the precautionary measures provided for in Article 57 (*Precautions in attack*).¹⁴

- 540 Although not explicitly mentioned, these precautions should also be taken with regard to the wounded and sick, and consequently the medical units where they are being cared for. The victims should not have to pay for trickery for which they are not responsible, particularly as the *intention* of siting the medical units in the vicinity of military objectives in an attempt to shield the latter from attacks is rarely easy to establish with any certainty. However, it is clear that if one of the Parties to the conflict is unmistakably continuing to use this unlawful method for endeavouring to shield military objectives from attack, the delicate balance established in the Conventions and the Protocols between military necessity and humanitarian needs would be in great danger of being jeopardized and consequently so would the protection of the units concerned.

Second sentence

- 541 This sentence repeats a rule introduced in 1949 in Article 19, paragraph 2, of the First Convention, though the formulation is slightly different. It extends the scope of application to all the medical units covered by the Protocol, and not only to military units.
- 542 We are not concerned here, as in the rule contained in the first sentence, with prohibiting the wrongful use of medical units, but with including an additional precaution for safeguarding their function. The provision requires that care should be taken to ensure that medical units are so sited that attacks against military objectives do not imperil their safety, in other words that they are sufficiently removed from these objectives not to be affected by damage in the surrounding area which is very likely to occur during an attack. As stated in the Commentary on the First Convention, this precaution is obviously taken above all against aerial bombardment.¹⁵
- 543 Moreover, it should be noted that this provision requires the Parties to the conflict to take precautions which are essentially for the benefit of persons belonging to their own side. This led to objections when a similar provision was adopted in 1949, and still remains an exception, albeit an important one, in the Protocols.
- 544 In practical terms this provision should already have been taken into consideration by the contracting Parties in time of peace, for example by avoiding the construction of a hospital next to a barracks, or vice versa.
- 545 The obligation should be observed “whenever possible”. It is quite clear that the Parties to the conflict should always do so to the best of their capability. However, this expression was inserted because it was generally agreed that it was not always possible to shield medical units from the danger one wishes to avoid.

¹⁴ On the subject of these, cf. commentary Art. 57, *infra*, pp. 680-687. Cf. also commentary Art. 51, *infra*, pp. 627-628.

¹⁵ Cf. *Commentary I*, p. 198.

When it was proposed to remove this expression in Committee II, it was not considered possible to prohibit mobile medical units from moving into the vicinity of combat in order to retrieve and care for the wounded as quickly as possible, despite the risks that this would incur.¹⁶ Thus there are two interests to weigh up, and the obligation to favour one of the two should not be too rigid.

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¹⁶ Cf. particularly *O.R.* XI, pp. 117-118, CDDH/II/SR.13, para. 41.

Protocol I

Article 13 – Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such a warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:
 - (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
 - (b) that the unit is guarded by a picket or by sentries or by an escort;
 - (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
 - (d) that members of the armed forces or other combatants are in the unit for medical reasons.

Documentary references

Official Records

O.R. I, Part I, p. 132; Part III, p. 6 (Art. 13). *O.R.* III, pp. 66-68 (Art. 13). *O.R.* VI, p. 70, CDDH/SR.37, para. 30. *O.R.* XI, pp. 127-129, CDDH/II/SR.14, paras. 59-73; pp. 227-231, CDDH/II/SR.23, paras. 50-85; pp. 556-557, CDDH/II/SR.49, paras. 41-42. *O.R.* XII, pp. 222-223, CDDH/II/SR.75, paras. 35-38. *O.R.* XIII, pp. 73-75, CDDH/221/Rev.1, paras. 44-50; p. 171, *id.*, Annex II (Art. 13); p. 254, CDDH/235/Rev.1, para. 22.

Other references

CE/7b, pp. 5, 13 (Art. 4, para. 3). *CE 1971, Report*, pp. 24-25, para. 50; pp. 29-30 (Art. 6). *CE 1972, Basic Texts*, p. 9 (Art. 15). *CE 1972, Commentaries*, Part I, pp. 34-35 (Art. 15). *CE 1972, Report*, vol. I, pp. 35-36 (Art. 15), para. 1.28. *Commentary Drafts*, pp. 22-23 (Art. 13).

Commentary

General remarks

- 546 The first paragraph of this article is based on Article 21 and the second on Article 22 of the First Convention. It lays down rules for all civilian medical units similar to those laid down in these articles for military medical units. With regard to civilian medical units, there is also a similar article in the Fourth Convention (Article 19), but its scope is restricted to civilian *hospitals*.
- 547 The aim of this article is to determine exactly which acts result in losing the right to protection, above all to prevent false pretexts from being resorted to.
- 548 Paragraph 1 lays down the rule in the first sentence and in the second sentence goes on to introduce some flexibility for the benefit of the victims. Paragraph 2 describes four acts which shall not be considered harmful to the enemy (even though they might appear to be harmful) so that consequently the perpetration of these acts does not cancel the right of a medical unit to protection.

Paragraph 1

First sentence

- 549 This sentence clearly states that the protection to which civilian medical units are entitled shall not cease except in the case where the units are used to commit acts harmful to the enemy. No other reason can give rise to the termination of their right to protection. This formulation is derived from Article 21 of the First Convention. The 1949 Diplomatic Conference insisted that “protection could only cease in the one case mentioned above, whereas in 1929 it had merely been stated that protection would cease if such acts were committed”.¹ However, if the medical unit were systematically used for purposes other than medical purposes, even if no acts harmful to the enemy were committed, it would lose its status as a medical unit within the meaning of the Protocol which *defines* these units as being *exclusively* dedicated to medical purposes.² As we are concerned here with medical units in the sense of the Protocol, it is clear that they are deemed to be dedicated exclusively to medical purposes and that, if acts which are harmful to the enemy are ascribed to them, these acts are accidental or sporadic and are not the result of any intention to use these units for military purposes.
- 550 The next question is to know what would constitute *acts which are harmful to the enemy* and which are prohibited. The 1949 Diplomatic Conference, like the 1929 Diplomatic Conference, did not consider that there was a need for defining these because in their opinion this expression was self-explanatory and should remain very general.³ The Diplomatic Conference of 1974-1977 followed

¹ *Commentary I*, p. 200.

² Cf. commentary Art. 8, sub-para. (k), *supra*, pp. 132-133.

³ Cf. *Commentary I*, p. 200.

suit. However, the ICRC had come up with a more explicit formulation in 1949 in the event that the Diplomatic Conference should have felt the need for a more precise definition. This was worded as follows: “Acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations”.

551 Moreover, some examples of harmful acts are given in the commentary on Article 21 of the First Convention. These examples also elucidate the interpretation to be given to the expression: “the use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post; another instance would be the deliberate siting of a medical unit in a position where it would impede an enemy attack”⁴ (this last act is in fact specifically prohibited by Article 12 (*Protection of medical units*), paragraph 4, first sentence, of the Protocol, examined above). Thus the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever.

552 In any event, in order to be classified as being prohibited, these acts which are harmful to the enemy must be committed *outside the humanitarian function* of the medical units, which implies that certain acts that are harmful to the enemy may be compatible with this humanitarian function, and as such may be lawfully committed. This clarification also appears in Article 21 of the First Convention, although it is formulated in a slightly different way (in this case the phrase is “outside their humanitarian duties”). It is justified because it may actually happen, though only in exceptional cases, that an act committed in accordance with the humanitarian function of the medical units is such as to be harmful to the enemy, or can incorrectly be interpreted in this sense. One might think, for example, of the case where a mobile medical unit accidentally breaks down while it is being moved in accordance with its humanitarian function, and thereby obstructs a crossroads of military importance. The 1949 Conference mentioned the example of the radiation emitted by X-ray apparatus which could interfere with the transmission or reception of wireless messages at a military location, or with the working of a radar unit.⁵

553 As already stated, such acts are obviously exceptional and remedies should be found as soon as their harmful character to the enemy is realized. However, it was important to include this clarification to make a distinction between those acts that are committed without the intention of being harmful, but which could accidentally have an unfavourable effect on the enemy, and those acts which are deliberately committed in order to harm the enemy.

Second sentence

554 The second sentence applies in the case where there is a valid reason, in the sense of the first sentence examined above, for discontinuing the protection to

⁴ *Ibid.*, pp. 200-201.

⁵ *Cf. ibid.*, p. 201.

which a civilian medical unit is entitled. This sentence, too, has been taken from Article 21 of the First Convention, with some slight modifications.

555 The principle laid down here is intended to temper the effect of the strict interpretation of the preceding sentence, above all with the aim of preventing the wounded and sick who are hospitalized in the unit from becoming the innocent victims of acts for which they are not responsible. If the medical unit is used to commit acts which are harmful to the enemy, it actually becomes a military objective which can legitimately be attacked, and even destroyed. Before resorting to this extreme action it is of paramount importance that the fate of the legitimate occupants of the medical unit is guaranteed. This is the aim of the warning referred to in the principle laid down here. Moreover, the warning may take various forms. In most cases it would simply consist of an order to cease the harmful act within a specified period. In the most serious cases there may be a time-limit for evacuating the unit which will be attacked after this time-limit.

556 The period of respite must be *reasonable*, but it has not been specified. It will vary according to the particular case. As stated in the commentary on Article 21 of the First Convention, “one thing is certain, however. It must be long enough either to allow the unlawful acts to be stopped, or for the wounded and sick who are present with the unit to be removed to a place of safety”.⁶ This time-limit should also allow those in charge of the unit enough time to reply to the accusations that have been made, and if they can, to justify themselves. However, it is also specified that a time-limit will only be set “whenever appropriate”. This stipulation, which has also been taken from Article 21 of the First Convention, is obviously not included to allow the possibility of evading the duty to set a time-limit. However, it takes into account the cases where it is not practicable to set a time-limit: an example might be a body of troops approaching a hospital being met by heavy fire. However, even in this case humanitarian considerations should not be forgotten. A hospital with eight hundred beds should not be destroyed by mortar-fire because one soldier has taken cover in one of the rooms. Here too, the principle of proportionality between military necessity and humanitarian exigencies⁷ shall be taken into consideration.

Paragraph 2

557 This paragraph enumerates four acts which could give rise to misunderstanding and for which the perpetrators could be accused of committing acts which are harmful to the enemy, but which it has nevertheless been considered necessary to permit. It was essential therefore to stipulate that these acts shall not be considered as being harmful to the enemy, and thus shall not deprive the medical unit concerned of the protection to which it is entitled.

558 This paragraph is based on both Article 22 of the First Convention, with the modifications necessitated by the fact that the units concerned here are *civilian*

⁶ *Ibid.*, p. 202.

⁷ On this subject see commentary Art. 12, par. 4, first sentence, *supra*, pp. 170-171.

medical units, and on Article 19, paragraph 2, of the Fourth Convention, which it completes with two acts which are not included in this article. Thus the four acts included here which are not to be considered to be harmful to the enemy are the following:

Sub-paragraph (a) – “that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge”

559 Even though the right for medical personnel to bear arms is laid down in the Conventions since 1906, this point, which was not included in the first draft, was certainly responsible for the most heated discussions of Committee II during the CDDH. Two questions actually arose in succession with regard to this matter. The first of these is the actual principle of arming personnel of civilian medical units. Once this is accepted, the second question which was discussed was that of the type of arms with which this personnel may be equipped.

560 In 1949 it was confirmed that military medical personnel have the right to bear arms, though there were objections to this. It is certainly possible to argue that the most certain guarantee of protection is to be absolutely defenceless, thus forming the least possible risk for the enemy. In fact, if the principle that medical personnel have the right to bear arms was finally accepted, it was obviously not for the reason that this personnel should use force to oppose the capture of the unit: in this case it would lose its status and the right to protection derived from this status. However, it is possible that the unit is attacked by uncontrolled elements or looters. It may also happen that considerable problems present themselves with regard to maintaining order amongst the convalescent wounded or sick. These sound reasons finally prevailed and therefore in 1949 the use of arms by military medical personnel was accepted. However, the CDDH was concerned with taking this matter one step further, as this time the medical personnel being given the use of arms was a civilian personnel, although throughout the CDDH the emphasis had been laid on the importance of maintaining a clear distinction between civilian and military personnel. Moreover, giving this right to bear arms was not in accordance with the protection given civilian hospitals in Article 19 of the Fourth Convention. Nevertheless, the principle that civilian personnel of medical units could bear arms was finally adopted because it was admitted that civilian medical personnel were exposed to the same dangers and had to deal with the same situations as military medical personnel, as a result of the increased scope of its role in the Protocol. Therefore they should have the same means at their disposal for their own defence.

561 However, it is appropriate to stress once again that as medical personnel and as civilians the personnel have a strict obligation to refrain from using arms except for their own defence or for that of the wounded and sick in their charge. In other words, to prevent themselves or the wounded and sick in their charge from becoming the victims of violence. The term “defence” should in fact be interpreted in the restricted sense of defence against violence, and medical personnel cannot use force to try and prevent combatants from the adverse Party from capturing the medical unit, without losing their right to protection.

- 562 It is clear that when medical personnel were granted the right to bear arms in 1949, the views regarding the lawful use that this personnel could make of these arms implied that they must be light weapons. However, it was not considered necessary to specify this in Article 22 of the First Convention.
- 563 Nevertheless, the question resurfaced to be discussed by Committee II during the CDDH, and the decision was finally taken to specify that the weapons that could lawfully be used by the civilian personnel of a medical unit were limited to “light individual weapons”. This expression was not defined, but it appears from the discussions in Committee II regarding this article and, regarding the cessation of protection to which civilian civil defence organizations are entitled,⁸ that it refers to weapons which are generally carried and used by a single individual. Thus not only hand weapons such as pistols are permitted, but also rifles or even sub-machine guns. On the other hand, machine guns and any other heavy arms which cannot easily be transported by an individual and which have to be operated by a number of people are prohibited. Thus it is evident that the level of acceptance is quite high. However, this is the case above all to prevent the unit’s right to protection from being suppressed too easily. Independently of the weapons with which the personnel are equipped, they may use them, as we have seen, only for very specific purposes, and it is above all with regard to this that no abuses should be committed. Pistols should certainly be sufficient to carry out the tasks specified, but it makes little difference in the end if the personnel prefer rifles, provided that they stay strictly within their competence.
- 564 Finally, it should be noted that Article 22 of the First Convention does not specify what type of arms the personnel of military medical units can carry. But as the tasks to be carried out are the same as in this article, any weapons that are heavier than those stipulated here could not be allocated to the military personnel without the risk of incurring serious suspicion, and therefore without endangering the protection of the medical unit.

Sub-paragraph (b) – “that the unit is guarded by a picket or by sentries or by an escort”

- 565 This act is also mentioned in Article 22 of the First Convention, though it is only provided for there “in the absence of armed orderlies”. However, the commentary on this provision shows that there was no intention on the part of the drafters to exclude the simultaneous presence of armed orderlies and a military guard and that what was intended was that the guard of a medical unit would, as a rule, be provided by its own personnel.⁹ However, as this point may give rise to misunderstanding, it was not included in the Protocol.
- 566 Whether the guard consists of a picket, sentries or an escort, it is generally made up of soldiers, as the medical service is part of the army and is normally protected by a military authority. However, in the exceptional case where the

⁸ Cf. commentary Art. 65, par. 3, *infra*, pp. 774-778.

⁹ Cf. *Commentary I*, p. 203.

guard duties were to be entrusted to a civilian uniformed police force, this would not entail an infringement of the Protocol. Like medical personnel, the police are generally only equipped with light weapons. They should not exceed their functions.

567 The use of weapons by the members of this guard detailed to a medical unit is subject to the same conditions as the use of arms by medical personnel. The guards are there to prevent looting and violence, but they should not attempt to oppose the capture or control of the medical unit by the adverse Party.

568 With regard to the status of military guards, a passage from the Commentary on the First Convention is reproduced below, which clearly explains what this status was and what it is now (being understood that the members of the military guard of a medical unit have the same status whether the unit is a civilian or a military unit).

“The 1906 Convention (Article 9, paragraph 2) placed them on exactly the same footing as medical personnel, on condition that they were provided with regular instructions (Article 8, sub-paragraph (2)). They were entitled to the same protection as medical personnel and were not to be treated as prisoners of war.

The 1929 Conference firmly rejected the above arrangement, regarding it as impracticable. It had not been respected during the First World War and had given rise to abuses. The provision of regular instructions appeared to be impossible in practice.

Their status will therefore be that of ordinary members of the armed forces, although the mere fact of their presence with a medical unit will shelter them from attack. This practical immunity is, after all, only reasonable, since they have no offensive role to play and are there only to protect the wounded and sick. But in case of capture they will be prisoners of war.”¹⁰

Sub-paragraph (c) – “that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units”

569 This provision is taken from Article 22 of the First Convention. The arms and ammunition will be taken from the wounded and handed to the proper service. However, this may take some time, and it is important to clarify that, if the arms are kept in the medical unit for a while, the unit will not lose its right to protection as a result.

570 The arms concerned are small arms, in other words, arms which can be carried by men. On the other hand, there is no indication that they must be individual arms. Thus some weapons which are slightly heavier than those which are authorized for medical personnel could be involved, such as, for example, small machine guns, provided that they are portable (even if this should require two or

¹⁰ *Ibid.*, p. 204.

three soldiers). However, the extremely deadly character of some of these portable arms should be emphasized, this being a result of technological progress.

Sub-paragraph (d) – “that members of the armed forces or other combatants are in the unit for medical reasons”

- 571** In view of the conditions of modern warfare, military and civilian wounded and sick are often found in the same place, and consequently they may be collected by the same medical units. Thus it is not possible to complain about the presence of wounded and sick civilians in a military unit, or that of military wounded and sick in a civilian unit, as a reason to terminate the protection to which these units are entitled. The provision quoted above removes any ambiguity on this point, as do the equivalent provisions of Article 22 of the First Convention with regard to military medical units, and of Article 19 of the Fourth Convention for civilian hospitals.
- 572** The expression “or other combatants” was added to the expression “members of the armed forces” to ensure that all combatants within the meaning of Article 43 of the Protocol (*Armed forces*) are included. This addition, which was made during the CDDH, was retained in the end, even though it had become superfluous in view of the final wording of Article 43 (*Armed forces*). As armed forces are defined in a very broad sense in paragraph 1 of that article, there are no combatants who are not members of the armed forces of a Party to the conflict within the meaning of the Protocol.
- 573** The expression “for medical reasons” was preferred to the expression “for medical treatment”, which appeared in the draft. It may happen that members of the armed forces are in a medical unit for medical reasons when they are not receiving medical *treatment* as such. For example, this could be the case with medical examinations or vaccinations. The formulation which was finally adopted is more flexible and should make it possible to avoid unjustified accusations that a medical unit is being used to commit acts which are harmful to the enemy.
- 574** Finally, it should be noted that the soldiers being treated in a civilian medical unit can be soldiers belonging to the Party to which the unit belongs, but they may also, in urgent cases, be combatants of the adverse Party who must be treated in accordance with the principle of non-discrimination among the wounded and sick.¹¹ As they are prisoners of war these wounded will nevertheless be transferred to a military medical unit as soon as their condition and situation permit, as a civilian medical unit does not in principle have to guard prisoners of war.

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¹¹ Cf. commentary Art. 10, par. 2, second sentence, *supra*, pp. 147-148.

Protocol I

Article 14 – Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.
2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their *matériel* or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.
3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
 - (a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
 - (b) that the requisition continues only while such necessity exists; and
 - (c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

Documentary references

Official Records

O.R. I, Part I, pp. 132-133 (Art. 14); Part III, pp. 6-7 (Art. 14). *O.R.* III, pp. 69-71 (Art. 14). *O.R.* VI, p. 70, CDDH/SR.37, para. 30. *O.R.* XI, pp. 132-139, CDDH/II/SR.15, paras. 10-48; pp. 302-303, CDDH/II/SR.29, paras. 47-48; p. 581, CDDH/II/SR.51, para. 18. *O.R.* XIII, pp. 75-78, CDDH/221/Rev.1, paras. 51-58; p. 172, *id.*, Annex I (Art. 14).

Other references

CE/7b, p. 15 (Art. 6). *CE 1971, Report*, pp. 28-30, *CE 1972, Basic Texts*, p. 10 (Art. 17). *CE 1972, Commentaries*, Part I, pp. 36-37 (Art. 17). *CE 1972, Report*, vol. I, p. 37 (Art. 17), paras. 1.32-1.36 a; vol. II, p. 27, *CE/COM I/3*; p. 31, *CE/COM I/13. Commentary Drafts*, p. 23 (Art. 14).

Commentary

General remarks

- 575 The purpose of this article is to regulate the problem of requisition of civilian medical units in occupied territory with a view to completing the provisions of Article 57 of the Fourth Convention which are concerned only with requisitioning civilian hospitals.
- 576 Before dealing with the problem of requisition itself, Committee II of the CDDH considered that it should be viewed in the light of the Occupying Power's duty to see that the medical needs of the civilian population of the occupied territory are attended to, as stipulated in paragraph 1. The principle laid down here is based on the more detailed provisions contained in Article 55, paragraph 1, and Article 56, paragraph 1, of the Fourth Convention.
- 577 The wide obligation referred to in paragraph 1 has the general consequence of imposing a strict limitation on the requisition of civilian medical units, which is in fact prohibited as long as these units are necessary for the health of the civilian population and for the wounded and sick receiving treatment. This is the content of the provision contained in paragraph 2.
- 578 Thus requisitions are only allowed if they are carried out in accordance with the strict rule laid down in paragraph 2, and even then the three conditions mentioned in paragraph 3 must be complied with.
- 579 Finally it is worthy of note that this article is concerned only with the requisition of civilian medical units, while the fate of military medical units which have fallen into enemy hands is regulated by Article 33 of the First Convention.

Paragraph 1

- 580 The principle laid down here is restricted to the duties of the Occupying Power with regard to medical matters, for the problem of the requisition of civilian medical units is closely related to these duties. It should be read in connection with the following principles laid down in Article 55, paragraph 1, and Article 56, paragraph 1, of the Fourth Convention, which complement it:

“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; [...]”

“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, [...]”

- 581 There are two differences between the wording of these principles and the wording given in paragraph 1 of the article under consideration. The latter does not state that the duty imposed on the Occupying Power is “to the fullest extent of the means available to it”. On the other hand, it does not state that the Occupying Power has the duty to ensure that the medical needs of the civilian

population *are* satisfied but that they *continue* to be satisfied. These differences in formulation are directly linked.

- 582 The above-mentioned provisions of the Fourth Convention are concerned with ensuring public health in the occupied territory, regardless of the public health situation previously. It may happen that health conditions existing in a territory before it is occupied are deplorable. In this case the Occupying Power will probably be unable to rectify this situation very quickly, particularly if the infrastructure itself is inadequate. This is why it was necessary to qualify the duty of the Occupying Power with the expression “to the fullest extent of the means available to it”.
- 583 On the other hand, the principle laid down in paragraph 1 of the article under consideration does not require a particular endeavour from the Occupying Power. It is merely required to ensure that the medical system which already exists in the occupied territory continues to function properly. There was no reason therefore not to impose this requirement in absolute terms.
- 584 The problem of the requisition of civilian medical units directly affects the duty of ensuring the continuation of the existing medical system, rather than that of ensuring public health regardless of its former standard, as such requisition for the benefit of the Occupying Power may well have a harmful effect on the medical system already established in the occupied territory.

Paragraph 2

- 585 The provision contained in this paragraph is the consequence of the principle contained in paragraph 1 with regard to the Occupying Power’s possibility of requisitioning civilian medical units.
- 586 If the condition specified in this paragraph is met, the prohibition on requisitioning the personnel and the resources listed herein is absolute. Let us examine what is prohibited from being requisitioned, and in what circumstances.
- 587 It is prohibited to requisition civilian medical units, their equipment, their *matériel* and the services of their personnel. Medical units, whether civilian or military, are defined earlier in this commentary.¹ The equipment of these units, whether this includes medical equipment, such as operating tables, or functional equipment, such as the heating system or the kitchen (much of which, it could even be argued, forms an integral part of the unit), as well as the *matériel* (surgical instruments, medication, but equally linen, and food services) cannot be requisitioned either, as they are actually indispensable to the proper functioning of the unit, and it would be pointless to prohibit the requisition of the unit if its functioning were allowed to be hampered. The same applies to the personnel of the unit, whether this concerns the personnel taking care of the patients, or other personnel essential to the proper functioning of the unit (administrators, cooks,

¹ Cf. commentary Art. 8, sub-para. (e), *supra*, pp. 128-129.

laundry staff etc.). It is worth noting that this type of personnel is also covered by the next article of the Protocol, Article 15 (*Protection of civilian medical and religious personnel*), which is concerned with all civilian medical and religious personnel.

- 588 The condition attached to this absolute prohibition on requisition is that “these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment”.
- 589 The prohibition is absolute “so long as” these resources are necessary, in other words, the absolute prohibition applies only to the resources necessary for the purposes mentioned, and ceases as soon as they are no longer necessary.
- 590 The term *resources* refers to all the objects and services mentioned above, including the medical personnel, who are considered here only in the light of their role (while Article 15 – *Protection of civilian medical and religious personnel*, deals with their protection).
- 591 Obviously the word “necessary” is not very clear. It can be interpreted in a wide range of meanings from “useful” to “indispensable”. Any requisition which manifestly jeopardizes, in a medical context, any of the purposes for which the resources are intended, is prohibited. For example, it would not be permissible to requisition the only surgeon of a hospital containing a large number of wounded. On the other hand, a certain degree of flexibility is possible, depending on the circumstances, with regard to resources which are useful without being indispensable (for example, it might be possible to make a slight reduction in the number of orderlies if the hospital had a very large staff).
- 592 These resources must be necessary for either of the following two purposes:

a) *The provision of adequate medical services for the civilian population*

- 593 Again the provision leaves a great deal of leeway for interpretation. The ratio of doctors per head of population varies enormously from one area of the world to another, more for economic reasons than in relation to the medical needs of the population. Bearing this in mind, how can one assess the medical needs of the civilian population? Obviously it is not within the scope of the Protocol to lay down social policies or to determine a general criterion defining the needs of a civilian population, wherever it may be. The context in which this question must be dealt with here is with regard to the *continuation* of the medical system existing before the occupation. Thus, in order to assess the medical needs in the sense intended here, it is a matter above all of taking into account the customary medical practices of the local population. For example, the services of a gynaecologist are considered essential in some areas for childbirth, while it is considered a superfluous luxury in other areas. The concept of medical needs for that matter, must be interpreted in a wide sense. Customary prophylactic measures (hygiene, vaccination, check-ups) should also be taken into consideration.

b) *Ensuring the continuing medical care of any wounded or sick already under treatment*

594 This is a short-term necessity which it was important to emphasize. Even if certain forms of treatment (such as cosmetic surgery) do not fall under the category of medical *needs* of the civilian population, it is important that any treatment being undertaken is completed (or perhaps in certain cases, interrupted) without endangering the life or the health of the patient because of insufficient or inadequate care.

595 Moreover, it should be noted that the principle laid down in this paragraph might seem to contradict the principle of non-discrimination in the treatment of the wounded and sick, founded on any grounds other than medical ones.² How should an Occupying Power act if large numbers of its armed forces are wounded and without care, if the conditions for requisition are not met? In the long term it is clear that its responsibility as an Occupying Power means that it must find a solution which is not prejudicial to the civilian population of the occupied territory in any way. However, in the short term, although the Occupying Power certainly does not have the right to *requisition* the medical “resources” mentioned here, which is contrary to the principle expressed in this paragraph, it can nevertheless provisionally transfer the wounded into the civilian medical units of the occupied territory. In fact the principle of non-discrimination with regard to treatment means that those in charge of these units cannot refuse to accept the wounded and means that they must be treated in the same way as the civilian wounded in the unit. They should be concerned only with the medical condition of the patients under their care. Even if the medical orderlies are overburdened and the hospital corridors are crowded with the wounded, which is obviously not without some inconvenience for the civilian wounded being treated in this hospital, it would be intolerable to have wounded dying outside the doors of the hospital without being treated. However, it must be emphasized once again that this can only be a provisional solution and that the responsibility of an Occupying Power is such that it implies the duty to deal with this sort of situation.

Paragraph 3

596 Thus the requisition of civilian medical units, of their equipment, their *matériel*, or the services of their personnel, can only be considered if these “resources” are not necessary for the purposes examined above in the preceding paragraph. However, even if they are not necessary for these purposes, these “resources” cannot be lawfully requisitioned by the Occupying Power unless the additional following three conditions contained in the paragraph under consideration are all fulfilled.

² Cf. commentary Art. 10, para. 2, *supra*, pp. 147-148.

Sub-paragraph (a) – The resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war

597 Thus these resources should retain their medical purpose. For example, it is out of the question to requisition a medical unit for use as a munitions depot.

598 Moreover, they must be necessary for the *adequate* and *immediate* medical treatment. The term *immediate* means that they must be used without delay for providing care for the wounded and sick needing care. They cannot be requisitioned for future needs, even if these are genuinely predictable. The term *adequate* means that the resources that have been requisitioned should correspond to the treatment to be given and the possibility of giving it. It is not permitted to requisition equipment which is not needed, or if there is no personnel available who know how to operate it. Finally, the wounded and sick for whom these resources may be requisitioned are those belonging to the armed forces of the Occupying Power or the prisoners of war who have fallen into their hands. Thus these are the wounded and sick of the occupying forces and the captured enemy combatants (i.e., in particular, native soldiers of the occupied territory who were defending their country). Consequently it is unlawful to requisition the “resources” referred to here to use them in the Occupying Power’s own territory.

Sub-paragraph (b) – The requisition continues only while such necessity exists

599 This second condition follows from the first. It is also intended to prevent abuse. The medical necessity for the requisitioned “resources” should not exist only at the moment of requisition, but throughout the period of requisition. As soon as there is no longer any necessity for the resources, their requisition should cease and they should be restored to their former use, or be returned to the service of the civilian population of the occupied territory.

Sub-paragraph (c) – Immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied

600 At first sight this third condition seems superfluous, as paragraph 2 prohibits any requisition of “resources” necessary for these needs. However, it is not superfluous. It could be the case that certain “resources” can be requisitioned without prejudicing in any way the wounded and sick under treatment or the civilian population, but only provided that adequate arrangements are made. Thus, for example, this could be the case if two hospitals were identically equipped and certain pieces of equipment were used to only half their capacity. In this case certain resources could be requisitioned provided that certain measures were taken (specialization of the hospitals, transfer of particular

patients etc.). Thus it was important to state that requisition is prohibited not only if those resources are necessary for the overall medical needs of the civilian population, but also in the case where they may not be necessary in an absolute sense, if practical arrangements are not taken to remove the harmful effects which the requisition might have for the civilian population of the occupied territory.

Y.S.

Article 15 – Protection of civilian medical and religious personnel

1. Civilian medical personnel shall be respected and protected.
2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.
3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.
5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Documentary references

Official Records

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Commentary**General remarks**

- 601 The object of this article is to allow civilian medical personnel, as well as civilian religious personnel, to fulfil their task, not only by ensuring that they will be respected and protected, but also by affording them help in areas and circumstances where this is required.
- 602 Thus respect and protection are extended to all civilian medical personnel (paragraph 1) and civilian religious personnel (paragraph 5), as they are defined in Article 8 (*Terminology*), sub-paragraphs (c) and (d) respectively, while such respect and protection are provided in the Conventions only for military medical and religious personnel, and for the medical personnel of civilian hospitals.¹
- 603 Such an extension of protection is amply justified by the fact that a large number of States nowadays envisage the amalgamation, or at least coordination, between the military and civilian medical services in case of armed conflict.
- 604 A distinction is then made in the help to be given civilian medical personnel, depending on whether it is afforded in one of two areas: an area where medical services are disrupted by reason of combat activity (paragraph 2), and in occupied territories (paragraph 3). In fact only such areas deserve special attention. Apart from these two cases, civilian medical personnel will operate as normal in the context of a medical service which has not been disrupted by combat activity in the territory of the Party to the conflict on which it depends. There is no reason to provide special measures in these circumstances.
- 605 The problem of access of medical personnel to places where their services are indispensable – a matter of great importance for the wounded – is at last dealt with in this article (paragraph 4).
- 606 Moreover, it should be noted that the question of the identification of civilian medical personnel is dealt with later in Article 18 (*Identification*).
- 607 On the other hand, there is no special provision for the case where members of the civilian medical personnel fall into the hands of the adverse Party (except

¹ Cf. First Convention, Arts. 24-26; Fourth Convention, Art. 20.

in the case of occupied territory). In principle such personnel should not be captured, but be left free to carry out its activities. However, if they are seized in a combat zone for reasons of security, or if they inadvertently find themselves in territory controlled by the adverse Party, they will be treated by the latter as protected persons in the sense of the Fourth Convention and Part III, Section II, of that Convention will apply to them in particular. In addition, the rule that such personnel must not be compelled to carry out tasks incompatible with their humanitarian function, must also be observed in this case.²

Paragraph 1

- 608 The fundamental principle of respect and protection for medical personnel is simply mentioned without any addition or restriction.³
- 609 The draft specified that temporary civilian medical personnel are protected only “for the duration of their medical mission”. This specification has become meaningless because of the adoption of a definition of the term “temporary”, which states that temporary medical personnel is only considered to be medical personnel during such time as it is exclusively assigned to medical tasks.⁴ The problem of their protection as civilian medical personnel therefore does not arise outside these periods when they are then considered to be on an equal footing with all other civilians.
- 610 Finally, it should be remembered that not all civilian medical and nursing personnel is covered here, but only those who have been assigned to medical tasks by the Party to the conflict on which they depend.⁵

Paragraph 2

- 611 The areas referred to here are those where the civilian medical services have been disrupted by reason of combat activity. The draft simply referred to combat zones. The present text is an improvement as it emphasizes the disruption of medical services. In fact, it may be that medical services remain properly organized in a combat zone, even though they are usually overburdened, and then it may also be that medical services are disrupted by combat activity, even though they are not situated in the combat zone. The example of bombing behind the lines springs to mind, or the problems of ensuring adequate supplies which may be caused by combat a long way away.
- 612 The help must be given “if needed”. As a matter of fact, it may happen that the civilian medical personnel themselves are in a position to deal immediately with events immediately in case of the disruption of the civilian medical service (e.g., hospitals damaged by bombing). In such a case there is no need to insist on

² Cf. commentary para. 3, *in fine, infra*, pp. 193-194.

³ On the concepts of “respect” and “protection”, cf. commentary Art. 10, para. 1, *supra*, p. 146.

⁴ Cf. commentary Art. 8, sub-para. (c), *supra*, pp. 124-127.

⁵ *Ibid.*

helping those responsible for civilian medical services, if they do not want help, as this could lead to more problems than it would solve.

- 613 It is the *available* help which must be given and not the *necessary* help. It is not possible to ignore military necessity, particularly in combat zones. Thus it is a matter of affording help, as far as this is possible, without weakening one's own military position. This help may have a passive character (such as permitting the transit of medical supplies) or an active character (such as providing places to shelter the wounded and sick or providing a vehicle to transport them).
- 614 Finally, it is not specified who must provide this help; in fact, it is up to the Party to the conflict capable of providing such help. Obviously this is primarily the Party to the conflict on which the civilian personnel depend, but it can also be the adverse Party in some cases, particularly when a temporary advance places it in the presence of civilian medical units and personnel or when medical transports have to cross its lines.

Paragraph 3

- 615 This paragraph imposes three obligations upon the Occupying Power with respect to civilian medical personnel in occupied territories.
- 616 First, the Occupying Power must afford every assistance to such personnel to enable them to perform their humanitarian functions to the best of their ability.
- 617 This does not only refer to "possible" assistance. The Occupying Power has a responsibility to maintain public health and hygiene,⁶ and its duty to assist in territories which are no longer combat zones, but are considered to have regained a measure of stability, is clearly expressed. Humanitarian considerations carry great weight here yet again. Thus the Occupying Power should provide the *necessary* assistance for the civilian medical personnel to perform their humanitarian functions.⁷
- 618 Moreover, this requirement complements the principles laid down in Article 14 (*Limitations on requisition of civilian medical units*), paragraphs 1 and 2.
- 619 Such assistance must be afforded civilian medical personnel "to enable them to perform, to the best of their ability, their humanitarian functions". This is a reminder that the ultimate aim of such assistance, like that of the protection accorded medical personnel, is the help and care given to the wounded and sick. Such assistance can take a concrete form, such as medical supplies or vehicles, but it can also consist of removing hindrances which could be put in the way of the work of medical personnel, particularly by facilitating access to places where the presence of such personnel is required.
- 620 The second obligation imposed on the Occupying Power is to refrain from requiring that the civilian medical personnel should give priority to any person in the performance of their functions, except on medical grounds.
- 621 In fact, this obligation follows from the general principle also contained in Article 10 (*Protection and care*), paragraph 2, second sentence, of the Protocol,

⁶ Cf. in particular Fourth Convention, Art. 56.

⁷ On the interpretation of the term "necessary", cf. commentary Art. 14, para. 2, *supra*, p. 184.

which provides that no distinction shall be made between the wounded, sick and shipwrecked, founded on any grounds other than medical ones.⁸

622 Obviously this principle should be observed primarily by medical personnel, but it should also be observed by any person in contact with the wounded, sick or shipwrecked. Above all, it imposes upon the Parties to the conflict an obligation not to do anything to prevent compliance with it. Thus, in a strict sense, the repetition of this principle in Article 15 was not indispensable. However, it was considered to be useful because it is precisely in situations of occupation that abuse is most to be feared. It can be very tempting for the Occupying Power to order the civilian medical personnel to give priority to the care of its own wounded and sick to the detriment of the civilian wounded and sick of the occupied territory. It was therefore important to stress that such behaviour would be unlawful. But, conversely, it should also be recalled that on the basis of the same principle civilian medical personnel cannot leave without care the wounded and sick of the Occupying Power taken to them in emergencies.⁹

623 In all cases the priorities regarding the care to be given should solely be based on criteria derived from medical ethics.

624 Finally, the third obligation imposed on the Occupying Power is to refrain from compelling civilian medical personnel from carrying out tasks which are not compatible with their humanitarian mission.

625 The text of the draft went further in prohibiting such personnel from being compelled to carry out tasks “unrelated to their mission”. A careful examination by Committee II of Article 15 of draft Protocol II, which was also devoted to medical and religious personnel, resulted in the setting up of a Working Group which considered that the text of the draft was “unnecessarily restrictive on this point, and that it should be sufficient to provide that medical personnel shall not be employed on tasks which are not compatible with their humanitarian role”.¹⁰ Following an amendment, Committee II then accepted the reopening of the discussion on the corresponding article of Protocol I, with which we are concerned here, and the insertion of the present wording in preference to the wording of the draft.¹¹

626 The present text, as shown by the above-mentioned Working Group, is less restrictive than the text of the draft as regards the prohibition of tasks which medical personnel may be compelled to perform. While of course all tasks incompatible with the mission of medical personnel are extraneous, i.e., unrelated to that mission, there are tasks unrelated to that mission which are not incompatible with it. For example, to make nursing personnel take part in the construction of medical buildings is certainly unrelated to their mission, but not incompatible with it.

627 Certain acts are incompatible as such with the humanitarian mission of medical personnel, particularly such acts as could lead to a loss of trust in such personnel by the wounded and sick whom they are detailed to look after. However, some acts which are not in themselves incompatible may become so if carrying out such

⁸ On this subject, *cf.* commentary Art. 10, para. 2, second sentence, *supra*, pp. 147-148.

⁹ On this subject, *cf.* commentary Art. 14, para. 2, *in fine, supra*, p. 185.

¹⁰ *O.R. XIII*, p. 218, CDDH/II/269, question 5.

¹¹ *O.R. XII*, p. 281, CDDH/II/SR.81, paras. 1-2.

acts overburdens the work of the medical personnel to the point where they are prevented from properly carrying out the tasks necessary for their humanitarian mission.

- 628 Moreover, this provision should be read in conjunction with Article 14 (*Limitation on requisition of civilian medical units*), which imposes strict limitations on the requisition of civilian medical “resources” – including personnel – and in particular imposes the condition that such “resources” should be necessary on medical grounds. It should also be read in conjunction with Article 16 (*General protection of medical duties*), which specifically prohibits any persons engaged in medical activities from being compelled to perform acts contrary to the rules of medical ethics.
- 629 Finally, nothing is mentioned concerning the arming of civilian medical personnel in occupied territories, but it seems to be well within the competence of the Occupying Power to disarm this personnel if it deems the measure necessary for security reasons.¹²

Paragraph 4

- 630 The provision laid down in this paragraph is essential to ensure that the extension introduced in the Protocol of the protection granted military medical personnel to civilian medical personnel is effective. Indeed, for civilian medical personnel to be able to provide the services which justify their protection, it is necessary that they are mobile, and it is especially while they are moving around that the protection afforded them is of paramount importance.
- 631 The principle of free movement for medical personnel is thus laid down, though with two reservations.
- 632 The first is that the movement is related to the medical function. In principle, medical personnel can only move to places “where their services are essential”. However, the word “essential” should not be interpreted in an excessively restrictive sense. It is not only in emergencies – e.g., large numbers of wounded after combat or bombing – that medical personnel must be able to move around, but whenever there is medical justification for such movement: a surgeon who has to perform an operation must have access to the hospital without prolonged discussions regarding the essential nature or not of the operation he wishes to perform.
- 633 On the other hand, apart from movements justified by their function, civilian medical personnel are, if necessary, subject to the same restrictions on movements as the rest of the civilian population.
- 634 The second reservation imposed on such freedom of movement is left to the discretion of the Party to the conflict concerned, i.e., the Party which controls the territory where freedom of movement is required, whether this is its own territory or occupied territory. In these circumstances there are certain security requirements which cannot be ignored. Thus all movement is subject to “such

¹² It is to be noted that this competence is explicitly provided regarding civil defence personnel: cf. Art. 63, para. 3.

supervisory and safety measures as the relevant Party to the conflict may deem necessary”. In extreme cases movement may even therefore be prohibited, though the Party concerned must also take into account its responsibility towards public health in the territory which it controls, and must avoid imposing such categorical restrictions as far as possible. On the other hand, it is quite legitimate for the Party concerned to carry out checks, particularly identity checks, and to take various measures to ensure its own security, especially if it fears espionage or sabotage, or the safety of the medical personnel for whom it could, for example, provide an escort on dangerous journeys.

Paragraph 5

635 This paragraph lays down the principle of respect and protection¹³ for civilian religious personnel which is additional to that enjoyed by all civilians.

636 Up to now protection has only been accorded to chaplains attached to armed forces,¹⁴ religious personnel of hospital ships,¹⁵ and religious personnel assigned to the spiritual care of the wounded, sick and shipwrecked covered by the Second Convention.¹⁶ To enjoy such protection, such personnel had to be attached to the armed forces, i.e., there had to be “an official relationship” established by “the competent military authorities”.¹⁷

637 Article 15, paragraph 5, extends the protection to all civilian religious personnel. However, it is appropriate to be aware of the fact that this covers only the personnel defined in Article 8 (*Terminology*), sub-paragraph (*d*). Only religious personnel attached either to the armed forces of the Parties to the conflict, to medical units or transports, or to civil defence organizations are considered to be religious personnel.¹⁸ As in the case of civilian medical personnel, the competent authorities of the Parties to the conflict therefore retain responsibility for designating, or at least accepting, religious personnel who will enjoy protection. It should be remembered that this restriction is justified by the fact that the authorities of the Parties to the conflict are responsible for the application of the Protocol, and in particular for ensuring that no abuses will be committed by protected persons. To automatically and generally attribute the right to protection to all medical or religious personnel would make such a task extremely difficult, if not impossible.

638 The majority of civilian religious personnel in the usual meaning of the term, i.e., those carrying out their function amongst the civilian population, are therefore not covered by this provision. However, special protection cannot be justified for such personnel, who, it should be remembered, remain covered by the general protection accorded the population and all civilian persons.

¹³ On the concept of “respect” and “protection”, cf. commentary Art. 10, para. 1, *supra*, p. 146.

¹⁴ Cf. Art. 24, First Convention.

¹⁵ Cf. Art. 36, Second Convention.

¹⁶ Cf. Art. 37, Second Convention.

¹⁷ Cf. *Commentary I*, p. 220.

¹⁸ For further details, cf. commentary Art. 8. sub-para. (*d*), *supra*, pp. 127-128.

639 As the second sentence of paragraph 5 makes clear, the right of religious personnel to protection and the measures of identification taken in their regard are the same as those for medical personnel. Thus paragraph 5 simply operates by reference. We will do the same, recalling that this is essentially covered by the provisions of Chapter IV and Article 40 of the First Convention, Chapter IV and Article 42 of the Second Convention, and Articles 15 and 18 (*Identification*) of this Protocol.

Y.S.

Protocol I

Article 16 – General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.
3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who would have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Documentary references

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CE/COM I/2; pp. 27-28, CE/COM I/4-5; p. 31, CE/COM I/13-14. *Commentary Drafts*, pp. 25-26 (Art. 16).

Commentary

General remarks

- 640 The principle that the wounded, sick and shipwrecked (hereafter referred to as “the wounded”), must be treated and cared for humanely, in addition to the respect and protection to which they are entitled, is one of the pillars of the Geneva Conventions. The first corollary of this principle is that medical personnel must be respected and protected. This is essential for them to be able to act for the benefit of the wounded. A second corollary is laid down in Article 16: any person able to perform medical activities for the benefit of the wounded should be able to do so without fear or any form of coercion.
- 641 Article 16 supplements the principle contained in Article 18, paragraph 3, of the First Convention for the whole population, which states: “no one may ever be molested or convicted for having nursed the wounded or sick”, though it does so only with respect to personnel engaged in medical activities.
- 642 It is no longer only the fact of providing care which is covered here, but any form of medical activities, always provided that they are compatible with medical ethics. As shown in the documentation presented to the Conference of Government Experts in 1971, a doctor is not limited to giving treatment: “He may be called upon also to diagnose (which may reveal that nothing is wrong), report as an expert consultant, give proof of death, or merely advice, and so forth”.¹ This is why it is important to cover all medical activities.
- 643 Moreover, while it is important that medical activities undertaken for the benefit of the wounded cannot be punished, it is even more so to prevent any behaviour conflicting with their interests. Article 11 (*Protection of persons*) deals with persons receiving treatment, and prohibits subjecting them to any medical procedure which is not indicated by their state of health.² Article 16, paragraph 2, supplements this prohibition by protecting the potential perpetrator against any compulsion to perform acts – or refrain from performing acts – contrary to the patient’s interests.
- 644 Finally, still with the intention of benefitting medical activities for the well-being of the wounded, Article 16, paragraph 3, is concerned with preventing the use of the privileged relationship which often exists between medical personnel and the wounded to compel such personnel to extract information from the wounded. This restriction is necessary to establish an atmosphere of trust between those providing care and their patients, which is nowadays even considered to form part of the healing process.

¹ CE/7b, p. 21.

² For further details on this subject, cf. commentary Art. 11, *supra*, p. 154.

- 645 As to the historical background, it should be noted that the principles on which this article is based were already raised in the context of the “Entretiens consacrés au droit international médical” and were included in the “Draft Rules for the Protection of Wounded, Sick and Civil Medical and Nursing Personnel in Time of Conflict” which resulted from these discussions and were presented by the ICRC at the XXth International Conference of the Red Cross (Vienna, 1965).³ It is clear therefore that the essence of Article 16 reflects a preoccupation which was already an issue right at the beginning of the work that led to the Protocols.

Paragraph 1

- 646 The object of this provision is obviously to remove all fear of punishment from persons who may get involved in caring for the wounded who are the true beneficiaries of this provisions. As a matter of fact, the threat of punishment hanging over the head of persons able to help them means that they would be in danger of being left without care.
- 647 Thus, though the ultimate aim of Article 16 is to improve the treatment of the wounded, this paragraph is directly concerned with persons who have provided care and therefore implicitly those who could get involved in such activities.
- 648 It may seem that this category of persons could be extremely broad or even include the whole population, since anyone may find himself in the presence of a wounded person who is losing blood and may perform a medical act such as applying a tourniquet in such circumstances.
- 649 Although the spirit of international humanitarian law is of course opposed to any condemnation of such acts, the present provision is nevertheless more particularly concerned with those performing medical activities or activities directly related thereto, whether or not they are considered to be medical personnel in the sense of the Protocol. On the other hand, Article 17 (*Role of the civilian population and of aid societies*) covers the whole population.
- 650 What meaning can be ascribed to the term *punishing*? Article 18, paragraph 3, of the First Convention uses the terms *molest* and *convict*, and Article 17 (*Role of the civilian population and of aid societies*), paragraph 1, of the Protocol adds the term *prosecute*. The draft presented at the Conference of Government Experts in 1971 stated that the exercise of medical activities should not be “considered an offence”.⁴ The verb *convict*, used in the First Convention, and the term *offence*, used in the 1971 draft, show that these are concerned only with the criminal law aspects. However, the term *molest*, used in the Convention, goes much further. This should prevent any criminal proceedings or even administrative proceedings being brought solely on the basis of such grounds, as is even more clearly prohibited by the term *prosecute*, used in Article 17 (*Role of the civilian population and of aid societies*) of the Protocol. *A fortiori*, it should also prevent any administrative measure (particularly a disciplinary measure)

³ On the subject of these discussions and these “Draft rules...” and their historical background, cf. introduction to Part II, *supra*, pp. 108-110.

⁴ CE/7b, p. 21.

from being taken, or even any form of annoyance, threat or harassment. By using the term *punishing* the prohibition is here restricted to sanctions. However, the verb *punishing* is less restrictive than *convicting*; it refers not only to penal sanctions, but also to any other sanctions or harassment.

- 651 The obligation to refrain from punishing is addressed to all authorities in a position to administer punishment, from the immediate superior in the hierarchy of the person concerned who is entitled to do so, to the supreme court of a State. It applies not only to the enemy authorities, but also to the authorities of the State of which the person concerned is a national. This is important, because there could be a great temptation for a State to punish its own nationals who have administered care to the enemy wounded.
- 652 The expression “medical activities” is very broad, and its precise limitations are difficult to define. Ultimately the determining element is that the activities are aimed at improving the health or alleviating the suffering of the wounded. In this way activities which should obviously be excluded, are in fact excluded: activities unrelated to the wounded person’s state of health, such as messages which could be transmitted to help him.
- 653 Medical activities must be “compatible with medical ethics”. This point first of all acts as a reminder that the provision under consideration here is aimed at medical personnel. However, it raises two questions. What exactly are medical ethics? To what extent can one require that persons who are not professionally bound by ethical rules, observe and therefore are familiar with such rules?
- 654 It is possible to define this concept fairly closely. Ethics are defined as “the science of morals [...] the science of human duty”.⁵ They are not only concerned with the medical profession, though modern usage of the term usually refers to *medical* ethics, viz., the science of the professional duties of medical practitioners.⁶ These are certainly the ethics with which we are concerned here: there is no doubt about that.⁷
- 655 Thus the phrase refers to the moral duties incumbent upon the medical profession. Such duties are generally decreed by the medical corps of each State in the form of professional duties. However, this should not be confused with the rules of the internal organization of medicine which obviously are not part of medical ethics.
- 656 At the international level, the World Medical Association⁸ adopted an “International Code of Medical Ethics” (1949)⁹; a modern version of the Hippocratic Oath, the “Declaration of Geneva” (1948)¹⁰; the “Regulations in

⁵ Shorter Oxford English Dictionary, 1973 Edition, p. 685.

⁶ The French equivalent “déontologie” in particular refers to “déontologie médicale”, cf. Paul Robert, Dictionnaire alphabétique et analogique de la langue française, Paris, 1971, Vol. II, p. 120.

⁷ A proposal was made to use the expression “déontologie médicale” in the French text, “medical ethics” in the English text (cf. O.R. III, p. 78, CDDH/II/53).

⁸ This Association was set up in 1947. It is constituted of one medical association in each country and has about 700,000 members. On this subject, cf., in particular, M. Torrelli, *op. cit.*

⁹ *Ibid.*, pp. 384 ff., which contains the text of this Code in an Annex.

¹⁰ *Ibid.*, pp. 385 ff.

time of armed conflict”¹¹ and the “Rules governing the care of sick and wounded, particularly in time of conflict”.¹² These rules have not been adopted by States and have no binding force in international law. Nevertheless, they constitute a valuable instrument of reference and no one contests the principles on which they are laid down. There is no doubt that these are the rules of medical ethics referred to in the context of the provision under consideration here.¹³

657 As these rules were adopted for the medical profession, strictly speaking they bind only the members of this profession. However, an examination of these rules reveals that the underlying principles are simply common sense and that no person administering care could transgress them without being aware of being in the wrong. In fact the more delicate ethical problems, such as those raised by abortion or euthanasia, do not play a part in this context.

658 What is the essential maxim of these principles? It is never to act in conflict with the wounded person’s interests, to help him to the fullest extent of the

¹¹ These rules, as amended by the 35th World Medical Assembly in 1983, are as follows:

“1. Medical Ethics in time of armed conflict is identical to medical ethics in time of peace, as established in the International Code of Medical Ethics of the World Medical Association. The primary obligation of the physician is his professional duty; in performing his professional duty, the physician’s supreme guide is his conscience.

2. The primary task of the medical profession is to preserve health and save life. Hence it is deemed unethical for physicians to:

A. Give advice or perform prophylactic, diagnostic or therapeutic procedures that are not justifiable in the patient’s interest.

B. Weaken the physical or mental strength of a human being without therapeutic justification.

C. Employ scientific knowledge to imperil health or destroy life.

3. Human experimentation in time of armed conflict is governed by the same code as in time of peace; it is strictly forbidden on all persons deprived of their liberty, especially civilian and military prisoners and the population of occupied countries.

4. In emergencies, the physician must always give the required care impartially and without consideration of sex, race, nationality, religion, political affiliation or any other similar criterion. Such medical assistance must be continued for as long as necessary and practicable.

5. Medical confidentiality must be preserved by the physician in the practice of his profession.

6. Privileges and facilities afforded the physician must never be used for other than professional purposes.”

¹² These rules, as amended in 1983, are as follows:

“A.1. Under all circumstances, every person, military or civilian must receive promptly the care he needs without consideration of sex, race, nationality, religion, political affiliation or any other similar criterion.

2. Any procedure detrimental to the health, physical or mental integrity of a human being is forbidden unless therapeutically justifiable.

B. 1. In emergencies, physicians and associated medical personnel are required to render immediate service to the best of their ability. No distinction shall be made between patients except those justified by medical urgency.

2. The members of medical and auxiliary professions must be granted the protection needed to carry out their professional activities freely. The assistance necessary should be given to them in fulfilling their responsibilities. Free passage should be granted whenever their assistance is required. They should be afforded complete professional independence.

3. The fulfillment of medical duties and responsibilities shall in no circumstance be considered an offence. The physician must never be prosecuted for observing professional confidentiality.

4. In fulfilling their professional duties, the medical and auxiliary professions will be identified by the distinctive emblem of a red serpent and staff on a white field. The use of this emblem is governed by special regulation.”

¹³ For further details in this field, *cf.* in particular M. Torrelli, *op. cit.*

means available, whoever he is (principle of non-discrimination), to be discreet regarding his condition and never to abuse his sense of dependence on the person administering care, particularly not with a view to gaining an advantage from him.

659 Thus the meaning of paragraph 1 is clear: it encourages concern for the wounded, provided that this concern remains pure and impartial.¹⁴

660 The second part of the sentence, “regardless of the person benefitting therefrom” (medical activities), was not indispensable. It simply reveals the absolute character of the principle, to which no exception can be made. There is a right, and even a duty (in any case for medical personnel) to administer care to the worst enemy of one’s own Party to the conflict, if he is wounded, even in the middle of the most cruel battle.

661 However, one tricky problem remains: if a national of a State is in service of the enemy, this act may be punished by that State. Should Article 16 be considered as an obligation for a State Party to the conflict not to punish its own nationals serving in the enemy medical service? Without being able to answer this in the affirmative, it is to be earnestly wished. In any case, the act of serving in the *medical service* of the enemy should at least be considered an important mitigating circumstance in a case of *being in the enemy service*.

662 It should also be stated that on the basis of this provision, it is not possible to rule out the prosecution of those who have not answered a call to mobilisation. However, this is another problem which does not belong to international humanitarian law.¹⁵

Paragraph 2

663 This paragraph is concerned with another aspect of the protection of medical duties. This time it is not a case of preventing medical activities from being paralyzed by the fear of possible punishment, but of preventing compulsion from being exercised on medical personnel to make them behave contrary to medical ethics.

664 Those on whom such compulsion must not be exercised are “persons engaged in medical activities”. This refers, first of all, to all personnel caring for the wounded, whether these are doctors, nurses or medical aides. However, it also includes technical personnel whose activities, such as X-ray examinations and the preparation of medicine, has a direct influence on the wounded. It should be noted that this concept only partially covers that of medical personnel. Indeed, on the one hand, it covers members of medical personnel who do not qualify as such in the sense of the Protocol because they are carrying out medical activities without being “assigned, by a Party to the conflict, exclusively” to such medical purposes (*cf.* Article 8 – *Terminology*, sub-paragraph (c)); on the other hand, some persons considered as medical personnel by the Protocol do not carry out

¹⁴ *Cf.* also Art. 11, para. 1, and its commentary, *supra*, pp. 152-156.

¹⁵ On this subject, see also J. Pictet, *Humanitarian Law and the Protection of War Victims*, *op.cit.*, pp. 78-80.

medical activities (such as, for example, the personnel assigned to the administration of medical units). Nevertheless, the latter are covered by the general principle of Article 17 (*Role of the civilian population and of aid societies*), paragraph 1, third sentence.¹⁶

665 Such persons cannot be *compelled* to perform acts or to carry out work, or refrain from so doing. “To compel” means “to urge irresistibly, to constrain, oblige, force”¹⁷ someone to act against his will. People may be compelled directly (by threats of death, of maltreatment, of harassment, of imprisonment) or indirectly (e.g., by threats relating to members of their family). For military medical personnel a simple military order may even constitute a form of compulsion, as refusing to carry out an order is severely punished. However, there should be more than mere pressure, such as that of withdrawing or failing to grant certain material advantages. Moreover, it should be noted that anyone who compelled a person engaged in medical activities to perform acts contrary to medical ethics would not only be violating Article 16, paragraph 2, but also Article 10 (*Protection and care*), and probably Article 11 (*Protection of persons*). As regards the person who had been compelled to commit such an act, he would not be automatically absolved from blame. The compulsion would be considered as a mitigating circumstance of the violation of Article 10 (*Protection and care*), and probably of Article 11 (*Protection of persons*), and depending on the circumstances, might even result in the acquittal of the accused.¹⁸

666 The persons concerned cannot be compelled “to perform acts or to carry out work contrary to the rules of medical ethics” (or other rules: see below). Thus this does not refer only to medical procedures (such as performing an operation, giving an injection, administering medicine etc.), but also to work that is essential for medical treatment (preparation of medicines, analyses etc.)

667 For that matter, it is clearly stated that such compulsion may take either a positive or a negative form. To prevent the performance of an essential operation, administering medicines or disinfecting a wound, clearly constitutes a compulsion which is just as reprehensible as a compulsion to perform certain acts. For example, it is quite clear that preventing an orderly from carrying out an analysis which is essential for medical treatment is also contrary to the provisions of paragraph 2.

668 The acts or the work referred to in this paragraph are those which are “contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick, or to the provisions of the Conventions or of this Protocol”. These are alternative conditions, and it is sufficient for such acts or works to be contrary to one of these three types of rules.

669 It should be noted that in the documentation presented at the first session of the Conference of Government Experts in 1971 reference was made to conduct “contrary to his vocation and professional conscience”. The experts attempted to draw up a list of acts which should be prohibited, but in view of the difficulties of such a task, they gave up. Finally, they adopted the solution of including a

¹⁶ Cf. commentary Art. 17. *infra*, pp. 216-217.

¹⁷ Shorter Oxford English Dictionary, 1973 Edition, p. 382.

¹⁸ On this subject, cf. also commentary Arts. 85-87, *infra*, p. 989.

paragraph specifically prohibiting medical personnel from being compelled to violate the provisions of the Conventions or the Protocol, and another paragraph prohibiting them from being compelled to perform acts or carry out work contrary to *professional rules*. The concept of *professional conscience* was considered to be too subjective and was abandoned. In the draft presented to the CDDH this part of the article was simplified. The two paragraphs were combined into a single one, referring only to *medical ethics*, on the basis that this covered all the provisions considered previously. However, various amendments requested the reintroduction of more complete and explicit references.¹⁹ As stated during the CDDH,

“the relevant norms were to be found, first in the Geneva Conventions and the Protocols themselves; secondly, in the rules of medical ethics designed for the benefit of the wounded and sick, as opposed to those rules concerned only with the interests of the profession; thirdly, in other rules designed for the same purpose and applicable in a specific case”.²⁰

However, it should be remarked that no attempt was made to list these various rules. The main point in understanding the scope of this paragraph is to be sensitive to its spirit. It is concerned with removing a compulsion which might be exerted on medical personnel to conduct themselves in a way that is contrary to their patients’ interests. This is at the heart of the problem, and the seriousness of a breach of this provision should be considered in the light of the harm it could do to such patients’ interests and the awareness of harm being done.

Paragraph 3

- 670 This paragraph is an attempt to resolve an awkward problem which had already been raised during the drafting of the Conventions, and which had been thoroughly discussed in medical circles. It is not the problem of “medical confidentiality”, as it has sometimes improperly been described,²¹ but the principle that the wounded and sick should not be denounced and that they should not be informed on.
- 671 This problem arose mainly because of experiences during the Second World War when the occupying forces ordered inhabitants, including doctors, to denounce the presence of any presumed enemy, under threat of grave punishment.
- 672 During the discussions which resulted in 1949 in the adoption of the Conventions, some delegations would have liked to specify that medical personnel and the civilian population should not be permitted to conceal the wounded whom they had given shelter or care from the control of the authorities.

¹⁹ Cf. O.R. III, pp. 77-81, particularly CDDH/II/36, CDDH/II/53, CDDH/II/209, CDDH/II/212.

²⁰ O.R. XI, p. 183, CDDH/II/SR.19, para. 59.

²¹ As a general rule, medical confidentiality refers to the discretion that a doctor must observe with respect to third parties regarding the state of health of his patients and the treatment he has administered or prescribed for them. Cf. also CE/7b, p. 22.

They considered that otherwise such personnel and population would be infringing their neutral status.²²

673 Others were opposed to this point of view, fearing that such a provision would confer legitimacy on measures taken by occupying authorities to compel doctors to denounce wounded members of the enemy forces or of resistance movements. Taking this argument to its logical conclusion, some wished to include non-denunciation as a principle.²³

674 Finally, because of the lack of agreement, this was not mentioned at all in the First Convention.

675 However, the problem was subsequently taken up by the International Law Association,²⁴ as well as by the IIIrd International Congress on the Neutrality of Medicine,²⁵ which both recommended that the principle of non-denunciation should be categorically recognized, emphasizing that otherwise the wounded would not take the risk of seeking medical attention.

676 The text proposed by the ICRC during the first session of the Conference of Government Experts does not put the principle of non-denunciation categorically, but leaves the responsibility whether or not to denounce a patient up to the doctor: the doctor cannot be compelled to denounce (but he is under no obligation to refrain from denunciation).²⁶ In this way the possibility of imposing denunciation has been taken away from the authorities, but a doctor retains the freedom to denounce a patient on the basis that he may legitimately wish to prevent the patient pursuing activities which he considers to be dangerous for other human beings, just as, in peacetime, he may wish to prevent a criminal from continuing his criminal activities. This principle was retained throughout all the stages of the Protocol's drafting and is contained in the final text.

677 However, the experts increased its scope by making it applicable to all persons carrying out medical activities.

678 Furthermore, it should be pointed out that the principle is concerned primarily with occupied territory, and that at first it had been provided that it applied only in such territory. As a controversy had arisen during the second session of the Conference of Government Experts regarding its application to the occupying authority's own medical personnel, the expression "occupying authorities" was replaced by "adverse Party". For that matter, it seemed to be clearly established that nothing in this provision could prevent the occupying authorities from imposing a duty to denounce on its own personnel. However, subsequently some confusion arose whether it was the adverse Party of that of the medical personnel, or of that of the wounded, that was referred to. In the Commentary on the draft Additional Protocols presented to the CDDH, the ICRC opted for the second

²² On this subject, cf. CE/7b, p. 22.

²³ *Ibid.*

²⁴ Cf. *Report of the 53rd Conference, Buenos Aires, 1968*, The International Law Association, London, 1969.

²⁵ A summary of the reports, debates and resolutions of this congress, which took place in Rome from 16-20 April 1968, can be found in the *Annales de Droit international médical*, Commission médico-juridique, Palais de Monaco, No. 18, December 1968, pp. 72-76.

²⁶ Cf. CE/7b, p. 23.

explanation, though this was contested.²⁷ Replacing the expression “occupying authorities” by the expression “adverse Party”, moreover, also resulted in the application of the rule no longer being restricted to occupied territory.

679 Finally, it should be noted that the Government Experts Conference made a reservation to the principle with regard to the notification of communicable diseases and the personnel caring for the wounded may therefore be compelled to make such notification. This reservation was retained and is included in the present text of Article 16, paragraph 3.

680 Let us now turn to the text to be reviewed.

681 Paragraph 3 applies to any person “engaged in medical activities”, i.e., the same wording as in paragraph 2. The French text uses slightly different expressions in paragraphs 2 and 3, referring to “activité de caractère médical” and “activité médicale”, respectively. However, this is merely a question of translation. The English text, which is identical in both paragraphs, shows that paragraph 3 is not addressed to a different group of persons from paragraph 2. As regards the meaning of the words quoted, reference should therefore be made to the commentary on paragraph 2. The same applies to the meaning of the verb *compel*.

682 Such a person cannot be compelled to give “information concerning the wounded and sick who are, or who have been, under his care”. This refers not so much to information relating to the health or physical condition of the wounded and sick. In fact, discretion in this respect is required by medical ethics and is therefore imposed by paragraph 2. The information concerned is rather information about the activities, connections, position or simply the existence of the wounded. The provision does not cover only the wounded who are still under the care of the person engaged in medical activities, but also those who have been cared for previously. Thus the protection is not of a temporary nature, but long term, based on the general idea that it is not right to use information obtained in the context of the relationship between the wounded and persons caring for them. This relationship must be free of any suspicion if it is to be truly effective.

683 Nevertheless, this obligation to refrain from compelling a person engaged in medical activities to give information thereon is subject to the condition that “such information, would, in his opinion, prove harmful to the patients concerned or to their families”. In other words, the personnel caring for the wounded could not lawfully use this provision as an excuse to refuse to give information for other reasons. However, it is clear that the discretion of the person engaged in medical activities is still very broad, all the more so as it is very difficult, if not impossible in practice, to examine the validity of such reasons.

684 Moreover, as we saw above, there is no obligation upon those exercising medical activities to remain silent. They may denounce the presence of the wounded to the authorities even when they know that this will be prejudicial to the wounded person or his family, if such denunciation is in their view necessary for saving lives. The prohibition is aimed at those who could compel such denunciations.

²⁷ Cf. *Commentary Drafts*, p. 25, and *O.R.* XI, p. 150, CDDH/II/SR.16, para. 52.

- 685 The information must not be demanded under compulsion by “anyone” belonging to the Parties to the conflict, with one reservation which will be examined below. The draft presented to the CDDH referred to the “authorities”. Even though only authorities in the wide sense can lawfully be in a position to exercise compulsion, there is no need to regret the wider formulation adopted in the final text, as this avoids any ambiguity.
- 686 Although compulsion exercised by personnel of the adverse Party is absolutely prohibited, such compulsion exercised on a person by his own authorities is only forbidden insofar as the national law of such a person does not allow exceptions (“except as required by the law of the latter Party”). Without reiterating the historical background of this clause outlined above, it is worth recalling that the draft presented to the CDDH simply imposes a prohibition on the authorities of the adverse Party. During the CDDH the text first adopted by Committee II also referred only to the adverse Party. However, this text presented the Drafting Committee with some difficult problems, and it decided to refer it back to a Working Group. It was this latter which adopted the present wording, maintaining that it was not altering the essential meaning of the preceding text. The Rapporteur of the Committee’s Drafting Committee considered that the idea “that no person engaged in medical activities should be compelled to give, even to his own Party, the information in question except if so required by national legislation” had “always been implicit in the former wording”.²⁸
- 687 However, this modification was not unimportant as regards the principle involved, as it clearly presumes that in the relationship between the authorities of a Party to the conflict and its own personnel engaged in medical activities, compulsion to denounce is prohibited in principle. Only an explicit provision of national legislation can remove this presumption. It is by no means negligible as the problem of the relationship between the doctor dependent on the authorities of his own Party, and the wounded of the adverse Party (care of persons in occupied territory, prisoners of war etc.) is not a mere academic point. At a purely humanitarian level it is regrettable that the wording did not go even further by adopting the provision without restriction, even with respect to the Party to the conflict of the personnel engaged in medical activities and leaving the sole responsibility whether or not to denounce to such personnel. However, the view prevailed that there could be no question “of interfering with the application of national legislation”²⁹ once it was decided that the scope of the provision should not be confined to occupied territories, but should be extended to national territories.
- 688 Finally, it should be mentioned that the solution which was ultimately adopted is not very satisfactory from the purely legal point of view, insofar as it results in an international legal norm varying according to different national legislations. One delegation at the CDDH even stated that “such a provision was contrary to

²⁸ *O.R.* XII, p. 282, CDDH/II/SR.81, para. 3.

²⁹ *O.R.* XI, p. 153, CDDH/II/SR.16, para. 68.

the very essence of international law”.³⁰ It remains to be hoped that the national legislation on which the application of the rule depends on this point will exercise as little compulsion as possible with regard to persons engaged in medical activities. In any case they may not impose an obligation to violate the minimum standards imposed by the general rules of medical ethics mentioned above.³¹

- 689 The final sentence of the paragraph concerns the relationship of the personnel caring for the wounded both with the adverse Party and with its own Party. In fact, in the case of communicable diseases, general interest takes precedence over special interests. Thus it is logical to impose on persons engaged in medical activities an obligation in all circumstances to notify cases of communicable diseases which they can trace. The Protocol itself does not impose this obligation, but refers to domestic regulations, removing any ambiguity with regard to the conformity of these regulations and the present article.

Y.S.

³⁰ *O.R.* XI, p. 513, CDDH/II/SR.46, para. 2. This remark referred to a similar provision in Protocol II, but it was repeated with regard to the present provision: *O.R.* XII, p. 282, CDDH/II/SR.81, para. 5.

³¹ *Cf. supra*, pp. 200-201, and notes 11-12.

Protocol I

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

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.
2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed.

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Commentary

General remarks

- 690 The foremost reason for this provision is once again to protect the interests of the wounded, sick and shipwrecked, and its immediate aim is to permit the civilian population and aid societies to assist such victims, either on their own initiative or at the request of the authorities.
- 691 The draft Protocol additional to the Fourth Convention, presented by the ICRC at the first session of the Conference of Government Experts in 1971, contained an article entitled “Role of the civilian population”, which more or less covered the scope of the present Article 17, paragraph 1.
- 692 This provision was inspired by Article 18, paragraphs 2, 3 and 4, of the First Convention – the principle of which came from the original Convention of 22 August 1864 (Article 5) – and it was aimed at extending the scope of Article 18 to the civilian wounded and sick. In fact, Article 18 applies only to the military wounded and sick, as defined in Article 13 of the First Convention.
- 693 A first addition was made to this text in the draft presented by the ICRC at the second session of the Conference of Government Experts in 1972: the ICRC included the shipwrecked, in addition to the wounded and sick. In doing so, it extended the scope of the provisions of Article 21 of the Second Convention, which permits an “appeal to the charity of commanders of neutral merchant vessels, yachts or other craft”, and guarantees special protection for vessels responding to this appeal, or for those “having of their own accord collected wounded, sick or shipwrecked persons”. The Committee which dealt with this question during the second session of the Conference of Government Experts in 1972 considered that it was appropriate to introduce in the draft a paragraph corresponding more closely to Article 21 of the Second Convention, but covering all victims protected in the draft, including in particular shipwrecked civilians who are not covered by the Second Convention.
- 694 In the 1973 draft a new addition was made with the introduction of a paragraph inspired by Article 18, paragraph 1, of the First Convention. This provides for the possibility of military authorities appealing to the charity of the civilian population to collect the wounded and sick. The new paragraph extended its scope in two respects: first, like the whole of the new article, it also covered the civilian wounded and sick; secondly, it allowed for the possibility of appealing to the civilian population, as does Article 18 of the First Convention, and also to aid societies.¹

¹ However, it should be noted that in this second case there is not really a substantial change. According to *Commentary I*, it is clear that relief societies are covered by the generic term “inhabitants”. Cf. p. 189 of that *Commentary*.

- 695 As regards the structure of the article, the 1973 draft adopted a division into five paragraphs, of which the first four formed a corollary to part of Article 18 of the First Convention, while the fifth supplemented Article 21 of the Second Convention.
- 696 Though the substance of this draft article was retained during the CDDH with one exception, its structure was again modified. The first three paragraphs were combined to form a single paragraph, the fourth therefore remained as a separate paragraph (which became the second paragraph of the present article), and the fifth was deleted.
- 697 The main modification of the substance of the draft during the CDDH consisted of the deletion of the fifth paragraph, although it was ultimately of less importance than it had first seemed. In fact, the deletion of this paragraph² should be considered in conjunction with the reintroduction of the term “shipwrecked” in the first and second paragraphs, which thus became complementary to Article 21 of the Second Convention.
- 698 Thus the main reason for the deletion of this paragraph was that it no longer seemed to have much purpose.³ Moreover, this argument is strengthened by the new regulations adopted for medical ships and craft.⁴ However, it is appropriate to point out that perhaps an attempt to increase the scope of this paragraph was not unrelated either to the decision finally taken to delete it. In presenting the article, the ICRC representative had actually already mentioned that the lack of any mention of aircraft⁵ in paragraph 5 of the draft meant that there was something missing, and an amendment was put forward to include aircraft and vehicles in this paragraph.⁶ This amendment was hotly disputed, particularly because such a vague provision relating to aircraft entailed the risk of reintroducing the fear that medical aircraft might abuse their privileges while detailed regulations had just been established for medical aircraft.⁷ It was after this debate that the decision to delete the paragraph was taken by Committee II.⁸

Paragraph 1

First sentence

- 699 This paragraph confirms a traditional rule which the civilian population should observe. It is the only place in the Protocol where the rule is explicitly addressed to the civilian population. Nevertheless, as with any rule in the Protocol, it is appropriate to recall that it is up to the High Contracting Parties to respect and

² On this subject, *cf.* O.R. XII, p. 50, CDDH/II/SR.59, para. 78.

³ On this subject, *cf. ibid.*, pp. 49-50, paras. 72 and 77.

⁴ *Cf.* Arts. 22 and 23 with the commentary thereon, *infra*, p. 253.

⁵ *Cf.* O.R. XI, p. 157, CDDH/II/SR.17, para. 18.

⁶ *Cf.* O.R. III, pp. 85-86, CDDH/II/203.

⁷ *Cf.* O.R. XII, pp. 48-50, CDDH/II/SR.59, paras. 67, 72 and 74. As regards medical aircraft, *cf.* Arts. 24-31, with the commentary thereon, *infra*, p. 279.

⁸ *Cf.* O.R. XII, p. 50, CDDH/II/SR.59, para. 78.

to ensure respect for it in all circumstances,⁹ and therefore to instruct the civilian population accordingly.

700 The civilian population is defined in Article 50 of the Protocol (*Definition of civilians and civilian population*).¹⁰

701 The duty imposed here upon the civilian population is only to *respect* the wounded, sick and shipwrecked, and not to *protect* them.¹¹ Thus it is above all an obligation to refrain from action, i.e., to commit no act of violence against the wounded or take advantage of their condition. There is no positive obligation to assist a wounded person, though obviously the possibility of imposing such an obligation remains open for national legislation, and in several countries the law has indeed provided for the obligation to assist persons who are in danger, on pain of penal sanctions.

702 The obligation is imposed with respect to the *wounded, sick and shipwrecked* as they are defined in Article 8 (*Terminology*).¹² Such an obligation had already been laid down with respect to the wounded and sick covered by the First Convention, but not with respect to the shipwrecked covered by the Second Convention. A proposal had been made to add to this list “combatants *hors de combat*”,¹³ but the point of view which finally prevailed was that the problem of combatants *hors de combat* without also being wounded, sick or shipwrecked, should not be dealt with in Part II, which is devoted to the wounded, sick and shipwrecked.¹⁴ At a later stage Committee II even rejected the suggestion of Committee III that Article 17 should refer to the protection of persons *hors de combat*.¹⁵

703 The obligation is unconditional, and it was considered proper to recall that it exists even if the victims *belong to the adverse Party*. This stipulation was not indispensable and a proposal was made to delete it:¹⁶ clearly, it is the members of the adverse Party with which this provision is primarily concerned, as violence committed against victims of one’s own Party, or against neutral victims, is undoubtedly already prohibited by national legislation. However, despite this, it was retained to make sure that there could be no ambiguity.

704 The clause “and shall commit no act of violence against them” at first sight also seems superfluous. Would it actually be possible to respect a wounded person and at the same time commit an act of violence against him? This wording was already contained in the draft presented to the CDDH by the ICRC, and it is in fact an approximate transcription of Article 18, paragraph 2, second sentence, of the

⁹ Cf. Art. 1, para. 1.

¹⁰ Cf. commentary Art. 50, *infra*, p. 609.

¹¹ On the meaning of these two terms, cf. commentary Art. 10, *supra*, p. 145.

¹² Cf. commentary Art. 8, sub-paras. (a) and (b), *supra*, pp. 116-124.

¹³ Cf. O.R. III, p. 83, CDDH/II/14.

¹⁴ Cf. O.R. XI, pp. 158-161, CDDH/II/SR.17, paras. 34-56.

¹⁵ Cf. O.R. XIII, p. 66, CDDH/236/Rev. 1, para. 25. According to the Rapporteur of Committee III, speaking on persons *hors de combat*, it seemed undeniable that such persons should be respected by the civilian population. However, Committee III considered that a provision on this point would be more appropriate in Art. 17, which is why it was referred to Committee II, which refused to take up the question for the reason mentioned above. For further details on this matter, cf. commentary Art. 41 and Art. 42, *infra*, p. 479.

¹⁶ Cf. O.R. III, p. 85, CDDH/II/203.

First Convention.¹⁷ Thus the act of violence must be considered as an aspect of disrespect which deserves to be emphasized. This is certainly the way in which this clause of paragraph 1 should be understood. In this respect it should also be noted that the violence which is prohibited is not necessarily physical violence. For example, threatening or harassing a wounded person would certainly constitute reprehensible moral violence against him, and in any case this would be in violation of the duty imposed by this provision to *respect* him.

Second sentence

- 705 The first sentence was concerned with instilling in the civilian population an attitude at least of neutrality with regard to any victim. The second sentence is aimed at permitting civilians, including aid societies, to adopt a positive attitude towards such victims, if they desire to do so. In other words, the civilian population *must respect* and *may protect*.
- 706 This sentence is concerned, in addition to the civilian population, with *aid societies*, which are also mentioned in Article 18 of the First Convention.
- 707 The mention of such societies had formed the subject of discussion during the second session of the Conference of Government Experts in 1972. The opinion had been voiced that such societies did not need to be mentioned specifically, as they form part of the civilian population, but the opposite view prevailed. It was admitted that as the population often organizes aid societies of different kinds, it was opportune to mention such societies.¹⁸
- 708 The draft did not contain any example of such societies, though various amendments were put forward, proposing that the National Red Cross (Red Crescent, Red Lion and Sun) Societies should be mentioned by way of example, in view of their prominent role in this type of activity.¹⁹ The principle of such a mention was adopted by Committee II.²⁰ However, as stated above, such a mention is given only by way of example, and when it was adopted by consensus at a plenary meeting of the Conference, one delegation considered that it was appropriate to recall that the mention of such societies “does not imply any limitation on the initiative and the action of other aid societies”.²¹ However, *aid societies* should be understood to mean “voluntary aid societies duly recognized and authorized by their governments”, i.e., the societies covered by Article 26 of the First Convention. This was the intention of the authors of the draft,²² and it was not contested by anyone during the CDDH. A profit-making society or a society established without complying with the rules imposed by national legislation, could therefore not fall under this provision.

¹⁷ This sentence is worded as follows: “The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence”.

¹⁸ *CE 1972, Report*, vol. I, p. 40, para. 1.58.

¹⁹ *Cf. O.R. III*, p. 82-84, CDDH/II/1, 11, 16, 19.

²⁰ By 45 votes to none against and seven abstentions: *cf. O.R. XI*, p. 162, CDDH/II/SR.17, paras. 62 and 63.

²¹ *O.R. VI*, p. 78, CDDH/SR.37, Annex (Holy See).

²² *Cf. Commentary Drafts*, p. 26 (Art. 17, para. 2).

- 709 The civilian population and aid societies “shall be permitted, even on their own initiative” to undertake the described activities (see below). This wording might lead one to suppose that authorization should be requested (which, in principle, should be granted). Yet this is not the case. In the absence of any provision to the contrary, there is a presumption that the activities described are permitted. In fact, this wording is taken from the First Convention where the commentary is very clear on this subject: assistance to the wounded is a duty and

“it is impossible *a fortiori* to deny those who wish to come to the help of the wounded their right to do so. That right is the natural appanage of all persons; and no one can prevent the civilian population from carrying out, in all circumstances, their humanitarian duty towards the wounded [...]”²³

At most, the authorities could prevent the civilian population from reaching the victims by prohibiting certain movements, provided that there are valid reasons for such action, in particular, reasons of security. However, it is up to them to justify such a prohibition. In fact, this interpretation is reinforced by the expression “even on their own initiative”. There can actually be no question of requesting authorization when people act on their own initiative. Otherwise, they would no longer really be acting on their own initiative. Thus the authorization referred to here applies generally and is given once and for all. It is the expression of a right.²⁴

- 710 However, it should also be noted that the expression *even on their own initiative* was only finally adopted after lengthy discussions. Article 18 of the First Convention, like the 1973 draft, used the term *spontaneously*. This expression was considered inadequate, as on the one hand, it seemed to exclude organized aid, and on the other hand, did not apply very accurately to the societies whose activities do, after all, necessarily require some degree of concerted cooperation.²⁵ The expression which was finally chosen is appropriate, since the word *even* does not exclude organized activities, and the expression *on their own initiative* does not necessarily imply improvised action. It means that the aid societies can take their decision in accordance with their respective decision making processes, without external consultations.

- 711 Permission is given to *collect and care for the wounded, sick and shipwrecked*. The original 1864 Convention had already stated that “the presence of any wounded combatant receiving shelter and care in a house shall ensure its protection”. The principle went very far and it was subsequently slightly diluted,²⁶ but the concepts expressed by the terms “collect” and “care” were retained, for, as the Commentary to the First Convention states, “to ‘collect’ a wounded man is to receive him into one’s house. But it may also mean to bring him in from where he is lying wounded”.²⁷ Apart from the reference to “collect”, the 1973 draft refers to “care or assistance”. However, this proposal led to heated

²³ *Commentary I*, p. 189.

²⁴ On this subject, *cf.* also *O.R. XI*, p. 243, CDDH/II/SR.24, para. 59.

²⁵ *Cf.* in particular *O.R. XI*, pp. 238-243, CDDH/II/SR.24, paras. 21-66.

²⁶ On this subject. *cf.* *Commentary I*, pp. 184 ff.

²⁷ *Ibid.*, p. 187.

discussion in Committee II and several proposals were made to amend it.²⁸ Some were afraid that the term “assistance” entailed a “possibility of conflict with domestic legislation concerning treason or other crimes or unlawful acts”.²⁹ Others thought that the term “care”, as well as the expressions “medical assistance” or “medical care”, to the exclusion of a more general term, “would restrict the scope of the article in a way that was incompatible with its humanitarian aim”.³⁰ In their opinion, “warm clothing or a packet of biscuits could be just as useful as medical care”.³¹ The solution which was finally adopted – to “care” (French: “prodiguer des soins”) – is at the same time a general and a restrictive term. It is general in that there was no attempt to restrict aid solely to medical care, but the intention was to include any act contributing to the victim’s relief; it is restrictive to the extent that it excluded assistance not directly intended to relieve the victim, in order to avoid any confusion with acts of treason or other punishable acts. Thus the criterion is undeniably the purely humanitarian character of the acts, as confirmed in the last sentence of the paragraph, which qualifies them as “humanitarian acts”.

- 712** There remains the thorny problem of supervision and the possible obligation for the civilian population or aid societies to report the wounded they have collected or cared for to the authorities. On this point the article is silent, as is Article 18 of the First Convention. In this respect it is appropriate to refer to the commentary on this article, which also applies to Article 17, paragraph 1, of the Protocol:

“But the Diplomatic Conference refused to make the permission granted to the inhabitants to give spontaneous help dependent on the acceptance of military supervision, or on any kind of compulsory statement, which would be tantamount to informing against those cared for. They pointed out that the absence from the Convention of any allusion to control did not necessarily mean that control was prohibited, and that in actual fact the military authorities could undoubtedly issue regulations of this kind where such a course was indicated by circumstances.”³²

- 713** Finally, the authorization applies “even in invaded or occupied areas”. In fact, the right of the civilian population and aid societies to collect and care for the wounded, sick and shipwrecked is an absolute right and this clarification was by no means necessary. It was already present in Article 18 of the First Convention, and was retained during the Conference of Government Experts and the CDDH. It is actually in invaded or occupied areas that the respect for this right of the civilian population is most at risk, since it applies to the relationship between the authorities of one Party to the conflict and the civilian population of the adverse Party. Hence, this point was made explicitly to avoid any ambiguity. However, it should be noted that during the Conference of Government Experts in 1972, one delegation proposed deleting this phrase, given that in practical terms such areas

²⁸ Cf. *O.R.* III, pp. 83 and 85, CDDH/II/12, 54 and 203.

²⁹ *O.R.* XI, p. 158, CDDH/II/SR.17, para. 32.

³⁰ *Ibid.*, p. 159, para. 35.

³¹ *Ibid.*, para. 43.

³² *Commentary I*, pp. 190-191.

are the only ones where the rule can be effectively applied.³³ This is not strictly correct. The rule also applies to the authorities of a Party to the conflict with respect to its own population, even though, in such cases, there should be fewer problems regarding its implementation. During the CDDH it was also proposed to make a distinction between the situation “in invaded areas, which would probably be immediately behind the battlefield, and occupied areas”.³⁴ However, this proposal was not adopted. Finally, it should be noted that no definition was given of “invaded or occupied areas”. In fact, it is a question of degree. An area will be considered to be invaded, but not occupied, when combatants have entered without yet having set up the administrative machinery of occupation. Thus it is a transitional period, and at the end the invader will either withdraw or establish a proper form of occupation with all the juridical consequences implicit in this, particularly the integral application of the Fourth Convention.³⁵

Third sentence

- 714 The last sentence of paragraph 1 is a corollary of the previous sentence. The civilian population enjoys a right, and it follows logically that it cannot be punished for the sole reason of having exercised this right.
- 715 The term “no one” is used deliberately, and it extends the scope of the sentence. Not only civilians, but anyone, whether civilian or military, the nationals of any Party, is covered by this sentence if he has performed the acts referred to.
- 716 For such acts it is prohibited to *harm, prosecute, convict or punish* the persons concerned. Article 18 of the First Convention used only the words *molested or convicted*; the word “prosecuted” was added in the 1973 draft and Committee II of the CDDH decided to introduce a second addition, i.e., the verb “punish”. These terms were added for the sake of being complete. The aim of the provision is to prevent any repression, whether or not this is judicial (*prosecute* refers in particular to the examining magistrate and the public prosecutor, who should not bring such a case before the court, *convict* refers to the court which must acquit anyone who is nonetheless brought before it on such a charge; *harm* may refer to the investigation stage, which should not be embarked upon only for such a reason). There may actually also be an extra-judiciary form of repression. It is possible to harm someone with threats, whether these are open or anonymous. As regards the meaning of *punish*, this is very broad and has already been discussed.³⁶
- 717 By referring to “such humanitarian acts”, this obviously indicates the acts enumerated in the preceding sentence, i.e., collecting and caring for the wounded, sick and shipwrecked. In this way, as shown above, it is also confirmed that the permitted acts must have humanitarian motives: to collect a wounded

³³ CE 1972, *Report*, vol. II, p. 27 (Art. 20).

³⁴ O.R. XI, p. 238, CDDH/II/SR.24, para. 24.

³⁵ Cf. in addition commentary Art. 44, *infra*, pp. 532-533 and note 53.

³⁶ Cf. commentary Art. 16, para. 1, *supra*, p. 199. On the subject of this sentence, cf. also *Commentary I*, pp. 192-193 (Art. 18, para. 3).

person in the hope of financial reward is no longer a humanitarian act. For the rest, the rule cannot be invoked to shirk an obligation to report the wounded that have been collected in the event that such an obligation had been imposed by the authorities. On this point there is certainly a difference to be made as compared with medical personnel.³⁷

Paragraph 2

- 718 Since it is important that the civilian population can act on its own initiative for the benefit of the wounded, sick and shipwrecked, without fear of being punished, it is no less important that it can carry out such tasks at the request of the Parties to the conflict, especially when the medical services of the latter are overworked. This second aspect of the participation of civilians in activities for the benefit of victims is absolutely fundamental. It was such an appeal that Dunant made to the local population in Solferino, based at that time only upon his moral authority, long before the founding of the Red Cross and the adoption of the Geneva Convention of 22 August 1864.
- 719 Such a provision was contained in all the versions of the Geneva Convention, and it was included in 1949 in Article 18, paragraph 1, of the First Convention and Article 21 of the Second Convention. The reason that it is repeated in the Protocol is that the victims – with regard to whom the civilian population may be called upon to help – are no longer only the military wounded and sick (as defined in Article 13 of the First Convention), but military *and civilian* wounded, sick *and shipwrecked*.
- 720 It is the *Parties to the conflict* which may make such an appeal, whereas the First Convention stipulated that this should be the *military authorities*. The solution given in the Protocol is very suitable, leaving the competence to the highest authorities of the Parties to the conflict, whether civilian or military – i.e., for States, to the government – while giving the latter the possibility of delegating this competence to subordinate bodies.
- 721 The 1973 draft referred to the possibility of appealing to the *charity* of the civilian population, the word used in the First Convention. During the CDDH the proposal to delete this word, which was considered “out of date”³⁸ was adopted. Various replacements for this term – “goodwill”, “humanitarian feelings”, “generous feelings” – were also rejected³⁹ and Committee II finally adopted a proposal “that all reference to ‘feelings’ should be deleted” from paragraph 2 of Article 17.⁴⁰ In fact, this reference to the feelings of the population hardly seems to be necessary, though with one reservation. Two representatives expressed the fear that the absence of such a reference would permit the provisions of paragraph 2 to be interpreted as being mandatory for the civilian

³⁷ On this subject, cf. commentary Art. 16, para. 3, *supra*, pp. 204-208.

³⁸ Cf. in particular *O.R.* XI, p. 241, CDDH/II/SR.24, para. 49.

³⁹ Cf. in particular *ibid.*, pp. 237-244, paras. 17, 30, 40-42, 46, 49-51, 55, 57, 60, 67-70.

⁴⁰ *Ibid.*, p. 244, CDDH/II/SR.24, para. 70. This proposal was approved by 27 votes for, 8 against and 14 abstentions.

population.⁴¹ The present text is actually ambiguous on this point and it is appropriate to stress in this commentary that the drafters' intention was to retain an optional character for this provision, both with regard to the Parties to the conflict (who may make an appeal or refrain from so doing) and with regard to the civilian population and aid societies (who remain free to respond as they wish). This provision should not be seen as a sort of "right to mobilize" civilians for humanitarian purposes.

722 The appeal is made to the civilian population and the aid societies referred to in paragraph 1.⁴²

723 The appeal can be made only for specific tasks. The first two of these, "to collect and [to] care for the wounded, sick and shipwrecked", are identical to those described in paragraph 1.⁴³

724 However, the civilian population and aid societies may also be called upon for a third task, and it is appropriate to consider this here. The task referred to is "to search for the dead and report their location". This task is not contained in Article 18 of the First Convention⁴⁴ and had not been introduced in the 1973 draft. Curiously, it was introduced by the Drafting Committee of Committee II, who were concerned to make this paragraph accord with paragraph 5 of the 1973 draft, which related to the appeal to commanders of civilian ships and craft, and which contained a similar provision. Yet, as mentioned above, this paragraph 5 was deleted,⁴⁵ though the addition made to paragraph 2 was retained, admittedly in a modified form. The Drafting Committee of Committee II had actually proposed the expression "to collect the dead", but one delegation remarked that "it was not right that civilian populations and relief societies should be expected to collect the dead, with the possible exception of those at sea".⁴⁶ The present text was then proposed in an amendment which was adopted by consensus at the 44th meeting of Committee II.⁴⁷ The possibility of asking the civilian population and aid societies to deal with the dead is not mentioned. This omission seems justified, particularly for reasons of hygiene. On the other hand, it is certainly possible to appeal to them to search for the dead, and if they should find them, to report their location to the authorities.

725 Next it is specified that the Parties to the conflict which have made such an appeal to the civilian population or aid societies should grant "protection and the necessary facilities to those who respond to this appeal". This is a logical and indispensable requirement. It would not be possible to appeal to the civilian population and to aid societies without granting them sufficient protection and assistance. Such a provision is also contained in similar terms in Article 18, paragraph 1, of the First Convention.⁴⁸

⁴¹ Cf. *ibid.*, p. 242, CDDH/II/SR.24, paras. 55 and 57.

⁴² On this subject, cf. commentary para. 1, *supra*, pp. 211-216.

⁴³ On this subject, cf. *ibid.*

⁴⁴ However, the Parties to the conflict could also rely on Art. 15, para. 1, of the First Convention to approach the civilian population for these purposes.

⁴⁵ On this subject, cf. *supra*, p. 211.

⁴⁶ O.R. XI, p. 486, CDDH/II/SR.44, para. 8.

⁴⁷ Cf. O.R. III, p. 86, CDDH/II/256, and O.R. XIII, p. 94, CDDH/221/Rev. 1, para. 87.

⁴⁸ On this subject, reference could be made to *Commentary I*, pp. 186 ff. The following remarks are largely inspired by this.

- 726 What constitutes such protection and *necessary* facilities? This refers to such protection and facilities without which the task of the population or the aid societies would be too difficult or dangerous. The assessment of such necessity is left in the first instance to the competent authorities of the Party to the conflict which made the appeal, but this Party must take into account, as far as possible, the wishes and views of the societies or persons prepared to respond to the appeal. Such protection and facilities will essentially depend on the circumstances and can therefore not be listed exhaustively.
- 727 However, it should be noted that the protection which can be granted in this context does not automatically include the right to use the red cross emblem, as the use of this emblem must be reserved to situations explicitly provided for by the Conventions and the Protocol. This restriction is justified because the risk of abuse is so great. However, there is nothing to prevent the Parties to the conflict from increasing the strength of their temporary medical personnel or the number of their temporary medical units. The Protocol is very flexible in this respect. However, such measures imply strict supervision and do not fall under the scope of this article.
- 728 Finally, Article 17 imposes an obligation on the adverse Party to afford the same protection and facilities for as long as they are needed, if it gains or regains control of the area. The logic of this obligation is not the same as that for the previous obligation, as in this case a Party to the conflict is required to afford protection and facilities to persons or societies to which it has not made an appeal itself. However, it is in the interests of the wounded and sick that the population or the societies to which an appeal had been made for help by the often overloaded authorities, can continue their humanitarian task, even under the authorities of the adverse Party. A similar provision had been introduced in Article 18 of the First Convention in 1949 to fill the gap which was felt to exist in the 1929 Convention.⁴⁹
- 729 It should be noted that this phrase refers to a Party which *gains or regains* control of the area. The determining factor is the need, and not the fact that one Party or the other controls the area. In this respect it is of little or no importance whether the area is occupied or not. The facilities must be afforded if they are needed, and must continue to be afforded by the adversary if the need continues.
- 730 However, the maintenance of such protection and such facilities remains obligatory only for “so long as they are needed”. This specific stipulation was made neither in Article 18 of the First Convention, nor in the 1973 draft. It was added during the CDDH on the basis of an amendment.⁵⁰ Nevertheless, it is justified. A change in the control of territory can totally change the parameters of a problem. Some measures of protection or assistance may no longer be necessary. It may no longer be useful to resort to the civilian population or to aid societies, particularly if the medical services of the Party gaining or regaining control of the area can easily cope with their task. As regards an assessment of what is *necessary*, what was said above also applies here.⁵¹

⁴⁹ Cf. *Commentary I*, p. 188.

⁵⁰ Cf. *O.R. III*, p. 85, CDDH/II/54; *O.R. XIII*, pp. 91 and 93, CDDH/221/Rev. 1, para. 83.

⁵¹ Cf. *supra*.

- 731** Moreover, it should be recalled that the civilian population and aid societies obviously retain the right to collect and care for the wounded, sick and shipwrecked on their own initiative in accordance with paragraph 1, independently of any protection and facilities which the Parties to the conflict might grant them or withhold from them.

Y.S.

Protocol I

Article 18 – Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.
2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.
3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.
4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.
5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.
6. The application of the provisions of paragraphs 1 to 5 of this Article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.
7. This Article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.
8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.

Documentary references

Official Records

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paras. 3-64; pp. 213-217, CDDH/II/SR.22, paras. 5-34; pp. 307-314, CDDH/II/SR.30, paras. 15-70; p. 335, CDDH/II/SR.32, paras. 45-48; pp. 485-486, CDDH/II/SR.44, paras. 2-7; p. 560, CDDH/II/SR.49, paras. 66-67. *O.R. XIII*, pp. 94-98, CDDH/221/Rev.1, paras. 89-98; pp. 176-177, *id.*, Annex II (Art. 18); p. 225, CDDH/II/286; p. 232, CDDH/II/296, para. 5.

Other references

CE/7b, pp. 25-26 (Art. 10-11). *CRCE 1971, Report*, p. 23; pp. 26-27 (Art. 10-11). *CE 1971, Report*, p. 26, paras. 65-68; pp. 29-30 (Art. 12). *CE 1972, Basic Texts*, pp. 9-12 (Art. 14, 16, 18, 21, 27). *CE 1972, Commentaries*, Part I, pp. 31-33 (Art. 4, paras. 3-4); pp. 35-36 (Art. 16); p. 38 (Art. 18, para. 2); pp. 45-46 (Art. 21); pp. 54-55 (Art. 27). *CRCE 1972, Report*, p. 24 (Arts. 14 and 18, para. 2); p. 26 (Art. 16). *CE 1972, Report*, vol. I, p. 35, paras. 1.25-1.27 (Art. 14); p. 38, para. 1.45 (Art. 18); p. 41, paras. 1.60-1.63 (Art. 21); p. 48, paras. 1.90-1.94 (Art. 27); vol. II, pp. 24-27, *CE/COM I/1-2*; p. 28, *CE/COM I/5*; pp. 31-32, *CE/COM I/15. Commentary Drafts*, pp. 27-28 (Art. 18).

Commentary

General remarks

- 732** The possibility, in areas where hostilities take place, of identifying persons and objects entitled to respect and protection is an essential corollary to this right.
- 733** The principal persons protected by the Conventions and the Protocols, i.e., the wounded, sick and shipwrecked, can be identified by means of their condition, even though an additional means of identification in the form of the distinctive emblem is desirable whenever possible. A wounded soldier will be bedridden and unable to continue taking part in combat; the situation of a shipwrecked person who has the good fortune to be retrieved does not give rise to much confusion.
- 734** The same does not apply to the personnel and objects protected in their functional capacity (i.e., so that they are able to ensure the protection of persons principally protected). A soldier with medical duties is actually an able-bodied person who might well engage in combat; a medical vehicle could be used to transport ammunition rather than the wounded or medical supplies. Thus it is essential for medical personnel, units, materials and transports to be identified in order to ensure the protection to which they are entitled, which is identical to that accorded the wounded, sick and shipwrecked.
- 735** The need for this is clear, and did not escape the attention of the authors of the very first Geneva Convention of 22 August 1864. Article 7 of this Convention already provided for the use of flags and armlets bearing the red cross on a white ground. In the 1949 Conventions this problem was treated in greater detail.¹

¹ Cf. Chapter VII of the First Convention, containing seven articles, entitled: "The distinctive emblem"; Chapter VI of the Second Convention, with the same title, and containing five articles; Articles 18 (paras. 3 and 4), 20 (para. 2), 21 and 22 (para. 2) of the Fourth Convention.

- 736 Moreover, as the entire system of protection established in the Conventions is based on the trust which can be placed in the proper use of the distinctive emblem, the control of such use and the repression of abuse are of paramount importance.²
- 737 As regards identification, the Protocol had to comply with two requirements: to determine how civilian personnel and objects entitled to respect and protection could be identified, and to adapt the means of identification to modern techniques.
- 738 The first requirement was discussed from the beginning of the preliminary negotiations of the Protocol. The most delicate question was that of the emblem to be chosen to identify civilian medical persons and objects entitled to protection. Should the use of the red cross, red crescent or red lion and sun emblem simply be extended, or was it better to introduce a new emblem for such persons and objects? At first, the latter solution was chosen, and this is contained in the “Draft Rules for the Protection of Wounded and Sick and Civil Medical and Nursing Personnel in Time of Conflict”, presented at the XXth International Conference of the Red Cross.³ An emblem was even proposed, that of the Aesculapian symbol, on a white ground. However, the XXth International Conference of the Red Cross declared that it was in favour of extending the red cross, red crescent or red lion and sun emblem.
- 739 In the draft Protocol Additional to the Fourth Convention, presented to the Conference of Government Experts in 1971, the ICRC accepted this extension, though still without completely abandoning the Aesculapian symbol. In fact, this draft made a distinction between civilian medical personnel “organized and duly authorized by the State”,⁴ which should be entitled to use the emblem of the red cross (red crescent, red lion and sun), and “doctors and nurses who are not members of the State medical service”, who may “with the consent of the relevant authorities, display the red Staff of Aesculapius on a white background as a means of identification”.⁵ Nevertheless, both at the Conference of Red Cross Experts in 1971, and at the Conference of Government Experts in the same year, the great majority of experts considered that it would be best to discard this new emblem.
- 740 The following passage, taken from the ICRC contribution to the third round of the “Entretiens consacrés au droit international médical”⁶ takes up the arguments which could be put forward in favour of a new emblem:

“Extending the use of the emblem to all doctors without distinction [...] would hardly be possible nor would it be desirable. In fact, if the value of this emblem is to be retained, it is important to limit its use to those who are entitled to use it under the Conventions; moreover, its widespread use would make any control impossible. On the other hand [...] the creation of a clear, easily recognisable, “meaningful” emblem, which is neither the red cross nor

² On this subject, *cf.* commentary para. 8, *infra*, pp. 234-235.

³ *Cf.* introduction to Part II, *supra*, p. 107.

⁴ Art. 7 of the Draft, *cf.* CE/7b, p. 6.

⁵ *Cf.* Art. 11 of the Draft, CE/7b, p. 8.

⁶ On this subject, *cf.* introduction to Part II, *supra*, p. 107.

an imitation of it, and which would be adopted by the medical profession throughout the world and be recognized at a national level by each State [...] would undoubtedly soon become the symbol of devoted and innocent medical assistance, alongside the Red Cross.”⁷

Obviously these arguments lost their relevance to some extent once it was decided that the medical personnel who were also to be protected henceforth, were only personnel *duly recognized and authorized* by the Parties to the conflict concerned. As regards retaining the use of a different emblem for all civilian medical personnel not authorized to use the red cross, red crescent or red lion and sun, the opinion expressed by the Conference of Government Experts in 1971 finally prevailed:

“The Commission felt, however, as did also the Conference of Red Cross Experts in The Hague in March 1971, that this new emblem conferred no special protection, that it concerned a relatively limited number of persons, and that confusion might arise by the indication of two emblems in the same Protocol. It was decided therefore not to include in this Protocol any mention of the Staff of Aesculapius.”⁸

- 741 Thus it was finally decided to opt for an extension of the use of the emblem of the red cross, red crescent or red lion and sun in the Protocol, because this avoided any possibility of confusion and consequently offered a better guarantee.
- 742 The second requirement with which the provisions of the Protocol devoted to identification had to comply – adapting identification to modern combat techniques – was also of paramount importance, particularly for medical aircraft. In fact, the use of such aircraft was extremely limited in 1949 for technical reasons.⁹ Merely to have the emblem of the red cross, red crescent or red lion and sun painted on an aircraft seemed insufficient to ensure effective protection, having regard to modern means of warfare.
- 743 Thus to deal with this virtual impasse with regard to medical aircraft, it was necessary to solve such technical problems and it was not long before an appeal was made to technical experts rather than to legal experts.¹⁰
- 744 Finally, these questions were grouped together in Annex I to the Protocol, which supplements Article 18.

⁷ Translated by the ICRC. The original French is as follows: “Une extension de l’usage de l’emblème à tous les médecins sans distinction [...] ne serait guère possible ni souhaitable. Il importe en effet, si l’on veut conserver à cet emblème toute sa valeur, d’en limiter l’emploi aux seuls bénéficiaires prévus par les Conventions; de plus, sa multiplication rendrait tout contrôle impossible. En revanche [...] la création d’un emblème clair, bien reconnaissable, “parlant”, qui ne serait ni la croix rouge ni une imitation de celle-ci et serait adopté par l’ensemble du corps médical dans le monde et reconnu sur le plan national, par chaque Etat [...] deviendrait rapidement sans doute, à côté de la Croix-Rouge, le symbole de l’assistance médicale, dévouée et innocente.” Contribution of the ICRC to the “Entretiens consacrés au droit international médical” (Liège, April 1956), Document ICRC, D.430, pp. 6-7.

⁸ *CE 1971, Report*, p. 26, para. 66.

⁹ On this subject, *cf.* in particular Art. 36 of the First Convention, and *Commentary I*, pp. 284-293.

¹⁰ On this subject, and in particular for the historical background to these negotiations, *cf.* commentary Annex I, *infra*, p. 1137.

745 It should also be noted that the problem of identification had been dealt with in various articles in the first drafts of the Protocol, particularly in the draft presented at the second session of the Conference of Government Experts in 1972. Finally, as stated in the Commentary on the draft presented to the CDDH:

“To avoid repetition, it seemed advisable to concentrate all provisions relating to the marking and identification of medical units, means of medical transport and medical personnel in a single article, which incidentally would connect this Part and the Annex.”¹¹

Paragraph 1

746 The basic principle is stated in this first paragraph. The right to respect and protection of medical personnel and medical objects would be meaningless if they could not be clearly recognized. The Parties to the conflict therefore have a great interest in seeing that such personnel and objects can be identified by the enemy. Thus the rule laid down here is in the interests of those who are responsible for observing it. In fact, it would be the medical personnel and medical objects of the Party concerned which would suffer from poor means of identification and which could become the target of an enemy that had not identified them. Yet it must be emphasized that the means of identification do not *constitute* the right to protection, and from the moment that medical personnel or medical objects have been identified, shortcomings in the means of identification cannot be used as a pretext for failing to respect them.

747 The Parties to the conflict must *endeavour* to ensure that the personnel and objects concerned are identifiable. As this is an obligation to achieve a result which not only depends on the Party under obligation, it cannot be imposed in an absolute fashion: despite all the efforts one might make, it is not out of the question that at some point, persons or objects, even if they are correctly marked, are not identified by the enemy in time. However, the reason that the obligation is not absolute is also because some means of identification are very expensive or highly technical, and it is not possible to impose these on Parties to the conflict which do not have the financial or technical means to employ them. The Parties to the conflict must do *all they can*, which in any case is in their own interest, as we have seen above.

748 It is not specified *who* must be able to identify. However, it is clear that this refers first of all (though not exclusively) to those who could harm the persons and objects to be identified, i.e., mainly members of the armed forces of the adverse Party. However, no emphasis is placed on this aspect of the problem at this stage deliberately, as it occurs again in paragraph 2. What is required here is a clear identification comprehensible by everyone, as provided in the Protocol and its Annex I.

749 Finally, the personnel and objects to be identified (medical personnel, religious personnel, medical units and transports) are defined in Article 8 of the Protocol (*Terminology*).¹²

¹¹ *Commentary Drafts*, p. 27.

¹² Cf. commentary Art. 8, sub-paras. (c), (d), (e) and (g), *supra*, pp. 124-131.

Paragraph 2

- 750 Paragraph 2 is the corollary of paragraph 1. If it is necessary to make one's own medical personnel and medical objects identifiable, it is also necessary to make an effort to recognize those of others. It is only on this condition that the duty to respect and protect them can be fulfilled.
- 751 In the draft no distinction had been made between these two aspects of the problem, and the scope of the rule laid down in paragraph 1 of the draft was not clearly defined. This became apparent in Committee II of the CDDH,¹³ and a perfectly justifiable decision was taken to have two separate paragraphs.
- 752 There is of course not always a need for such a provision. Formerly, identification was purely visual and there were no special measures to take: a good eye-sight was all that was needed to identify the persons and objects regarding which there was a duty to respect and protect. However, as mentioned above, methods of warfare have developed, and long range combat has rendered purely visual means of identification inadequate. Moreover, to a great extent the technical means of long range identification are effective only if the adverse Party is equipped to perceive them. This applies particularly to electronic means of signalling and identification.
- 753 In this paragraph there is again no *obligation* for the Parties to the conflict to adopt adequate methods and procedures. The reason is that it did not seem desirable to impose an absolute obligation which would involve excessively onerous financial or technical burdens for certain States or other Parties to the conflict. Thus States are merely urged to *endeavour*, i.e., to do all they can, to fulfil the obligation laid down here.
- 754 Obviously this is not possible without raising a practical problem. If a Party to the conflict has means of signalling at its disposal the reception of which requires a certain technology, it would be acting rashly if it used them without the assurance that the adversary has access to such technology and is ready to use it for these purposes. Thus prior agreement between the Parties to the conflict seems almost indispensable.
- 755 This paragraph requires the Parties to the conflict to endeavour "to adopt and to implement methods and procedures". Thus the obligation has two aspects. First, regarding the choice of a method (i.e., the technology and equipment that are needed) and a procedure (i.e., the way in which such technology can be used effectively), and secondly, as regards its implementation, which may necessitate an extensive training and instruction programme – it is not sufficient to possess the equipment; it must also be used correctly.
- 756 Finally, it should be noted that reference is made here to the identification of medical units and transports, but not to that of medical personnel. This is because, although the use of signals is not excluded, such personnel are generally identified by means of visual emblems which do not require special methods or procedures of identification.
- 757 As regards the distinctive emblem and signals, these have been defined above.¹⁴

¹³ Cf. O.R. XI, p. 166, CDDH/II/SR.18, para. 7.

¹⁴ Cf. commentary Art. 8, sub-paras. (l) and (m), *supra*, pp. 134-135.

Paragraph 3

758 This paragraph is concerned with the means of identification which must be used by civilian medical and religious personnel. It is not concerned with the medical and religious personnel covered by the Conventions, as the question of their identification is regulated there.¹⁵

759 However, it should be noted in passing that Annex I emphasizes the effectiveness of the means of identification, and consequently the importance of their visibility. This means that the indications of the Conventions regarding restrictive use of the emblem (armlets) and particularly those imposing on temporary personnel the obligation to wear an emblem smaller in size, must be considered to be obsolete.¹⁶ The real question is whether a person is or is not entitled to use the distinctive emblem. Once his right to such use has been established, it would be illogical to impose measures which would diminish the visibility of the emblem, and in this way render effective protection uncertain.

760 Though the preceding remark applies to all persons entitled to the use of the distinctive emblem, it should be remembered that paragraph 3 applies only to *civilian* medical and religious personnel. For such personnel the rule regarding identification is imposed only “in occupied territory and in areas where fighting is taking place or is likely to take place”. We will not reconsider here the concept of occupied territory.¹⁷ The expression “areas where fighting is taking place or is likely to take place” is a result of the work of the mixed Working Group of Committee II and Committee III of the CDDH, which recommended:

“a) terms that should be used to cover the various military situations that are envisaged in some of the articles contained in the Draft Additional Protocols I and II to the Geneva Conventions of 12 August 1949; and b) definitions of the terms recommended”.¹⁸

As regards the present article, this Working Group defined the expression *combat area* as follows: “In an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located.”¹⁹

761 In the case under consideration here, the areas concerned are not only such areas, but also “areas where fighting [...] is likely to take place”, i.e., areas which may be presumed to become combat areas as defined above. Obviously the expression “is likely to take place” allows for a degree of judgment. However, there is no reason for the authorities concerned to be too restrictive. As soon as contact with the enemy becomes a possible or probable event, such authorities have every interest in providing civilian medical and religious personnel with the distinctive emblem and the identity card prescribed: it is a matter of their protection.

¹⁵ Cf. First Convention, Arts. 40-41; Second Convention, Art. 42.

¹⁶ On this subject, cf. also commentary Annex I, Arts. 3 and 4, *infra*, p. 1173.

¹⁷ On this subject, cf. in particular *Commentary IV*, pp. 2 ff. and 59 ff.

¹⁸ Report of the mixed Working Group, March 1975, O.R. XIII, p. 199, CDDH/II/266-CDDH/III/255.

¹⁹ Annex A of the above-mentioned report, *ibid.*, p. 203.

762 However, it should be noted that the expression “should be recognizable” (in the French text “se feront en règle générale reconnaître”) to some extent reduces the strictness of the obligation. In fact, the choice of this expression is the result of lengthy discussions. Some would have preferred that the entire system – particularly the issuing of the identity cards referred to here – should be set in motion already in peacetime.²⁰ Others were opposed to this point of view and even wished the system to remain optional in time of conflict. One solution envisaged by the Drafting Committee of Committee II was to make the identity card compulsory for permanent personnel and optional for temporary personnel.²¹ One of the main arguments for this solution was that: “in extraordinary combat conditions it might not be possible to provide temporary civilian medical personnel with identity cards”.²² However, a distinction of this sort was rejected, particularly because “the carrying of an identity card proved the qualifications of the holder, whether permanent or temporary. It was therefore in everyone’s interest that such cards should be carried”.²³ Such a distinction regarding identification was abandoned in Article 18, but the possibility of a simplified card for temporary personnel was introduced in Annex I of the Protocol.²⁴ Moreover, several delegates raised the practical problems facing certain countries.²⁵

763 Finally, therefore, the introduction of the expression “should be recognizable” (in French “se feront en règle générale reconnaître”) is the result of compromise. This means that personnel should be provided with such emblems and cards, but that it is not made a condition *sine qua non* of protection. Neither the identity card nor the distinctive emblem create a right of protection as such, as one delegate clearly pointed out: “protection was provided to medical personnel because of their function; the distinctive emblem was merely evidence of protection”.²⁶ The fact remains that the absence of such evidence – particularly the emblem – would make the safety of such personnel very uncertain, and it is therefore desirable that this rule is in practice generally observed. Moreover, it should be noted that though the expression “should” (in French “en règle générale”) allows civilian medical and religious personnel to operate in exceptional cases without the prescribed means for certifying their status, it cannot be interpreted as permitting the use of another distinctive sign, even in exceptional cases. One delegate correctly remarked in this respect that “there was no obligation to carry a distinctive emblem, but if one was carried it must be the distinctive emblem of the Red Cross (Red Crescent, Red Lion and Sun)”.²⁷

764 The details relating to the identity card and the distinctive emblem can be found in Articles 1-4 of Annex I to the Protocol.²⁸

²⁰ Cf. in particular *O.R.* XI, p. 169, CDDH/II/SR.18, para. 27.

²¹ Cf. text of Art. 18 as submitted in document CDDH/II/240/Add. 1 (not published in the *O.R.*).

²² *O.R.* XI, p. 307, CDDH/II/SR.30, para. 17.

²³ *Ibid.*, p. 310, CDDH/II/SR.30, para. 31; cf. also paras. 33 and 34.

²⁴ Cf. Annex I, Art. 2, para. 2.

²⁵ *O.R.* XI, pp. 310-311, CDDH/II/SR.30, para. 35; cf. also paras. 39 and 41.

²⁶ *Ibid.*, p. 309, CDDH/II/SR.30, para. 27.

²⁷ *Ibid.*, p. 313, CDDH/II/SR.30, para. 60.

²⁸ On this subject, cf. commentary Annex I, *infra*, p. 1153.

Paragraph 4

- 765 This paragraph lays down the principle of the marking of medical units and transports. One may wonder why, as in the case of personnel, it is not solely concerned with *civilian* medical units and transports. The reason is that the concepts *medical units* and *medical transports* are not exactly equivalent in the Protocol to the concepts used in the Conventions. Thus it was necessary to repeat the rule for all units and transports.
- 766 Whether the units and transports are civilian or military, their use is subject to control by the Party to which they belong. Thus the distinctive emblem should not be affixed without the consent of the competent authority of this Party (which may also be an adverse Party for that matter, particularly in the case of occupied territory). Apparently this authority has but one choice: either it allows a unit or transport the character of a *medical* unit or transport in the sense of the Protocol, in which case it permits and even requires marking it by means of the distinctive emblem, or it does not recognize this character and does not allow the use of the emblem.
- 767 However, in reality the situation is more varied: certainly, the authority could not permit a unit or transport which is not recognized as a medical unit or transport within the meaning of the Protocol to be marked in this way. On the other hand, it is not out of the question that it desists from marking a medical unit or transport recognized as such, even if, in the great majority of cases, this would be against its own interest. Indeed, it may happen in some exceptional cases that a distinctive emblem is too striking, and this could be detrimental to military exigencies.²⁹
- 768 The way in which medical units and transports are to be marked is specified in Annex I to the Protocol, which emphasizes the visibility of the emblem.³⁰
- 769 However, it was necessary to take into account in the Protocol the special solutions adopted in the Second Convention for marking hospital ships and coastal rescue craft. In this respect no decision could be taken before the discussion on the articles of the Protocol relating to medical ships and craft.³¹ Article 22 of the Protocol (*Hospital ships and coastal rescue craft*)³² extends the possibility of using the ships and craft described in Articles 22, 24, 25 and 27 of the Second Convention and introduces some flexibility. Thus the solution which was finally adopted was to retain the system laid down in the Second Convention for the marking of such ships and craft. This concerns most of all Article 43 of the Second Convention, to which we now refer. It should be noted that this article already emphasizes the visibility of the distinctive emblem. Moreover, it lays down the rules to be adopted with regard to national flags, which must be hoisted or hauled down, depending on the circumstances. Finally, the last paragraph of this Article 43 is of special interest here, as it urges Parties to the conflict to endeavour at all times “to conclude mutual agreements, in order to use the most

²⁹ In this respect, *cf.* also in particular Art. 42, para. 3, of the First Convention. *Cf.* also commentary para. 5, second sentence, *infra*, pp. 231-232.

³⁰ On this subject, *cf.* Annex I, Arts. 3 and 4 and the commentary thereon, *infra*, p. 1173.

³¹ *Cf.* O.R. XI, p. 560, CDDH/II/SR.49, paras. 66-67.

³² On this subject, *cf.* *infra*, p. 253.

modern methods available to facilitate the identification of hospital ships”. On the basis of this paragraph, and to supplement the measures which it requires, even States not Parties to the Protocol will be encouraged to apply the appropriate provisions of Annex I to the Protocol.³³

- 770 In addition, it should be noted that in Article 23 (*Other medical ships and craft*) the Protocol introduces the possibility of using medical ships and craft not covered by the Second Convention. The marking of such ships and craft is laid down in Article 23 (*Other medical ships and craft*), paragraph 1. This article requires that such ships and craft are marked with the distinctive emblem and comply as far as possible with Article 43, paragraph 2, of the Second Convention (which provides for the question of the flags to be flown at the mainmast of hospital ships). Moreover, the provisions of the Protocol and its Annex I relating to medical units and transports are also applicable to such ships and craft.

Paragraph 5

- 771 We saw above³⁴ that one of the requirements with which the Protocol had to comply with regard to the question of the means of identification was to adapt these to modern techniques. The use of distinctive signals, in addition to the distinctive emblem, meets this requirement.

First sentence

- 772 The first sentence of paragraph 5 grants to Parties to the conflict the competence to authorize the use of distinctive signals, though they remain free not to exercise this competence. However, it imposes some limitations on this competence as regards the purpose for which and the way in which it must be used. In fact, such signals may not be used for other purposes than “to identify medical units and transports”, i.e., to allow in the first place the enemy to realise that he is dealing with such units or transports soon enough to spare them. The way in which this competence is to be exercised, is laid down in Annex I to the Protocol. Thus the distinctive signals will be used in accordance with this Annex.
- 773 Moreover, it should be noted that, with the exception laid down in the second sentence of the paragraph, such signals should be used only to supplement the distinctive emblem, which remains the basic element. Apart from the exception mentioned, it would be unlawful to use distinctive signals to permit the identification of a medical unit or transport which was not marked with the distinctive emblem.

³³ Cf. in particular Arts. 3-5 and 7-11, as well as the commentary thereon, *infra*, p. 65 and p. 103.

³⁴ Cf. *supra*, p. 224.

Second sentence

- 774 As mentioned above, there is one exception to the rule that distinctive signals can only be used for units and transports marked with the distinctive emblem. This exception led to some controversy in Committee II of the CDDH. It is contained in Article 5 (*Optional use*), paragraph 2, of Annex I to the Protocol, and relates to “temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem”. The draft contained this exception “in case of an emergency” for all temporary means of medical transport.
- 775 As one delegate stated, there were three different currents of opinion with regard to this question. The first was that the distinctive signals could be used instead of the distinctive emblem in case of emergency. The second was that under no circumstances should the distinctive signals be used unless the unit or the transport concerned was also marked with the distinctive emblem. Finally, the third current of opinion was that the distinctive signals should normally be used only when a distinctive emblem was also displayed, but that in extreme emergencies it should be possible to use any available means to identify transports in temporary use for medical purposes.³⁵ One delegate justifiably remarked that there were also a number of intermediate possibilities, particularly that of restricting the exception solely to aircraft.³⁶ Finally, it was the compromise provided by this last solution which the Committee adopted on the basis of a report of a Working Group to which it had submitted the whole problem.³⁷
- 776 The principal arguments in favour of the use of the distinctive signal only in combination with the emblem were, on the one hand, that the use of distinctive signals without displaying the distinctive emblem would entail the risk that the latter would lose its character of being the main means of identification,³⁸ and on the other hand, that it was dangerous to permit an aircraft not marked with the distinctive emblem to transmit distinctive signals because of the increased risk of abuse, as military aircraft “would have no difficulty in transmitting on a given frequency or emitting a blue light”.³⁹
- 777 The main argument in favour of the use of distinctive signals by units or transports not displaying the distinctive emblem was that:

“the number of small aircraft or helicopters required for use solely in transporting the wounded would be very much beyond the capacity of most countries and they would frequently use aircraft which had been engaged in military combat at one time of the day for humanitarian activities at another”.⁴⁰

³⁵ Cf. *O.R.* XI, p. 170, CDDH/II/SR.18, para. 32.

³⁶ *Ibid.*, para. 37.

³⁷ *Ibid.*, pp. 214-217, CDDH/II/SR. 22, paras. 6-30.

³⁸ *Ibid.*, p. 166, CDDH/II/SR.18, para. 9.

³⁹ *Ibid.*, p. 168, para. 18.

⁴⁰ *Ibid.*, para. 19. Cf. also in particular para. 33.

For this reason it would be necessary that such aircraft, which cannot be marked with the distinctive emblem, can use distinctive signals when engaged in humanitarian missions.

- 778 The solution which was finally adopted retains the fundamental character of the distinctive emblem which has been in force since the adoption of the original Convention of 22 August 1864. The use of distinctive signals by temporary medical aircraft – and exclusively by such aircraft – which are not marked with the distinctive emblem therefore remains an exception, but it is a welcome exception from the humanitarian point of view, for in case of emergency it is important that any medical aircraft available to bring relief to the wounded can be used.
- 779 In order to interpret the second sentence of paragraph 5 correctly it should therefore be understood that “the special cases covered in that Chapter” (i.e., Chapter III of Annex I to the Protocol) are cases in which temporary medical aircraft “cannot, whether for lack of time or because of their characteristics, be marked with the distinctive emblem” (Article 5 – *Optional use*, paragraph 2, first sentence, of Annex I) and that the only medical transports referred to here are these same temporary medical aircraft.⁴¹
- 780 Finally, it should be noted that, although the use of flashing blue light is reserved in the air to medical transports, it is not so on land and on water, unless a special agreement has been reached. However, this is a different problem, for in this case a flashing blue light is obviously no longer considered to be a distinctive signal in the sense of the Protocol.⁴²

Paragraph 6

First sentence

- 781 Paragraphs 1-5 laid down principles which may be quite difficult to implement, especially in view of the new technical means employed. This is the reason why an Annex is needed to provide all the requisite technical specifications and to relieve the Protocol of provisions which would have made it extremely unwieldy. The first sentence of paragraph 6 simply describes the relation between Article 18 and Annex I. It clearly shows – and this is its true *raison d'être* – that the High Contracting Parties or the Parties to the conflict have an obligation to carry out the provisions of Article 18, paragraphs 1-5, in accordance with Chapters I-III of Annex I (entitled respectively: *Identity cards*; *The distinctive emblem*; *Distinctive signals*). The fact that some of the provisions in the Annex are not absolutely mandatory, or are even optional, does not alter this obligation in any way. Some provisions are not mandatory because the Annex says so, and not because compliance with the Annex for carrying out the provisions of Article 18, paragraphs 1-5, is optional.

⁴¹ Cf. in addition commentary on Annex I, Art. 5, para. 2, *infra*, pp. 1202-1204.

⁴² On this subject, cf. also commentary on Annex I, Art. 6, *infra*, pp. 1210-1211.

Second sentence

- 782** The principle contained in this sentence is repeated in Article 5 (*Optional use*), paragraph 1, first sentence, of Annex I, which explains why one delegate doubted its usefulness.⁴³ Indeed, as Article 18, paragraph 6, first sentence, of the Protocol requires absolute compliance with this Annex for the execution of the provisions laid down in Article 18, paragraphs 1-5, as we saw above, it was not necessary to include this principle in two places. However, the reason that it was finally retained in Article 18 was probably because it does concern a principle and it was therefore considered logical to include it in the Protocol itself, and not only in the Annex.
- 783** The rule concerned here is of paramount importance. The effectiveness of protection actually depends on the trust that can be placed in the signalling. If a Party to the conflict has the slightest doubt regarding the nature of an aircraft transmitting agreed signals, it will probably be inclined not to grant this aircraft the protection to which it is entitled. It is certainly possible to conceive of the use of the same distinctive signals for other peaceful purposes, but the exclusive use for the purpose of the identification of medical units and transports is the only way of removing all ambiguity and of allaying all doubt. In such cases doubt is too dangerous to be permitted. Admittedly an aircraft on a military mission could use such signals, but this would be a flagrant violation of the Protocol with all the attendant consequences. The exclusive character of the rule does not allow for any half measures: either it is respected, or it is consciously violated.
- 784** Only distinctive signals are covered here because the same principle has already been laid down with regard to the distinctive emblem in Article 44, paragraph 1, of the First Convention. In that case it obviously does not concern only medical units and transports, but also medical personnel and material.
- 785** Article 18, paragraph 6, second sentence, refers to the exception laid down in Chapter III of Annex I. These exceptions, which are also referred to at the beginning of Article 5 (*Optional use*), paragraph 1, of the Annex, is mentioned in Article 6 (*Light signal*), paragraph 3. They concern only the use of the flashing blue light which is considered as a distinctive signal for the use of medical aircraft, though not – unless there is a special agreement between the Parties to the conflict – for vehicles or ships. Thus the exceptions apply to all the categories of medical vehicles and medical ships and craft. However, it does not permit the use of the signal on a transport in some cases for the purpose of identifying it as a medical transport, and sometimes for other purposes. Thus the exceptions do not allow for any ambiguity and the principle retains all its force and indispensable clarity.⁴⁴

⁴³ Cf. *O.R.* XI, pp. 215-216, CDDH/II/SR.22, paras. 13 and 22.

⁴⁴ Cf. also commentary Annex I, Art. 6, para. 3, *infra*, pp. 1210-1211.

Paragraph 7

- 786** The distinctive emblem of the red cross or the red crescent is of course intended first of all to permit the identification of persons and objects which should be protected in time of armed conflict, for the purpose of their protection. However, it is important that already in time of peace, the image of the emblem acquires or retains dignity for everyone. For example, the widespread use of the red cross emblem for commercial purposes would certainly damage its image, and in time of armed conflict might have unfortunate repercussions on the application of the rules demanding the respect and protection of persons and objects which it is used to identify.
- 787** The drafters of the Geneva Conventions were aware of this danger, and strict rules were laid down regarding the use of the emblem of the red cross, red crescent or red lion and sun in peacetime. It was in 1949 that a clear difference was made, in Article 44 of the First Convention, between the use of the distinctive emblem in time of war and in time of peace. In the first case, it is a protective emblem, while in the second, it is only an indicative sign. However, for the reasons mentioned above, the fact that it is of lesser importance then does not mean that the emblem, if it is not to lose credibility, may be used by anyone for any purpose in time of peace. For this reason, Article 44 of the First Convention imposes strict limitations on its use. Subsequently, to supplement the provisions of this article, the XXth International Conference of the Red Cross in 1965 adopted the “Regulations on the Use of the Emblem of the Red Cross, of the Red Crescent, and of the Red Lion and Sun by National Societies”.⁴⁵
- 788** In this commentary it is not possible to describe the rules relating to the use of the distinctive emblem in time of peace. On this matter we refer to Article 44 of the First Convention, the commentary thereon⁴⁶ and the above-mentioned Regulations.
- 789** The object of paragraph 7 of Article 18 is to prevent the increased use of the distinctive emblem in time of armed conflict, particularly to civilian medical personnel and units, from serving as a pretext for using this emblem for indicative purposes in time of peace more extensively than allowed by Article 44 of the First Convention. Such an extension would therefore be unlawful: this paragraph removes any doubt that might remain on this subject.
- 790** The introduction of this paragraph, which was not included in the 1973 draft, was proposed by the Working Group set up by Committee II to study the article. Committee II, in plenary, adopted this new paragraph as well as the substance of the Working Group’s report.⁴⁷ It might be thought that this paragraph was not essential and merely confirmed an established fact. However, as in other cases, the CDDH showed its concern not to leave any gaps in the system it was supplementing.

⁴⁵ These regulations, presently being revised, can be found, i.a., in the *International Red Cross Handbook*, 12th edition, Geneva, 1983, pp. 514 ff.

⁴⁶ *Commentary I*, pp. 323-339.

⁴⁷ Cf. O.R. XI, p. 217, CDDH/II/SR.22, para. 30.

Paragraph 8

- 791 To a great extent the system of the Conventions is based on the trust which can be placed in the distinctive emblem. The supervision of its use and the repression of abuses are therefore indispensable elements in the system.
- 792 As pointed out above,⁴⁸ modern techniques of warfare require new means of signalling and identification, and to this end the Protocol has introduced different distinctive signals. It is clear that the reasons which led to the supervision of the use of the distinctive emblem and the repression of abuse also apply with regard to such signals. Thus, it was easiest simply to refer to the rules of the Conventions and the Protocol dealing with such subjects. These rules therefore become applicable to distinctive signals, as well as to the distinctive emblem, for the Parties to the Protocol.
- 793 The provisions concerned are in particular those contained in Chapter VII and in Articles 53 and 54 of the First Convention, in Chapter VI of the Second Convention, in Articles 18 and 20 of the Fourth Convention, in the article under consideration here, and in Article 85 (*Repression of breaches of this Protocol*) of the Protocol. It is not possible to discuss these provisions in detail here, and we refer to the commentaries thereon.
- 794 However, the obligation upon the Contracting Parties (or, in the case of the Protocol, upon any other Parties to the conflict bound by it), to supervise the use of the distinctive emblem and signals by persons and on objects belonging to them, also arises in a more general way from their undertaking to respect and to ensure respect for the Conventions and the Protocol in all circumstances.⁴⁹

Y.S.

⁴⁸ Cf. *supra*, p. 224.

⁴⁹ Cf. Art. 1 common to the Conventions, and Art. 1, para. 1, of the Protocol.

Protocol I

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

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

Documentary references

Official Records

O.R. I, Part I, p. 134; Part III, p. 8 (Art. 19). *O.R.* III, pp. 94-95. *O.R.* VI, pp. 70-71, CDDH/SR.37, para. 32. *O.R.* XI, pp. 195-196, CDDH/II/SR.20, paras. 36-43; pp. 220-222, CDDH/II/SR.23, paras. 12 and 16-20; p. 245, CDDH/II/SR.25, paras. 1-3; pp. 257-262, CDDH/II/SR.26, paras. 1-36; p. 349, CDDH/II/SR.34, para. 3. *O.R.* XIII, pp. 98-100, CDDH/221/Rev.1, paras. 99-106; p. 178, *id.*, Annex II (Art. 19).

Other references

CE 1972, Basic Texts, p. 11 (Art. 22). *CE 1972, Commentaries*, Part I, p. 47. *CE 1972, Report*, vol. I, p. 41, paras. 1.64-1.65 (Art. 22); vol. II, p. 35, CE/COM I/13. *Commentary Drafts*, p. 28 (Art. 19).

Commentary

General remarks

- 795** This article concerns the obligations of States which are not Parties to the conflict with respect to persons protected by Part II of the Protocol, and with respect to the dead of the Parties to the conflict. It supplements Article 4 of the First Convention, Article 5 of the Second Convention, and Article 4 B (2) of the Third Convention, which deal with the same problem and it lays down the same rules as those laid down in the 1949 Conventions.
- 796** The question may arise whether this article might not have been better placed among the general provisions of the Protocol. However, as one delegate stated,

it is essentially the obligations contained in the provisions of Part II which are placed on States not Parties to the conflict:

“Part I laid down the basic obligations imposed on all High Contracting Parties, and Parts III and IV were concerned with the situation on the battlefield and with the relations between the belligerent Power, especially as an Occupying Power, and the population. None of the provisions of those three Parts was applicable to a third State, with the exception of Articles 60 to 62, which were concerned with relief; in those articles, however, the obligations of the third State were explicitly regulated. Finally, Part V imposed obligations on all High Contracting Parties, whether Parties to the conflict or not, and accordingly did not come within the scope of Article 19.”¹

In addition, it should be noted that Article 9 (*Field of application*), paragraph 2 (a), and Article 31 (*Neutral or other States not Parties to the conflict*) of the Protocol, which both also fall under Part II, are also directly concerned with the States mentioned in Article 19.²

Text of the article

797 The States which are bound by obligations in pursuance of this article are “neutral and other States not Parties to the conflict”.³

798 This article does not cover liberation movements to which the Protocol may apply.⁴ However, it would be desirable that if a conflict in which they are not engaged takes place on the borders of territory under their control, they should at least endeavour to act in the spirit of the provisions which could relate to them.

799 The States concerned here are required to apply the “relevant provisions of this Protocol”. Mentioning only the provisions of the Protocol, without referring to those of the Conventions, shows that the category of States covered by the provisions of this Protocol is the same as that covered by the corresponding articles of the Conventions. On the other hand, there was a preference for requiring the application of the relevant provisions of the present Protocol, rather than the application “by analogy [...] [of] the provisions of the present Protocol”, as provided in the draft, which in turn was inspired by the Conventions. As one delegate stated, this expression:

“did not accurately reflect the true position of States not Parties to the conflict. Those words might seem to imply that such States were being asked to apply the provisions relating to the wounded, sick and shipwrecked as if they were Parties to the conflict”.⁵

¹ O.R. XI, p. 259, CDDH/II/SR.26, para. 11. The articles relating to relief actions have become Articles 68-71 in the final version of the Protocol.

² For further details on this subject, cf. commentary Art. 9, para. 2, point 1, *supra*, p. 142, and Art. 31, *infra*, p. 325.

³ On the meaning of this expression, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61.

⁴ Cf. Art. 1, para. 4, and its commentary, *supra*, pp. 41-56.

⁵ O.R. XI, pp. 258-259, CDDH/II/SR.26, para. 9.

It is clear that many provisions of the Protocol cannot impose obligations on the States concerned here, even if they relate to persons who are to be protected.⁶ However, it is only a question of wording, for basically it is quite clear that the situation under the Conventions was precisely the same, as shown indeed in the commentary on Article 4 of the First Convention: “The Convention, having been drawn up with a view to determining the treatment of enemies, contains a number of provisions which could only apply to belligerents”.⁷

800 In the Protocol, as in Articles 4 of the First Convention and 5 of the Second Convention, though unlike Article 4 B (2) of the Third Convention, there is no list of the articles which must be applied – or those which need not be applied – by the States concerned in Article 19. The reason, which also applies for Article 19 of the Protocol, was clearly explained in the Commentary on the First Convention:

“An enumeration is justified in the Third Convention, whose object is to lay down regulations for the treatment of men who are interned; in the First Convention it would necessarily have been somewhat rigid and arbitrary, some of the articles being partially applicable. The application of the Convention by neutral Powers is primarily a question of common sense, guided by a humane spirit. The interests of the wounded themselves will provide a touchstone in cases of doubt.”⁸

801 It should also be noted that there was even a proposal in one amendment to mention only “the provisions of this Part”.⁹ The reason was that essentially only the provisions of this Part have to be applied by the States covered here. We noted this above, to explain the fact that Article 19 is included in Part II, and the reasons we gave were also put forward by the sponsors of this proposal. As the amendment was proposed rather late, and was considered by a number of delegates as a matter of substance,¹⁰ it was withdrawn without any real discussion taking place.¹¹ In any case the question is not of great importance. The States concerned are required mainly to observe the general principles of respect and protection for the wounded, sick and shipwrecked, as well as for medical personnel. These principles are actually stated in Part II.¹² However, these States could also seek inspiration in rules contained elsewhere. An example that springs to mind is Article 76 (*Protection of women*), paragraph 2, in Part IV, relating to pregnant women, who are also covered by Part II as “wounded” or “sick” in the sense of the Protocol.¹³

802 The persons covered by Article 19 are “persons protected by this Part”. This concise formulation was ultimately preferred to an enumeration of protected persons,¹⁴ as contained in the 1973 draft and the report of the Drafting Committee

⁶ Cf., for example, Art. 15, paras. 2-4.

⁷ *Commentary I*, p. 63.

⁸ *Ibid.*

⁹ Cf. *O.R.* III, p. 95, CDDH/II/242.

¹⁰ Cf. *O.R.* XI, p. 260, CDDH/II/SR. 26, paras. 18, 20-21.

¹¹ *Ibid.*, p. 260, para. 22.

¹² Cf., in particular, Arts. 10 and 15.

¹³ Cf. Art. 8, sub-para. (a).

¹⁴ Cf. *O.R.* XI, p. 262, CDDH/II/SR.26, para. 35.

of Committee II.¹⁵ The persons covered here are the wounded, sick and shipwrecked, civilian medical personnel and civilian religious personnel, in the sense of the Protocol.¹⁶ Medical and religious personnel not protected by Part II, and consequently not covered by this article, are protected by the Conventions and are therefore covered by the analagous articles in the Conventions mentioned above. These several instruments together cover all such personnel, leaving no gaps.

803 It should be noted that some provisions apply partially to persons whose protection is explicitly provided, and partially to other persons. This applies in particular to Article 16 (*General protection of medical duties*). Ordinary common sense should dictate to neutral or other States not Parties to the conflict that they should generally apply these articles, or at least, the principles on which they are based.

804 However, persons protected by this Part are only covered by Article 19 if they are “received or interned” within the territory of a neutral or other State not Party to the conflict. Indeed, their relationship to such a State becomes important only in this case. The text refers to persons who “may” be received or interned. This should be understood to mean “any persons who are actually received or interned when the occasion arises”. The article does not impose obligations on the States concerned with regard to persons they would be able to (but do not in fact) receive or intern. As regards the expression “received or interned”, it is taken from similar articles in the Conventions. These terms were deliberately selected in 1949 “in order to cover all cases which might arise through the application of the Fifth Hague Convention of 1907”.¹⁷ Reference should be made to this Convention, as well as to Articles 4 and 37, paragraph 3, of the First Convention and to the relevant Commentaries to ascertain in detail what persons must be interned. With regard to persons protected by this Part, it can simply be stated that in any case no obligation is imposed by international law on neutral or other States not Parties to the conflict to intern or detain civilians.¹⁸

805 Finally, neutral States and other States not Parties to the conflict must also apply the relevant provisions of the Protocol “to any dead of the Parties to that conflict whom they may find”. Basically this concerns the provisions of Article 34 (*Remains of deceased*), which in turn refers to some provisions of the Conventions.¹⁹ However, the States concerned could also refer to Article 17 (*Role of the civilian population and of aid societies*), paragraph 2, in cases where large numbers of dead are found in their territory.

Y.S.

¹⁵ Cf. CDDH/II/240 of 21 February 1975 (not published in the *Official Records*.)

¹⁶ Cf. Art. 8, sub-paras. (a), (b), (c) and (d).

¹⁷ *Commentary I*, p. 62. This refers to the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

¹⁸ However, there are a few exceptions, as in the case when such a person has committed an offence covered by an extradition treaty or a grave breach of the Conventions or the Protocol.

¹⁹ For further details on this subject, cf. commentary Art. 34, *infra*, p. 365.

Protocol I

Article 20 – Prohibition of reprisals

Reprisals against the persons and objects protected by this Part are prohibited.

Documentary references

Official Records

O.R. I, Part. I, p. 134; Part III, p. 8 (Art. 20). *O.R.* III, pp. 96-97. *O.R.* VI, p. 71, CDDH/SR.37, paras. 33-35; pp. 77-78, *id.*, Annex (Egypt). *O.R.* XI, pp. 196-199, CDDH/II/SR.20, paras. 44-64; p. 219, CDDH/II/SR.23, paras. 1-3; p. 246, CDDH/II/SR.25, paras. 4-8. *O.R.* XIII, pp. 101-102, CDDH/221/Rev.1, paras. 107-112; p. 179, *id.*, Annex II (Art. 20).

Other references

CE/2b, pp. 49-63. *CRCE 1971, Report*, p. 32. *CE 1971, Report*, p. 111, paras. 573-577. *CE 1972, Basic Texts*, p. 25 (Art. 74). *CE 1972, Commentaries*, Part I, pp. 151-153 (Art. 74). *CRCE 1972, Report*, pp. 50-51 (Art. 74). *CE 1972, Report*, vol. I, pp. 190-191, paras. 4.134-4.142 (Art. 74); vol. II, p. 102, *CE/COM IV/19*; p. 107, *CE/COM IV/44*; p. 108, *CE/COM IV/50*; p. 109, *CE/COM IV/53-55*. *Commentary Drafts*, p. 29 (Art. 20); p. 90 (Introduction to Section I of Part V).

Commentary

806 Article 46 of the First Convention prohibits reprisals “against the wounded, sick, personnel, buildings or equipment protected by the Convention”, and Article 47 of the Second Convention prohibits them “against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention”.

807 In 1929 the prohibition of reprisals against prisoners of war was introduced.

“The fact that this prohibition was not also inserted in 1929 in the Convention dealing with the wounded and sick – not explicitly, that is to say, for it follows

by implication from the principle of the respect to which they are entitled – can only have been due to an oversight.”¹

This oversight was corrected in 1949 when “the International Committee’s proposal that the prohibition should be inserted in all four Conventions was approved unanimously without opposition of any sort”.²

808 The mention of the principle in Part II of the Protocol supplements the rule mentioned above, which is contained in each of the Conventions, for persons and objects protected by this Part, which were not yet covered by the First and Second Conventions.

809 The Conventions include a list of the persons and objects covered. The Protocol has a more concise formulation. Protected persons include the wounded, sick and shipwrecked as well as medical personnel; as regards “objects”, these cover medical units and *matériel*, as well as medical transports.

810 The prohibition of reprisals is mentioned in Part II, because the negotiations which took place at the CDDH with regard to creating a single article dealing with this problem in the Protocol, were not successful.³

811 Nevertheless, two further elements on this brief article are discussed below.

812 The prohibition contained in this article is expressed very briefly and clearly and is absolute. Even unlawful acts committed by a Party to the conflict against protected persons or objects cannot justify similar acts by the adverse Party by way of reprisal. Nothing can ever justify reprisals against the persons and objects covered here.

813 A proposal was made to replace the term “reprisals” by the expression “measures in the nature of reprisals”⁴ with the view of encompassing in this way “all acts which might be called by any name but reprisals against the persons or objects protected by Part II”.⁵ However, an objection was made to this proposal stating that it was in danger of giving rise to confusion and that it would be better “to use the wording of the Geneva Conventions, which constituted a traditional and accepted concept”.⁶

814 In fact, Article 20 removes the only doubt that might remain with regard to the absolute character of the obligations imposed on Parties to the conflict with respect to persons and objects protected by Part II. Only reprisals indeed permit acts being committed which are “not normally legal”, in that they are “regarded as being legal in the particular circumstances which exist at the time”.⁷ By prohibiting reprisals, the only justification a Party to the conflict might have used from a legal point of view for violating its obligations with respect to persons and objects protected here, is denied.

¹ *Commentary I*, p. 344.

² *Ibid.*, pp. 343-345.

³ With regard to the historical background to this question and the situation as it is with the adoption of the Protocol, cf. introduction to Part V, Section II, *infra*, p. 973.

⁴ Cf. O.R. III, p. 97, CDDH/II/214.

⁵ O.R. XI, p. 197, CDDH/II/SR.20, para. 47.

⁶ *Ibid.*, p. 197, para. 52.

⁷ *Commentary I*, p. 342.

- 815** The question of retortion is a different matter. This allows acts to be carried out which are unfavourable to the persons and objects protected, as a reaction to acts committed by the adverse Party. However retortion does not allow any violation of the law, even in exceptional cases. Thus this is only possible for a Party to the conflict which has accorded greater privileges than are required under the Protocol. Such a Party could indeed withdraw such privileges by way of retortion. But it may never fall short of the obligations laid down by the Protocol. To prohibit retortion would therefore be tantamount to laying down an unfounded rule in a field not covered by the Protocol. Certainly it might be desirable for the Parties to the conflict not to resort to retortion, just as one might wish that they would agree to grant the persons and objects protected more favourable treatment than the minimum required by the Protocol. However, it cannot be denied that a prohibition of retortion in the Protocol would have been rather inequitable, since it would tend to penalize in some way the most generous Parties to the conflict, the only ones in a position to practise retortion.
- 816** As concluded in the commentary on Article 46 of the First Convention, which had also raised this problem, “what matters most, however, is that there should be no infringement of the rules of the Convention, that is to say, no interference with the rights of the persons protected, considered as a minimum”.⁸ In this respect, Article 20 does not allow for any uncertainty either.

Y.S.

⁸ *Ibid.*, p. 347.

Part II, Section II – Medical transportation

Introduction

- 817 The title of the Section has a rather hybrid character in the light of the way that medical transportation and medical transports have been defined.¹ In fact, the Section is essentially concerned with the protection of medical transports.
- 818 As was remarked in the introduction to this Part, the structure of the second Section of this Part was completely modified during the CDDH. Without examining this question at length, it seems useful to detail these structural modifications, and to analyse their substantive consequences on the protection of medical transportation.
- 819 The draft divided the section into two chapters: one devoted to the common provisions, i.e., the provisions relating to all types of medical transports, the other devoted more specifically to medical aircraft. This distinction was abandoned by the CDDH. In the Protocol there are no longer any common provisions, but one article devoted to medical vehicles, two articles to medical ships and craft, and eight articles to medical aircraft. The latter therefore remains the core of the Section.
- 820 Which were the common provisions of the draft, and why did they disappear ?
- 821 The first, Article 21, contained definitions relating more specifically to Section II. These definitions have been retained with some modifications,² but Committee II decided that it was better to group all the definitions relating to Part II at the beginning of this Part, and therefore they have been included in Article 8 (*Terminology*) in the final text.
- 822 The second, Article 22 of the 1973 draft, laid down the possibility of using medical transports to search for and evacuate the wounded, sick and shipwrecked. The Working Group considered that it was not desirable to mention search and evacuation:

“This function is fully covered in the First, Second and Fourth Conventions, and in Article 17 of the Protocol. To refer to the matter again would be to cast doubt on the meaning of the Conventions, and if search and evacuation were mentioned, the other functions of medical transport when carrying medical personnel should also be included, and those are already fully covered under the definition of medical personnel.”³

¹ Cf. Art. 8, sub-paras. (f) and (g).

² Cf. *supra*, commentary Art. 8, sub-paras. (f)-(j), pp. 130-132.

³ O.R. XIII, p. 231, CDDH/II/296, para. 3.

This point of view was approved by Committee II and then by the Conference in plenary meeting. Thus the removal of this article does not mean that transports may not be used for such essential tasks as the search for and evacuation of the wounded, sick and shipwrecked (though subject to an explicit restriction with regard to the use of medical aircraft⁴).

823 The third common provision of the draft contained in Article 23 was entitled *Application*, and sought to determine precisely which provisions of the Conventions and the Protocols would apply to medical ships and craft, as well as to amphibious medical transports covered by the Conventions and the Protocol, and in which circumstances they would apply. However, with the exception of amphibious medical transports, this article was concerned only with medical ships and craft, and the problems with which it dealt were included and elaborated in the articles specifically devoted to these medical transports, i.e., Articles 22 (*Hospital ships and coastal rescue craft*) and Article 23 (*Other medical ships and craft*). As regards amphibious medical transports, the Committee decided not to mention these. In this it followed the conclusion of the Working Group which considered that such means were covered by the relevant provisions relating to medical vehicles when they are on land, and by the relevant provisions relating to medical ships and craft when they are on water.⁵

824 The fourth of the common provisions of the draft, Article 24, entitled *Protection*, laid down the principle of respect and protection of medical transports, and made Article 12 of the Protocol (*Protection of medical units*) and Article 13 (*Discontinuance of protection of civilian medical units*) applicable to medical transports by analogy. Finally, it added another two activities characteristic of medical transportation which should not be considered as being harmful to the enemy.

825 The Working Group considered that it was preferable to include the provisions relating to protection in the articles concerning each type of medical transports. Consequently it also recommended the deletion of the general provisions contained in Article 24 of the draft.⁶

826 However, it should be noted that the two activities of medical transports, which the draft had added and which should not be considered as being harmful to the enemy, were only finally included, subject to some slight changes, with regard to medical aircraft.⁷

827 These related to:

- “(a) the carrying on board military or civilian means of medical transport of equipment to be used solely for such transmissions as may be necessary to movement or navigation;
- (b) the carrying on board military means of medical transport of armed military medical personnel who use such arms for their own protection and for that of the wounded and the sick being conveyed.”⁸

⁴ Cf. Art. 28, para. 4, and its commentary, *infra*, pp. 305-306.

⁵ Cf. O.R. XIII, p. 232, CDDH/II/296, para. 8.

⁶ Cf. *ibid.*, p. 231, para. 2.

⁷ Cf. commentary Art. 28, para. 2, *infra*, pp. 302-304.

⁸ Draft Art. 24, para. 3.

- 828 It is clear that the first of these activities cannot be considered as being harmful to the enemy, even if it is not specifically mentioned. However, to avoid all ambiguity, it is also necessary that medical transports only contain equipment indispensable for the purposes mentioned here. Nevertheless, when such a case arises, it is only by having full knowledge of the content of a communication – rather than from the presence of instruments which often have many uses – that it is really possible to discover whether abuse has taken place.
- 829 The second condition has become superfluous because civilian medical personnel were henceforth also permitted to carry light arms. It is explicitly mentioned in Article 13 of the Protocol (*Discontinuance of protection of civilian medical units*)(which was not the case in the draft) that the fact “that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge” should not be considered as an act harmful to the enemy.⁹ Thus this rule applies to the same extent to personnel of medical transports.
- 830 Finally, the fifth and last article of the draft devoted to general provisions dealt with notification, and the Working Group “concluded that there was no requirement for a separate article on Notification”.¹⁰
- 831 The notification of medical aircraft in any case raises a very specific problem, and even in the draft this was dealt with separately. As the Working Group had expressed the opinion that “notification would be of no practical value in the case of medical vehicles”,¹¹ a general provision lost its *raison d’être* and the provisions relating to notification of medical ships and craft were logically included in the articles relating to these types of medical transports.
- 832 Nevertheless, the question arises whether the remark of the Working Group relating to the notification of medical vehicles is still altogether appropriate.
- 833 Indeed, it should not be forgotten that trains also count as medical vehicles within the meaning of the Protocol:¹² notification of medical convoys travelling by rail, or those consisting of a number of trucks or ambulances, would certainly be useful.
- 834 However, this omission is not of great importance. In general, the draft article itself provided only for the possibility, and not the obligation, to notify the characteristics useful for identifying medical transports. This possibility remains regardless of any official rule providing for it. There is nothing in the Protocol to prevent the notification of an important medical convoy – in fact, this can only be recommended.
- 835 Thus such considerations on the part of the Working Group led Committee II, and later the Conference as a whole, to abandon the division of Section II into chapters. Even so, Article 21 (*Medical vehicles*), Articles 22 and 23 relating to medical ships and craft, and finally Articles 24-31 relating to medical aircraft, form three separate groups. The articles on medical aircraft in particular form a whole and should be interpreted as such.

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⁹ On the meaning of such weapons and the limitations imposed on their use, *cf.* however, *supra*, commentary Art. 13, para. 2(a), p. 177.

¹⁰ *Cf. O.R. XIII*, p. 231, CDDH/II/296, para. 2.

¹¹ *Ibid.*

¹² *Cf. supra*, commentary Art. 8, sub-para. (h), pp. 131-132.

Article 21 – Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

Documentary references

Official records

O.R. I, Part I, p. 135; Part III, pp. 8-9 (Art. 21-25). *O.R.* III, pp. 115-119. *O.R.* VI, pp. 83-84, CDDH/SR.38, paras. 4-13. *O.R.* XI, pp. 389-394, CDDH/II/SR.36, paras. 1-35; pp. 397-406, CDDH/II/SR.37, paras. 15-72; pp. 407-417, CDDH/II/SR.38; pp. 419-425, CDDH/II/SR.39, paras. 2-33. *O.R.* XIII, pp. 137-138, CDDH/221/Rev.1, paras. 190-195; pp. 141-145, paras. 197-211; p. 181, *id.*, Annex II (Art. 22); pp. 231-235, CDDH/II/296.

Other references

CE/7b, pp. 14 and 34 (Art. 5). *CRCE 1971, Report*, pp. 23 and 25-26 (Art. 5). *CE 1971, Report*, p. 25, paras. 52-54; pp. 30 and 32 (Art. 7). *CE 1972, Basic Texts*, pp. 9-10 (Art. 16). *CE 1972, Commentaries*, Part I, pp. 35-36 (Art. 16). *CRCE 1972, Report*, p. 26 (Art. 16). *CE 1972, Report*, vol. I, p. 36, paras. 1.29-1.31 (Art. 16); vol. II, p. 3 (Art. 16); p. 26, *CE/COM I/2. Commentary Drafts*, pp. 29-34 (Art. 21-25).

Commentary

General remarks

- 836 The Conventions protect two types of medical transportation on land: first, the transportation of military wounded and sick undertaken in vehicles of the military medical services;¹ secondly, the transportation of civilian wounded and sick, the

¹ Cf. Art. 35, First Convention.

infirm and maternity cases, though only if they are undertaken by convoys of vehicles or by hospital trains.²

837 The aim of the Protocol in this field is to ensure the optimum protection of all wounded and sick persons. Whether they are civilian or military, the wounded and sick, medical personnel, medical units and *matériel*, will henceforth enjoy the same right to protection. It was logical also to grant exactly the same protection to all medical transportation, as far as this is possible.

838 The improvement created by the Protocol at the humanitarian level concerns civilian medical vehicles proceeding alone. Such single vehicles were not covered by the Conventions.³ In addition, civilian medical vehicles, like any other form of medical transports, are also permitted to transport medical or religious personnel or medical materials, while Article 21 of the Fourth Convention only permitted the transportation of “wounded and sick civilians, the infirm and maternity cases”.⁴

Text of the article

839 The meaning of the expression *medical vehicle* was examined above.⁵ In addition, it should be noted that amphibious medical transports should be considered as medical vehicles when they are used on land.⁶

840 The concepts of *respect* and *protection* were also defined above.⁷

841 Medical vehicles must be respected and protected “in the same way as mobile medical units under the Conventions and this Protocol”. It should be noted in passing that the First Convention also provides that medical transportation must be protected “in the same way as mobile medical units”.⁸

842 To be quite precise, the expression “and under the same conditions” should have been added in the Protocol to the words “in the same way”. Indeed, the Conventions and the Protocol not only lay down the way in which medical units must be protected, but also the conditions under which such protection is granted.

843 As regards the way in which they are protected, the Conventions, like the Protocol, provide that medical units must be respected and protected *at all times*, and that they *shall not be the object of attack*. The reason for these phrases and their meaning were analysed above.⁹ Clearly they also apply for medical vehicles.

844 Two conditions are imposed for medical units – and therefore medical vehicles – to enjoy the right to respect and protection. One concerns only civilian medical units (and vehicles), the other all medical units (and vehicles). The following comments are again based on references to the relevant provisions.

² Cf. Art. 21, Fourth Convention.

³ Cf. *Commentary IV*, p. 170.

⁴ It will be recalled that the infirm and maternity cases are included in the definition of the “wounded” and “sick” given in the Protocol: cf. *supra*, commentary Art. 8, sub-para. (a), pp. 116-118.

⁵ Cf. *supra*, commentary Art. 8, sub-para. (h), pp. 131-132.

⁶ Cf. *supra*, p. 246.

⁷ Cf. *supra*, commentary Art. 10, p. 146.

⁸ Cf. Art. 35, also Arts. 19, 21, 22, First Convention.

⁹ Cf. *supra*, commentary Art. 12, para. 1, pp. 166-167; and *Commentary I*, p. 196.

845 To be entitled to respect and protection civilian medical vehicles must fulfil one of the following conditions:

- a) they must belong to one of the Parties to the conflict;
- b) they must be recognized and authorized by the competent authority of one of the Parties to the conflict; or
- c) they must be authorized in accordance with Article 9 (*Field of application*), paragraph 2, of this Protocol, or Article 27 of the First Convention.

846 These conditions are listed in Article 12 (*Protection of medical units*), paragraph 2, of the Protocol, and explained in the commentary on that paragraph.¹⁰

847 As regards the condition imposed for all medical vehicles, this is that, outside their humanitarian mission, they shall not be used to commit any acts harmful to the enemy.¹¹

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¹⁰ Cf. commentary Art. 12, para. 2, *supra*, pp. 167-169.

¹¹ On this subject, see commentary Art. 13, paragraph 2 of which also lists certain acts which should not be considered as being harmful to the enemy, even though they might be rather equivocal; *supra*, pp. 176-180.

Article 22 – Hospital ships and coastal rescue craft

1. The provisions of the Conventions relating to:
 - (a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
 - (b) their lifeboats and small craft,
 - (c) their personnel and crews, and
 - (d) the wounded, sick and shipwrecked on board,shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.
2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:
 - (a) by a neutral or other State which is not a Party to that conflict; or
 - (b) by an impartial international humanitarian organization,provided that, in either case, the requirements set out in that Article are complied with.
3. Small craft described in Article 27 of the Second Convention shall be protected even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

Documentary references

Official Records

O.R. I, Part I, p. 135; Part III, pp. 8-9 (Art. 21-25). *O.R.* III, pp. 113-127. *O.R.* VI, pp. 85-87, CDDH/SR.38, paras. 14-31; p. 91, *id.*, Annex (Indonesia). *O.R.* XI, pp. 389-394, CDDH/II/SR.36; pp. 404-406, CDDH/II/SR.37, paras. 62-72; pp. 407-413, CDDH/II/SR.38, paras. 4-31; pp. 551-552, CDDH/II/SR.49, paras. 5-6; p. 553, para. 14; pp. 555-559, paras. 34-56. *O.R.* XII, p. 41, CDDH/II/SR.59, paras. 16-17; p. 46, para. 54; pp. 205-206, CDDH/II/SR.73, paras. 44-50; pp. 224-226, CDDH/II/SR.75, paras. 39-52; pp. 461-463, CDDH/II/SR.98, paras. 45-56. *O.R.* XIII, pp. 138-142, CDDH/221/Rev.1, paras. 195-199; p. 145, paras.

210-211; p. 182, *id.*, Annex II (Art. 23); pp. 231-234, CDDH/II/296, paras. 1-10 and Art. 21-23; p. 257, CDDH/235/Rev.1, paras. 30-31; pp. 286-287, *id.*, Annex I (Art. 23); p. 361, CDDH/406/Rev.1, para. 33; p. 399, *id.*, Annex (Art. 23).

Other references

CE/7b, pp. 62-77. *CE 1971, Report*, p. 27; p. 32, paras. 89-92; p. 34 (Art. 7). *CE 1972, Basic Texts*, pp. 9-10 (Art. 16). *CE 1972, Commentaries*, Part I, pp. 35-36 (Art. 16). *CRCE 1972, Report*, p. 26 (Art. 16). *CE 1972, Report*, vol. I, p. 36 (Art. 16); vol. II, p. 3 (Art. 16); p. 26, CE/COM I/2. *Commentary Drafts*, pp. 29-34 (Art. 21-25).

Commentary

General remarks

- 848 The 1973 draft divided the Section devoted to medical transportation into two chapters: “common provisions” and “Medical aircraft”. At first sight it apparently did not contain any article solely devoted to medical ships and craft. However, a close examination reveals that apart from paragraph 3, which deals with amphibious medical transports, Article 23 of the draft actually deals exclusively with medical ships and craft.
- 849 The first paragraph of the draft sought to bring civilian medical ships and craft, as defined by the Protocol, under the terms of the Second Convention. Up to that time they had not been covered by that Convention.
- 850 The second paragraph was concerned with clarifying the provisions applicable to medical ships and craft on inland waterways, i.e., *not at sea*. As a matter of fact, the Second Convention only covers protection *at sea*, and some doubt remained regarding the legal régime which applies to medical ships and craft navigating on waters other than the sea.
- 851 The third paragraph dealt with amphibious medical transports, specifying that they were subject to “the provisions relating to their use at a given time”. Thus the Second Convention would be applicable to them at sea, and the First (or perhaps even the Fourth Convention) would apply on land.
- 852 Finally, the fourth paragraph specified that though medical ships and craft, as defined by the Protocol – i.e., also *civilian* medical ships and craft – were covered by the Second Convention as a whole, the articles devoted to hospital ships were applicable only to such ships. The need to clarify this point seemed to be indispensable due to the fact that the function of hospital ships justifies more extensive privileges, while at the same time also requiring a stricter notification procedure.
- 853 As we saw above,¹ the structure of the ICRC draft of the Section devoted to medical transportation was completely modified during the Diplomatic

¹ *Supra*, pp. 245-247.

Conference. On this occasion the problem of medical ships and craft was seriously taken up by a Working Group of Committee II on the basis of numerous amendments,² and finally, two long articles exclusively devoted to this question were included in the Protocol.

854 These articles basically offer a solution to the two following subjects of concern:

- to permit ships and craft already covered by the Second Convention to also be available for all *civilian* wounded, sick and shipwrecked persons;
- to provide protection for medical ships and craft which had not been covered by the Second Convention.

855 These two concerns are reflected in two separate articles, the first of which deals with the new privileges granted ships and craft already covered by the Second Convention, while at the same time slightly extending the category of hospital ships;³ and the second of which deals with the protection of medical ships and craft not covered by the Second Convention, which will benefit from privileges slightly less extensive than the former, though in accordance with a more flexible procedure.

856 The articles which were adopted go further and are much more detailed than Article 23 of the 1973 draft while resolving the questions raised in the draft. Moreover, although this question was not mentioned in Article 22 as finally adopted, it was clearly stated during the discussions in Committee II that, unlike what was indicated in Article 23, paragraph 2, of the draft: “a hospital ship enjoyed its privileged status wherever it might be, and no distinction was drawn whether it happened to be on the high seas or elsewhere”.⁴ This point of view prevailed, and it must be concluded that hospital ships fall under the scope of the Second Convention wherever they happen to be.

Paragraph 1

857 In the Second Convention, the ships described in Articles 22, 24 and 25 are those which are “built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them”.⁵ The wounded, sick and shipwrecked referred to are essentially members of the armed forces.⁶

858 As one of the main aims of Part II of the Protocol is to grant the same protection to any wounded, sick or shipwrecked person, whether civilian or military, it was deemed necessary to specify that such ships, as well as their lifeboats and small craft, and coastal rescue craft,⁷ can lawfully be used for civilian wounded, sick

² Cf. particularly *O.R.* III, pp. 116-117, CDDH/II/249 and Add.2 and 3; CDDH/II/258 and Add.1.

³ Cf. Art. 22, para. 2.

⁴ *O.R.* XI, p. 409, CDDH/II/SR.38, para. 12.

⁵ Cf. Art. 22, Second Convention.

⁶ Cf. Art. 13, Second Convention.

⁷ Cf. Art. 27, Second Convention.

and shipwrecked persons, and that in doing so they retain the rights granted them under the Second Convention, as do their personnel and crew.

- 859 Nevertheless, it should be noted that even under the régime of the Second Convention, the ships and craft that are covered were already under an obligation to offer assistance to any shipwrecked person they came across, in accordance with the general law of the sea. However, a specific task of taking care of civilian wounded, sick and shipwrecked persons could not be said to rest upon them, nor, in particular, that of transporting such wounded and sick civilians.

Sub-paragraph (a)

- 860 To be absolutely precise, this should have referred to “ships and craft”, since Article 27 of the Second Convention deals with *coastal rescue craft*. As such ships and craft are described in the articles of the Second Convention that are mentioned, reference can be made to them. However, the provisions relating to such ships and craft are not only those where they are described, but also Article 26, which recommends a minimum tonnage of 2,000 tons gross for hospital ships transporting wounded, sick and shipwrecked over long distances; Article 29, which permits hospital ships to leave ports falling into the hands of the enemy; Article 30, concerning the use of hospital ships and small craft; Article 31, granting the right of Parties to the conflict to control, search, and, where justified even to detain such ships and craft for a period not exceeding seven days; Article 32, which deals with their stay in a neutral port; Article 33, which imposes on merchant vessels which have been converted into hospital ships the obligation to remain dedicated to such use throughout the duration of hostilities; and Articles 34 and 35, which cover the cessation of protection.

Sub-paragraph (b)

- 861 The protection granted hospital ships is explicitly extended to their lifeboats – which is obviously necessary – by the Second Convention.⁸ On the other hand, the latter does not refer to the *small craft* of such ships. Yet there is no doubt that these were also covered. To mention them separately has the advantage of removing any ambiguity about the fact that auxiliary craft belonging to a hospital ship for the purpose of helping it to carry out its tasks is also protected.

Sub-paragraph (c)

- 862 This refers to the rules of Article 36 of the Second Convention relating to the medical personnel⁹ of hospital ships, and those of Article 37 for any religious or medical personnel who might be on board coastal rescue craft.

⁸ Cf. Art. 26, Second Convention.

⁹ In this respect, it should be recalled that the crew is also considered as personnel in the sense of the Protocol, cf. Art. 8, sub-para. (c) and (d).

Sub-paragraph (d)

- 863** The provisions of the Second Convention relating to such wounded, sick and shipwrecked persons are those of Article 12, which describes the protection and treatment to which they are entitled; Article 14, which lays down the conditions under which a belligerent may require the surrender of such persons; Article 15, which deals with cases in which they are taken on board a neutral warship or neutral military aircraft; Article 16, which provides for the fate of those who have fallen into enemy hands; and finally, Article 17, which deals with such persons who are landed in a neutral port.
- 864** As regards civilian wounded, sick and shipwrecked persons covered by the Protocol but not by the Second Convention, we will see below that only Article 12 of the latter remains applicable. However, it was necessary to point out that the fate of the wounded, sick and shipwrecked covered by the Second Convention is not affected by the presence on board ship of wounded, sick and shipwrecked persons not covered by that Convention.
- 865** Therefore, what new category of wounded, sick and shipwrecked persons can henceforth be taken on board, treated and transported without restriction? This covers all civilian wounded, sick and shipwrecked persons who are not already covered by Article 13 of the Second Convention.
- 866** The Protocol describes in detail which persons are included in the categories of wounded, sick and shipwrecked.¹⁰
- 867** As regards Article 13 of the Second Convention, this basically covers military wounded, sick and shipwrecked, though it also covers some well-defined categories of civilians.¹¹ Nevertheless, the great majority of civilians are not covered by this article, and in this respect the present article represents a step forward.
- 868** Although on the main points the rules applicable to such civilians are the same – i.e., the right to protection and care¹² – they are not identical with regard to other points, as was mentioned above:

- 1) *Such civilians (viz., those not covered by Article 13 of the Second Convention) may not be surrendered to any Party which is not their own*

- 869** Article 14 of the Second Convention permits warships of belligerent Parties to require that the wounded, sick or shipwrecked on board hospital ships or other craft shall be surrendered to them, provided that the condition of the persons to

¹⁰ Cf. *supra*, commentary Art. 8, sub-paras. (a) and (b), pp. 116-124.

¹¹ Persons following the armed forces without forming part of them and who have received authorization to do so, members of the crew of the merchant navy and civil aviation of the Parties to the conflict, if they do not enjoy more favourable treatment under the provisions of international law, and the civilian population taking up arms spontaneously, provided they carry them openly and respect the laws and customs of war; cf. Art 13, paras. 4-6, Second Convention.

¹² Cf. Art. 12, Second Convention.

be transferred permits this, and that the warship can provide adequate facilities for necessary medical treatment. Though this rule continues to apply to the wounded, sick and shipwrecked covered by Article 13 of the Second Convention, regardless of their nationality, it does not apply to all *civilian* wounded, sick and shipwrecked persons. Only the surrender to those who are nationals of the State whose flag the warship is flying can be lawfully required by this ship. As regards shipwrecked persons who have not yet been taken on board, a rather subtle distinction has to be made between the act of taking them on board and capturing them. When not engaged in combat, a warship has the duty to *take on board* shipwrecked persons, and in by far the majority of cases this could not be termed “capture”. Such action could be termed “capture” only in the possibly rather academic case that shipwrecked persons are manifestly on the point of reaching dry land safe and sound, or of being taken on board by another craft. In this respect the determining factor is the intention of the captain of the warship.

870 The hospital ships covered by Articles 22, 24 and 25 of the Second Convention all depend on a Party to the conflict, either belonging to it, or officially commissioned by it or otherwise placed under its command. Thus, in principle they will not enter the territorial waters or approach the territory of an adverse Party to that on which they depend. Nevertheless, they may be compelled to do so by adverse circumstances (storms, damage etc.), and again in such a case the surrender of the civilian wounded, sick and shipwrecked who are not covered by Article 13 of the Second Convention, or are not nationals of the adverse Party, cannot be required by the latter either. However, hospital ships will entrust such persons to this Party if their condition requires care which they are unable to provide. In this the victim’s interests are predominant – a matter of common sense. Moreover, as they do not enjoy extraterritorial rights, hospital ships have no power to oppose the wishes of those in their care who ask the adverse Party to land in the latter’s territory.

871 Finally, it should be noted that no reservation has been made for civilian wounded, sick and shipwrecked who do not wish to return to their own territory, even though they are nationals of a Party to the conflict (refugees, political dissidents etc.) The Protocol does not prevent a Party to the conflict – particularly one of its warships – from requiring the surrender of such persons. Nevertheless, the latter should still enjoy at least the guarantees provided by Article 75 (*Fundamental guarantees*).¹³

872 The question of the fate of those on board a hospital ship or medical craft which has landed in a neutral port is examined below.¹⁴

¹³ On this subject, cf. commentary Art. 75, *infra*, p. 861, and Art. 73, *infra*, p. 845.

¹⁴ Cf. commentary Art. 23, para. 6, *infra*, pp. 273-278.

2) *Nevertheless, such civilians may find themselves in the power of a Party to the conflict other than their own, and in this case they will be covered by the Fourth Convention and this Protocol*

- 873 The Protocol provides that civilians not covered by Article 13 of the Second Convention may not be surrendered to a Party to the conflict of which they are not nationals. However, it is conceivable that such civilians could fall into the hands of such a Party, particularly if they are taken on board a ship belonging to the latter. In such cases they should obviously not be treated as civilians covered by Article 13 of the Second Convention, who become prisoners of war, but as aliens within the territory of a Party to the conflict.
- 874 If they are nationals of an adverse Party, the Fourth Convention applies to them, particularly Section II (Aliens within the territory of a Party to the conflict) of Part III, and in the case that they are interned, Section IV (Regulations for the treatment of internees). As regards the Protocol, one or more provisions of Section III (Treatment of persons in the power of a Party to the conflict) of Part IV may also be applicable to them, depending on the circumstances.
- 875 If they are nationals of a neutral or other State not Party to the conflict, the above-mentioned provisions of the Fourth Convention and the Protocol apply to them only if the State of which they are nationals has no “normal diplomatic representation in the State in whose hands they are”.¹⁵ The general question of the status of shipwrecked persons, and the rights and obligations arising therefrom, was examined above.¹⁶

Paragraph 2

- 876 Article 25 of the Second Convention provides for the possibility that hospital ships are used by National Red Cross Societies, or other officially recognized relief societies, or even private persons of *neutral countries* – according to the terminology of Protocol I, of a “neutral or other State not Party to the conflict”¹⁷ – under the control of a Party to the conflict. The present paragraph deals with the possibility, not provided for in Article 25 of the Second Convention, that a hospital ship is made available directly to a Party to the conflict by a neutral or other State not Party to the conflict, or by an impartial international humanitarian organization.
- 877 Such a hospital ship must be made available “for humanitarian purposes”.
- 878 This last point was hardly necessary considering it is a requirement for all hospital ships. However, it was stressed in this context to remove any possible doubt regarding the character of the donor’s intention.
- 879 Article 25 of the Second Convention specifies that the hospital ship is “utilized” by the society or the private person making it available, which implies that the latter provides the necessary crew and medical personnel. As the present

¹⁵ Cf. Article 4, Fourth Convention.

¹⁶ Cf. commentary Art. 8, sub-para. (b), pp. 118-124.

¹⁷ Cf. commentary Art. 2, sub-para. (c), pp. 61-62.

paragraph does not specify whether the hospital ship is made available with or without an adequate crew and medical personnel, it must be recognized that both possibilities exist.

880 In any case, protection is granted such a hospital ship only if the conditions listed under Article 25 of the Second Convention are fulfilled, viz.:

- the hospital ship is placed under the control – and under the responsibility – of the Party to the conflict to which it has been made available;
- it has been made available with the consent not only of the Party receiving it, but also with that of the government of those providing it. This last condition is obviously superfluous when the neutral State itself provides the hospital ship. Its meaning is more difficult to determine when it is provided by an impartial international humanitarian organization,¹⁸ but it would seem that in most cases the agreement of a government other than that of the beneficiary State is not required. Nevertheless, a more precise answer could be given only after an analysis of the various organizations concerned;
- the provisions of Article 22 of the Second Convention concerning notification must be observed: the names and characteristics of hospital ships made available in this way must be notified to the Parties to the conflict ten days before those ships are used. Moreover, it is specified that “the characteristics which must appear in the notification shall include registered gross tonnage, the length from stem to stern, and the number of masts and funnels”.¹⁹

Paragraph 3

881 This paragraph makes a more flexible provision for one of the conditions to which the protection of coastal rescue craft is subject. In fact, it seemed excessively formal to make the notification of such craft a condition of their protection, as is the case in Article 27 of the Second Convention. Thus the Protocol recommends such notification, which provides an additional guarantee for such craft to be respected, but it does not make it a *condition* of protection. Thus, this should prevent such craft from being immobilized at a time when their services could be of enormous value from a humanitarian point of view.

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¹⁸ On the meaning of this expression, *cf.* commentary Art. 9, para. 2, *supra*, p. 143.

¹⁹ Art. 22, para. 2, Second Convention.

Protocol I

Article 23 – Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.
2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.
3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.
4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.
5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.
6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

Documentary references

Official Records

O.R. I, Part I, pp. 135-136; Part III, pp. 8-9 (Art. 21-25). *O.R.* III, pp. 110-112, 116-117, 120-121 and 126-127. *O.R.* VI, pp. 87-89, CDDH/SR.38, paras. 32-43. *O.R.* XI, pp. 389-394, CDDH/II/SR.36, paras. 1-35; pp. 404-406, CDDH/II/SR.37, paras. 63-72; pp. 407-417, CDDH/II/SR.38, paras. 4-62; pp. 551-553, CDDH/II/SR.49, paras. 2-16; pp. 559-560, paras. 57-64. *O.R.* XII, pp. 15-18, CDDH/II/SR.56, paras. 19-35; pp. 41-46, CDDH/II/SR.59, paras. 12-54. *O.R.* XIII, pp. 138-143, CDDH/221/Rev.1, paras. 195-204; p. 145, paras. 210-211; p. 183, *id.*, Annex II (Art. 24); p. 232, CDDH/II/296, paras. 6 and 8; pp. 234-235, *id.* (Art. 24); p. 258, CDDH/235/Rev.1, para. 32; pp. 288-289, *id.*, Annex I (Art. 24); pp. 329-330, CDDH/II/350 (Art. 24).

Other references

CE/7b, pp. 62-77. *CE 1971, Report*, p. 25; p. 28, paras. 89-92; p. 31 (Art. 7). *CE 1972, Basic Texts*, pp. 9-10 (Art. 16). *CE 1972, Commentaries*, Part I, pp. 35-36 (Art. 16). *CRCE 1972, Report*, p. 26 (Art. 16). *CE 1972, Report*, vol. I, p. 36 (Art. 16); vol. II, p. 3 (Art. 16); p. 26, CE/COM I/2. *Commentary Drafts*, pp. 29-34 (Art. 21-25).

Commentary

General remarks

- 882 Article 23 covers medical ships and craft as defined in Article 8 (*Terminology*), and not covered by Article 22 (*Hospital ships and coastal rescue craft*) of the Protocol or by Article 38 of the Second Convention. Article 22 (*Hospital ships and coastal rescue craft*) extended the protection of ships and craft covered by Articles 22, 24, 25 and 27 of the Second Convention, and therefore all ships and craft covered by that Convention are excluded from the scope of Article 23.
- 883 In the system of the Conventions only the transportation of civilian wounded and sick,¹ of the infirm and maternity cases, which is undertaken by ships assigned to such transportation, falls under the scope of this article with any certainty.² Although this question is not mentioned in the First Convention, it is also clear that in the case of armed conflict taking place on land, the transportation of the wounded and sick, or of medical equipment, covered by Article 35 of the First

¹ In the usual sense of the expression and not as defined by the Protocol in Art. 8, sub-para. (a).

² Cf. Art. 21 of the Fourth Convention.

Convention, also come into this category when it is carried out by water (for example, on canals or across lakes).

884 Protocol I extends the concept of “medical ships and craft”. It covers “any medical transports by water”,³ medical transports⁴ and medical transportation⁵ having been previously defined.

885 Thus any means of transportation by water fulfilling the following conditions may be considered to be “medical ships and craft”:

- they must be *exclusively* assigned, for the duration of their assignment (which may be short) to medical transportation as defined above;
- they must be placed under the control of a Party to the conflict.

886 For example, a simple fishing boat requisitioned exclusively for the transportation of medicines to a hospital situated on an island falls under the category of medical ships and craft as long as the transportation lasts. For this reason several delegates during the CDDH considered that it was necessary to make a distinction and single out ships and craft whose protection is subject to stricter requirements, and to provide two articles. Indeed, as one of the delegates stated, the majority considered that it was not possible to grant the “wider protection of the Second Geneva Convention of 1949 to ships and craft which did not meet the difficult requirements which that Convention set as a condition of such protection”.⁶

887 The basic difference between the two types of medical ships and craft lies in the fact that the former are “permanent and could not change their status during the conflict”: for this reason it is accepted that they may not be seized by the enemy, while the latter, whose status could change during the conflict so that they could subsequently contribute to the enemy war effort “enjoyed less protection and could be seized if they fell into enemy hands”.⁷

888 Thus Article 23 is devoted to this second category of medical ships and craft.

Paragraph 1

First sentence

889 The hospital ships and craft concerned here are all “medical ships and craft” as described above, with the exception of those covered by Article 22 of the Protocol (*Hospital ships and coastal rescue craft*), viz.:

- military hospital ships,
- hospital ships used by relief societies or private individuals,
- hospital ships used by relief societies or private individuals of neutral countries,

³ Art. 8, sub-para. (i).

⁴ Art. 8, sub-para. (g).

⁵ Art. 8, sub-para. (f).

⁶ O.R. XI, p. 412, CDDH/II/SR.38, para. 28.

⁷ *Ibid.*, p. 559, CDDH/II/SR.49, para. 58.

- hospital ships made available to a Party to the conflict by a State not Party to that conflict, or by an impartial international humanitarian organization,
- coastal rescue craft,⁸

and with the exception of those covered by Article 38 of the Second Convention, i.e., ships chartered by a Party to the conflict to transport medical equipment intended for the treatment of the wounded covered by Article 13 of the same Convention.

- 890 The conditions for according protection to ships and craft not covered by Article 23 are stricter, and, accordingly, the rules according protection are more extensive. However, there is an exception with regard to the use of the distinctive emblem, which is laid down for all medical ships and craft, but not for the ships covered by Article 38 of the Second Convention. Article 43 of the Second Convention, which lays down the rules regarding the marking of hospital ships and other craft, does not provide for the use of the distinctive emblem for ships covered by Article 38 of that Convention. Such ships, which must meet more stringent conditions for protection than those required for all the ships and craft covered by Article 23 of the Protocol – the particulars regarding their voyage must be “notified to the adverse Party and approved by the latter” – would not be entitled to use the emblem, unlike all other medical ships and craft. This is illogical, and common sense requires that this discrepancy should be eliminated. It does not seem that anyone could be opposed to such ships using the distinctive emblem in future, particularly as they fall under the definition of medical ships and craft given in the Protocol.⁹
- 891 The ships and craft covered by Article 23 must be “respected and protected¹⁰ in the same way as mobile medical units under the Conventions and this Protocol”.
- 892 Article 19 of the First Convention provides that mobile medical units, as indeed fixed establishments, “may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict”.
- 893 It adds that “should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick”.
- 894 It follows from this that the medical ships and craft covered by Article 23 are not exempt from being seized, unlike those covered by Article 22 (*Hospital ships and coastal rescue craft*), but that as everywhere else in the Conventions, the interests of the wounded and sick remain the prime consideration. In no case may the care administered to the wounded on board ship be interrupted.
- 895 The question of ships and craft only transporting medical personnel or even medical equipment is not actually clearly resolved by reference to the Conventions. However, an examination of paragraph 2 of Article 23 inevitably

⁸ Cf. in the order Art. 22, Art. 24, Art. 25, Second Convention; Art. 22, para. 2, Protocol I; Art. 27, Second Convention.

⁹ Cf. commentary Art. 8, sub-para. (i), *supra*, pp. 131-132.

¹⁰ On these concepts, cf. commentary Art. 10, para. 1, *supra*, p. 146.

leads to the conclusion that the medical duties of such ships or craft were not considered sufficiently important to prohibit them from being seized, as long as such duties had not been accomplished. On this point the ships covered by Article 38 of the Second Convention enjoy a significant additional guarantee, since they do enjoy exemption from being seized.

896 Article 19 of the First Convention also provides that the responsible authorities must ensure that medical units are, as far as possible, positioned in such a manner that attacks against military objectives cannot imperil their safety. A warship which sought to benefit from the protection granted the ships and craft covered by Article 23 by sailing close to such ships would be violating this provision. By doing so, it would endanger the safety of the ships and craft covered by Article 23, as the possibility of damage caused by the enemy to such ships and craft could not then be excluded.¹¹

897 The first sentence of paragraph 1 of Article 23 also refers to the protection granted medical units under this Protocol. The reference is in particular to Article 12 of the Protocol (*Protection of medical units*). That article principally attempts to define the conditions under which civilian medical units enjoy identical protection to that accorded military medical units.¹²

898 Finally, the first sentence of paragraph 1 specifies that the respect and protection of the ships and craft covered by Article 23 is an obligation applicable whether they are “at sea or in other waters”. It was stated above that hospital ships are protected everywhere.¹³ With regard to the ships and craft covered by Article 23 which are not exempt from being seized, it was important to specify clearly that protection extends to all waters. In particular there are some very large lakes on which such ships and craft must be able to accomplish their medical duties. The same applies, for example, if they have to carry the wounded or medicines to an inland hospital along canals.

Second sentence

899 This sentence begins with a statement: unless they are clearly marked, medical ships and craft cannot be recognized as such, and therefore run the risk of not being respected, particularly in a combat area. Consequently it is desirable that such ships and craft can be identified, i.e., that it is possible to identify them as *medical* ships and craft, on the one hand, and to recognize on which Party to the conflict they depend, on the other. The inclusion of the words “and recognized” means exactly this. Reference is made to the second paragraph of Article 43 of the Second Convention, which requires that the national flag is hoisted, and that a white flag with a red cross is flown “at the mainmast as high as possible”.

¹¹ In this respect, *cf.* by analogy Arts. 57 and 58 of Protocol I, as well as the commentary thereon.

¹² On this subject, *cf.* commentary Art. 12, and in particular, commentary para. 2, *supra*, pp. 167-169.

¹³ *Cf. supra.*

- 900 In addition, the second sentence of paragraph 1 of Article 23 indicates that such ships and craft should be “marked with the distinctive emblem”, without giving any further particulars. In this respect, reference may be made to Article 18 (*Identification*). Paragraph 1 of this article requires that each Party to the conflict shall endeavour to ensure that medical units, in particular, are identifiable, while paragraph 6 refers to Annex I to the Protocol for the application of this provision. The Annex lays down the basic rule that the distinctive emblem should be “as large as appropriate under the circumstances”.¹⁴ Thus there is no restriction regarding the way in which ships and craft, covered by Article 23, should be marked with the distinctive emblem.¹⁵
- 901 These provisions on marking are laid down only in the form of recommendations. The absence of formal rules is justified by the large measure of flexibility which the Parties to the conflict must enjoy in order to assign ships and craft to medical tasks without delay in case of emergency. It means that marking is not a constitutive element of the protection, as is, for example, the notification of names and characteristics of hospital ships to Parties to the conflict ten days before they are used. Thus ships and craft covered by Article 23 are protected even when they are not marked, though in this case they obviously run the risk of sustaining damage due to mistaken identity. This is why compliance is recommended as far as possible with the proposals contained in the second sentence of paragraph 1.

Paragraph 2

First sentence

- 902 “The ships and craft referred to in paragraph 1 shall remain subject to the laws of war”. This is the rule laid down in the first sentence, while exceptions to this rule are contained in the second and third sentences.
- 903 References to “the laws of war” (in French “le droit de la guerre” or “les lois de la guerre”) were already made in the First Convention, particularly in Articles 33 and 35, with regard to the buildings and materials of fixed medical establishments and medical transports.¹⁶ In this respect the Commentary on the First Convention remarks that the rules of the laws of war are “often summary and not very precise, and have not always been accepted unanimously by legal authorities”.¹⁷ Besides, this remark applies particularly to the treaty provisions enumerated below, and for the whole of the laws of war at sea.

¹⁴ Art. 3, para. 1.

¹⁵ For further details, cf. also Annex I, Arts. 3 and 4, and their commentary, *infra*, p. 1173.

¹⁶ Cf. respectively Arts. 33 and 35, Second Convention.

¹⁷ *Commentary I*, p. 274.

- 904 Various Conventions adopted in The Hague in 1899 and 1907 relate to the laws of war at sea.¹⁸
- 905 However, none of these Conventions applies to the ships and craft covered by Article 23, as their existence had simply not been anticipated as legally relevant, before the Protocol was adopted.
- 906 On the other hand, as regards legal literature, the Manual adopted by the Institute of International Law in 1913 in Oxford, on the laws of war at sea governing the relations between belligerents,¹⁹ gives some indications, particularly in Articles 32-40, relating to publicly and privately owned vessels other than those of the navy, and other than hospital ships.
- 907 It follows fairly clearly that the ships and craft covered by Article 23 are subject to capture, except for the reservations made in the next two sentences of paragraph 2, and that goods on board are liable to seizure. Moreover, it is specified that such capture and seizure are permitted “even when the vessels or the goods have fallen into the power of the belligerent because of *force majeure*, through shipwreck or by being compelled to put into port”.²⁰
- 908 Some grounds for extenuation of the principle of capture, which are also laid down in the Oxford Manual, especially for ships in an enemy port at the outbreak of hostilities, or ships which had left their last port of departure before the commencement of the war,²¹ could also be taken into account.
- 909 However, it seems obvious that only if States are prepared to re-examine naval war overall would it become possible to precisely define the present state of the laws of war at sea.

Second and third sentences

- 910 The second and third sentences of paragraph 2 contain detailed rules limiting the application of the general laws of war, i.e., essentially limiting the right of a warship to seize ships and craft belonging to the adverse Party, which are covered by Article 23.

¹⁸ Apart from the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the 1864 Geneva Convention, which forms the basis of the Second Convention of 1949, the following conventions of 1907 deserve a mention:

- 1) Convention Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities;
- 2) Convention Relative to the Conversion of Merchant Ships into Warships;
- 3) Convention Relative to the Laying of Automatic Submarine Contact Mines;
- 4) Convention Respecting Bombardment by Naval Forces in Time of War;
- 5) Convention relative to Certain Restrictions to the Exercise of the Right of Capture in Naval War;
- 6) Convention Relative to the Establishment of an International Prize Court;
- 7) Convention Concerning the Rights and Duties of Neutral Powers in Naval War.

¹⁹ The content of this manual can be found in particular in M. Deltenre, *op. cit.*, pp. 666-715. As regards recent literature, *cf.* in particular, the bibliography produced by Y. Dinstein, “Sea Warfare”, in Bernhardt (ed.), *op. cit.*, Instalment 4, 1982, pp. 211 ff.

²⁰ *Cf.* the above-mentioned Oxford Manual of 1913, Arts. 33-34.

²¹ *Ibid.*, Arts. 36-40.

- 911 A distinction is made between two situations, i.e., that in which such ships and craft are “needed for the wounded, sick and shipwrecked on board”, and that in which they are not. Similar rules, protecting the interests of the wounded and sick, can be found in several places in the Conventions. In the first situation, such ships and craft are the only ones able to provide adequate care for the wounded, sick and shipwrecked they shelter.²² It should be noted that this refers only to the wounded *on board*. For example, a ship transporting medical personnel or equipment needed by the wounded in a hospital situated on an island would therefore not be covered. However, it is to be hoped that in such cases belligerents would act in a humanitarian spirit and permit such a ship to accomplish its task.
- 912 The second situation means that the wounded, sick and shipwrecked can be cared for in another way – for example, by being transferred onto a hospital ship or taken onto land²³ – or that such ships and craft are not transporting wounded or sick persons, but only medical personnel or equipment.²⁴

1. *Ships and craft are needed for the wounded, sick and shipwrecked on board*

- 913 In principle, only specific types of ships may give orders to the ships and craft in question, and such orders themselves are subject to restrictions.

1.1. *Ships allowed to give orders*

- 914 Paragraph 2 refers to “any warship on the surface able immediately to enforce its command”.
- 915 The expression *warship* in the Protocol is not defined here, though it was defined in the Convention on the High Seas of 29 April 1958.²⁵ It is clear that medical ships and craft, even if they are attached to the naval forces of a State, cannot be considered as warships. In this respect the definition could lead to some ambiguity, though international humanitarian law does not leave any room for doubt. Warships, being by their very nature military objectives, are ships whose purpose or use “make an effective contribution to military action”.²⁶ By contrast,

²² In the same sense, cf. *Commentary I*, p. 274 (Art. 33, para. 2).

²³ Cf. however, *infra*, commentary para. 6, regarding persons who cannot be obliged to leave ship.

²⁴ With regard to this situation, cf. *supra*, pp. 264-265.

²⁵ This Convention was adopted by the United Nations Conference on the Law of the Sea and entered into force on 30 September 1962. It had 57 States Parties as of 31 December 1984, including notably the United States, the United Kingdom and the USSR. Article 8, paragraph 2, reads as follows:

“For the purposes of these Articles, the term “warship” means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”

A similar definition was introduced in Article 29 of the Convention of the United Nations on the Law of the Sea of 10 December 1982, though this has not yet entered into force.

²⁶ Cf. Art. 52, para. 2, which defines a military objective.

medical ships and craft, which cannot display the distinctive emblems of warships and which do not make such a contribution, enjoy privileged protection.²⁷

916 In addition, such a warship must sail *on the surface*. In this respect, Committee II clearly specified that naval submarines which have surfaced are included in this definition.²⁸

917 Finally, such a warship must be *able immediately to enforce its command*. Thus the warship must have the military capacity to impose its will on the ship or craft to which the order has been given. Moreover, it is clear that it must be on the spot: the obligation to obey “existed only while the ship was present and able to enforce its command”.²⁹ Thus it should be recognized that the warship must have the other ship or craft in sight.

918 Some ships are equipped with weapons which can hit a long-range target with precision, and by imposing this specific requirement, it was hoped to avoid such ships abusing their power on the navigation of the ships and craft covered by Article 23 in a very wide area.

1.2. *Orders which may be given*

919 The above-mentioned warships may order the ships and craft covered by Article 23 “to stop, order them off, or make them take a certain course”. A similar provision is laid down in Article 31 of the Second Convention, while this article also mentions the possibility of controlling “the use of their wireless and other means of communication, and even detain them for a period not exceeding seven days from the time of interception, if the gravity of the circumstances so requires”. These two last possibilities have not been mentioned in paragraph 2 under discussion here. Yet, the abuse of means of communication constitutes an act harmful to the enemy which can lead to the loss of protection of the ship or craft concerned.³⁰ As regards the possibility of detaining the ship or craft for a period up to seven days, this was not included for the ships and craft covered by Article 23, because, unlike the ships and craft covered by Article 31 of the Second Convention, they may be seized as long as the wounded and sick on board are cared for. Moreover, it should be noted that a warship retains the possibility of escorting a ship containing wounded in need of care to its own territory, as long as the voyage is not too long, and could for that reason have an unfavourable effect on the condition of the wounded.

920 There is nothing to indicate that the orders given, which all relate to navigation, must comply with a special motive. However, they may not be purely arbitrary.

²⁷ In favour of the opposite point of view, arguments could certainly be drawn from Article 14 of the Hague Convention of 18 October 1907 concerning the Rights and Duties of Neutral Powers in Naval War, since Article 14 of this Convention refers to: “warships devoted exclusively to religious, scientific or philanthropic purposes”. However, international humanitarian law prefers a clear distinction. *Commentary II*, p. 113, states unambiguously: “A hospital ship may belong to the naval forces, but it is not a warship in the proper sense of the term”.

²⁸ Cf. *O.R.* XII, pp. 42-43, CDDH/II/SR.59, para. 28; also *cf.* para. 30.

²⁹ *Ibid.*, p. 43.

³⁰ Cf. *commentary* para. 3, *infra*, pp. 270-271.

The commentary on Article 31 of the Second Convention³¹ indicates that such orders must be given “for reasons of military security”.³² This interpretation seems to apply equally in the context of Article 23 under consideration here.

- 921 Paragraph 2 also mentions the obligation for the ship or craft covered by Article 23 to obey such commands. The consequences of disobeying are implied in paragraph 3 and reference should be made to the commentary thereon.³³

2. *Ships and craft which are not needed for the wounded and sick on board*

- 922 Ships and craft covered by Article 23, which are in this situation,³⁴ may be diverted from their medical duties in other ways. In this case the general laws of war³⁵ apply to such ships and craft. In this respect it should be recalled primarily that they may be *seized* and assigned to other purposes.

Paragraph 3

- 923 This paragraph deals with the termination of protection accorded ships and craft covered by this article.
- 924 The term *protection* is a form of shorthand which is frequently used. As indicated in paragraph 1, it is used here to mean the respect and protection as provided for mobile medical units by the Conventions and Protocol.³⁶
- 925 As regards Articles 34 and 35 of the Second Convention, which are referred to here, the former relates to the termination of protection, while the latter describes conditions not depriving hospital ships of protection. The rules laid down in this respect for medical units and establishments (or medical units as this term used in the Protocol covers both expressions) in Articles 21 and 22 of the First Convention are adapted here for ships. The principle is that such protection can only cease if the ships are used to commit acts harmful to the enemy, such as, for example, firing at a warship, transporting able-bodied soldiers or weaponry, or transmitting military information.
- 926 Such harmful acts to the enemy are not mentioned specifically, with the exception of one, namely, the possession or use of a secret code for communication.³⁷ On the other hand, five situations are listed which at first glance could be considered as equivalent to acts harmful to the enemy, but precisely must not be considered as such.

³¹ Commentary based on the Rules for the Control of Radio in Time of War and Rules for Air Warfare, prepared by the Commission of Jurists responsible for investigating and reporting on the revision of the laws of war, which met in The Hague on 11 December 1922. Cf. M. Deltenre, *op. cit.*, pp. 819-849.

³² *Commentary II*, p. 182.

³³ Cf. *infra*.

³⁴ In this respect, cf. *supra*, pp. 264-265.

³⁵ On this subject, cf. *supra*, pp. 266-268.

³⁶ On this subject, cf. *supra*, pp. 263-266.

³⁷ Cf. Art. 34, para. 2, Second Convention.

- 927 The first of these situations is the personnel of such ships and craft being armed – which is therefore implicitly tolerated. However, it should be remembered that such (light) arms can only be used for the purpose of keeping order on board ship, or for dealing with acts of piracy. Their use against a warship attempting to stop and search a medical ship or craft would undoubtedly constitute an “act harmful to the enemy”.
- 928 The second situation is the presence on board of apparatus exclusively intended to facilitate navigation or communication. This is related to the explicitly mentioned prohibition of using secret codes.³⁸ Moreover, it should be noted that the question of signalling and identification of medical ships and craft is currently being developed.³⁹
- 929 The third situation is the presence on board of portable arms and ammunition taken from the wounded, sick or shipwrecked, when it has not yet been possible to hand it over to the proper service.
- 930 Finally, the fourth and fifth situations do not really need to be mentioned with regard to the ships and craft covered by Article 23. They relate to the fact that such ships and craft also transport *civilian* wounded, sick or shipwrecked, and the fact that such ships transport equipment and personnel “exclusively for medical duties, over and above the normal requirements”. These two situations were actually exceptions allowed by the Second Convention, which intended that hospital ships should solely be devoted to providing relief, treating and transporting wounded, sick and shipwrecked soldiers and equivalent categories, but they also take part, in the same way as the others, in tasks assigned to “medical ships and craft” as defined in the Protocol.⁴⁰
- 931 In addition to the rules of Articles 34 and 35 of the Second Convention, paragraph 3 adds another act specifically defined as constituting an act harmful to the enemy, namely, a clear refusal to obey a command given in accordance with paragraph 2 (that paragraph, in any case, imposes the obligation on ships and craft covered by Article 23 to obey such an order). The word *clear* shows the intention to avoid a situation where a misunderstanding may lead to a disaster. It must be plain that a medical ship or craft has *refused* to obey, and has not simply misunderstood the command, for a warship to consider that it is the victim of a harmful act and take measures accordingly.
- 932 Finally, it should be noted that Article 34 of the Second Convention in all appropriate cases imposes the obligation to give due warning, naming a time-limit, before attacking a medical ship or craft which has committed a harmful act.⁴¹

³⁸ *Ibid.*

³⁹ On this subject, *cf.* particularly Ph. Eberlin, “Identification of Hospital Ships and Ships Protected by the Geneva Convention of 12 August 1949”, *IRRC*, Nov.-Dec. 1982, pp. 315 ff. *Cf.* in addition, commentary Annex I, Chapter III, *infra*, p. 1185.

⁴⁰ *Cf.* Art. 8, sub-paras. (f), (g) and (i).

⁴¹ For further details on Articles 34 and 35, *cf. Commentary II*, pp. 189-198. With regard to the warning, *cf.* also commentary Art. 13, para. 1, second sentence, *supra*, pp. 175-176.

Paragraph 4

- 933** The first sentence of this paragraph consists of a recommendation, the second of an obligation which arises when effect is given to this recommendation.

First sentence

- 934** The notification provided for here is a recommendation and not an obligation. Thus protection is not dependent on the notification. However, it provides an additional guarantee for the ships and craft concerned by making the authorities of the adverse Party “responsible” and enabling them to notify their warships of the presence of medical ships and craft. Moreover, the sooner such authorities receive such notification, the better they can transmit it, and this is the reason why the notification is asked to be made “as far in advance of sailing as possible”.
- 935** Without constituting an obligation, the recommendation is made in more pressing terms for larger ships, and the figure of 2,000 gross tons mentioned here is taken from Article 26 of the Second Convention.⁴²
- 936** The content of the notification requires little comment, particularly as the details mentioned in paragraph 4 – name, description, estimated speed – are given only by way of example. It is apparent from the end of the sentence that the notification may include any appropriate information which would facilitate identification and recognition of the medical ship or craft.
- 937** It should be recalled with regard to the characteristics which appear in the notification, that Article 22, paragraph 2, of the Second Convention requires that in all cases “the registered gross tonnage, the length from stem to stern and the number of masts and funnels” must be included.

Second sentence

- 938** Though the Parties to the conflict remain free to notify the adverse Party or not, any Party receiving such notification is obliged to acknowledge receipt as soon as it has received it. It is even specified that such a Party must acknowledge receipt “of such information”, which indicates that the acknowledgement of receipt should be fairly detailed in order to avoid any confusion.
- 939** In addition, it should be noted that if the notification or the acknowledgement of receipt cannot be made directly between the Parties to the conflict because of a lack of communication, the Protecting Powers, their substitute or the ICRC could take care of the transmission.

⁴² Which indicates this as the minimum recommended limit for hospital ships called upon to transport the wounded, sick and shipwrecked over long distances on the high seas.

Paragraph 5

- 940 This paragraph relates to medical and religious personnel of ships and craft covered by Article 23 when they have fallen into the hands of an enemy. Article 37 of the Second Convention basically provides that such personnel shall be respected and protected; that they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick on board ship; that they shall afterwards be repatriated to the extent that this is possible; and finally, that they will be subject to the provisions of the First Convention if they are landed in the territory of the adverse Party.⁴³
- 941 Moreover, it should be noted that the crew of such ships and craft are considered as medical personnel in the sense of the Protocol,⁴⁴ and that they are therefore also covered by Article 37 of the Second Convention.⁴⁵

Paragraph 6

- 942 This paragraph regulates the fate of the wounded, sick and shipwrecked on board ships and craft covered by Article 23 in the event that such ships and craft are boarded and searched or captured by the adverse Party. The basic rule which should be kept in mind is that nothing which could jeopardize the care due to the wounded and sick is permitted. Apart from this, a distinction is made between military wounded, sick and shipwrecked and those with equivalent status, on the one hand, and civilian wounded, sick and shipwrecked, on the other.

First sentence – Military wounded, sick and shipwrecked persons and those with equivalent status

- 943 The persons referred to here are first of all those covered by Article 13 of the Second Convention, i.e., basically the wounded, sick and shipwrecked who are members of the armed forces of a Party to the conflict.⁴⁶ However, it should be stressed that Article 13, sub-paragraph (5), of the Convention, which relates in particular to members of crews of the merchant marine, cannot apply by analogy to members of crews of ships and craft covered by Article 23 of the Protocol, since the latter are considered as medical personnel, as mentioned in the previous paragraph, and therefore enjoy a more favourable status.
- 944 Combatants who, pursuant to Article 44 (*Combatants and prisoners of war*) of the Protocol, are entitled to prisoner-of-war status if they fall into the hands of the adverse Party, have the same status as persons covered by Article 13 of the

⁴³ On this subject, *cf.* in particular, Arts. 28 (Retained medical personnel and chaplains), 30 (Return of medical and religious personnel), and 31 (Selection of personnel for return).

⁴⁴ *Cf.* commentary Art. 8, sub-para. (c), *supra*, pp. 124-127.

⁴⁵ For further details, *cf.* also *Commentary II*, pp. 207-211.

⁴⁶ Apart from this, *cf.* Article 13 of the Second Convention, as well as *Commentary II*, pp. 93-104.

Second Convention. Under the provisions of the Conventions, they were not yet considered as combatants, and, in case of capture, as prisoners of war.⁴⁷

945 The “provisions of the Second Convention” to which reference is made, and which are applicable to such persons, are basically:

- Article 12, which provides that they must be respected and protected in all circumstances, and be treated and cared for humanely;
- Article 14, which provides that warships have the right to require the surrender of such persons, provided that they can provide adequate facilities for necessary medical treatment;
- Article 15, which deals with wounded, sick and shipwrecked persons taken on board a neutral warship and requires that the State to which such a warship belongs ensure that such persons can take no further part in hostilities;
- Article 16, which deals with the fate of wounded, sick and shipwrecked persons who have fallen into enemy hands, and provides that the enemy may decide, according to circumstances, “whether it is expedient to hold them, or to convey them to a port in the captor’s own country, to a neutral port, or even to a port in enemy territory”, provided the treatment required by their condition is ensured.

In the last case, “prisoners of war thus returned to their home country may not serve for the duration of the war”. In the event that they are landed in a neutral port, Article 17 of the Second Convention applies. Basically this provides that in general the wounded, sick and shipwrecked must be guarded by the neutral Power so that “the said persons cannot again take part in operations of war”. Finally, in the case that they are kept in custody, or sent to a port of the Party to which the ship that captured them belongs, they become prisoners of war. The Third Convention applies to them in addition to the Second Convention, as long as they are at sea, or if they are wounded or sick, both the First and Third Conventions apply from the moment they land.⁴⁸

First part of the second sentence – Wounded, sick and shipwrecked civilians

946 Apart from civilians covered by Article 13 of the Second Convention, this provision covers all civilian wounded, sick and shipwrecked on board the ships and craft covered by Article 23.

947 When such persons are at sea, they may not be surrendered “to any Party which is not their own”, nor may they be removed from such ships or craft. Each of these provisions requires comment.

948 In the first place, the rule only applies to ships and craft *at sea*. In fact, this ought to read *on the high seas*, to be quite accurate, as the intent is that they do not find themselves within the jurisdiction of any State. Nevertheless, this lack of

⁴⁷ On this subject, cf. commentary Art. 44, *infra*, p. 519.

⁴⁸ On this subject, cf. in addition, *Commentary II*, Art. 12, pp. 84-92; Art. 14, pp. 104-107; Art. 15, pp. 107-112; Art. 16, pp. 112-116, Art. 17, pp. 116-129, Art. 19, pp. 136-146; Art. 20, pp. 146-150.

accuracy may have an advantage, as it is often difficult to establish whether a ship is in fact situated on the high seas or whether it is within the territorial sea of a State.⁴⁹ In case of doubt, it should therefore be assumed that it is “on the high seas”. In any case there can be no doubt that the rule does not apply to a ship or craft sailing within the territorial waters of a State, whether they are sea, lake, river, canal or anything else.

- 949 “At sea”, therefore, such persons are not subject to “surrender to any Party which is not their own”. This means that if the ship or craft covered by Article 23 holds wounded, sick or shipwrecked persons (whether they have military or equivalent status or are civilians) belonging to the adverse Party, such persons may be claimed by a warship of the latter. Though such a warship can also require the surrender of *military* wounded, sick or shipwrecked persons (or those of *equivalent status*) of the adverse Party, i.e., belonging to the Party to which the medical ship or craft belongs, it cannot do so in the case of *civilians*. Indeed, this is perfectly logical: civilians are obviously not military objectives and although certain rules have been provided for the event that they happen to be in territory controlled by the enemy, they cannot be captured outside such territory.
- 950 In addition, such civilian wounded, sick and shipwrecked may not be subjected to *removal from such ships or craft*. This means that if persons belonging to a State Party to the conflict refuse to be transferred to a ship of that State – particularly if they have deliberately left that State to seek refuge elsewhere – such a transfer cannot be *imposed* upon them.⁵⁰
- 951 However, as we saw above, a certain course may be imposed on a medical ship or craft, and it may be escorted by a warship of the adverse Party to territory controlled by the latter, as long as this is not harmful to the wounded and sick on board.
- 952 In this case, as in any case when a medical ship or craft is within the territorial limits of a State, the question deserves to be re-examined in its entirety.
- 953 If the medical ship or craft is within the territorial limits of the State to which it belongs, the answers given for the high seas remain applicable. The warship of the adverse Party stopping and boarding it is obviously taking a greater risk since it is venturing into enemy territory, but this is purely a question of fact. Obviously, from a legal point of view, the possibility cannot be excluded that in the context of armed conflict, such a warship could enter enemy territory.
- 954 If, in exceptional circumstances, the medical ship or craft is within the territorial limits of the adverse Party, the solution still remains the same, with one exception:

⁴⁹ In legal terms, the concept of territorial sea and that of the contiguous zone (where the coastal State is also granted certain prerogatives) are defined in the Convention on the Territorial Sea and the Contiguous Zone, adopted on 29 April 1958 by the United Nations Conference on the Law of the Sea. This Convention entered into force on 10 September 1964 and had 46 States Parties as of 31 December 1984, including notably the United States, the United Kingdom and the USSR. The United Nations Convention on the Law of the Sea, referred to in note 25 *supra*, deals with this question in its Part II, Arts. 2-31.

⁵⁰ Nevertheless, see Arts. 22-23 of the Convention on the High Seas of 29 April 1958, referred to in note 25, *supra*. These articles deal with the right of visit and the right of hot pursuit, respectively. On that Convention, *cf.* note 25, *supra*. These articles were included, with some changes, in the Convention on the Law of the Sea (also referred to in note 25, *supra*) as Arts. 110 and 111.

such a Party cannot be prevented from exercising jurisdiction over its own civilian nationals, even if they are sick or wounded, if any are present on the medical ship or craft. Apart from this, it is obvious that in such a case the outcome will probably be the capture of the medical ship or craft, but this again is purely a question of fact, subject to the rules laid down in Article 23.

955 Finally, what happens if a medical ship or craft is within the territorial limits of a neutral or other State not Party to the conflict?⁵¹ There is no real problem if it is only passing through such territorial waters, as, like any other ship, it enjoys the right of “innocent passage”.⁵² On the other hand, various problems arise if it docks in a port of the neutral State.

956 Article 17 of the Second Convention deals with the problem of wounded, sick and shipwrecked persons with military or equivalent status who are landed by a hospital ship in a neutral port. The commentary on this article underlines the fact that the text does not specify the duty of neutral States in the case where the hospital ship wishes to land wounded, sick or shipwrecked persons. The author of the commentary proposes his own solution, and suggests that the wounded, sick and shipwrecked members of the armed forces (or persons with equivalent status) of the Party to which the hospital ship belongs, should remain interned until hostilities have ceased, and that those belonging to the adverse Party should be left free.⁵³ This solution was proposed because in both cases it avoids a situation in which it might be in the interests of a hospital ship to get rid of the wounded, sick and shipwrecked it has on board, in a neutral port. In any case, it seems clear that there was no question that the neutral State should, or could, *impose* the landing of wounded, sick and shipwrecked persons belonging to the adverse Party of the State to which the hospital ship belonged.

957 However, this question should be raised. Neither hospital ships nor *a fortiori* ships and craft covered by Article 23, enjoy *extraterritorial status*, unlike warships.⁵⁴ Furthermore, medical ships and craft cannot *capture* wounded, sick or shipwrecked members of the enemy armed forces.⁵⁵ These only really become prisoners of war when they are transferred onto a warship or taken to enemy territory. Thus what right could medical ships and craft have to keep on board such persons against their will, when they are within the territorial limits of a neutral State?

958 The solution which seems to be most logical is to permit the neutral State to accept such persons if *they* express a wish for this, and not at the request of the medical ship or craft.

⁵¹ On the meaning of this expression, *cf.* commentary Art. 2, sub-para. (c), *supra*, pp. 61-62. In the commentary on this paragraph we use the term “neutral State” for the sake of simplicity to designate any State covered by this expression.

⁵² *Cf.* on this subject, the Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone, quoted *supra*, note 49, Arts. 14-23, and the Convention of the United Nations on the Law of the Sea, cited *supra*, note 25, Arts. 17-32.

⁵³ *Cf. Commentary II*, pp. 125-129. On this subject, *cf.* in addition, K. Özerden, *Le sort des militaires belligérants, victimes de la guerre, débarqués dans un port neutre, d'après la Convention de Genève*, Paris, 1971.

⁵⁴ On this subject, *cf. ibid.*, p. 190, note 1.

⁵⁵ *Cf. ibid.*, p. 114.

- 959 The question remains whether or not they should be interned. Reference to the corresponding provisions of the Hague Convention of 18 October 1907 Respecting the Rights and Duties of Neutral Powers and Persons in War on Land suggests a choice between two possible solutions. Belligerent troops seeking refuge in neutral territory must be prevented from taking part in hostilities again. The same applies to wounded soldiers who reach neutral territory in a convoy of their enemy.⁵⁶ On the other hand, escaped prisoners of war who are admitted by a neutral Power will remain free.⁵⁷ As we recommend that the choice with regard to this decision should be left to the persons concerned, precisely because they cannot be considered as prisoners of the medical ship or craft, we believe that such persons should be treated as belligerents reaching neutral territory, and should therefore be interned.⁵⁸
- 960 As regards wounded, sick or shipwrecked members of the armed forces of the Party to which the medical ship or craft belongs, the solution proposed by the author of the commentary on the Second Convention seems indisputable: the decision to hand over those whose medical condition in their judgment requires this, must be taken by the medical ship or craft in the knowledge that the neutral State will be responsible for preventing them from taking part again in hostilities (i.e., in general, for interning them).
- 961 In addition, Article 23 of the Protocol means that the problem of civilian wounded, sick and shipwrecked must be considered. For those who do not belong to the Party to which the medical ship or craft belongs, there is little doubt as to the solution to be adopted: they must be considered to be perfectly free in deciding whether to remain on the ship or craft, or to disembark. As for the neutral State, it is obliged to take care of any wounded and sick entrusting themselves to it, but is not obliged to intern them. As soon as their state of health permits, such civilians are free to return to their State of origin, or to any other State of their choice, even to remain in the neutral State on a long-term basis, if the latter is willing to accept them. There is only one restriction on the freedom of choice of such civilian wounded, sick or shipwrecked: while they are in the territory of the neutral State, and subject to its jurisdiction, they can be disembarked against their will if the jurisdiction of the neutral State so requires, particularly if the persons concerned are wanted by this State for a crime or for an investigation.
- 962 However, the most delicate problem is that of civilians belonging to the Party to the conflict to which the medical ship or craft belongs. It would seem that if such civilians are in neutral territory (for it must be remembered that medical ships and craft do not enjoy extraterritorial status), those in charge of the medical ship or craft – however much authority they might have in their own territory in civil matters – could not oblige them to remain on the ship or craft. Thus such civilians should enjoy the same prerogatives as civilians who do not belong to the

⁵⁶ cf. Arts. 11 and 14 of that Convention.

⁵⁷ Art. 13, first sentence of that Convention.

⁵⁸ However, it should be recalled that Article 11 of the Hague Convention mentioned here allows a neutral State the possibility of deciding “whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission”.

Party to the conflict to which the ship or craft belongs. As regards criminals or anyone accused of a crime, it would seem that the neutral State should intern them and then decide on the basis of its own legislation and its international obligations whether to extradite them, prosecute them itself, execute a penalty or an additional penalty or allow them to go free. With regard to this, it is important to emphasize that though international humanitarian law imposes an obligation on the neutral State to treat wounded, sick and shipwrecked persons humanely,⁵⁹ the fate of such civilians in other respects does not fall under this body of law. This is a matter in particular of human rights law, as well as the national legislation and the international obligations of the neutral State.

963 Finally, for the sake of completeness, it should be noted that a belligerent warship does not have the right to capture or even to stop and board a medical ship or craft in the territorial waters of a neutral State.⁶⁰ Thus the question of persons whose transfer could be required in these conditions does not arise.

Second part of the second sentence – Civilian wounded, sick and shipwrecked in the power of a Party other than their own

964 The word “néanmoins” (nevertheless) is used in the French text because the sentence in which it is used refers to circumstances which can only occur within the constraints of the preceding part of the sentence. However, the English text has correctly refrained from using this term, as it might give the incorrect impression that the situation referred to is an exception. In fact, this is not the case. A medical ship or craft may dock in an enemy port, either because of natural circumstances (e.g., storms, damage etc.), or because it is forced to do so by a warship. Moreover, a medical ship or craft may rescue shipwrecked persons of the adverse Party and take them to the territory of its own State. In all such cases there is no doubt that the civilian wounded, sick and shipwrecked of the adverse Party to that in whose territory they are disembarked, are in the power of the latter and are therefore protected by various provisions of international humanitarian law. The same applies to nationals of a neutral State, if this State does not have “normal diplomatic representation”.⁶¹

Y.S.

⁵⁹ On this subject, cf. commentary Art. 19, *supra*, p. 237.

⁶⁰ In this respect, Article 2 of the Hague Convention of 18 October 1907 concerning the Rights and Duties of Neutral Powers in Naval War is perfectly clear: “Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.”

⁶¹ Cf. Art. 4, para. 2, Fourth Convention and *Commentary IV*, pp. 57-58. The Fourth Convention applies to such persons, particularly Section II (Aliens within the territory of a Party to the conflict) and, if applicable, Section IV (Regulations for the treatment of internees), Part III; Protocol I is also applicable, particularly Section III (Treatment of persons in the power of a Party to the conflict) of Part IV. In the context of the commentary on this article we cannot summarize these numerous provisions. Thus we refer the interested reader to these provisions and the commentary thereon.

Article 24 – Protection of medical aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

Documentary references (as a whole for Arts. 24 to 31)

Official Records

O.R. I, Part I, p. 136. *O.R.* III, p. 131 (new Art. 26). *O.R.* VI, p. 89, CDDH/SR.38, paras. 44-49; pp. 94-99, CDDH/SR.39, paras. 7-46; p. 114, *id.*, Annex (Egypt). *O.R.* XI, pp. 502-512, CDDH/II/SR.45, paras. 5-53; pp. 514-524, CDDH/II/SR.46, paras. 5-59; pp. 525-537, CDDH/II/SR.47; pp. 539-549, CDDH/II/SR.48, paras. 1-54; pp. 589-594, CDDH/II/SR.52, paras. 1-36; pp. 597-598, CDDH/II/SR.53, paras. 1-7. *O.R.* XII, pp. 20-27, CDDH/II/SR.57, paras. 6-14 and 19-54; pp. 29-37, CDDH/II/SR.58, paras. 2-54; pp. 39-40, CDDH/II/SR.59, paras. 2-11. *O.R.* XIII, pp. 145-158, CDDH/221/Rev.1, paras. 212-257; pp. 185-190, *id.*, Annex II (Arts. 26, 26 *bis* and 27-30); pp. 237-239, CDDH/II/306; pp. 241-242, CDDH/II/314; p. 259, CDDH/235/Rev.1, paras. 34-37; pp. 290-293, *id.*, Annex I (Arts. 31-32); pp. 323-326, CDDH/II/333.

Other references

CE/7b, pp. 39-61. *CE 1971, Report*, p. 32, paras. 89-92; pp. 36-37, Annex IV. *CE 1972, Basic Texts*, pp. 11-13 (Arts. 23-29). *CE 1972, Commentaries*, Part I, pp. 49-59 (Arts. 23-29). *CRCE 1972, Report*, pp. 27-28. *CE 1972, Report*, vol. I, pp. 41-52, paras. 1.66-1.109 and Annex (Arts. 23-29); vol. II, pp. 24-26, CE/COM I/1; pp. 28-30, CE/COM I/6-8 and CE/COM I/10. *Commentary Drafts*, pp. 35-40 (Arts. 26-32).

Commentary

General remarks (relating to Articles 24-31)

- 965 The articles on medical aircraft belong together and should have formed a separate chapter, as in the draft, but it was finally decided not to divide Section

II of Part II into chapters.¹ It therefore seems appropriate at this point to make a few comments on Articles 24-31 as a whole.²

- 966 Medical aircraft were first mentioned in international humanitarian law in 1929. On the basis of experience during the First World War, the Diplomatic Conference introduced a provision concerning medical aircraft into Article 18 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929. Such aircraft had to be painted white and had to bear the distinctive emblem of the red cross or red crescent. They were permitted to fly up to the zone situated in front of clearing or dressing stations. A special and express agreement was needed for permission to fly over this zone, or over any territory under the control of the adverse Party.
- 967 Far from developing these rather embryonic provisions of the 1929 Convention, the Diplomatic Conference of 1949 virtually paralyzed medical aviation when it subordinated all activity of medical aircraft of a Party to the conflict to a prior agreement with the adverse Party (*cf.* Article 36, First Convention; Article 39, Second Convention; Article 22, Fourth Convention).
- 968 The main reason that government delegates adopted such a strict view was the impossible situation that arose with regard to marking medical aircraft adequately in the face of modern means of anti-aircraft defence which made it possible to fire at aircraft before they were visible. Admittedly another reason given, as a delegate at the CDDH remarked, was that “Parties had sought to use the aircraft for logistic purposes when they were not employed on medical evacuation”.³
- 969 As significant technical progress was made in due course in the field of signalling, the ICRC started to hope that the rules governing the use of medical aircraft could once again be made more flexible and permit the development of this essential means of modern medical transportation.
- 970 The ICRC invited the Commission médico-juridique de Monaco to endeavour to develop this field. In 1965 the latter drafted technical specifications relating to additional means of identification of aircraft engaged on medical activities, as well as draft rules relating to medical transportation by air in time of armed conflict. The ICRC put these texts before the XXIst International Conference of the Red Cross (Istanbul, 1969), and then submitted them to a meeting of technical experts, which took place at the headquarters of the ICRC on 28 and 29 October 1970.⁴
- 971 The question of medical aviation was subsequently put to the first session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which was held in Geneva from 24 May to 12 June 1971, and has since then followed the path which led to the drafts submitted to the CDDH.⁵

¹ On this subject, *cf. supra*, p. 245.

² On this subject, see particularly CE/7b, pp. 39-40; *Commentary Drafts*, pp. 34-35; O.R. XI pp. 502-504, CDDH/II/SR.45, paras. 6-15.

³ O.R. XI, p. 503, CDDH/II/SR.45, para. 12.

⁴ *Cf.* Document D.1169, ICRC, Geneva.

⁵ On this subject, *cf. supra*, p. 107.

- 972 In the draft, medical transportation by air was the object of a chapter of seven articles. As was stated on the occasion of the presentation of these articles, they could be divided into three parts. The first three articles distinguish three zones, and lay down general rules for each of these. The following three articles contain provisions on application. Finally, the last article deals with the problem of medical aircraft flying over territory of States not Parties to the conflict, or landing there.
- 973 The common provisions of the draft concerning medical transportation⁶ were deleted by Committee II of the CDDH, justifying the inclusion of a general article at the beginning of the articles devoted to medical transportation by air. Apart from this, Committee II retained the structure adopted in the draft, even though some fairly important modifications as to substance and form were introduced in the articles, particularly in accordance with various amendments and the extensive work of the various Working Groups and the Drafting Committee of Committee II.
- 974 Articles 24-31 form a balanced unit in the way they are presented, and while they take full account of safety requirements, which are particularly strict in the field of aviation, they should make it possible to give new life to medical aviation. In addition, it is clear that the technical provisions contained in the Regulations concerning identification (Annex I to Protocol I) constitute an essential complement to these articles.⁷
- 975 Finally, it is necessary to ask how these articles can be harmonized with the provisions of the Conventions concerning medical aircraft.⁸ In principle, as we have said before, the Protocol is additional to the Conventions.⁹ However, in this particular case it is clear that there has been more than a simple development, as the provisions of the Protocol form a whole and some of them are even in conflict with the above-mentioned articles of the Conventions. Thus, as one delegate stated explicitly during the CDDH, it cannot be denied that the articles of the Protocol relating to medical aircraft must be considered, in the relations between Parties to the Protocol, to replace the above-mentioned articles of the Conventions.¹⁰

Text of Article 24

- 976 As mentioned above, this general article, which was not contained in the draft, was added by Committee II because of its decision to delete the common provisions of the draft, and particularly Article 24, which laid down the principle of respect and protection for medical transports.
- 977 The expression *medical aircraft* is defined in Article 8 (*Terminology*), subparagraph (j).¹¹

⁶ On this subject, *cf. supra*, p. 245.

⁷ On this subject, *cf. commentary Annex I, infra*, p. 1137.

⁸ Viz. Articles 36, First Convention; 39, Second Convention and 22, Fourth Convention.

⁹ On this subject, *cf. supra*, pp. 20-21.

¹⁰ *Cf. O.R. XI*, p. 529, CDDH/II/SR.47, para. 25.

¹¹ *Cf. commentary Art. 8, sub-para. (j), supra*, pp. 131-132.

- 978 The concepts of respect and protection were mentioned above.¹²
- 979 Medical aircraft must be “respected and protected, subject to the provisions of this Part”.
- 980 The amendment which gave rise to this article¹³ stated “subject to” these provisions, and “in accordance with” these provisions, because the authors “desired to make it completely clear that while indicating the situations in which there was loss of protection, Chapter II did provide for such protection”.¹⁴ However, the final wording used in the article is perfectly clear: it clearly shows that this Part determines the *extent and the limits* of protection.
- 981 The reference to the Part as a whole, and not merely to Articles 24-31, is justified. As shown above, medical aircraft are defined in Article 8 (*Terminology*), and it is particularly important to remember that a medical aircraft, in order to be considered as such, must be “under the control of a competent authority of a Party to the conflict” (Article 8 – *Terminology*, subparagraph (g)). Article 9 (*Field of application*), paragraph 2, which raises the possibility of making permanent medical units and transports available to a Party to the conflict is also very important for medical aircraft. Indeed, according to one delegate at the CDDH, it is “a key point in the text prepared by the Conference of Government Experts with a view to providing less-developed countries with medical aircraft facilities”.¹⁵

Y.S.

¹² Cf. commentary Art. 10, *supra*, p. 146.

¹³ Cf. O.R. III, p. 130, CDDH/II/82 and CDDH/II/82/Rev. 1.

¹⁴ O.R. XI, p. 509, CDDH/II/SR.45, para. 41.

¹⁵ *Ibid.*, p. 510, para. 42.

Protocol I

Article 25 – Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapon systems of the adverse Party.

Documentary references

Official Records

O.R. I, Part I, p. 136; Part III, p. 9 (Art. 26). *O.R.* III, pp. 126-127. *O.R.* VI, p. 89, CDDH/SR.38, para. 49. *O.R.* XI, pp. 502-511, CDDH/II/SR.45, paras. 5-51; pp. 514-519, CDDH/II/SR.46, paras. 8-31; pp. 520-521, paras. 38-39; p. 590, CDDH/II/SR.52, paras. 8-10. *O.R.* XIII, pp. 147-148, CDDH/221/Rev.1, paras. 218-223; p. 186, *id.*, Annex II (Art. 26 *bis*); p. 237, CDDH/II/306 (Art. 26 *bis*).

Other references

CRCE 1972, Report, pp. 28-29. *Commentary Drafts*, pp. 35-36 (Art. 26).

Commentary

- 982 Article 25 is the first of three articles which lay down general rules on the use of medical aircraft according to the area or zone where they are used.

First sentence

- 983 The expression *physically controlled* was finally preferred to the word *controlled* on its own, used in the text of the draft¹ and in the main amendment to this.² *Physically* clearly indicates, as the authors of the above-mentioned amendment had also intended, that it was considered desirable to avoid “the use of terms having legal connotations”.³ Thus this does not refer to the sovereignty of a Party over such territory, but to its actual domination (the presence of its armed forces) which alone makes it possible to ensure the safety of medical aircraft. Obviously this element of safety is the determining factor in this context.
- 984 The expression *by friendly forces* was preferred to the expression *by itself or by its allies*, used in the draft. As a matter of fact, the latter did not cover the armed forces of a liberation movement engaged in an armed conflict in accordance with Article 1 (*General principles and scope of application*), paragraph 4, of the Protocol.⁴ It is clear that “friendly forces” covers both the armed forces of a Party to the conflict and allied forces.⁵
- 985 The draft laid down the same requirement with regard to land areas and sea areas. Both should be “controlled”. During the discussions in the Committee, the sponsors of the above-mentioned amendment emphasized the fact that though land areas – obviously including inland waters (lakes, rivers, etc.) – were, as a rule, under the actual domination of a Party to the conflict, such domination was exceptional for sea areas. In general, the Parties limit the exercise of their domination to certain zones, “such as the sea around island bases, or waters adjacent to defended areas of the territorial sea, or areas along some straits”.⁶ Outside such zones, medical aircraft, and for that matter, neutral aircraft, should be able to fly over areas without being subject to prior conditions.
- 986 Article 25 uses the term *in and over* land areas and *in and over* sea areas, thus clearly showing that the obligation to respect and protect medical aircraft exists both when they are in flight and when they are grounded.
- 987 In such areas respect and protection “is not dependent on any agreement with an adverse Party”. Thus such an agreement is not required, as is the case in the context of Article 27 (*Medical aircraft in areas controlled by an adverse Party*), or considered virtually indispensable, as in the context of Article 26 (*Medical aircraft in contact or similar zones*). Thus the Party to the conflict which controls the medical aircraft is solely responsible for their use in such areas, even though certain precautions are recommended in the second sentence.

¹ 1973 Draft, Art. 26. On the other hand, this expression was retained in Arts. 54, para. 5, and 70, para. 1.

² O.R. III, p. 130, CDDH/II/82/Rev.1, Art. 26.

³ O.R. XI, p. 504, CDDH/II/SR.45, para. 16; cf. also *ibid.*, p. 517, CDDH/II/SR.46, para. 17.

⁴ On this subject, cf. *ibid.*, p. 515, CDDH/II/SR.46, para. 11.

⁵ On this subject, cf. *ibid.*, pp. 515-516, paras. 12 and 16.

⁶ *Ibid.*, p. 504, CDDH/II/SR.45, para. 16.

Second sentence

- 988** The freedom of medical aircraft to fly in the areas defined above is not put into question by the second sentence. The use of the word “ainsi” (in this manner) in the French text is not very suitable, since the first sentence does not define the way in which such aircraft should be used. Moreover, no such word is used in the English text, and it should not be considered as any form of restriction on the use of medical aircraft in the areas mentioned, as the conditions of use are determined by Article 28 (*Restrictions on operations of medical aircraft*).
- 989** Obviously notification provides an additional element of safety. It is rightly more forcefully recommended for medical aircraft making flying within range of surface-to-air weapons systems of the adverse Party. This point is emphasized to indicate the importance of precautions to be taken for the protection of medical transportation.
- 990** Finally, though the *decision* to notify is left to the discretion of the Party concerned, the *contents* of such notification are laid down mandatorily. This is perfectly logical: as soon as a Party decides to notify the adverse Party, it should do so unambiguously to prevent any subsequent controversy.⁷

Y.S.

⁷ In addition, cf. commentary Art. 29, *infra*, p. 307.

Protocol I

Article 26 – Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.
2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Documentary references

Official Records

O.R. I, Part I, p. 136; Part III, pp. 9-10 (Art. 27). *O.R.* III, pp. 129-132. *O.R.* VI, p. 94, CDDH/SR.39, paras. 8-11; p. 114, *id.*, Annex (Egypt). *O.R.* XI, p. 502, CDDH/II/SR.45, paras. 6-8; p. 505, paras. 17-19; p. 508, para. 33; p. 515, CDDH/II/SR.46, paras. 9-10; p. 518, para. 21; pp. 521-524, paras. 32-59; pp. 525-526, CDDH/II/SR.47, paras. 1-3 and 7; p. 529, para. 23; pp. 590-592, CDDH/II/SR.52, paras. 11-19. *O.R.* XIII, pp. 148-149, CDDH/221/Rev.1, paras. 224-229; p. 187, *id.*, Annex II (Art. 27); p. 205, CDDH/II/266-CDDH/III/255, Annex A; p. 238, CDHD/II/306 (Art. 27). *O.R.* XIV, p. 201, CDDH/III/SR.23, para. 1.

Other references

CE/7b, p. 44. *CE 1972, Basic Texts*, p. 12 (Art. 25). *CE 1972, Commentaries*, Part I, pp. 52-53 (Art. 25). *CRCE 1972, Report*, pp. 27-28. *CE 1972, Report*, vol. I, p. 48, paras. 1.80-1.85; vol. II, p. 4 (Art. 25); pp. 24-26, *CE/COM I/1*; pp. 28-29, *CE/COM I/6-8*; p. 30, *CE/COM I/10-11*. *Commentary Drafts*, pp. 36-37 (Art. 27).

Commentary

- 991 Article 26 is the second of three articles laying down the general rules for the use of medical aircraft, depending on the area (zone) where they are.
- 992 It will be noted that this article actually imposes only one obligation on the Parties to the conflict, namely, that they must respect medical aircraft as soon as they have been recognized as such in the areas defined in the article. In addition, the great risk taken by medical aircraft operating in such areas without prior agreement with the adverse Party is pointed out, though such action is not prohibited.
- 993 The second paragraph of the article defines the expression *contact zone*, which is used in the first paragraph. As it is virtually impossible to interpret the first paragraph without understanding this definition, we will begin by examining the second paragraph.

Paragraph 2

- 994 This paragraph defines the expression *contact zone*.
- 995 The draft adopted by the Conference of Government Experts in 1972 referred to the forward part of the battle area,¹ as opposed to the *rear part*, and these concepts were described in the following terms:
- “in the forward part are to be found units in direct contact with the enemy. Freedom of movement is limited; the forces are exposed to direct enemy vision and hence to direct firing. In the ‘rear part’ of the battle area are the units belonging to the second echelon and the reserve units of the troops in hostile contact. They are less exposed to enemy vision and firing, and there is, therefore, greater freedom of movement.”²
- 996 During the Diplomatic Conference a mixed Working Group from Committees II and III met with a view to recommend the “terms that should be used to cover the various military situations that are envisaged in some of the articles contained in the Draft Additional Protocols” and the “definitions of the terms recommended”.³
- 997 The expression “contact area” was defined by the Working Group as follows: “In an armed conflict, that area where the most forward elements of the armed forces of the adverse Parties are in contact with each other”.⁴

¹ CE 1972, Report, Vol. I, p. 46, para. 1.83 and draft Article 25, para. 1, of the Committee.

² F. de Mulinen, “Signalling and Identification of Medical Personnel and Material”, *IRRC*, September 1972, p. 479; cf. also *O.R.* XI, p. 505, CDDH/II/SR.45, para. 19.

³ *O.R.* XIII, p. 199, CDDH/II/266-CDDH/III/255, para. 1; cf. also F. de Mulinen, “A propos de la Conférence de Lucerne et Lugano sur l’emploi de certaines armes conventionnelles”. 9 *Annales d’Etudes internationales*, Geneva, 1977, pp. 123-125.

⁴ On this subject, cf. *O.R.* XIII, p. 203, CDDH/II/266-CDDH/III/255, Annex 1.

- 998 As the Rapporteur of the Drafting Committee of Committee II stated, this Committee considered that “the expression contact zone corresponded *grosso modo* to the definition proposed by the Joint Working Group”.⁵
- 999 The fact that it was limited to areas *on land* was in order to “exclude naval engagements where there was, strictly speaking, no ‘contact zone’”.⁶ It should be added that, in any event, such engagements would be governed by the laws of war at sea, which were not dealt with by the CDDH, and that the very concept of a contact zone basically, if not exclusively, belongs to the field of war on land.
- 1000 On the other hand, as the Rapporteur stated unequivocally, land areas also include “rivers, shallow waters and beaches where fighting could take place in the same way as anywhere on other land areas”.⁷
- 1001 Though the phrase “especially where they are exposed to direct fire from the ground” was added, this was as a “reference to a military scenario” by way of a clarifying example.⁸ In this respect the Rapporteur indicated that *direct fire* should be understood as “any shooting where the person shooting had his target in sight, as distinguished from indirect fire, where the gunner did not see the target but directed the shooting on the basis of data other than his own vision”.⁹ Moreover, it should be stressed that the direct fire referred to here is *from the ground*, i.e., it does not include direct fire that might come from aircraft. Thus the extent of the contact zone can vary considerably, depending on the range of the weapons used and the configuration of the ground.
- 1002 The term *forward elements* should not be interpreted merely as a small number of scouts, but as all troops in contact with the enemy. In short, the contact zone is simply the “forward part” of the field of battle.
- 1003 Finally, as the Rapporteur of the Drafting Committee stated, it should be noted that this definition does not claim to be applicable in other contexts and was established only for the specific needs of Article 26.¹⁰ However, the possibility cannot be excluded that it might be used for reference in the future.

Paragraph 1

First sentence

- 1004 This paragraph first sets out to define the areas where the article will apply.
- 1005 First it refers to “parts of the contact zone which are physically controlled by friendly forces”. Even this forward part of the battle-area constituting the contact zone can be sub-divided into zones controlled by each of the Parties to the conflict.¹¹

⁵ O.R. XI, p. 591, CDDH/II/SR.52, para. 12.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Cf. *ibid.*, para. 15.

¹¹ On the meaning of the expressions “physically controlled” and “friendly forces”, cf. commentary Art. 25, *supra*, p. 284.

- 1006 Secondly it refers to “areas the physical control of which is not clearly established”. Although there are zones in the “forward part” of the battle-area, where one or other of the Parties has clearly established control, there are others where physical control by one or other of the Parties is not clearly established. Furthermore, the latter zones may be predominant in view of the nature of modern conflicts. These are areas where, as the Conference of Government Experts expressed it in 1972, the military situation is “not clear”,¹² where the opposing forces may be entangled as a result of a series of assaults and repulses.
- 1007 Thus these are the two types of areas covered by Article 26, excluding the part of the contact zone dominated by enemy forces. That part of the contact zone is subject to the same rules as any area under the control of the adverse Party.¹³
- 1008 In addition, it is stated that Article 26 applies not only *in* the areas defined above, but also *over* those areas, i.e., in the air space situated above such areas. In fact, the article applies *primarily* to the air space, since it deals with aircraft. However, by making this distinction it is clearly shown that the protection of medical aircraft does not apply only when they are flying over such areas, but also when they are on the ground.
- 1009 The rest of the first sentence is a straightforward remark, implying a recommendation. Reference is made to the risk run by medical aircraft used in such areas without prior agreement. Thus an implicit recommendation is made to conclude such agreements between the “competent military authorities of the Parties to the conflict”. The draft referred to “local military authorities”. Even though such agreements are generally concluded at that level, Committee II considered that a specific mention of local authorities was unduly restrictive. As one delegate pointed out, it is important to avoid
- “a situation in which protection for medical aircraft was not fully effective merely because it had been impossible to reach prior agreement between the local military authorities, whereas there might have been means of communication and agreement between the Parties at a higher level”.¹⁴
- 1010 There is nothing in the article to indicate that there is any form of *obligation* for the Parties to the conflict to conclude such agreements. However, given that medical aircraft can play a role of paramount importance in rescuing the wounded, and that the risk they would run by operating without an agreement would be considerable, it seems clear that the spirit of the text means that Parties to the conflict should not refuse to conclude such agreements without a valid reason. Moreover, the draft presented to the Conference of Government Experts in 1972 stated that the Parties to the conflict shall permit, and an exception was only made in case of imperative military necessity.
- 1011 The procedure and the content of the agreement are specified in Article 29 (*Notifications and agreements concerning medical aircraft*).¹⁵

¹² CE 1972, Report, Vol. I, p. 46, para. 1.82.

¹³ On this subject, cf. commentary Art. 27, *infra*, p. 293.

¹⁴ O.R. XI, pp. 521-522, CDDH/II/SR.46, para. 43.

¹⁵ Cf. commentary Art. 29, *infra*, p. 307.

Second sentence, first part

- 1012 As is made clear in the second part of the sentence, this first part should not be interpreted as a sort of “free for all”. The drafters of the Protocol merely refused to allow States engaged in armed conflict to be made responsible for medical aircraft flying without prior agreement in the area defined above. Thus the authorities of such States cannot be held responsible when a medical aircraft flying in such circumstances, and not yet identified, is shot down by mistake.

Second sentence, second part

- 1013 Basically this second part of the sentence repeats the second paragraph of the draft. Some delegates wished to delete it in order to impose a total ban on medical aircraft flying in such areas without prior agreement.¹⁶ With some justification they relied for this view on the Conventions, particularly Article 36 of the First Convention, which makes agreement a condition *sine qua non* of the use of medical aircraft.
- 1014 The fact that the second part of the sentence was retained means that medical aircraft flying in such areas without prior agreement, though taking considerable risks, as stressed in the article, nevertheless do not lose their right to protection. Obviously there is a risk that members of the armed forces of the adverse Party might fire before recognizing that the aircraft are *medical* aircraft, but as soon as they have recognized them as such, they are under a strict obligation to respect the aircraft, i.e., not to take aim at them, and by violating this obligation, they would commit a grave breach (even though in such cases it would obviously be very difficult to establish fault).
- 1015 The connection between this article and Article 30 (*Landing and inspection of medical aircraft*), paragraph 1, needs to be pointed out. This provides that over “areas the physical control of which is not clearly established”, but only over such areas, medical aircraft may be ordered to land and must obey any such order. If aircraft flying over such areas are unequivocally ordered to land and clearly refuse to comply, they lose the right to respect which is laid down in the second part of the second sentence. It was rightly pointed out in Committee II that it might be difficult to order a landing and make an inspection of aircraft in such areas.¹⁷ In this respect it is clearly impossible to require a medical aircraft to land somewhere where it is not possible to land or, in some situations, to alight on water satisfactorily. However, even if there is a possibility, it was pointed out that it might happen that a medical aircraft decided not to obey the order¹⁸ and attempted to return to the rear. Nevertheless, it will be recalled that a pilot taking such a decision would be in contravention of the provision laid down in Article

¹⁶ Cf. particularly *O.R.* XI, p. 520, CDDH/II/SR.46, para. 38. On the relationship between the articles of the Conventions and those of the Protocol relating to medical aircraft, cf. in addition, *supra*, commentary Art. 24, p. 279.

¹⁷ *O.R.* XI, p. 541, CDDH/II/SR.48, para. 17.

¹⁸ *Ibid.*, p. 542, para. 23.

30 (*Landing and inspection of medical aircraft*), paragraph 1, second sentence, and that he would run the risk of his aircraft being shot down.

1016 A summary of the situation may be stated as follows: in the part of the contact zone physically controlled by friendly forces, medical aircraft operate at their own risk, if there is no agreement, but they should be respected by the adverse Party as soon as the latter has realized that it is a medical aircraft.

1017 The situation is the same in areas the physical control of which is not clearly established, though the adverse Party has the additional option of ordering the aircraft to land or, in some cases, to alight on water – provided that it is actually possible to carry out such an order. If the aircraft clearly refuses to comply with this order, it loses its right to be respected.

Y.S.

Protocol I

Article 27 – Medical aircraft in areas controlled by an adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.
2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Documentary references

Official Records

O.R. I, Part I, p. 137; Part III, p. 10 (Art. 28). *O.R.* III, pp. 136-137. *O.R.* VI, p. 95, CDDH/SR.39, paras. 12-16. *O.R.* XI, p. 502, CDDH/II/SR.45, paras. 6-7; p. 505, paras. 20-21; p. 508, para. 34; p. 515, CDDH/II/SR.46, paras. 9-10; p. 518, para. 21; pp. 525-531, CDDH/II/SR.47, paras. 1-39; p. 541, CDDH/II/SR.48, para. 17; pp. 592-593, CDDH/II/SR.52, paras. 20-32. *O.R.* XIII, pp. 149-150, CDDH/221/Rev.1, paras. 230-235; p. 188, *id.*, Annex II (Art. 28); p. 238, CDDH/II/306 (Art. 28).

Other references

CE/7b, p. 44. *CE 1972, Basic Texts*, p. 12 (Art. 26). *CE 1972, Commentaries*, Part I, pp. 53-54 (Art. 26). *CRCE 1972, Report*, pp. 28-29. *CE 1972, Report*, vol. I, p. 47, paras. 1.87-1.89; vol. II, p. 5 (Art. 26); p. 24, *CE/COM I/1*; pp. 28-29, *CE/COM I/5-7*; p. 30, *CE/COM I/10. Commentary Drafts*, p. 37 (Art. 28).

Commentary

- 1018** Article 27 is the last of three articles which lay down general rules for the use of medical aircraft, depending on the area (zone) where they are used.
- 1019** The reason why Article 26 (*Medical aircraft in contact or similar zones*) closed the door halfway to the use of medical aircraft without prior agreement in “contact or similar zones” is primarily to ensure the safety of such aircraft. The fact that now the door is even more firmly closed to flight without prior agreement over areas “physically controlled by an adverse Party”, is basically because the safety of that Party could also be seriously jeopardized by such overflight.

Paragraph 1

- 1020** The rule laid down in this paragraph takes up, though in a more positive vein, the provision of Article 36, paragraph 3, of the First Convention, which reads as follows: “Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited”. This should be interpreted as reflecting a different attitude with regard to such flights. Some had even wished to allow overflight without agreement, merely subject to notification.¹ It is true that the obligation to obtain the agreement of the adverse Party has been retained, but the positive formulation of the sentence indicates that that Party should in principle give its agreement and may refuse to do so only for imperative reasons, particularly security reasons.
- 1021** Medical aircraft will only fly through the air space of the adverse Party and will not land on its territory, except in the case of technical difficulties, or if they are ordered to do so. Thus paragraph 1 concerns only overflight and an agreement relates only to this.
- 1022** The concept of “land or sea areas physically controlled by an adverse Party” was examined above.²
- 1023** Agreement should be given by the “competent authority of the adverse Party”. This wording was deliberately left vague. As one delegate remarked, it is possible “that flight over enemy territory would be over broader areas than were represented by the contact zone, and in the enemy’s rear. As a general rule, however, overflight of enemy territory was more likely to take place over combat areas and that was therefore when it was necessary to reach an agreement with the adverse Party. There must, for instance, be provision for the case of an air head or a besieged area from which the wounded had to be evacuated by air over relatively short distances, strictly within the area controlled by the combat commander; in that case it was clearly not the national or political authority which would have to give clearance, but the military commander.”

¹ Cf. *CE 1972, Report*, Vol. I, p. 47.

² Cf. commentary Art. 25, *supra*, p. 284.

That delegate therefore considered, as did the Committee as a whole, that it was better not to identify the authority which had to agree: “that was for each State to determine”.³

- 1024 The request for an agreement and the response to such a request may be made by any means of communication. The help of Protecting Powers, their substitute or the ICRC may be requested, if this should be necessary. The contents of the request for an agreement, and the obligations of the Party receiving such a request, are laid down in Article 29 (*Notifications and agreements concerning medical aircraft*).⁴

Paragraph 2

- 1025 The purpose of this paragraph is to prevent a tragic accident i.e., the shooting down of a medical aircraft, while taking into account the legitimate fears of the Parties to the conflict with regard to their security. If a Party to the conflict happened to shoot down a medical aircraft, this would certainly not be intentional in the majority of cases, but because it had been led to believe that the characteristics of the aircraft were deceptive, and that it was actually an aircraft on an espionage mission or even an aircraft carrying bombs.

First sentence

- 1026 The first sentence indicates the problem and outlines the obligations incumbent upon medical aircraft.
- 1027 As shown above, medical aircraft may not fly over “areas physically controlled by the adverse Party”⁵ unless they have the agreement of that Party. This paragraph provides for the case where medical aircraft fly over such areas “without, or in deviation from the terms of, an agreement provided for in paragraph 1”. In fact, the agreement must contain in particular a flight plan,⁶ and a medical aircraft which did not comply with this would not be flying without an agreement, but in deviation of the terms of an agreement.
- 1028 However, this paragraph does not provide for the case of a *deliberately* planned overflight without, or in deviation from the terms of, an agreement. There must be a navigational error or an emergency affecting the safety of the flight. As one delegate stated:

“An aircraft was at the mercy of the law of gravity. If something went wrong, the pilot could not stop; he had to go on, possibly in a direction which he had not intended. There was also the phenomenon of the jet-stream over oceans, which could force a pilot to fly at a speed lower by 200 miles an hour than he had expected, with the resultant effect on fuel consumption and the pilot’s

³ O.R. XI, p. 528, CDDH/II/SR.47, para. 20.

⁴ Cf. commentary Art. 29, *infra*, p. 307.

⁵ A concept which was discussed above, cf. commentary Art. 25, *supra*, p. 284.

⁶ Cf. Art. 29, para. 1.

ability to reach his planned destination. Sometimes also a pilot was forced to make extensive detours in order to allow for unexpected weather.”⁷

Finally, the instruments may be faulty and the pilot may lose his way. In all these cases the medical aircraft may find itself in the air space of a Party to the conflict without any agreement giving it the right to be there, or if there is an agreement, at another time or place than arranged.

1029 One delegate stated that such situations were not provided for by the Geneva Conventions and that such cases were therefore in violation of the Conventions, regardless of their cause. Consequently he considered that the article of the Protocol modified the Conventions, and that it was necessary to say so.⁸ We have already expressed our own view that the articles on medical aircraft do indeed modify the régime of the Conventions.⁹ However, in this particular case it certainly seems that the recognized legal concepts of *necessity* (in the case of an intentional overflight justified by technical reasons), *error* (in the case of non-intentional overflight), or more generally, *force majeure* preventing compliance with an obligation, can be invoked even under the régime of the Conventions.

1030 As regards the Protocol, this provides that in such cases the aircraft must “make every effort to identify itself and to inform the adverse Party of the circumstances”. As soon as they realize they are flying over territory of the adverse Party without the right to do so (which is not always the case), the crew must do all they can, as soon as possible, to ensure that the medical aircraft be identified and recognized as such by the adverse Party. This is perfectly logical, as the aircraft is in the gravest danger at this point: in the context of armed conflict a Party to the conflict could certainly not remain passive for very long in the face of the risk to its security presented by an unidentified aircraft flying over its territory. Thus the crew of the aircraft must use every means at their disposal to communicate with the adverse Party so that they can be identified.¹⁰

1031 Although not explicitly stated in the text, it is clear that, to the extent that there is an error which can be corrected, the aircraft will endeavour to leave the air space of the adverse Party, whilst at the same time making every effort to be identified. However, it will do so obviously only as long as it has not received any order to the contrary from the adverse Party.¹¹

Second sentence

1032 This sentence deals with the obligations incumbent in such a situation on the Party to the conflict over whose territory the aircraft is flying.

1033 It is admitted that as a final solution, that Party can resort to *an attack against the aircraft*. This is a perfect example of what international humanitarian law

⁷ O.R. XI, pp. 527-528, CDDH/II/SR.47, para. 16.

⁸ Cf. *ibid.*, p. 559, para. 36.

⁹ Cf. commentary Art. 24, *supra*, pp. 280-281.

¹⁰ On this subject, cf. Annex I (particularly Arts. 5-13) and the commentary thereon, *infra*, p. 1137.

¹¹ Cf. the commentary on the second sentence, *infra*.

often comes down to: a balance between diverging interests, even though this seems shocking at first. Everything that is possible must be done to prevent an attack on a medical aircraft, but as a last resort, such an act cannot be prohibited, for, as one delegate stressed, “the fact that a single aircraft could wipe out an entire city”, cannot be ignored.¹² Moreover, as another delegate stated, “the word ‘attack’ did not mean ‘to shoot down’”,¹³ even though the possibility that such an aircraft might be shot down remains if all other methods – particularly warning shots – have been ineffective. This cannot be denied, for the reasons given above.

- 1034** However, the second sentence of the paragraph is aimed at preventing this final solution. Before resorting to an attack, the adverse Party:

“shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance”.

The significance of this admittedly rather ponderous wording is studied in detail below.

- 1035** The expression “make all reasonable efforts” resulted in controversy right up to the final plenary meetings. For example, it was claimed that “the adjective ‘reasonable’ was borrowed from the Anglo-Saxon system” and that the expression was “not very clear”.¹⁴ Even though the expression does not have a very precise legal meaning in this context, at any rate not in French, there is little doubt concerning the intent behind the words: the efforts required are those dictated by common sense. No one is obliged to do the impossible, and a Party to the conflict cannot be required to take suicidal risks. Thus it is asked to do all it can to avoid attacking the aircraft, taking into account its security requirements. This is above all a matter of common sense.
- 1036** Such efforts may first be concerned with ordering the aircraft to land, or if it is a hydroplane, to alight on water. This situation and its consequences are dealt with in detail in Article 30 (*Landing and inspection of medical aircraft*).¹⁵
- 1037** Such efforts may also involve taking “other measures”. In fact, there are several possible alternative measures that could be employed, such as obliging the aircraft to take another route and “sending another aircraft to order the medical aircraft to follow it”.¹⁶ There was no reason to give a limitative enumeration in this respect, and Parties to the conflict are free to adopt such measures as they consider to be adequate.
- 1038** The object of such measures is specified. It is to *safeguard the interests* of the Party taking them. Thus they should not be measures of intimidation or of mere harassment, unrelated to the interests of that Party, which in this context are basically, if not exclusively concerned with its security.

¹² O.R. XII, p. 33, CDDH/II/SR.58, para. 19.

¹³ *Ibid.*, p. 35, para. 34.

¹⁴ O.R. VI, p. 95, CDDH/SR.39, paras. 12 and 15.

¹⁵ On the subject of which, *cf. infra*, p. 315.

¹⁶ O.R. XI, p. 592, CDDH/II/SR.52, para. 24.

- 1039 Whether that Party to the conflict orders the aircraft to land or to alight on water, it must also “make all reasonable efforts [...] to allow the aircraft time for compliance”. This is more or less self-evident. It is obvious that nothing is gained by ordering a medical aircraft to land, if it is then shot down before it has the time to carry out this order.
- 1040 In fact, the intention is that the medical aircraft must be given every possible opportunity to show its good will. If a medical aircraft in a situation as described in this paragraph manifestly does not comply with the order, although it has understood it, the Party to the conflict in whose air space it is flying has good reason to think *that it is not actually a medical aircraft*, i.e., an aircraft exclusively assigned to medical transportation, and it will take the action required for the preservation of its own security.
- 1041 The problem remains of *medical aircraft deliberately entering the air space of an adverse Party*. It could happen that the crew of a medical aircraft deliberately choose to enter prohibited air space and this choice is not caused by technical or weather conditions but, for example, because this course would shorten the duration of transporting the wounded in urgent need of care. For reasons of security, the CDDH did not tolerate such overflight, which would therefore constitute a breach of the Protocol.
- 1042 However, in the first instance, the reaction of a Party to the conflict over whose territory an aircraft is flying for such a reason should be the same as the reaction that it should have with regard to a medical aircraft which had entered its air space by mistake, or for technical difficulties, for the simple reason that it cannot distinguish one from the other.
- 1043 Thus, in the event, the Party to the conflict concerned will apply the second sentence of paragraph 2 with respect to such aircraft.
- 1044 It would be later, when the aircraft had been brought down to land, and its crew had therefore fallen into the hands of that Party, that the situation of the crew would be different.
- 1045 If they have committed a breach of the Protocol, they could be punished in accordance with the gravity of the breach. However, it should be noted that this could vary considerably: the case in which a pilot errs in taking the risk of entering prohibited air space for purely humanitarian reasons, such as that mentioned above, of shortening the journey of seriously wounded persons, has nothing in common with the case of a pilot who has misused the red cross or red crescent emblem for the purpose of committing a hostile act.

Y.S.

Protocol I

Article 28 – Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.
2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, sub-paragraph (f). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.
3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.
4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

Documentary references

Official Records

O.R. I, Part I, p. 137; Part III, p. 10 (Art. 29). *O.R.* III, pp. 138-139. *O.R.* VI, pp. 95-97, CDDH/SR.39, paras. 17-30. *O.R.* XI, p. 502, CDDH/II/SR.45, para. 6; pp. 506-507, paras. 22-25; p. 515, CDDH/II/SR.46, paras. 9-10; pp. 531-534, CDDH/II/SR.47, paras. 40-51; p. 594, CDDH/II/SR.52, paras. 33-36. *O.R.* XIII, pp. 150-152, CDDH/221/Rev.1, paras. 236-241; p. 189, *id.*, Annex II (Art. 29); pp. 238-239, CDDH/II/306 (Art. 29).

Other references

CE 1972, Report, vol. I, pp. 44-45, paras. 1.74-1.79 (Art. 24); vol. II, p. 24, *CE/COM I/1*; p. 29, *CE/COM I/8. Commentary Drafts*, pp. 30-31 (Art. 22); pp. 32-33 (Art. 24); pp. 37-38 (Art. 29).

Commentary**General remarks**

1046 As one delegate remarked at the CDDH:

“Apart from the fear that the safety of medical aircraft could not be assured against attack from distances which exceeded the range of recognition of the distinctive emblem, an important factor in limitations on the protection of medical aircraft under present law was the concern felt over the security threat posed by possible abuses of protected status.”¹

1047 Article 28 is an attempt to deal with this last concern, and lists the various restrictions imposed on the use of medical aircraft. The restrictions mentioned in paragraphs 1-3 have a general scope of application and apply to all uses of medical aircraft; the restriction imposed by paragraph 4 applies for flights carried out in the air space corresponding to the zones and areas covered by Article 26 (*Medical aircraft in contact or similar zones*) and Article 27 (*Medical aircraft in areas controlled by an adverse Party*), but does not apply to flights carried out over the areas covered by Article 25 (*Medical aircraft in areas not controlled by an adverse Party*).

1048 The restrictions imposed in paragraphs 1-3 have a general character and therefore apply to aircraft:

“even when flying over their own territory. It had been brought out in the discussion [...] that a Party might be intending to fly over its own territory, but might accidentally fly over enemy territory, through inadvertence or stress of weather”.²

1049 Article 29 of the 1973 draft, which corresponds to the present Article 28, consisted of only one paragraph. It contained only the restriction included in paragraph 4, and a shorter version of that contained in the first sentence of paragraph 2 of the article.

1050 However, this should not lead one to conclude that there was no intention to impose the other restrictions now contained in Article 28. The construction of the entire part of the draft concerning the protection of medical transports was different,³ and these restrictions were simply mentioned somewhere else. Article 24 of the draft, entitled *Protection*, applied to all medical transportation by air. Paragraph 3(a) dealt with part of the question now governed by paragraph 2 of Article 28, and paragraph 3(b) is similar to the present paragraph 3 of Article 28. Other provisions were contained in Articles 12 and 13 concerning medical units and the cessation of protection of medical units, respectively. The contents of paragraph 4 of Article 12 in particular were included in the present paragraph 1

¹ *O.R.* XI, p. 506, CDDH/II/SR.45, para. 22.

² *Ibid.*, p. 532, CDDH/II/SR.47, para. 42.

³ On this subject, cf. introduction to Section II of Part II, *supra*, p. 245.

of Article 28, while those of paragraph 2(b) of Article 13 were included at the beginning of the present paragraph 3 of Article 28.

- 1051 Therefore Committee II – which, incidentally, followed to a large extent the conclusions of the Conference of Government Experts in 1972⁴ – did not really modify the restrictions imposed on medical aircraft in the draft, but improved the Protocol by making it more comprehensible in this respect. Article 24, paragraph 2, of the draft, which referred back to Articles 12 and 13, subject, in the case of medical aircraft, to Articles 27, 28, 29 and 32, is a striking example of a provision that was far too difficult to understand. As one delegate stressed, as these provisions “must be observed and enforced by non-lawyers under the stress of combat, the demands of clarity suggested that they be collected in one place of the Protocol”.⁵

Paragraph 1

First sentence

- 1052 The prohibition mentioned here is fundamental, and applies not only to medical aircraft, but for any person and any objects enjoying special protection. Such a rule is actually one of the pillars on which international humanitarian law is founded, and one might ask whether it is necessary to repeat it here. It flows from the definition of medical aircraft which, like all other medical transports, is only considered as such if it is “assigned exclusively to medical transportation”. Thus the use of an aircraft that is supposedly a medical aircraft *to attempt to acquire any military advantage* would mean that the aircraft loses its status of medical aircraft, and therefore its right to protection.
- 1053 The fact that this principle is nevertheless still mentioned in Article 28 is because all the other provisions of the article are concerned with its implementation.⁶
- 1054 As regards the meaning of the sentence, it should be noted that there must be *intent* to acquire a military advantage. It is possible to conceive – though such a situation is unlikely to occur in reality – that an aircraft could impede military action without any deliberate intention of so doing. In such a case the aircraft would not lose its right to protection. As regards the military advantage, this may take different forms. Apart from using weapons against the adverse Party, we mention the possibility of collecting information of military importance, or that of deceiving the enemy.

⁴ Cf. CE 1972, Report, Vol. I, p. 45, paras. 1.77-1.79, and draft Article 24 of the Committee.

⁵ Cf. O.R. XI, p. 507, CDDH/II/SR.45, para. 25.

⁶ In this sense, cf. O.R. XI, p. 532, CDDH/II/SR.47, para. 42.

Second sentence

- 1055** This sentence is an application of the principle contained in the first sentence. It is inspired by rules given in the Conventions prohibiting, in particular, the use of prisoners of war or persons protected by the Fourth Convention “to render certain points or areas immune from military operations”.⁷
- 1056** It is also similar to Article 51 (*Protection of the civilian population*), paragraph 7, of the Protocol.⁸
- 1057** For example, medical aircraft used as cover to protect non-medical military aircraft from being fired at from the ground, or deliberately placed at an airport in between such military aircraft, can no longer lay a claim to being spared; the object of this sentence is to demonstrate this point clearly.

Paragraph 2*First sentence*

- 1058** This sentence mentions a form of abuse which is especially to be feared with regard to the use of medical aircraft. It is clear that any aircraft forms a particularly favourable observation post, and this is one of the reasons why medical aircraft are not allowed to fly over the territory of the adverse Party without specific permission from the latter.⁹
- 1059** This sentence contains three prohibitions which should be distinguished:
- 1060** *First*, medical aircraft must not be used to “collect [...] intelligence data”. Broadly speaking, intelligence data means any information which could have an effect on the conduct of military operations: for example, signaling the presence of military positions in a particular sector is clearly intelligence data, but so is signaling the absence of such positions. *To collect* means that there is intent to acquire such data. Thus what is prohibited here is not the discovery of intelligence data as such, but setting out to do so.
- 1061** *Secondly*, medical aircraft may not be used to “transmit” such data. Even if there is no intent to collect intelligence data, it may happen that a medical aircraft comes across such information by chance. In this case there could be a great temptation to transmit it. However, in doing so the aircraft would be betraying its function. It was important to clearly stress this point.
- 1062** *Thirdly*, medical aircraft must not *carry* any equipment intended for collecting or transmitting intelligence data. This provision is not limited to “photographic equipment”, as was the 1973 draft, because, as one delegate pointed out, there are today “many kinds”¹⁰ of detection devices and it was appropriate to adopt a general wording encompassing all such equipment.

⁷ Cf. Art. 23, para. 1, Third Convention; Art. 28, Fourth Convention.

⁸ On this subject, cf. commentary Art. 51, para. 7, *infra*, p. 627; cf. also Art. 58.

⁹ Cf. commentary Art. 27, *supra*, pp. 294-295.

¹⁰ Cf. O.R. XI, p. 532, CDDH/II/SR.47, para. 42.

- 1063** Whether or not it has collected or transmitted such data, an aircraft carrying equipment intended for such purposes is committing a breach. Thus such carrying is a breach in itself, and not merely indicative of a breach. Such a strict rule is logical. It may be very difficult to prove that an aircraft has actually collected or transmitted information, and if in time of armed conflict it is carrying equipment apparently intended for this purpose, it is not entitled to have the benefit of the doubt. However, the third sentence of the paragraph is meant to prevent the presence of just any equipment of suspicious appearance from being considered to be a breach of this provision.¹¹

Second sentence

- 1064** It could be maintained that this sentence serves no purpose, and one delegate proposed that it be deleted.¹² In fact the very definition of medical transportation which is referred to in this sentence, implies that it concerns the conveyance of “the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol”, and “medical transports” means any means of transportation assigned *exclusively* to medical transportation. Once again, however, common sense prevailed over purely legal arguments,

“since Protocol I would not be interpreted by lawyers or airmen or by lawyers in Air Ministeries, the sponsors had thought it useful to include the second and third sentences of paragraph 2. They might be the very points that would be checked in aircraft landing on foreign territory”.¹³

Furthermore, one delegate considered that this mention revealed more clearly that the transportation of persons or of a cargo that was not permitted constituted a breach of the Protocol.¹⁴

- 1065** It should be recalled that persons who may be transported are, on the one hand, the wounded, sick and shipwrecked (it has been shown that under some conditions aircraft may be used for rescue operations at sea); on the other hand, medical and religious personnel: i.e., personnel accompanying the wounded, sick and shipwrecked, and the crew of the aircraft, as well as medical or religious personnel who are travelling on the medical aircraft.
- 1066** As regards the cargo, apart from the effects and equipment described in the following sentence, this may consist only of medical equipment and *matériel*, whether needed for the wounded and sick being transported, or whether they are being sent from one place to another.
- 1067** A controversy arose with regard to transporting the dead, and the Rapporteur of the Drafting Committee of Committee II explained that this was not permitted. Nevertheless, he added that it was understood “that the protection of medical

¹¹ Cf. *infra*, p. 304.

¹² O.R. XI, p. 532, CDDH/II/SR.47, para. 43.

¹³ *Ibid.*, p. 533, para. 47.

¹⁴ *Ibid.*

aircraft did not cease if they were carrying the bodies of persons who had died during the flight”.¹⁵

Third sentence

- 1068** What is said in this provision is self-evident, and it was considered pointless by some to state it. However, as with the preceding sentence, it was wisely considered that one can never be too careful, particularly when the provisions concerned may have to be applied by people with little ability to grasp the legal subtleties involved. The mention of “equipment intended solely to facilitate navigation, communication or identification” seemed especially important “since for a soldier on the ground or for a layman it was not always obvious that such apparatus formed part of the essential equipment of an aircraft”,¹⁶ and because it could easily be confused with the equipment mentioned in the first sentence of the paragraph. It should be recognized for that matter that authorized effects and equipment could in certain cases be used for prohibited purposes. This is why it is important, in the first sentence, to distinguish prohibited acts from the equipment medical aircraft are forbidden to carry.

Paragraph 3

- 1069** The provisions laid down in this paragraph are similar to those which apply generally to medical units and transports. They correspond to Article 13 (*Discontinuance of protection of civilian medical units*), paragraph 2(a) and (c), which implicitly permits the two acts mentioned here, since it states that they may not be “considered as acts harmful to the enemy”. Moreover, they can also be found mentioned as such in Article 22 of the First Convention, which specifies that they must not be “considered as depriving a medical unit or establishment of the protection guaranteed”. As shown above, the 1973 draft also referred back, with regard to protection, to the articles concerning medical units. However, as other elements of these articles could not apply to medical aircraft, the system became too complicated. On the specific points mentioned in paragraph 3, the rules adopted for medical aircraft are the same as those governing medical units as a whole. Thus for the meaning of these provisions, we refer to the commentary on Article 13 (*Discontinuance of protection of civilian medical units*), paragraph 2(a) and (c).¹⁷
- 1070** Perhaps it should merely be added that in the case of medical aircraft the use of defensive weapons – with all the restrictions mentioned in this respect¹⁸ – is conceivable only on the ground, particularly when an aircraft is forced to land or alight on water. Of course there is no question here either of forcibly opposing

¹⁵ *Ibid.*, p. 594, CDDH/II/SR.52, para. 34.

¹⁶ *Ibid.*, p. 533, CDDH/II/SR.47, para. 44.

¹⁷ *Supra*, pp. 177-180.

¹⁸ *Cf. supra*, pp. 177-178.

the aircraft from being seized by armed forces, but of defence against possible acts of banditry or vandalism.

Paragraph 4

- 1071 In the 1973 draft, Article 22 provided the general rule that medical transport may be used to search for and evacuate the wounded, the sick and the shipwrecked. This article was considered unnecessary by Committee II, which, as one delegate stated in particular, considered that “search for the wounded was a normal medical function”, and that if it were decided to mention it here, “all the other things permitted to medical personnel would have to be included” as well.¹⁹
- 1072 Thus no one doubts that searching for the wounded is a normal medical function. Consequently, if a medical transport is to be prohibited from carrying out such a task, this should be explicitly stated. In fact, this had already been done in the above-mentioned Article 22 of the 1973 draft, which contained the general rule “subject to Article 29”, the latter imposing such exceptions. The exception imposed by the present paragraph 4 therefore continues to be necessary even without the explicit mention of the rule.
- 1073 Let us now examine the effect of the restriction mentioned in paragraph 4 on the use of medical aircraft.
- 1074 First, the expression *to search for the wounded* clearly refers in this context to flights over an area with the aim of finding the wounded.
- 1075 In the context of Article 25 (*Medical aircraft in areas not controlled by an adverse Party*) the search is freely permitted, as it is not subject to the restriction of this paragraph, and it is therefore left to the sole initiative of the Party to which the medical aircrafts belong.
- 1076 In the context of Article 26 (*Medical aircraft in contact or similar zones*) a prior agreement with the military authorities of the adverse Party is strongly recommended before flights over contact or similar zones. In the absence of a specific mention in the agreement, search is not included: it is therefore prohibited.
- 1077 However, Article 26 (*Medical aircraft in contact or similar zones*) does not prohibit medical aircraft from operating in such zones without an agreement, though it states that in this case they do so at their own risk. Paragraph 4 under consideration here prohibits such flights for search purposes. This is important. An aircraft which enters a zone such as defined in Article 26 (*Medical aircraft in contact or similar zones*) without a prior agreement, with the aim of bringing relief to the wounded previously found there, certainly takes great risks, but it does not commit a breach of the Protocol. On the other hand, anyone operating in such a zone with the aim of searching for the wounded is committing a breach. More seriously, the rule of Article 26 (*Medical aircraft in contact or similar zones*), which provides that medical aircraft flying in such a zone must be respected as

¹⁹ O.R. XI, p. 401, CDDH/II/SR.37, para. 40.

soon as they are recognized, no longer applies to aircraft which are visibly engaged in a search mission. In practice it is of course advisable to spare such medical aircraft as far as possible, particularly as it is often not very easy to determine whether an aircraft is actually engaged in a search mission. However, the rule is strictly laid down for reasons of security, for there is a danger that such a search mission could be abused as a pretext for spying on enemy positions.

1078 Finally, in the context of Article 27 (*Medical aircraft in areas controlled by an adverse Party*), any flight over areas physically controlled by the adverse Party can only be lawfully carried out with the agreement of the latter. If such an agreement does not specify that a search mission may be carried out during a permitted flight, such a mission is prohibited.

1079 If a medical aircraft carrying out a search mission in areas defined by Article 25 (*Medical aircraft in areas not controlled by an adverse Party*) enters an area under the control of the adverse Party as the result of a navigational error, it should obviously stop searching immediately upon realizing its mistake, make an attempt to get itself identified by the adverse Party, and act in accordance with any instructions that might be given by the latter.

1080 Thus, for obvious reasons of security the Protocol is rather strict as regards the missions which might be undertaken by medical aircraft to search for the wounded in areas outside those under the control of the Party to which the aircraft belongs. In fact, this problem arises mainly in contact or similar zones, as wounded persons requiring relief are most numerous there, and no search mission by aircraft is permitted without the agreement of the two Parties to the conflict. This is why in this case it is proper to insist on the obligation of the Parties to do all they can to reach such agreements. In this respect it is appropriate to recall in particular Article 15, paragraph 2, of the First Convention, which does not allow for any doubt in this respect:

“Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.”

Y.S.

Protocol I

Article 29 – Notifications and agreements concerning medical aircraft

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.
2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.
3. A Party which receives a request for prior agreement under Articles 26, 27 28 (paragraph 4), or 31 shall, as rapidly as possible, notify the requesting Party:
 - (a) that the request is agreed to;
 - (b) that the request is denied; or
 - (c) of reasonable alternative proposals to the request. It may also propose a prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.
4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.
5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

Documentary references

Official Records

O.R. I, Part I, pp. 137-138; Part III, p. 10 (Art. 30). *O.R.* III, pp. 141-142. *O.R.* VI, pp. 97-98, CDDH/SR.39, paras. 31-37. *O.R.* XI, p. 502, CDDH/II/SR.45, paras. 6-7; p. 507, para. 29; p. 515, CDDH/II/SR.46, paras. 9-11; p. 518, para. 21; pp. 534-537, CDDH/II/SR.47, paras. 52-70; pp. 597-598, CDDH/II/SR.53, paras. 1-7. *O.R.* XIII, pp. 152-153, CDDH/221/Rev.1, paras. 242-247; p. 190, *id.*, Annex II (Art. 30); pp. 241-244, CDDH/II/314.

Other references

CE/7b, pp. 43-44, 58 and 61 (Arts. 5-6). *CE 1972, Basic Texts*, p. 12 (Art. 26). *CE 1972, Commentaries*, Part I, pp. 53-54 (Art. 26). *CRCE 1972, Report*, p. 28. *CE 1972, Report*, vol. I, pp. 49-50, paras. 1.87-1.89 (Arts. 26 and 26 A); vol. II, p. 5 (Art. 26); pp. 24-25, CE/COM I/1; p. 28, CE/COM I/5-6; p. 29, CE/COM I/8; p. 30, CE/COM I/10. *Commentary Drafts*, p. 38 (Art. 30).

Commentary**General remarks**

- 1081** This article lays down the way in which notifications and agreements concerning medical aircraft should be made. The 1973 draft was very brief, and Committee II developed it considerably. For the sake of the safety of aircraft operating in accordance with such notifications and agreements, it was essential that such matters were made perfectly clear.

Paragraph 1

- 1082** Notifications under Article 25 (*Medical aircraft in areas not controlled by an adverse Party*) are optional and are especially recommended in certain cases. Requests for prior agreements are very strongly recommended for flights referred to in Article 26 (*Medical aircraft in contact or similar zones*); they are required for flights referred to in Article 27 (*Medical aircraft in areas controlled by an adverse Party*); and also required for flights undertaken to search for the wounded,¹ whether they are covered by Article 26 (*Medical aircraft in contact or similar zones*) or by Article 27 (*Medical aircraft in areas controlled by an adverse Party*). Finally they are also required for flights over the territory of a State not Party to the conflict, and for landing or alighting on water in such territory.²
- 1083** However, whether they be optional, recommended in various degrees or obligatory, such notifications or requests for agreement *must*, once they are made, contain a number of elements which are listed in paragraph 1. Such an *obligation regarding the content* of a notification or a request for agreement is logical. Whenever a notification – even if this is of an optional character – is made to the adverse Party, the latter incurs a greater responsibility in case of blunders, since it had been warned. However, it would be wrong and could result in dangerously worsening relations to make accusations based on notifications that had not been sufficiently precise. This is why there is an *obligation* to include the elements that are listed *even for optional notifications*.

¹ Cf. Art. 28, para. 4.

² Cf. Art. 31, para. 1.

- 1084 There are three such elements. The information that must be given is: the “proposed number of medical aircraft”, their “flight plans” (i.e., as precisely as possible their departure and arrival times, their flight path and altitude) which should be as far as possible formulated in accordance with the procedures laid down by the International Civil Aviation Organization³ and their “means of identification” (i.e., the distinctive emblem and signals with which they are equipped).⁴
- 1085 These three points *must* be included in all notifications or requests for agreement although, as indicated in the commentary on Article 30 of the draft, this list is not exhaustive; the Parties sending the notification or the request for agreement may add other elements.
- 1086 In addition, according to the second part of paragraph 1, such notifications or requests for agreement “shall be understood to mean that every flight will be carried out in compliance with Article 28”.
- 1087 In fact, any use of medical aircraft must be in accordance with the provisions of Article 28 (*Restrictions on operations of medical aircraft*). However, as information is communicated in the cases covered by Article 29, it seemed better to Committee II to clearly state that Article 28 (*Restrictions on operations of medical aircraft*) would apply regardless of whether those provisions were mentioned explicitly in the notification or the request for agreement. For example, if there is no mention in a notification or a request for agreement on transport of weapons, that does not mean that one is allowed to act contrary to Article 28 (*Restrictions on the operations of medical aircraft*), paragraph 3. This is self-evident, but the Committee nevertheless considered that it would be useful to emphasize the point. It could even be considered that this provision goes somewhat further: in making a notification or a request for an agreement, a Party to the conflict implicitly indicates that it is perfectly aware of the restrictions laid down in Article 28 (*Restrictions on operations of medical aircraft*), and that it will comply with them.

Paragraph 2

- 1088 As we have seen, the notification made pursuant to Article 25 (*Medical aircraft in areas not controlled by an adverse Party*) is optional. On the other hand, the acknowledgement of receipt of such notification is justifiably compulsory. Indeed, a notification made in accordance with this article does not entail any additional obligation for the Party receiving it – thus it cannot refuse it – but helps it to observe the obligation to respect medical aircraft used outside areas under its physical control, an obligation which falls upon it anyway, independently of any notification. Furthermore, the notification is an additional guarantee for the Party making it that its medical aircraft will not be hit by the adverse Party by mistake. However, in order that such aircraft can really fly with an enhanced

³ Cf. commentary Annex I, Art. 12, *infra*, p. 1273.

⁴ Cf. commentary Art. 18, *supra*, p. 221, and commentary Annex I, Chapters I-III, *infra*, p. 1151.

sense of security, the pilots must know that the notification has been properly received. Thus there is a good reason for the Party receiving the notification to acknowledge receipt and no valid reason for refusing. This is why there is an *obligation*. Moreover, the acknowledgement of receipt should take place “at once”, i.e., as soon as that Party has become aware of the notification. The channels used for such acknowledgement, as for the notification itself, can be either direct, if such direct channels exist, or indirect, if there are none. In this case the Protecting Powers, their substitute or the ICRC could notably serve as a channel of communication.

Paragraph 3

1089 In the situations covered here there is a request for agreement which, if accepted by the adverse Party, would modify the obligations of the latter. Thus it is logical that the procedure is more complicated. In the case of Articles 26 (*Medical aircraft in contact or similar zones*), 27 (*Medical aircraft in areas controlled by an adverse Party*) or 31 (*Neutral or other States not Parties to the conflict*), the adverse Party is requested (Articles 26 – *Medical aircraft in contact or similar zones*, and 27 – *Medical aircraft in areas controlled by an adverse Party*), or a State not Party to the conflict is requested (Article 31 – *Neutral or other States not Parties to the conflict*) to agree to the use, by the Party making the request, of a determined number of medical aircraft equipped with clearly defined means of identification and flying in accordance with an indicated flight plan over areas where such aircraft without an agreement either cannot be used, except at their own risk (Article 26 – *Medical aircraft in contact or similar zones*) or do not have any right to be used (Articles 27 – *Medical aircraft in areas controlled by an adverse Party* and 31 – *Neutral or other States not Parties to the conflict*). In both cases, if the adverse Party or the State not Party to the conflict agrees to the request, it thereby accepts the responsibility for ensuring that its own forces will not endanger aircraft flying in accordance with the agreement.

1090 The reply of the Party receiving the request must be sent “as rapidly as possible”, and no longer “at once”. In fact, although paragraph 2 is simply concerned with acknowledging receipt of information received, the reply to be sent under paragraph 3 may require consultations, and therefore involve a short delay.

1091 Four types of reply are possible:

- Unconditional acceptance of the request, permitting the entry into force of the agreement as soon as the requesting Party receives the acceptance (the latter could still acknowledge receipt of such a positive response for the sake of security).
- Denial of the request, which should in principle be explained, at any rate when coming from the adverse Party. In fact, it should not be forgotten that Article 15 of the First Convention in particular requests Parties to the conflict at all times to “without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care”. A denial of the request, even if it does not contain alternative proposals, should explain the reasons for denial to the requesting

Party, and as far as possible, include indications to help such a Party formulate a request which has a chance of being accepted.

- “Reasonable alternative proposals to the request”.⁵ For example, this could refer to a change in flight plan, or in the number of aircraft permitted to carry out the tasks or any other proposal which makes good sense. An alternative proposal should be made in a positive spirit with the real intention of coming to an agreement. It must not be a delaying tactic or a suggestion which is obviously not going to have any chance of being accepted.
- Finally, an additional condition may be proposed either on its own or together with a proposal for an alternative agreement, viz., a “prohibition or restriction of other flights in the area during the time involved”. One delegate expressed his doubts about this possibility, which “could make those flights conditional upon the prohibition or restriction of all non-medical flights of the adverse Party in the area concerned”. He feared that such a condition might be “drawn up in such a way that the humanitarian aim of the medical flight might be endangered”.⁶ However, this point of view did not prevail. As one delegate stated, the Committee considered that, to prevent any form of abuse in this respect, it was reasonable that the Party to whom the request is addressed, should require the requesting Party to stop all non-medical operational flights “while its own automatic defence equipment was switched off to permit the medical flight”.⁷

1092 If the Party which has submitted the request accepts the alternative proposals – i.e., to modify the agreement, restrict or prohibit other flights during the time concerned, or a combination of these two possibilities – “it shall notify the other Party of such acceptance”. Indeed such notification is essential, since there are new proposals. For the sake of greater security the Party which has received the notification should acknowledge receipt before the agreement is put into operation, even though this is not laid down in Article 29 and is therefore not essential.

1093 No provision has been made in the case that the alternative proposals are not acceptable to the Party which made the first request. In principle, such “toing and froing” between the Parties to the conflict should not be too drawn out. However, there is nothing to prevent this Party from addressing a new request, in which case the procedure laid down in paragraph 3 applies again *ab initio*.

Paragraph 4

1094 The wounded cannot be kept waiting for relief. It is therefore essential that agreements which may be concluded to this end should be made rapidly, as otherwise they generally lose a great deal of their purpose. This is the reason for paragraph 4, which imposes upon the Parties (i.e., the Parties to the conflict, but

⁵ On the meaning of the word “reasonable” as used in this context, cf. commentary Art. 27, para. 2, *supra*, pp. 297-298.

⁶ O.R. XI, p. 535, CDDH/II/SR.47, para. 55.

⁷ *Ibid.*, para. 57.

also States not Parties within the meaning of Article 31 – *Neutral or other States not Parties to the conflict*) the obligation to take the “necessary measures” to ensure that such notifications can be made and agreements can be “rapidly” concluded. The first step is to ensure that a rapid communication channel is permanently open between the Parties to the conflict, whether it is direct or indirect.⁸ However, the Parties must also ensure that requests for agreement are examined without delay by the competent authorities so that a reply and, if necessary alternative proposals, can be rapidly communicated. In this context the word “rapidly” cannot be given a *precise* definition. The speed which can be expected from a Party depends on the circumstances and the technical means available to it. However, as a general rule, this space of time should be only a matter of hours.

- 1095 As regards acknowledgement of the receipt of a notification, this should be sent “at once”, as mentioned above.

Paragraph 5

- 1096 The fact that medical aircraft should not be shot down is part of the instruction that should be acquired in the context of a general and long-term dissemination programme;⁹ the obligation to refrain from firing at any unidentified aircraft flying over one’s own territory, in a combat zone or over enemy territory but within range of one’s own surface-to-air weapons systems, is not a general obligation of international humanitarian law. Such an obligation can only be based on specific agreements which should give rise to precise instructions related to the cases in point. This is why it is particularly important to inform *all those who could, through ignorance, act contrary to the notifications and agreements* concerned here. The expression “the military units concerned” should be interpreted in this sense being understood that it is the responsibility of the Parties to ensure that the information is passed by unit commanders to all persons – airmen, artillery gunners or others – who are in a position to put aircraft flying in accordance with the notifications or agreements in jeopardy.
- 1097 Moreover, it is specified that such units must be instructed “regarding the means of identification that will be used by the medical aircraft in question”. The French text further specifies that they must be so instructed “rapidly” (*rapidement*). This point might seem superfluous at first sight, since the notifications and agreements concerned *must* include the means of identification.¹⁰ Nevertheless, it is not merely a matter of communicating the means of identification to the military units concerned, but of *instructing* them, i.e., clearly explaining how such aircraft can be identified (by distinctive emblem and signals).¹¹
- 1098 It is clear that such dissemination has a *particularly urgent* character. At any rate the word “rapidly” used in the French version of paragraph 5 is not

⁸ On this subject, cf. commentary para. 2, *supra*, p. 310.

⁹ Cf. Art. 83 and its commentary, *infra*, p. 959.

¹⁰ Cf. commentary para. 1, *supra*, pp. 308-309.

¹¹ Cf. commentary Annex I, Chapters II-III, *infra*, p. 1167.

sufficiently precise in this context. For it to be meaningful, the *dissemination* prescribed in paragraph 5 must take place before the start of flights carried out in accordance with the notification or agreement in question. Thus the speed required here depends on the times at which such flights are scheduled.

1099 As regards the timing of such information, the Parties are requested to inform persons who are in a position to put the aircraft concerned in jeopardy, before they have to take any decision relating to them.

Y.S.

Article 30 – Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.
2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.
3. If the inspection discloses that the aircraft:
 - (a) is a medical aircraft within the meaning of Article 8, sub-paragraph (j),
 - (b) is not in violation of the conditions prescribed in Article 28, and
 - (c) has not flown without or in breach of a prior agreement where such agreement is required,the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.
4. If the inspection discloses that the aircraft:
 - (a) is not a medical aircraft within the meaning of Article 8, sub-paragraph (j),
 - (b) is in violation of the conditions prescribed in Article 28, or
 - (c) has flown without or in breach of a prior agreement where such agreement is required,the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

Documentary references

Official Records

O.R. I, Part I, p. 138; Part III, p. 10 (Art. 31). *O.R.* III, pp. 144-147. *O.R.* VI, p. 98, CDDH/SR.39, paras. 38-43. *O.R.* XI, p. 502, CDDH/II/SR.45, para. 6;

p. 515, CDDH/II/SR.46, paras. 9-10; pp. 528-529, CDDH/II/SR.47, paras. 22 and 25; p. 530, para. 31; pp. 539-543, CDDH/II/SR.48, paras. 1-30. *O.R. XII*, pp. 20-27, CDDH/II/SR.57, paras. 6-8, 1-14 and 19-54; pp. 29-31, CDDH/II/SR.58, paras. 2-12; pp. 39-40, CDDH/II/SR.59, paras. 1-11. *O.R. XIII*, pp. 154-155, CDDH/221/Rev.1, paras. 248-252; p. 259, CDDH/235/Rev.1, paras. 34-36; pp. 290-291, *id.*, Annex I (Art. 31); pp. 323-324, CDDH/II/333 (Art. 31); p. 329, CDDH/II/350 (Art. 31, para. 4).

Other references

CE/7b, pp. 44-45; pp. 57 and 61 (Art. 6). *CE 1972, Basic Texts*, p. 12 (Art. 28). *CE 1972, Commentaries*, Part I, pp. 55-56 (Art. 28). *CE 1972, Report*, vol. I, pp. 51-52, paras. 1.95-1.100 (Arts. 28 and 28 A); vol. II, p. 5 (Art. 28); pp. 24-25, *CE/COM I/1*; pp. 28-29, *CE/COM I/6-8. Commentary Drafts*, pp. 38-39 (Art. 31).

Commentary

General remarks

- 1100** In an armed conflict any aircraft of a Party to the conflict flying over an area under the control of the adverse Party – or where elements of the latter’s armed forces are located – constitutes a threat to that Party. The agreements and notifications required for such overflight were examined above (Article 29 – *Notifications and agreements concerning medical aircraft*). The adverse Party may require aircraft to land or alight on water in areas under its control during such overflight, even if there is an agreement. Obviously such aircraft will be required to do so almost automatically in case of flights carried out without, or in contravention of, the terms of an agreement. Finally, a medical aircraft may have to land or alight on water on its own initiative on territory under the control of the adverse Party because of damage, technical difficulties or adverse weather conditions.
- 1101** This article deals with this question as a whole, i.e. with the order which may be given to land or alight on water, with inspection on the ground and with the fate of the aircraft and the treatment of its occupants.

Paragraph 1

- 1102** Aircraft covered in this paragraph are “medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established”, i.e., aircraft in situations provided for in

Articles 27 (*Medical aircraft in areas controlled by an adverse Party*) and 26 (*Medical aircraft in contact or similar zones*), respectively.¹

- 1103 However, it should be noted that, in addition to “areas the physical control of which is not clearly established”, Article 26 (*Medical aircraft in contact or similar zones*) also covers the “parts of the contact zone which are physically controlled by friendly forces” and that aircraft flying over such parts do not come within the scope of Article 30.
- 1104 *All medical aircraft flying over the areas mentioned above* may be ordered to land or to alight on water, regardless of whether the flight has been made in accordance with an agreement, in violation of an agreement, or without an agreement. It is therefore important to emphasize the fact that even a medical aircraft flying in accordance with the terms of an agreement may be ordered to land or to alight on water. This is a provision in the interest of the security of the Parties to the conflict; an agreement guaranteeing that a medical aircraft could not be ordered to land for inspection was considered to entail too great a risk that the benefitting Party might abuse such a guarantee to its own advantage, by using the aircraft for other purposes than the purely medical purposes to which it should be exclusively assigned.
- 1105 The aircraft may be ordered “to land or to alight on water, as appropriate”. Alighting on water clearly refers only to hydroplanes or to amphibious aircraft. Without exception all steps should be taken to ensure that the aircraft can land under adequate safety conditions.
- 1106 If a medical aircraft is ordered to land, this can only be for the clearly specified reason of *permitting inspection*, in accordance with the provisions of the following paragraphs.
- 1107 Finally, there is an *obligation* for medical aircraft flying over the areas mentioned in this paragraph to obey the order to land or to alight on water. An aircraft refusing to comply with such an order may be forced to land, or even as a last resort, be shot down.² It is therefore of paramount importance that the captain of an aircraft receiving such an order to land should heed the *obligation* to comply with it. The lives of his passengers are at stake.³

Paragraph 2

- 1108 Like paragraphs 3 and 4, this paragraph concerns medical aircraft on the ground, in the power of the adverse Party. They may have been “ordered” to land or alight in situations described in paragraph 1, but they may also have landed or alighted *on their own initiative*, because of damage, technical difficulties or adverse weather conditions, or even simply by mistake.

¹ For details on these areas and zones, cf. commentary Art. 26, *supra*, p. 287, and Art. 27, *supra*, p. 293.

² On this subject, cf. commentary Art. 26, para. 1, *supra*, pp. 291-292, and Art. 27, para. 2, *supra*, pp. 295-297.

³ Cf., however, commentary Art. 26, para. 1, second sentence, second part, *supra*, pp. 291-292.

- 1109 As mentioned above in paragraph 1, an aircraft may be ordered to land (or alight) so as to permit inspection. This paragraph specifies that the inspection must be limited to verify particular points described below.
- 1110 An inspection relating to other points, such as the technical characteristics of the aircraft, would therefore be abusive.
- 1111 Moreover, three rules are given, aimed at ensuring the best possible treatment for the wounded and sick in such circumstances, which could be particularly gruelling for them.
- 1112 First, such inspection “shall be commenced without delay” and “shall be conducted expeditiously”. These two factors are both aimed at reducing as far as possible the time that the wounded, sick or shipwrecked in the aircraft have to wait. The first condition is generally addressed to the authorities of the Party undertaking the inspection. They must do all they can to ensure that personnel authorized to carry out the inspection are available at very short notice. This applies in particular, if they wish to investigate this, to personnel with the technical competence to distinguish equipment “intended solely to facilitate navigation, communication or identification” from that intended “to collect or transmit intelligence data”.⁴ The second part of the rule is more particularly addressed to the personnel charged with the inspection; they should carry out their task as rapidly as possible.
- 1113 The second rule is that the wounded and sick may not be required to be removed “unless their removal is essential for the inspection”. The purpose of this rule is also obviously to protect the interests of the wounded and sick. The rule applies neither to the crew nor to shipwrecked persons who may have been taken on board the aircraft and are not wounded or sick. The term “essential” means that the removal is necessary to achieve the purposes for which the inspection may be carried out; for example, in Committee II reference was made to the case that there was suspicion that equipment intended for transmitting information was concealed in the aircraft, and where the wounded and sick might have been used to conceal such equipment.⁵
- 1114 Finally, the third rule should be considered as a general rule of which the first two are only particular applications. The requirement that the inspection should be carried out rapidly, and the wounded and sick should be removed only if their removal is essential, certainly has the aim of ensuring that “the condition of the wounded and sick is not adversely affected by the inspection or by the removal”. The overriding importance of the last rule compared with the two others is clearly revealed by the beginning of the sentence, which requires the Party concerned to “in any event ensure” that such an adverse effect does not occur, i.e., whether the wounded are removed or whether they stay on board. In more general terms, it could even be said that these three rules merely specify for this particular situation the general obligation given in Article 10 (*Protection and care*) to respect and protect the wounded, sick and shipwrecked and treat them humanely.

⁴ Cf. commentary Art. 28, paras. 1 and 2. *supra*, pp. 301-303.

⁵ Cf. O.R. XI, p. 542, CDDH/II/SR.48, para. 22. Cf. also commentary Art. 31, para. 3, *infra*, pp. 331-332.

- 1115 In fact it is clear that, in general, removal is harmful (which is the reason for the second rule quoted above) particularly if the inspection as required is conducted expeditiously. However, the possibility that it might be *in the interests of the wounded and sick* to get them off the aircraft cannot be excluded. As stated in Committee II, there are cases when leaving the wounded and sick on board could be even more harmful to their state of health than their removal would be.⁶ The example given was of an aircraft landing in a country with a tropical climate.
- 1116 As regards responsibility for the *removal*, this obviously does not end with merely transporting the wounded and sick from the aircraft, but also concerns finding them provisional accommodation in a place where they can be given adequate care.

Paragraph 3

- 1117 This paragraph lists the three elements which are to be investigated during the inspection and are determining factors in deciding the fate of the aircraft and the treatment of its occupants.
- 1118 The first element is the question whether the aircraft really is a medical aircraft as defined in Article 8 (*Terminology*), sub-paragraph (j). Thus it must be a medical transport by air which is “under the control of a competent authority of a Party to the conflict” and “assigned exclusively to medical transportation”, i.e., the transportation of the “wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol”.⁷
- 1119 The second element to be ascertained during the inspection is that the aircraft is not in violation of the conditions prescribed in Article 28 (*Restrictions on operations of medical aircraft*). In this respect, as mentioned above, it might be argued that the restrictions imposed by the first three paragraphs of Article 28 (*Restrictions on operations of medical aircraft*) are already covered by the actual definition of medical aircraft, as this must be assigned *exclusively* to medical purposes.⁸ Apart from this, reference should be made to the whole of the commentary on Article 28 (*Restrictions on operations of medical aircraft*).⁹
- 1120 Finally, the third element is the question whether the aircraft has “flown without or in breach of a prior agreement where such agreement is required”. Thus this refers only to cases where agreement is *required*, viz.:
- *first*, flights over contact or similar zones for the purpose of searching for the wounded, sick or shipwrecked¹⁰ (an agreement for flights over such zones for other medical purposes being strongly recommended but *not required*);

⁶ Cf. O.R. XI, pp. 541-542, CDDH/II/SR.48, paras. 18 and 24.

⁷ Cf. Art. 8, sub-paras. (f), (g), and (j), and, for further details, the commentary thereon, *supra*, pp. 130-132.

⁸ Cf. commentary Art. 8, sub-paras. (g) and (j), *supra*, pp. 130-132.

⁹ *Supra*, p. 299.

¹⁰ Cf. Art. 26 and Art. 28, para. 4.

- *secondly*, flights over areas under the control of the adverse Party;¹¹
- *thirdly*, flights over areas under the control of the adverse Party for the purpose of searching for the wounded, sick and shipwrecked, in which case the agreement must specify permission to carry out such search in such areas.¹²

1121 The flight may have been made “without” or “in breach of” a prior agreement. Only the latter case could be problematic in so far as there may have been a lack of specification as to the limits beyond which the agreement could be considered as violated. In principle the agreement itself should be sufficiently flexible, particularly as regards the flight duration, to take into account the unknown factors involved in aerial navigation. At any rate the principle of good faith should be applied to determine whether there has been any real violation of the agreement.

1122 Finally, the most difficult point of the paragraph concerns the term “has flown”. The French text uses the term “entrepris”, which could indicate that an aircraft which had made a flight without or in breach of the terms of a required agreement, doing so because of damage, technical difficulties or weather conditions but *without the intention of committing a violation*, would not be in conflict with the condition prescribed in paragraph 3 (c). However, the amendment which was the inspiration for the article as finally adopted was in English, and the English text, by using the term “has flown”, removes any doubt that might exist in this respect¹³. Thus it is clearly the objective fact that a flight has been carried out without or in breach of the terms of an agreement that is the determining factor here, *irrespective of the will* to fly without an agreement or in conflict with such an agreement.

1123 In fact, this conclusion is in line with the First Convention of which the final paragraph of Article 36 states that:

“In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.” [All persons mentioned in this paragraph are, of course, members of the armed forces under the régime of the Conventions (Y.S.).]

1124 When all three elements mentioned above apply, the medical aircraft “shall be authorized to continue the flight without delay”. The continuation of the flight will thereupon be subject only to the usual technical requirements prescribed also for civilian flights. It will be up to the captain to ascertain that his aircraft is able to continue the flight and that the necessary facilities are made available by the local authorities for the flight to continue in normal conditions; there is an

¹¹ Cf. Art 27.

¹² Cf. Art. 28, para. 4.

¹³ Cf. O.R. III, p. 150 (French version) and p. 146 (English version), CDDH/II/82/Rev.1, draft Article 31. Paragraphs 3, 4 and 5 of Article 31 (present Art. 30) proposed in this amendment, reveal that the original English expression “has flown”, had already been translated by “a entrepris son vol”. Thus this is undoubtedly a matter of imprecise translation and not a question of hesitation in Committee II on a point of substance.

obligation to allow the aircraft to leave and no obstacles may be placed in the way of such departure.

- 1125** As regards the occupants of the aircraft, in principle they must also be authorized to continue their flight. This rule was laid down in the 1973 draft without any restrictions. Its scope was later limited to those occupants (whether they are wounded, sick or shipwrecked, or medical or religious personnel) belonging either to the adverse Party to that which carried out the inspection, or to a State not involved in the conflict.¹⁴ On the other hand, the Rapporteur of the Drafting Committee of Committee II stated that it “would have been unreasonable and had clearly not been intended by the original drafters” to prohibit a Party to the conflict from taking “persons belonging to its own side from an aircraft landing on its territory or on territory controlled by it”.¹⁵ In this respect it should be noted that a Party cannot be prevented from keeping its own nationals, even against their wishes, as the latter cannot seek political asylum in the aircraft, which does not enjoy extraterritorial rights. For the same reason, the other occupants of the aircraft have the *right* to continue their flight, but they are not under an *obligation* to do so. As a matter of fact, it is quite clear that the captain of the aircraft authorized to continue his flight cannot *oblige* the other occupants to remain in the aircraft. There is nothing to prevent nationals of a State not involved in the conflict to request admission into the territory of the Party which carried out the inspection, nor could even nationals of the adverse Party – that to which the aircraft belongs – be prevented from seeking political asylum. Finally, the article does not mention the case of seriously wounded persons whose condition is such that they cannot continue to travel. Insofar as such a wounded person is no longer able to express himself, the decision will be up to the captain of the aircraft. The wounded person left behind in this way, provided that he is not a national of a co-belligerent State or a State which is not involved in the conflict and which has normal diplomatic representation with the Party to which he is entrusted, will then be covered by the Conventions (First and Third, if he is a member of the armed forces or has equivalent status; Fourth, if he is a civilian) and by Protocol I.

Paragraph 4

- 1126** This paragraph deals with the case in which inspection discloses that at least *one* of the three conditions which should be verified is not fulfilled. As paragraph 3 was concerned with the situation in which each of the three conditions is fulfilled, paragraph 4 already applies in fact if only one of them is not fulfilled.¹⁶
- 1127** When one of these conditions is not fulfilled, paragraph 4 indicates what *may* happen to the aircraft and what *must* happen to its occupants.
- 1128** “The aircraft may be seized”. This is therefore an option for the Party into whose hands the medical aircraft or alleged medical aircraft of the adverse Party

¹⁴ On the exact meaning of the expression “a neutral or other State not Party to the conflict”, cf. commentary Art. 2, sub-para. (c), *supra*, pp. 61-62.

¹⁵ O.R. XII, p. 21, CDDH/II/SR.57, para. 7.

¹⁶ On these three conditions, cf. *supra*, pp. 319-320.

(if the inspection discloses that it is not, in fact, such an aircraft) has fallen. It is to be hoped that this option will rarely be used. Though it is easy to understand that this right will be used unhesitatingly in cases where the aircraft has deliberately flown in violation of the provisions of the Protocol or of a prior agreement, it seems that such a Party should carefully consider the possibility of authorizing aircrafts to continue their flight if they have not wilfully committed a breach but were the victims of damage, technical problems or adverse weather conditions. In the event that the aircraft is authorized to leave, the fate of its occupants will be established in accordance with our comments on paragraph 3.¹⁷

1129 In the case that the seized aircraft had been assigned as a permanent medical aircraft, i.e., that it was *assigned exclusively to medical purposes for an indeterminate period*,¹⁸ it may only be used thereafter as a medical aircraft by the Party which has seized it. There is no limitation on this obligation, and it therefore lasts until the end of the conflict concerned.

1130 No mention is made regarding the use to be made of an aircraft when the inspection has disclosed that it is not a medical aircraft, nor is it mentioned what is to be done with a *temporary* medical aircraft, i.e., one “devoted exclusively to medical purposes for limited periods”.¹⁹ In both cases the aircraft may be assigned to purposes other than medical purposes. Obviously the distinctive emblem must be carefully removed in this case and the means of identification laid down in the Protocol for medical aircraft may no longer be used.

1131 As regards the occupants of a seized aircraft, they must be treated “in conformity with the relevant provisions of the Conventions and of this Protocol”. This very general provision requires an explanation. We will attempt to summarize possible categories of occupants with the provisions of the Conventions and the Protocol applicable to each of them.²⁰

- a) Nationals of a co-belligerent State or of a State which is not involved in the conflict and which has normal diplomatic relations with the State in whose power they are, no longer enjoy the protection of the Conventions and of the Protocol, apart from Article 75 (*Fundamental guarantees*) of the latter.²¹ Their fate must be settled between the States concerned. Apart from this, the provisions of human rights law obviously continue to apply.
- b) Nationals of the Party seizing the aircraft, if they are wounded or sick, must be treated humanely and receive the care to which this category is entitled.²² If they are imprisoned or prosecuted for a reason related to the conflict – particularly if they are considered to be traitors – Articles 11 (*Protection of*

¹⁷ Cf. *supra*, pp. 320-321.

¹⁸ Cf. Art. 8, sub-para. (k).

¹⁹ *Ibid.*

²⁰ For the sake of simplification, we will not deal with the situation, which is exceptional nowadays, where some of the occupants are nationals of a State which is not a Party to the Conventions. However, in this respect it should be noted that the fundamental rules of the Conventions are presently recognized as customary law. Thus they would apply even to this category of occupants.

²¹ Cf. commentary Art. 75, para. 1, *infra*, pp. 866-871.

²² Cf. especially Art. 10 of the Protocol.

persons) and 75 (*Fundamental guarantees*) of the Protocol will also apply to them.²³ If they are neither wounded nor sick and are not imprisoned nor committed to trial, they will no longer benefit from the protection of the Conventions in their relations with their own Party. As stated in subparagraph (a), the protection afforded by human rights law obviously continues to apply.

- c) The civilian wounded, sick and shipwrecked belonging to the adverse Party, or to a co-belligerent State or a State not involved in the conflict, but not having normal diplomatic relations with the Power into whose hands they have fallen, will come within the scope of the Fourth Convention – particularly Section II of Part III and if they are interned, of Section IV – and of the Protocol (particularly Section III of Part IV). Moreover, if they are at the same time wounded or sick, they must also be treated in accordance with those provisions of the Conventions and the Protocol which protect this category of victims.
- d) The military wounded, sick and shipwrecked belonging to the adverse Party will be prisoners of war and be covered by the Third Convention. If they are at the same time wounded or sick they must also be treated in accordance with the provisions of the Conventions and the Protocol protecting such victims.
- e) The wounded, sick and shipwrecked who do not fall in one of the categories mentioned above – such as mercenaries – will at least enjoy the fundamental guarantees laid down in Article 75 (*Fundamental guarantees*), apart their protection as sick, wounded or shipwrecked.
- f) The crew of the medical aircraft, whether this is the personnel required for the functioning of the aircraft, or the personnel charged with caring for the wounded and sick, are considered as medical personnel in the sense of the Protocol.²⁴ Medical personnel who, though not employed to take care of the wounded and sick on board the aircraft, are transported by the latter, fall in the same category. The rules of the Conventions and the Protocol concerning medical personnel apply to all such persons (particularly Chapter IV of the First Convention and Article 15 of the Protocol – *Protection of civilian medical and religious personnel*).
- g) If the inspection discloses that the aircraft is not actually a medical aircraft, every member or alleged member of the medical personnel responsible for such abuse will lose his status of medical personnel and, depending on his situation, will be considered as a prisoner of war or simply as a civilian, protected by the Fourth Convention or not, depending on his nationality.²⁵ He is further covered by Article 75 of Protocol I (*Fundamental guarantees*) particularly if he is committed to trial and does not enjoy any better protection. In either case he may be tried and convicted for such a breach of international humanitarian law which, depending on the circumstances, may even be considered as a grave breach.²⁶

²³ On this subject, cf. commentary Art. 11, para. 1, *supra*, p. 152, and Art. 75, para. 1, *infra*, pp. 866-871.

²⁴ Cf. Art. 8, sub-para. (e).

²⁵ Cf. Art. 4, Fourth Convention.

²⁶ Cf. commentary Art. 85, para. 3 (f), *infra*, pp. 998-999.

- 1132 Finally, it should be noted that a debate took place in Committee II regarding the treatment to be given the wounded and sick. The main amendment to Article 31²⁷ (the present Article 29 – *Notifications and agreements concerning medical aircraft*) distinguished between the case that inspection revealed that the aircraft was not a medical aircraft or was in violation of the provisions of the present Article 28 (*Restrictions on operations of medical aircraft*) and the case that the aircraft had flown without or in breach of an agreement. In the last case it was provided that the aircraft could be seized only “if the seizing Party was in a position to provide adequate medical facilities for the wounded and sick aboard”. However, this requirement seemed unacceptable to some delegates, who considered that this discriminated against countries which do not possess “the level of technical development required to satisfy the conditions of the proposed text”.²⁸ This was countered with a claim that the expression “adequate facilities for the necessary medical treatment” should be understood to mean “the level of facilities accorded by a given country to its own citizens”.²⁹ This restriction has admittedly disappeared from the text finally adopted, but the general obligation remains to treat all occupants, i.e., also the wounded and sick, “in conformity with the relevant provisions of the Conventions and of this Protocol”. When this article was adopted in Committee, one delegate emphasized the fact that the general obligation of Article 10 (*Protection and care*), according to which the wounded and sick should “be treated humanely and in all circumstances, and that they should receive to the fullest extent practicable and with the least possible delay, the medical care required by their condition”, obviously also applied in the context of this paragraph.³⁰ However, it should be noted that there is no need to fear discrimination against countries that are technically underdeveloped, because the requirement is that such States act *to the best of their ability*.³¹
- 1133 It remains to be said that a Party to the conflict truly unable to ensure the treatment required by the condition of the wounded and sick – for example, because personnel or hospital facilities are overburdened – should allow a medical aircraft to continue on its way, or find another way of transferring such wounded and sick rapidly, without endangering their health, to a place where adequate medical care can be administered.

Y.S.

²⁷ O.R. III, p. 146, CDDH/82/Rev.1.

²⁸ O.R. XII, p. 23, CDDH/II/SR. 57, para. 25.

²⁹ *Ibid.*, p. 24, para. 28.

³⁰ Cf. *ibid.*, p. 40, CDDH/II/SR.59, para. 11.

³¹ On this subject, cf. commentary Art. 10, para. 2, *supra*, pp. 147-148, and Art. 11, para. 1, *supra*, pp. 154-156.

Protocol I

Article 31 – Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.
2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.
3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.
4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take

part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

Documentary references

Official Records

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CE/7b, pp. 44 and 58-59 (Arts. 7-8). *CE 1972, Basic Texts*, pp. 12-13 (Art. 29). *CE 1972, Commentaries*, Part I, pp. 57-59 (Art. 29). *CE 1972, Report*, vol. I, pp. 50-52, paras. 1.101-1.105 (Arts. 29 and 29 A); vol. II, p. 5 (Art. 29); pp. 24-25, *CE/COM I/1*; pp. 28-29, *CE/COM I/6. Commentary Drafts*, pp. 39-40 (Art. 32).

Commentary

General remarks

- 1134 The First Convention (Article 37) and the Second Convention (Article 40) contain a similar article about flights over neutral countries¹ by medical aircraft, landing in such countries and the consequences. On the other hand, the question of overflight and landing by *civilian* aircraft is not broached in the Conventions.
- 1135 Article 31 is aimed at extending the benefits of the Conventions to *civilian* medical aircraft which, under the régime of the Protocols, are subject to the same

¹ For the exact meaning of the expression “neutral and other States not Parties to the conflict”, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61. For the sake of simplicity, the term “States not Parties to the conflict” is used below to cover the whole expression.

rules as military medical aircraft. Moreover, it provides certain details which were not contained in the Conventions, particularly with regard to landing.

Paragraph 1

- 1136 This paragraph lays down the general rules for flights over the territory or calls in the territory of a State not a Party to the conflict. These rules are similar to those laid down for medical aircraft flying over an area under the physical control of the adverse Party,² except that a voluntary call made under an agreement is not even considered in the territory of the latter, while it has been provided for in the context of this article. However, whether they merely want to fly over the State not a Party to the conflict or whether they wish to land or alight on water in its territory, medical aircraft can lawfully do so only if there is a prior agreement, as in the case of flights over areas under the control of the adverse Party.
- 1137 As the requirement of an agreement provided for in Articles 26 (*Medical aircraft in contact or similar zones*), 27 (*Medical aircraft in areas controlled by an adverse Party*), 28 (*Restrictions on operations of medical aircraft*), paragraph 4, the request for an agreement mentioned in this Article 31 is subject to the restrictions provided for in Article 28 (*Restrictions on operations of medical aircraft*), paragraphs 1-3. On the other hand, it is not subject to those provided for by Article 28 (*Restrictions on operations of medical aircraft*), paragraph 4, whereas prohibited search for the wounded, sick and shipwrecked being not envisageable over the territory of a State not Party to the conflict. Logically speaking, the points indicated in Article 29 (*Notifications and agreements concerning medical aircraft*), paragraph 1, have also to be mentioned. The rules of procedure also contained in Article 29 (*Notifications and agreements concerning medical aircraft*) apply either to a Party to the conflict or to a State not a Party to the conflict, when they wish to conclude an agreement, in spite of the fact that the dialogue between such States or Parties (particularly through the normal diplomatic channels) should not in principle pose any special problems.
- 1138 When there is an agreement about overflight or calls, medical aircraft acting in accordance with the agreement must be respected. This is self-evident, as it is the very aim of the agreement, but it obviously implies, as specifically presented in Article 29 (*Notifications and agreements concerning medical aircraft*), paragraph 5, that the authorities concerned must inform all the services concerned and indicate to them the means of identifying the aircraft which they are bound to respect, specifying the flights and any landing or alighting on water which they must allow without offering any obstacles.
- 1139 It should be noted in passing that the word “however” at the beginning of the second sentence is not very appropriate. In fact, the second sentence does not constitute an exception to the first sentence as a whole, but supplements it by being more specific. Thus the text is to be read as though this word is not there,

² On this, cf. commentary Art. 27, *supra*, p. 293.

as the Conference did not have any intention of affecting the substance of the matter. It was merely an inaccurate use of language which was left to stand. At most it can be seen as an intention to emphasize the fact that there is no *obligation* to respect aircraft flying, landing or alighting on water without or in deviation from the terms of an agreement, as confirmed in the rest of the article.

- 1140 As in the case when they fly over “areas physically controlled by an adverse Party” or “areas the physical control of which is not clearly established”, medical aircraft may be ordered to land or if need be, to alight on water, even when they are flying over the territory of a State not a Party to the conflict in accordance with a prior agreement.³
- 1141 In this situation, the responsibility for taking all measures required to guarantee a safe landing or alighting on water, which is incumbent upon a State giving the order in any case, is all the greater.

Paragraph 2

- 1142 The first sentence is similar to the first sentence of Article 27 (*Medical aircraft in areas controlled by an adverse Party*), paragraph 2.
- 1143 However, there are a few slight differences in the wording. We shall note in particular that no reference is made regarding the agreement without which or in breach of which the flight is carried out. But this is without substantial consequences, as this agreement, like the one mentioned in Article 27 (*Medical aircraft in areas controlled by an adverse Party*) is subject to the rules laid down in Article 29 (*Notifications and agreements concerning medical aircraft*).
- 1144 The obligation upon the aircraft in the situation referred to in Article 27 (*Medical aircraft in areas controlled by an adverse Party*) is to “make every effort to identify itself and to inform the adverse Party of the circumstances”. The corresponding obligation in Article 31 is to “make every effort to give notice of the flight and to identify itself”. It was proposed in Committee II to replace the term *to give notice* in Article 31, as some did not consider it to be very clear in this context, and no objection was raised against this proposal.⁴
- 1145 The fact that this term was finally retained seems to have been unintentional and not an attempt to distinguish the obligation as formulated here from that of Article 27 (*Medical aircraft in areas controlled by an adverse Party*), paragraph 2. In any case, there is no practical difference for the aircraft. If it gets involved in an illegal flight despite itself and is therefore in danger of being shot down, it should do all it can to inform the State or the Party over whose territory it is flying, of the circumstances.
- 1146 Thus there is no substantive difference between the first sentence of paragraph 2 of Article 27 (*Medical aircraft in areas controlled by an adverse Party*) and the corresponding provision in Article 31.⁵

³ For the reason for this provision. *cf.* commentary Art. 30, para. 1, *supra*, p. 316.

⁴ *Cf.* O.R. XI, pp. 545-546, CDDH/II/SR.48, paras. 39-41 and 43.

⁵ On this subject, *cf.* commentary Art. 27, *supra*, pp. 295-296, which *mutatis mutandis* also applies here.

- 1147 The second sentence of paragraph 2 is virtually identical to the second sentence of paragraph 2 of Article 27 (*Medical aircraft in areas controlled by an adverse Party*).⁶ However, it should be mentioned that in relation to Article 31, the possibility that a State not a Party to the conflict might resort to an attack, mentioned here specifically as it is in Article 27 (*Medical aircraft in areas controlled by an adverse Party*) gave rise to a debate of some significance. For this reason the paragraph was actually not adopted by consensus in Committee II, but by vote.⁷
- 1148 It will be noted that according to both Article 37 of the First Convention and Article 40 of the Second Convention, medical aircraft flying over the territory of a State not a Party to the conflict “will be immune from attack” only during flights that are in accordance with a prior agreement. However, the commentary on the draft presented at the Conference of Government Experts in 1972 considered the sentence containing these terms to be shocking for its brutality, and did not consider that it had a place in a humanitarian convention.⁸
- 1149 From the discussions in Committee II we first quote that “the word ‘attack’ does not mean to shoot down”,⁹ that “an order to attack implied many things other than shooting down”,¹⁰ and that “an attack was only the last step in a series of measures”.¹¹ However, it cannot be denied that the possibility of shooting down the aircraft was left open as a last resort. The fact that nowadays “a single aircraft could wipe out an entire city should be the first point to consider”, according to one delegate,¹² was probably a determining factor in this respect.

Paragraph 3

- 1150 The first sentence indicates that in *all cases* where a medical aircraft of a Party to the conflict lands in the territory of a State not a Party to the conflict, the latter can subject the aircraft to inspection. Thus this applies when the aircraft lands without a prior agreement; or when it lands after an order to do so, following a flight carried out without or in deviation from the terms of an agreement. It also applies for those cases in which landing or alighting on water is provided for in the agreement, and those where the State not Party to the conflict exercises its right to order the medical aircraft to land or to alight on water, even if it was flying in accordance with an agreement.¹³ Thus a medical aircraft of a Party to the conflict flying over the territory of a State not Party to the conflict should know that it may at any time be subject to inspection and this possibility should be one more important deterrent discouraging the wrongful use of such aircraft. When

⁶ Again, cf. commentary Art. 27, *supra*, pp. 296-298.

⁷ Cf. O.R. XII, p. 259, CDDH/235/Rev.1, para. 37.

⁸ CE 1972, *Commentary*, Part I, p. 58 (Art. 29, paras. 1-3).

⁹ O.R. XII, p. 35, CDDH/II/SR.58, para. 34.

¹⁰ *Ibid.*, para. 36.

¹¹ *Ibid.*, p. 36, para. 44.

¹² *Ibid.*, p. 33, para. 19.

¹³ Cf. para. 1, last sentence, and the commentary thereon, *supra*, p. 328.

a medical aircraft landing on the territory of a State not a Party to the conflict has not done anything wrong, it is quite clear, as the text shows, that such a State has the *option* to carry out an inspection, but is not obliged to do so.

- 1151 On the other hand, it might seem that the law of neutrality could impose some *obligation* to carry out an inspection when the aircraft which has landed, has done so either on its own initiative without a prior agreement, or had been ordered to do so following a flight made without or in deviation from the terms of an agreement. In fact, in such cases the risk that the aircraft has abused the distinctive emblem for military purposes is greater. It will be found that the Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907 particularly prescribes for neutral Powers (which should be understood to mean all “neutral and other State not Party to the conflict” in the sense of the Protocol) that they should not tolerate in their territory movements of foreign troops or convoys of ammunition or supplies, or even the erection of “a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea” (*cf.* Articles 2, 3 and 5 of that Convention).¹⁴ Thus to carry out an inspection in such cases seems to be an elementary precaution for a State not Party to the conflict, as the only means that can ensure that it is fulfilling its obligations under the law of neutrality. Moreover, in this respect reference can be made to Article 14 of the above-mentioned Hague Convention, which permits a neutral Power to authorize the passage over its territory of convoys of the sick and wounded on condition that they include “neither personnel [*i.e.*, able-bodied personnel] nor war material” and that “whatever measures of safety and control are necessary for the purpose” are taken.
- 1152 As regards the inspection, this should have a very specific aim, namely, *to determine whether it is in fact a medical aircraft*. It must be limited to this purpose and investigations made for other purposes, such as, for instance, commercial ones, would be wrong.
- 1153 As regards the question of determining whether the aircraft is in fact a medical aircraft, this was examined above.¹⁵
- 1154 As compared with inspections under Article 30 (*Landing and inspection of medical aircraft*), paragraphs 3 and 4, two of the three points listed are left out. There is no requirement to ascertain, firstly, whether the aircraft is in violation of the conditions prescribed in Article 28 (*Restrictions on operations of medical aircraft*); and secondly, whether it has flown without or in breach of a prior agreement.
- 1155 The fact that Article 28 (*Restrictions on operations of medical aircraft*) is not mentioned is without important consequences. Paragraph 1 and to some extent paragraph 2 apply principally to the relations between a medical aircraft belonging to a Party to the conflict and the adverse Party. As regards paragraph 4, the text itself indicates that it refers only to flights in contact or similar zones

¹⁴ It is generally agreed that a large part of this convention now constitutes customary international law.

¹⁵ *Cf.* commentary Art. 30, para. 3, *supra*, p. 319.

or in areas physically controlled by the adverse Party. However, aircraft flying over neutral territory as a convenient way of reaching enemy territory in order to collect or transmit intelligence data, is not only prohibited by Article 28 (*Restrictions on operations of medical aircraft*), paragraphs 1 and 2, but is also a breach of the law of neutrality. Further, aircraft carrying equipment intended for collecting or transmitting intelligence data, as prohibited by Article 28 (*Restrictions on operations of medical aircraft*), paragraph 2, and carrying other armaments than those listed in Article 28 (*Restrictions on operations of medical aircraft*), paragraph 3, would no longer even be covered by the definition of medical aircraft¹⁶ as set out in Article 8 (*Terminology*), sub-paragraphs (f), (g) and (j). Thus the conclusion of the inspection would be that the aircraft is not a medical aircraft, with all the attendant consequences.

- 1156 On the other hand, the fact that there is no requirement that one of the aims of the inspection should be to verify whether the aircraft has made the flight without or in violation of the terms of the agreement constitutes a significant difference as compared with the inspection provided for in Article 30 (*Landing and inspection of medical aircraft*). As the final sentences of this paragraph confirm, it shows that unlike a Party to the conflict which has in its power a medical aircraft belonging to the adverse Party, a State not Party to the conflict does not have the right to seize a medical aircraft for the sole reason that it has flown over its territory or has landed there without or in violation of the terms of an agreement. The obviously very different relations between a Party to the conflict and the adverse Party, compared with those between a Party to the conflict and a State not Party to the conflict, justify this relaxation of the rule.
- 1157 *The second, third and fourth sentences* of the paragraph, which determine the manner in which the inspection should be carried out in order to safeguard the condition of the wounded and sick as far as possible, are similar to the second, third and fourth sentences of Article 30 (*Landing and inspection of medical aircraft*), paragraph 2.¹⁷ The only difference between these two articles on this subject lies in the reference in Article 31 to the “Party operating the aircraft”, whose wounded and sick shall not be removed from it unless their removal is essential for the inspection. In fact, these three rules of procedure have the sole aim, as we have already recalled several times, of safeguarding the condition of the wounded and sick. This is included in Article 31 taking into account the fact that, as a general rule, the other wounded and sick have to be removed from the aircraft in any case, and that it is therefore preferable to take them immediately to somewhere adequately equipped for their care. The reason for this provision is to avoid as far as possible any pointless transportation of the wounded and sick. Thus, under Article 31 every effort should be made to avoid removing the wounded and sick from the aircraft unless such removal is justified by the inspection or by their condition. This applies just as much to Article 30 (*Landing and inspection of medical aircraft*), as it applies to Article 31. The wounded and sick should, therefore, depending on each individual case, stay on board or should

¹⁶ Cf. commentary Art. 28, *supra*, p. 299.

¹⁷ On this subject, cf. commentary Art. 30, *supra*, pp. 317-319.

have the choice to remain in the aircraft if it is allowed to continue the flight at the end of the inspection.

1158 *The fifth and sixth sentences determine the fate of the aircraft and that of its occupants.*

1159 We will first examine the case of the aircraft. “If the inspection discloses that the aircraft is in fact a medical aircraft” in the sense of the Protocol, it must in any case be allowed to continue the flight. As mentioned above, the fact that it has flown over the territory of a State not Party to the conflict, or landed on such territory, without permission or in violation of an agreement, is not a sufficient reason to detain it. On the other hand, there is nothing to prevent the State not a Party to the conflict from making a protest to the Party to which the aircraft belongs, and to take all possible steps to prevent such an incident occurring again, particularly if the flight over its territory was not justified by *force majeure*, but resulted from a decision taken deliberately. An aircraft permitted to leave will be given “reasonable facilities” for the continuation of the flight, i.e., as far as possible, it will be given all the technical help needed for the safety of the flight. Although not explicitly stated, a State allowing an aircraft to leave must also give the appropriate medical assistance to ensure the adequate treatment of the wounded and sick during the flight as far as it is able to do so. This obligation follows, in particular, from Article 19 (*Neutral and other States not Parties to the conflict*).¹⁸

1160 If the inspection discloses that the aircraft “is not a medical aircraft” in the sense of the Protocol, it *must* be seized. Thus this provision is stricter than that laid down in Article 30 (*Landing and inspection of medical aircraft*) which, in a similar situation, leaves the adverse Party to that to which the medical aircraft belongs, the *choice* whether or not to seize the aircraft. The reason for this difference is perfectly logical. In the case where the adverse Party detains the aircraft there is only a bilateral relationship. There is nothing in humanitarian law that aims to prevent a Party to the conflict from being more generous vis-à-vis the adverse Party than the law prescribes. On the other hand, when the aircraft is in the hands of a State not Party to the conflict, there is a trilateral relationship. By acting too liberally vis-à-vis one Party to the conflict, the State not Party to the conflict would put the other Party at a disadvantage. Moreover, the possibility of choosing could place such a Party in an embarrassing situation vis-à-vis one or other of the Parties to the conflict. For this reason there is an obligation to seize the aircraft in the situation envisaged here. It will be shown, for that matter, that paragraph 5 of this article is concerned with the same problem.¹⁹ Moreover, it is worth noting that this rule also flows from Article 5 of the 1907 Hague Convention V, on neutrality.

1161 We will now deal with the delicate problem of the fate of the passengers.

1162 If the aircraft is permitted to continue its flight it may do so “with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict”. Thus it is the duty of States not

¹⁸ On this subject, *cf.* commentary Art. 19, *supra*, p. 237.

¹⁹ *Cf. infra*, p. 337.

Parties to the conflict to detain certain occupants. However, the question could also be asked whether the other occupants should be *obliged* to continue the flight.

1163 The “rules of international law applicable in armed conflict” referred to here are the relevant provisions of the above-mentioned Hague Convention²⁰ Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Reference is also made indirectly to it in Articles 37 of the First Convention and 40 of the Second Convention.²¹

1164 Article 14 of this Hague Convention deals with the passage over neutral territory of “the sick and wounded belonging to the belligerent armies”. The provisions of that article should apply here by analogy. Nevertheless, one might wonder whether a distinction should not be made between aircraft which have landed without an agreement or because they have been ordered to do so, following a flight carried out without or in violation of the terms of an agreement, and aircraft which have been ordered to land for verification purposes, even though they were flying in accordance with an agreement. In fact, in the latter case, the decision whether or not to order the aircraft to land is left to the discretion of the State not Party to the conflict, and at first sight it might seem inequitable that the fate of some of its occupants should depend on such discretionary power. However, the deliberations in Committee II did not show any intention of making such a distinction. Moreover, Parties to a conflict which conclude an agreement for overflight of territory of a State not Party to the conflict by a medical aircraft know that such aircraft may be ordered to land.²² Finally, a State not Party to the conflict should act in the same way vis-à-vis all the belligerents.²³ For all these reasons it must be admitted that Article 14 applies by analogy in all cases where a medical aircraft belonging to a Party to the conflict lands in the territory of a neutral State.

1165 Article 14, which deals only with the military wounded and sick, makes two requirements of a State not Party to the conflict. First, to guard the wounded and sick of the adverse Party to that to which the aircraft belongs. Thus it must guard such wounded, sick and shipwrecked persons who would otherwise become prisoners of war. Secondly, it must guard the wounded and sick of the Party to which the aircraft belongs, if these *are committed to its care*, i.e., in practical terms, those whom the captain of the aircraft, after consulting medical personnel, considers are unable to endure the continuation of the flight. In the first case it therefore depends on a control to be carried out by the State not Party to the conflict whether they stay behind. In the second case it depends on the decision of the captain of the aircraft. All wounded, sick and shipwrecked persons who remain behind must be guarded by the State not Party to the conflict “so as to ensure their not taking part again in the military operations”.²⁴ Insofar as the

²⁰ Cf. *supra*, p. 330.

²¹ Cf. *Commentary I*, p. 296.

²² Cf. *supra*, p. 328.

²³ Cf. *commentary* para. 5, *infra*, p. 337.

²⁴ In some cases they may be repatriated before hostilities have ceased. On this subject, cf. Third Convention, Part IV, Section I, in particular Art. 110.

State not Party to the conflict is a Party to the First Convention and to Protocol I, the relevant provisions of these instruments will be applied to them by analogy.²⁵

- 1166** Except for one specific category which is discussed below, other occupants of the aircraft are not comparable to the persons referred to in the Hague Convention, and it would be abusive to apply this Convention by analogy. With regard to such persons, it suffices to say that they are not covered by the law of neutrality but by the rules of human rights law and by the national legislation of the State where the persons concerned are situated. Thus the determining factor should be the free will of the persons involved. The medical aircraft does not enjoy extraterritorial rights and the crew have no right to detain the occupants against their will.
- 1167** With regard to civilian wounded or sick who are unable to express their will, but whose condition does not require them to be removed from the aircraft, a logical approach should be adopted. If their nationality is that of the Party to which the aircraft belongs, they should continue the flight. If their nationality is that of the adverse Party, they should be removed from the aircraft. If they are nationals of the State not Party to the conflict on the territory of which the aircraft has landed, they will obviously be removed from the aircraft, but, if they are nationals of another State not Party to the conflict, their fate should be determined in agreement between the captain of the aircraft and the authorities of the State on the territory of which the aircraft has landed.
- 1168** A State not Party to the conflict is under an obligation to care for the civilian wounded and sick removed from the aircraft and to treat them humanely, but unlike the provisions laid down with regard to the military wounded and sick, there is no obligation to keep them until hostilities have ended. The civilian wounded and sick may request repatriation, particularly through the diplomatic representation of their country. They may also seek asylum in the State in whose territory they have landed, or in another State.
- 1169** For the sake of completeness, one special case should be mentioned, namely, members of the crew seeking asylum in a State not Party to the conflict. It was shown above that all members of the crew are considered to be medical personnel in the sense of the Protocol. However, in this case it is necessary to make a distinction between military medical personnel and civilian medical personnel.²⁶ Those belonging to the first category – who would therefore be deserting – should be treated as members of the armed forces seeking refuge in the territory of a State not Party to the conflict,²⁷ and be interned until hostilities have ended. In fact, it would appear incompatible with the law of neutrality to allow them to reach the adverse Party. When hostilities have ceased, they will remain free to seek asylum wherever they wish, unless they are suspected of any war crimes.

²⁵ Cf. Art. 4, First Convention and Art. 19, Protocol I.

²⁶ On this subject, also cf. commentary Art. 15, *supra*, p. 189.

²⁷ Cf. Art. 11 of the above-mentioned Hague Convention.

- 1170 On the other hand, someone who is a member of the civilian medical personnel should be treated like any other civilian. In any case, the law of neutrality does not impose any obligation on a State not Party to the conflict to hold him until hostilities have ceased.
- 1171 When the inspection discloses that the aircraft is not in fact a medical aircraft in the sense of the Protocol, it must be seized as mentioned above. All the occupants will therefore be disembarked in the territory of the State not Party to the conflict and their fate is determined by paragraph 4 of this article.

Paragraph 4

- 1172 This paragraph deals with the fate of the wounded, sick and shipwrecked disembarked in the territory of a State not Party to the conflict with the exception of those who are disembarked temporarily (i.e., the wounded and sick who are disembarked while they are waiting for the aircraft to continue its flight because of their condition and local circumstances).
- 1173 The various categories of persons who may be disembarked in the event that the aircraft is permitted to continue its flight were outlined above. If the aircraft is seized, what was said with respect to paragraph 3 continues to apply for those concerned. A few additional remarks should be made regarding the fate of other occupants.
- 1174 All the military wounded, sick and shipwrecked of the Party to which the aircraft belongs are in the same situation as those entrusted to the State not Party to the conflict when the aircraft is permitted to continue its flight, a situation which was examined above. Thus they must be held “in such a manner that they cannot again take part in the hostilities”. As regards other military wounded, sick and shipwrecked, it was shown above that they must in any case be held in this way.
- 1175 As was also mentioned above, the law of neutrality does not impose an obligation to hold the civilian wounded, sick and shipwrecked. These will be repatriated or sent to the State of their choice (if this State will accept them) provided that their condition allows it.
- 1176 As regards the crew, the special case in which crew members refused to continue the flight, even though the aircraft had permission to do so, was discussed above. In the event that the aircraft is seized, the whole crew falls into the hands of the State not Party to the conflict. In this respect there is an omission in Article 31, as it does not deal with this problem. It should therefore be dealt with on the basis of the principles of international humanitarian law and the law of neutrality, and by applying the existing rules by analogy.
- 1177 In the situation discussed here, the aircraft *is not* really a medical aircraft in the sense of the Protocol, since this is the only reason for which it can (and must) be seized by the State not Party to the conflict. Members of the crew who consciously participated in what constitutes an abuse of the emblem no longer enjoy the status of medical personnel. With regard to civilians, this also constitutes a punishable breach for them. By analogy, Article 11 of the above-mentioned Hague Convention should be applied to these persons. Thus they should be interned

until hostilities have ceased, without prejudice to their being put on trial, which is compulsory if they are found to have committed a grave breach of the Conventions or of the Protocol.²⁸

1178 In our opinion, the fate of those members of the medical personnel who can clearly be shown not to have been involved in abuse of the distinctive emblem should be as follows: civilian medical personnel will be repatriated like any other civilians in this situation, if they express the wish to be repatriated. Members of permanent military medical personnel will also be repatriated if they wish, in the way that such personnel must be repatriated when they fall into enemy hands.²⁹ The possibility given in Article 28 of the First Convention for a Party to the conflict to compel such personnel to remain behind insofar as they are needed to care for the wounded and sick of the Party to the conflict to which they belong, should not be applied by analogy to a State not Party to the conflict. Finally, temporary military medical personnel have to be treated as members of the armed forces of a Party to the conflict entering neutral territory³⁰ and must be interned until hostilities have ceased.

1179 Paragraph 4 adds two elements which are worthy of note. The obligation imposed upon a State not Party to the conflict to detain some categories of persons may be lifted or modified if so agreed between *that State and the Parties to the conflict*. This clearly means that each time there must be agreement between all three Parties (State not Party to the conflict and the two belligerent Parties). Thus, for example, if a State not Party to the conflict wishes to set free nationals of a Party to the conflict, whom it is supposed to detain until hostilities have ceased, before such time, it must not only have the agreement of the Party to which such persons belong (which will presumably grant permission very easily), but also that of the adverse Party. Such agreements can be envisaged particularly on the basis of reciprocity when nationals of both sides are interned in a State not Party to the conflict.

1180 The second new element mentioned in paragraph 4 concerns the “cost of hospital treatment and internment”, which “shall be borne by the State to which those persons belong”. This is in accordance with the above-mentioned Hague Convention of which Article 12, paragraph 2, provides that: “At the conclusion of peace the expenses caused by the internment shall be made good”. Nevertheless, there is nothing to indicate here that the debt need not be settled until there is peace, and in general the Parties to which the interned persons belong³¹ should cover the expenses caused by such persons regularly, in such manner as may be agreed upon with the State not Party to the conflict. Finally it is clear that this obligation is related only to persons who *must be interned* by the State not Party to the conflict and not such persons as it may have granted temporary or permanent asylum.

²⁸ On this subject, *cf.*, in particular, Arts. 49-50 of the First Convention, and *Commentary I*, pp. 350-372, as well as Art. 85 of the Protocol and the commentary thereon, *infra*, p. 989.

²⁹ *Cf.* Art. 28 of the First Convention.

³⁰ *Cf.* Art. 11 of the above-mentioned Hague Convention.

³¹ Although it is not mentioned in the text, this need not necessarily be a State in the context of Protocol I: *cf.*, in this respect, Art. 1, para. 4.

Paragraph 5

- 1181** This paragraph is important for States not Parties to the conflict. In the tense international situation which exists when an international armed conflict takes place on the borders of such a State, it is essential that it should not be open to the accusation of favouring one belligerent to the disadvantage of the other. The danger of such accusations and the possibility that they might have dramatic consequences should encourage the State not Party to the conflict to do all it can to avoid an ambiguous attitude.
- 1182** The case under consideration here concerns the facilities accorded for passage of medical aircraft of the Parties to the conflict over its territory, or for the landing or alighting on water of such aircraft. Paragraph 5 lays down an *obligation* to apply “equally to all Parties to the conflict” any conditions and restrictions in force in this respect.³² Of course, this does not mean that a State not Party to the conflict is obliged to allow exactly the same number of medical aircraft of each of the Parties to fly over its territory. However, it should consider all requests for agreements, from whatever Party they come, in the same way. The procedures it demands in such agreements, the degree of verification that it imposes on such flights, should also be the same for each of the Parties to the conflict. As regards inspection on the ground, the fate of the aircraft and that of its occupants, it has already been shown that the same rules apply to aircraft of each of the Parties.

Y.S.

³² This is merely a reflection, for that matter, of a general obligation arising from the law of neutrality.

Part II, Section III – Missing and dead persons

Documentary references (for the whole Section)*

Official Records

O.R. I, Part I, pp. 139-141. *O.R.* III, pp. 98-109 (Section I *bis*). *O.R.* IV, pp. 166-167. *O.R.* VI, pp. 71-72, CDDH/SR.37, paras. 36-38; p. 81, *id.*, Annex (United Kingdom). *O.R.* XI, p. 41, CDDH/II/SR.6, paras. 2-4; pp. 184-188, CDDH/II/SR.19, paras. 66-89; pp. 189-195, CDDH/II/SR.20, paras. 1-35; p. 196, para. 41; pp. 352-360, CDDH/II/SR.34, paras. 14-16; pp. 363-375, CDDH/II/SR.35, paras. 1-77; p. 561, CDDH/II/SR.49, para. 70; p. 563, para. 80; p. 595, CDDH/II/SR.52, paras. 37-40. *O.R.* XII, pp. 227-235, CDDH/II/SR.76, paras. 1-45; pp. 249-256, CDDH/II/SR.78, paras. 1-51; pp. 258-259, CDDH/II/SR.79, paras. 11-17; p. 468, CDDH/II/SR.99, paras. 17-18; p. 476, CDDH/II/SR.100, para. 33. *O.R.* XIII, p. 98, CDDH/221/Rev.1, para. 99; pp. 102-107, paras. 113-118; p. 257, CDDH/235/Rev.1, para. 29; pp. 283-285, *id.*, Annex; pp. 331-333, CDDH/II/376; pp. 360-361, CDDH/406/Rev.1, para. 32; pp. 397-398, *id.*, Annex.

Introduction

- 1183 The draft did not contain provisions on missing and dead persons – even though this is a question that had been dealt with by international humanitarian law at an early stage¹ – for this area is covered at some length in the Geneva Conventions.
- 1184 Nevertheless, on 6 November 1974, the United Nations General Assembly discussed the problems dealt with in the present Section, and adopted Resolution

* Remark: By way of exception, the references are given here for the whole Section as it was treated as a single article during much of the CDDH.

¹ Cf. in particular the Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention II of 29 July 1899 and the Hague Convention IV of 18 October 1907, Arts. 14 and 19, and the Geneva Convention of 6 July 1906, Arts. 3 and 4. Also see the Manual published by the Institute of International Law on the laws of war on land, following its session in Oxford in 1880, Art. 20.

3320 (XXIX) thereon, entitled “Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts”, asking the United Nations Secretary-General to bring this resolution to the attention of the second session of the CDDH.

- 1185** That resolution follows up Resolution V of the XXIInd International Conference of the Red Cross (Teheran, 1973) and calls on Parties to armed conflicts to

“take such action as may be within their power to help to locate and mark the graves of the dead, to facilitate the disinterment and the return of remains, if requested by their families, and to provide information about those who are missing in action”.

- 1186** Some States then prepared a draft text and submitted a proposal to the second session of the CDDH,² while another delegation also presented a draft on the subject. Moreover, in accordance with the mandate given him, the Secretary-General presented Resolution 3220 (XXIX) to the Conference through the intermediary of the Director of the United Nations Human Rights Division.³

- 1187** The sponsors of the proposals drew attention to the positive effects of the existing provisions, but also pointed out that they “left a number of gaps”.⁴ To remedy this they proposed improvements on five main issues:

“First, the existing provisions did not cover all categories of missing and dead persons, in particular those civilians who were not internees protected by the Fourth Geneva Convention of 1949. Second, the provisions with regard to the maintenance of graves and the keeping of records thereof needed elucidation. Thirdly, the access to graves was not expressly granted in the provisions; fourthly, the duty to allow exhumation and return of the remains needed to be made clearer; fifthly, the duty to secure and exchange information on the missing and dead needed to be strengthened.”⁵

- 1188** The ICRC representative emphasized that:

“The Conventions were silent on one important matter: they did not oblige the Parties to a conflict to search at all times for soldiers of the opposing side whose names did not appear on the lists of captured or deceased persons. Nor were they obliged to carry out such searches in the case of civilians.”⁶

² Cf. *O.R.* XIII, pp. 102-103, CDDH/221/Rev.1, paras. 113-115; *O.R.* III, pp. 48-100, CDDH/II/56, and *O.R.* IV, pp. 166-167, CDDH/II/90.

³ Cf. *O.R.* XI, pp. 184-185, CDDH/II/19, paras. 67-69.

⁴ *Ibid.*, p. 185, para. 72.

⁵ *Ibid.*

⁶ *Ibid.*, p. 187, para. 86.

- 1189 Despite the fact that there were no provisions in the draft, the ICRC approved the idea that a new provision should be introduced into the Protocol, particularly as this would comply with the request put forward during the XXIIInd International Conference of the Red Cross (Teheran, 1973 (Resolution V)), as well as Resolution 3320 (XXIX) of the United Nations General Assembly as mentioned above.⁷
- 1190 The Committee adopted this point of view, but considering the numerous problems raised by these proposals, referred examination of the question to a Working Group. The latter proposed introducing three articles in a new section of Part II of the Protocol, and this proposal was adopted by Committee II.
- 1191 This third Section of Part II first lays down the general principle on which the Section is based (Article 32 – *General principle*), then makes a distinction between the problem of missing persons (Article 33 – *Missing persons*) and that of the remains of the deceased (Article 34 – *Remains of deceased*). Each one of these questions is dealt with in a lengthy article. In the commentary on these articles, we will examine the new features which they add to the provisions of the Conventions on this subject.
- 1192 Three further elements which concern the Section as a whole deserve to be mentioned:
- 1193 – In principle the Parties to the Protocol are only required to apply it *inter se* in order to resolve problems relating to the consequences of conflicts breaking out between them or relating to the aftermath of such conflicts. Obviously we would not wish to defend the idea of retroactive application of the Protocol, but even so it is to be hoped that Parties bound by it will refer to it to resolve problems still unresolved at the end of a conflict which had ended before they had become bound by the Protocol. Questions relating to missing persons, and to an even greater extent, those concerning the remains of the deceased, actually pose problems well after the end of an armed conflict.
- 1194 – As explicitly mentioned in Article 33 (*Missing persons*), paragraph 2, and Article 34 (*Remains of deceased*), paragraph 1, the provisions of this Section are only intended to fill a gap and should in no case be substituted for a more favourable régime which the persons concerned may enjoy under the Geneva Conventions.

In order not to weaken the existing provisions and to leave them intact,⁸ the “additional” character of the new provisions was explicitly mentioned in the report of the Working Group presented during the 34th meeting of the Committee.⁹ This qualification was subsequently deleted as it was considered superfluous having regard to the general provision of Article 1 (*General principles and scope of application*), paragraph 3.¹⁰ However, in the context of this Section it is important to bear this in mind, for it is very relevant, as we will see in the analysis of certain provisions.

⁷ *Ibid.*

⁸ *Ibid.*, p. 186, para. 82.

⁹ CDDH/II/244/Rev.1, Chapter III, para. 11, 2nd sentence. Cf. O.R. XIII, pp. 107-110, CDDH/221/Rev.1, para. 120.

¹⁰ In this connection, cf. in particular O.R. XI, p. 358, CDDH/II/SR.34, para. 54. Cf. also Article 96, para. 1.

- 1195** – The question whether some provisions of this Section should impose obligations on a Party to the conflict vis-à-vis its own nationals was discussed repeatedly in Committee II.¹¹ The Committee's intentions, as clearly expressed, were ultimately not to impose any such obligations: in fact, the report of the Working Group on this Section adopted by Committee II contained a paragraph in square brackets (Article 20 *quater*, paragraph 5), which provided that: "this Section does not impose on any High Contracting Party or Party to a conflict obligations with regards to its own nationals".¹² Although this paragraph was later deleted by consensus, this was, according to the report by Committee II, "because it was self-evident that the article did not apply to a Party's own nationals".¹³

Y.S.

¹¹ Cf. in particular *O.R.* XI, p. 352, CDDH/II/SR.34, para. 18; p. 354, para. 30; pp. 358-359, para. 55; p. 370, CDDH/II/SR.35, para. 45; p. 372, para. 58; p. 374, para. 68. *O.R.* XII, p. 468, CDDH/II/SR.99, paras. 17-18; p. 476, CDDH/II/SR.100; para. 33.

¹² Cf. *O.R.* XIII, p. 285, CDDH/235/Rev.1, Annex I (Article 20 *quater*, paragraph 5).

¹³ *Ibid.* p. 361, CDDH/II/406/Rev.1, para. 32. However, in this connection, see commentary Art. 32, *infra*, p. 346 and note 19.

Article 32 – General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Documentary references

By way of exception, the references to the Official Records of the CDDH are cited at the beginning of the Section as Articles 32-34 were treated as one article during much of the CDDH.

Commentary

General remarks

1196 The sponsors of the proposal, introduced as an amendment,¹ and which led to this Section, did not give expression to the general principle on which it was based. They were, however, aware of its importance, as shown in the following statement explaining the need for the amendment:

“To mitigate the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead in the place where their remains lay was a fundamental humanitarian principle.”²

1197 However, an explicit statement of this principle was later included in a new amendment.³ The aim of the amendment was clearly explained by those who presented it. They were concerned with drawing attention to the suffering inflicted on families by armed conflict, and in particular the anxiety resulting from the absence of information. For this reason, families should be accorded a

¹ *O.R.* III, pp. 98-100, CDDH/II/56.

² *O.R.* XI, p. 185, CDDH/II/SR.19, para. 70.

³ *O.R.* III, p. 102, CDDH/II/259.

fundamental right which had never been recognized up to that time, namely, the right to know the fate of their relatives.⁴

- 1198 Nevertheless, the introduction of this principle met with some objections. Some delegates, while recognizing that there was a “basic need” for families to know the fate of their relatives, did not consider that it was truly a “fundamental right”.⁵
- 1199 Others considered that there was no need for this statement since “it merely stated the motive behind the article, which could surely be taken for granted”.⁶
- 1200 The Rapporteur of the Working Group, replying to this objection, recognized that “it was unusual to state the premises on which an article was based”, but emphasized the fact that the general principle had been incorporated “in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives”.⁷
- 1201 In this way he also answered the first objection by confirming the existence of a right,⁸ and his point of view finally prevailed both in Committee II and in the plenary Conference.
- 1202 The decision to state this general principle in a separate article was left to the Drafting Committee of Committee II, which opted for the solution given here.⁹ First, it was thought to include it as the first paragraph of Article 20 *bis* (the present Article 33 – *Missing persons*) and it must be admitted that the present wording of the principle relates essentially to that article.
- 1203 However, it should be stated that no one contested the statement made at the time of the presentation of the initial proposal that “the right of access to graves [...] was an obvious and fundamental humanitarian need”.¹⁰

Text of the article

- 1204 The principle is mentioned as the main motive for “activities” of the Parties to the conflict. It was therefore necessary to specify that it applies *only in the context of this Section*.
- 1205 Those undertaking the activities referred to are said to be the “High Contracting Parties”, the “Parties to the conflict” and the “international humanitarian organizations mentioned in the Conventions and in this Protocol”.
- 1206 The *Parties to the conflict* and the *High Contracting Parties* are mentioned separately because some Parties to the conflict may not be Contracting Parties and yet be bound by the Protocol.¹¹
- 1207 It is clear that apart from the Contracting Parties and Parties to the conflict, some organizations are brought in to play a role in the areas covered by this

⁴ Cf. O.R. XI, p. 363, CDDH/II/SR.35, para. 2.

⁵ *Ibid.*, p. 371, para. 49.

⁶ O.R. XII, p. 231, CDDH/II/SR.76, para. 26.

⁷ *Ibid.*, p. 232, para. 29.

⁸ On this subject, cf. also *infra*, p. 346.

⁹ Cf. O.R. XII, p. 253, CDDH/II/SR.78, para. 34.

¹⁰ O.R. XI, p. 186, CDDH/II/SR.19, para. 76.

¹¹ On this subject, cf. commentary Art. 96, paras. 2 and 3, *infra*, pp. 1086-1092.

Section. As a matter of fact, the Central Tracing Agency of the International Committee of the Red Cross is explicitly mentioned in Article 33 (*Missing persons*), paragraph 3.¹²

- 1208 The sponsors of the amendment, requesting that the principle mentioned in Article 32 should be given expression, referred only to “international organizations”. The present wording, proposed by another delegate,¹³ was preferred to this rather vague expression and was adopted without giving rise to any discussion. Yet the expression that was finally used is not very precise either. The organizations mentioned in the Conventions and the Protocol are referred to in many different ways, and in most cases such references are open-ended, so that it is impossible to draw up a comprehensive list of such organizations.¹⁴
- 1209 It should therefore be noted that the expression should be understood in a broad sense. The words “international humanitarian organizations”, in particular, might lead to the idea that there was an intention to limit them to inter-governmental humanitarian organizations, which is evidently not the case. The ICRC and its Central Tracing Agency are the first to be mentioned, and they would not fall under such a restrictive definition of international organizations. These therefore cover also non-governmental organizations.
- 1210 This broad interpretation is all the more important as it is not a matter of conferring powers, but of reminding those working in this area of a line of conduct which, it is hoped, will always be respected.
- 1211 The reference to the *right* of families to know the fate of their relatives gave rise to considerable discussion.¹⁵ It should be stressed once again that the use of this term was adopted after careful reflection, and made in full consciousness. The Rapporteur of the Working Group in particular drew attention to the fact that:

“United Nations General Assembly resolution 3220 (XXIX), which the Working Group had studied when drawing up the present text, stated in the last preambular paragraph that ‘the desire to know [...] is a basic human need’, but the text under consideration went even further by referring to the ‘right’.”¹⁶

He also justified calling it a right by stating that “if the right of families was not specifically mentioned, the Section might be interpreted as referring to the right of governments, for instance, to know what had happened to certain missing persons”.¹⁷ Finally, in the speech he made after the Section was adopted by consensus in Committee II, the Director of the United Nations Human Rights Division made the following statement:

¹² On this subject, *cf. infra*, p. 360.

¹³ *Cf. O.R. XI*, p. 365, CDDH/II/SR.35, para. 13.

¹⁴ However, on this subject, *cf. Commentary III*, pp. 594-596 (Art. 125) and commentary Art. 9, para. 2, *supra*, p. 143.

¹⁵ *Cf. supra*, p. 344.

¹⁶ *O.R. XII*, p. 232, CDDH/II/SR.76, para. 29.

¹⁷ *Ibid.*, para. 28.

“The text which had just been adopted by consensus was an important step forward in the field of international efforts to protect human rights. The Conference would emphasize the ‘right’ of families to be informed of the fate of their next-of-kin involved in armed conflicts [...]”¹⁸

- 1212 Thus, although there may be a right,¹⁹ the content of the obligation imposed on States, on other Parties to the conflict, and on the organizations concerned, is not easy to determine. In fact, it cannot be denied that there is no individual legal right for a representative of a family to insist that a government or other organization concerned undertake any particular action. This applies all the more because, as seen above, Committee II clearly confirmed that this Section did not impose obligations on a State with respect to its own nationals.²⁰
- 1213 However, it does grant the right (and imposes the duty) on those who are entrusted with ensuring the application of international humanitarian law – first, the Parties concerned, secondly the Protecting Powers and their substitutes, but also all the States Parties to the Protocol in pursuance of Article 1 (*General principles and scope of application*), paragraph 1 – to take care that activities undertaken in the light of this Section are basically motivated by this legal provision and keep clear of political or other motivations foreign to the nature of international humanitarian law.
- 1214 The right is that of a *family* with regard to its *relatives*. This right should obviously be exercised by one or more of the members of the family. The actual relationship required is deliberately not specified in greater detail. The sponsors of the amendment introducing the general principle had used the word “proches” (the original text was in French) and subsequently “parents”.²¹ The English translation in both cases referred to “relatives”. It was later pointed out that “there were varying definitions of ‘family’ and ‘relatives’ throughout the world”,²² and that in certain countries there was “the extended family”.²³
- 1215 In the end the Committee decided not to define the meaning of family and family members, leaving this, and the latitude with which the expression should be understood, to the Contracting Parties in accordance with their social and cultural environment. From the humanitarian point of view it is important to adopt an approach which, at a practical level, takes into account, as far as possible, not only blood relations and legal ties, but also personal and emotional ties. Article 74 (*Reunion of dispersed families*) confirms in any case that there is such a duty on the part of Contracting Parties and Parties to the conflict.
- 1216 The right of families mentioned here consists of knowing “the fate of their relatives”, i.e., all possible steps should be taken to inform them of such a fate,

¹⁸ *Ibid.*, p. 255, CDDH/II/SR.78, para. 46.

¹⁹ The recognition of such a right in international armed conflicts should have further repercussions, particularly with regard to the families of missing persons in non-international armed conflicts and in the framework of human rights, even during internal disturbances or tensions.

²⁰ Cf. introduction to the present Section, *supra*, p. 342.

²¹ O.R. III, p. 102, CDDH/II/259 and p. 105, CDDH/II/354.

²² O.R. XI, p. 365, CDDH/II/SR.35, para. 11.

²³ Cf. *ibid.*, p. 372, para. 58.

(but no one can be held to do the impossible). Thus it basically relates to Article 33 (*Missing persons*), which is concerned with the search for missing persons. Nevertheless, some obligations related to Article 34 (*Remains of deceased*), concerning the remains of the deceased, are also affected by this right, particularly the obligation to mark gravesites. Moreover, although this point is not explicitly mentioned, it should not be forgotten in commenting on this provision, that the right of access to gravesites was also mentioned during the Conference,²⁴ and no objections on points of principle were made. In the speech mentioned above,²⁵ the Director of the United Nations Human Rights Division mentioned the will of the Conference to underline “the right of families” also “to have some assurance that the remains of those who died would be treated in accordance with national ethical values and age-old traditional standards”.²⁶

- 1217** In short, it certainly seems that the Conference wished to see that all the activities undertaken in the context of this Section would be basically founded on a concern for the interests of families and to spare them emotional suffering as far as possible.
- 1218** However, the right of families should not be more than the “primary” motivation for the activities concerned and thus these activities are founded basically, but not solely, on this right.²⁷ A Party to the conflict also has the right to know the fate of its soldiers, and it may happen, though only in exceptional cases, that a prisoner does not wish to communicate with his family.
- 1219** Indeed this right is shared, and although priority should be given to the family, the two interests involved do not clash. In the situation where the prisoner does not wish to communicate with his family, however, the two interests, i.e. that of the individual and that of his family, contradict each other. In this situation, although one can try to make the unwilling person understand his family’s suffering, one cannot impose on him a course of action by virtue of the general principle.

Y.S.

²⁴ Cf. particularly *ibid.*, p. 186, CDDH/II/SR.19, para. 76.

²⁵ Cf. *supra*, p. 346.

²⁶ O.R. XII, p. 255, CDDH/II/SR.78, para. 46.

²⁷ On this subject, cf. particularly O.R. XI, p. 374, CDDH/II/SR.35, para. 69, and O.R. XII, p. 231, CDDH/II/SR.76, para. 25 and p. 234, para. 37.

Protocol I

Article 33 – Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
 - (a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
 - (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.
4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Documentary references

By way of exception the references to the Official Records of the CDDH are cited at the beginning of the Section as Articles 32-34 were treated as one article during much of the CDDH.

Commentary

General remarks

- 1220 The substance of this article was contained in paragraphs 2, 7, 8 and 9 of the initial draft which led to this Section and which consisted of only one article.¹
- 1221 In its first report the Working Group charged with examining this subject had already proposed dividing the article into two main parts, one devoted to “information on the missing and dead”, and the other to “graves”.² Although the titles were changed later, this distinction was retained.
- 1222 The main aims of the article are, on the one hand, to extend the obligation to search for missing persons to embrace also persons not covered by the Conventions, and on the other hand, to reinforce the duty to furnish and exchange information on the missing and the dead in order to facilitate the search for them.³

Paragraph 1 – Search

- 1223 This paragraph introduces the obligation to search for persons who have been reported missing, an obligation which, as the delegate presenting the initial proposal stated, “met a fundamental humanitarian need, which was not yet fully and explicitly covered by existing treaty obligations”.⁴

First sentence – Obligations of the Party receiving the request

- 1224 Obviously this type of search is distinct from that carried out on the battlefield after a clash, which is covered by Article 15 of the First Convention and paragraph 4 of this article. With regard to paragraph 1 under consideration here, it is not so much a question of combing a well-defined area, but of carrying out a real investigation.
- 1225 The persons covered by this paragraph are not listed. Apparently the only restriction imposed is that the request should come from the adverse Party. Does this mean that the latter may request information about anyone? It certainly does not. The request must relate to persons who are either nationals of that Party, or in some other way are linked to it – such as, in particular, persons who had been admitted to its territory as refugees or persons who had enlisted in its armed forces – or generally persons in whom it has a genuine interest based on the general principle of Article 32 (*General principle*), such as members of the family of a person belonging to the two former categories.

¹ Cf. *O.R.* III, pp. 98-100, CDDH/II/56.

² Cf. *O.R.* XIII, pp. 107-110, CDDH/221/Rev., para. 120.

³ On this subject, cf. particularly *O.R.* XI, p. 185, CDDH/II/SR. 19, para. 72.

⁴ *Ibid.*, p. 186, para. 79. Cf. also *ibid.*, p. 187, para. 86.

- 1226 Although this restriction is not explicitly made in Article 33, it is nevertheless quite clear that it follows from the general principle of Article 32 (*General principle*) – the object of the request must be humanitarian – and from the jurisdiction *ratione personae* of States as defined by general international law.⁵
- 1227 Nevertheless, when there is any controversy regarding the legitimacy of the request, particularly if it relates to persons from territory the status of which is contested, so that consequently their nationality is also contested,⁶ the interests of families and the humanitarian character of the problem should prevail in accordance with the principle set out in Article 32 (*General principle*).
- 1228 Moreover, a Party reporting missing persons will use its authority mainly to deal with requests submitted to it by the families of missing persons. A systematic refusal to transmit such requests would be contrary to the principle of Article 32 (*General principle*).
- 1229 Persons to be searched for, according to a request, should basically be combatants from whom there has been no news, or civilians in occupied territory or enemy territory. The idea of including “a definition of ‘missing’, to indicate that a missing person, whether military or civilian, was one who had not returned to his unit after a military operation or mission, or who had not returned to his home because of circumstances associated with the hostilities”⁷ was rejected, and the Working Group on this matter adopted the following working definition: “the missing were those reported by another party as missing”.⁸ It follows that a request cannot be refused for the sole reason that the person to be searched for is not “missing” in the strict sense of the word.
- 1230 In theory searches should not be related to prisoners of war or civilian internees, since, on the one hand, information about persons in these categories should be transmitted to the Powers concerned by the national Information Bureaux which must be established by Detaining Powers in pursuance of Articles 119 and 122 of the Third Convention, as well as Article 137 of the Fourth Convention, while on the other hand, any search should be undertaken on the basis of Article 119 of the Third Convention and Article 133 of the Fourth Convention.
- 1231 Requests from allied States or States not Parties to the conflict are not taken into consideration in this context as they are supposed to be made through normal diplomatic channels and are not subject to international humanitarian law. However, logically, requests from States not Parties to the conflict, but without diplomatic relations with the Party to whom the request for the search is directed, should also be admitted, since nationals of such States are considered as protected persons under the Fourth Convention while they are in the territory of that Party.⁹ Thus there is a gap here, probably unintentional, as the record of the

⁵ On this subject, cf. particularly A.N. Makarov, “Règles générales du Droit de la nationalité”, 74 *Hague Recueil*, 1949/I, p. 269.

⁶ In this respect it should be noted that Committee II clearly indicated that the Section did not lay down any obligation for a Party to the conflict with respect to its nationals. Cf. the introduction to this Section, *supra*, p. 342.

⁷ O.R. XI, p. 191, CDDH/II/SR. 20, para. 13.

⁸ *Ibid.*, p. 353, CDDH/II/SR.34, para. 20.

⁹ Cf. Art. 4 of that Convention.

negotiations shows that the problem has not been raised.¹⁰ Whatever the facts of the matter, this omission could also be remedied by an initiative taken by an organization such as the ICRC, which could transmit requests relating to such cases.

- 1232** The obligation is imposed only on Parties to the conflict, which is logical in the context of international humanitarian law. It is expressed in a very general manner: those persons who have been reported missing shall be “searched for”. The first step in such a search, which suffices in some cases, may be relatively simple: the last known place of residence of the person concerned is checked or the registers of detention centres are inspected (however, the second task may be more complicated than it seems if there is no central register or if the registers are badly kept or non-existent).
- 1233** If the first step is not successful, the search of course becomes more difficult and may require considerable effort. For example, it may be necessary to search for members of the family who could give information, to question neighbours and colleagues, in short, to carry out a true investigation. It is quite clear that the possibility of conducting such investigations will vary considerably, depending on the situation and also on the infrastructure and the geography of the country and on the willingness of its leaders and the manpower available. In this respect it should be mentioned that the National Red Cross or Red Crescent Societies should be able to make a considerable contribution to this task. They can draw on the experience of the Central Tracing Agency of the ICRC, which also plays a coordinating role.
- 1234** The Conference did not specify how far the *obligation* extends. Certainly it would not be met if the first step mentioned above, which must be considered as a minimum requirement, were not undertaken. As regards the second step, there were delegates who stated that “too heavy a burden should not be imposed on the Parties” and that “account must be taken of the fact that the conditions of the search might be difficult and the costs high”.¹¹ Furthermore, though a proposal to mitigate the obligation by adding the words “as far as practicable” was finally withdrawn, this was only after the intervention of the Rapporteur of the Working Group, who stressed that “such a provision was implicit in the entire Section”.¹²
- 1235** The obligation exists “as soon as circumstances permit, and at the latest from the end of active hostilities”. This wording tends to set a time-limit which allows great latitude of judgment to the Parties to the conflict obliged to carry out the search (they themselves must determine whether circumstances will permit the search to be carried out), but it also lays down an absolute limit: the end of active hostilities.
- 1236** Various opinions, which do not all accord, were expressed with regard to this wording,¹³ but during one of the last discussions relating more specifically to the

¹⁰ The obligation to record information about nationals of such States – on this subject, *cf. infra*, pp. 357-358 – is another important indication with regard to the intention that para. 1 should cover such States.

¹¹ *O.R.* XII, p. 231, CDDH/II/SR.76, para. 22.

¹² *Ibid.*, para. 27. *Cf.* also pp. 252-253, CDDH/II/SR.78, paras. 25-32.

¹³ *Cf.* particularly, *O.R.* XI, p. 365, CDDH/II/SR.35, para. 13; *O.R.* XII, p. 231, CDDH/II/SR.76, para. 25; p. 234, CDDH/II/SR.76, para. 38.

term “active hostilities” the Rapporteur of the Drafting Committee recalled that as these words were used in the Geneva Conventions, the Working Group considered that they should be retained.¹⁴ This point of view finally prevailed.

1237 The expression “as soon as circumstances permit” requires that the Parties which have to undertake the search examine the possibility of doing so before the end of active hostilities. There is therefore a clear directive that consideration of the request should not simply be delayed to the second time-limit; the situation should be assessed immediately, and then at regular intervals, to determine whether circumstances permit the requested search to be carried out. For example, there are no major *a priori* reasons preventing registers from being checked. On the other hand, if a more thorough investigation turned out to be necessary, the possibilities of gaining access to certain places or communicating with them may be reduced as a result of hostilities, and may justify delaying the investigation. However, the Parties concerned must constantly bear in mind the interests of families and be aware of the terrible moral suffering inflicted on them by any delay in the transmission of information about their relatives.

1238 As regards the absolute limit of the “end of active hostilities”, virtually the same expression can be found in the Geneva Conventions, though only in one place.¹⁵ The Commentary in French on the Third Convention equates the end of active hostilities with a cease-fire¹⁶ (though this term is not mentioned in the English text), underlining the fact that hostilities “could cease without any peace treaty, or even armistice”.¹⁷ In fact, the meaning of the expression “active hostilities” is no different in this context from that of the expression “hostilities”. In both cases it refers to armed hostilities.

1239 Finally it should be noted that no time-limit is laid down with regard to how long such activities should be pursued. As the Rapporteur of the Working Group remarked:

“The representative of the Central Tracing Agency of the ICRC had in fact suggested adding a provision to the effect that the search should continue without any limit of duration, but the members of the Working Group had considered that such a provision was implicit in the paragraph.”¹⁸

This statement was not contested.

¹⁴ O.R. XII, p. 250-253, CDDH/II/SR.78, paras. 12, 20, 33-34.

¹⁵ Article 118, para. 1, Third Convention. The French text is identical (*la fin des hostilités actives*); in the English version there is a slight difference: “the cessation of active hostilities” instead of “the end of active hostilities”. On the other hand, Article 17, para. 4, of the First Convention and Article 130, para. 3, of the Fourth Convention use the same expression in French: “dès que les circonstances le permettront et au plus tard à la fin des hostilités”. In the English text they are different in wording: First Convention: “As soon as circumstances permit, and at the latest at the end of hostilities; Fourth Convention: “as soon as circumstances permit, and not later than the close of hostilities”.

¹⁶ Cf. *Commentary III*, p. 550 (English text) and p. 579 (French text).

¹⁷ *Commentary III*, p. 541.

¹⁸ O.R. XII, p. 232, CDDH/II/SR.76, para. 28.

Second sentence – Obligation of the Party making the request

- 1240 The second sentence of paragraph 1 seems self-evident. If a Party requests a search, it is in its own interests to transmit all relevant information to facilitate the investigation.
- 1241 Nevertheless, the sentence has a purpose. Transmitting requests for searches received from families should not become a routine matter, and it is therefore proper that from the outset this should be done in a serious and thorough manner. For this purpose the officials or other persons responsible for preparing the request to be transmitted should consistently stipulate that requesting families give all the information that might facilitate the investigation.
- 1242 The expression “all relevant information” is of course not very precise. The report of the Working Group presented during the third session of the CDDH indicated: “the name, special characteristics and other information on such persons”.¹⁹
- 1243 At the presentation of the report of the Working Group at the preceding session, the Rapporteur of this group had mentioned “names and other relevant information (such as the date and place of loss)”.²⁰
- 1244 The general expression that was finally adopted is justified by the fact that the information concerned may vary considerably in each individual case (date of last letter and place where it was despatched, testimony of witnesses, addresses of friends etc.). It is important simply that the person making the request does so intelligently and conscientiously in order to “facilitate search” to be undertaken by the adverse Party, as the text states explicitly.
- 1245 Where necessary, the Central Tracing Agency of the ICRC will make its experience available to persons charged with gathering and transmitting information about cases of missing persons.²¹

Paragraph 2 – Measures to facilitate the search*Opening sentence*

- 1246 Paragraph 2 is addressed to the Parties to the conflict only, and imposes two obligations on them mentioned in sub-paragraphs (a) and (b). In addition to the

¹⁹ O.R. XIII, p. 331, CDDH/II/376 (Art. 20 *bis*, para. 2).

²⁰ O.R. XI, p. 353, CDDH/II/SR.34, para. 20.

²¹ The wording of requests for a search by the CTA contains the following points: full name of the person being searched for (as used locally); father's full name; mother's full name; date of birth; sex; place of birth; nationality; country of origin; occupation; marital status; rank/unit/service number (if applicable); date and kind of last news; last known address; circumstances leading to loss of contact; full name of family members accompanying the person to be traced; date of birth; sex; relationship; additional information (request to supply all information that may assist investigation, such as: duration and address of former residences, precisions regarding business address or that of present employer, religion etc.); name and address of persons able to supply information; full name of the enquirer (as used locally); father's full name; mother's full name; date of birth; sex; place of birth; full present address; relationship to the person to be traced; signature of the enquirer; date and place of request.

general objective of the Section as a whole, described in Article 32 (*General principle*), these obligations have a direct purpose mentioned in the opening sentence: “to facilitate the gathering of information pursuant to the preceding paragraph”. This wording is actually not very clear at first reading, in that it could lead one to think that it refers to the information described in the second sentence of paragraph 1 which must be communicated by the requesting Party to facilitate the investigation by the Party undertaking the search. However, the measures laid down in sub-paragraphs (a) and (b) only concern the Party holding missing persons, i.e., the Party to which requests may in due course be addressed. Thus paragraph 2 refers to the first sentence of paragraph 1, and not to the second sentence.

1247 Finally, the introductory sentence is a reminder that the obligations laid down here establish new duties, for the benefit of persons who were previously inadequately covered or not covered at all, but do not in any way restrict the more extensive rights to which some categories of persons are entitled under the rules of the Conventions, or by virtue of other provisions of Protocol I. We will examine below which persons are covered by each of these obligations, and which are not because they are entitled to better protection under other provisions of the Conventions or Protocol I.

Sub-paragraph (a) – Keeping records

1248 This provision deals separately with the obligation to record information about persons who have been detained, on the one hand, and those who have died during a period of detention, on the other.

1. The obligation to record information in respect of persons who have been detained

1249 The content of the first part of the obligation is relatively simple: it consists of recording the information laid down in Article 138 of the Fourth Convention, viz.:

- surname;
- first names;
- place and date of birth;
- nationality;
- last residence;
- distinguishing characteristics;
- the first name of the father and the maiden name of the mother;
- the date, place and nature of the action taken with regard to the individual;
- the address at which correspondence to him may be sent;
- the name and address of the person to be informed.

1250 It should be recalled that this list is preceded by the qualification “at least”, and that other useful information may be added, particularly when some of the information mentioned above cannot be obtained.

- 1251 Finally, as Article 138 also provides for the regular transmission of information regarding the state of health of internees who are seriously ill or seriously wounded, every file should contain, where applicable, information about the medical procedures which have been carried out on the persons concerned, as is in fact explicitly provided in Article 11 (*Protection of persons*), paragraph 6, of the Protocol, which also covers such persons.²²
- 1252 Next, it is necessary to determine exactly to which persons the first part of the obligation applies.
- 1253 First we shall examine who are “protected persons” under the Fourth Convention, i.e., as regards the relations between two Parties to the Conventions:
- nationals of one Party who are in the power of the adverse Party;
 - nationals of a Party not involved in the conflict (a neutral State according to the terminology of the Conventions)²³ in occupied territory;
 - nationals of a Party not involved in the conflict who are in the territory of a Party to the conflict where their State does not have “normal diplomatic representation”;²⁴
 - nationals of a Party engaged in the conflict who are in the power of a co-belligerent (allied) Party in which their State has no “normal diplomatic representation” (which should be very exceptional).
- 1254 The obligation to record the information listed in Article 138 of the Fourth Convention covers those protected persons who are “kept in custody for more than two weeks, who are subjected to assigned residence or who are interned” (Article 136, Fourth Convention). The wording used in the Protocol – “detained, imprisoned or otherwise held in captivity for more than two weeks” – attempts to avoid any loopholes: it refers to any person who is forcefully detained by the Party concerned for a period longer than two weeks. This period has been retained, as it corresponds to the time which may be necessary for a preliminary judicial investigation. In fact, although the expression “interned”, which is used in Article 136 of the Fourth Convention, may leave some room for doubt whether it was meant to cover all forms of detention, this was certainly the intention of the Conference in 1949, as confirmed in the commentary on this provision. The Diplomatic Conference of 1949 “considered that the national Information Bureaux, in order to keep constant track of each person, should record every sort of detention”.²⁵ Thus, the first part of the obligation laid down in paragraph 2, sub-paragraph (a), clarifies, but does not in any way change, the obligation to record information laid down in Article 138 with regard to persons protected by the Fourth Convention. In addition, it should be recalled that the obligation of the Fourth Convention applies to all protected persons detained for more than

²² Cf. commentary Art. 11, para. 6, *supra*, pp. 161-163. For more details on Article 138 of the Fourth Convention, cf. also *Commentary IV*, pp. 534-537.

²³ On this subject, cf. commentary Art. 2, sub-para. (c), *supra*, pp. 61-62.

²⁴ On the meaning of the expression “normal diplomatic representation”, cf. *Commentary IV*, pp. 48-49.

²⁵ *Commentary IV*, p. 526.

two weeks “whether for political reasons or for offences against ordinary law”,²⁶ while the Protocol is limited to detention “as a result of hostilities or occupation”.

1255 We shall now consider the position of civilians in the territory of a Party to the conflict or in occupied territory who are not specifically protected by the Fourth Convention, viz.:

- a) nationals of a State not Party to the Fourth Convention;
- b) nationals, other than those in occupied territory, of a State not Party to the conflict which has “normal diplomatic representation” in the detaining State;
- c) nationals of a co-belligerent State which has “normal diplomatic representation” in the detaining State;
- d) the Party to the conflict’s own nationals.

a) *Nationals of States not Parties to the Fourth Convention*

1256 In principle the Protocol only applies between Contracting Parties or between a Contracting Party and a Party to the conflict which, though not a Contracting Party, is bound pursuant to Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraphs 2 and 3.²⁷ Nevertheless, the Conference’s intention in Article 33 seems to have been to cover *all* persons, except nationals, who are missing in the territory of a Party to the conflict in time of armed conflict and who do not already enjoy protection under another treaty.²⁸ In fact, keeping such records is in the interests of families and therefore accords with the spirit of Article 32 (*General principle*).

b) *Nationals of States not Parties to the conflict*

1257 Nationals of States not Parties to the conflict were expressly mentioned by the acting Rapporteur of the Working Group of Committee II charged with examining this Section, as being covered by Article 33.²⁹ This view did not raise any objections, and must be considered to have been generally accepted. It may be viewed as the counterpart to the obligation which rests upon States not Parties to the conflict to apply “the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find” (Article 19 – *Neutral and other States not Parties to the conflict*).³⁰

c) *Nationals of co-belligerent States*

1258 The above-mentioned statement by the acting Rapporteur of the Working Group also related to nationals of co-belligerent States.³¹ The logic of this is not

²⁶ *Ibid.*

²⁷ On this subject, cf. commentary Art. 96, *infra*, pp. 1086-1092.

²⁸ In this sense, cf. O.R. XII, p. 228, CDDH/II/SR.76, para. 8, and M. Bothe, K.J. Partsch, W. Solf, *op. cit.*, p. 173.

²⁹ Cf. O.R. XII, p. 228, CDDH/II/SR.76, para. 8.

³⁰ On this subject, cf. commentary Art. 19, *supra*, p. 237.

³¹ Cf. O.R. XII, p. 228, CDDH/II/SR.76, para. 8.

so clear for this category of persons, as their situation is not governed by the Conventions and the Protocol, except where there are no diplomatic relations. It is, in fact, a very useful exception; there are cases where a government engages the State which it represents in a conflict on the side of another State, against the wishes of the majority of its own population, of which some members may leave the country or go underground. In such cases the humanitarian importance of prescribing compulsory records for nationals of the co-belligerent State who have been detained is apparent. However, the obligation to keep records only relates to nationals of a Party which is also bound by the Protocol, and only if such persons are held in captivity “as a result of hostilities or occupation”.³² Thus this does not include someone imprisoned under ordinary rules of criminal law, though of course this should not be used as a pretext to wrongfully exclude persons who have committed acts for reasons related to the conflict. In this case again legal niceties should not be the dominant factor, but a respect for the interests of families.

d) *A Party to the conflict's own nationals*

- 1259** As regards the nationals of a Party to the conflict itself, the clear statements made in Committee II about excluding them from the scope of this Section were mentioned above.³³ Thus the Protocol does not impose an obligation on a State to keep records of its own nationals who are held in captivity, even when this is for reasons related to the hostilities. However, it cannot be denied that it would be desirable to keep such records in accordance with the general principle of Article 32 (*General principle*), particularly when a State is divided politically, or even physically split in two. In addition, it is absolutely essential that records of persons whose nationality is contested are kept, *a fortiori* when the question of nationality is the crux of the conflict.
- 1260** The obligation to record prisoners of war (Article 4A, Third Convention) and persons entitled to prisoner-of-war treatment (Article 4B, Third Convention) is laid down in Article 122 of the Third Convention, and these categories are therefore not covered by Article 33, paragraph 2, sub-paragraph (a), under consideration here.
- 1261** Persons enjoying the status of combatant and, where applicable, prisoner-of-war status in accordance with Articles 43 (*Armed forces*), 44 (*Combatants and prisoners of war*) and 45 (*Protection of persons who have taken part in hostilities*) of the Protocol, and who are not covered by Article 4 of the Third Convention, are also protected, in the case of Parties to the Protocol, by Article 122 of the Third Convention, and therefore do not fall under Article 33 of the Protocol with which we are concerned here.
- 1262** Apart from this, spies,³⁴ mercenaries³⁵ and all those denied prisoner-of-war status are normally covered by the Fourth Convention, and if not, by this Article.

³² Cf. *supra*, p. 357.

³³ Cf. introduction to this Section, *supra*, p. 339.

³⁴ Cf. Art. 46, Protocol I.

³⁵ Cf. Art. 47, Protocol I.

Thus records must be kept on them in accordance with the requirements examined above.

2. *The obligation to record information in respect of persons who died during detention*

- 1263 Information as set out in Article 138 of the Fourth Convention and in this paragraph must also be recorded if those concerned have died in detention.³⁶
- 1264 This applies to all persons defined above. In case of death, however, the obligation even applies during the first two weeks of detention.
- 1265 It is logical that the obligation has been so strengthened in case of death in detention, and it fits into the system of the present Section III. For it may be recalled that one of the purposes of this Section was to strengthen “the duty to secure and exchange information on the missing and dead”.³⁷

Sub-paragraph (b) – Keeping records in case of death otherwise than in detention

- 1266 Sub-paragraph (a) is concerned with an obligation to keep records which presupposes instructions at an administrative level, but does not involve great expense; it is no great thing to ask a State to keep a record of persons it holds in detention.
- 1267 Although the purpose of sub-paragraph (b) is the same, i.e., to inform families, it implies the setting into motion of specific measures which may be costly. This is why the expression “to the fullest extent possible” was introduced at the explicit request of several delegates who had stressed the limited means available to some States.³⁸
- 1268 The persons concerned are still the same, i.e., those who do not enjoy more favourable treatment under the Conventions and this Protocol.³⁹ The search and recording of information are in this case concerned with persons who have died, on the one hand, “as a result of hostilities or occupation”,⁴⁰ and on the other hand not in a place of detention under the control of the Party to the conflict. The expression “in other circumstances” actually refers to the words “during any period of detention” used in sub-paragraph (a), so as to exclude detention. The latter of course covers only detention imposed by the Party concerned, and not that resulting from banditry (kidnapping, taking hostages etc.).
- 1269 It should be remembered that sub-paragraph (b) only seeks to make the obligation laid down in paragraph 1, i.e., to search for persons who have been reported missing by an adverse Party, more specific. The scope of this obligation here, in the context of sub-paragraph (b), only extends to the search for *deceased*

³⁶ On the meaning of the word “detention”, cf. *supra*, p. 356.

³⁷ O.R. XI, p. 185, CDDH/II/SR.19, para. 72.

³⁸ Cf. particularly *ibid.*, pp. 368-369, CDDH/II/SR.35, paras. 33 and 41.

³⁹ Cf. *supra*, pp. 341 and 354-355.

⁴⁰ On this subject, cf. *supra*, p. 357.

persons, and keeping records of them. Nevertheless, as regards the search, this concerns persons who are presumed dead. This applies in particular to the registration of the missing and the dead after bombardments.

- 1270 The obligation imposed on the Parties to the conflict is to “facilitate and, if need be, carry out” the search for and the recording of information concerned. As one delegate stated, this wording is justified as “in occupied territory the search for and recording of information concerning the persons referred to [...] would normally be left to the local municipal authorities”.⁴¹

Paragraph 3 – Transmission of information

- 1271 First, this paragraph determines the appropriate channel for transmitting requests and the information mentioned in paragraphs 1 and 2. Secondly, it provides for the central safekeeping of such information in view of the humanitarian importance it has sometimes for a very long time.
- 1272 The information concerned is that gathered in accordance with paragraphs 1 and 2. As regards the “requests for such information”, this refers, as clearly shown in the English text, to the requests made by a Party to the conflict to an adverse Party, in accordance with paragraph 1, to search for a missing person. In short, all these activities presuppose a contact between the Parties to the conflict and a way must be found to establish this.
- 1273 The first possibility to be mentioned is through direct contact, which is logical wherever possible. If not, an intermediary should be found. As a first resort, the Protecting Power is mentioned, which is designated by a Party to the conflict to safeguard its humanitarian interests vis-à-vis the adverse Party, and can easily play this role.
- 1274 However, for this to happen, the system of Protecting Powers, or at least of their substitutes, must be functioning properly. Yet though it is to be hoped that it will gain strength by virtue of the fact that it is reinforced in the Protocol,⁴² it cannot be denied that it has seldom been applied since the Conventions were adopted.
- 1275 Other possibilities were therefore provided for. The first is to employ the channel of the Central Tracing Agency (CTA) of the ICRC. In particular, this has the right to visit prisoners of war and civilian internees, and generally sends a delegation to each of the Parties to the conflict in the case of an international armed conflict. Representatives of the CTA are included in these delegations and thus they can easily play an intermediary role as the information and the requests are generally transmitted through the headquarters of the organization in Geneva. It should be noted that the explicit mention of the CTA of the ICRC also constitutes *a posteriori* recognition of the fact that in practice the CTA plays the role of the central information agencies which, according to the Conventions, should be created in neutral countries in the case of international

⁴¹ O.R. XI, p. 370, CDDH/II/SR.35, para. 46.

⁴² On this subject, *cf.* commentary Art. 5, *supra*, p. 75.

armed conflict, both for prisoners of war and for persons protected by the Fourth Convention.⁴³

- 1276 Finally, the possibility is laid down of using the national Red Cross and Red Crescent Societies. In fact, it may happen that contact is established between two National Societies of countries engaged in conflict, and that as a result, they play a humanitarian role. Resolution XXI of the XXIst International Conference of the Red Cross (Istanbul, 1969) indeed recommends such contacts.
- 1277 On the other hand, the reference to other impartial humanitarian organizations, initially included in the report of the Working Group, was deleted, since, according to one delegate, “division of effort means loss of efficiency”.⁴⁴
- 1278 The second sentence of the paragraph “underlined the role of the Central Tracing Agency”,⁴⁵ as stated by the acting Rapporteur of the Working Group, by requesting that information which had not passed through this Agency should be transmitted to it. The Parties to the conflict are responsible for “ensuring” that such information is transmitted, either by directly communicating such information as is available to them, or by ensuring that the intermediary acting as liaison with the adverse Party also informs the CTA.
- 1279 In this way, the importance of making sure that the information is centralized in one place and safely stored on a long-term basis is recognized. National frontiers may be changed, populations dispersed and files destroyed, but the central storage of information has enabled families to be reunited or to regain contact, sometimes even long after the end of the armed conflict, as well as making possible many other humanitarian acts.⁴⁶

Paragraph 4 – Searching for the dead in battlefield areas

- 1280 This paragraph supplements Article 15 of the First Convention, which provides in particular that the Parties to the conflict:

⁴³ Cf. Art. 123, Third Convention, and Art. 140, Fourth Convention. Cf. also *O.R.* XI, p. 191, CDDH/II/SR.20, para. 10.

⁴⁴ *O.R.* XI, p. 355, CDDH/II/SR.34, para. 37. Cf. also pp. 363-364, CDDH/II/SR.35, para. 3.

⁴⁵ *O.R.* XII, p. 228, CDDH/II/SR.76, para. 9.

⁴⁶ In this respect it should be noted that information received “over and above” that which the Parties to the conflict are obliged to furnish under treaty obligations has enabled the solution of many humanitarian problems. By way of example the following could be mentioned:

- lists of former prisoners of war and internees in German hands, drawn up by the allied forces when they liberated them;
- lists of civilian internees repatriated from Ethiopia (occupied by the United Kingdom) to Italy during the conflict;
- lists of the Italian Red Cross and other Italian organizations of Italian civilians and former prisoners of war, repatriated after the end of hostilities;
- information received from the Italians, after the war, on Italian soldiers killed during hostilities;
- replies to questionnaires on civilian internees in the United Kingdom and in the Commonwealth.

In addition it should be noted that information from neutral countries may be very useful, such as, for example, the lists of persons who passed through Switzerland in the process of repatriation.

“shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled”.⁴⁷

- 1281 Paragraph 4 of Article 33 provides “to search for, identify and recover the dead”, in order to fulfil two humanitarian objectives: that of informing the family of the deceased, if he has been identified, and that of ensuring a decent burial after having been removed to behind the lines, if that is possible, or on the spot if it is not.
- 1282 Logically the function of searching for the dead, as provided for in this article, should be coordinated with the function, laid down in Article 15 of the First Convention, of searching for the wounded.
- 1283 As far as possible this will be the case. However, it should be noted that although Article 15 provides that “whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made”, this is only in order to permit “the removal, exchange and transport of the wounded left on the battlefield”, and not to recover the dead. Now the provision of Article 33 under consideration here also lays down the possibility of making arrangements with regard to recovering the dead, though in a less imperative manner: “The Parties to the conflict shall endeavour to agree on arrangements”. Admittedly the difference in meaning is minimal,⁴⁸ but it is clear that the obligation laid down is not absolute.⁴⁹ For that matter, it often happens that these activities are carried out in two stages: the first, devoted to the wounded for whom every minute counts; the second, devoted to the dead.
- 1284 Though Article 15 of the First Convention does not explicitly mention joint teams, i.e., teams of one Party to the conflict accompanied by personnel of the adverse Party, as does the provision under consideration here, such a possibility is not excluded in that article and it therefore also exists with regard to the search for the wounded.
- 1285 The possibility of a team being accompanied by personnel of the adverse Party is provided when such teams are “carrying out these missions in areas controlled by the adverse Party”.
- 1286 In this respect it was clearly stated that activities of a team in territory controlled by the adverse Party could not be carried out without the agreement of the latter.⁵⁰
- 1287 In fact, in referring to battlefield areas, we are dealing with “areas the physical control of which is not clearly established”,⁵¹ as described in Article 26 (*Medical aircraft in contact or similar zones*), unless hostilities have ceased. Moreover, there will probably be dead or even wounded of each of the Parties. The arrangement should therefore, as far as possible, allow for activities by joint teams to search for the dead and wounded of *both* Parties.

⁴⁷ Cf. also O.R. XI, p. 192, CDDH/II/SR.20, para. 20.

⁴⁸ On this subject, cf. also O.R. XII, p. 230, CDDH/II/SR.76, paras. 18-19; p. 233, paras. 31-32.

⁴⁹ In this respect, cf. O.R. XI, p. 360, CDDH/II/SR.34, para. 62.

⁵⁰ Cf. particularly *ibid.*, p. 365, CDDH/II/SR.35, para. 14.

⁵¹ Cf. commentary Art. 26, *supra*, p. 290.

- 1288 The expression “battlefield areas”, taken from Article 15 of the First Convention, was finally preferred to “combat zones”, which had been suggested.⁵² However, there is no reason to insist on a more precise definition of this expression with regard to this provision, since the Parties to the conflict have the authority to enter into such agreements and can conclude them whenever they are deemed useful.
- 1289 It should be noted that in its first report the Working Group of Committee II had provided that such teams could be assisted by “personnel of international humanitarian organizations”,⁵³ though this idea was later abandoned. However, the fact that it was deleted does not express an intention to exclude the personnel of such organizations from such tasks. As one delegate, who proposed deleting the phrase, stated: “the Parties could by mutual agreement decide that personnel of international humanitarian organizations might participate in the activities referred to”.⁵⁴
- 1290 In practice the ICRC has often played an important role in concluding such agreements and has actively participated in their implementation.
- 1291 Finally, the last sentence recalls the obvious obligation to respect and protect the personnel of such teams.⁵⁵
- 1292 However, this obligation was qualified in that it is only imposed while such personnel are “exclusively carrying out these duties”. In this way the obligation of the personnel of such teams to devote themselves *exclusively*⁵⁶ to their task throughout such missions is emphasized, as in the case of temporary medical personnel. The trust which allows such activities would be seriously betrayed if the personnel were entrusted with other tasks, particularly that of military intelligence.
- 1293 Apart from this, it is clearly indicated that for such missions, personnel may be employed who are not normally protected, and that the immunity granted such personnel applies only for the duration of the mission.
- 1294 Finally, this sentence indirectly recalls the delicate nature of such agreements and the importance of their being perfectly clear and precise.

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⁵² Cf. particularly *O.R.* XI, p. 353, CDDH/II/SR.34, para. 22.

⁵³ Cf. *O.R.* XIII, p. 108, CDDH/221/Rev.1, para. 120 (para. 4, sub-para. (b), of the new proposed Section).

⁵⁴ *O.R.* XI, p. 367, CDDH/II/SR.35, para. 22.

⁵⁵ On the concepts of respect and protection, cf. commentary Art. 10, *supra*, p. 146.

⁵⁶ On this concept, cf. commentary Art. 8, sub-para. (k), *supra*, pp. 132-135.

Article 34 – Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
 - (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
 - (b) to protect and maintain such gravesites permanently;
 - (c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.
3. In the absence of the agreements provided for in paragraph 2(b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.
4. A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only:
 - (a) in accordance with paragraphs 2(c) and 3, or
 - (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

Documentary references

By way of exception, the references to the Official Records of the CDDH are cited at the beginning of the Section as Articles 32-34 were treated as one article during much of the CDDH.

Commentary

- 1295** Article 34 is concerned with the remains of persons who have died, as shown in the title, and with various problems linked to the burial of such persons. It develops the Conventions by introducing new provisions and moreover, by extending the personal field of application of existing provisions.

Paragraph 1 – Respect for remains and gravesites

- 1296** This paragraph is concerned with the respect due to the remains and gravesites of persons insofar as these are not covered by other provisions of the Conventions or Protocol I.
- 1297** Thus it concerns only remains and gravesites that “would not receive more favourable consideration under the Conventions and this Protocol”. It therefore excludes:
- combatants who have died in battle and who are covered by Articles 15-17 of the First Convention, and by Articles 18-20 of the Second Convention;
 - prisoners of war who have died during a period of detention and who are covered by Articles 120 and 121 of the Third Convention;
 - protected civilians who have died during internment and who are covered by Articles 129-131 of the Fourth Convention.
- 1298** It therefore covers the following categories:

a) *Persons who have died for reasons related to occupation*

- 1299** The whole population of occupied territories seems to be covered by this provision. Nevertheless, the following are excluded:
- civilian internees, as these enjoy greater protection under the Conventions (see above);
 - the nationals of the Occupying Power.¹ However, under Article 75 (*Fundamental guarantees*) the latter are entitled to humanitarian treatment if they are detained for reasons related to the conflict,² and it is clear that such

¹ On this subject, *cf.* introduction to this Section, *supra*, p. 342.

² *Cf.* commentary Art. 75, para. 1, *infra*, pp. 866-871.

humanitarian treatment implies a respect for their remains and a decent gravesite;

- persons who have died for reasons not related to the occupation. However, with the exception of nationals of States not Parties to the Conventions, such persons are covered by Article 27 of the Fourth Convention, which provides in particular that they are entitled in all circumstances “to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs”, and that “they shall at all times be humanely treated”. It is clear here, too, that such a provision implies, at the very least, a respect for the remains of the dead and a decent burial in accordance with their religious practices.

1300 As regards Article 34, paragraph 1, this is concerned more specifically, as shown above, with persons who have died “for reasons related to occupation”. The connection between the occupation and the death is not defined more precisely. It basically relates to persons who are victims of armed conflicts, particularly of bombardments, and to persons killed by the armed forces of the Occupying Power for failing to comply with security regulations related to the occupation, such as curfews. It is probably advisable to limit this category to clear-cut cases such as these, and to exclude cases which are less clear, such as death which is to some extent hastened by a lack of medication or by the grief resulting from separation (it may be recalled that respect for the remains and gravesites of persons who have died for such reasons is, in any case, implicitly imposed by Article 27 of the Fourth Convention).³

1301 Finally, nationals of States not Parties to the Conventions should also be considered to be covered by this provision,⁴ if they have died for reasons related to the occupation.

b) Persons who have died in detention resulting from occupation or hostilities

1302 With the exception of civilian internees and the nationals of the Party concerned, this category concerns:

- persons whose detention results from occupation. There is no difference intended between detention “resulting from occupation” and the phrase “during occupation”, used in paragraph 2 of Article 33 (*Missing persons*).⁵ This remark is important also in relation to the category mentioned above under a), because of the fact that persons detained for reasons of occupation can obviously die for reasons that are not related to occupation;
- persons “in detention resulting from hostilities”. It would have been more precise to refer here to “the hostilities” as we are concerned with the same armed conflict which gave rise to the application of the Protocol in the first place (apart from the above-mentioned occupation problem). The French text is not more precise here, as it also omits the definite article (“d’hostilités”),

³ National legislation, particularly social legislation, may also give indications in this respect.

⁴ On this subject, *cf.*, by analogy, commentary Art. 33, *supra*, p. 357.

⁵ *Cf.* also commentary Art. 33, para. 2, *supra*, p. 357.

although in Article 33 (*Missing persons*), paragraph 2(a), it did use, in a similar context, the definite article (“des hostilités”). However, the English text in Article 33 (*Missing persons*) is as imprecise as it is in Article 34. Yet, the reference to “detention resulting from hostilities” should be understood in the same way as the corresponding one in Article 33 (*Missing persons*).⁶

c) *Persons not nationals of the country in which they have died as the result of hostilities*

1303 These are persons who are in the territory of a Party to the conflict and who are:

- neither nationals of that Party to the conflict;
- nor persons who fall under a more favourable régime under the Conventions and Protocol I.⁷

1304 They therefore comprise:

- nationals of States not Parties to the conflict or co-belligerent States who are in the territory of a Party to the conflict where the State of which they are nationals has a “normal diplomatic representation”,⁸ and who are therefore excluded from the protection of Part III of the Fourth Convention. In the event of their death, such persons are therefore covered by this provision, even if the problem should in principle be solved without recourse to international humanitarian law;
- nationals of the adverse Party (other than prisoners of war and civilian internees), nationals of States not Parties to the conflict and nationals of co-belligerent States who are in the territory of a Party to the conflict where the State of which they are nationals does not have a “normal diplomatic representation”. In fact, such persons are covered by Part III of the Fourth Convention, but apart from the general provisions of Article 27,⁹ Part III does not contain any provisions concerning the remains and gravesites of the dead;
- nationals of States not Parties to the Fourth Convention, who are therefore not Parties to the Protocol either.

1305 All such persons are covered by this provision of Article 34, if they have died as a result of hostilities. Death may be due in particular to bombardment or other attacks, possibly aimed directly at such persons in violation of international humanitarian law, or they may be victims of incidental damage resulting from attacks on military objectives.¹⁰ Their death may be immediate or not. For example, if a man spends a year in hospital because of injuries caused by bombardment, and dies after this period from his injuries, he is of course covered.

⁶ *Ibid.*

⁷ On this subject, *cf. supra*, pp. 354-356.

⁸ *Cf.* Fourth Convention, Art. 4, para. 2.

⁹ On these provisions, *cf. supra*, p. 367.

¹⁰ On this subject, *cf.* particularly Art. 57, sub-para. 2(a)(ii), and the commentary thereon, *infra*, pp. 682-683.

But here, too, there may be borderline cases where the causal link between death and hostilities is not clear. However, there must undoubtedly be a direct causal link.¹¹

- 1306** There are two requirements vis-à-vis the persons listed above: respect for their remains, and respect for and maintenance and marking of the gravesites.

a) *Respect for remains*

- 1307** Article 34, paragraph 1, is very brief in this respect, simply stating that the remains of certain persons “shall be respected”, without any further clarification. Reference should be made to the provisions of the Conventions,¹² to determine the contents of this obligation. Basically this consists of preventing the remains from being despoiled and from being exposed to public curiosity, by placing them in an appropriate place before burial or cremation. This also, for that matter, constitutes a measure of essential public hygiene. Respect for the remains also implies that they are disposed of as far as possible in accordance with the wishes or the religious beliefs of the deceased, insofar as these are known.

b) *Gravesites*

- 1308** Gravesites must be “respected, maintained and marked as provided for in Article 130 of the Fourth Convention”. That article deals with the burial or cremation of civilian internees and the relevant provisions of that article therefore apply to the gravesites of the persons covered by this paragraph.
- 1309** As regards respect, Article 130 mentions respect for graves without any further explanation. It shows how much this is considered self-evident.
- 1310** However, the same article also lays down a principle of individual graves, and only permits cremation in exceptional circumstances “for imperative reasons of hygiene, on account of the religion of the deceased, or in accordance with his expressed wish to this effect”. The duty to retain the ashes and transfer them to the next of kin is also mentioned. These provisions arise from a respect for both the remains and for the gravesites, and this should be duly taken into account.
- 1311** Moreover, Article 130 states that graves should be “properly maintained”, and above all, that they must be “marked in such a way that they can always be recognized”. This is certainly the essential element, and even the main object, not only of marking the grave, but also of maintaining it properly.¹³

¹¹ Cf. also *supra*, pp. 367-368.

¹² Cf. particularly Arts. 15-17, First Convention; 18-20, Second Convention; 120, Third Convention; and 119-120, Fourth Convention.

¹³ For more details on this subject, cf. *Commentary IV*, pp. 506-507.

Paragraph 2 – Access to and maintenance of gravesites; return of the remains

Opening sentence

- 1312** This sentence imposes the obligation to conclude agreements of which the subject matter is specified in sub-paragraphs (a), (b) and (c). This obligation rests on the “High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated”.
- 1313** The persons whose graves or remains are situated in the territory of the Contracting Party are those covered by paragraph 1, even though the wording of paragraph 2 seems to have a broader scope. However, the development of the situation should be taken into account. Thus, for example, a Contracting Party occupying the territory of the adverse Party would be affected by these provisions if the said adverse Party had buried in such territory some of its own nationals who had died as a result of hostilities.
- 1314** The fact that “other locations of the remains” of such persons are mentioned in addition to graves is in order to take into account all eventualities, lawful or unlawful, such as, in particular, cremation, collective graves, and even mass graves consequent upon atrocities committed during hostilities.¹⁴
- 1315** The obligation concerns the “High Contracting Parties”. The Parties engaged in a conflict such as that provided in Article 1 (*General principles and scope of application*), paragraph 4, which have made the declaration provided for in Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, are not mentioned. However, this omission has no legal consequences as Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3(b), provides that the authority representing such a Party “assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol”.¹⁵
- 1316** However, in practice the agreements concerned presuppose lasting control of the territory which such a Party rarely has in fact. Thus they should act in accordance with the spirit of these provisions to the extent that they are able to do so. Depending on the circumstances, some *ad hoc* procedures could be envisaged, particularly through the good offices of the Protecting Powers or the ICRC.
- 1317** Finally, the obligation to conclude agreements only enters into force “as soon as circumstances and the relations between the adverse Parties permit”. This phrase was discussed at length in Committee II.¹⁶ At first the Working Group of Committee II preferred the solution of using the same expression that was used in Article 33 (*Missing persons*), paragraph 1, namely, “as soon as circumstances permit, and at the latest from the end of active hostilities”.¹⁷

¹⁴ Cf. also *O.R.* XI, p. 354, CDDH/II/SR.34, para. 28.

¹⁵ On this subject, cf. also commentary Art. 96, *infra*, pp. 1088-1092.

¹⁶ Cf. particularly *O.R.* XI, p. 367, CDDH/II/SR.35, para. 25, and *O.R.* XII, p. 250, CDDH/II/SR.78, para. 10; pp. 254-255, paras. 39-43.

¹⁷ Cf. *O.R.* XIII, p. 109, CDDH/221/Rev.1, para. 120 (Art. 18 *bis*, para. 7).

- 1318 The Committee then opted for the expression “as soon as circumstances permit”,¹⁸ but in the end it agreed on the formulation that was finally adopted, and which did not give rise to any comments¹⁹ after a statement emphasizing the difficulty of carrying out agreements permitting access of families to gravesites whilst hostilities were continuing.²⁰
- 1319 It could be claimed that the relations between the Parties constitute part of the “circumstances” which make it possible to conclude such agreements or not. However, the more specific wording has the advantage of emphasizing the importance of such relations, which obviously form the key to the problem. The very flexible wording which was finally adopted should make it possible to deal with important humanitarian problems raised by this paragraph without seeing any political motivation behind this. It is clear that it is up to the Parties concerned to determine whether their relations permit the conclusion of such agreements, but in the event there is nothing to prevent Protecting Powers or the ICRC from suggesting them.
- 1320 Finally, it should be noted that the Parties to the agreement are not identified, but it is clear that these will be States with a legitimate interest in the remains situated in the territory of the Contracting Party concerned, an interest based on the fact that the remains are those of their nationals or of others for whom they are responsible, insofar as they meet the criteria set out above.²¹

Sub-paragraph (a) – Access to gravesites

- 1321 The first of the agreements which the Contracting Parties must conclude within the restraints described above concerns access to gravesites, which was presented on behalf of the co-authors of the initial proposal as an “obvious and fundamental humanitarian need”.²²
- 1322 Those benefitting from the agreement are first of all the “relatives” of the persons who have died and who meet the criteria listed above.²³ The concept of “relatives” has been examined above.²⁴
- 1323 Another category of beneficiaries is also mentioned, namely, representatives of official graves registration services. In fact it is important that a census of the dead and an accurate report on the location of gravesites should be carefully drawn up by the services of every State concerned, particularly in order to facilitate the informing of families and for the solution of various problems, whether legal or otherwise. However, it is not impossible that a Contracting Party may consider that the situation only permits access for families or, conversely, for the graves registration services. In such cases agreements are made in two stages.

¹⁸ Cf. *ibid.*, p. 332, CDDH/II/376 (Art. 20 *ter*, para. 2).

¹⁹ O.R. XII, pp. 254-255, CDDH/II/SR.78, paras. 38-44.

²⁰ Cf. *ibid.*, p. 251, para. 16.

²¹ Cf. *supra*, pp. 366-369.

²² O.R. XI, p. 186, CDDH/II/SR.19, para. 76.

²³ Cf. *supra*, pp. 366-369.

²⁴ Cf. commentary Art. 32, *supra*, pp. 346-347.

1324 The agreements should “facilitate access to the gravesites”, which is not a very precise wording. Obviously this primarily means that the persons concerned should be able to enter the territory and, if necessary, be granted a visa. Then they should be informed exactly where the graves are located. However, in practice many problems may arise concerning in particular the transport of persons, or the exact location of a grave at the indicated site, and this applies all the more if the armed hostilities have not yet terminated. This did not escape the notice of the drafters of the Protocol. This instrument therefore requires, in addition to agreements facilitating access to the gravesites, that the Contracting Parties concerned “regulate the practical arrangements for such access”. Thus, if necessary, special transport should be made available, and specific dates fixed for the persons concerned to avoid possible congestion. Officials able to locate the graves should be made available at the site and, in short, all that is necessary for the agreement to be put into operation in the best conditions.

Sub-paragraph (b) – Protection and maintenance of gravesites

1325 Paragraph 1 lays down obligations relating to the establishment, marking and maintenance of gravesites, as mentioned in this paragraph. The problem posed by this sub-paragraph concerns the duration of such obligations. The maintenance of gravesites after all involves financial expenditure which cannot be laid *ad infinitum* to the charge of countries where gravesites of other countries’ nationals are located.²⁵

1326 As the sponsors of the initial proposal stated, the fact that the State of origin of the dead must bear the cost of maintenance of gravesites in the territory of another State is “a necessary corollary to the duty of maintaining such graves. Otherwise, the State responsible for the maintenance of the graves might rightly feel itself overburdened”.²⁶

1327 Thus bilateral agreements must be concluded to solve this problem, as the sub-paragraph under consideration here requires, and a procedure should be laid down in case agreements cannot be concluded. This is done in paragraph 3.²⁷

1328 Moreover, in this respect it should be noted that the Conventions do not deal with this problem and do not specify a time-limit on the obligation to maintain gravesites.²⁸ Even though the system now laid down only officially applies to the gravesites concerned here, which are not those covered by the Conventions, it must be admitted that in future it will also be applied to the latter, in this way filling an obvious gap in the Conventions.

²⁵ On this subject, *cf.* also commentary para. 3, *infra*, pp. 376-377.

²⁶ *O.R.* XI, p. 186, CDDH/II/SR.19, para. 78.

²⁷ *Cf. infra*, pp. 376-377.

²⁸ *Cf.* Art. 17, para. 3, First Convention; Art. 120, para. 4, Third Convention; Art. 130, para. 1, Fourth Convention.

Sub-paragraph (c) – Return of the remains

- 1329** The second field in which the Contracting Parties referred to in this paragraph are obliged to conclude agreements is that of repatriating the remains of the dead covered by this sub-paragraph.
- 1330** It should be noted that the Conventions do not provide for the repatriation of the remains of deceased persons which are dealt with by specific provisions.²⁹ They do not, of course, exclude this, but they do not contain any procedure to be followed. Thus this provision can again serve as an example, not only for the dead explicitly covered, but also for those covered by the Conventions. When they presented the initial proposal, the co-sponsors clearly indicated that although they intended to extend the procedure to cases which had not been previously covered, their aim was still “a clarification of the procedure and time with respect to the duty to allow the exhumation and return of the remains of a deceased person”.³⁰
- 1331** The return of the remains of the deceased provided for here should form the object of an agreement as should that of their “personal effects”. In this respect it should be noted that the First and Second Conventions provide for the automatic forwarding of the personal effects of deceased combatants to the Power on which they depend, by the Information Bureau referred to in Article 122 of the Third Convention.³¹ The Third Convention lays down the same procedure for articles left by prisoners of war “who have been repatriated or released, or who have escaped or died”.³² Similarly, the forwarding of personal valuables of persons protected by the Fourth Convention, “in particular those who have been repatriated or released, or who have escaped or died”, is laid down in that Convention.³³ In this respect it is clear that the provision under consideration here cannot in any way diminish the obligations arising from those articles.³⁴
- 1332** For the meaning of the expression “personal effects”, reference should be made to the Conventions: Article 16 of the First Convention mentions “last wills or other documents of importance to the next of kin, money, and in general all articles of an intrinsic or sentimental value”. Article 122, paragraph 9, of the Third Convention refers to “all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin”.
- 1333** As regards Article 139 of the Fourth Convention, this refers only to “personal valuables”. In this respect the commentary on that Convention specifies that these are “all the articles which belonged to the person” concerned, and which “are of any commercial worth or sentimental value”. Finally, it adds: “In practice,

²⁹ Cf. Art. 17, First Convention; Art. 20, Second Convention; Art. 120, Third Convention; Art. 130, Fourth Convention.

³⁰ O.R. XI, p. 186, CDDH/II/SR.19, para. 75.

³¹ Cf. Art. 16, para. 3, First Convention and Art. 19, para. 3, Second Convention.

³² Cf. Art. 122, para. 9, Third Convention.

³³ Cf. Art. 139, Fourth Convention.

³⁴ On this subject, cf. particularly O.R. XI, p. 190, CDDH/II/SR.20, para. 6.

therefore, almost all the articles found on the spot will be collected and forwarded.”³⁵

1334 The agreements must “facilitate” the return of the remains and the personal effects. Basically this implies the exhumation of the remains when they have been buried, and the forwarding of such remains and of personal effects. These tasks can only be carried out by the competent authorities of the Contracting Parties concerned. However, the agreements can lay down rules for sharing the costs.

1335 As in the case of sub-paragraph (b) examined above, paragraph 3 provides for a procedure when there is no agreement regarding repatriation of remains.³⁶

1336 The agreements should provide for the repatriation of the remains and of personal effects:

- on the one hand, upon the request of the home country;
- on the other hand, upon the request of the next of kin, with a right of veto of the home country.

1337 Committee II discussed the question of the “home country” at length. One amendment proposed including a definition of the State of origin.³⁷ This amendment was subsequently withdrawn in favour of the proposal made by the Working Group.³⁸

1338 The idea that the home country should be permitted to *object* to the repatriation of remains, even though an express agreement is not required, was also introduced by an amendment,³⁹ with the aim of permitting repatriation

“even if there was no home State, and consequently no one was allowed to object. That might be the case, for example, if a defeated State broke up into two or more separate States, neither of which was interested in some or all of the dead, although their families might still wish to have the remains repatriated”.⁴⁰

1339 A definition close to that proposed in the above-mentioned amendment was then introduced into the report of the Working Group presented at the fifty-second session of Committee II, but it was in square brackets, indicating that the desirability of such a definition was in dispute. It gives a good indication of how this expression should be interpreted:

“‘home country’ means the State on which a person depended on the date he died or was reported missing, or, in the event of a succession of States taking place in relation to that country, the State on which such person would have depended had he not died or been reported missing”.⁴¹

³⁵ Cf. *Commentary IV*, p. 538.

³⁶ Cf. *infra*, pp. 376-377.

³⁷ *O.R.* III, p. 101, CDDH/II/220.

³⁸ Cf. *O.R.* XI, p. 357, CDDH/II/SR.34, para. 49.

³⁹ Cf. *O.R.* III, p. 100, CDDH/II/56/Rev.1.

⁴⁰ *O.R.* XI, p. 190, CDDH/II/SR.20, para. 7.

⁴¹ *O.R.* XIII, p. 117, CDDH/221/Rev.1, para. 124 (para. 11 of the new Section I *bis*).

- 1340 In the end, as the Rapporteur of the Working Group stated,
- “the Working Group as a whole had considered that the question of definition was so complex that it would be better not to attempt a definition which might lead to difficulties in reaching a decision on the responsibility for missing or dead persons”.⁴²
- However, commenting on this definition and stressing that it was not “intended to be exclusive”,⁴³ he indicated that “for a soldier or combatant, that definition would normally mean a country in whose forces he was serving, and for a civilian, the country of citizenship or residence”.⁴⁴
- 1341 Finally, one delegate emphasized the importance of two factors: “that of dependency on a State”,⁴⁵ for which the above-mentioned commentary of the Rapporteur gave a valuable pointer, and the “reference to succession of States”⁴⁶ made in the draft definition.
- 1342 These factors will solve the problem in the great majority of cases. A solution taking into account the interests of families should be found in other cases.
- 1343 Thus the request may be made by the home country, but it may also come directly from the family.⁴⁷
- 1344 The question of precisely which relatives were entitled to request repatriation of remains led to some discussion in Committee II. One delegate stated that, according to his delegation, such relatives could only be “close personal relatives”,⁴⁸ and an amendment was even proposed on these lines.⁴⁹ However, another delegate emphasized the fact that the expression “close personal relatives” would not be applicable in his country, “because of the existence there of the extended family”.⁵⁰ This point of view finally prevailed and it is up to each country individually to find a solution on the basis of its laws and customs. However, it should be noted that the English text uses the expression “next of kin”, which only designates the closest living relative, and is therefore more restrictive than the term “relatives” used in Article 32 (*General principle*) and in Article 34, paragraph 2(a). In view of the above-mentioned discussions, the French term “famille” therefore seems more appropriate.
- 1345 Nevertheless, in this case the home country has a right of veto. As one delegate explained, it was not desirable that the exhumation and transfer of remains from well-established gravesites such as those dating back to the First World War, should be carried out without the agreement of the home country.⁵¹

⁴² O.R. XI, p. 354, CDDH/II/SR.34, para. 29.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 358, para. 52.

⁴⁶ *Ibid.*, para. 53.

⁴⁷ On the concept of the family, cf. commentary Art. 32, *supra*, pp. 346-347.

⁴⁸ Cf. O.R. XI, p. 357, CDDH/II/SR.34, para. 45.

⁴⁹ Cf. O.R. III, p. 103, CDDH/II/260; cf. also O.R. XI, p. 374, CDDH/II/SR.35, para. 67.

⁵⁰ O.R. XI, p. 372, CDDH/II/SR.35, para. 58.

⁵¹ Cf. *ibid.*, p. 189, CDDH/II/SR.20, para. 4; cf. also p. 353, CDDH/II/SR.34, para. 25.

- 1346 Moreover, he also stressed the importance of laying down rules for the question of repatriation in an orderly manner, which explains the importance of the right of veto of the home State, which itself takes over the problem in its entirety.⁵²

Paragraph 3 – Treatment of gravesites in the absence of agreements

- 1347 Article 34 does not ignore the fact that the agreements described in paragraph 2(b) and (c) might not be concluded, particularly for financial reasons.
- 1348 In this case the Contracting Party may legitimately wish to stop meeting the expenses incurred by the maintenance of the gravesites concerned. Nevertheless, respect for the remains and the interests of families should still be maintained. For this reason paragraph 3 wisely makes the decision the responsibility of the home country or even of the family in case that country is not prepared to meet the expenses. Although it is not spelled out in so many words, it is quite clear that the offer is directed to the home country, but if needed, this may be transferred to the family or the family may be invited to participate in the expenses.
- 1349 Logically the offer is made only if the agreements regarding permanent maintenance of gravesites or repatriation of the remains, as laid down in paragraph 2(b) and (c), have not been concluded. Further, even if such agreements have not been concluded, the Contracting Party in whose territory the gravesites are situated is obliged to ensure permanent maintenance if the home country of the deceased is prepared to meet the costs.
- 1350 However, an agreement on this subject concluded as soon as possible seems clearly preferable as a long-term solution.
- 1351 In the following situation – i.e., no agreement with the home country and no declaration of intent on the part of the latter to meet the costs of maintaining the gravesites – the Contracting Party concerned “may offer to facilitate the return of the remains of the deceased to the home country”. In practice this means that, at the request of the home country, it is prepared, on the one hand, to exhume the remains, and on the other hand, to ensure that they are transported to a place to be agreed upon (whether this is the border or any other place) where the home country takes charge of them. The technical details and the costs incurred by the operation should clearly be arranged between the Contracting Party and the home country concerned.
- 1352 If the offer to facilitate the return of the remains of the deceased is refused, the Contracting Party may “adopt the arrangements laid down in its own laws related to cemeteries and graves”. Of course, such national legislation is extremely diverse, but this may entail the closure and disappearance of gravesites, particularly if no financial contribution is made for their maintenance.
- 1353 However, two conditions are laid down before such measures may be resorted to:
- A period of five years must have elapsed since the offer was made. There is therefore in any case an obligation to maintain gravesites for five years after

⁵² Cf. *ibid.*, p. 190, CDDH/II/SR.20, para. 5.

the proposal is made to repatriate the remains. This period was contested in Committee II, as one delegate considered in particular that “the Party to the conflict in whose territory such graves were situated should have the right to act in accordance with its domestic legislation without being bound to wait for any given period”.⁵³ However, the period was retained and represents a useful guarantee for families.

- The Contracting Party must give “due notice to the home country” before applying the provisions laid down in its own laws. Thus there is a sort of *ultimatum* which is addressed to the home country, and this is also a positive element, particularly if the national legislation permits the destruction of gravesites. Thus the home country is clearly faced with its responsibilities once again in case the initial offer made five years previously had been forgotten.

Paragraph 4 – Exhumation of remains

1354 Article 34 also includes exhumation, particularly in dealing with the repatriation of the remains of the deceased, and paragraph 4 specifies exact rules which should be observed in this field.

1355 As one of the co-sponsors of the amendment⁵⁴ which gave rise to paragraph 4 stated: respect for graves had been proclaimed as a general principle, and similarly the duty to exhume in certain circumstances, but “exhumation should be the subject of closer control”.⁵⁵ This is why a proposal was made to permit it only in the situations listed. “They had sought to strike a balance between the general principle of respect for graves and the need to exhume”.⁵⁶

1356 This paragraph is addressed to the Contracting Parties in whose territory the gravesites covered by this article⁵⁷ are situated, and it provides that exhumations are strictly prohibited outside the situations described.

1357 These situations are the following:

- exhumation in accordance with the agreements laid down in paragraph 2 (c);⁵⁸
- exhumation in accordance with paragraph 3,⁵⁹ in the absence of such agreements;
- exhumation required in cases of “overriding public necessity, including cases of medical and investigative necessity”. In the last case exhumation is based on a unilateral decision of the Party in whose territory the gravesite is situated.

1358 At first the Working Group considered that the Protocol should not restrict such exhumations, on the one hand, because the principle of respect for the remains of the deceased and for gravesites laid down earlier provided sufficient general limitations, and on the other hand, because the exhumation might be

⁵³ *Ibid.*, p. 367, CDDH/II/SR.35, para. 26.

⁵⁴ O.R. III, p. 101, CDDH/II/204.

⁵⁵ O.R. XI, p. 190, CDDH/II/SR.20, para. 9.

⁵⁶ *Ibid.*

⁵⁷ On this subject, *cf. supra*, pp. 366-369.

⁵⁸ *Cf. supra*, pp. 373-376.

⁵⁹ *Cf. supra*, pp. 376-377.

“undertaken for many reasons, such as the grouping of remains by nationality, relocation of cemeteries, threats of flood or rising water, reasons of health and sanitation, identification of the deceased or enquiries on war crimes or mutilations”.⁶⁰

However, several delegates advocated retaining rules “covering situations where the host State required exhumations for its own purposes”.⁶¹

- 1359** The exhumation should be *necessary* in the public interest. There must be compelling reasons, and as the acting Rapporteur of the Working Group stated, this wording stresses “the need to protect graves”.⁶² He continued by stating that:

“Where adequate protection and maintenance was not otherwise possible – for instance, in the case of scattered and temporary graves made during a battle – exhumation for the purpose of regrouping graves in one location would be a matter of public necessity. There was, however, no clause on general re-grouping of graves, since that might result in the arbitrary or capricious removal of graves.”⁶³

- 1360** The expression “including cases of medical and investigative necessity” was added, following the comment of a delegate who considered that, in addition to cases of overriding public necessity there might be “a matter of military and medical necessity, for example, when it was necessary to determine the cause of death”.⁶⁴ According to another delegate, “public necessity must, by its nature, include both those concepts”.⁶⁵ Although the latter view prevailed, the discussed concepts were included to avoid any misunderstanding.

- 1361** Although the term “overriding public necessity” is therefore fairly clearly defined, it should nevertheless be noted, as the Rapporteur of the Working Group stated, that “it would of course be for the country in whose territory the graves were situated to decide whether or not exhumation was a matter of overriding public necessity”.⁶⁶ In this respect the interpretative declaration by one delegation should be noted:

“Paragraph 4 of the article in no way prevents the exhumation of the remains in temporary graves at the end of an armed conflict by or on behalf of a Graves Registration Service for the purpose of providing permanent gravesites, as was done after the last two European conflicts.”⁶⁷

- 1362** In the cases examined above where exhumation is carried out for reasons relevant to the State in whose territory the graves are situated, three additional obligations are specified with which it must comply:

⁶⁰ O.R. XI, pp. 353-354, CDDH/II/SR.34, para. 27.

⁶¹ *Ibid.*, p. 356, para. 43; also *cf.* paras. 44-46.

⁶² O.R. XII, p. 229, CDDH/II/SR.76, para. 13.

⁶³ *Ibid.*

⁶⁴ O.R. XI, p. 365, CDDH/II/SR.35, para. 15.

⁶⁵ *Ibid.*, p. 373, para. 61.

⁶⁶ *Ibid.*, p. 360, CDDH/II/SR.34, para. 62.

⁶⁷ O.R. VI, p. 81, CDDH/SR.37, Annex (United Kingdom).

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- to treat the remains of the deceased with respect at all times. This reminder was not essential inasmuch as this obligation already follows from paragraph 1. Nevertheless, it is appropriate to emphasize that even reasons of overriding public necessity cannot in any case justify a lack of respect for the remains of the deceased;⁶⁸
 - to give notice to the home country of the intention to exhume. This country may then make comments although it cannot object to the exhumation. On the other hand, on this occasion it could still propose the repatriation of the remains in accordance with a procedure to be determined;
 - to give the home country details of the intended place of reburial. The right of families to access to the graves of their relatives clearly requires the transmission of such information and the home country is responsible for transmitting it to the families concerned.

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⁶⁸ On the concept of respect, *cf.* also *supra*, p. 369.

Part III – Methods and means of warfare - Combatant and prisoner-of-war status

Introduction

- 1363** The law of war, and particularly that part of the law of war which relates to methods and means of warfare, more than ever before deserve our special attention.
- 1364** Despite numerous violations and despite the horrors related to the appearance of new means of destruction, the Hague Regulations Respecting the Laws and Customs of War on Land were still more or less respected by the belligerents during the First World War. The situation worsened during the Second World War, particularly in the field of air and naval warfare, to the point where the question might well be asked whether any rules still existed. However, with regard to the matters more particularly covered by the Hague Regulations, the Military Tribunal of Nuremberg declared on 1 October 1946, addressing both signatories and non-signatories, that the provisions of the Regulations were recognized, at least at the start of the Second World War, by all civilized nations and that they were considered as being declaratory of the laws and customs of war. Furthermore, throughout the conflict no belligerent dared to claim that it was not bound by these rules. The mere fact of invoking the need to take reprisals for any particular operation necessarily implied the existence and recognition of a rule which would have prohibited the operations in other circumstances. In fact the most serious breaches of the Hague Regulations were particularly committed with regard to prisoners of war not covered by the Geneva Convention of 1929, and with regard to the inhabitants of occupied territories.
- 1365** In the resolutions adopted on respect for human rights in time of armed conflict, the United Nations General Assembly called upon all Parties to such conflicts to recognize and carry out the obligations incumbent upon them under the applicable humanitarian instruments, in particular the Hague Conventions of 1899 and 1907. In 1965 the XXth International Conference of the Red Cross confirmed the fundamental principle underlying the Hague Regulations, in Resolution XXVIII, namely that the right of Parties engaged in an armed conflict to adopt means of injuring the enemy is not unlimited (Article 22). On 19 December 1968 the United Nations General Assembly affirmed the resolution of the International Conference of the Red Cross and confirmed the above-mentioned fundamental principle of the law of The Hague (Resolution 2444 (XXIII)).
- 1366** These rules of warfare, or of conduct between combatants as they are sometimes called, are basically those contained in Articles 22 and 23, paragraph 1(b), (c), (d), (e) and (f) of the Hague Regulations. In addition to the general

principle by which the right of belligerents to adopt means of injuring the enemy is not unlimited, they contain two types of fundamental rules: on the one hand, humanitarian rules, and on the other hand, rules on good faith. The humanitarian rules prohibit killing or wounding an enemy who has laid down his arms or no longer has the means to defend himself and has therefore surrendered unconditionally; they also prohibit refusing to give quarter and causing superfluous injury or unnecessary suffering. The rules on good faith prohibit killing or wounding the enemy treacherously, as well as deceiving him by the improper use of the flag of truce, of national emblems or of enemy uniforms, and also by the improper use of the red cross emblem. Every military Power, without exception, must include these fundamental principles in the instructions it issues to its troops.

1367 Thus the first Section of Part III (*Methods and means of warfare*) is concerned with the reaffirmation of these principles. This implies accepting the principle of limited warfare, as opposed to total warfare which discards all rules. It has a key function in relation to the other provisions of the Protocol, since non-respect for the rules of combat entails non-respect for all other rules. It should be considered as a constructive reaffirmation of the law of The Hague.

1368 One of the first objectives was to restore the fundamental rules amongst those who had brushed them aside, i.e., the participants in the two World Wars. There was another objective.

“It is a fact that between the end of the Second World War and the 1960s the community of States underwent a transformation without historical precedent in its extent and the speed with which it took place. The members of the *universitas civitatum* more than doubled in number in less than two decades. The vast areas occupied by dependent territories which still existed in 1945, mainly in two large continents, gradually and almost totally disappeared during this short period. Their populations, which had formerly been considered as objects of international relations and not as subjects enjoying, in the very first place, the right to self-determination, gave rise to numerous independent political entities, to States which have become full members of the international community.”¹

1369 These States, which had recently appeared on the international scene, were to be associated, formally and freely, with the promulgation of the fundamental principles. This was all the more appropriate because since 1945 it was the

¹ Translated by the ICRC. Original French: “Il est un fait qu’entre la fin du deuxième conflit mondial et les années soixante, la société des Etats a été le théâtre d’une transformation dont l’étendue et la vitesse n’ont pas de précédents dans son histoire. Le nombre des membres de l’*universitas civitatum* a plus que doublé en moins de deux décennies. Les vastes étendues de territoires dépendants qui subsistaient encore, vers 1945, dans deux grands continents surtout, ont progressivement et presque totalement disparu au cours de cette courte période. Leurs populations, considérées auparavant comme objet de relations internationales, et non comme sujets dotés avant toute chose du droit de décider d’eux-mêmes, ont donné naissance à de nombreuses entités politiques indépendantes, à des Etats devenus membres à part entière de la communauté internationale.” R. Ago, “Droit des traités à la lumière de la Convention de Vienne, Introduction”, 134 *Hague Recueil*, 1971/III, pp. 306-307.

territories of these new States that had been unceasingly afflicted by the ravages of war. They did not reveal any opposition in this respect and gave their support to the law of The Hague without difficulty.

1370 Problems only started to arise with regard to the second question, namely, combatant and prisoner-of-war status in guerrilla warfare, which is the subject matter of Section II of the present Part (*Combatants and prisoner-of-war status*). It is actually rather strange to note that on this point – one might almost say, on this point alone – the law of The Hague coped rather well during 1939-1945, so as to survive virtually intact, even at the end of the Diplomatic Conference of 1949. Hundreds of thousands, if not millions of resistance fighters opposed the occupying armies in Europe and elsewhere, often with nothing more than makeshift equipment at their disposal, but the Hague Regulations were not, on the whole, seriously shaken thereby. Belgians, Dutchmen, Frenchmen, Greeks, Italians, Norwegians, Poles, Russians and Yugoslavs, to mention only the peoples of the main occupied countries in Europe, as well as many others throughout the world, entered the fight bearing to a greater or lesser extent signs or uniforms to distinguish themselves from civilians (and sometimes bearing none at all), showing more or less respect for their prisoners (and sometimes not respecting them at all), often carrying their arms openly, though not always. Their combatant status was accepted or rejected, depending on whether one considered the territory in which they were fighting as invaded or occupied. It was not in fact unusual that in this struggle, where the rules of the law of The Hague barely survived, the conditions imposed by those rules for recognition of combatant status – conditions which resistance fighters were unable to satisfy or to satisfy fully – were upheld with full force. Both during the conflict however, and thereafter, the law as laid down in The Hague prevailed. During the conflict resistance fighters were often executed summarily, i.e., without formalities. After the conflict such summary executions were only disclaimed in exceptional cases, and when they were, it was at the price of arguing the illegality of the invasion or occupation. Thus there was no one who maintained that the Hague Regulations of 1907 had lapsed on this point. In this way the four conditions of 1907 were eventually reaffirmed in 1949 in Article 4 of the Third Convention: a responsible commander, a fixed distinctive sign, carrying arms openly, observing the laws and customs of war. The only concession consisted of recognizing the right to continue fighting when under occupation, provided that such guerrilla fighters belonged to a Party to the conflict.

1371 Thus in the 1949 Diplomatic Conference there was no intention to contest the reality of the phenomenon which had spread throughout the occupied countries, particularly in Europe, but rather to reaffirm the 1907 rules in order to avoid developments which were considered to be full of risks. This amounted to denying an inevitable evolution linked to the wish of territories to achieve independence. The situation was thus clearly paradoxical.

1372 There was one view in the past that no distinction was needed between combatants and non-combatants as military operations must have the aim of destroying the adversary's will to resist, wherever there is resistance, and thus indiscriminate bombing would be justifiable. On the other hand, with respect to guerrilla fighters, the legal view on that distinction remained as strict as before, and therefore qualified anyone who violated the four conditions of 1907 as a

non-privileged combatant, i.e., as a civilian with no right to carry arms. In view of such developments and contradictions, it was inevitable that subsequent to 1949 the design would sooner or later be returned to the drawing board, without prejudice however to the subject matter already covered by the 1949 Conventions. Yet there has never been any question of blaming those who in 1949, with the best intentions, upheld the draconian conditions with regard to guerrillas, in the belief that this phenomenon, which had been provoked during the Second World War by the occupation, mainly in Europe, could and should be limited in future, precisely because it had been connected with the occupation. What the drafters in 1949 could not have foreseen, was the truly enormous tidal wave of guerrilla activity which in the thirty years following 1945 affected countries which had not yet achieved independence. It was not clear at that time that ultimately guerrilla warfare would be the method of warfare *par excellence* for liberation movements and that the tide of self-determination would propel these movements forward, without giving thought to the conditions agreed upon in The Hague in another time and for other circumstances. The combination of, on the one hand, highly sophisticated means of warfare, products of technological development which make it possible to hit the enemy everywhere and anywhere, with weak legal regulations and, on the other hand, guerrilla activities whose methods are contested to the point where they have no real chance of confronting the adversary, can only lead to an escalation of brutality. Of course, this is not the aim of the law of war. Law is made for life, and not life for law. Is this not clear when man, at the price of so many lives and so much sacrifice, has striven to show the need for new behaviour. Law must not be dominated by sophisticated technical developments as a matter of course.

- 1373 This awareness of a growing rift between the law and reality, on the one hand, and between the available technical means and acceptance of rules governing their use, on the other hand, led the International Red Cross to proclaim certain fundamental principles in Vienna in 1965 and to start the process which was to conclude with the Diplomatic Conference and with the Additional Protocols. In fact, the prevailing view in Vienna in 1965 was basically a concern for the protection of civilian populations against the dangers of indiscriminate warfare. It was the Human Rights Conference in Teheran in 1968 which emphasized respect for human rights in armed conflicts, and which took up the cause of some categories of guerrilla fighters, relying on the principles of the United Nations. Subsequent resolutions of the United Nations General Assembly insisted on the need for developing rules governing the status, protection and humane treatment of combatants (Resolution 2852 (XXVI), 1971) and on the absolute necessity to make significant further progress, particularly in the field of guerrilla warfare (Resolution 3032 (XXVII), 1972). Moreover, it would be wrong to think that the majority view which had emerged during the Diplomatic Conference of 1949 was unalterable. Even in 1951 Professor Baxter had predicted that “it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status”.² Before the start of the Diplomatic

² R.R. Baxter, “So-called ‘Unprivileged Belligerency’: Spies, Guerillas and Saboteurs”, 28 *BYIL*, 1951, p. 323, in particular p. 343.

Conference, in 1974, proposals were made suggesting that the open carrying of arms during military operations would be sufficient to distinguish guerrilla fighters from members of the civilian population. Such suggestions did not come only from countries striving for independence, or those supporting them.³ As far as Draft Additional Protocol was concerned, which the ICRC had prepared to serve as a basis of discussion at the Diplomatic Conference, this only provided in Article 42 for an obligation “that [members of organized resistance movements] distinguish themselves from the civilian population” without any further clarification.

1374 Thus the matter seemed to have a promising start. However, when it was linked to a proposal presented at the first session of the Diplomatic Conference in 1974, to consider wars of national liberation engaged upon invoking the principles of the United Nations Charter as international conflicts, the entire issue became doubtful. By sheer hard work, the will to find a solution, concern to avoid breaking up the Conference and a sense of the magnitude and indivisibility of the problems, success was finally achieved by means of a formulation which admittedly is not always very clear. But if there is one area where it may be said that while criticism is easy positive action is not, this must be it.

1375 Some claimed that this concession amounted to abolishing the requirement that the law of armed conflict be respected in military operations conducted by members of guerrilla movements, while still granting the latter the status of legitimate combatants and of prisoner of war in case of capture. Such allegations are not well-founded, but this introduction is not the right place to discuss that. A status does not entail exemption from penal prosecution if a crime is committed, but offers international procedural guarantees. The achievement is no less great for all that. It led to an international definition of legitimate combatants in an international armed conflict which applies whether combatants are those of a State or not.

1376 Of course, an international conference always takes place at a given time in history with its underlying or open disagreements and its current concerns which influence those looking for solutions and the solutions found, which are therefore to some extent pragmatic. There is no greater possibility of permanent rules than there is of permanent circumstances. Some will always argue that the steps taken are unduly cautious, while others will say they are too bold, but the main point is that they are taken in the right direction.

1377 The first part of the heading of Part III, like the heading of Section I, which is identical, uses words taken directly from the text of Article 35 (*Basic rules*). Although they use different terminology from that used in the Hague Regulations for the same subject, they are not fundamentally different. The expression “means of injuring the enemy” was also taken from the fundamental article according to which belligerents do not have an unlimited right in this respect (Hague Regulations, Section II, Hostilities, Chapter I, Means of injuring the enemy, sieges, and bombardments).

³ See, for example, *The Department of State Bulletin*, No. 1773, 18 June 1973, p. 880.

- 1378** As regards the term “combatant and prisoner-of-war status”, used as the heading of Section II, one may recall the headings found in Section I of the Hague Regulations, viz., “On belligerents” or even more specifically “The qualifications of belligerents”, and “Prisoners of war”. Apart from the fact that the order of the sections is reversed, the structure used in the Protocol for these subjects is therefore the same as that of the Hague Regulations.
- 1379** However, such similarities have only gradually become apparent. As the ICRC had no intention of saying anything about the possibility of amending the Hague Regulations, but was originally concerned only with the conduct of combatants with a view to limiting unnecessary suffering, Part III was simply entitled “Combatants” in the draft presented in 1972 to the second session of the Conference of Government Experts. This subject was not subdivided, although one article (38) was devoted to guerrilla fighters. The fundamental character of the rules of the present Article 35 (*Basic rules*) as well as the importance to be accorded to combatants status in guerrilla warfare, at least when they are captured, finally prevailed, however. In 1973 the draft presented by the ICRC had a basically similar structure to the present one. However, during the Conference itself Section II was considerably developed.

J. de P.

Part III, Section I – Methods and means of warfare

Introduction

1380 This Section is aimed primarily at reaffirming and developing Articles 22, 23 (b), (c), (d), (e) (f), and 24 of the Hague Regulations of 1907. Article 23(a), which deals with the prohibition of poison, was not included, as particular individual weapons were the subject of separate studies. In fact, this omission has no effect on the prohibition which remains fully in force. Similarly, the rules relating to the treatment of enemy property (Article 23(g) and (h)) were not included here as this problem seemed to be less urgent. On the other hand, three absolutely new provisions, which have no equivalent in the above-mentioned articles of the Regulations, have been introduced. These are concerned with the protection of the environment (Article 35 – *Basic rules*, paragraph 3), with the responsibilities at the national level relating to the introduction of new weapons (Article 36 – *New weapons*), and with the protection of airmen in distress (Article 42 – *Occupants of aircraft*).

1381 Finally, with regard to subjects which are common to the Section concerned here and the Hague Regulations, it may be noted that the Hague Conference had urged that until regulations for the law of naval warfare were drawn up, Powers should apply as far as possible to war at sea the principles of the Convention Relative to the Laws and Customs of War on Land.¹

J. de P.

¹ Final Act of the Hague Conference of 1907, resolution No. 4, M. Deltenre, *Recueil général des lois et coutumes de la guerre*, Brussels, 1943, p. 424.

Protocol I

Article 35 – Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Documentary references

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Commentary

Paragraph 1 – Methods or means of warfare: no unlimited right

Introduction

- 1382** The principle contained in this paragraph reaffirms the law in force. Whether the armed conflict concerned is considered by the protagonists to be lawful or unlawful, general or local, a war of liberation or a war of conquest, a war of aggression or of self-defence, limited or “total” war, using conventional weapons or not, the Parties to the conflict are not free to use any methods or any means of warfare whatsoever.
- 1383** With reference to its basis in international law, it was Grotius in his work *De iure belli ac pacis*, published in 1625, who demonstrated the necessity of *temperamenta belli*, of imposing limitations on the destructive power of weapons to be used (at that time Europe was plunged in the horrors of the Thirty Years’ War, which had all too often been waged as a “total war”). This principle undoubtedly had its opponents between 1625 and 1907, but it was never actually contested. The Hague Regulations of 1907 repeat this principle in Article 22 in the following form: “The right of belligerents to adopt means of injuring the enemy is not unlimited”. The necessity of reaching complete agreement on this essential basic principle before any attempt could be made at formulating specific regulations was obvious to the members of the Conference of 1907.
- 1384** In 1965 the XXth International Conference of the Red Cross considered it necessary to reaffirm this principle (“the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited”, Resolution XXVIII). This proposition was taken up again by the United Nations General Assembly on 13 January 1969 in a slightly different form (Resolution 2444 (XXIII)),¹ which was actually closer to the text finally adopted by the Diplomatic Conference. The latter did not contest the proposition submitted on this point by the ICRC,² but it slightly modified the wording of it after a number of proposals and amendments were made,³ finally returning to the “English version”. These modifications did not change the basic intent.⁴ The proposal of making this paragraph into a separate article reveals the importance that was attached to it. The title, “Basic rules”, was introduced by the Conference.⁵

¹ In fact, this was taken from the English version of the 1907 text, except that the expression “belligerents” was replaced by “Parties to an armed conflict”. However, one should remember that the authentic text of the Hague Regulations was in French.

² The ICRC text was as follows: “The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited”. (Draft Protocol I, Art. 33, para. 1).

³ O.R. III, pp. 155, 157, CDDH/III/91, 108, 237.

⁴ A possibly more substantial modification was proposed in an amendment stating that “the choice” (and not the right) of the methods and means of combat was not unlimited (*ibid.*, p. 156, CDDH/III/225); cf. CE 1972, Report, Vol. II, p. 56, CE/COM III/C 27.

⁵ O.R. XIV, p. 234, CDDH/III/SR. 26, para. 5.

- 1385 Contrary to what some might think or wish, in law there are no exceptions to this fundamental rule. If one were to renounce the rule, by which Parties to the conflict do not have an unlimited right, one would enter the realm of arbitrary behaviour, i.e., an area where law does not exist, whether this was intended or not. It is quite another matter to determine the actual scope of the principle, and the specific rules and practices implied by it, which may differ with the times, depending on the prevalent customs and treaties. These variations do not affect the principle itself but its application.

The pretext of the so-called “Kriegsraison”

- 1386 A number of different theories, of which some are still in existence, seek to contest the validity of the rule as such, i.e., the rule contained in the paragraph under consideration. The best known of these, though it is now out of date, was expressed by the maxim “Kriegsraison geht vor Kriegsmanier” (“the necessities of war take precedence over the rules of war”), or “Not kennt kein Gebot” (“necessity knows no law”). These maxims imply that the commander on the battlefield can decide in every case whether the rules will be respected or ignored, depending on the demands of the military situation at the time. It is quite obvious that if combatants were to have the authority to violate the laws of armed conflict every time they consider this violation to be necessary for the success of an operation, the law would cease to exist.⁶ Law is a restraint which cannot be confused with more usages to be applied when convenient. The doctrine of “Kriegsraison” was still applied during the Second World War.⁷ It is possibly the uncertainty as to the applicability of the Hague law in conditions which had changed considerably since 1907 that contributed to this to some extent. However, it is probable that the resort to this doctrine was above all based on contempt for the law, the weakening of which is may be characteristic and a danger of our age.⁸ “Kriegsraison” was condemned at Nuremberg,⁹ and this condemnation has been confirmed by legal writings. One can and should consider this theory discredited. It is totally incompatible with the wording of Article 35, paragraph 1, and with the very existence of the Protocol.

A state of necessity

- 1387 The second obstacle placed in the path of this provision is more serious. It is related to the state of necessity, which is different from the valid doctrine of military necessity which will be examined below. The argument runs like this: the laws of war no longer apply in the case of a state of emergency affecting the very

⁶ M. Greenspan, *The Modern Law of Land Warfare*, Berkeley and Los Angeles, 1959, p. 314; F. Berber, *Lehrbuch des Völkerrechts*, II, Kriegsrecht, 1962, p. 166.

⁷ W. Downey, “The Law of War and Military Necessity”, 47 *AJIL*, 1953, p. 253.

⁸ M. Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, 1954, pp. 291-292.

⁹ For a well-known case, see 42 *AJIL*, 1948, pp. 301-304.

existence of the nation (“Staatsnotstand”), i.e., there is a genuine right to ensure the preservation of the State, which may be exercised when conditions are such that no remedy is available, except by the violation of the laws of war, and to be decided, not by military commanders, but by the highest government authorities.¹⁰ In its work on State responsibility and the state of necessity, a report of the International Law Commission comes to the conclusion that there are no situations which have the effect

“of precluding the wrongfulness of State conduct not in conformity with one of the rules of the law of war which impose limitations on the belligerents regarding the means and methods of conducting hostilities between them, the general purpose being to attenuate the rigours of war” (para. 28).

The International Law Commission considers that a state of necessity cannot be invoked as a reason for eliminating the unlawful nature of conduct against “obligations arising out of peremptory norm of international law, i.e., norm from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character” (para. 37).¹¹

- 1388** It is quite probable that there has been a tendency for war to be conducted, at least to some extent, in conflict with these principles. The *tabula rasa* doctrine, which was put forward by those who considered that the Second World War had left neither rules nor principles behind it, cannot be explained in any other way.¹² This obstacle should be taken seriously, but we are not concerned here with pursuing the examination of this problem any further. However, it does not seem that this doctrine went so far as to repudiate either the Geneva Conventions themselves or the Martens clause.¹³ It is precisely because this sort of situation threatens everything, including the interests protected by the Geneva Conventions, that an effort was made in the Protocol to reaffirm and develop the law applicable to armed conflict. In other words, the principle which states that the Parties to the conflict do not have an unlimited right was contested in the name of total war. The Protocol answered by declaring that the negation of this principle is incompatible with the preservation of civilisation and humanity, and this is in fact the real issue.

Military necessity

- 1389** Though the principle is clear, the concepts which result from it require some explanation. The law of armed conflict is a compromise based on a balance between military necessity, on the one hand, and the requirements of humanity,

¹⁰ F. Berber, *op. cit.*, p. 78.

¹¹ *Yearbook of the International Law Commission*, 1980, Vol. II, part two, pp. 34, 46-47 and 50; there are also numerous bibliographical references, particularly on pp. 46-47. See also the Vienna Convention on the Law of Treaties, Art. 53.

¹² J.L. Kunz, “The Laws of War”, 50 *AJIL*, 1956, p. 328.

¹³ On this subject, see H. Lauterpacht, “The Problem of the Revision of the Law of War”, 29 *BYIL*, 1952, p. 360.

on the other. It is customarily expressed in the form of prohibitions which take military necessity into account. Military necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war.¹⁴ Consequently a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question. Conversely, when the law of armed conflict does not provide for any prohibition, the Parties to the conflict are in principle free within the constraints of customary law and general principles. This is specified in Article 1 (*General principles and scope of application*), paragraph 2, of the Protocol, when it states that:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

This is the Martens clause, which was already contained in essentially the same form in the Preamble of Hague Convention IV of 1907. In other words, when the Parties to the conflict do not clash with a formal prohibition of law of armed conflict, they can act freely within the bounds of the principles of international law, i.e., they have the benefit of a freedom which is not arbitrary but within the framework of law. When they come up against a formal prohibition, they cannot invoke military necessity to derogate from it. When this possibility is explicitly provided for, the Parties to the conflict can only invoke it to the extent that it is provided for.

- 1390 This principle and these concepts are meant to be applied in practice. This is almost always where the difficulties begin. It has been argued that the principle is clear but the concepts are vague.¹⁵ As to these concepts, an effort was made to clarify them in the preceding lines. Others have said that the principle is basic, but it needs to be elaborated; methods and means which strike indiscriminately must be further circumscribed, and this also applies to weapons, environmental factors and terrorism.¹⁶ It is quite clear that these clarifications have above all been given by the rules of the Protocol itself, beginning with the two other paragraphs of Article 35 examined here, which are aimed at the prohibition of superfluous injury or unnecessary suffering and severe damage to the natural environment; these will be examined below. However, it is appropriate to begin by remarking that the text does not contain a prohibition on specific weapons. This might seem unusual at a time when all questions, whatever their nature, end by posing a technical problem. It is not surprising, therefore, that the subject was debated for a long time, from the time of the preliminary draft and throughout

¹⁴ F. Lieber, *Instructions for the Government of Armies of the United States in the Field* (known as the Lieber Code), 1863, Art. 14; this formula is still applicable. In this sense, see W. Downey, *op. cit.*, p. 252.

¹⁵ O.R. XIV, pp. 233-249, CDDH/III/SR.26 and 27.

¹⁶ *Ibid.*

the Conference itself,¹⁷ but it is a fact that the Protocol does not contain a single formal prohibition concerning a specific weapon. This means that even more importance must be attached to the general principles, particularly to the rule of paragraph 2 of the article concerned here, which prohibits superfluous injury and unnecessary suffering. The same applies, of course, to a proper understanding of “military necessity” when the Protocol alludes to it. In fact, this was a criticism which had already been made of the 1949 Geneva Conventions. By repeatedly allowing expressions such as “if possible”, “as far as possible” and exceptions based on military considerations, whether they are considered to be “urgent”, “absolute” or simply “necessary”, one introduces an element of uncertainty and risks arbitrary behaviour. In this respect the 1949 drafters replied that without these concessions, which take reality into account, it would never have been possible to arrive at such detailed texts and at provisions which were so favourable to the victims of war. According to Max Huber, the objection has sometimes been raised:

“that provisions which take reality into account are at risk of becoming a source of reciprocal accusation for the belligerents or a pretext for questioning all laws of war; but this will not be the case if the Conventions combine a high moral tone with a sense of reality”.¹⁸

On the other hand, he admits that:

“there is no branch of law in which complete clarity is more essential than in that of the laws of war, for in this field allegations of violations of the law are particularly difficult to settle by means of juridical and peaceful procedures. This is because practical and psychological conditions in wartime are opposed to an impartial and swift appraisal of the facts”.¹⁹

1391 Yet “the consensus procedure, which is in itself useful, always has certain limitations. The agreement of the Parties is often only reached at the cost of the clarity and precision of the text”.²⁰

1392 The lack of clarity frequently conceals more or less unadmitted “military necessities”. However, if the rule of Article 35, which is discussed here, is not to become a dead letter, it is necessary to determine its scope. In other provisions, the rule may be perfectly clear, but containing a safety clause, depriving it

¹⁷ See, in particular, *CE 1971, Report*, pp. 103-104, paras. 518 and 522; *CE 1972, Report*, Vol. I, pp. 128-131, paras. 3.14 to 3.23; *O.R. XVI, CDDH/47/Rev.1, Report 1974; CDDH/220/Rev.1, Report 1975; CDDH/237/Rev.1, Report 1976; CDDH/408/Rev.1, Report 1977; Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne Report and Lugano Report*.

¹⁸ Translated by the ICRC. M. Huber, *La pensée et l'action de la Croix-Rouge, op. cit.*, p. 221.

¹⁹ Translated by the ICRC. M. Huber, “Quelques considérations sur une révision éventuelle des Conventions de La Haye relatives à la guerre”, *RICR*, July 1955, p. 430.

²⁰ Translated by the ICRC; original text: “la procédure en soi utile du consensus connaît toutefois des limites. L'accord des Parties n'est souvent acquis qu'au détriment de la clarté et de la précision des textes”. Report of 29 July 1976 on relations between Switzerland and the United Nations and its specialized agencies from 1972-1976, submitted by the Federal Council to the Federal Parliament, p. 21, footnote.

precision.²¹ “Have confidence in the wisdom of the generals”²² was the only solution to limit the injury and suffering of war entertained by a number of authors following the Second World War.²³ But it is not the solution which was chosen by the international community, as evidenced by the existence of the Protocol, and there is absolutely no reason to go back on this choice.

- 1393** Having said this, it is important that generals and all combatants who have to interpret matters left to their discretion as a result of recourse to military necessity, do so wisely. Good faith is not a virtue which is the exclusive attribute of the interpreters of the law, but is also imposed on those who enjoy a certain degree of freedom of action in the field, even though the heat of battle does not favour an objective view of things. This is also the place to recall that the Martens clause, which is included in Article 1 (*General principles and scope of application*), paragraph 2, of the Protocol, automatically applies from the moment that a specific rule is questioned as a result of a discretionary clause. Even though the Parties to the conflict may only be bound within the limits of “what is practicable” in a particular case, they will never be exempted from fundamental humanitarian requirements.
- 1394** Moreover, in certain countries the very concept of military necessity has assumed a relatively well-defined form, not only on the basis of legal theory, but also on the basis of case-law. Born of necessity, often by improvisation, the laws of war derive their permanent source from these constraints (“temperamenta”). Those matters which were left to discretionary clauses based on military necessity were those which could not be regulated; and matters which are not regulated provide a field for the law to develop. This is stated explicitly in Article 45 of the First Convention of 1949, which lays down that unforeseen cases are to be provided for by the Commanders-in-Chief in conformity with the general principles of the Convention.²⁴ Undoubtedly the well-known statement by Lauterpacht could also apply to these unforeseen cases. He stated that “the law on these subjects must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being”,²⁵ though writing this, he was thinking in broader terms and was referring to the conduct of hostilities in general.

²¹ For example, this led to a number of experts at the second session of the Conference of Government Experts expressing their fear of passing the responsibility of deciding what is a lawful objective and what is not to the military commander at any level. They firmly opposed the proposal that a military commander could draw up his own criteria and consequently they requested that objective criteria should be laid down in the Protocol, to which the military must refer in practice (*CE 1972, Report*, Vol. I, p. 147, para. 3.141). See also E. David, *La protection des populations civiles pendant les conflits armés*, International Institute for Human Rights, VIIIth Teaching Session, July 1977, p. 32.

²² *Ibid*, p. 52.

²³ F. Berber, *op. cit.*, p. 60, quoting Fenwick.

²⁴ See *Commentary I*, pp. 340-341.

²⁵ H. Lauterpacht, *op. cit.*, p. 379.

- 1395 However, apart from these basic considerations, it is possible to detect elements which define the concept of military necessity even more clearly. This concept can, in exceptional cases, and only in those where it has been explicitly provided for, justify a certain degree of freedom of judgment, though it can never justify a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case.²⁶ This rule is sometimes expressed by the maxim which states that necessity is the limit of legality. Any violence which exceeds the minimum that is necessary is unlawful and it is on this principle that all law relating to the conduct of hostilities is ultimately founded. This principle is expressed in specific rules in the Protocol, but it does not govern only these specific rules. Its scope also extends to situations which are not covered by these rules. This is a direct consequence of the principle which states that the Parties to the conflict do not have an unlimited right.
- 1396 An American writer has attempted a more precise definition with particular reference to the case law:

“Military necessity is an urgent need, admitting of no delay, for the taking by a commander, of measures which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not forbidden by the laws and customs of war.”²⁷

Thus this definition is based on four foundations: urgency, measures which are limited to the indispensable, the control (in space and time) of the force used, and the means which should not infringe an unconditional prohibition.

- 1397 Another definition in very general terms is given as follows: military necessity constitutes “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money”.²⁸ However, this description has the disadvantage that it does not in fact take into account the paragraph of Article 35 with which we are concerned, and therefore it cannot stand on its own. Moreover, it should be quite clear that the requirement as to minimum loss of life and objects which is included in this definition refers not only to the assailant, but also to the party attacked. If this were not the case, the description would be completely inadequate. Finally, it is important to realize that this formula is normally applied purely and simply as a result of respect for the rules of the Protocol, since these rules encompass all considerations of military necessity.²⁹

²⁶ N.C.H. Dunbar, “Military necessity in War Crimes Trials: Notes”, 29 *BYIL*, 1952, p. 442, at p. 444, in a quotation attributed to Phillipson.

²⁷ W. Downey, *op. cit.*, p. 254. In “The Hostages Trial” (Trial of Wilhelm List and Others), the American military tribunal declared that: “Military necessity or expediency do not justify a violation of positive rules [...] The rules of international law must be followed even if it results in the loss of a battle or even a war.” The tribunal added that the prohibitions contained in the Hague Regulations “are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary” (15 *Law Reports*, p. 175, and 8 *Law Reports*, pp. 66-69).

²⁸ M. Greenspan, *op. cit.*, pp. 313-314.

²⁹ See, in addition, M. Greenspan, *op. cit.*, pp. 314-316; for a more detailed discussion of this subject, cf. N.C.H. Dunbar, *op. cit.*

Limits on the exception of reprisals

1398 Obviously these principles and the rule contained in Article 35, paragraph 1, cannot be nullified by reprisals. This above all because reprisals are prohibited in the majority of cases. The Geneva Conventions prohibit them purely and simply against persons protected by these Conventions.³⁰ The Protocol prohibits them in Articles 51-56, against civilians, civilian objects, cultural objects and places of worship, objects indispensable to the survival of the civilian population, the environment and the works and installations containing dangerous forces, as well as all those persons and all the objects which are protected in Part II (the wounded, sick and shipwrecked, medical and religious personnel, medical units and transports, Article 20 – *Prohibition of reprisals*). Thus, according to the Protocol, reprisals are no longer authorized, except in the conduct of hostilities, and even then they cannot be carried out arbitrarily. The following are principles of customary law that apply to the execution of reprisals: the evident failure or manifest impracticability of any other solution, prior and express warning that reprisals will be carried out if the violation does not cease, the decision to be taken at the highest governmental level, the means to be proportional to the offence in question, and immediate interruption when the offence has stopped.³¹ These conditions only serve to confirm the validity and the intangible character of the principle contained in Article 35.

Questions of terminology

- 1399** With regard to the terms used, there are no particular difficulties. In the first place it should be noted that the rule is formulated, as is often the case in Part III, in the present tense, without further explanation or specific prohibitions. This means that the text merely lays down the rule, independently of the conditions of application.³²
- 1400** The expression “Parties to the conflict” replaced the term “belligerents” used in the Hague Regulations, but the term is commonly used in the Geneva Conventions. Moreover, the term “belligerents” dates back to a time when war was still considered as a recognized method of resolving differences which arose between nations. This is no longer the case today, even though all too often the international community is unable to prevent it.

³⁰ First Convention, Art. 46; Second Convention, Art. 47; Third Convention, Art. 13; Fourth Convention, Art. 33.

³¹ See in particular, *Reaffirmation*, Report of the ICRC at the XXth International Conference of the Red Cross, Geneva, 1969, pp. 96-100. For the discussion of the problem at the Diplomatic Conference, see S.E. Nahlik, “Belligerent Reprisals as Seen in the Light of the diplomatic Conference on Humanitarian Law, Geneva, 1974-1977”, 42 *Law and Contemporary Problems* 2, 1978, p. 36.

³² By way of comparison, see Art. 15: “Civilian medical personnel shall be respected and protected”, or Art. 42: “No person parachuting from an aircraft in distress shall be made the object of attack during his descent”; the conditions under which the obligation is to be carried out are explicit in the second example, and those on the exercise of the right are implied in the first case.

- 1401 The Conference preferred the term “methods and means of warfare” to the term “methods and means of combat”, which was used in the ICRC draft,³³ “for the reason that ‘combat’ might be construed more narrowly than ‘warfare’.”³⁴ It is clear that the term “warfare” encompasses “combat”, a term that is used occasionally in the Protocol.³⁵
- 1402 The words “methods and means” include weapons in the widest sense, as well as the way in which they are used. The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. It would automatically fall under the prohibition of Article 57 (*Precautions in attack*), paragraph 2(a)(ii). However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.³⁶

Statements

- 1403 The Conference adopted Article 35 by consensus. However, at the time that it was adopted certain countries expressed an opinion either to say that paragraphs 1 and 2 constitute a reaffirmation of customary law,³⁷ as codified in The Hague, or to indicate that they would have abstained if it had been put to a vote.³⁸ One country joined the consensus on the understanding that: “the basic rules contained in this article will apply to all categories of weapons, namely nuclear weapons, bacteriological, chemical or conventional weapons, or any other category of weapons”.³⁹

³³ See *supra*, note 2.

³⁴ Report of the Rapporteur, *O.R.* XV, p. 267, CDDH/215/Rev.1, para. 20.

³⁵ See Art. 18, para. 3; Art. 41, paras. 1, 2 and 3; Art. 51, para. 4(b) and (c); Art. 65, para. 3; Art. 85, para. 3(e).

³⁶ The ICRC Draft contained yet another explicit reference to the members of the armed forces (see *supra*, note 2), which was finally rejected by the Conference. Perhaps it is because of the extent of the “grey areas” where the prescribed conduct is even more difficult to determine for an ordinary soldier or his superior officer than for the legal experts that this reference was rejected. Nevertheless, it was in accordance with a number of military manuals (see, for example, *US Army Field Manual 27-10*, para. 3(b): “the law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed forces”) and with the Geneva Conventions of 1949. These clarifications were added after the “Hostages Trial” at Nuremberg.

³⁷ *O.R.* VI, p. 115, CDDH/SR.39, Annex.

³⁸ Based on the fact that this article, as well as others in this Part, have “direct implications for the defence and security of States” (*O.R.* VI, p. 101, CDDH/SR.39, para. 55), or for motives relating to para. 3 (*ibid.*, p. 113, Annex).

³⁹ *Ibid.*, p. 115, Annex; the United States has made a declaration contrary to this statement with regard to nuclear arms at the time of signature on 12 December 1977; the United Kingdom also did so to some extent. See commentary Art. 51, *infra*, p. 613.

Conclusion

- 1404 – The principle which states that the right of the Parties to the conflict to choose the methods and means of warfare is not unlimited implies principally the obligation to respect the rules of international law applicable in case of armed conflict.
- 1405 – Military necessity cannot justify any derogation from rules which are drafted in a peremptory manner. On the other hand, military necessity does give military commanders some freedom of judgment if, and only if, this is explicitly provided for in the Protocol, as well as in unforeseen cases or when the applicable rules are very unclear.
- 1406 – Military necessity is limited to measures which are essential to ensure the success of an operation that is planned, and are lawful according to the other rules of the Protocol, or of international law applicable in the particular case. It is always subject to the Martens clause (Article 1 – *General principles and scope of application*, paragraph 2).
- 1407 – To the extent that they are not prohibited by the Protocol, reprisals are governed by customary law and therefore do not confer an unlimited right.
- 1408 – The Protocol does not impose a specific prohibition on any specific weapon. The prohibitions are those of customary law, or are contained in other international agreements.
- 1409 – The rules of the Protocol must be interpreted in good faith at every level.

Paragraph 2 – Prohibition of superfluous injury or unnecessary suffering*Preliminary remarks*

- 1410 Warfare entails a complete upheaval of values.⁴⁰ In war, law, the governing element in social order, is replaced by force. In the majority of cases it turns men who are destined to live normally and achieve, into wounded soldiers, prisoners, oppressed persons or even corpses. In fact, this was the reason for the founding of the Red Cross. It is the Red Cross which takes up the challenge of these outrages perpetrated by men against their fellow men. It is the Red Cross whose prime concern is man's suffering at the very moment that men are desperately engaged in their task of destruction. However, the development of the techniques of war has caused the Red Cross to wonder if it will be able to concern itself much longer with effects to the exclusion of causes. At the start of the Conference a delegate remarked that "what was more important than seeking to improve the condition of the wounded was to restrict the use of weapons which caused unnecessary suffering or had indiscriminate effects".⁴¹ The ICRC was perfectly aware of this. The expression, "the reaffirmation and development of international humanitarian law applicable in armed conflicts" corresponded to the new situation, and indicated that in future the development of humanitarian

⁴⁰ M. Huber, *La pensée et l'action de la Croix-Rouge*, op. cit., p. 33.

⁴¹ O.R. V, p. 129, CDDH/SR.13, para. 15

law should be conceived and undertaken on a wider scale,⁴² although this does not mean that all the necessary attention should not be paid to the Geneva Conventions. The Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, submitted to all governments by the ICRC in 1957, had the sole aim of reducing the suffering of the civilian population. This is now the basic aim of the Protocol itself. However, the memorandum sent to all governments by the ICRC, on 25 May 1967, on the protection of the civilian population against the dangers of indiscriminate warfare, emphasized another matter – that of the combatants. It was not only concerned with saving those who did not participate in the hostilities, but also with avoiding any injury or suffering of the combatants in excess of that necessary to put the enemy *hors de combat*. The ICRC quoted a clause from the Preamble of the St. Petersburg Declaration of 1868, whilst expressing its regret that this was virtually ignored. This clause, which is still applicable, envisages that governments will in due course seek an understanding:

“whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity”.

Finally, in the preliminary papers for the Conference, the ICRC referred to the principles which in its view impose the obligation on the belligerents to abstain from the use of arms:

- of a nature to cause superfluous injury or unnecessary suffering;
- which, because of the imprecision or their effects, will indiscriminately affect the civilian population as well as the combatants;
- of which the harmful effects will escape the control, in space or in time, of those using them.⁴³

1411 At the beginning of the first session of the Conference of Government Experts in 1971, the ICRC was already quite convinced that, from the point of view of humanitarian law, it would be difficult today to make provisions only with regard to the care to be given to the wounded and the sick, or even only to formulate rules of protection. It has become necessary to deal with the means which are available to the combatants. Article 35, paragraph 2, has this sole aim, although it merely announces the principle without detailing any specific points. The object of combat is to disarm the enemy. Therefore it is prohibited to use any means or methods which exceed what is necessary for rendering the enemy *hors de combat*. This rule is the corollary to paragraph 1, which denies an unlimited right to choose the means to harm the enemy. Neither the combatants nor the Parties to the conflict are free to inflict unnecessary damage or injury, or to use violence in an irrational way. All in all, this is the position adopted by the ICRC.

⁴² *Reaffirmation*, p. 2. As Max Huber has remarked, the words “Red Cross” also signify “the indefatigable struggle against all the causes of suffering which can be overcome” (translated by the ICRC) (M. Huber, *La pensée et l'action de la Croix-Rouge*, *op. cit.*, p. 50).

⁴³ *Reaffirmation*, pp. 74-75.

- 1412 However, the history of weapons is above all dominated by the contest between projectile and armour, between mortar fire and fortification. The discovery of a new means of attack leads to the introduction of a new means of defence, which in turn provokes the introduction of an even more powerful projectile. This course of events has been taking place since time immemorial. The battlefield of armaments is now littered with weapons that have disappeared because they are either obsolete or they have been improved upon. In our time this evolution of the means used in attack and defence has developed with a dizzying speed, and to guard against this, “deterrence” is resorted to, which is significant. Historically, when particular weapons disappeared, this was because they were replaced by others. There are very few exceptions to this rule, though certain weapons were rejected because they had a double-edged effect of endangering those who were using them, as well as those against whom they were used. Bacteriological weapons are an example of this.
- 1413 However, it is equally true that there have been a number of attempts in the past aimed at prohibiting certain weapons for disinterested humanitarian motives or, at least, for motives alleged to be such. These attempts did not have the desired effect, possibly because this would have consolidated definitively the superiority of certain categories of individuals over others. Means as simple as the bow and arrow or the crossbow, or as sophisticated for the time of the European Middle Ages as gunpowder, became temporarily subject to prohibitions. Nevertheless, they were used and have contributed to the disintegration of an outdated social order. This makes it difficult to pass judgment. There are the weapons of the poor and the weapons of the rich, the weapons of the attackers and those of the defenders; the problem is indeed complex.

The Declarations of St. Petersburg and The Hague

- 1414 However, a glimmer of light eventually appeared in the murky process of the development of weapons. This came in the form of the St. Petersburg Declaration of 1868, which introduced a prohibition on the use, in time of war, of explosive or inflammable projectiles with a weight of less than 400 grammes. The significance of this Declaration does not primarily lie in the prohibition itself, as the problems arising today are on a different scale from those described. It lies in its Preamble. The salient feature of the St. Petersburg Declaration is the relatively clear idea of the purpose of military operations, i.e., to weaken the military forces of the enemy. With this concept as a starting point, the Declaration continues by stating a principle and concludes with a specific prohibition. The principle is that of the prohibition of weapons which would unnecessarily increase the suffering of men rendered *hors de combat*, or which would inevitably lead to their death. It is sufficient to render enemy combatants *hors de combat*. The actual prohibition is restricted to any projectile of less than 400 grammes which “is either explosive or charged with fulminating or inflammable substances”, but it allows for the possibility of future prohibitions.
- 1415 This was undeniably a milestone, for even in 1863, Lieber had stated in his Instructions – which codified the law existing at the time he was writing – that

since wars had developed into large scale national wars, there were no longer any treaty restrictions of the modes adopted to injure the enemy, but that the law of war imposes many limitations and restrictions based on principles of justice, faith and honour.⁴⁴ The St. Petersburg Declaration was followed in 1899 by three other Declarations at The Hague, including one concerned with the use of bullets which expand or flatten easily in the human body (dum-dum bullets).⁴⁵ There was apparently a general respect for this last prohibition by belligerent Parties, even though modern weapons could give rise to new problems in this respect. With regard to the prohibition of 1868, practice is less clear and the question is controversial.⁴⁶ However, the principal point which was raised by some of the experts who concerned themselves with this matter was a different issue. The St. Petersburg Declaration of 1868 and the Hague Declarations of 1899 explicitly prohibit particular weapons on the basis of a certain concept of military operations which renders these weapons unnecessary. The Hague Regulations of 1907 which in Article 23, paragraph 1(e), states that it is prohibited “to employ arms, projectiles, or material calculated to cause unnecessary suffering” turns this basis into the rule itself, but as a result it becomes so vague and generalized that in the view of the experts it lacks any practical value.⁴⁷ The principle in the Preamble of the Declaration was thus turned into the rule in The Hague in 1907, whereas its true role is, and only can be, a source of inspiration for establishing the rules.⁴⁸

The work of the United Nations

- 1416 The fact remains that the text of Article 23, paragraph 1(e), of the Hague Regulations had to be included in the Protocol with some modifications in the wording. It can be found in Article 35, paragraph 2, under the title “Basic rules”. However, the problem was not resolved and this is why the participants in the Conference endeavoured to find a solution since the start of the *travaux préparatoires* in 1971.⁴⁹ This was the start of a debate which went on during the two sessions of the Conference of Government Experts, three meetings of experts,⁵⁰ the four sessions of the Diplomatic Conference in an *Ad Hoc* Committee. Resolution 22, entitled “Follow-up regarding Prohibitions or Restriction of Use of Certain Conventional Weapons”, crowned all these efforts.

⁴⁴ F. Lieber, *op. cit.*, Art. 30.

⁴⁵ The two others are entitled “Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons” and “Declaration Concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases”, which has now been replaced by the 1925 Geneva Protocol.

⁴⁶ On this point, see, Y. Sandoz, *Des armes interdites en droit de la guerre*, Geneva, 1975, pp. 16-20.

⁴⁷ A. Cassese, “Weapons Causing Unnecessary Suffering: Are They Prohibited?”, 58 *Rivista di diritto internazionale*, No. 1, 1975, particularly pp. 16-20.

⁴⁸ *Ibid.*, pp. 37-42.

⁴⁹ CE 1971, Report, p. 99, CE/COM III/44, chap. VII.

⁵⁰ The first took place in 1973; see ICRC, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects*, Geneva, 1973, 72 p.; see also *supra*, note 17, and P.A. Robblee Jr., “The Legitimacy of Modern Conventional Weaponry”, *RDPMDG XVI-4*, 1977, p. 401.

Throughout the course of these debates the principle of the prohibition on superfluous damage and injury was examined, analysed, thoroughly studied and questioned, both in the light of past experience and from the point of view of modern military necessity. The principle was never contested, but neither did it form the subject of a wide-ranging agreement on its significance and its scope as far as actual means used in combat are concerned. The first fruits of these efforts were gathered by the “United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects”, which was held in Geneva from 10 to 28 September 1979, and from 15 September to 10 October 1980. This Conference was called on the basis of a recommendation formulated in Resolution 22 mentioned above, which gained the full support of the United Nations General Assembly. It concluded by adopting the following instruments by consensus:

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects;
- Protocol I on Non-Detectable Fragments;
- Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices;
- Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons.⁵¹

The scope of the prohibition

a) General

1417 The report of the Rapporteur indicates that:

“several representatives wished to have it recorded that they understood the injuries covered by that phrase to be limited to those which were more severe than would be necessary to render an adversary *hors de combat*”.⁵²

As we have seen above, this corresponds to the position of the ICRC⁵³ and to the intent of the original rule.

1418 However, before examining particular aspects, it is appropriate now first to examine the undisputed importance and value of the paragraph under consideration here, in relation to all the Geneva Conventions and to the Protocol

⁵¹ See Y. Sandoz, “A New Step Forward in International Law – Prohibitions or Restrictions on the Use of Certain Conventional Weapons”, *IRRC*, January-February 1981, p. 3, and for the Final Act of the Conference, *ibid.*, p. 41.

⁵² O.R. XV, p. 267, CDDH/215/Rev. 1, para. 21.

⁵³ The ICRC draft was as follows: “It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances”. This text is even closer to the St. Petersburg Declaration of 1868. The article is entitled: “Prohibition of unnecessary injury”.

itself. It is precisely because mistreating someone who is *hors de combat*, whether he is wounded, sick, or shipwrecked, a prisoner or a harmless civilian, is considered as being completely unnecessary from the point of view of military necessity, that the Geneva Conventions since 1864, and now the Protocol, have been adopted. It is precisely in order to prevent unnecessary suffering that Article 51 of the Protocol (*Protection of the civilian population*), paragraph 4, prohibits indiscriminate attacks. Similarly, Article 48 (*Basic rule*) imposes the obligation at all times “to distinguish between the civilian population and combatants”, Article 52 (*General protection of civilian objects*) distinguishes military objectives and civilian objects, and Article 57 (*Precautions in attack*) imposes the obligation on those who plan and decide upon an attack to identify the objective before proceeding with the attack. These are just a few examples. The same principle forms the basis for Article 35, paragraph 3, which prohibits widespread, long-term and severe damage to the natural environment. Similarly, Article 36 (*New weapons*) places the High Contracting Parties under an obligation to take care when developing or adopting a new weapon. In all these fields the principle of the prohibition of causing unnecessary suffering is not only undisputed but is applied in the form of concrete rules, including those which are specifically concerned with the civilian population.

b) *Specifics*

1419 The problem of the weapons remains. This is the most difficult, and possibly also the most important issue:

“[...] if there is continued exploitation of technological developments for military purposes, as has unfortunately been the case since 1907, the existence and the value of what still remains of the laws of war and even of the law of nations in general, will become problematical”.⁵⁴

The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

1. explosive bullets and projectiles filled with glass, but not explosives contained in artillery missiles, mines, rockets and hand grenades;⁵⁵
2. “dum-dum” bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions⁵⁶ or bullets of irregular shape or with a hollowed out nose;⁵⁷

⁵⁴ Translated by the ICRC; original text: “[...] si l’on continue à exploiter à des fins guerrières les possibilités techniques qui s’ouvrent comme ce fut malheureusement le cas depuis 1907, l’existence et la valeur de tout ce qui reste du droit de la guerre et même du droit des gens en général deviendra problématique”. M. Huber, “Quelques considérations...”, *op. cit.*, p. 432.

⁵⁵ Declaration of St. Petersburg of 1868; see also The Law of Land Warfare, p. 18, para. 34, in *US Field Manual 27-10*, 1956.

⁵⁶ Hague Declaration III of 1899.

⁵⁷ *US Field Manual 27-10*, p. 18, para. 34; Zusammenstellung der für die Bundeswehr wichtigen kriegsvölkerrechtlichen Abkommen (ZD 15/10), para. 75.

3. poison and poisoned weapons,⁵⁸ as well as any substance intended to aggravate a wound;⁵⁹
4. asphyxiating or deleterious gases;⁶⁰
5. bayonets with a serrated edge,⁶¹ and lances with barbed heads;⁶²
6. hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effect on a soft target.⁶³

1420 The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under the paragraph of Article 35 with which we are concerned here.

1421 The above-mentioned Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, and the Protocols annexed to it, formulate rules prohibiting or restricting the use of certain weapons with particular reference in the Preamble to the text of this paragraph of Article 35, as well as to paragraphs 1 and 3 of this article.

a) The following are prohibited:

- the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays (Protocol I);⁶⁴
- the use of booby-traps intended to cause superfluous injury or unnecessary suffering, as well as any booby-traps that are placed perfidiously (Protocol II).⁶⁵

b) The following have a restricted or limited use:

- mines, booby-traps (those which are not prohibited in the sense described above), and other delayed-action devices (Protocol II);
- incendiary weapons (Protocol III).

1422 With regard to the first category, apart from the restrictions which are already imposed by the rules of Protocol I Additional to the Conventions (restriction of attacks to military objectives, prohibition on indiscriminate attacks etc.), the restrictions concern populated areas and remotely delivered mines (Articles 4 and 5). In principle, mines should not be used in populated areas. Exceptions are provided for in combat, or if adequate control measures are taken. Regarding the use of remotely-delivered mines, this is subject either to a precise recording of the mined area, or to the condition that the mines deployed are fitted with a self-activating or remotely-controlled mechanism capable of neutralizing them as soon as the military situation allows it. Special provisions (Articles 7–9) provide for the publication of the location of the minefields as soon as active hostilities cease, and for special security measures for the protection of United Nations

⁵⁸ Hague Regulations of 1907, Art. 23(a).

⁵⁹ *US Field Manual 27-10*, paras. 34 and 37.

⁶⁰ Hague Declaration II of 1899; this point is now covered in the Geneva Protocol of 1925.

⁶¹ See A. Cassese, "Weapons causing ...", *op. cit.*, p. 23.

⁶² *US Field Manual 27-10*, para. 34.

⁶³ *ICRC, Weapons that may cause...*, *op. cit.*, p. 16.

⁶⁴ These are weapons manufactured entirely or principally with substances such as wood, glass, or plastic, composed of light atoms which are virtually indistinguishable from the atoms of the human body with regard to the absorption of X-rays.

⁶⁵ For details, see *infra*, p. 442.

forces and for international cooperation regarding the removal of minefields, mines and booby-traps.

1423 Incendiary weapons are also subject to restrictions on their use on the basis of Protocol I Additional to the Conventions (prohibition of attacks against the civilian population and civilian objects). But in addition, a military objective situated inside a concentration of civilians should never be the object of attack by incendiary weapons delivered by aircraft (Article 2, paragraph 2). Other incendiary weapons can only be used in such a situation if the military objective is clearly separated from the concentration of civilians, and if all precautions have been taken to prevent or minimize civilian losses and injury (Article 2, paragraph 3). Finally, the use of incendiary weapons is prohibited in forests and other types of vegetation, unless these constitute military objectives or conceal military objectives (Article 2, paragraph 4).

1424 It is worth noting that none of the rules explicitly protects combatants from incendiary weapons such as flame-throwers or napalm. However, it is generally admitted that these weapons should not be used in such a way that they will cause unnecessary suffering,⁶⁶ which means that in particular they should not be used against individuals without cover. Certain other weapons that may have an indiscriminate effect continue to be the object of controversy (although the Additional Protocol imposes mandatory rules in this respect in Article 51 – *Protection of the civilian population*, paragraph 4 which admittedly refers to “attacks” and not to weapons). These include, for example, certain blast and fragmentation weapons, as well as small-calibre projectiles. A start has been made on examining the possibility of prohibiting or restricting their use.⁶⁷

1425 In this field, which concerns the security of States, more than in any other, any extension of the scope of Article 35, paragraph 2, relating to weapons⁶⁸ depends either on the practice of States or on their express agreement to prohibitions or restrictions on the use of the weapons referred to above.

Questions of terminology

1426 Regarding the wording of the paragraph under consideration, this only differs slightly in the French version from the Hague text,⁶⁹ and only the word “méthodes” has been added. On the other hand, the difference is greater in the English text from two points of view. The Conference certainly considered that the expression “calculated to cause”, which was used in English as an equivalent of the French expression “propre à”, and which can be found in the 1907 version

⁶⁶ *US Field Manual 27-10*, para. 36.

⁶⁷ Resolution 22, cited above, p. 402; see also *O.R.* XVI, pp. 602-622, CDDH/IV/226. Unconventional weapons are left out of consideration here as their prohibition was negotiated outside the CDDH, for example, by the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons and Toxin Weapons, and on their Destruction, which entered into force in 1975.

⁶⁸ For an outline of this question, see Y. Sandoz, *Des armes interdites...*, *op cit.*, pp. 16-35.

⁶⁹ See *supra*, p. 401.

of the Hague Regulations was not appropriate,⁷⁰ and consequently the text was amended to “of a nature to”. Moreover, the French expression “maux superflus” was translated in English no longer only by the words “unnecessary suffering”, as it had been formerly, but by the expression “superfluous injury or unnecessary suffering”, as the French expression covers “simultaneously the sense of moral and physical suffering”.⁷¹

Problems arising within the Ad Hoc Committee

- 1427 Thus the principle which forms the object of the paragraph of Article 35 with which we are concerned here, was accepted without any difficulty by Committee III of the Conference. Not surprisingly, there were a number of proposals aimed at rendering it more complete and precise. In this respect one could refer to the proposed amendments designed to prohibit methods and means of mass extermination,⁷² or weapons which have indiscriminate effects,⁷³ or even means of combat resorted to in the context of the conflicts covered by Article 1 (*General principles and scope of application*), paragraph 4,⁷⁴ but these proposals did not, in the end, give rise to any real discussion at this stage. Only the problem of damage to the natural environment, which is covered by paragraph 3 examined below, was dealt with. Obviously the scope of Article 36 (*New weapons*) is left for consideration later. It was in the *Ad Hoc* Committee and in the meetings of experts mentioned above that detailed debates took place on the questions raised by the rule under consideration here. The most that can be said with regard to Committee III is that certain delegations insisted from the very beginning of the discussion of Article 35, paragraph 2, that the problems raised by this provision fall exclusively within the competence of States.⁷⁵
- 1428 Thus the *Ad Hoc* Committee was faced with an arduous task.⁷⁶ It is clear that in the eyes of the victim all suffering is superfluous and any injury is unnecessary.

⁷⁰ O.R. XV, p. 267, CDDH/215/ Rev.1, para. 19.

⁷¹ *Ibid.*, para. 21; the English text was further corrected as compared with the previous translation of the Hague Regulations in that the expression “to choose” was substituted for the expression “to adopt” (O.R. XIV, pp. 234 and 241, CDDH/III/SR.26, paras. 5 and 28).

⁷² O.R. III, p. 157, CDDH/III/238.

⁷³ *Ibid.*, p. 154, CDDH/III/11.

⁷⁴ *Ibid.*, p. 157, CDDH/III/238, and O.R. XIV, pp. 236-238, CDDH/III/SR.26, paras. 12 and 15.

⁷⁵ O.R. XIV, p. 246, CDDH/III/SR.27, para. 8.

⁷⁶ The *Ad Hoc* Committee did not restrict itself to examining those weapons that are of a nature to cause superfluous injury and unnecessary suffering in a strict sense, but also considered other criteria such as non-discrimination, perfidy, the dictates of public conscience (O.R. XVI, p. 470, CDDH/220/Rev.1, Report of the 2nd session, para. 5). Its programme included: a) incendiary weapons; b) small calibre projectiles; c) blast and fragmentation weapons; d) delayed action and perfidious weapons; e) potential weapons development (*ibid.*, p. 453, CDDH/47/Rev.1, para. 2). From the beginning arms which are dealt with in another forum were excluded, particularly those on the agenda of the Conference of the Committee on Disarmament (CCD) (CE 1971, Report, CE/COM III/44, ch. VII, “Prohibited methods and means of warfare” “Note”, p. 99, and CE 1972, Report, Vol. I, para. 3.14, pp. 127-128, and paras. 3.15-3.23, pp. 128-130).

Thus in principle it is necessary to weigh up the nature of the injury or the intensity of suffering on the one hand, against the “military necessity”, on the other hand, before deciding whether there is a case of superfluous injury or unnecessary suffering as this term is understood in war. The debates on this point have too often given way to discussions which could almost be described as Byzantine with regard to the examination of each individual weapon. This occurred to such an extent that “most experts had [...] agreed that it would be easier to ensure that a weapon was banned if the treaty did not spell out the underlying motives”.⁷⁷ This reveals to what extent the matter has remained a question of controversy.⁷⁸ This is the case even if the question is considered from the purely medical point of view, as appeared in the “Statement concerning unnecessary suffering presented by the informal working group of medical experts” at the second session of the Conference of Government Experts on the Use of Certain Conventional Weapons.

1429 This Statement is as follows:

“‘Unnecessary suffering’ is a term implying numerous medical parameters. From a strictly medical standpoint it seems impossible at the present stage of medical knowledge to objectively define suffering or to give absolute values permitting comparisons between human individuals. Pain, for instance, which is but one of many components of suffering, is subject to enormous individual variations. Not only does the pain threshold vary between human beings: at different times it varies in the same person, depending upon circumstances.

It was the opinion of all medical experts that instead of ‘suffering’, *the wound or injury* caused by a weapon offered a better but still very complex way of defining the effect of that particular weapon. It is still very difficult to compare an injury in one part of the human body with one in a different location. Likewise, general effects caused by a local injury are subject to many variables and make comparison between different individuals difficult. However, if such parameters are taken into consideration, it seemed to the medical experts preferable to use *injury instead of suffering*.”⁷⁹

It is quite clear that the French expression “maux superflus” implies the concept of injury as well as that of suffering.⁸⁰

⁷⁷ O.R. XVI, p. 392, CDDH/IV/SR.38, para. 9.

⁷⁸ For the question as a whole, see in particular: ICRC, *Weapons that may cause... op. cit.*, pp. 11-19, paras. 18-39, and pp. 25-29, paras. 59-76; *Lucerne Report*, pp. 7-14, paras. 16-42; *Lugano Report*, pp. 5-9, paras. 1-15 and pp. 24 ff.; as well as the reports of the *Ad Hoc* Committee on conventional weapons, already cited *supra*, note 76; see also the Report of the United Nations Secretary-General, “Napalm and other incendiary weapons and all aspects of their possible use” (following resolution 2852 (XXVI) of the United Nations General Assembly, New York, 1973, A/8803/Rev.1).

⁷⁹ *Lugano Report*, p. 140.

⁸⁰ O.R. VI, p. 99, CDDH/SR.39, para. 47.

Conclusion

- 1430 Article 35, paragraph 2, was finally adopted by consensus.⁸¹ It lays down a prohibition relating to the results produced, though not directly a prohibition on the means. However, this does not mean that such prohibitions are necessarily absent in the Protocol, as is clear from other provisions (for example, the prohibition on the use of perfidy, on methods and means of combat with indiscriminate effects, on starvation etc.).
- 1431 Despite the difficulties encountered by the *Ad Hoc* Committee in its task, the reaffirmation of the prohibition on unnecessary suffering and superfluous injury corresponds to the ICRC's own proposals. To cast any doubt on the prohibition of superfluous injury or unnecessary suffering, or, even worse, to renounce it, would have resulted sooner or later in the acceptance of torture. Admittedly, obstacles will be met in applying this principle to specific weapons, but the main thing is that the principle has been upheld as a permanent signpost indicating the ultimate objective. We conclude with the following summary:
- 1432 – The principle of the Hague Regulations, Article 23(e) is reaffirmed.
- 1433 – All methods of war conflicting with the rules of the Protocol and the Geneva Conventions are of a nature to cause superfluous injury or unnecessary suffering.
- 1434 – The prohibitions on inflicting superfluous injury or unnecessary suffering on combatants and civilians, resulting from preceding rules, are confirmed (see in particular, *supra*, pp. 404-405).
- 1435 – Fragmentation projectiles of which the fragments cannot be traced by X-rays are prohibited as they are of a nature to cause superfluous injury or unnecessary suffering (see *supra*, p. 405).
- 1436 – In inhabited areas, landmines⁸² are subject to restrictions on their use, with the intention of avoiding superfluous injury or unnecessary suffering. The same applies to booby-traps and other delayed-action devices, which should never be deployed perfidiously. The use of remotely delivered mines is subject in all circumstances to the condition that the mined area be recorded or neutralized as soon as the military situation allows (see *supra*, pp. 405-406).
- 1437 – Incendiary weapons are subject to restrictions on their use when the military objective is situated in an inhabited area. In particular, they should never be delivered by aircraft in these circumstances (see *supra*, p. 406).
- 1438 – Napalm, small-calibre projectiles, and certain blast and fragmentation weapons can also result in superfluous injury or unnecessary suffering, in the sense of the provision contained in this article, even though up to now no regulations have been adopted on this subject.
- 1439 – The concept of superfluous injury or unnecessary suffering, its objective effect on the victim (severity of the injury, intensity of suffering), and its relation to military necessity (rendering the enemy *hors de combat*) are not interpreted in

⁸¹ *Ibid.*, p. 101.

⁸² In war at sea, the use of mines is regulated by the Hague Convention of 1907 Relative to the Laying of Automatic Submarine Contact Mines.

a consistent and generally accepted manner. This concept continues to be the basis on which judgment is formed, but debates have shown its relative and imprecise character.

Paragraph 3 – Protection of the natural environment

Introduction

- 1440** Any method or means of warfare which are planned to cause, or may be expected (albeit without the intention) to cause serious damage to the natural environment, even if this effect is incidental, are prohibited.
- 1441** Thus this is a matter not only of protecting the natural environment against the use of weapons or techniques deliberately directed against it, nor merely of protecting the population and the combatants of the countries at war against any of these effects, but also one of protecting the natural environment itself, taking into account the inevitable overflow effect inherent in these incidents and the resulting “transnational” aspect of this problem.
- 1442** These days, the environment is all too often adversely affected, which is the subject of much criticism, and which has principally affected industrialized countries. Pollution, ugliness, soot, noise and the psycho-physiological conditions resulting for mankind, all contribute to create a degraded environment in which mankind is forced to live. Thus preventative or corrective measures have to be taken to prevent this environment from having a harmful effect on the physical or mental health of the people. This struggle has already begun, both at the national level and at the international level. At the national level this action is led by public authorities, and in some cases a Cabinet Member is even appointed with responsibility for the quality of life. At the international level, the United Nations Conference on the Environment, held in Stockholm in 1972, formed the starting point for the United Nations Environment Programme, as well as a declaration known as the Stockholm Declaration. The Red Cross is involved to a significant extent in this peacetime effort, whether it takes place at a national level, through the National Red Cross or Red Crescent Societies, or at the international level, through the intervention of their federation, the League of the Red Cross and Red Crescent Societies.⁸³
- 1443** The threat of peacetime activities to man’s environment is a relatively new problem.⁸⁴ Until quite recently this was the unhappy prerogative, above all, of war. War is still a threat, but it no longer has a monopoly. In fact it is a threat to such an extent, in view of the devastating character of modern weapons, that

⁸³ XXIIInd and XXIIIrd International Conferences of the Red Cross, Teheran, 1973, and Bucharest, 1977, Resolutions XVIII and XXI; *IRRC*, August 1972, p. 468, and “The Red Cross and the Human Environment”, *IRRC*, June 1976, p. 295.

⁸⁴ See also UN, 9 *Monthly Chronicle*, No. 7, July 1972, pp. 89-94; “International Environment, Protection, Policy, Legal and Trade Aspects” in *American Society of International Law, Proceedings*, 1977, p. 48; M. Bothe, “War and Environment”, in Bernhardt (ed.), *op. cit.*, Instalment 4, 1982, p. 290.

Article 54 of the Protocol (*Protection of objects indispensable to the survival of the civilian population*) contains a special provision to this effect. In fact, the threat is not limited to the period of hostilities. It extends far beyond this period, as shown by the studies carried out under the aegis of the United Nations Environment Programme.⁸⁵ Landmines and booby-traps have in some cases been scattered in astronomical quantities in certain theatres of war. Once the war is over, these devices can only be eliminated with considerable risk by patient efforts which must continue for many years. Meanwhile, they form a serious and constant threat to the population. This is just one example, but in reality all delayed-action devices or those which have not exploded, for whatever reason, have a similar effect on the environment, with ominous consequences. In addition, chemical components of certain material war remnants can have permanent harmful effects on humans, animals, vegetation, water, land and the ecosystem as a whole.⁸⁶

Travaux préparatoires

- 1444 The concept of the ecosystem brings us to the essence of Article 35, paragraph 3 (identical on this point to that of Article 55 – *Protection of the natural environment*), as opposed to the concept of the human environment which forms the subject matter previously considered. In fact this distinction has only gradually emerged in the text. The first proposals submitted in 1972 referred to “means and methods which destroy the natural human environmental conditions”,⁸⁷ or the “methods and means which destroy natural human environment”.⁸⁸ These formulations are understandable when one remembers that they express a concern for the protection of the natural environment, for example, the climate, from effects which could in the long run be harmful to the environment necessary for man’s existence.⁸⁹ Man could and should modify his environment by cooperating with nature, not by attacking it in an ill-considered way. However, as war is a destructive activity which is directed against men, i.e. combatants, as much as against the environment surrounding them, these proposals undoubtedly seemed to be lacking in clarity or ambiguous. However,

⁸⁵ United Nations Environment Programme, Administrative Council, 5th session, Nairobi, 9-25 May 1977, item 14 on the provisional agenda “Application of resolution 3435 (XXX) of the General Assembly: The study of the material remnants of war, particularly mines, and their effect on the environment” (UNEP/GC/103/19, April 1977; *O.R.* IV, pp. 282-289, CDDH/IV/inf.241, and *ibid.*, pp. 236-238, CDDH/IV/inf. 222). See also: UNITAR and the Libyan Institute of international relations, *The material remnants of war*, UNITAR/CR/26, 1983; Resolution 3435(XXX) of 9 December 1982 of the United Nations General Assembly.

⁸⁶ UNEP/GC/103, p. 2, para. 6, and *O.R.* XVI, p. 386, CDDH/IV/SR.37, para. 5. See also General Assembly, “Protection of nature from the pernicious effects of the arms race”, Report of the Secretary General, A/S-12/9, 28 April 1982, particularly pp. 6-8, paras. 19-28.

⁸⁷ *CE 1972, Report*, Vol. II, p. 63, CE/COM III/C 68-69; see also *ibid.*, Vol. I, pp. 28-29, para. 0.30.

⁸⁸ *Ibid.*, Vol. II, p. 51, CE/COM III/C 2. For the discussion, see *ibid.*, Vol. I, pp. 30 (par. 0.30), 129 (paras. 3.17 and 3.19), 149 (para. 3.156) and 208 (para. 5.33).

⁸⁹ In this respect, see the amendment CDDH/III/222, *infra*, note 94.

they retain their usefulness in revealing the concern of the original proponents of the final provision with which we are concerned here. This also applies to another proposition concerned with the “means and methods which upset the balance of the natural living and environmental conditions”,⁹⁰ which is linked to the above-mentioned concept of the ecosystem.

1445 These fears are by no means imaginary.

1446 As shown in the *Final Report: An Agenda for the Red Cross*, by D. Tansley, published in 1975:

“Another possibility for the future concerns new kinds of disasters which may emerge from the growing impact of technology upon the environment. Deterioration of the environment through various human activities can be expected to have an important effect on human populations, particularly in large urban agglomerations and densely populated areas. Pollution of the air and of the water cycle raises the possibility of increased ‘technological disasters’ in the future. Many of these can be expected to be local in impact, confined to a single city, region or country. But concern is also growing over the extent to which human activities might also touch the ‘outer limits’ of the ecological systems of the earth. Prediction in such a difficult area is hazardous. It is perhaps enough to note the concern expressed by the Club of Rome [...]”⁹¹

If peacetime activities can unleash such “technological disasters”, we should fear them all the more during wartime.⁹²

The work of the Diplomatic Conference

1447 The problem was brought up by a number of delegations⁹³ from the very beginning of the Conference in 1974, and various proposals were again submitted.⁹⁴ Finally, Committee III set up an informal working group, called the Group “Biotope”, which proposed adding a supplementary paragraph to Article

⁹⁰ CE 1972, Report, Vol. II, p. 52, CE/COM III/C6.

⁹¹ D.D. Tansley, *Final Report: An Agenda for the Red Cross. Re-appraisal of the Role of the Red Cross*, Geneva, July 1975, p. 57.

⁹² For example, see the Report of the United Nations Secretary-General on napalm (*op. cit.*), pp. 31-32, paras. 98-102; pp. 51-52, paras. 160-162; pp. 57-58, paras. 181; p. 60, paras. 160-162. See also “Stockholm International Peace Research Institute”, *SIPRI Yearbook*, 1977, pp. 79-94, and the statement by Mr. Tolba, Executive Director of the United Nations Environment Programme (UNEP), drawn up for the World Day for the Environment, which states that there is “a constant deterioration of the situation in the biological and ecological fields”, in *Weekly Summary of United Nations’ Activities*, SI/22/82, 7 June 1982.

⁹³ See O.R. V, p. 105: CDDH/SR.11, para. 22; p. 139, CDDH/SR.13, para. 61, and p. 141, CDDH/SR.14, para. 3.

⁹⁴ “It is forbidden to employ methods and means of combat which disrupt or destroy the natural conditions of the human environment” (O.R. III, p. 157, CDDH/III/238 and Add.1). “It is forbidden to use means and methods which destroy natural human environmental conditions” (*ibid.*, p. 155, CDDH/III/108, para. 4). “It is forbidden to use methods and means which disturb or alter the ecological balance of the human environment” (*ibid.*, p. 156, CDDH/III/222). See also CDDH/III/60, *ad new Article 49bis* of the ICRC draft, O.R. III, p. 220.

35, with the following wording: “It is forbidden to employ methods and means of warfare which damage the environment in such a way that the stability of the ecosystem is disturbed”.⁹⁵ However, Committee III did not follow the proposal of its working group entirely, and finally eliminated all references to the “ecosystem”.⁹⁶ However, it is clear that there is a discrepancy between the proposals submitted, on the one hand, by a number of different countries (CDDH/III/222, see *supra*, note 94), and on the other, by the Group “Biotope”. Some refer to the ecological balance of the human environment, others to the stability of the ecosystem, and the text which was finally adopted simply refers to “widespread, long-term and severe damage to the natural environment”. The opinions expressed on this point by the United States and the Soviet Union are not unrelated to this result.

1448 A concern for coordination can in fact explain this. At the time that the problem was being debated in the Diplomatic Conference, i.e., in the spring of 1975, the Conference of the Committee on Disarmament (CCD), which was also meeting in Geneva at that time, had on its agenda Resolution 3264 (XXIX) of the United Nations General Assembly. This resolution was concerned precisely with the prohibition of actions to influence the environment and climate for military and other purposes incompatible with the maintenance of international security, human well-being and health. In the annex it included a draft Convention. Article 1⁹⁷ of the Convention, which reflected the deliberations of the CCD,⁹⁸ finally incorporated the prohibition “of environmental modification techniques having widespread, long-term or severe effects”.⁹⁹

⁹⁵ CDDH/III/GT/35; this proposal was made independently of two others of the same nature aimed at the insertion in Part IV of a supplementary article relating to the “protection of the natural environment” (present Article 55) and another article relating to the “protection of natural reserves” (*ibid.*).

⁹⁶ On its part, the ICRC had considered that the concept of the environment was extremely vague, and in the absence of a satisfactory definition, had deemed it best to avoid introducing it in the draft.

⁹⁷ This Article 1 had the following wording in the first Soviet draft: “Each of the Parties to this Convention undertake not to develop meteorological, geophysical or any other scientific or technological means of influencing the environment, including the weather and the climate, for military and other purposes incompatible with the maintenance of international security, human well-being and health and furthermore never under any circumstances to resort to such means of influencing the environment and climate nor to carry out preparations for their use.” (General Assembly, Resolution 3264 (XXIX), Annex.

⁹⁸ “Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques” (47 States Parties at 31 December 1984). See in particular, J. Goldblat, “The ENMOD Convention Review Conference”, in *Disarmament, A Periodic Review by the United Nations*, New York, Vol. III, No. 2, Summer 1984, p. 93.

⁹⁹ The record of the CCD debates leaves little doubt that this wording is the result of an agreement between the major powers. Within the working group of Committee III of the Diplomatic Conference, the United States and the Soviet Union put forward similar views (large scale, prolonged, severe) during the discussion of a proposal by the Rapporteur. Whether it occurred within the CCD or within the Diplomatic Conference, the agreement was reached and led to the withdrawal of the proposals which had been submitted previously. In particular, see Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st session, supplement No. 27 (A/31/27), p. 61, para. 273; p. 66, para. 299 and p. 93, para. 7.

1449 A number of questions arise. Could one maintain that these two texts which seem to be identical, or at least extremely similar on essential points, actually duplicate each other? Within the Diplomatic Conference, this point was examined primarily with regard to the apparent duplication resulting from the paragraph of Article 35 under consideration, and Article 55 (*Protection of the natural environment*). The Group “Biotope”¹⁰⁰ gave the following answer to this question in its report:

“An effort was made to incorporate Article 33 [now Article 35] within Article 48*bis* [now Article 55]. The Group reached the conclusion, however, that the two Articles should remain separate for the reason that whereas Article 48*bis* [55] relates to the protection of the civilian population, Article 33 [35] relates to the prohibition of unnecessary injury.”¹⁰¹

A number of delegations expressed a similar point of view during the discussion of Article 48*bis* [55] within the Working Group.¹⁰² The present paragraph 3 of Article 35 was included in the context of methods of warfare, while Article 55 (*Protection of the natural environment*) is aimed at ensuring the survival or the health of the civilian population living in a particular wartime environment. For this reason it was not considered that these two provisions duplicated each other, as Article 35, paragraph 3, has a much wider scope, taking into account the inevitable “overflow effect”, i.e., the “transnational” aspect of the problem. However, the question was debated above all in relation to the United Nations Convention.

Relation to the United Nations Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques

1450 This question of possible duplication was raised in particular with regard to the two separate instruments: on the one hand, the Additional Protocol to the Geneva Conventions, and on the other hand, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The problem was discussed within the CCD and the representative of the United States clearly responded to this in the negative. He stated that the Protocol is aimed at protecting the natural environment against damage which could be inflicted on it by any weapon, whereas the goal of the Convention is to prevent the

¹⁰⁰ See *supra*, p. 412.

¹⁰¹ CDDH/III/GT/35, p. 3, para. 11. The countries which participated in the Group were: Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, the Netherlands, Spain, Sweden, Yugoslavia.

¹⁰² For example: Switzerland, Democratic Republic of Vietnam, Mongolia, Cyprus. Canada expressed the same opinion but “without throwing out the baby with the bathwater”. Sweden pointed out that the problem had a transnational character.

use of environmental modification techniques¹⁰³ as a weapon.¹⁰⁴ He added that the Protocol only applied to armed conflict, while the prohibition contained in the Convention applies to the use of these techniques for hostile purposes, even in a case where there had been no declaration of war whatsoever, and where no other weapons were used.¹⁰⁵ These views do not seem to have been contested,¹⁰⁶ though some representatives regretted that the identical or virtually identical wording on this essential point (“widespread, long-lasting or severe” in the Convention and “widespread, long-term and severe” in the Protocol) does not make it easy to make a distinction between the two.¹⁰⁷ However, it is generally accepted that the United Nations Convention has a wider application than the Protocol in this respect.

1451 In more concrete terms, one could add that the Convention prohibits the deliberate manipulation of natural processes in order to change “the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space”,¹⁰⁸ with the intention of damaging the armed forces of another State Party to the Convention, its civilian population, towns, industries, agriculture, transportation and communication networks, or its natural resources and wealth.¹⁰⁹ In contrast the Protocol prohibits damaging the natural environment by any means whatsoever, whether direct or indirect, as opposed to effects on the human environment, i.e. “to external conditions and influences which affect the life, development and the survival of the civilian population and living organisms”.¹¹⁰ Even though the formula referring to perturbations of the stability of the ecosystem was rejected, “as an operative part of the standard”,¹¹¹ the term “natural environment” in the Protocol does refer to this system of inextricable interrelations between living organisms and their inanimate environment.¹¹² This is a kind of permanent or transient equilibrium depending on the situation, though always relatively fragile, of forces which keep each other in balance and condition the life of biological groups.

1452 Thus these texts do not duplicate each other. Nor do they seem to contradict each other, as was once feared. This fear was based on the fact that the United

¹⁰³ Cf. Article 1: “Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.”

¹⁰⁴ By way of example the understanding annexed to the Convention mentions: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types, and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere”. (Report cited, A/31/27, p. 92).

¹⁰⁵ *Ibid.*, p. 72, para. 327.

¹⁰⁶ *Ibid.*, paras. 328-330.

¹⁰⁷ *Ibid.*, para. 330; these terms do not actually have the same meaning in the two instruments, as we will see.

¹⁰⁸ Art. 2; for some specific examples, see *supra*, note 104.

¹⁰⁹ Report cited A/31/27, p. 73, para. 332.

¹¹⁰ Report of the Group “Biotope”, CDDH/III/GT/35, p. 2, para. 5.

¹¹¹ Report of the Rapporteur, O.R. XV, p. 268, CDDH/215/Rev.1, para. 26.

¹¹² Report of the Group “Biotope”, p. 2, par. 7.

Nations Convention does not prohibit environmental modifications which cause widespread, long-lasting or severe damage as such, but only to the extent that they are used to cause damage to another State, while the Protocol prohibits any means of a nature to cause widespread, long-term and severe damage to the natural environment. As we have seen above, these similar, though not identical terms reveal different realities and different goals. On the other hand, there is no doubt that the two texts are complementary in time of war, i.e., that the Protocol supplements the United Nations Convention. It is probably for this reason that an effort was made to employ a uniform terminology as far as possible.¹¹³ However, an additional difficulty arises from the fact that the United Nations Convention, on the one hand, and the Protocol, on the other hand, do not give the same meaning to the same terms. For example, for the United Nations Convention, the term “long-lasting” was defined as lasting for a period of months or approximately a season,¹¹⁴ while for the Protocol “long-term” was interpreted as a matter of decades.¹¹⁵ Taking this into consideration, the United Nations Convention prohibits both in times of war and peace any actions which could be expected to cause, for example, a “long-lasting” (several months) modification of the climate, which could harm another State Party to the Convention. In the case of armed conflict the Protocol prohibits any “long-term” (a period of decades) modification of the climate, whether this is instigated directly or indirectly.

1453 In times of armed conflict, which is only what concerns us here, the Protocol and the Convention, taken together, prohibit:

- a) any direct action on natural phenomena of which the effects would last more than three months or a season for one or other of the Parties to the Convention, even if this Party is not a Party to the conflict;
- b) any direct action on natural phenomena of which the effects would be widespread or severe (for the interpretation of these terms, see *infra*, note 117), regardless of the duration, affecting one or other of the Parties to the Convention, even if it is not a Party to the conflict;
- c) any method of conventional or unconventional warfare which, by collateral effects, would cause widespread and severe damage to the natural environment as such, whenever this may occur over a period of decades.¹¹⁶

1454 Undoubtedly there was concern for coordination and even unification of the terminology used, but there is also some danger of confusion as the same words are not used with the same meaning. The drafters of the United Nations

¹¹³ CCD/480, 20 February 1976, reproducing the text of a statement made by the representative of Australia on 24 November 1975 at the First Committee of the United Nations General Assembly.

¹¹⁴ Report cited, A/31/27, p. 91, understanding on interpretation, letter b).

¹¹⁵ O.R. XV, p. 268, CDDH/215/Rev.1, para. 27.

¹¹⁶ Like the oceans, the natural environment, taken in an ecological sense, “res communis”, taken in an ecological sense. It cannot be appropriated but is for the use of everyone, without exclusive jurisdiction or sovereign rights. The most recent writers have advanced the concept of the “common heritage of mankind” (see A.C. Kiss, in 175 *Hague Recueil*, 1982/II, p. 103, particularly pp. 116 and 174).

Convention are thinking of hurricanes, tidal waves and earthquakes as well as rain and snow, and they reason in terms of months and seasons.¹¹⁷ The authors of the Protocol think in terms of “ecology”, and the time scales are not at all the same. This is what the Rapporteur stated in his report:

“The three elements of the adopted formula of time or duration of the damage, scope or area affected, and the severity or prejudicial effect of the damage to the civilian population was extensively discussed. The time or duration required (i.e., long-term) was considered by some to be measured in decades. References to twenty or thirty years were made by some representatives as being a minimum. Others referred to battlefield destruction in France in the First World War as being outside the scope of the prohibition. The Biotope report states that ‘Acts of warfare which cause short-term damage to the natural environment, such as artillery bombardment, are not intended to be prohibited by the article’, and continues by stating that the period might be perhaps for ten years or more. However, it is impossible to say with certainty what period of time might be involved. It appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by this provision. What the article is primarily directed to is thus such damage as would be likely to prejudice, over a long term, the continued survival of the civilian population or would risk causing it major health problems.”¹¹⁸

1455 This last remark seems to refer to Article 55 (*Protection of the natural environment*) of the Protocol rather than to Article 35, with which we are concerned here.¹¹⁹ However, the report clearly indicates that the period should be measured in decades and not in months, which underlines the ecological aspect of the problem, even though the term “ecosystem” is not used in the text.¹²⁰ Similarly, it eliminates certain effects which can extend over decades, while they are not of a nature to affect the ecosystem as such. Also, the problems arising from the material remnants of war, which were referred to above,¹²¹ seem to be covered not only by the provisions of Article 35, but also by Article 55 (*Protection of the natural environment*). The drafters of the United Nations Convention took

¹¹⁷ It is the understanding of “the Committee that, for the purposes of this Convention, the terms ‘widespread’, ‘long-lasting’ and ‘severe’ shall be interpreted as follows:

a) ‘widespread’: encompassing an area on the scale of several hundred square kilometers;
b) ‘long-lasting’: lasting for a period of months, or approximately a season;
c) ‘severe’: involving serious or significant disruption or harm to human life, natural economic resources or other assets.”

Understanding on interpretation relating to Article 1, report cited, A/31/27, p. 91.

¹¹⁸ O.R. XV, p. 268, CDDH/215/Rev.1, para. 27.

¹¹⁹ See *supra*, p. 414.

¹²⁰ See *supra*, pp. 412-413; it is actually in these terms that ecological catastrophes are measured. At the time of the Amoco Cadiz disaster – a tanker which lost 220,000 tons of oil off the coast of Brittany in the spring of 1978 – it was estimated that it would take five to ten years for the equilibrium of the ecological system on the shore to recover, i.e., for the flora and fauna to return to their former level of existence (see 85 *RGDIP*, 1981/4, p. 892).

¹²¹ See *supra*, pp. 410-411.

every precaution to ensure that the interpretation of the terms “widespread, long-lasting or severe” used in the Convention would not be automatically applied to the Protocol.¹²²

- 1456** These apparently contradictory demands are not irreconcilable at the level of interpretation. The ordinary meaning to be given to the terms of a treaty in their context should be established in the light of the object and purpose of the treaty,¹²³ or those of the provision under consideration. These different rules relating to the protection of the environment manifestly reflect a concern about the harmonization of the terminology used. However, each one of these articles should still be understood and interpreted in the light of its own character, its context, object and purpose. These concepts are not interchangeable, nor are the conclusions which are based on them.

Questions of terminology

- 1457** We repeat that the formula used in the United Nations Convention (“widespread, long-lasting or severe”) implies that it is sufficient for one or other of these conditions to be fulfilled, for the situation to fall under the prohibition. On the other hand, a method or a means of war does not become unlawful under Article 35 of the Protocol unless it cumulatively fulfils all three conditions included in the provision, i.e., unless it causes damage which is simultaneously widespread, long-lasting and severe.
- 1458** Further, as a matter of drafting, Article 35, paragraph 3, contains the phrase “intended, or may be expected, to cause”, though there is no equivalent phrase in paragraph 2. The analysis of the latter provision has shown that the English formula (“calculated to cause”), was corrected to conform with the French text (“de nature à”).¹²⁴ In fact, the experts had recognized that the English turn of phrase contained the notion of intention or of deliberate design, which seemed to be missing in the French expression and that it could be interpreted in a more restrictive sense.¹²⁵ It was even contended that the English expression was aimed in particular at the manufacturers of arms and meant to force them to abstain from developing arms of a nature to cause unnecessary suffering.¹²⁶ Whatever the case may be, the drafting of the paragraph under consideration here deliberately differs in this respect from the preceding paragraph and refers both to geophysical weapons, exclusively intended to affect for example the climate,

¹²² “It is further understood that the interpretation set forth above [see *supra*, note 117] is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement”. Report cited, A/31/27, interpretative understandings, p. 91.

¹²³ Vienna Convention on the Law of Treaties, Art. 31, para. 1.

¹²⁴ *Supra*, pp. 406-407.

¹²⁵ *Lucerne Report*, p. 8, para. 22.

¹²⁶ *Ibid.*

and “non-intentional ecological war” in which the consequences for the natural environment simply result from the large scale use of conventional weapons.¹²⁷

Declarations

1459 Article 35, paragraph 3, was adopted by consensus at a plenary meeting. However, a number of delegations decided to make statements,¹²⁸ particularly those who did not approve of the wording of Article 1 of the United Nations Convention and the inclusion of the words “widespread, long-lasting or severe” in this provision, a wording which was considered by its supporters to help “friction on insignificant questions”.¹²⁹ One delegate stated that in his opinion:

“the interpretation of the terms ‘widespread’, ‘long-term’ and ‘severe’ has to be consistent with the general line of thought as it emerged from the deliberations on this article in Committee III, as reflected in its report (CDDH/215/Rev.1). In no case should it be interpreted in the light of the terminology of other instruments of environmental protection that have a different scope of application altogether”.¹³⁰

¹²⁷ *Lucerne Report*, p. 76, para. 273. The Report of the Rapporteur indicates that these two expressions “may be expected” and “are intended” were included for reasons of extreme caution. The latter alludes to deliberate harm directed against the natural environment, as a method or means of warfare, such as the destruction of natural resources. The former implies an objective norm concerning that which a State or an individual considers, or should consider, to cause the effects described (*O.R.* XV, p. 360, CDDH/III/275).

¹²⁸ *Venezuela*: “[...] on the understanding that this approval is without prejudice to Venezuela’s position on the Convention on the prohibition of military or any other hostile use of environmental modification techniques” (*O.R.* VI, p. 118, CDDH/SR.39, Annex).

Mexico: “His delegation’s support for paragraph 3 of Article 33 [35] could in no way be construed as a change in its Government’s attitude to the Convention entitled “Convention on the prohibition of military or any other hostile use of environmental modification techniques” in which the words “widespread, long-lasting or severe effects” appeared. Those words had not the same scope as they had in the context of the Protocol” (*ibid.*, p. 100, CDDH/SR.39, para. 49).

Argentina: “The Argentine delegation interprets the provision which has now been approved as in no way connected with the work of the Conference of the Committee on Disarmament, which culminated in the Convention on the prohibition of military or any other hostile use of environmental modification techniques in respect of which the Argentine government has made its position clear at the appropriate time” (*ibid.*, p. 113, CDDH/SR.39, Annex).

Egypt: “The Egyptian delegation emphasizes the fact that its acceptance of Article 33, paragraph 3, in no way prejudices its country’s position on the Convention on the prohibition of military or any other hostile use of environmental modification techniques” (*ibid.*, p. 114, CDDH/SR.39, Annex).

¹²⁹ Report cited, A/31/27, p. 66, para. 298.

¹³⁰ Federal Republic of Germany; see *O.R.* VI, p. 115, CDDH/SR.39, Annex.

Another delegation did not approve of the inclusion of the clause relating to the environment in Article 35.¹³¹

Conclusion

- 1460** Geophysical war and ecological war are two aspects of the same subject. They are dealt with in two separate juridical instruments and form the object of provisions which are sometimes couched in similar terms, underlining their kinship, though this should not lead to confusion.
- 1461** For example, geophysical war might be aimed at changing the weather or the climate, or triggering off earthquakes. It is prohibited by the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, vis-à-vis any State Party to the Convention. This concerns a measure of arm control which applies in time of peace, as in time of war. The threshold of applicability of this prohibition is determined with reference to the extent of the damage, to the period during which the damage is caused, or to its severity. The order of magnitude is in terms of some hundreds of square kilometers with regard to the extent, several months or one season with regard to the duration, and the serious disruption of human life and natural or other resources with regard to the severity.
- 1462** Ecological warfare refers to the serious disruption of the natural equilibrium permitting life and the development of man and all living organisms, a disruption of which the effects may be felt for one or more decades. The paragraph under consideration here prohibits this, whether it is committed intentionally or not, for example, by the deliberate use of the tools of chemical warfare, or whether it is simply the result of the use of weapons which inevitably have the same effect on vast stretches of land, whether these are populated or not. Because of the transnational aspect of this problem in particular, the prohibition is absolute; it even continues to apply in the absence of any direct threat to the population or to the flora and fauna of the enemy State. It is the natural environment itself that is protected. It is common property, and should be retained for everyone's use and be preserved.

J. de P.

¹³¹ United Kingdom: "We regard this paragraph as otiose repetition of Article 48 *bis* and would have preferred that paragraph 3 not be included in this Article. We consider that it is basically in order to protect the civilians living in the environment that the environment itself is to be protected against attack. Hence the provision on protection of the environment is in our view rightly placed in the section on protection of civilians. Now that Article 33 has been adopted with paragraph 3, we shall interpret that paragraph in the same way as Article 48 *bis*, which in our view is a fuller and more satisfactory formulation" (*ibid.*, p. 118, CDDH/SR.39, Annex).

Protocol I

Article 36 – New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Documentary references

Official Records

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Other references

CE/3b, pp. 110-117. *CE 1972, Report*, vol. I, pp. 129-130, paras. 3.21-3.22; vol. II, p. 56, *CE/COM III/C 26. Commentary Drafts*, p. 42 (Art. 34). *XXIIInd Int. Conf. RC, Report*, p. 13, para. 31; pp. 35-40 (Art. 34).

Commentary

General remarks

- 1463 There was a need for a link between the principles laid down in Article 35 (*Basic rules*) and the concrete prohibitions or the effective restrictions on arms

which cause superfluous injury or unnecessary suffering, or have indiscriminate effects. Some delegates saw the need for a specific legal connexion involving the creation of a special body, a committee responsible for drawing up a list of weapons or methods of use which would fall under the prohibition. This committee would be established by the Protocol itself. It also implied the setting up of a mechanism designed to ensure that, in due course, special conferences would be convened with responsibility for concluding suitable agreements on the basis of humanitarian law. The advocates of this solution were concerned with elaborating Article 35 (*Basic rules*) in a specific and substantive way, and to establish “controls inspired by humanitarian considerations to limit superfluous injury or unnecessary suffering”. For small countries this was a fundamental point, essential for their security. Some even seemed to be inclined to make it a condition of accepting the Protocol in its entirety.¹

1464 In the view of opposing delegations, however, this proposal seemed to imply disarmament, a subject which was outside the scope of the Diplomatic Conference. It would lead to a proliferation of international bodies which would only complicate the search for a solution. It had one major drawback in that some of the factors, which are obviously of importance, such as military or political considerations, necessarily elude a humanitarian forum. Moreover, the link established with Article 35 (*Basic rules*) would ultimately establish the unlawful character of certain weapons, even if they had been used prior to the conclusion of the agreements envisaged, which would be unacceptable. Furthermore, they stated that without any consensus the proposal of the small countries was doomed to failure in the face of realities, and, as a practical matter, it would only be possible to establish a mechanism of control and review outside the Protocol.²

1465 This exchange of views ended in a rejection in plenary meeting of draft Article 86 *bis* submitted by Committee I,³ for the majority in favour fell short of

¹ O.R. VII, p. 30, CDDH/SR.47, para. 76; for the discussion of the Conference in plenary meeting, *ibid.*, pp. 16-50.

² *Ibid.*, pp. 16-50; for the discussion in the *Ad Hoc* Committee, see O.R. XVI, pp. 519-522, CDDH/408/Rev.1, paras. 36-44.

³ This draft article read as follows:

“1. A Committee of States Parties to the Conventions or this Protocol shall be established to consider and adopt recommendations regarding any proposal that one or more States Parties and the Committee itself may submit on the basis of Article 35 of this Protocol for the prohibition or restriction, for humanitarian reasons, of the use of certain conventional weapons that may cause superfluous injuries or have indiscriminate effects.

2. The Committee shall consist of representatives of thirty-one States Parties elected for three years on the basis of equitable geographical distribution by the States Parties to the Conventions or this Protocol, by means of notifications addressed to the depositary Government. The depositary Government, if it should consider it necessary, may convene a meeting of the States Parties to elect the members of the Committee. The Committee shall meet whenever one third of its members so requests; it shall adopt its recommendations by majority and shall elect its chairman.

3. The International Committee of the Red Cross shall participate in the work of the Committee referred to in this article, and shall provide the necessary secretarial facilities.

4. On the basis of the Committee’s recommendations the depositary Government may convene a special Conference, in consultation with any State Party or Parties that may wish to invite such

(continued on next page)

the necessary two-thirds. Finally, by way of compromise, the Conference adopted by consensus Resolution 22 entitled “Follow-up regarding prohibition or restriction of use of certain conventional weapons”, which was mentioned above.⁴

Nature of the obligation

- 1466 Thus it is only in Article 36 that the Protocol establishes a link between its provisions, including those laid down in Article 35 (*Basic rules*) and the introduction of a new weapon by States. The principle is as follows: on the basis of this article the High Contracting Parties undertake to determine the possibly unlawful nature of a new weapon, both with regard to the provisions of the Protocol, and with regard to any other applicable rule of international law. The determination is to be made on the basis of normal use of the weapon as anticipated at the time of evaluation. If these measures are not taken, the State will be responsible in any case for any wrongful damage ensuing.
- 1467 The internal rules of certain States already contained a provision of this nature.⁵ During the Conference of Government Experts in 1972, a formal proposition was tabled,⁶ which was taken over in its essential points in the draft submitted by the ICRC at the opening of the Conference,⁷ and was the object of a number of amendments.⁸

a Conference with a view to adopting agreements that implement the principle that the Parties to the conflict do not have an unlimited right of choice of means of combat.” (*O.R.* X, pp. 276-277, CDDH/405/Rev.1. For the vote in the Committee, *ibid.*, pp. 196-198, and, for the debate and the vote in plenary meeting, *O.R.* VII, pp. 16-35, CDDH/SR.47).

⁴ Commentary Art. 35, *supra*, p. 402, and *O.R.* VII, pp. 261-268, CDDH/SR.57, paras. 47-76. Draft resolution on weapons, CDDH/441 and Add.1.

⁵ See *infra*, note 19.

⁶ CE/COM III/C 56 and 59 (*CE 1972, Report*, vol. II, pp. 65-66; also see *ibid.*, vol. I, p. 130, paras. 3.21-3.22).

⁷ “Article 34 – New weapons

In the study and development of new weapons or methods of warfare, the High Contracting Parties shall determine whether their use will cause unnecessary injury.”

⁸ In fact, these are not always without interest. They represent a whole range of possibilities. One of the first proposals, which came from Pakistan, to some extent anticipates the draft Article 86 *bis* referred to above, in foreseeing that the High Contracting Parties should meet under the auspices of the ICRC for the purpose of determining which weapons should be prohibited (*O.R.* III, p. 154, CDDH/III/11). Certain delegations wanted expressly to link Article 36 to Article 35 by formally imposing an obligation on the Contracting Parties to ensure that new weapons would be compatible with this provision (*ibid.*, p. 161, CDDH/III/235, and p. 159, CDDH/III/32). Others added a reference to Article 51, paragraph 4, which prohibits indiscriminate attacks (*ibid.*, p. 160, CDDH/III/226) or, on the contrary, would prefer to refer merely to the prohibition on weapons causing unnecessary suffering, as in the ICRC draft (*ibid.*, p. 156, CDDH/III/225), sometimes even extending it to a State that is not a Party to the conflict (*ibid.*, p. 159, CDDH/III/28). One delegation asked for an explicit mention of the protection of the natural environment (*ibid.*, p. 160, CDDH/III/92). With the exception of the proposal by Pakistan, all the suggestions were aimed at leaving compliance with the obligation under the control of the State itself, as in the final text. However, a proposal by the Byelorussian SSR deserves a mention. This consisted of making the following addition: “and in cases where it is determined that such weapons or the methods of their use in fact cause unnecessary suffering, they shall transmit the problem of their prohibition to the competent international organs for consideration” (*ibid.*, p. 161, CDDH/III/288).
(continued on next page)

1468 For the reasons outlined above, in the end a general formula won the day in Article 36, with the addition of Resolution 22, which was mentioned above. This solution became necessary as soon as the participants failed to agree on the interpretation of Article 35 (*Basic rules*), paragraph 2.

1469 This obligation was defined by the Rapporteur of Committee III as follows:

“The determination of legality required of States by this article is not intended to create a subjective standard⁹. Determination by any State that the employment of a weapon is prohibited or permitted is not binding internationally, but it is hoped that the obligation to make such determinations will ensure that means or methods of warfare will not be adopted without the issue of legality being explored with care.

It should also be noted that the article is intended to require States to analyse whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.”¹⁰

1470 This commentary is quite clear. However, it should be added that a State which respects the obligation provided for in Article 36, and determines that a new weapon is prohibited, is not automatically obliged to make public its finding.¹¹ This reservation is quite understandable, as modern strategy very often relies not on deployment of military means in the traditional ways, but on new possibilities resulting from research and which consists of creating an imbalance of military strength vis-à-vis the enemy precisely by means of superior technology in the form of new weapons. However, Article 36 in itself constitutes progress as it fills a gap at an international level. It implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality, and the other Contracting Parties can ask to be informed on this point.¹²

1471 We emphasize the fact that this article, like *jus in bello* in general, is concerned with the use of weapons, not their possession, for prohibition of the latter falls under the heading of disarmament.¹³ Whether a weapon is prohibited with regard

231). This proposition is reminiscent of the final paragraph of the St. Petersburg Declaration of 1868 (“The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity”).

⁹ “Standard” is used in English for the French word “norme”.

¹⁰ *O.R.* XV, p. 269, CDDH/215/Rev.1, paras. 30-31.

¹¹ See in this respect *O.R.* XIV, p. 252, CDDH/III/SR.27, para. 46.

¹² In this sense, A. Cassese, “Means of Warfare; the Present and Emerging Law”, *RBDI*, 1976/1, p. 158; and, by way of example, see *infra*, note 19, and *American Society of International Law, Proceedings*, “Should weapons of dubious legality be developed”, 72nd meeting, Washington, 27-29 April 1978, pp. 26-50. *Cf.*, in addition, Art. 48, First Convention; Art. 49, Second Convention; Art. 128, Third Convention; Art. 145, Fourth Convention. See also Arts. 80 and 84 of the Protocol.

¹³ Thus, for example, the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques prohibits geophysical means as a weapon, and it is in this respect a form of disarmament (see commentary Art. 35, *supra*, p. 414).

to its use, or with regard to its possession, is not merely a theoretical distinction. It is easy to imagine that a State equips itself with weapons whose use is normally prohibited for reasons of security, with the proviso that it may use them in certain circumstances by way of reprisal. However, it should remember that the use of these weapons is normally prohibited, and for this reason it must evaluate them in the light of the provisions of Article 36, for example, at the time of their acquisition. Moreover, it is quite clear that a State could not knowingly equip itself only with weapons whose use is normally prohibited, without placing deliberately itself in a position in which it would, when the time came, violate the spirit and the letter of the Protocol, in other words, of the *jus in bello*.

The problem of evaluation

1472 On what basis can or should this evaluation be made? Article 36 refers to “this Protocol” and “any other rule of international law applicable to the High Contracting Party”, i.e., the Party which is acquiring a new weapons or new methods or means of warfare. The methods and means prohibited by the Protocol were studied above at a general level in the analysis of Article 35 (*Basic rules*). The weapons which are prohibited by the Hague Regulations and with regard to which the prohibition is virtually confirmed in the Protocol, were listed in the analysis of paragraph 2 of Article 35 (*Basic rules*). Without necessarily being “new” in a technical sense, these arms are new for the State which is intending to acquire them after becoming a Party to the Protocol. Thus their introduction is subject to the evaluation provided for in Article 36. Regarding the clause on “any other rule of international law applicable to the High Contracting Party”, this refers to any agreement on disarmament concluded by the Party concerned, or any other agreement related to the prohibition, limitation or restriction on the use of a weapon or a particular type of weapon,¹⁴ concluded by this Party, which would relate, for example to a new generation of small calibre weapons or any other type of weapons.¹⁵ Naturally, it also includes the rules which form part of international customary law.

¹⁴ For example, the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, of 10 October 1980. Article 8 of this Convention provides for a review mechanism with the purpose of examining new categories of conventional weapons which do not yet fall under the Protocols annexed to the Convention. A Conference will be held when this is requested by a Contracting Party to the Convention with the agreement of a majority of at least eighteen of them. All States, including all Parties to the Protocol, will be invited to this Conference. Thus this provision complements the implementation of the present Article 36 in a valuable way.

¹⁵ Some further examples can be given of auxiliary means of interpretation, such as the Report of the Secretary General of the United Nations (“Rules of international law in force relating to the prohibition or the restriction on the use of certain weapons” (A/9215, 1973)), the “Comparative table of proposals” drawn up by the Ad Hoc Committee on conventional weapons (O.R. XVI, pp. 551-627, CDDH/IV/226) and the “possible elements of a prohibition of the use of weapons” drawn up by this same Committee (*ibid.*, pp. 539-549, CDDH/408/Rev.1, Appendices I and II). This concerns future law to be created by the States themselves, individually or not, on the basis of the principles which they have established, at least up to a point, during laborious discussions.

- 1473** This obligation applies to countries manufacturing weapons, as well as those purchasing them. There are far more countries purchasing weapons than countries manufacturing weapons, and the former may be Parties to the Protocol, while the latter, who conceive, develop, manufacture and sell the weapon may not yet be. Whatever the case may be, the purchaser should not blindly depend on the attitude of the seller or the manufacturer, but should proceed itself to evaluate the use of the weapon in question with regard to the provisions of the Protocol or any other rule of international law which applies to it. With regard to the producer countries, they are bound by Article 36 to the same extent as the purchasing countries, from the moment that they become Parties to the Protocol, though the article does not seem to oblige them to prohibit the sale and export of weapons when the evaluation contradicts the rules in force in either their own country or the purchasing country. However, it is obviously desirable that the countries which manufacture arms, which devote to this industry a considerable investment in terms of employment and finance,¹⁶ and which are mainly responsible for the fact that weapons are multiplying at an ever increasing rate throughout the world, also carry out their responsibilities in this matter.¹⁷
- 1474** In this respect various suggestions submitted during the session of the *Ad Hoc* Committee, such as, for example, the proposal to create an independent institution to gather useful facts,¹⁸ could be of interest one day with regard to the application of Article 36. However, in the short term the Contracting Parties have an obligation to determine themselves whether the arms that they possess, as well as the arms that they expect to produce or acquire in the future, are the object of a prohibition or not. Some of them have expressed their intention of referring for this purpose to international bodies, which could establish some degree of coordination, at least at a regional level.¹⁹

¹⁶ See "World Armaments and Disarmament", *SIPRI Yearbooks* 1978-1982, and United Nations, General Assembly, "Protection of nature from the pernicious effects of the arms race", Report of the Secretary General, A/S-12/9, 28 April 1982, especially paras. 18 and 29.

¹⁷ It would be desirable for the country selling weapons to make sure in all circumstances that the country buying them undertakes the obligation only to use the weapons acquired in accordance with the applicable rules of the law of armed conflict. For the view that Article 36 applies equally to any new weapon for the country purchasing it, see *O.R.* VI, p. 101, CDDH/SR.39, para. 56.

¹⁸ *O.R.* XVI, CDDH/237/Rev.1, Report of the *Ad Hoc* Committee, 1976, p. 501, par. 58.

¹⁹ The following are some of these statements:

Sweden: "The government had set up a special committee of jurists, military experts and doctors to consider all projects for the incorporation of new weapons into the arsenals of the State, and to advise the government on their compatibility with the rules of international law in force." (*O.R.* XIV, p. 253, CDDH/III/SR.27, para. 53).

Canada: "As regards future weapons, his delegation had announced [...] that Canada had decided to set up a national body to consider the question from the point of view of international law" (*O.R.* XVI, p. 246, CDDH/IV/SR.24, para. 32. See also *Lugano Report*, p. 125, paras. 86 and 87). The French text (*Actes* XVI, p. 250) refers to "une instance internationale".

United States: "In the United States of America the Department of Defense had issued an instruction requiring a legal review of all proposed new weapons to see that their development complied fully with international law." (*O.R.* XVI, p. 145, CDDH/IV/SR.15, para. 26; this instruction, entitled "Department of Defense Instruction, Review of the Legality of Weapons under International Law" (55.00.15), is dated 16 October 1974).

The "Allgemeine Bestimmungen des Kriegsführungsrechts und Landkriegsrechts" (General provisions of the law of armed conflict and of the law of war on land), March 1961, of the *Federal*
(continued on next page)

- 1475 The scope of Article 36 is not restricted to future weapons. However, it cannot be expected that States will introduce specific prohibitions on the basis of general principles, when such prohibitions could be considered as an *a posteriori* condemnation of prior use of such weapons. It is necessary to emphasize that the work and the proposals of the *Ad Hoc* Committee were certainly also concerned with existing weapons, because their prohibition or the restrictions on their use seemed necessary, at least in certain circumstances. Even taking into account the above-mentioned Convention on the prohibition or limitation of certain conventional weapons, which has a relatively restricted scope, Article 36 remains, together with the Hague Regulations, the only instrument in the law of armed conflict that can act as a brake on the abuses resulting from the arms race or on the possibility of future abuses, a possibility that must never be lost sight of – quite the reverse! However, this article is also concerned with future weapons.

Future arms

- 1476 Quite independently of the problems of atomic (nuclear), bacteriological and chemical warfare (ABC), or space war, which have not been included in this context, the experts were concerned with geophysical, ecological, electronic and radiological warfare as well as with devices generating radiation, microwaves, infrasonic waves, light flashes²⁰ and laser beams.²¹ The use of long distance, remote control weapons, or weapons connected to sensors positioned in the field, leads to the automation of the battlefield in which the soldier plays an increasingly less important role. The counter-measures developed as a result of this evolution,

Republic of Germany provide as follows in para. 86: “When new weapons are developed, their employment should be preceded by a study aimed at determining whether they infringe any explicit prohibition or general principles. If they do not, the use of these weapons is permissible” (translated by the ICRC).

The Netherlands: the Ministry of Defence of the Netherlands followed a similar procedure to Canada when deciding to acquire or develop new weapons or weapon systems. “It would be a good idea to set up some sort of independent institute to collect information on the possible and actual effects of certain conventional weapons.” (*O.R.* XVI, p. 338, CDDH/IV/SR.32, paras. 38-39).

United Kingdom: “the additional Protocols had provided an opportunity for the codification of existing practice and his country was therefore at present establishing a formal review procedure to ensure that future weapons would meet the requirements of international law.” (*O.R.* VI, pp. 101-102, CDDH/SR.39, para. 58. See also *O.R.* XVI, p. 394, CDDH/IV/SR.38, para. 18).

Soviet Union: Article 34 [36] “placed on the High Contracting Parties the obligation of determining whether or not their weapons were prohibited. All States at present had facilities for determining specifically whether a particular type of weapon was prohibited.” (*O.R.* VI, p. 101, CDDH/SR.39, para. 56).

Switzerland: The Swiss representative associated himself with the important statement by the USSR representative [...] Article 34 [36] imposed an obligation on States and it was for each State to take that into account” (*ibid.*, p. 102, para. 62).

²⁰ *Lucerne Report*, pp. 79-83, paras. 260-276.

²¹ ICRC, *Weapons of a nature...*, op. cit., pp. 67-69, paras. 235- 242.

in particular electronic jamming (or interference), exacerbates the indiscriminate character of combat.²² In short, all predictions agree that if man does not master technology, but allows it to master him, he will be destroyed by technology.

- 1477 Now is it not the uncontrolled rate of technological development for its own sake, much more than the real needs of security, which is primarily responsible for the escalation of the arms race? Technological progress necessarily implies a certain *fait accompli*²³ which opens the way for new military applications, even when the research was originally oriented towards peaceful ends. Thus new weapons discovered “inadvertently” in this way, have been adopted for the sole reason that they exist or because of a fear that others will develop them. Only governments are in a position to watch constantly, as they should each in its own country, the outcome of such technical progress. They may then identify those factors which contribute to escalation and ask themselves how such escalation can take place, despite external constraints and notwithstanding the fact that it paralyzes the efforts of those who seek greater wisdom and humanity.²⁴
- 1478 Thus Article 36 correctly places the solution to the problem where it actually belongs, in the domestic government of nations, and identifies the essential point, i.e., the technological development of armaments.

Conclusion

- 1479 – The High Contracting Parties are obliged to determine the legality or illegality of the use of any new weapon introduced into their armed forces.
- 1480 – This obligation only concerns the normal use of the weapon as seen at the time of the evaluation, whether it were to be used in some or all circumstances (and not possibly misused).
- 1481 – If a weapon is found to be illegal by a State, this does not by itself create a mandatory rule of international law vis-à-vis third parties, even for the State first mentioned, nor is there an obligation for this State to make its findings public. Consequently the High Contracting Parties are not bound to reveal anything regarding new weapons which are being developed or manufactured.
- 1482 – However, Article 36 does imply the obligation to establish internal procedures with a view to elucidating the problem of illegality and therefore the other Contracting Parties can ask for information on this point.

J. de P.

²² *Ibid.*, p. 67, paras. 232-233.

²³ *Lucerne Report*, p. 77, para. 279; cf. the remarks of N. Landa, “El derecho de la guerra conforme a la moral”, *Revista de la Cruz Roja Española*, No. 741, April 1971, p. 133, which was already criticizing the doctrine of *fait accompli* one hundred years ago.

²⁴ “Between Peace and War: The Quest for Disarmament”, Statement by a Disarmament Study Group of the International Peace Research Association, 3 *Bulletin of Peace Proposals*, Oslo, 1977, p. 277, letter a). It is significant, as the United Nations Secretary-General remarked, that there has been a continuation and even an acceleration in the arms race in the middle of the period of political détente (UN, *Monthly Chronicle*, No. 2, February 1978, p. 25).

Protocol I

Article 37 – Prohibition of perfidy

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
 - (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
 - (b) the feigning of an incapacitation by wounds or sickness;
 - (c) the feigning of civilian, non-combatant status; and
 - (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Documentary references

Official Records

O.R. I, Part I, pp. 141-142; Part III, p. 12 (Art. 35). *O.R.* III, pp. 162-165. *O.R.* VI, p. 103, CDDH/SR.39, para. 64; pp. 115-116, *id.*, Annex (Israel, Mali). *O.R.* XIV, p. 208, CDDH/III/SR.23, para. 31; pp. 254-258, CDDH/III/SR.27, paras. 57-82; pp. 259-270, CDDH/III/SR.28, in particular paras. 6, 20, 23 and 43; pp. 271-272, CDDH/III/SR.29, paras. 6-7; pp. 287 ff., CDDH/III/SR.30, paras. 3, 9, 11-12, 14, 22, 33 and 48; p. 323, CDDH/III/SR.33, para. 33; p. 332, para. 68; p. 334, para. 76; p. 366, CDDH/III/SR.35, para. 45; p. 378, CDDH/III/SR.36, para. 25; pp. 380-381, para. 32. *O.R.* XV, pp. 85-86, CDDH/III/SR.47, paras. 4-5; p. 92, paras. 39-41; p. 93, para. 43; pp. 93-94, para. 49; p. 96, para. 60; p. 98, para. 70; p. 99, para. 78; pp. 101-102, CDDH/III/SR.48, para. 3; p. 103, para. 9; p. 105, para. 18; p. 106, para. 20; pp. 380-382, CDDH/236/Rev.1, paras. 14-19; p. 426, CDDH/III/338. *O.R.* XVI, pp. 590-591, 593-594, 598-599, CDDH/IV/226.

Other references

CE/4b, pp. 12-16; pp. 05-07 (Annex I); pp. 09-010 (Annex II). CE 1971, *Report*, pp. 103-104, paras. 521-522. CE 1972, *Basic Texts*, p. 13 (Art. 31). CE 1972, *Commentaries*, Part I, pp. 62-63 (Art. 31). CE 1972, *Report*, vol. I, p. 130, paras. 3.24-3.30; vol. II, p. 51, CE/COM III/C 1; p. 51, CE/COM III/C 4; p. 52, CE/COM III/C 9; pp. 53-54, CE/COM III/C 14 and C 16; p. 59, CE/COM III/C 45; pp. 60-61, CE/COM III/C 55; pp. 63-64, CE/COM III/C 70. *Commentary Drafts*, pp. 42-43 (Art. 35). *XXIIInd Int. Conf. RC, Report*, p. 12, para. 32; p. 73 (Art. 35).

Commentary**General remarks**

- 1483** Literally speaking, perfidy means the breaking of faith, and the problem of bad faith may present itself in time of peace or in time of armed conflict with regard to the whole field of international relations, whether at a political level, implicating only those participating in the decision-making process, or at the level of the application of the rules.¹
- 1484** The title of this article, “Prohibition of perfidy”, as well as the definition of perfidy given in the article, should not give rise to confusion. The article is concerned only with acts that take place in combat, as is clear from the scope of this Part, as well as this Section. Thus this prohibition is formulated with reference to those participating in hostilities, and the present article only aims to provide for that aspect of the problem.
- 1485** Article 35 (*Basic rules*), paragraph 1, which limits the choice of methods and means of warfare, is not only concerned with technical matters. For the Parties to the conflict and the combatants it also implies a certain type of conduct during combat which meets various criteria of honour² and humanity.
- 1486** The rules regarding honour are basically concentrated in Articles 37, 38 (*Recognized emblems*) and 39 (*Emblems of nationality*). However, various other provisions – Articles 44 (*Combatants and prisoners of war*), paragraph 3 (open

¹ On the subject of this distinction, see “The High Command Case”, 12 *Law Reports*, 1949, p. 69.

² Although the principle is not contested, opinions vary on the fundamental reason for its existence. Some authors consider that it is based on the necessity of forbidding anything which makes the attainment of peace more difficult; others simply state that although morality is not a recognized source of law, it nevertheless remains a condition of its existence. See also F. Lieber, *op. cit.*, Art. 30.

carrying of arms), and 46 (*Spies*), paragraph 3 (the clandestine gathering of information) – are directly related to the same principle.³

1487 This correlation is actually so important that some delegations at the Diplomatic Conference wished to defer the discussion of the problem of perfidy until other provisions concerned in Part III had also been studied.⁴ The Working Group of Committee III in practice followed up this suggestion.

1488 Finally, this Part does not aim to replace the Hague Regulations of 1907, but is concerned with developing them,⁵ and thus it is clear that the prohibition on the treacherous killing or wounding of individuals belonging to the nation or the army of the enemy, as formulated in Article 23 (*b*) of the Regulations, has survived in its entirety.⁶ However, the term “trahison” in the French text is too restricted in its meaning, and for that reason the term “perfidie” (perfidy) was preferred here.⁷

1489 It is not certain it is because of the inadequate wording of the Hague Regulations, whether decline in the respect for general international law, or a declining sense of morality,⁸ but the fact is that experts have always agreed

³ This is also the case with regard to numerous provisions of the Protocol as a whole. The various rules which prohibit protecting military targets from attack by using protected persons or objects for this purpose provide a good illustration. These prohibitions are explicitly concerned with medical units (Art. 12, para. 4), medical aircraft (Art. 28, para. 1), the civilian population (Art. 51, para. 7), and cultural objects (Art. 53, sub-para. (*b*)). Article 58, sub-paras. (*a*) and (*b*) is no doubt derived from a humanitarian principle, but it is also derived from the principle of honour when it urges the Parties to the conflict to remove civilian elements from military targets “to the maximum extent feasible”. The prohibition on the use of medical aircraft which have been granted protection in order to obtain a military advantage or intelligence data (Art. 28, paras. 1 and 2) is another example. The requirement that protected personnel and installations are used only for tasks for which this protection has been authorized reflects a similar concern. This is true for medical personnel (Art. 8, sub-paras. (*c*) and (*k*)), and for civil defence (Art. 67, para. 1(*b*)), and for medical transports (Art. 8, sub-para. (*g*)). The prohibition on the perfidious use of protective signs is explicitly confirmed in Art. 85, para. 3(*f*). The rule is also the same for signals (Art. 18, paras. 6 and 8). All these cases are concerned with avoiding the wrongful application for purposes which would not be honest as they would be different from those for which the protection was authorized. The same is true of relief actions (Art. 70, para. 3(*c*)).

⁴ *O.R.* XIV, p. 245, CDDH/III/SR.27, and pp. 261 and 263, CDDH/III/SR.28.

⁵ This point was not contested; for the statement to this effect, see *O.R.* V, p. 133, CDDH/SR.13, para. 33; p. 180, CDDH/SR.17, para. 40; *O.R.* XIV, p. 264, CDDH/SR.28, para. 22; *O.R.* XV, p. 271, CDDH/215/Rev.1, para. 40; see also *CE 1971, Report*, pp. 103-104, para. 522.

⁶ According to M. Greenspan, *op. cit.*, p. 317, this rule prohibits assassination, recruitment of hired killers, placing a price on the head of an adversary, or the offer of a reward for his capture “dead or alive”; proscription and outlawry of an enemy, treacherous request of quarter, and the treacherous simulation of death, wound or sickness, or pretended surrender, for the purpose of putting the enemy off his guard and then attacking him. It does not seem to prohibit attacking enemy combatants individually, whether this is in the area of combat, in occupied territory or elsewhere, even though in principle the rule which prohibits killing except in combat is still applicable. However, methods of guerrilla warfare do not seem to conform with this (*cf. US Field Manual 27-10*, para. 31, and D. Fleck, “Ruses of War and Prohibition of Perfidy”, 13 *RDPM DG*, No. 2, 1974, p. 278).

⁷ This remark had already been made at the Brussels Conference in 1874 by a delegate who pointed out that the term “trahison” was not applicable to an enemy. *Cf. Reaffirmation*, p. 80.

⁸ At the Conference itself a representative affirmed that the protection of the civilian population and the prohibition of perfidy were the principal objectives of Protocol I (*O.R.* XIV, p. 323, CDDH/III/SR.33, para. 33).

unanimously on the necessity of reaffirming this prohibition.⁹ This was also the occasion for providing a general definition of perfidy for the first time. This definition though both very useful and welcome, is not without weaknesses.

Paragraph 1 – Scope of the prohibition and definition

- 1490 Paragraph 1 explicitly prohibits a particular category of acts of perfidy, as well as giving a definition of acts of perfidy. Despite the wish which was expressed repeatedly during the preliminary discussions and during the Conference itself,¹⁰ it was not the prohibition of perfidy *per se* which was the prime consideration of Article 37, but only the prohibition of a particular category of acts of perfidy.¹¹

First sentence – The scope of the prohibition

- 1491 Following the Hague Regulations (Article 23(b)),¹² the prohibition only concerns the killing, injuring or capturing of an adversary by resort to perfidy. For reasons given above, the term “treachery”, which was considered to be too narrow, was abandoned in favour of the term “perfidy”; moreover, the capture of the adversary was added to the two former prohibitions on “killing” and “injuring”. However, bearing these considerations in mind, the present Article 37 is limited to the framework defined by the 1907 Regulations, and therefore the present article only condemns perfidy in the sense of the first sentence of the article.¹³ Nevertheless, this does not mean that even within these limitations, the interpretation of perfidy will always be easy.
- 1492 The problems arising from this provision seem to have been aptly revealed by members of a delegation to the Diplomatic Conference in a study of the results of the Conference. According to the authors of this study, the prohibition of perfidy has its weak points. If only the fact of killing, injuring or capturing an adversary by resort to perfidy constitutes a perfidious act, the question arises what an unsuccessful attempt would be called. Moreover, it seems that a prohibition which is restricted to acts which have a definite result would give the Parties to the conflict a considerable number of possibilities to indulge in perfidious conduct which was not directly aimed at killing, injuring or capturing the members of the armed forces of the adverse party, but at forcing them to submit to tactical or operational measures which will be to their disadvantage

⁹ CE 1972, Report, vol. I, p. 108, para. 2.415.

¹⁰ CE 1971, Report, p. 103, para. 521; CE 1972, Report, vol. II, p. 52, CE/COM III/C 9 and vol. I, p. 130; O.R. XIV, p. 268, CDDH/III/SR.28, para. 43.

¹¹ This conclusion, as stated above, is not diluted by the wording of the title of the article, which should be read in context.

¹² “It is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army”.

¹³ The fact that the intention was restricted in this way obviously does not mean that one can conclude from this by a *contrario* reasoning that acts of perfidy are authorized in other cases.

(raising the white flag for the sole purpose of deflecting or delaying an attack is not a direct violation of the prohibition contained in the first sentence even though it is a violation of Article 23(f) of the Hague Regulations). On the other hand, people will then be killed, injured or captured in the course of combat. It will be no easy matter to establish a causal relation between the perfidious act that has taken place and the consequences of combat. The authors consider that it follows that there remains a sort of grey area of perfidy which is not explicitly sanctioned as such, in between perfidy and ruses of war. This grey area forms a subject of permanent controversy in practice as well as in theory.¹⁴

1493 These are real difficulties, but they should not be allowed to become out of proportion. First, it seems evident that the attempted or unsuccessful act also falls under the scope of this prohibition. Secondly, a treaty should not be interpreted so as to conflict with a peremptory norm of general international law,¹⁵ and therefore it should not be interpreted in this way.

1494 The fact is that the first sentence of Article 37 is devoted essentially to combat – as is evident from the context and the list of examples – and it is aimed at regulating one of the problems of combat: acts of killing, injuring or capturing with resort to perfidy. On the other hand, this article has the advantage of giving a definition of perfidy with a general scope in the second sentence. Although the problems which were pointed out above cannot always be resolved by resorting to Article 37, it should be possible to resolve them in the context of the Protocol as a whole, with the aid of the general principles of law and without at all giving the impression that there is such a concept as permitted perfidy. Moreover, Article 38 (*Recognized emblems*) and Article 39 (*Emblems of nationality*) make a by no means insignificant contribution to reinforcing Article 37, particularly by the absolute quality of the prohibitions formulated in them. Finally, there is more to an international treaty than the literal reading of all the words in the document may suggest; it represents one step forward in the ongoing evolution in relations between States.

1495 If any doubt should remain regarding the basic meaning, Article 1 (*General principles and scope of application*), paragraph 2, should suffice to remove these doubts. This emphasizes particularly that, in cases not covered by the Protocol or by other international agreements, combatants remain under the protection of the principles of humanitarian law derived from established custom, from the principles of humanity and the dictates of public conscience. However, in the sense of the present article, and only in this sense, it is true that there are breaches of faith which do not specifically fall under the scope of the prohibition laid down here or under Article 85 (*Repression of breaches of this Protocol*), paragraph 3 (f). Nevertheless, this is once more without prejudice to general international law and the other rules of the Protocol.

¹⁴ Cf. M. Bothe, K. Ipsen, K.J. Partsch, “Die Genfer Konferenz über humanitäres Völkerrecht, Verlauf und Ergebnisse”, 38 *ZaöRV*, No. 1-2, 1978, pp. 25-26.

¹⁵ Vienna Convention on the Law of Treaties, 1969, Art. 53.

Second sentence – The definition of perfidy

- 1496** The first sentence of Article 37 prohibits the killing, injuring or capturing of an adversary by resort to perfidy. This makes it appropriate to have a definition of perfidy, which forms the object of the second sentence.
- 1497** The essential concept of perfidy is not difficult to grasp: a broken word, dishonesty, unfaithful breaking of promises, deliberate deception, covert threats – these are only a few aspects of this spectre to which the fundamental rule of laws “*pacta sunt servanda*” or “*fides etiam hosti servanda*” is opposed. On the other hand, it is more difficult to define this concept precisely in a particular social order. In every society, law has had a social, religious, moral or ethical basis, at least at the beginning.¹⁶
- 1498** However, these have been described as:

“three powerful spirits, which from time to time have moved over the face of the waters, and given a predominant impulse to the moral sentiments and energies of mankind. These are the spirits of liberty, of religion and of honour”.¹⁷

This sense of honour, which was nourished during the Middle Ages of Europe by chivalry, particularly in tournaments and in jousting, has contributed to the establishment of the rules which finally became assimilated into the customs and practices of war, in accordance with the principle that the law of the powerful tends to become common law.¹⁸ There were rules for attack and rules for defence, and the knight always trusted the word of another knight, even if he were an enemy. Perfidy was considered a dishonour which could not be redeemed by any act, no matter how heroic.¹⁹

- 1499** Perfidy is injurious to the social order which it betrays, regardless of the values on which this social order is founded. However, as our age is characterized by a great diversity of classification of values, it was natural that the first proposals concerned with defining the concept of perfidy were based on the concept of trust,²⁰ which forms the basis of the security of international relations. This concept seemed to be too abstract for some authorities, and it was proposed that perfidy be defined in relation to a situation protected by international law.²¹ However, the feeling persisted that the problem went beyond the rule of law, while at the same time encompassing it. Finally, Canada, Ireland and the United Kingdom submitted an amendment that obtained a majority of votes,²² and

¹⁶ In Islam, to take this example, the obligation to respect all the clauses of a treaty, both in the letter and the spirit, was a strict and actually a sacred duty. Cf. M.A. Draz, “Le droit international public et l’Islam”, *RICR*, March 1952, p. 207.

¹⁷ G.I.A.D. Draper, “The Interaction of Christianity and Chivalry in the Historical Development of the Law of War”, *IRRC*, January 1965, p. 7, quoting Hallam.

¹⁸ *Ibid.*, p. 17. On the other hand, the alliance of the military order of chivalry and the Christian religion in the Crusades had very serious consequences (see *ibid.*, pp. 10-16).

¹⁹ *Ibid.*, p. 20.

²⁰ *CE 1971, Report*, p. 105.

²¹ *CE 1972, Report*, Vol. II, pp. 63-64 (CE/COM III/C 70).

²² *O.R. III*, pp. 164, CDDH/III/233.

overcame the resistance of those who would have preferred to have abstained from any definition as they considered the attempt to be too difficult.²³

- 1500 The definition is based on three elements: inviting the confidence of an adversary, the intent to betray that confidence (subjective element) and to betray it on a specific point, the existence of the protection afforded by international law applicable in armed conflict (objective element).²⁴ In its turn, Article 2 (*Definitions*), sub-paragraph (*b*), specifies that this last concept refers to “the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict”. This is a relatively wide interpretation, and consequently the definition of perfidy extends beyond the prohibition formulated in the first sentence. For example, it encompasses war at sea, even though this subject is not dealt with in the Protocol.²⁵ As regards the characteristic material element of this wrongful act, this consists of the intentional and conscious deception of the adversary regarding a matter on which the protection provided for by the applicable law explicitly depends. Thus the formula implies a totally clear and consistent interpretation of the relevant legal rule and the act which is the condition which is the condition of its application.²⁶ The central element of the definition of perfidy²⁷ is the deliberate claim to legal protection for hostile purposes. The enemy attacks under cover of the protection accorded by humanitarian law of which he has usurped the signs. It is by inviting the other’s confidence with the intention or the will to betray it that renders perfidy a particularly serious illegality, as compared with other violations of international law, and which constitutes for its perpetrator an aggravating circumstance. In doing so, he destroys the faith that the combatants

²³ *Ibid.*, pp. 163, CDDH/III/223.

²⁴ “It is necessary that there was treacherous intent and that the adversary’s confidence was betrayed surreptitiously” (translated by the ICRC), Ph. Bretton, “Le problème des ‘méthodes et moyens de guerre et de combat’ dans les Protocoles additionnels aux Conventions de Genève du 12 août 1949”, *RGDIP*, January-March 1978, p. 1, at p. 11. However, it should be noted that the use of enemy uniforms, which is prohibited in Art. 39, was not retained in the list of typical examples of perfidy quoted in the article under consideration here (*cf. O.R. III*, p. 163, CDDH/III/223). Despite the provisions of Art. 39, the Conference considered that it could not accord to the protection granted to the signs of nationality of the belligerents the same status as the protection granted by international law to persons specifically entitled to such protection (the wounded and sick, parlementaires etc.).

²⁵ Nevertheless, this concerns only the general prohibition of perfidy and the concept of perfidy. The recognized rules relating to war at sea remain as they are: *cf. Art. 39*, para. 3 (see also *infra*, sub-para. (*d*), p. 439).

²⁶ Art. 84 invites the High Contracting Parties to communicate to each other the laws and regulations adopted in order to ensure the implementation of the Protocol. Compliance with this obligation, which could, in particular, involve the exchange of military manuals, would certainly contribute to clarifying these situations.

²⁷ It can be argued whether this “juridical” definition completely covers the concept of perfidy on the battlefield, in particular with regard to wars which go on for a long time, when the adversaries have come to know each other. The juridical element remains dominant, but various other factors such as morals, the concept of honour (*cf. D. Fleck*, “Ruses of war...”, *op. cit.*, p. 272), and the knowledge that each one has of the ideas of the adversary on these different points, all equally contribute to establishing a certain level of confidence resulting in the correct application of the legal rules. However, these elements could be included in the concept of good faith.

are entitled to have in the rules of armed conflict, shows a lack of the minimum respect which even enemies should have for one another, and damages the dignity of those who bear arms. As a result of these consequences, perfidy destroys the necessary basis for reestablishing peace.

Third sentence – The list of examples

- 1501** The idea of clarifying the rule of the prohibition of perfidy in the form of a list of concrete examples arose at the beginning of the discussions for reasons of both a practical and technical nature.²⁸ From a practical point of view, it is obvious that the enumeration of concrete situations facilitates the task of those who are responsible for giving instructions to the combatants. From a technical point of view, it is a not unimportant auxiliary element for realising a concept which is difficult to define in concrete terms.
- 1502** As this is a list of examples, it obviously does not have an exhaustive character.²⁹ Moreover, each example should be understood in the context of the paragraph taken as a whole, and not in isolation. To strike an adversary after allaying his suspicion by feigning an incapacitation by wounds or sickness is a perfidious act in the sense of Article 37. However, feigning an incapacitation by imaginary wounds with the intent of bringing about an interruption in an adversary's attack, though it certainly constitutes perfidious conduct in the sense of the second sentence, does not so obviously fall under the scope of the prohibition of the first sentence.³⁰ Feigning an incapacitation by a purely imaginary wound, with the sole intent of justifying the desire to surrender, a desire which may be quite sincere for that matter, is neither an act of perfidy nor a prohibited ruse. It is simply an expedient, used to reveal the wish to withdraw from combat definitively.
- 1503** With regard to the list itself, the Conference amended the proposals submitted by the ICRC,³¹ particularly as a matter of drafting, though there were some

²⁸ CE 1971, *Report*, p. 105, CE/COM III/C 1.

²⁹ The error made with regard to Art. 23 of the Hague Regulations should therefore not be repeated. Omitting the adverb "especially", which precedes the list of prohibitions enumerated under letters (a) to (h), it was concluded rather simply by an *a contrario* reasoning that the methods of combat which were not included in this list were authorized with the sole exception of the Martens clause, or an incontestable rule of customary law to the contrary. This reasoning was unsound (cf. D. Fleck, "Ruses of war...", *op. cit.*, p. 280).

³⁰ In this respect, see the considerations put forward above, p. 432. The ICRC draft (Art. 35) qualified as perfidious the acts given by way of example, "when carried out in order to commit or resume hostilities", a phrase which some would have wished to supplement with the word "immediately": "in order to commit or resume hostilities immediately".

³¹ The draft presented by the ICRC listed in Art. 35: "(a) the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign; (b) the feigning of a cease-fire, of a humanitarian negotiation or of a surrender; (c) the disguising of combatants in civilian clothing." The other proposals submitted by the Rapporteur to the Working Group of Committee III include: abusing the provisions of an international convention to gain an advantage; the use of the distinctive signs of the enemy or enemy uniform during combat (CDDH/III/GT/54) (in this respect, see the ICRC proposals at the second session of the Conference of Government Experts, CE 1972, *Report*, vol. II, p. 5, Art. 31, as well as "the creation, prior to an attack, of an impression with the enemy of being a non-combatant" (O.R. III, p. 162, CDDH/III/80)).

substantive modifications. At times, opinion was divided within the Working Group with regard to the choices which some considered to be debatable. At any rate, it was finally agreed that Article 37 should be restricted to a short list of clear examples, leaving aside borderline cases.³² The discussion was mainly concerned with sub-paragraph (c), which relates to the feigning of a civilian or non-combatant status, and as a result the problem of guerrillas. However, to begin with, it would be appropriate to examine sub-paragraphs (a) and (b).

Sub-paragraph (a) – “the feigning of an intent to negotiate under a flag of truce or of a surrender”

- 1504 According to Article 85 (*Repression of breaches of this Protocol*), paragraph 3 (f), the perfidious use of a flag of truce is a grave breach if it causes the death or serious injury to body or health of an adversary; such perfidious use of the flag of truce was already prohibited in Article 23(f) of the Hague Regulations. In general, combatants can never be too scrupulous about respecting the conditions pertaining to their non-belligerent relations.³³ This rule also covers the opening of negotiations, their pursuit and possibly their repudiation, as well as surrender, the conditions of which are defined in Article 41 (*Safeguard of an enemy hors de combat*)³⁴

Sub-paragraph (b) – “the feigning of an incapacitation by wounds or sickness”

- 1505 It is appropriate to refer to the First and Second Conventions, which apply to the battlefield, and impose the obligation of respecting and protecting the wounded, sick and shipwrecked in all circumstances (Article 12). In addition, reference should be made to Article 41 of the Protocol (*Safeguard of an enemy hors de combat*), which prohibits any attack on any person who is recognized, or who in the circumstances should be recognized, to be *hors de combat*. Paragraph 2 of this article defines the conditions which render a person *hors de combat*. If a person who is known to be *hors de combat* is attacked wilfully, and this results in his death or causes serious injury to his body or his health, this constitutes a grave breach under Article 85 (*Repression of breaches of this Protocol*), paragraph 3(e). The counterpart to these protections, the feigning of being *hors de combat*, therefore constitutes an act of perfidy. Under the same conditions, the perfidious use of the distinctive emblem of the red cross or the red crescent or other recognized protective signs, in violation of the article with which we are concerned

³² O.R. XV, p. 382, CDDH/236/Rev.1, para. 17, and p. 426, CDDH/III/338.

³³ See in particular the Hague Regulations, Art. 35; see also M. Greenspan, *op. cit.*, p. 320.

³⁴ A question which is sometimes raised is whether prisoners of war who attack their guards while they are being detained are committing an act of perfidy; this is not very likely, as prisoners of war are not bound by any duty of allegiance to the Power detaining them (Third Convention, Art. 87, para. 2), and the fact that the captivity is based only on a relationship of force, but such acts can compromise the application of the Third Convention.

here, is also a grave breach under Article 85 (*Repression of breaches of this Protocol*), paragraph 3(f). This perfidious use always involves the abuse of the adversary's confidence. Thus, for example, feigning death simply to save one's life would not be an act of perfidy, while feigning death to kill an enemy once his back is turned, would constitute an act of perfidy.³⁵

Sub-paragraph (c) – “the feigning of civilian, non-combatant status”

1506 The inclusion of this example brought Committee III to the heart of the problem.³⁶ To reject it would have meant compromising the fundamental distinction between civilians and combatants, which forms the basis for the law of armed conflict.³⁷ To accept it without restrictions would have meant destroying the compromise which had been achieved with regard to Article 44 (*Combatants and prisoners of war*), which in some circumstances allows a guerrilla combatant who cannot distinguish himself from the civilian population to retain his status as a combatant, by the sole fact of his carrying his arms openly (Article 44 – *Combatants and prisoners of war*, paragraph 3, second sentence). The fact that under the terms of the definition of perfidy it is not sufficient to prove the feigning or the disguise of the combatant in civilian dress, but that it is also necessary to prove the intention to mislead in the sense given in the same definition, has not sufficed to allay the suspicion of those who advocated the cause of guerrillas. For the combatant of Article 44 (*Combatants and prisoners of war*), the fact of being or having been in civilian dress at one time or another will, according to the latter, always mean that they fall under the scope of Article 37, i.e., the accusation of perfidy, if sub-paragraph (c) is not qualified by a safeguard clause. It was finally decided³⁸ that this clause would be included, not in Article 37, but in Article 44 (*Combatants and prisoners of war*), paragraph 3, where it can be found in the following form: “Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).” The example has therefore survived, but with the reservation stipulated in Article 44 (*Combatants and prisoners of war*).

1507 A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign a civilian status and hide amongst a crowd. This is the crux of the rule. There are a number of special situations, as described in Article 44 (*Combatants and prisoners of war*), paragraph 3, second sentence, but there is no double standard.³⁹

³⁵ O.R. XV, p. 382, CDDH/236/Rev.1, para. 16, and p. 426, CDDH/III/338.

³⁶ See in particular O.R. XIV, p. 264, CDDH/III/SR.28, para. 23.

³⁷ With regard to this example, see the statement by a delegation at the time of the adoption of Art. 37, at a plenary meeting; O.R. VI, p. 115, CDDH/SR.39.

³⁸ O.R. XV, p. 382, CDDH/236/Rev.1, para. 18.

³⁹ For proof that Art. 44 in no way invites terrorism, see M. Bothe, K. Ipsen, K.J. Partsch, *op. cit.*, p. 35.

Sub-paragraph (d) “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict”

1508 This example is not contestable, but it brings into play three different factors.

1509 With regard to the United Nations, it is appropriate to state that the wrongful use of its signs, emblems or uniforms can constitute an act of perfidy in the sense of Article 37⁴¹ only in cases where the personnel of the United Nations have the status of neutral or protected persons,⁴⁰ and not in situations where members of United Nations armed forces intervene in a conflict as combatants, even when this is for peacekeeping purposes. However, this type of abuse remains unlawful.

1510 The term “neutral and/or other States not Parties to the conflict” can also be found in particular in Articles 2 (*Definitions*), 19 (*Neutral and other States not Parties to the conflict*) and 31 (*Neutral or other States not Parties to the conflict*). The Conventions used the term “neutral States” to cover all States not Parties to the conflict. In the formula adopted by the Protocol, the term “neutral States” only covers States with a neutral status; hence the need to add the term “other States not Parties to the conflict”.⁴² As neutral countries were already mentioned in the Conventions, particularly in Article 27 of the First Convention, it was considered useful to retain this concept, which corresponds to the concept of neutrality in the traditional sense, i.e., to the law of neutrality. Obviously the term “other States not Parties to the conflict” refers to all States that do not participate in the conflict.

1511 Finally, the reference to neutral signs or emblems is not considered to affect the law governing the use of neutral flags in war at sea⁴³ any more than Article 37 as a whole affects the existing, generally recognized rules of international law applicable to the use of flags in the conduct of armed conflict at sea.⁴⁴ However, with this reservation, it is understood that the definition of perfidy given in Article 37, like the prohibition formulated in the first sentence, applies just as much to war at sea or war in the air as to war on land. The prohibition of perfidy in war is, by its very nature, indivisible.

Paragraph 2 – Ruses of war

1512 The law of armed conflict requires that military operations be conducted within the confines of the rules that are imposed, in good faith, without resort to perfidy or to perfidious attacks, as we have seen above. Within these limitations, the art

⁴⁰ In principle this is always the case when the United Nations plays the role of an observer; cf., for example, the agreement on the withdrawal of Israeli and Syrian forces of 31 May 1974, and the Protocol with regard to the United Nations force responsible for observing this withdrawal, UN, 2 *Monthly Chronicle*, No. 6, June 1974, pp. 26-27.

⁴¹ O.R. XV, p. 382, CDDH/236/Rev.1, para. 18.

⁴² On this subject, see commentary Art. 2, sub-para. (c), *supra*, p. 61.

⁴³ O.R. XV, p. 382, CDDH/236/Rev.1, para. 18.

⁴⁴ Art. 39, para. 3.

of warfare is a matter, not only of force and of courage, but also of judgment and perspicacity.⁴⁵ In addition, it is no stranger to cunning, skill, ingenuity, stratagems and artifices, in other words, to ruses of war, or the use of deception. There are numerous examples of these throughout history.⁴⁶ However, as imagination is too often lacking in those who invoke the right to use such practices, the ruse of war has many times served as a pretext for pure and simple violations of the rules in force. Obviously this should be condemned extremely severely. The purpose of this paragraph is to draw the borderline between the ruse which is prohibited because it is perfidious or implies a violation of the law of armed conflict, and the ruse which is permitted.⁴⁷

First sentence – The non-prohibition of ruses of war

- 1513** Article 24 of the Hague Regulations explicitly states that “ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible”. This principle, which was embodied in the Hague Regulations, was not contested by the Diplomatic Conference, although the wording of Article 24, which confuses ruses of war and gathering of information in a single provision, leaves a lot to be desired. It is not surprising therefore that agreement was easily reached⁴⁸ on the usefulness of reaffirming, in the Protocol, the admissibility of this method of combat,⁴⁹ which is rooted in custom without confusing it with the gathering of information which is actually a separate question.
- 1514** In fact, the real problem does not consist of knowing whether ruses of war are permitted, but of determining which are the ruses of war that are permissible. The ruse is very often the only course open to a weak combatant, and the law of armed conflict, if it is to be respected, should ensure that the combatants have equal chances. However, just as the use of force requires regulation – which is the object of the Protocol as a whole – the recourse to a ruse should meet certain conditions which do not jeopardize these rules.

⁴⁵ D. Fleck, “Ruses of War...”, *op. cit.*, p. 270, quoting Clausewitz.

⁴⁶ *Ibid.*, pp. 273-274.

⁴⁷ Is the ruse of war as important in our time as it was in the past when armies were in combat at a short distance from each other? Such ruses, which could formerly be decisive for the result of a battle, could today only be of marginal value at the most. However, this combat technique is not absent from the modern battlefield. “Instruction in ruses of war might well be rudimentary in highly technical armies, whereas it was fundamental in ‘amateur’ armies, whose tactics were based largely on surprise, ambushes, trickery, switching of uniforms, incitement of the enemy to rebellion, and so forth. A long list, which those disposing of multiple facilities might regard as fairly complete, would appear by no means comprehensive to others who had to fight from a position of numerical or technical inferiority” (*O.R.* XIV, p. 263, CDDH/III/SR.28, para. 20). However, it has been said that, even in highly technical armies, operations of deception such as the deflection by electronic means of jet bombers to targets in their own countries are far from unimportant.

⁴⁸ However, for these reservations, see *O.R.* XIV, p. 260, CDDH/III/SR.28, para. 6.

⁴⁹ While making these reservations, which will be examined below, Lieber states that “deception in war is admitted as a just and necessary means of hostility” and is “consistent with honorable warfare” (F. Lieber, *op. cit.*, Art. 101.)

Second sentence – The definition of ruses of war

- 1515** A ruse of war consists either of inducing an adversary to make a mistake by deliberately deceiving him, or of inducing him to commit an imprudent act, though without necessarily deceiving him to this end. Such operations are perfectly lawful on the express condition that they do not infringe any applicable rule of either the Protocol as a whole, or, *a fortiori*, the rule relating to the prohibition on perfidy. Any ruse based on the violation of a rule of the Protocol by the wrongful use of emblems of a particular nationality, for example, in violation of Article 39 (*Emblems of nationality*) is a prohibited ruse, rather than an act of perfidy, in the sense of the Protocol at any rate.⁵⁰ If this form of deception in addition invites the confidence of the adversary with regard to the protection provided for by the law of armed conflict, for example, by using the uniforms of neutral countries, it does constitute an act of perfidy. Thus a distinction should be made between a ruse, a prohibited ruse, and an act of perfidy. A ruse can never legitimize an act which is not lawful. In most cases it consists of a form of feigning, as shown in the list of examples given below, but it should never veil a violation. If it consists of an outright violation, rather than a veiled one, for example, covering an attack by a shield of prisoners of war, it is prohibited for this reason alone, without there being any visual deception.
- 1516** A ruse can resort to acoustic means (such as simulating the noise of an advancing column), optical means (creation of fictitious positions), the use of information (circulating misleading messages), operational means (simulated attacks). It can induce the adversary to make an imprudent and reckless move without resorting to any simulation, for example, by submitting an isolated post to pressure in order to encourage an appeal for reinforcements which will then be attacked as they are advancing in conditions disadvantageous to them. Within the limits assigned to it, the ruse is not only in no way unlawful, but is not immoral either. In many cases it will permit a successful operation with less loss of life than through the simple use of force.
- 1517** However, mention should be made of a particular category of weapons. Modern warfare makes a great deal of use of delayed-action weapons, such as mines and explosive or non-explosive booby-traps which are activated by the target itself, in other words, by the person or vehicle which makes contact with the device. The purpose of these weapons is to obstruct the enemy's mobility. If their whereabouts is not indicated, or if they are camouflaged, these devices may actually assume a perfidious character in a wide sense, or even in a legal sense.⁵¹ The problem was examined at length by the *Ad Hoc* Committee, and the Working Group finally formulated a number of proposals on this subject.⁵² These proposals were taken up again and further elaborated, particularly in Articles 2 and 6 of Protocol II, annexed to the Convention of 10 October 1980 on the

⁵⁰ Cf. K. Ipsen, who seems to regret the weakness of this definition in "Perfidy", in Bernhardt (ed.), *op. cit.*, Instalment 4, 1982, p. 131.

⁵¹ See *O.R.* XVI, p. 284, CDDH/IV/SR.28, para. 6; *ICRC, Weapons that may cause...*, *op. cit.*, p. 50, para. 160; *Lucerne Report*, pp. 68-71, paras. 242 and 247-259.

⁵² See *O.R.* XVI, pp. 590-591, 593-594, 598-599, CDDH/IV/226.

prohibitions or restrictions on the use of certain conventional weapons (see *supra*, p. 405): “Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices”.

1518 By “booby-trap” Article 2 means:

“any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act”.

Article 6, entitled “Prohibitions on the use of certain booby-traps” reads as follows:

“1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:

a) any booby-traps in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached, or

b) booby-traps which are in any way attached to or associated with:

- i) internationally recognized protective emblems, signs or signals;
- ii) sick, wounded or dead persons;
- iii) burial or cremation sites or graves;
- iv) medical facilities, medical equipment, medical supplies or medical transportation;
- v) children’s toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- vi) food or drink;
- vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- viii) objects clearly of a religious nature;
- ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- x) animals or their carcasses.

2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.”

1519 This Convention is undoubtedly independent of the Protocol which, as stated above, does not contain any prohibitions on specific weapons. However, the Protocol denies the Parties to the conflict an unlimited right with regard to their choice of the methods or means of warfare. It prohibits any weapons, as well as methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Article 35 – *Basic rules*). It prohibits killing or injuring by resort to perfidy (paragraph 1 of the article under consideration here), and it protects the civilian population (Article 51 – *Protection of the civilian population*), the wounded, sick and shipwrecked (Article 10 – *Protection and care*), medical and religious personnel (Article 15 – *Protection of civilian medical and religious personnel*), and objects indispensable to the survival of the civilian population (Article 54 – *Protection of objects indispensable to the survival of the civilian*

population). To associate booby-traps at any category of persons or objects protected by the Protocol would be to infringe this paragraph, by inviting the adversary's confidence as regards the protection provided for in the Protocol, with the intention of killing or wounding him. It is therefore prohibited and even perfidious, whether the Party to the conflict is a Party to the Convention on conventional weapons, or not. Moreover, one could consider that this Convention, which has taken up virtually all the proposals submitted during the Diplomatic Conference,⁵³ provides for an interpretation of prohibited ruses within the meaning of this paragraph, in the field of delayed-action weapons.

Third sentence – The list of examples

1520 The list of examples of ruses of war corresponds to the proposals presented by the ICRC in Article 35 of its draft, and did not provoke any debate. It was impossible to enumerate in the Protocol all the operations described under this heading in military manuals, and it was necessary to restrict this to an indication of certain categories. These were given only by way of example and by no means form a comprehensive list.

1521 Some military manuals actually give a fairly extensive list of procedures which are commonly described as ruses of war: setting up surprise attacks, ambushes, retreats, simulated operations on land, in the air or at sea; simulating quiet and inactivity; camouflaging troops, weapons, depots or firing positions in the natural or artificial environment; taking advantage of the night or of favourable weather conditions (fog, etc.); constructing installations that will not be used; putting up dummy aerodromes or placing in position dummy canon and dummy armoured vehicles, and laying dummy mines; use of small units to simulate large forces and equipping them with a strong avant-garde or numerous advanced bases; transmitting misleading messages by radio or in the press; knowingly permitting the enemy to intercept false documents, plans of operations, despatches or news items which actually bear no relation to reality; using the enemy wavelengths, passwords⁵⁴ and wireless codes to transmit false instructions; pretending to communicate with reinforcements which do not exist; organizing simulated parachute drops and supply operations; moving land marks and route markers or altering road signs; removing the signs indicating rank, unit, nationality or special function from uniforms; giving members of one military unit the signs from other units to make the enemy believe that it is faced with a more important force; using signals for the sole purpose of deceiving an adversary; resorting to psychological warfare methods by inciting the enemy soldiers to rebel, to mutiny or desert,

⁵³ See *supra*, note 52.

⁵⁴ This point is sometimes contested; see M. Greenspan, *op. cit.*, p. 319, note 26, and D. Fleck, "Ruses of War...", *op. cit.*, p. 274, quoting Grotius.

possibly taking weapons and transportation; inciting the enemy population to revolt⁵⁵ against its government etc.⁵⁶

- 1522** Obviously this list is not and does not purport to be comprehensive. In the first place, it does not take into account the problems raised by certain types of weapons, but this point was examined above.⁵⁷ Moreover, the imagination of man is too inventive for one to think that everything it could come up with can be covered in a list. Finally, the situations in combat and their evolution are unforeseeable and will always give rise to new ideas. It does not take into account the conditions of war at sea where, for example, use is still made of dummy ships or warships camouflaged by artificial superstructures, but the legality of certain type of camouflage is controversial.

Conclusion

- 1523** The prohibition of perfidy is a basic rule of the conduct of combat. According to the Protocol, perfidy consists of the deliberate use of international law protection in the sense of the law of armed conflict (for example the use of the red cross emblem, a flag of truce, the simulation of a protected situation) to deceive the adversary. Thus it does not consist only of the infringement, for the same purpose, of a rule prescribing some form of conduct (for example, prohibition on the use of enemy uniform to assist military operations).
- 1524** The rule prohibits acts performed in combat: killing, injuring and capturing by resort to perfidy. It covers attempted and unsuccessful acts. If an act of perfidy results in the death, or serious injury to body or health, it constitutes a war crime in the sense of Article 85 (*Repression of breaches of this Protocol*), paragraph 3(f).
- 1525** A ruse of war is not prohibited as long as there is no intention to deceive the adversary by inviting his confidence that the rules will be duly respected and that they will afford protection, provided that the adversary is entitled to have such confidence, and provided that the ruse does not infringe any rule of obligatory conduct.

J. de P.

⁵⁵ But not by inviting the enemy population to listen in by announcing information about prisoners of war in such a way that it is actually a pretext for the use of a psychological weapon (see M. Greenspan, *op. cit.*, p. 324).

⁵⁶ Cf. *US Field Manual 27-10*, para. 51; Swiss Army, *Manuel des lois et coutumes de la guerre*, 1963, chiffre 36; M. Greenspan, *op. cit.*, pp. 319-320.

⁵⁷ See *supra*, pp. 441-442.

Protocol I

Article 38 – Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Documentary references

Official Records

O.R. I, Part I, p. 142; Part III, p. 12 (Art. 36). *O.R.* III, p. 166. *O.R.* VI, p. 103, CDHH/SR.39, para. 64; p. 115, *id.*, Annex (Israel). *O.R.* XIV, p. 256, CDDH/III/SR.27, paras. 70-72; pp. 271-272, CDDH/III/SR.29, paras. 2-9; p. 315, CDDH/III/SR.32, paras. 27-28; p. 405, CDDH/III/SR.38, para. 9; p. 408, para. 34; p. 409, para. 40; p. 413, para. 59. *O.R.* XV, p. 270, CDDH/215/Rev.1, paras. 33-36; pp. 370-371, CDDH/III/293 (Art. 36).

Other references

CE/4b, pp. 13-15; p. 07 (Annex I); p. 08, para. 102 (Annex II). *CE 1971, Report*, p. 26, paras. 65-68 (Art. 12); p. 103, para. 521. *CE 1972, Basic Texts*, p. 13 (Art. 32). *CE 1972, Commentaries*, Part I, pp. 63-64 (Art. 32). *CE 1972, Report*, vol. I, p. 41, paras. 1.60-1.63 (Art. 21); p. 48, para. 1.93; pp. 130-131, paras. 3.31-3.32 (Art. 32); vol. II, p. 52, *CE/COM III/C 7*; pp. 57-58, *CE/COM III/C 38*; p. 62, *CE/COM III/C 60*; p. 64, *CE/COM III/C 73*. *Commentary Drafts*, pp. 43-44 (Art. 36).

Commentary

General remarks

- 1526** The very existence of a law of armed conflict implies the recognition of protective signs. In fact, the use of protective agreements affording protection for certain persons and certain objects, goes back to ancient times. Similarly, the necessities of war have always obliged the belligerents to deal with each other with some formality. Custom ultimately established the use of the white flag by those authorized by one of the Parties to enter into negotiation with the adversary, and the 1864 Geneva Convention introduced the sign of the red cross on a white ground as the distinctive sign of the protection accorded to the medical services of armies. In 1899 Article 23(f) of the Hague Regulations specifically recognized the flag of truce and “the distinctive badges of the Geneva Convention”,¹ and prohibited their improper use. This prohibition covers equally the enemy national flag, military insignia, and the uniform. This text was adopted without modification in 1907.
- 1527** In accordance with the aims and objectives of the Diplomatic Conference, these rules of the law of armed conflict were reaffirmed and developed in the Protocol, in two separate articles. The article under consideration here is concerned only with internationally recognized protective signs, which include to some extent the emblem of the United Nations.

Paragraph 1 – Prohibition of improper use or misuse

- 1528** Paragraph 1 makes a distinction between protective emblems, signs or signals provided for or created by the Conventions or the Protocol (first sentence) and other internationally recognized protective emblems, signs or signals (second sentence).
- 1529** Thus the general range of protective emblems, signs or signals referred to in this paragraph is presented in two categories.

1. *Principal emblems, signs or signals provided for or created by the Conventions and the Protocol*²

¹ It was at the Brussels Conference of 1874 that the words “as well as the distinctive badges of the Geneva Convention” were proposed for the first time. The original text prohibited misuse with the intent of deceiving the enemy, an expression which was subsequently considered to be superfluous and was omitted. The words “improper use”, replacing the term “misuse” were introduced in 1899 (A. Mechelynck, *La Convention de La Haye concernant les lois et coutumes de la guerre sur terre*, Ghent, 1915, pp. 244, 246 and 248).

² Other signs:

- a) oblique red bands on a white ground (Fourth Convention, Annex I, Art. 6);
- b) markings for internment camps for prisoners of war and civilian detainees: PG, PW, IC or means to be agreed upon (Third Convention, Art. 23, para. 4; Fourth Convention, Art. 83, para. 3);
- c) non-defended localities (Protocol, Art. 59, para. 6) and demilitarized zones (Art. 60, para. 5): means to be agreed upon between the Parties.

- a) The distinctive sign of the red cross on a white ground, the red crescent or the red lion and sun on a white ground³ (First Convention, Article 38; Protocol, Annex I, Chapter II, Article 3 – *Shape and nature*, and Article 4 – *Use*).
- b) Distinctive signals (Protocol, Annex I, Chapter III).
- c) Sign marking works and installations containing dangerous forces (Protocol, Article 56 – *Protection of works and installations containing dangerous forces*, paragraph 7; Annex I, Chapter VI, Article 16 – *International special sign*).
- d) International distinctive sign for civil defence (Protocol, Article 66 – *Identification*, paragraph 4; Annex I, Chapter V, Article 15 – *International distinctive sign*).

2. *Emblems, signs or signals to which reference is made in the Protocol*

- a) Specific references:
 - flag of truce (Protocol, Article 37 – *Prohibition of perfidy*, paragraph 1, and Article 38 – *Recognized emblems*; Hague Regulations of 1907, Article 23(f), Article 32);
 - protective emblem of cultural property (Protocol, Article 38 – *Recognized emblems*, paragraph 1; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 1954, Chapter V, Articles 16 and 17);
- b) general reference: other internationally recognized protective emblems, signs or signals.⁴

1530 This list clearly indicates the proliferation of recognized protective signs, particularly with the entry into force of the Protocol. Some wished this proliferation to be even more pronounced, although there are undeniable risks in taking this too far. An increase in the number of protective signs increases the risk of misuse and affects their credibility. In this field, as in any other, there is merit in moderation.

First sentence – Emblems, signs or signals provided for or created by the Conventions or by this Protocol

1531 When the ICRC embarked upon the task of reaffirming and developing the laws and customs applicable in armed conflict, resulting in the adoption of the Protocol, it was essentially concerned with two problems in the field of protective signs: extending the use of the red cross emblem to civilian medical units – up to that time it had been reserved for military medical services – and strengthening

³ Since July 1980 there has no longer been a Society entitled Red Lion and Sun, or any Party to the Conventions using this sign.

⁴ Art. 5 of Hague Convention IX Respecting Bombardment by Naval Forces in Time of War prescribed large, stiff rectangular panels, divided diagonally into two coloured triangular portions, the upper portion black and the lower portion white, to distinguish buildings used for religion, the arts, science or charitable purposes, historic monuments etc. on the understanding that they are not used at the same time for military purposes.

the provisions on controlling its use. In the ICRC's view, the most important point was to suppress the misuse of protective signs in times of armed conflict,⁵ not only because of the perfidious nature of this misuse, but also because very important interests are at stake. Thus there was no question of revoking Article 23(f) of the Hague Regulations. On the contrary, the ICRC was concerned with reaffirming and reinforcing it by providing for measures for the repression of breaches, which forms the object of Article 85 – *Repression of breaches of this Protocol*, paragraph 3(f).

1532 This paragraph is concerned only with the prohibition itself, but unlike the first sentence of Article 37 (*Prohibition of perfidy*), it has an absolute character. Any improper use is prohibited, not merely perfidious use in the sense of Article 37 (*Prohibition of perfidy*), in other words, use that results in, or is intended to result in killing, injuring or capturing the adversary. This absolute character of the prohibition is significant for the article as a whole, and as such it unequivocally reinforces Article 37 (*Prohibition of perfidy*).

1533 As regards the wording, this is very close to the text of the Hague Regulations: "It is prohibited to make improper use". Nevertheless, the Conference did not adopt this formula which was already included in the draft presented by the ICRC to the Conference of Government Experts, without some hesitation.⁶ A considerable number of delegations would have liked the term "improper" to be defined more precisely,⁷ and the final draft of the ICRC provided for the prohibition of the use of recognized signs "in cases other than those provided for in international agreements establishing those signs and in the present Protocol".⁸ However, the Conference finally adopted the Hague formulation with regard to the signs provided for in the Conventions and the Protocol, and a slightly different formula, as we shall see in the analysis of the second sentence, for other internationally recognized signs. On this subject the Rapporteur merely stated that although the basic principle underlying this article was readily accepted, the wording of the text turned out to be much more difficult than had been expected.⁹

1534 Finally the Conference probably considered that unforeseeable situations can always occur, and that it is impractical to wish to foresee all possible contingencies. Thus the use of these signs or signals in situations or for purposes

⁵ Despite Resolution 5 annexed to the 1949 Conventions, States have devoted little attention to misuse in their implementing legislation, except with regard to the suppression of commercial misuse. This Resolution reads as follows: "Whereas misuse has frequently been made of the Red Cross emblem, the Conference recommends that States take strict measures to ensure that the said emblem, as well as other emblems referred to in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, is used only within the limits prescribed by the Geneva Conventions, in order to safeguard their authority and protect their high significance." For the distinction between protective sign and indicatory signs, see *infra*, p. 450.

⁶ CE 1972, Report, Vol. II, p. 5, *ad Art. 32*. This text referred both to the flag of truce and to the protective sign of the red cross (red crescent and red lion and sun), the protective sign for cultural property and other protective signs specified by international conventions.

⁷ Cf. amendment CE/COM III/C 73: "for purposes other than those specified in the Conventions establishing those signs and in the present Protocol", *ibid.*, p. 64.

⁸ Art. 36, para. 1, of the Draft Protocol.

⁹ O.R. XV, p. 270, CDDH/215/Rev.1, para. 34.

differing from those for which they were specifically intended, is not necessarily always prohibited. In the field of protection, the spirit should support the letter of the law, perhaps more than anywhere else. It should always be possible to take into consideration exceptional situations with a view to the possible future establishment of a rule of customary law (*opinio juris sive necessitatis*). However, it goes without saying that the wording which prohibits the improper use of the distinctive sign and other signs, signals or emblems provided for by the Conventions or by this Protocol, should in the first place be understood strictly within the confines of the text. This point cannot be over-emphasized, and it is appropriate to remember once again that the perfidious use of the distinctive emblem of the red cross, the red crescent and the red lion and sun, or of other protective signs recognized by the Conventions or the Protocol, in violation of Article 37 (*Prohibition of perfidy*) constitutes a grave breach (Article 85 – *Repression of breaches of this Protocol*, paragraph 3(f)) if it is intentional and causes the death or serious injury to body or health of an adversary.

1. *The distinctive emblem of the red cross, the red crescent or red lion and sun*

- 1535 The prohibition of the improper use of the distinctive emblem, whether this concerns the red cross or red crescent, may cover its representation, as well as the categories of persons and objects which may rely on it. This of course amounts to some extent to determining the conditions of its use.¹⁰
- 1536 The emblem is defined in Article 38 of the First Convention. It consists of a red cross, a red crescent or a red lion and sun, respectively, on a white ground. The shade of red is immaterial. The shape of the cross is not defined; it is a graphic sign *par excellence*. The cross is formed by the intersection of two straight lines. To demand a more specific description could too easily result in misuse, for example, the refusal to respect the emblem on the pretext that one or other of the cross bars was not the correct length or width, or even that it is forgery because of allegedly different dimensions than those provided for by the Convention. The simple emblem of the red cross, freely executed, can be improvised at any time for the purposes defined by the Conventions and the Protocols.
- 1537 It has become customary to use the so-called “Greek cross”, i.e. a cross with four bars of equal length, formed by two straight lines – a vertical and horizontal line – intersecting at right angles, without touching the borders of the white ground. The simplest and most frequently used version consists of five equal squares. The dimensions, shape and orientation of the crescent are not strictly defined either. In fact, certain Islamic countries have adopted a crescent with the points pointing towards the left, while others have opted for the converse.¹¹

¹⁰ These conditions are specified in Art. 18 for persons, services and installations authorized to display this emblem: Identification. For the commentary on this article, see p. 221.

¹¹ For further details, see *Commentary I*, p. 297. Also see F. Bugnion, *The Emblem of the Red Cross, A Brief History*, ICRC, Geneva, 1977 and also Ph. Eberlin, *Protective Signs*, ICRC, Geneva, 1983.

- 1538** This emblem – the red cross on a white ground – to which the red crescent and the red lion and sun were added in due course, was chosen in 1863 for the protection of voluntary medical orderlies. Upon the conclusion of the first Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field, it became the only distinctive emblem for all military medical personnel, as well as for military hospitals and ambulances. As then, it is now the visible manifestation of the protection provided by the Convention for certain persons and certain objects. It is the emblem of the Convention, and therefore an emblem of protection. It allows its bearers to venture onto the battlefield to carry out their humanitarian task. It bears witness to the totally inoffensive character of the persons and objects that it designates, as well as to the impartial, useful and orderly nature of their humanitarian task, and in return, it grants them immunity. Thus it should be displayed in good faith and in accordance with the prescribed conditions, deployed widely wherever possible and permanently under a strict control of the conditions of its use.
- 1539** However, the emblem is also used to indicate that a person or an object is connected with the institution of the Red Cross. This emblem is used in peacetime by National Societies and by millions of their members and volunteers as an indicatory sign, but this should not be confused in any way with the emblem as laid down in the Convention for the purpose of protection in time of armed conflict. It is up to the National Red Cross and Red Crescent Societies, and national legislation, to prescribe the rules for the use of the indicatory sign, and to suppress its misuse, in accordance with Articles 53 and 54 of the First Convention in particular.¹² It is of the utmost importance that the use of this indicatory sign, even if it is perfectly lawful, can in no case lead to confusion with its protective use, which is quite unrelated to it. In any situation of armed conflict the indicatory sign will always be of a small size¹³, and it may not be displayed on an armlet or on rooftops. The prohibition of the improper use of the distinctive emblem, formulated in this paragraph, is addressed to governments, which have the duty to introduce all the necessary legislation on this matter with the cooperation of the National Societies.¹⁴ If the sign of the Convention – bearing in mind that under the Convention the emblem itself is virtually the source of the protection –, ¹⁵ is to provide an effective guarantee for those who venture onto the battlefield unarmed as a “warrior without weapons”¹⁶ for the sole purpose of aiding the wounded, sick and threatened or abandoned civilians, it is essential that there should be no possible confusion on this point.
- 1540** The indispensable conditions for compliance with this paragraph in times of armed conflict are: the correct representation of the emblem; distinguishing

¹² On this subject, see J. Pictet, *Le signe de la croix rouge et la répression des abus du signe de la croix rouge*, ICRC, Geneva, 1951.

¹³ First Convention, Art. 44, para. 2.

¹⁴ See the “Regulations on the Use of the Emblem of the Red Cross, of the Red Crescent and of the Red Lion and Sun by the National Societies”, adopted by the XXth International Conference of the Red Cross, *International Red Cross Handbook*, Geneva, 1983, pp. 514-521.

¹⁵ See *Commentary I*, p. 306.

¹⁶ *Warrior without Weapons* is the title of a work published in 1947 by a former ICRC delegate, Dr. Marcel Junod, and republished a number of times since.

clearly and precisely between the protective emblem, which is for the sole use of those engaged on tasks provided for by the Conventions and the Protocol, and the indicatory emblem, and the disappearance of the signs displayed by persons, private enterprises and organizations which are not authorized to use it.¹⁷ Article 44 of the First Convention still governs the use of the indicatory sign, as the Protocol has not brought any part of this subject within its scope, and therefore contains no new provisions at all on this point (Article 18 – paragraph 7).

1541 Under the provisions of the Conventions and the Protocol, the following are entitled to the benefits of the protective emblem:

- a) *Fixed or mobile, permanent or temporary medical units of a Party to the conflict or made available to a Party to the conflict, viz.:*
 - i) military or civilian units¹⁸, including those belonging to civil defence, sickbays on board ship and civilian hospitals of a Party to the conflict (Article 8 – *Terminology*, sub-paragraph (e)), Article 18 – *Identification* and Article 66 – *Identification*, paragraph 9); First Convention, Articles 19, 28, 41 and 42; Fourth Convention, Article 18;
 - ii) military or civilian units made available to a Party to the conflict for humanitarian purposes by a neutral or other State that is not a Party to the conflict (Article 9, *Field of application*, paragraph 2(a)); or
 - iii) civilian units made available to a Party to the conflict for humanitarian purposes:
 - by a recognized and authorized aid society of a neutral or other State that is not a Party to the conflict (Article 9 – *Field of application*, paragraph 2(b));¹⁹
 - by an impartial international humanitarian organization (Article 9 – *Field of application* – paragraph 2(c)).
- b) *Military or civilian, permanent or temporary medical transports, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict* (Article 8 – *Terminology*, sub-paragraph (g)), viz.:
 - i) any medical transports by land (medical vehicles) (Article 8 – *Terminology*, sub-paragraph (h)) which comply with these conditions, and similarly

¹⁷ In this respect, see XXIIIrd International Conference of the Red Cross, Bucharest, 1977, Resolution XI, “Misuse of the Emblem of the Red Cross”.

¹⁸ Art. 12 stipulates that the protection of civilian medical units is subject to one of the following conditions, that they: a) belong to one of the Parties to the conflict; b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or c) are authorized in conformity with Art. 9, para. 2, of this Protocol, or Art. 27 of the First Convention.

¹⁹ In the terms of Art. 27 of the First Convention, this assistance is subject to the prior agreement of the government of the country to which this society belongs, and to the authorization of the Party to the conflict itself. The adverse Party of the State which accepts this assistance will be notified before any use is made of it, both by the neutral government and by the State receiving the assistance. The application of Article 27 of the First Convention is explicitly called for by the Protocol (Art. 9, para. 2, and Art. 12, para. 2(c); see *supra*, note 18).

- ii) any medical transports by air (medical aircraft) (Article 8 – *Terminology*, sub-paragraph (j)) including those which fall under letter a), ii) and iii) above; or
- iii) any medical transports by water, complying with the same conditions (medical ships and craft) (Article 8 – *Terminology*, sub-paragraph (i)), whether these are:
 - military hospital ships of a Party to the conflict in accordance with Article 22 of the Second Convention, even when they are transporting civilian wounded, sick or shipwrecked persons who do not belong to any of the categories mentioned in Article 13 of the Second Convention (Article 22 – *Hospital ships and coastal rescue craft*, paragraph 1; Second Convention, Articles 22, 43 and 44);
 - hospital ships of aid societies and private hospital ships originating from a Party to the conflict, under the same conditions as those mentioned above, and which comply, as far as possible, with the provisions of Article 43, paragraph 2, of the Second Convention (Article 23 – *Other medical ships and craft*, paragraph 1; Second Convention, Articles 24, 43 and 44);
 - hospital ships of aid societies and private hospital ships of neutral countries or those made available to a Party to the conflict by a neutral or other State that is not a Party to the conflict or by an impartial international humanitarian organization under the same conditions as those mentioned above (Article 22 – *Hospital ships and coastal rescue craft*, paragraph 2; Second Convention, Articles 25, 43 and 44);²⁰
 - lifeboats of hospital ships, lifeboats of coastal rescue stations and small craft belonging to the medical services under the same conditions as those mentioned above, even if the notification requirement of Article 27 of the Second Convention (Coastal rescue craft) has not been observed (Article 23 – *Other medical ships and craft*, paragraph 1; Second Convention, Articles 27, 43 and 44);
 - fixed coastal installations used by rescue craft (Second Convention, Articles 27 and 41).
- c) *Medical personnel assigned exclusively, whether permanently or temporarily:*
 - i) to medical units for medical purposes;
 - ii) to the administration of medical units;
 - iii) to the operation or administration of medical transports, i.e.:
 - military or civilian medical personnel of a Party to a conflict, including the medical personnel mentioned in the First and Second Conventions,²¹ and

²⁰ In the terms of Art. 25 these hospital ships should be placed under the control of one of the Parties to the conflict, with the prior agreement of their own government and with the authorization of this Party, and in addition, the provisions of Art. 22 of the Convention, relating to notification, shall be complied with.

²¹ This concerns:

- a) permanent medical personnel of the army and of aid societies, including the administrative personnel (First Convention, Arts. 24, 26 and 40);
- b) temporary medical personnel of the army while they are carrying out medical duties (First Convention, Arts. 25 and 41);
- c) medical personnel of hospital ships and their crew (Second Convention, Arts. 36 and 42);
- d) medical personnel of naval forces and of the merchant marine (Second Convention, Arts. 37 and 42);
- e) personnel of civilian hospitals (Fourth Convention, Art. 20).

- the personnel assigned to civil defence organizations²² (Article 8 – *Terminology*, sub-paragraph (c));
- medical personnel of National Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict²³ (Article 8 – *Terminology*, sub-paragraph (c)(ii));
 - medical personnel of medical units or transports made available to a Party to the conflict for humanitarian purposes by a neutral or other State which is not a Party to that conflict (Article 9 – *Field of application*, paragraph 2(a)); by a recognized and authorized aid society of such a State (Article 9 – *Field of application*, paragraph 2(b))²⁴; by an impartial international humanitarian organization (Article 9 – *Field of application*, paragraph 2(c)).
- d) *Religious personnel, i.e., military or civilian persons such as chaplains, who are exclusively engaged in the work of their ministry and are attached either permanently or temporarily to the armed forces of a Party to the conflict, to medical units of a Party to the conflict, or are made available to a Party to the conflict* (Article 8 – *Terminology*, sub-paragraph (d)), i.e.:
- i) religious personnel of the armed forces of a Party to the conflict, whether this is the army (First Convention, Article 24), airforce or navy (Second Convention, Article 37) (Article 8 – *Terminology*, sub-paragraph (d)(i));
 - ii) religious personnel attached to the medical units or medical transports of a Party to the conflict, including sick-bays on board ship (Second Convention, Article 28), hospital ships (Second Convention, Article 36), the merchant marine (Second Convention, Article 37) and civilian hospitals (Fourth Convention, Article 20) (Article 8 – *Terminology*, sub-paragraph (d)(ii));
 - iii) religious personnel attached to medical units or transports made available to a Party to the conflict under the conditions mentioned under letter c) above (Article 8 – *Terminology*, sub-paragraph (d)(iii)); or
 - iv) religious personnel of civil defence organizations of a Party to the conflict (Article 8 – *Terminology*, sub-paragraph (d)(iv)).
- e) *Medical equipment of medical units, medical transports, medical personnel and religious personnel* (First Convention, Articles 33, 34 and 39; Second Convention, Article 41) as defined under letters a)-d) above.

²² Art. 66, para. 9.

²³ In fact, these societies do not seem to be very numerous; examples that could be given include the Order of St. John of Jerusalem and the Order of Malta. However, in the context of a conflict relating to Art. 1, para. 4, this might refer to a National Red Cross or Red Crescent Society in the process of being established; see also commentary Art. 81, *infra*, p. 935.

²⁴ For the conditions, see *supra*, note 19.

- f) *The international Red Cross organizations and their duly authorized personnel* (First Convention, Article 44, paragraph 3).
- g) *Hospital zones and localities established in the territory of a Party to the conflict in order to protect the wounded and sick from the effects of war* (First Convention, Article 23, and Fourth Convention, Articles 14 and 15, paragraph 1(a); Annexes I, Article 6, and 6, paragraph 2; Protocol, Article 8 – *Terminology*, sub-paragraph (a)).

1542 In the context of the list indicated above, which is taken directly from the texts of the Conventions and the Protocol, it is the responsibility of every High Contracting Party to draw up the list of persons, establishments, services and medical transports, whether military or civilian, which will be placed under its control in a time of armed conflict, and which will be allowed to display the protective emblem. The role that used to be reserved to the army by the Geneva Conventions is now assigned by the Protocol to the Parties to the conflict, as modern warfare leads to the amalgamation, or at least, the coordination between civilian and military medical services. Thus it is no longer possible to leave these matters to the army, and control has passed to the State itself. The role of the State in this area is indeed essential.

1543 These limits, imposed by the Conventions and the Protocol, on the number and type of persons and objects entitled to bear the protective emblem can be exceeded in cases of emergency by recourse to the civilian population and to aid societies, such as the National Red Cross or Red Crescent Societies, which “shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas” (Article 17 – *Role of the civilian population and of aid societies*, paragraph 1).²⁵ When something is necessary, one must find the means, it does not seem possible to refuse these civilians and these aid societies the protective emblem, while it is necessary for the task in hand. Thus they will take it upon themselves to bear it as they are acting on their own initiative. However, this does not mean that the High Contracting Party is released from its obligations, and it must ensure that all misuse is suppressed.

2. *Distinctive signals*

1544 Medical units and transports which comply with the conditions listed under 1, a) and b) above, can also make use of the distinctive signals provided for in Chapter III of Annex I to the Protocol: Article 6 (*Light signal*), Article 7 (*Radio signal*), Article 8 (*Electronic identification*). These means of signalling are

²⁵ Thus this is a spontaneous intervention of the civilian population, as distinct from an appeal which might be made by the State (Art. 12, para. 2). For example, Switzerland aims to supplement the civilian and military medical strength in time of war with the participation of the population which could reach 4% of all the inhabitants, i.e., about 250,000 people from a population of 6,000,000. This civilian assistance, organized by the State, is automatically placed under its control in the same way as civilian or military medical units or services, and therefore does not pose any problem regarding the right to wear the protective sign. They are assimilated either by being incorporated in the medical units and services or by analogy.

exclusively²⁶ intended to permit the identification of medical units and transports (Article 8 – *Terminology*, sub-paragraph (*m*)) and are normally used in conjunction with the protective emblem. However, in exceptional cases temporary medical aircraft, which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem, may use only the distinctive signals (Article 18 – *Identification*, paragraph 5, and Annex I, Chapter III, Article 5 – *Optional use*, paragraph 2).²⁷

1545 The commentary on Annex I to the Protocol, entitled “Regulations concerning identification”, provides all the necessary details and explanations on these points.²⁸

3. *The sign for works and installations containing dangerous forces*

1546 This sign was created by the Protocol, as well as the distinctive signals mentioned above, and also the civil defence sign which is dealt with in the following section. We refer to the commentary on Article 56 (*Protection of works and installations containing dangerous forces*), and to Chapter VI, Article 16 (*International special sign*) of Annex I to the Protocol, for all matters related to the definition of this sign and the conditions of its use.²⁹

4. *The international distinctive sign of civil defence*

1547 We refer to the commentary on the articles of the Protocol relating to civil defence (Articles 61-67), in particular Article 66 (*Identification*), as well as to the commentary on Annex I to the Protocol, Chapter V, Article 15 (*International distinctive sign*).

²⁶ Nevertheless, in the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles, ships and craft, the use of these light signals for other vehicles or ships is not prohibited (Annex I, Chapter III, Art. 6, para. 3).

²⁷ See also resolutions 17-19.

²⁸ Oblique red bands on a white ground are provided for in Annex I of the Convention Relative to the Protection of Civilian Persons in Time of War, which contains a draft agreement relating to hospital and safety zones and localities, provided for in Art. 14 of this Convention. As long as these zones are reserved for the wounded and sick, they are deemed to be hospital zones which must be marked, as we have seen, by a red cross or a red crescent respectively, on a white ground. However, when access to these zones is open to persons who do not fall under the definition given in Art. 8, sub-para. (*a*), of the wounded and sick, it is no longer regarded as a hospital zone but as a safety zone. In the terms of Art. 14 of the Fourth Convention, this type of zone can shelter invalids, old people, children under fifteen years of age, expectant mothers and mothers of children under seven years of age, as well as the wounded and sick (see *Commentary IV*, pp. 125-126 and 627-629). This zone cannot be marked by a red cross, but will be marked by oblique red bands on a white ground, in pursuance of Art. 6 of the draft agreement contained in Annex I to the Fourth Convention (see *Commentary IV*, pp. 633-634). However, it should always be remembered that since the Protocol has extended the protection of the red cross sign to the civilian wounded and sick, the oblique red bands have lost a large degree of their significance.

²⁹ See *infra*, p. 1295.

*Second sentence – Other internationally recognized protective emblems, signs or signals*³⁰

1548 This provision covers all internationally recognized protective signs existing now and in the future, which are not covered by the first sentence. Thus it covers any signs which are not provided for by the Conventions or the Protocol, in particular recognized distress signals, including those established by certain international organizations.³¹

1549 During armed conflict the prohibition is absolute, in the sense that any deliberate misuse is prohibited, and not only, for example, the deliberate misuse aimed at killing, injuring or capturing the adversary. However, it should be noted that the wording differs significantly from that of the first sentence, and consequently from that of Article 23(f) of the Hague Regulations, not only because of the explicit mention “in an armed conflict” but also because of the expression “deliberate misuse”, which replaces the words “improper use” employed previously. The Rapporteur of Committee III explained this discrepancy by stating that

“a number of representatives stated that their Governments could not, in this Protocol, accept an obligation to avoid or prevent improper use of an emblem provided for in a convention to which their Governments were not Parties. On the other hand, these Governments could agree that they would not themselves deliberately misuse such an emblem”.³²

1550 This reservation concerns the distinctive sign of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. A considerable

³⁰ The signs for prisoner-of-war camps and civilian internment camps are given in Art. 23, para. 4, of the Third Convention and Art. 83, para. 3, of the Fourth Convention. During the Second World War prisoners of war took the initiative, either with or without the authorization of the camp commanders, to mark their places of internment by day by means of the letters PG or PW, so that they could be clearly recognized from the air. This initiative was approved by the Diplomatic Conference of 1949, which extended its use to internment camps for civilians by means of the letters IC. Only prisoner-of-war camps and civilian internment camps can be marked in this way. In either case the possibility of marking is subject to the reservation of military considerations (on this point, see *Commentary III*, p. 190, and *Commentary IV*, p. 383-384). For non-defended localities and demilitarized zones the Protocol has made provision for signs, though it has not specified them, since it merely stipulates that the Party which is in control of a locality which is the object of an agreement not to defend that area, or a demilitarized zone, must mark it so far as possible by such signs as may be agreed upon with the other Party; these signs must be displayed where they are clearly visible, especially on the perimeter, limits and highways of the zone (Art. 59, para. 6, and Art. 60, para. 5). For both the definition of non-defended localities and demilitarized zones, and for the conditions of use of any signs for them, we refer to the commentary on the provisions relating to these matters (see *infra*, pp. 699 and 707).

³¹ See commentary on Annex I, *infra*, p. 1137.

³² *O.R.* XV, p. 270, CDDH/215/Rev.1, para. 34.

number of States are Parties to it, though some have still not adhered to it.³³ As this Convention restricts the prohibition of the use of the distinctive sign in cases other than those provided for, to situations of armed conflict, it was appropriate to include this restriction in the Protocol as well. As regards the term “deliberately”, this expresses an intent³⁴ and refers to misuse that is made with full awareness of the motives, free of any pressure and voluntarily heedless of the rule. The prohibition of “deliberate misuse” is normally equivalent to that formulated in the Convention for the protection of cultural property.³⁵ Oddly enough, the expression “deliberate misuse” is also used in Article 18 (*Identification*), paragraph 8, where it refers to distinctive signs and signals, in the context of the prevention and suppression of their misuse.³⁶

- 1551 The use of the flag of truce is regulated in Article 23(f) of the Hague Regulations, which prohibits its improper use, while the parlementaire himself is dealt with in Articles 32-34. Traditionally the flag of truce is white. It simply indicates the wish on the part of the person bearing it to communicate with his adversary. However, as the only object of this communication is often the negotiation of a surrender, it sometimes happens that small units or soldiers fly

³³ The distinctive emblem of the Convention for the Protection of Cultural Property in the Event of Armed Conflict “shall take the form of a shield, pointed below, per saltire blue and white” (Art. 16). The sign is used alone or is repeated three times in a triangular formation (*ibid.*). If it is repeated three times, the sign can only be used for immovable cultural property under special protection (Art. 17, para. 1(a), and Art. 8), the transport of cultural property (Art. 17, para. 1(b) and Arts. 12 and 13) and for improvised refuges (Art. 17, para. 1(c)). The immunity of cultural property which enjoys special protection can only be withdrawn in exceptional cases of unavoidable military necessity (Art. 11, para. 2), which can only be determined by the officer commanding a force which is equivalent to or larger than a division (*ibid.*). During armed conflict it is prohibited to use the distinctive emblem in any cases other than those provided for, or to use a sign resembling the distinctive sign for any purpose whatsoever (Art. 17, para. 3). As regards the Treaty for the Protection of Artistic and Scientific Institutions and of Historic Monuments in Times of War and Peace (Roerich Pact), it provides for a sign consisting of a red circle encircling a triple sphere on a white ground. This Pact binds various States of North America and Latin America. See also the commentary on Art. 53 (which does not make the reservation of unavoidable military necessity) and Resolution 20 annexed to the Protocols.

³⁴ This concept of intent, which gives the rule a personal and subjective character, is expressed not only in the definition of perfidy (Art. 37), but also in other places in the text of the Protocol in different forms, particularly in Arts. 41, para. 1 (provision prohibiting a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat*, from being made the object of attack), in Art. 44, para. 3 (a combatant who misuses the absence of a distinguishing sign and benefits therefrom to take advantage of his adversary), and in Art. 55, para. 1 (means of warfare intended to cause damage to the natural environment); it is in Art. 85 (Repression of breaches) that this concept is most evident: acts committed “wilfully” or “in the knowledge” (paras. 3 and 4). In this case it implies a responsibility under criminal law.

³⁵ See *supra*, note 33. The concept of the abuse of rights is controversial; a number of lawyers distinguish acts *ad aemulationem*, i.e., the exercise of the right with the sole purpose of causing harm, from acts consisting of exercising a right for purposes different from those for which the right was granted. This distinction does not seem to be of interest except from the point of view of the intent of the person who is guilty of the abuse; it is irrelevant for the result. In either case it is an unlawful act. Finally, some lawyers sometimes deny the validity of the whole concept of abuse of rights by claiming that a right exercised for purposes different from those for which it was granted, actually does not exist.

³⁶ See commentary Art. 18, *supra*, pp. 234-235.

the white flag individually for the sole purpose of demonstrating their decision to cease combat. In this case the gesture should be accompanied by unequivocal behaviour supporting this decision. Leaving this aside, the reason for which the white flag has been used can only be known when the communication that is desired has taken place.

- 1552 Anyone who hoists the white flag must cease fire, and the act of sending an emissary should take place promptly after the flag is shown. The adversary, i.e., the Party which is requested to accept the non-belligerent contact, is not bound to cease fire, but may not direct it against the bearer of the flag and those accompanying him. The latter will advance unhurriedly towards the place which may be designated to them. The same applies to the return journey. To raise the white flag without a reason or for the sole purpose of deflecting attention away from a military operation in progress, or for other purposes conflicting with the law of armed conflict, such as threatening not to give quarter, constitutes a breach and may give rise to sanctions.
- 1553 Any soldier may find himself in a situation of seeing a white flag and should therefore be instructed in the conduct he should follow in this event.³⁷
- 1554 The colour white is also used to provide protection, even when there is no other emblem, particularly to certain aircraft.³⁸
- 1555 Despite the different formula (“improper use” in the Hague Regulations, “deliberate misuse” in the Protocol), it does not seem that the authors of the Protocol intended to alter the conditions of use of the flag of truce, which are based on customary law.
- 1556 The perfidious use of the flag of truce in the sense of Article 37 (*Prohibition of perfidy*), paragraph 1(a) is a grave breach (Article 85 – *Repression of breaches of this Protocol*, paragraph 3(f)), if it is intentional and causes death or serious injury to body or health.
- 1557 As regards the expression “other internationally recognized protected emblems, signs or signals”, this refers to any other existing or future sign, whether it is universally accepted or not, like the protective emblem of cultural property. It should be noted in particular that Resolutions 17, 18 and 19, annexed to the Protocol, recognize the competence of the International Civil Aviation Organization (ICAO), the Inter-Governmental Maritime Consultative Organization (now the International Maritime Organization (IMO)), and that of the World Administrative Radio Conference (WARC) in the field of the identification of medical transports, particularly medical aircraft. These Resolutions request these organizations either to recognize the signals provided for in the Protocol, or to establish a combined system (Resolution 18, paragraph 1(c)), or to establish appropriate procedures for the use of medical aircraft (Resolution 17, paragraph 1(a)).³⁹ Reference has already been made to Article

³⁷ For further details, see M. Greenspan, *op. cit.*, pp. 380-385.

³⁸ See M. Greenspan, *op. cit.*, p. 380; J.M. Spaight, *Air Power and War Rights*, London, 3rd edition, 1947, p. 134.

³⁹ For the commentary on these provisions, see *infra*, p. 1137.

5 of the Hague Convention Respecting Bombardments by Naval Forces in Time of War.⁴⁰

Paragraph 2 – United Nations' emblem

- 1558 This paragraph, which prohibits the use of the emblem of the United Nations, except as authorized by that organization, was introduced following an amendment submitted at the second session of the Conference of Government Experts⁴¹ at the suggestion of the United Nations.
- 1559 The use of the United Nations flag forms the object of a code issued for the first time by the Secretary General on 19 December 1947, and amended on 11 November 1952.⁴² Article 6 of the Code specifies that the flag cannot be displayed during military operations, except when this has been specifically authorized by a competent organ of the United Nations.
- 1560 The text of this paragraph does not state that the United Nations emblem is an internationally recognized protective emblem, but the provision relating to it is placed in the context of protective emblems, under the general title "Recognized emblems". In this respect we refer to what was said above regarding Article 37 (*Prohibition of perfidy*), paragraph 1(d).⁴³ The United Nations emblem only has a protective character to the extent that it can be assimilated to the emblems of neutral or other States not Parties to the conflict, but not when the United Nations intervenes in a conflict by sending combatants. Some seem to have regretted this restriction and would have preferred the protective character of the United Nations emblem to be always recognized when it is engaged in a peacekeeping operation.

⁴⁰ *Supra*, note 4. It is appropriate to recall at this point the declaration made by the representative of Israel at the final plenary meeting of the Conference: "With regard to Art. 36 [38] of draft additional Protocol I, the delegation of Israel wishes to declare that it attaches special importance to the second sentence of paragraph 1. This sentence forbids the misuse of any other protective emblem which has been recognized by States or has been used with the knowledge of the other Party" (*O.R.* VI, p. 116, CDDH/SR.39, Annex). This declaration relates to the red shield of David, an emblem which is not recognized by the Conventions, but which is used by the military and civilian medical services of the State of Israel, and which, in that country, fulfils the role played by the red cross and the red crescent in other countries. In this way Israel claims that the prohibition of deliberately misusing internationally recognized protective emblems, signs or signals in armed conflicts also applies to the red shield of David.

⁴¹ *CE 1972, Report*, Vol. II, p. 64, CE/COM III/C 73.

⁴² The United Nations Flag Code and Regulations, ST/SGB/132, United Nations, January 1967.

⁴³ *Supra*, p. 439.

Conclusion

- 1561** The prohibition of the improper use of signs provided for or created by the Conventions and the Protocol should be interpreted first of all within the confines set by the text. Any improper use is prohibited, not only the perfidious use in the sense of Article 37 (*Prohibition of perfidy*). The same is true of other internationally recognized protective emblems, signs or signals.

J. de P.

Protocol I

Article 39 – Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
3. Nothing in this Article or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Documentary references

Official Records

O.R. I, Part I, p. 142; Part III, p. 12 (Art. 37). *O.R.* III, p. 167. *O.R.* VI, p. 103, CDDH/SR.39, paras. 65-66. *O.R.* XIV, p. 256, CDDH/III/SR.27, para. 72; p. 271, CDDH/III/SR.29, para. 2; pp. 272-276, paras. 10-29; p. 405, CDDH/III/SR.38, paras. 10-13; pp. 420-421, CDDH/III/SR.39, para. 13. *O.R.* XV, p. 210, CDDH/III/SR.59, para. 5; p. 216, paras. 45-46; pp. 270-271, CDDH/215/Rev.1, paras. 37-41; p. 300, *id.*, Annex (Art. 37); p. 371, CDDH/III/293; p. 382, CDDH/236/Rev.1, para. 18; p. 450, CDDH/407/Rev.1, para. 14; p. 518, CDDH/III/391.

Other references

CE/4b, pp. 15-16; pp. 05-07 (Annex I); p. 09, para. 103 (Annex II). *CE 1971, Report*, p. 103, para. 521. *CE 1972, Basic Texts*, p. 14 (Art. 33). *CE 1972, Commentaries*, Part I, p. 65 (Art. 33). *CE 1972, Report*, vol. I, p. 131, paras. 3.33-3.34 (Art. 33); vol. II, p. 51, *CE/COM III/C 1*; p. 55, *CE/COM III/C 23 and C 25*; pp. 57-58, *CE/COM III/C 38*; p. 64, *CE/COM III/C 71*. *Commentary Drafts*, p. 44 (Art. 37).

Commentary**General remarks**

- 1562** Emblems of nationality are essentially customary in nature. In international society they constitute a generally recognized language which is accorded the same respect as the spoken or written word in relations between individuals. The term “nationality” normally relates to a political entity embodied by a State. However, in certain situations it can also indicate a connection with an entity which is a “Party to the conflict” but not a State. This applies in particular in cases of conflicts of self-determination mentioned in Article 1 (*General principles and scope of application*), paragraph 4.
- 1563** This article makes a distinction between the emblems of nationality of neutral States, which form the object of paragraph 1, and the emblems of nationality of the adverse Parties dealt with in paragraph 2. Paragraph 3 confirms the existing rules applicable to espionage and armed conflict at sea.

Paragraph 1 – Emblems of nationality of neutral or other States not Parties to the conflict

- 1564** Neutrality is a status which is defined in relation to war, and which designates the position of States which do not participate in an armed conflict. Traditionally, i.e., before the appearance of treaties restricting or prohibiting the use of force by nations as a political instrument, neutrality was always defined in terms of the impartial attitude of a third State vis-à-vis the belligerent States. Recognized by the latter, this neutrality formed a source of mutual rights and duties, as codified in the Hague Conventions.¹ This is known as integral neutrality or neutrality in the traditional sense. It is not the only characteristic of this neutrality to abstain from any intervention in the war, whether this would be of a political, economic or military nature, which also implies an impartial attitude.² However, the general prohibition on resorting to war, on the one hand, and ideological differences, on the other, have gradually given birth to a concept of neutrality which is known as qualified or quasi-neutrality, or even to a status of non-belligerence where the criterion of impartiality is absent. Thus, with regard to any situation of armed conflict, there are, or there could be, two categories of third States, as described in this paragraph, namely “neutral States” and “other States

¹ In particular, the Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land of 18 October 1907 (Hague Convention V).

² On the concept of neutrality in general, see R. Bindschedler, “Neutrality, Concept and General Rules”, *op. cit.*, and, on the applicability of the rules of neutrality, D. Schindler, “State of War, Belligerency, Armed Conflict”, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflicts*, *op. cit.*, pp. 3-20. See also Ch. Swinarski, “La notion d’un organisme neutre et le droit international”, in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 819.

not Parties to the conflict”.³ Of importance here, is that neither of these categories participate directly in the hostilities, and that the rules elucidated below apply in both cases.

Permitted use and limitations

- 1565** The prohibition of the use of the emblems of nationality of neutral or other States not Parties to the conflict is absolute “in an armed conflict”. This means that they may be used “as long as they are not used for the promotion of the interests of a Party to the conflict in the conduct of that conflict”.⁴ If this is not the case, the use is never permitted. The above-mentioned Hague Convention V⁵ does not consider services rendered in matters of police or civil administration as acts in favour of one of the belligerents (Article 18(b)). Thus the use of the neutral flag would be authorized in these circumstances, obviously on the condition, as regards police services, that they are not incorporated in the armed forces and do not participate in combat.⁶

“Also it is clear that Article 37 [39] is not intended to prohibit or restrict neutrals – or indeed any States or their agencies from using their own flags, emblems etc.”⁷

However, it goes without saying that the Party to the conflict remains responsible for this use in its territory. This concerns the recognized privileges granted to diplomatic missions and the heads of missions who “have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport”.⁸

- 1566** With regard to consular representation:

“the national flag of the sending State may be flown and its coat of arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport, when used on official business”.⁹

The last-mentioned facility is important when acting as a Protecting Power; its representatives can be called upon to move around frequently and may even have to get close to areas where hostilities take place. They will do so under cover of the neutral flag; such use is perfectly lawful.

- 1567** According to the Hague Convention V, the responsibility of a neutral Power is not engaged by the fact that individuals have crossed the frontier separately to

³ This form of words was introduced by the amendment CDDH/45 (*O.R.* III, p. 167). For the discussion in Committee III, see *O.R.* XIV, pp. 273-274, CDDH/SR.29. See also commentary Art. 2, *supra*, p. 61, and E. Kussbach, “Protocol I and Neutral States”, *op. cit.*

⁴ Report of the Rapporteur, *O.R.* XV, p. 270, CDDH/215/Rev.1, para. 38.

⁵ *Supra*, note 1.

⁶ On this point, see commentary Art. 43, par. 3, *infra*, p. 518.

⁷ Report of the Rapporteur, *ibid.*

⁸ Vienna Convention on Diplomatic Relations of 18 April 1961, Article 20.

⁹ Vienna Convention on Consular Relations of 24 April 1963, Article 29.

offer their services to one of the belligerents (Article 6). These individuals have no right whatsoever to use the flags, emblems, insignia or uniforms of the neutral State of their origin. These “volunteers” could raise thorny legal problems if this rule is not respected. Moreover, such acts would be perfidious.

1568 On the other hand, the converse applies to the medical services of a neutral or other State not Party to the conflict, which are authorized to lend their assistance to a Party to the conflict. They can display their national flag in all circumstances except under orders to the contrary by the military authority, even if they fall into the hands of the adverse Party.¹⁰ Hospital ships which originate from a neutral State display, in addition to their national flag and the red cross emblem, the flag of the Party to the conflict under whose authority they have been placed.¹¹ These various activities are not such as to “favour the interests of a Party to the conflict,” since they have an exclusively humanitarian character, and the use of the emblems of the neutral State is consequently in accordance with the spirit and the letter of this paragraph in these circumstances. The same applies to medical aircraft made available to a Party to the conflict by a neutral or other State not Party to the conflict,¹² which should display, in addition to the red cross emblem, their normal emblems of nationality.¹³ As regards civilians who are nationals of neutral States and resident in the territory of a Party to the conflict, and who find themselves in the middle of military operations, this paragraph does not seem to prohibit them from using their national flag to try and broadcast their status of neutrality, provided there is no military objective in the vicinity.

1569 The use of the neutral flag for the purposes of espionage is certainly prohibited, as this constitutes an intervention of a military nature. In addition, the principle of impartiality would not be respected. It should also be noted that the Convention for the Protection of Industrial Property prohibits the misuse of official coats of arms¹⁴ and consequently any use of the coat of arms of a neutral State by a Party to the conflict for the purpose of espionage.

1570 With regard to terminology, it should be noted that whereas the French text contains the word “symboles”, the English version uses the expression “emblems” (“flags or military emblems, insignia or uniforms”) as does the Spanish text (“banderas o [...] emblemas, insignias o uniformes militares”). As these terms are roughly synonymous in this context, they should not be seen as contradicting each other, but as different customary methods of expressing identical

¹⁰ First Convention, Art. 43, para. 2.

¹¹ Second Convention, Art. 43, para. 2.

¹² *Supra*, ad Art. 38, para. 1, first sentence, point 1, letters a) and b), p. 451.

¹³ For the general conditions of marking medical aircraft, see the First Convention, Art. 39, para. 2; see also the 1923 Hague Rules of aerial warfare, Art. 17, para. 2. Art. 29, para. 1, of the Protocol provides for the notification of the means of identification. According to the 1923 Hague Rules concerning air warfare, a neutral private aircraft which flies over the territory of a Party to the conflict without displaying its emblems of nationality, or displaying false marks, may be captured (Art. 53(e)). These Hague Rules were never adopted by States, but their persuasive authority has to some extent been recognized.

¹⁴ Art. 6 *ter* of the Paris Convention of 20 March 1883 on the Protection of Industrial Property, amended on this point in particular by the Paris Convention of 6 November 1925.

principles.¹⁵ The prohibition concerns each element individually, as indicated by the conjunction “or”, and therefore refers to any customary sign used by the States concerned.

- 1571 In conclusion, it is appropriate to emphasize the fact that all matters relating to neutrality are of great importance to the Red Cross. Apart from the cases mentioned above, respect for the rules of neutrality is fundamental for carrying out the mandate of a Protecting Power. This includes respect for this paragraph. Although some have condemned the concept of neutrality in our times, this is because they have done so from a different point of view, the point of view of the threat to humanity of contemporary developments.¹⁶ However, in the field of law, particularly the field of law applicable in the case of armed conflict, the concept of neutrality retains its importance. By sheltering a neutral State from military operations, this concept makes it possible to carry out humanitarian activities for the benefit of the States involved in the conflict.

Paragraph 2 – Emblems of nationality of the adverse Parties

- 1572 All armies in the traditional sense still possess today their own distinctive national flags, emblems, insignia and military uniforms. When the fate of a war was decided in a single day in a single battle, it was enough to wear shoulder bands of a particular colour to indicate to which side the combatants in the field belonged. Standards, banners and ensigns ensured the cohesion of an army by rallying the combatants around their leader. However, in order to start out on a campaign, an outfit was needed that could stand up to the rigours of war. Such a system came into general use with the introduction of large national armies which felt a great aversion towards combatants without uniform.¹⁷ Nevertheless, in exceptional situations simply wearing a crest, an armlet or a shirt of a particular colour was acceptable. The devastating fire power of modern armies eventually led to the adoption of military uniforms in colours which merged with the background to such an extent that nowadays the colour of all uniforms is more or less similar. This could obviously not constitute a breach. As a result the insignia become even more important. The same applies to heavy artillery, tanks, aircraft etc. which are supplied in large numbers throughout the world by a few manufacturers. They are all the same model, and very often it is only the emblems of nationality which unequivocally identify to which side they belong. In case of

¹⁵ According to the Shorter Oxford Dictionary, a symbol is a thing regarded by general consent as naturally typifying or representing or recalling something.

¹⁶ Cf. the declaration of President Eisenhower of 6 June 1956 in which he maintained that neutrality is not an intermediary position between legal and illegal or between right and wrong, but simply a refusal to participate in military alliances (quoted by F. Berber, *op. cit.*, p. 215).

¹⁷ During the First and Second World Wars armed persons who were captured while they were not wearing uniform, were often executed on the spot as *francs-tireurs* as they were not considered to be combatants but outlaws (cf. A.M. de Zayas, “Combatants”, in Bernhardt (ed.), *op cit.*, Instalment 3, 1982, p. 117).

a coalition, a common sign can be adopted by the allies.

1573 Traditionally the use of the emblems of nationality of the enemy in combat was strictly prohibited by the laws of war. Lieber's code leave no room for doubt in this respect.¹⁸ However, Article 23(f) of the Hague Regulations of 1907 merely prohibited their "improper use", which left ample room for controversy.¹⁹ The famous Skorzeny case²⁰ could only further stir up feelings about this issue. The prohibition on "improper use" is not a pure and simple prohibition; it is only a relative prohibition. It requires a definition of the term "improper". The first ICRC draft, presented to the Government Experts in 1972, retained in Article 33²¹ the rule as it had been worded in The Hague, adding that the use of national emblems of the enemy is always forbidden in combat. The experts themselves were divided on this question. Some preferred a pure and simple prohibition,²² believing that the Hague formula had given rise to excessive misuse. At most, they considered that an exception might be made in situations such as those dealt with in the Third Convention (prisoners of war) and in occupied territory. Others maintained that only the use with the intention of directly facilitating acts of combat should be prohibited.²³ There was a general opinion that there was undoubtedly a reciprocal military advantage in formulating a prohibition. Finally, the draft presented by the ICRC to the Diplomatic Conference proposed the prohibition of the use of the enemy flags, military insignia and uniforms in order to shield, favour or impede military operations (Article 37). The controversy arose again between those who wished to limit the prohibition to attacks,²⁴ and those who favoured a more restrictive concept.²⁵ The final wording is a compromise between these two positions in the sense that it responds to the concerns of the former as well as those of the latter.

1574 This text, which covers attacks, i.e., acts of violence committed against the adversary, whether these acts are offensive or defensive (Article 49 – *Basic rule and field of application*, paragraph 1), and all situations directly related to military operations, put an end to the long-standing uncertainty arising from both the imprecise text of The Hague, and from unclear customary law, as well as from

¹⁸ Arts. 63 and 65.

¹⁹ See, on this point, D. Fleck, "Ruses of War...", *op. cit.*, pp. 279-282.

²⁰ 11 *Law Reports*, pp. 90-94.

²¹ *CE 1972, Report*, vol. II, p. 6.

²² *Ibid.*, p. 55, CE/COM III/C 23, and p. 56, CE/COM III/C 31; see also *CE 1972, Report*, vol. I, p. 131, para. 3.34.

²³ *CE 1972, Report*, vol. II, p. 51, CE/COM III/C 1.

²⁴ O.R. III, p. 168, CDDH/III/240.

²⁵ *Ibid.*, p. 167, CDDH/III/239.

the Skorzeny case.²⁶ However, the fact remains that certain delegations at the Diplomatic Conference considered that any regulation which did not limit itself to attacks would go beyond existing law,²⁷ although this opinion was not shared by the Conference.

- 1575 The prohibition formulated in Article 39, “while engaging in attacks or in order to shield, favour, protect or impede military operations”, includes the preparatory stage to the attack (see the first sentence of Article 44 – *Combatants and prisoners of war*, paragraph 3). It means that every possible exception should always be examined on its merits, a point that legal experts had stressed throughout.

Permitted use and limitations

- 1576 It is appropriate to recall that, in accordance with the Vienna Convention on Diplomatic Relations, the head of a mission retains his privileges, i.e., the right to use the flag and emblem of the State he represents, up to the moment that he leaves the country “even in case of armed conflict” (Article 39, paragraph 2). Moreover, a break in diplomatic relations does not *ipso facto* imply a break in consular relations and therefore the same applies to consuls until there is a break. In general, prisoners of war wear their own uniforms (Third Convention, Article 27, paragraph 1) in the territory of the Detaining Power. Conversely, if prisoners of war do not have uniforms of the army to which they belong, or if these uniforms are not suitable for the climate, they can wear the uniforms of the enemy, though without insignia. A prisoner of war who escapes may be inclined to put on the uniform of the enemy in order to conceal, facilitate or protect his escape and hinder the search for him. If he is caught before successfully completing his escape, he will be liable to disciplinary punishment (Third Convention, Article 93, paragraph 2). If he is captured again after successfully escaping, he is not liable to any punishment (Third Convention, Article 91, paragraph 2). Under the provisions of the Hague Regulations, there is no doubt whatsoever that wearing an enemy uniform is not prohibited in this case.²⁸ A delicate question arises with

²⁶ This man, who was in command of a brigade, was ordered to penetrate the enemy zone in the Ardennes on 16 December 1944, disguised in enemy uniform. His troops were to occupy three particular military objectives. His instructions specified that in the event that the deception was discovered, combat would only take place in national, i.e. German, uniform, after removing the enemy uniform. The mission failed. The military tribunal which had to try the case found the accused not guilty. This decision contributed to support that part of the legal literature which tended to consider, perhaps by analogy with a rule of maritime warfare, that though the use of the enemy flag or uniform was certainly prohibited in combat, this was not necessarily the case during the preparatory stage preceding combat or during the phase following it. However, as the tribunal did not have the authority to lay down the law on this point, but only to pronounce on the guilt or innocence of the parties concerned, the problem has still not been solved in a decisive way (“Trial of Otto Skorzeny and Others”, 9 *Law Reports*, pp. 90-93).

²⁷ O.R. XIV, p. 273, CDDH/III/SR.29, para. 16.

²⁸ It would have been strange for the Conference to retain the possibility for a spy to wear enemy uniform (see *infra*, para. 3), but to withdraw this possibility for a prisoner of war when escaping, under the pretext that this would favour a military operation.

regard to military *matériel* captured on the battlefield. For example, it is understood that a tank captured from the enemy on the battlefield may immediately be used against the adversary on condition that the emblems of nationality are removed. However, up to now it has been assumed that such *matériel* could be evacuated to the rear even when equipped with the emblems of the nationality of the adverse Party, as long as fire is not opened from the tank until the emblem has been removed. One argument in favour of a clear-cut interpretation is that, quite apart from the letter of the provision under discussion, the Conference certainly wished to put an end to the excessive number of abuses which had resulted from the Hague Regulations. These included not only infiltration under cover of enemy uniform – as in the Skorzeny case mentioned above – a practice which has been adopted on a number of occasions by troops since the Second World War, but also the approach and opening of fire on an adversary at a short distance so that the adversary would in this way be completely unable to defend himself. It should be noted once more that occupation of a country results in complex situations in which emblems of nationality of the occupying forces and the occupied country can appear simultaneously without violating the present rule.

Uniform

- 1577 What constitutes a uniform, and how can emblems of nationality be distinguished from each other? The Conference in no way intended to define what constitutes a uniform. In temperate climates it is customary for a uniform to consist of regulation headdress, jacket and trousers, or equivalent clothing (flying suits, specialist overclothes etc.). However, this is not a rule, and “any customary uniform which clearly distinguished the member wearing it from a non-member should suffice”.²⁹ Thus a cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.
- 1578 The uniform and other emblems of nationality are visible signs. Although certain kinds of battle dress of different countries are very similar nowadays, it is nevertheless possible to distinguish allied armed forces from enemy armed forces by means of characteristics of outfitting and other signs of nationality. Furthermore, this makes it possible to distinguish members of the armed forces from the civilian population. Thus it is necessary that the uniform, or whatever replaces it, of each Party to the conflict should be known to the adverse Party. The Hague Conference of 1907 considered requiring a notification to this effect between the adverse Parties so that the troops could be instructed on the subject, but this question was abandoned,³⁰ leaving each country responsible for acquiring information with regard to the uniforms of its potential enemies.³¹ This is a

²⁹ Report of the Rapporteur, *O.R.* XV, p. 388, CDDH/236/Rev.1, para. 35.

³⁰ A. Mechelynck, *op. cit.*, pp. 166-167.

³¹ *Ibid.*, p. 166. Sometimes this has resulted in difficulties, particularly with regard to the clothing worn by pilots or parachutists. See A. Durand, *History of the International Committee of the Red Cross, From Sarajevo to Hiroshima*, Geneva, 1984, pp. 484-485.

common task for diplomatic missions, particularly for military attachés, who are invited to be present at military exercises and parades in the country where they are posted. Should the need arise, one Party to the conflict may request its adverse Party publicly to inform it of the sign or signs which are used by way of uniform or emblem of nationality by its armed forces.³²

- 1579 A final point which has already been raised with regard to Article 38 (*Recognized emblems*) concerns the insignia and the uniform of the personnel of the United Nations, particularly the forces responsible for peacekeeping. A number of representatives did in fact demonstrate the necessity of ensuring better protection for the emblems of the United Nations in these circumstances. It was finally decided not to do so in this article,

“but to consider further how such protection could best be provided. The Rapporteur pointed out that, quite apart from this Protocol, the United Nations itself could try to improve that protection through agreements concluded with the States concerned with a particular United States force”.³³

Paragraph 3 – Proviso on the rules applicable to espionage and armed conflict at sea

- 1580 The wording of this paragraph varied considerably during the course of the discussions. The first text, adopted by Committee III, was much simpler than the final text, and did not include any mention of either Article 37 or of espionage.³⁴ However, the Rapporteur expressed some doubts based on the fact that the Committee had had no intention of modifying the law applicable with regard to espionage, particularly Article 31 of the Hague Regulations, by means of this article. In fact, according to this article, a spy who succeeds in escaping does not incur any punishment for being a spy, if he is captured later. However, if he used the uniform of the adversary, it was feared that without Article 39, paragraph 3, “he could still presumably be punished for violations of the laws of war, which, it might be asserted, would include this article”.³⁵ Similarly, when Committee III adopted Article 37 (*Prohibition of perfidy*), paragraph 1(d), the Rapporteur reported that the reference to neutral emblems was not intended to affect the law governing the use of neutral flags in war at sea. Therefore the Committee suggested that:

³² The 1923 Hague Rules provide that all military aircraft must bear an external mark indicating its nationality and military character (Art. 3). These marks should be fixed in such a way that they cannot be altered during the flight. They should be as large as is practicable and be visible from above, from below and from each side (Art. 7). Article 43 of the Second Convention provides that hospital ships shall make themselves known by hoisting their national flag.

³³ Report of the Rapporteur, *O.R.* XV, p. 271, CDDH/215/Rev.1, para. 39, and p. 371, CDDH/III/293.

³⁴ This draft read as follows: “Nothing in this article shall affect the existing generally recognized rules of international law applicable to the use of flags in the conduct of armed conflict at sea”. It has been adopted by consensus on 10 April 1975 (*ibid.*, p. 300) during the second session.

³⁵ *O.R.* XV, p. 271, CDDH/215/Rev.1, para. 40.

“the Drafting Committee [should] consider the question whether Article 37 [39], paragraph 3, might not be made applicable specifically to Article 35 [37], as well as to Article 37 [39], so that no doubt could arise on this question”.³⁶

The Drafting Committee took up the proposal of the group of technical advisers to add the words “or Article 37, paragraph 1(d)”.³⁷

1581 The final text, which was only adopted by Committee III at the fourth session, therefore removed espionage and the conduct of armed conflict at sea from the field of application of Article 37 (*Prohibition of perfidy*), paragraph 1(d).

1582 As regards the law on naval warfare, this does not necessarily mean that the rules are totally satisfactory, as was already pointed out at the first session of the Conference of Government Experts.³⁸ It does not mean either that the concept of perfidy is not applicable to naval warfare, as was shown above.³⁹ However, it is true that when a warship during pursuit displays the enemy flag or a neutral flag, such conduct at sea is accepted, or at least tolerated, whether the ship in question is pursuing an enemy ship or is trying to escape from it,⁴⁰ though it is not accepted that fire should be opened in these conditions. Moreover, since the First World War, warfare has been extended at sea to the economic field and to the merchant navy of the belligerent countries. It even affected neutral ships or ships flying a neutral flag when it was considered that these could serve the interests of a country at war. This led to complex rules⁴¹ which cannot be changed without a thorough study, and this is the import of the proviso formulated in this article.

1583 With regard to the question of espionage, the intention was to prevent a spy who has made use of the enemy’s uniform and has successfully escaped from being punished for this act if he were to be recaptured, while he would not be punished if he had escaped in civilian clothes.⁴² However, the problem does not concern only the spy himself,⁴³ but also and importantly the authority who has given him orders. The Rapporteur makes this very clear in his report:

³⁶ *Ibid.*, p. 382, CDDH/236/Rev.1, para. 18.

³⁷ CDDH/SEC/Inf. 1, vol. II, p. 252, and *O.R.* XV, p. 210, CDDH/III/SR.59, para. 5.

³⁸ *CE 1971, Report*, p. 103, para. 518.

³⁹ *Supra*, ad Art. 37, p. 439 and p. 435.

⁴⁰ F. Berber, *op. cit.*, p. 167, and D. Fleck, “Ruses of War...”, *op. cit.*, pp. 292-294.

⁴¹ On a change of flag before or during the conflict, see, for example, F. Berber, *op. cit.*, pp. 201-202.

⁴² However, it should be noted that the problem is exactly the same for a prisoner of war who escapes. If a prisoner is recaptured after a successful escape, he shall not be liable to any punishment in respect of his previous escape (Third Convention, Art. 91, para. 2). In the event of an unsuccessful escape, if there are no attendant charges for violence against persons, the wearing of civilian clothing shall give rise to disciplinary punishment only (*ibid.*, Art. 93, para. 2). The possibility of wearing enemy uniform is not mentioned by the Third Convention because this eventuality was covered by the Hague Regulations which did not define such use as improper use.

⁴³ On this point the Rapporteur states that: “The Committee recognized that it would be of questionable wisdom to make it even marginally safer for spies to disguise themselves as civilians than as military personnel” (*O.R.* XV, p. 271, CDDH/215/Rev.1, para. 40).

“As the text was adopted by the Committee at the second session, it was subject to the interpretation that it prohibited sending out a spy wearing the enemy’s uniform. That was not the Committee’s intention, but, if so interpreted, any officer who sent out such a spy, and any officer who knew of such action and failed to stop it, could be accused of violating Article 37 [39]. Since the sending of spies has never been considered an unlawful act, this would be a drastic change in the law which should be avoided. Certainly it would be nonsensical to make the sending of a spy wearing the enemy’s uniform unlawful, while the sending of a spy dressed in civilian clothes remained lawful.”⁴⁴

- 1584 The new text was finally adopted by consensus, but it did give rise to some objections.⁴⁵

Conclusion

- 1585 – The prohibition on using the emblems of nationality of neutral or other States not Parties to the conflict is absolute “in an armed conflict”. This means that they can be used as long as such use does not favour the interests of a Party to the conflict: e.g., use by diplomatic missions, Protecting Powers, medical services of neutral countries etc.
- 1586 – The prohibition of the use of the emblems of the adverse Party during an attack includes the preparatory stage preceding the attack. It does not apply to prisoners of war when they are escaping.
- 1587 – Article 31 of the Hague Regulations of 1907 is confirmed. A spy who successfully rejoins the army to which he belongs, if subsequently captured by the enemy, must be treated as a prisoner of war and incurs no responsibility for his previous acts of espionage, even if these acts were committed under cover of enemy uniform. The authority which sends him on his mission, including the order to wear enemy uniform, does not fall under Article 39, paragraph 2.

J. de P.

⁴⁴ *Ibid.*, p. 450, CDDH/III/407/Rev.1, para. 14. This exception obviously does not cover sabotage.

⁴⁵ One delegate expressed himself as follows: “According to the criminal law of most States, a criminal act included the orders given to the criminal. That being so, the change made in Article 37 [39] by the mention of espionage and the idea expressed in Article 40 [46], paragraph 1, did not make sense. Consequently, although his delegation had joined in the consensus on the article, it had expressed reservations which it wished to reiterate in the plenary meeting” (*O.R.* VI, p. 103, CDDH/SR.39, para. 65). Another delegation also opposed the modification relating to espionage and maintained its reservations (*ibid.*, para. 66).

Article 40 – Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Documentary references

Official Records

O.R. I, Part. I, p. 142; Part III, p. 13 (Art. 38, sub-para. 3). *O.R.* III, p. 169, CDDH/III/241. *O.R.* VI, pp. 103-104, CDDH/SR.39, paras. 66-69. *O.R.* XIV, p. 276, CDDH/III/SR.29, para. 32; p. 277, para. 38; p. 279, para. 51; p. 280, paras. 54-55 and 57; p. 282, para. 64; p. 283, para. 66; p. 284, paras. 70-73. *O.R.* XV, p. 86, CDDH/III/SR.47, para. 6; p. 383, CDDH/236/Rev.1, paras. 20-21; p. 427, CDDH/III/338.

Other references

CE/4b, pp. 10-11; pp. 04-05 (Annex I); pp. 010-011, paras. 108-111 (Annex II). *CE 1971, Report*, p. 103, paras. 516 and 519. *CE 1972, Basic Texts*, p. 14 (Art. 34, sub-para. 2). *CE 1972, Commentaries*, Part I, pp. 66-67 (Art. 34, sub-para. 2). *CE 1972, Report*, vol. I, p. 131, paras. 3.35-3.36 and 3.38 (Art. 34, sub-para. 2); vol. II, p. 53, CE/COM III/C 11; p. 59, CE/COM III/C 46; p. 62, CE/COM III/C 61; p. 63, CE/COM III/C 65. *Commentary Drafts*, pp. 44-45 (Art. 38, sub-para. 3)

Commentary

General remarks

- 1588** Articles 37 (*Prohibition of perfidy*), 38 (*Recognized emblems*) and 39 (*Emblems of nationality*) appeal to the good faith of the combatant which is a fundamental condition for the existence of law. Articles 40 (*Quarter*), 41 (*Safeguard of an enemy hors de combat*), and 42 (*Occupants of aircraft*) appeal to his humanitarian

sentiment and represent that side of man where his instincts as a human being still prevail over those controlling him as a combatant, even in the midst of battle.

1589 Since the beginning of history the rule by which the conquered enemy may not be exterminated has become established in the course of time. Initially this rule was accepted with regard to peoples of the same race, the same religion, or with whom there were neighbourly relations¹ in times of peace, but eventually it was also imposed, though not without difficulty² in favour of those who were considered strangers. The laws of Manu in ancient India, to take just one example, included a general prohibition of refusing quarter, in other words, the refusal to spare lives.³ This elementary rule, like all humanitarian achievements, has developed in stages. For a long time the rule included enslaving those prisoners who were considered to be strangers, which at that time was a way of protecting them.

1590 Once slavery – and then ransoming – had been abolished, exceptions were made to the rule, even in modern times, particularly in siege warfare. A number of military leaders, who were perfectly acquainted with the safeguard of prisoners, had no hesitation, even in the seventeenth century, of informing the commander of a heavily besieged fortress that if he intended to put up an obstinate defence, far from recognizing his courage, they would immediately put him to death once the town had been taken.⁴ These threats were by no means empty threats. The draft presented by Russia at the Brussels Conference of 1874 reflected this state of affairs when it proposed the prohibition of threats to exterminate a garrison which obstinately defends a fortress.⁵ The French Revolution, which maintained that prisoners of war are under the safeguard of the nation and the protection of law, passed decrees in 1792 and 1794, refusing quarter to certain categories of enemy troops, though these were actually never applied and were quickly repealed.⁶ It is said that the last deliberate massacres of prisoners until the Second World War took place in 1795 and 1799.⁷

Scope of the rule

1591 Thus the spirit of the Red Cross has had an effect on humanity long before the letter of the rule. As regards the Geneva Conventions, which are concerned

¹ See M.W. Mouton, "History of the Laws and Customs of War up to the Middle Ages", *RICR – English Supplement*, October 1959, p. 184.

² According to Plato's *Republic*, those who were not Greek, i.e., the barbarians, were considered to be outside the law. Consequently the laws of war did not apply to them (*ibid.*, November 1959, p. 198).

³ *Ibid.*, October 1959, p. 190; also see F. Berber, *op. cit.*, p. 21.

⁴ Vattel does seem to accept that garrisons refusing to surrender will be punished after the attack (*The Law of Nations or Principles of the Law of Nature*, book III, chapter VIII, para. 143, quoted by A. Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, Helsinki, 1976, p. 52, note 52).

⁵ A. Mechelynck, *op. cit.*, p. 238.

⁶ A. Rosas, *op. cit.*, pp. 62-63.

⁷ *Ibid.*, p. 65, note 132.

above all with the condition of combatants from the time that they are in the power of the adversary, a provision which is of paramount importance is Article 23(d) of the Hague Regulations of 1907, which prohibits the declaration “that no quarter will be given”⁸. Strictly speaking, the text refers to the intention, the threat or pressure with a view to provoking an immediate surrender, or to terrorising the adversary, but behind these words one can also discern the thought that, naturally, one cannot refuse to give quarter⁹. It is obvious that if there is no quarter, in other words, no survivors, there will be no wounded to be retrieved and cared for, no shipwrecked persons to be rescued, and no prisoners to respect and treat humanely.

1592 This problem does not perhaps appear in quite the same light in the Protocol. In fact, Article 41 (*Safeguard of an enemy hors de combat*) is equally concerned with persons who are already in the power of the adverse Party, as with those who are defenceless on the battlefield, or on the point of surrender, as will be shown in the discussion of that article. The principle that it is prohibited to refuse quarter is covered by that provision. However, it was the opinion of a large number of delegations at the Diplomatic Conference that the problems arising from modern warfare fully justify the reaffirmation of the principle laid down in Article 23(d) of the Hague Regulations.

1593 However, the first session of the Conference of Government Experts hoped for a more explicit term than “quarter” and which would be a better translation of the French term “quartier”. The final wording was adopted without discussion after a few drafting corrections relating to earlier proposals.¹⁰ At the request of one delegation¹¹ Committee III separated this provision from the article relating to the safeguard of the enemy *hors de combat* (Article 41), where it was included in the ICRC draft, and made it a separate article. This was one way of underlining the fundamental importance of the principle it contains,¹² while an alternative solution would have been putting it right at the beginning of Article 41 (*Safeguard of an enemy hors de combat*).¹³

1594 This article confirms in the first place the Hague rule, i.e., it would not be acceptable that “combatants who went on defending themselves to the limit of

⁸ The term “quarter”, which here means that the conquered enemy’s life is spared, or that he is treated favourably, is also used to designate the quartering or encampment of a body of troops; thus to give quarter means to provide accommodation, security and by implication, life. This derivation is considered to be the most likely. It was confirmed in plenary meeting that the rule of Article 40 is perfectly in accordance with the term “quarter” used in the title (*O.R.* VI, pp. 103-104, CDDH/SR.39, paras. 67-68).

⁹ See A. Mechelynck, *op. cit.*, p. 245.

¹⁰ The draft put forward in 1972 by the ICRC (Art. 34, para. 2) reads as follows: “It is forbidden to decide to leave no survivors and take no prisoners, to so threaten an enemy and to conduct the fight in accordance with such a decision”. An Australian amendment (CE/COM III/C 46) substituted “to order” for “to decide”. (*CE 1972, Report*, vol. II, p. 59). The draft presented to the Diplomatic Conference reads: “It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, and to conduct hostilities on such basis.” (Art. 38, paragraph 3).

¹¹ *O.R.* III, p. 169, CDDH/III/241.

¹² *O.R.* XIV, p. 277, CDDH/III/SR.29, para. 38; p. 280, para. 57 and p. 282, para. 64.

¹³ For the various views expressed, see *ibid.*, pp. 283-285, and *O.R.* XV, p. 427, CDDH/III/338; for the decision, see *ibid.*, p. 86, CDDH/III/SR. 47, para. 6.

their strength and finally surrendered and laid down their arms, should be exterminated”.¹⁴ It also prohibits the use of a threat to that effect to accelerate surrender. The demand of unconditional capitulation, which one Party to the conflict may make of the adversary, should never be a pretext for a refusal to give quarter, whether the demand is met or not. This even applies in the event that the *jus ad bellum*, the right to participate directly in hostilities, is contested. In other words, it is always prohibited to declare that the adversary is outside the law, or to treat him as such.

- 1595 Unfortunately this rule has not always been respected in our time, and though it is true that great humanitarian ideas have progressed in stages throughout history, it is equally true that at times they have regressed.¹⁵ However, Article 40 is emphatic, and it is timely: any order of “liquidation” is prohibited, whether it concerns commandos, political or any other kind of commissars, irregular troops or so-called irregular troops, saboteurs, parachutists, mercenaries or persons considered to be mercenaries, or other cases. It is not only the order to put them to death that is prohibited, but also the threat and the execution, with or without orders.
- 1596 What attitude should be taken towards troops who do not respect this rule and do not give quarter? Traditionally it was accepted that only refusal to give quarter, and no other violation of the law applicable in armed conflict, could justify a refusal to give quarter by way of reprisal.¹⁶
- 1597 According to the Protocol the only reprisal measures which are not prohibited are precisely those which are taken on the battlefield. Reprisals can therefore only be directed at combatants and do not detract from the duty to retrieve the wounded and give them appropriate care.¹⁷ If an act of reprisal has been conducted by a unit which is unable to fulfil this obligation, for example, by the airforce, the duty to retrieve the wounded passes on to any other troops of the same Party to the conflict which are able to do so. To maintain that these troops are not involved, on the pretext that they are only bound to conform to the laws and customs of war in their “own” operations,¹⁸ would be an inadmissible argument in these circumstances and in any others. As regards the problem of reprisals in general, we refer to the introduction to Section II (*Repression of breaches of the Conventions and of this Protocol*) of Part V.
- 1598 Article 40 was adopted by consensus, with some regarding it as a rule of “great value from the humanitarian point of view”,¹⁹ while others saw it as a provision concerned less with the safeguard of combatants who were *hors de combat*, which is actually the object of Article 41 (*Safeguard of an enemy hors de combat*) than

¹⁴ O.R. XIV, p. 277, CDDH/III/SR.29, para. 38.

¹⁵ E.g., see on the Second World War, “The Führerbefehl of 18th October 1942” in 1 *Law Reports*, pp. 33-34, and the order “Barbarossa”, 12 *Law Reports*, pp. 29 ff., as well as “The Commissar Order” and “The Commando Order”, *ibid.*, pp. 23 and 34 (“The High Command Trial”).

¹⁶ On this particular point this concerns therefore reprisals in kind; see “Trial of Generaloberst Nikolaus von Falkenhorst”, in 11 *Law Reports*, pp. 29-30.

¹⁷ This rule had already been stated by Lieber: “Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops” (*op. cit.*, Art. 61).

¹⁸ Article 1, sub-paragraph 4, of the 1907 Hague Regulations.

¹⁹ O.R. XIV, p. 284, CDDH/III/SR.29, para. 71.

with the conduct of military operations,²⁰ though this does not detract from its humanitarian importance in any way. Independently of the points raised thus far, there is no doubt that in our age of extraordinary technical achievements with a proliferation of the most lethal weapons throughout the world, this article also raises a problem with regard to weapons, both conventional and others. It is not by any means the only article in the Protocol to raise this question, either in Part II, Part III or Part IV, but the problem is particularly relevant in Article 40. It is one of the articles referred to by a delegation at the time that Article 35 (*Basic rules*)²¹ was adopted, which “went beyond the strict confines of humanitarian law and in fact regulated the law of war”.²² This statement is unreservedly true in the context of conventional operations. Article 40 does not imply that the Parties to the conflict abandon the use of a particular weapon, but that they forgo using it in such a way that it would amount to a refusal to give quarter. In other words, the rule of proportionality also applies with regard to the combatants, up to a point. The deliberate and pointless extermination of the defending enemy constitutes disproportionate damage as compared with the concrete and direct advantage that the attacker has the right to achieve.²³ It is sufficient to render the adversary *hors de combat*. The prohibition of refusing quarter therefore complements the principle expressed in Article 35 (*Basic rules*), paragraph 2, which prohibits methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

1599 As regards nuclear weapons, whether tactical or strategic, these form the object of a controversy which is examined elsewhere.²⁴ However, it would be wrong to infer from this controversy that the constraints imposed by Article 40 in favour of enemy combatants concerning the use of conventional weapons are only of marginal importance on the argument that, if a nuclear weapon were used, the situation of these combatants would in any event be much worse. The rule is the rule and nuclear weapons raise questions which should be examined in their own right in the context of the recognized rules.

Conclusion

1600 It is always prohibited to declare that the adversary is outside the law, and to treat him as such on the battlefield.

J. de P.

²⁰ *Ibid.*, p. 279, para. 51.

²¹ *Supra*, ad Art. 35, para. 1, note 38, p. 398.

²² O.R. VI, p. 101, CDDH/SR.39, para. 55.

²³ This principle of reasonable proportionality between the destruction brought about by an act of hostility and its military result is, according to Max Huber, accepted in international law for the interpretation of the laws of war. This applies especially to the balance between damage caused and the consequent reprisals (M. Huber, “Quelques considérations...”, *op. cit.*, p. 423).

²⁴ See *infra*, p. 589, introduction to Section I of Part IV.

Protocol I

Article 41 – Safeguard of an enemy *hors de combat*

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - (a) he is in the power of an adverse Party;
 - (b) he clearly expresses an intention to surrender; or
 - (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.
3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Documentary references

Official Records

O.R. I, Part I, pp. 142-143; Part III, p. 13 (Art. 38). *O.R.* III, pp. 169-171. *O.R.* VI, p. 104, CDDH/SR.39, para. 69. *O.R.* X, p. 68, CDDH/I/235/Rev.1 (Art. 3). *O.R.* XII, pp. 486-487, CDDH/II/SR.99, paras. 9-16. *O.R.* XIV, pp. 276-285, CDDH/III/SR.29, paras. 30-75; pp. 287-290, paras. 1, 8, 11-14, 17 and 20-21; p. 313, CDDH/III/SR.32, para. 19. *O.R.* XV, pp. 86-87, CDDH/III/SR.47, paras. 6-10; p. 93, para. 44; p. 95, para. 52; p. 96, paras. 61, 63-64; pp. 283-285, CDDH/236/Rev.1, paras. 20-26; p. 411, *id.*, (Art. 3 *bis* new); pp. 427-428, CDDH/III/338.

Other references

CE/4b, pp. 7-10; pp. 02-04 (Annex I); pp. 09-010 (Annex II). *CE 1971, Report*, p. 103, paras. 516 and 518-519; p. 105, *CE/COM III/C 1* (Art. b). *CE 1972, Basic Texts*, p. 14 (Art. 34). *CE 1972, Commentaries*, Part I, pp. 66-67 (Art. 34). *CE 1972, Report*, vol. I, pp. 131-132, paras. 3.35-3.39 and 3.42 (Art. 34); vol. II, p. 53, *CE/COM III/C 11*; pp. 56-57, *CE/COM III/C 31*; pp. 62-63, *CE/COM III/C 61*, *C 65* and *C 67*. *Commentary Drafts*, pp. 44-45 (Art. 38).

Commentary

General remarks

- 1601 The reason that the Red Cross has been able for more than a century to pursue its course through all obstacles, is that it is solely concerned with the suffering of man, alone and disarmed. This is its secret strength. Similarly, one might argue that the whole secret of the law of war lies in the respect for a disarmed man. It would be useless to deny that in the heat of action and under the pressure of events, this rule is not always easy to follow. There are many examples in history in which the conqueror was unable to control his force or his victory. However, mankind should hold onto the light revealed by examples in which the opposite was the case, and these examples too are as old as time. Unable to eliminate the scourge of war, one endeavours to master it and mitigate its effects. The safeguard of the enemy *hors de combat* on the battlefield is the logical and natural complement to the preceding provision which prohibits the refusal to give quarter. It is a rule of application which follows from this provision and, like it, is derived from the principles laid down in Article 35 (*Basic rules*). In practice it is one of the most important rules of the Protocol. It is the object of Article 23 (c) of the Hague Regulations of 1907, which forbids the killing or wounding of an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.¹ This rule is implicit in the Third Convention,

¹ The first version presented at the Brussels Conference of 1874 contained the words “à merci”, which in English would be “at the mercy” or “at the discretion” of somebody: “L’homme qui porte les armes [...] pour éviter la mort [...] demande pardon à celui qui va le frapper, il lui dit: faites-moi grâce de la vie, je me rends à vous, je me constitue votre prisonnier. Son adversaire s’arrête, l’homme est sauvé. Cet homme se rend donc réellement à merci dans le sens littéral du mot; mais ce mot n’implique en soi aucune contradiction, puisqu’il est entendu qu’on ne peut pas refuser de faire quartier. Ainsi, dans le moment où cet homme est en présence de la mort, il dit: donnez-moi la vie. Voilà l’idée que la clause veut exprimer. Mais les opérations se poursuivent; une charge a lieu; on ne peut pas garder étroitement les prisonniers. Il y en a qui, ayant mis bas les armes, les reprennent et retournent pour combattre ceux qui les ont désarmés. C’est pour punir cette sorte de trahison qu’on s’est servi du mot ‘à merci’: il est rendu en allemand par le terme ‘auf Gnade oder Ungnade’.” (“A man who bears arms and wants to avoid death begs the pardon of the person who is going to harm him; he says: ‘Grant me my life. I surrender to you. I make myself your prisoner’. The adversary stops and the man is saved. Thus this man actually throws himself on the mercy of the adversary in the literal sense of the word; but the word does not in itself imply any contradiction, since it is understood that one cannot refuse to give quarter. Thus, at the moment that the man is in the presence of death, he says: ‘Spare my life’. This is the idea that this sentence expresses. However, military operations continue; a charge takes place; it is not possible to guard the prisoners too closely. In some cases combatants who have laid down arms will take them up again and resume combat against those who disarmed them. It is in order to punish this sort of treachery that the term ‘à merci’ was introduced. It is translated in German by the term ‘auf Gnade oder Ungnade’.” (translated by the ICRC) (Declaration of General de Voigts-Rhetz, *cf.* A. Mechelynck, *op. cit.*, pp. 245-246). “La Commission décide que le mot ‘à merci’ sera remplacé par celui de ‘à discrétion’ qui rend la même pensée et est plus en harmonie avec le langage moderne” (“The Committee decided that the term ‘à merci’ will be replaced by the term ‘à discrétion’, which expresses the same idea and is more appropriate for modern [French]” (translated by the ICRC), *ibid.*, p. 246).

which provides in particular that persons protected by this Convention will be treated humanely when they “have fallen into the power of the enemy” (Article 4). From the beginning of the preparatory deliberations, some considered that the connection between these two provisions of the Hague Regulations and the Geneva Convention was not sufficiently close, and that there was a need to define the conditions of surrender.² In the draft presented by the ICRC to the second session of the Conference of Government Experts, the ICRC made an attempt to meet this need by providing for two articles,³ one devoted to the safeguard of the enemy *hors de combat* – and this provision in particular took up the above-mentioned article of the Hague Regulations – the other to the conditions of capture and surrender. Following the observations made by the experts,⁴ these texts were rewritten and condensed into a single article in the draft presented by the ICRC to the Diplomatic Conference.⁵

1602 Despite these preparatory efforts, a number of difficulties arose with regard to the wording of the article.⁶ The essential problem concerned how to create a concrete link between the moment when an enemy soldier is no longer a combatant because he is *hors de combat*, and the moment when he becomes a prisoner of war because he has “fallen into the power” of his adversary. This precise moment is not always easy to determine exactly. According to the text of 1929 (Article 1), the Convention only applied to persons “captured” by the enemy, which might have led to the belief that they first should have been taken into custody in order to be protected. The expression adopted in 1949, “fallen into the power”, seems to have a wider scope, but it remains subject to interpretation as regards the precise moment that this event takes place. The central question was to avoid any gap in this protection, whatever interpretation was followed. This question was finally resolved by an overlapping clause: Article 41 prohibits the attack on an enemy *hors de combat* from the moment that he is rendered *hors de combat* and with no time-limit, i.e., the provision even protects the prisoner of war whose security is dealt with in the Third Convention. In this way the enemy *hors de combat* is protected at whatever moment he is considered to have “fallen into the power” of his adversary.

² United Nations, Report of the Secretary General on respect for human rights in armed conflicts, A/8052 (25th Session), pp. 38-39, paras. 104-107.

³ CE 1972, Report, Vol. II, p. 6, Arts. 34 and 35, and CE 1972, Commentaries, pp. 66-69.

⁴ See CE 1972, Report, Vol. II, p. 56, CE/COM III/C 31; p. 62, III/C 61, and p. 63, III/C 65.

⁵ Art. 38: “1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who: (a) is unable to express himself, or (b) has surrendered or has clearly expressed an intention to surrender, (c) and abstains from any hostile act and does not attempt to escape.

2. Any Party to the conflict is free to send back to the adverse Party those combatants it does not wish to hold as prisoners, after ensuring that they are in a fit state to make the journey without any danger to their safety.”

Paragraph 3 was about giving quarter which is now dealt with in Article 40.

⁶ A first draft proposal was presented by some delegations (O.R. III, p. 170, CDDH/III/242), but it was largely rewritten by the Working Group of Committee III.

- 1603 Article 41 thus purposefully overlaps the Third Geneva Convention. It is a perfect illustration of the interrelation between Hague law and Geneva law. Within the area allocated to it, it endeavours to forge an interlocking and comprehensive system.
- 1604 Paragraph 1 provides the basic rule, while paragraph 2 defines the conditions for being *hors de combat*. Paragraph 3 is concerned with persons released on the battlefield.

Paragraph 1 – The principle of safeguard

- 1605 It is a fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked. In this respect harmless civilians and soldiers *hors de combat* are *a priori* on the same footing. Civilians should not be made the object of attack, as stated in Article 51 (*Protection of the civilian population*), paragraph 2; no person *hors de combat* should be made the object of an attack, as stated in this paragraph (the English version uses virtually the same wording in both cases: “not be [made] the object of attack”). At first sight the prohibition seems to be stricter in Article 23(c) of the Hague Regulations, which refers to killing or wounding an enemy, almost the same expression as adopted in Article 37 (*Prohibition of perfidy*). The report explains this by indicating that:

“this change was designed to make clear that what was forbidden was the deliberate attack against persons *hors de combat*, not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*”.⁷

This argument is all the more convincing because even civilians are not totally sheltered from military operations in modern warfare, even in the best conditions. Article 57 (*Precautions in attack*), paragraph 2, recognizes this fact explicitly in admitting to the possible incidental loss of civilian life, and only prohibits that which would be excessive in relation to the concrete and direct military advantage anticipated. Accidents of this nature are also to be expected on the battlefield itself, and the combatants are not necessarily responsible for them. However, it is specifically prohibited to deliberately make persons *hors de combat* a target.

- 1606 In the meaning of the Protocol, the expression “attacks” refers to acts of violence against the adversary, whether these are in offence or defence (Article 49 – *Definition of attacks and scope of application* – paragraph 1). In fact, it refers to the use of arms with the intent of deliberately killing or wounding the enemy. Perhaps it is because a person *hors de combat* can no longer be considered as an enemy that the Conference has also abandoned here the terminology of Article 23(c) of the Hague Regulations in favour of the word “person”, suggested during the second session of the Conference of Government Experts.⁸ The terminology used in Article 41, as in Article 42 (*Occupants of aircraft*), which deals with

⁷ O.R. XV, p. 384, CDDH/236/Rev.1, para. 23.

⁸ CE 1972, Report, Vol. II, p. 56, CE/COM III/C 29.

persons parachuting from an aircraft in distress, is thus the same as in Part II, which refers to “persons in the power of the adverse Party” (Article 11 – *Protection of persons*) as well as to wounded and sick “persons” (Article 8 – *Terminology*, sub-paragraph (a)), and it is understood that this refers to both civilians and the military. Whatever the reason for this modification, there is no possible ambiguity in Article 41, paragraph 1. The rule protects both regular combatants and those combatants who are considered to be irregular, both those whose status seems unclear and ordinary civilians. There are no exceptions and respect for the rule is also imposed on the civilian population⁹, who should, like the combatants, respect persons *hors de combat*.

1607 Finally, this protection also extends, if necessary, beyond the period of combat, and even after the general close of military operations.¹⁰

1608 The red cross emblem was created to guarantee the safeguard of persons *hors de combat* and installations and units sheltering or transporting them, and of those who are retrieving them and caring for them.¹¹ It is not enough to decree that persons *hors de combat* shall not be made the object of attack. It is also necessary for the adversary to know who this applies to. In the confusion of the battlefield it is not always easy to determine these matters. When the red cross or the red crescent emblem is used, this problem of identification should not present itself. However, the emblem does not necessarily appear in the front line, except perhaps at the moment of rescue operations, and it is actually in the front line, i.e., in the firing line, that combatants fall or reveal their intention of surrendering.¹² Accidents cannot always be avoided. It was to make clear

“that the prohibition extended only to attacks directed against persons who were, in fact, recognized to be *hors de combat* and those who, under the circumstances, should have been recognized by a reasonable man as *hors de combat*”,¹³

that the paragraph was worded as it is.¹⁴ The expression “in the circumstances” should not give rise to difficulties: it refers to the circumstances of the case.

⁹ O.R. XV, p. 384, CDDH/236/Rev.1, para. 25; for the discussion on this point, see *ad Art. 42, infra*, p. 498.

¹⁰ See Art. 3, sub-para. (b).

¹¹ This was not a new idea. Lieber’s Instructions, adopted in 1863, i.e., the same year that the Red Cross was created, provide in Art. 115: “It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.” Para. 2 of Art. 116 continued: “An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.”

¹² For the use of the white flag, see *supra*, *ad Art. 38*, p. 457 and *infra*, *ad para. 2*.

¹³ O.R. XV, p. 384, CDDH/236/Rev.1, para. 23.

¹⁴ Various formulae have been suggested in this respect during the course of the debates, such as “it is prohibited to deliberately make [...] the object of attack [...]”, or “to make any person the object of attack in the knowledge that [...] or if it should have been known that [...]” (this proposition was adopted with respect to Art. 85, para. 3(e)), or “any person who is found or recognized to be *hors de combat*”, and finally “to kill or wound intentionally [...]”. Some feared that by referring too openly to the concept of intent, this would introduce an element of criminal law, while others considered that this might open the way to a pretext for failing to respect the rule.

- 1609 Article 85 (*Repression of breaches of this Protocol*), paragraph 3 (e), defines as a grave breach the fact of “making a person the object of attack in the knowledge that he is *hors de combat*” when this attack causes “death or serious injury to body or health”, and when it is intentional. There is no leeway for the argument of military necessity to justify a derogation.¹⁵

Paragraph 2 – Conditions of rendering a person *hors de combat*

- 1610 In accordance with this paragraph, a person is considered to be rendered *hors de combat* either if he is “in the power” of an adverse Party, or if he wishes to surrender, or if he is incapacitated. This status continues as long as the person does not commit any act of hostility and does not try to escape.

1. Sub-paragraph (a) – Being in the power of an adverse Party

- 1611 Article 4 of the Third Convention and Article 44 of the Protocol (*Combatants and prisoners of war*) state that prisoners of war are those members of the armed forces who have “fallen into the power” of the enemy. At first sight it might seem that all persons referred to under either Article 4 of the Third Convention or the categories listed in Article 43 (*Armed forces*) of the Protocol who are in the power of the adversary, are therefore protected and that the inclusion of the present sub-paragraph (a) in Article 41, paragraph 2, is redundant. However, this is not the case.
- 1612 Although the distinction may seem subtle, there could be a significant difference between “being” in the power and having “fallen” into the power. Some consider that having fallen into the power means having fallen into enemy hands, i.e., having been apprehended. This is virtually never the case when the attack is conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters). In other cases land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat. A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted. A defenceless adversary is *hors de combat* whether or not he has laid down arms. Some delegations considered that this situation was already covered by the Third Geneva Convention. If so, those concerned are protected both as prisoners of war and by the present provision. In this sense there is an overlap. On the other hand, others considered that the Third Convention only applies from the moment of the actual capture of the

¹⁵ Cf. “Trial of Gunther Thiele and Georg Steinert”, 3 *Law Reports*, pp. 56-59.

combatant, and that therefore the present provision constitutes the only safeguard in the interim.¹⁶

- 1613 From the moment that combatants have fallen “into the hands” of the adversary, the applicability of the Third Convention can no longer be contested. They are prisoners of war and should never be maltreated, but should always be treated humanely. If they make an attempt to escape or commit any hostile act, the use of arms against them is once more permitted within the conditions prescribed in the Third Convention.¹⁷ The same applies *a fortiori* for adversaries who benefit only from the safeguard of Article 41 without being recognized as prisoners of war. In fact, the proviso at the end of the present paragraph specifically provides it.
- 1614 Not all members of the armed forces are combatants. Medical and religious personnel (Article 43 – *Armed forces*, paragraph 2) and the military personnel assigned to civil defence (Article 67 – *Members of the armed forces and military units assigned to civil defence organizations*, paragraph 1(e)), do not have the right to participate directly in hostilities. Thus, when they fall into the power of the adverse Party, i.e., when the latter is able to impose its will upon them, it is without combat, and without being rendered *hors de combat*. They therefore automatically fall under the present safeguard, independently of the protection to which they are entitled according to other provisions of the Conventions and the Protocol.¹⁸ The same applies to any unarmed soldier, whether he is surprised in his sleep by the adversary, on leave or in any other similar situation. Obviously the safeguard only applies as long as the person concerned abstains from any hostile act and does not attempt to escape. As regards those persons who accompany the armed forces without actually being members thereof (Third Convention, Article 4A(4)), they are not permitted to participate directly in hostilities. Therefore they too, automatically, fall under this safeguard.
- 1615 The situation is not quite as clear in air warfare, as an aircraft is not considered to be in distress for the sole reason that its means of combat have been exhausted.¹⁹ On the other hand, from the moment that the occupants parachute from the aircraft to save their lives, Article 42 (*Occupants of aircraft*) applies.
- 1616 A vexed question is whether, and in what conditions, fire may be opened against a civilian aircraft during times of armed conflict, irrespective of whether the aircraft belongs to a neutral country or to the adverse Power. In this respect we refer first of all in this regard to the Chicago Convention of 7 December 1944

¹⁶ For the discussion, see *O.R.* XIV, pp. 276-285, CDDH/III/SR.29, and *O.R.* XV, p. 384, CDDH/236/Rev.1, para. 22.

¹⁷ Art. 42: “The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances”. For the conditions that must be met if an escape is to be considered successful, see Third Convention, Art. 91.

¹⁸ First Convention, Art. 24; Second Convention, Arts. 36 and 37; Protocol, Art. 67.

¹⁹ For confirmation that Art. 41 (as well as Arts. 37, 38 and 39) of the Protocol applies to tactical or strategic airforce operations, see F.A. von der Heydte, “Air Warfare”, in Bernhardt (ed.), *op. cit.*, Instalment 3, 1982, p. 6.

which prohibits shooting down civilian aircraft in all circumstances.²⁰ However, in times of armed conflict, the problem is that aircraft which appear to be civilian may be equipped for spy missions and may even be heavily armed, thus presenting a formidable danger.²¹ Legal opinion asserts, therefore, that such an aircraft may be attacked, but only;

- a) if it refuses to obey orders or signals given to it, or
- b) if it enters a zone with regard to which notification has been given that it is a zone of military activity in which any aircraft enter at their own risk and peril, and where fire may be opened without warning.²²

Moreover, all reasonable efforts should always be made to safeguard the interests of the passengers. It is only as a last resort that recourse should be taken to attack.²³

- 1617 The shipwrecked, wounded and sick at sea belonging to the categories listed in Article 13 of the Second Geneva Convention, are covered by this Convention, as well as by the Convention Relative to the Treatment of Prisoners of War. However, the wording of the text of Article 41, paragraph 2, is sufficiently broad to cover any person rendered “*hors de combat*” at sea, whether or not they belong to the categories referred to in the Second Convention, i.e., also the merchant navy when it is not engaged in hostilities. Obviously the same applies for armed ships of the merchant navy from the moment that they renounce the use of their arms. This safeguard concerns only persons, but it does concern all persons in the power of an adverse Party. The wording does not seem to leave any room for doubt in this respect. Otherwise, as indicated before in Article 39 (*Emblems of nationality*), the Protocol does not aim to regulate warfare at sea, which remains subject to the customary rules.²⁴

2. Sub-paragraph (b) – The clearly expressed intention to surrender

- 1618 In land warfare, surrender is not bound by strict formalities. In general, a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands.

²⁰ The Assembly of the ICAO, the International Civil Aviation Organization, met in Montreal from 24 April to 10 May 1984 (25th session) and adopted there a proposal, dated 10 May 1984, to amend the International Civil Aviation Convention. Article 3 *bis* (a) of that Convention, as amended, now provides that “The contracting States recognize that every State must refrain from resorting to the use of weapons against civilian aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.”

²¹ On this subject, *cf.* commentary Art. 28, para. 2, *supra*, p. 302.

²² J. M. Spaight, *op. cit.*, p. 402. See also, by way of background, “The Hague Rules of Air Warfare”, 1923, Arts. 30-35, in J.M. Spaight, *op. cit.*, pp. 502-503, and M.C.C. Bristol, “CRAF: Hawks in Doves Clothing”, 20 *The Air Force Law Review*, No. 1, 1978, pp. 48-70.

²³ *Cf.* by analogy, Art. 31, para. 2. For the conditions of flight of medical aircraft, see Arts. 24-31.

²⁴ See, for example, “Trial of Helmuth von Ruchteschell”, 9 *Law Reports*, pp. 82 ff.

Another way is to cease fire, wave a white flag and emerge from a shelter with hands raised, whether the soldiers concerned are the crew of a tank, the garrison of a fort, or camouflaged combatants in the field. If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.

- 1619** In these various situations, surrender is unconditional, which means that the only right which those who are surrendering can claim is to be treated as prisoners of war. If the intention to surrender is indicated in an absolutely clear manner, the adversary must cease fire immediately; it is prohibited to refuse unconditional surrender.²⁵ In the air, it is generally accepted that a crew wishing to indicate their intention to cease combat, should do so by waggling the wings while opening the cockpit (if this is possible).²⁶ At sea, fire should cease and the flag should be lowered.²⁷ These measures can be supplemented by radio signals transmitted on international frequencies for callsigns. No argument of military necessity may be invoked to refuse an unconditional surrender.

3. *Sub-paragraph (c) – Having been rendered unconscious, or otherwise being incapacitated by wounds or sickness, and therefore being incapable of defending oneself*

- 1620** The wounded and sick in the sense of Article 8 (*Terminology*), sub-paragraph (a), of the Protocol, are those persons who need medical care as a result of a trauma, disease or other physical or mental disorder or disability, and who refrain from any act of hostility. Shipwrecked persons in the sense of the same article (sub-paragraph (b)) are those persons who find themselves in peril at sea or in other waters, as a result of misfortune affecting them or the vessel or aircraft carrying them, and who refrain from any act of hostility. Article 10 (*Protection and care*) adds that all the wounded, sick and shipwrecked, to whatever party they belong, shall be respected and protected. This means in particular that it is prohibited for the adversary to attack or harm them in any way. Thus there is perfect agreement on this point between the rules relating to the methods and means of warfare, on the one hand, and the basic philosophy of the founders of the Red Cross, on the other hand: the soldier who is rendered *hors de combat* by an injury or sickness is inviolable from that moment and shall be respected.²⁸ However, in contrast to sub-paragraphs (a) and (b) above, it is the wound or sickness, the unconscious or shipwrecked condition – in short, the fact of being struck down, of having given up – which in this case forms the basis of the

²⁵ See, for example, the French *Règlement de discipline générale dans les armées*, of 1 October 1966, Art. 34, para. 2.

²⁶ F. Berber, *op. cit.*, p. 168, and F.A. von der Heydte, *op. cit.*, p. 7. The intention to obey an order to land is indicated by lowering the landing gear.

²⁷ Some consider that it is also necessary to stop the engines, reply to the signals of the captor, abstain from handling weapons and raise the white flag (or put on lights at night) (see “Trial of Helmuth von Ruchteschell”, 9 *Law Reports*, p. 89).

²⁸ Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield (First Convention, Art. 15, para. 2).

obligation. In fact it is not only because a person of the adverse Party is wounded, or partially handicapped, that this obligation arises, but because he is incapable of defending himself. In this respect the text goes back to the wording of Article 23(c) of the Hague Regulations, which prohibits especially the killing or wounding of an enemy who no longer has the means of defence.²⁹ On the other hand, there is no obligation to abstain from attacking a wounded or sick person who is preparing to fire, or who is actually firing, regardless of the severity of his wounds or sickness. The prohibition of attacks applies exclusively to persons *hors de combat*. The dead must be similarly respected.³⁰

4. *Proviso regarding safeguard: in any of these cases abstaining from hostile acts and not attempting to escape*

- 1621 A man who is in the power of his adversary may be tempted to resume combat if the occasion arises.³¹ Another may be tempted to feign a surrender in order to gain an advantage, which constitutes an act of perfidy.³² Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take counter-measures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be *hors de combat* once again. Obviously the remarks made above with regard to Article 35 (*Basic Rules*), paragraph 2, concerning the prohibition of superfluous injury or unnecessary suffering, continues to apply in full. The retort should be proportional to the measure of danger. It should not amount to a refusal to give quarter. Whatever the situation, the criterion of having been rendered *hors de combat* suffices.
- 1622 When troops, after surrendering, destroy installations in their possession or their own military equipment, this can be considered to be a hostile act. The same applies in principle if soldiers *hors de combat* attempt to communicate with the Party to the conflict to which they belong, unless this concerns the wounded and sick who require assistance from this Party's medical service.³³
- 1623 An escape, or an attempt at escape, by a prisoner or any other person considered to be *hors de combat*, justifies the use of arms for the purpose of stopping him. However, once more, the use of force is only lawful to the extent that the circumstances require it. It is only permissible to kill a person who is escaping if there is no other way of preventing the escape in the immediate circumstances. It is prohibited to open fire as a preventive measure on persons who are *hors de combat* on the pretext that they are intending to escape, and that

²⁹ Lieber stated that: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed." (Instructions, Art. 71).

³⁰ See 15 *Law Reports*, p. 134, and First Convention, Arts. 15-17.

³¹ *Supra*, note 1; see also *Commentary III*, ad Art. 42, pp. 245-248.

³² *Supra*, ad Art. 37, para. 1 (a), p. 437.

³³ For the particular case of airmen in distress, see *infra*, ad Art. 42, p. 493.

this is known.³⁴ Furthermore, reference should be made to the corresponding provisions of the Third Convention (Articles 91-94).

- 1624 It is clear that it is sufficient for one of the two contingencies referred to here – a hostile act or an attempt to escape – to be committed, for the safeguard to cease. Moreover, these exceptions remain the same throughout the period of captivity.

Paragraph 3 – Release on the spot

- 1625 In his report the Rapporteur states: “Paragraph 3, dealing with the release of prisoners who could not be evacuated, proved quite difficult”.³⁵

“The phrase ‘unusual conditions of combat’ was intended to reflect the fact that that circumstance would be abnormal. What, in fact, most representatives referred to was the situation of the long distance patrol which is not equipped to detain and evacuate prisoners. The requirement that all ‘feasible precautions’ be taken to ensure the safety of released prisoners was intended to emphasize that the detaining Power, even in those extraordinary circumstances, was expected to take all measures that were practicable in the light of the combat situation.³⁶ In the case of a long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do in view of all the circumstances to ensure their safety.”³⁷

Committee III has adopted this paragraph of the report without comment.³⁸ Nevertheless, as a member of one of the delegations in Committee III subsequently remarked, there is another situation which inevitably springs to mind, namely the guerrilla.³⁹ Commando operations have certainly given rise to abuses in many circumstances, fully justifying the position adopted by the report, but they are not the only ones to pose problems,⁴⁰ and it is the formula relating

³⁴ 15 *Law Reports*, pp. 186-87.

³⁵ O.R. XV, p. 384, CDDH/236/Rev.1, para. 24.

³⁶ At the time of signing the Protocol on 12 December 1977, the United Kingdom made a declaration stating: “in relation to Articles 41, 57 and 58, that the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations”.

³⁷ O.R. XV, pp. 384, CDDH/236/Rev.1, para. 24.

³⁸ *Ibid.*, p. 129, CDDH/III/SR.52, para. 23.

³⁹ Ph. Bretton, “Le problème...”, *op. cit.*, p. 32.

⁴⁰ An idea of the situations envisaged by the Committee can be gained by reference to two amendments. The first text read as follows: “Where, for operational reasons, a commander in the field cannot hold prisoners under humane conditions, as required by the Third Convention, he is obliged, when releasing them, to take such precautions as may in the circumstances be reasonable to ensure their safety.” (O.R. III, p. 170, CDDH/III/242, para. 2). Another amendment read as follows: “A Party to a conflict shall issue instructions to forces under its control that when members of the adversary forces have been captured under conditions of combat which prevent such captives from being evacuated as provided for in Part III, Section I, of the 1949 Geneva Convention for the Protection of Prisoners of War, such captives shall be released and such precautions as may in the circumstances be reasonable, shall be taken to ensure their safety” (*ibid.*, p. 176, CDDH/III/243).

to the “unusual conditions of combat” which finally gained a consensus. The ICRC proposal, which was based by analogy on Article 2, paragraph 4, of the Geneva Convention of 1906, foresaw the possibility for the Parties to the conflict of sending the wounded and sick they did not wish to keep as prisoners, back to their own country after ensuring they were in a condition to be transported. The tenor of the ICRC draft therefore went further,⁴¹ but it was not adopted in this form.

1626 *Ratione personae*, the scope of paragraph 3 is more restricted than that of paragraphs 1 and 2. It does not cover all persons, but only those “persons entitled to protection as prisoners of war”. Read in a literal sense, the text applies equally to prisoners whose status is doubtful, as they are covered by the protection of the Third Convention pending clarification of their status by a competent tribunal (Third Convention, Article 5, paragraph 2, and Protocol, Article 45 – *Protection of persons who have taken part in hostilities*, paragraph 1). Since these prisoners cannot be evacuated in conditions of sufficient safety, there is little chance that they will ever be able to go before a “competent” tribunal.⁴² They must therefore be released.

1627 Thus there is actually an obligation here: “they shall be released” whenever the conditions of evacuation laid down in Articles 19 and 20 of the Third Convention cannot be met. Obviously this does not concern the wounded and sick who run a greater risk by being released than by remaining prisoner, because of their wounds or sickness (*cf.*, by analogy, Third Convention, Article 19, paragraph 2). This is where the notion of safety comes in. The release should be a humanitarian gesture, not an easy means of getting rid of prisoners considered to be an encumbrance. In fact, in some situations where the prisoner would have virtually no chance of survival, this would be equivalent to a refusal to give quarter. Conversely, this paragraph clearly indicates that, despite Articles 7 and 12 in particular,⁴³ the Third Convention should not be interpreted as preventing the release of prisoners, as this interpretation could result in a conduct of hostilities in which there would be no survivors.⁴⁴

1628 The text does not clarify at what level of authority decisions on release have to be taken. It might be the commanding officer in the field, or the Party to the conflict itself that gives the appropriate instructions to this effect.⁴⁵ The Conference clearly thought that this is a problem of internal organization on which the Party to the conflict concerned is competent to decide.⁴⁶

⁴¹ *Supra*, note 5.

⁴² However, on this argument, see *infra ad* Art. 45, para. 1, p. 551.

⁴³ Art. 7 refers to the non-renunciation of rights of prisoners of war, and Art. 12 provides that they are in the hands of the enemy Power, and not of the individuals or military units who have captured them.

⁴⁴ *O.R.* XIV, p. 281, CDDH/III/SR.29, para. 59.

⁴⁵ *Cf. supra*, note 40.

⁴⁶ This is similar, *mutatis mutandis*, to an article in the United States *Field Manual* which authorizes a commanding officer, when circumstances require it, to permit a unit which has fallen into his hands to return to its own lines, admittedly on parole, which is not the case in this article:

(continued on next page)

- 1629 – Judiciously applied, this text represents a triumph of humanity. Perhaps it is to the credit of some that they have occasionally set an example on this point.

Conclusion

- 1630 – The safeguard applies both to regular combatants and those deemed to be irregulars, both to those whose status is unclear and to ordinary civilians. It prohibits making any person who is recognized, or who should be recognized by a reasonable man, as being *hors de combat*, the object of attack. This applies from the moment that it is recognized that the person is *hors de combat*. A defenceless adversary is *hors de combat*, whether or not he has laid down arms.
- 1631 – Any subsequent hostile act entitles the adverse Party to take counter-measures, in proportion to the level of danger.
- 1632 – Release on the spot must be a humanitarian act, and should therefore be carried out in such a way as to guarantee the safety of the prisoner who is released.

J. de P.

“However, special circumstances, such as inability of the victor to guard, evacuate and maintain large numbers of prisoners of war or to occupy the area in which military forces are present, may justify the victorious commanders in allowing the defeated force to remain in its present positions, to withdraw, or to disperse after having been disarmed and having given their paroles, provided that the giving of paroles is not forbidden by the law of their own country and that they are willing to give their paroles.” (*US Field Manual 27-10*, para. 475 b)

It is also appropriate to recall that, according to Art. 47, para. 2, of the Third Convention: “If the combat zone draws closer to a camp, the prisoners of war in the said camp shall not be transferred unless their transfer can be carried out in adequate conditions of safety, or if they are exposed to greater risks by remaining on the spot than by being transferred.”

Protocol I

Article 42 – Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

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Commentary

General remarks

- 1633** Military aviation really began to develop during the First World War. The novelty of this weapon, the spirit of adventure of its devotees, the prestige of its missions, and the sharing of risks created a sort of fraternity between the airmen of the two camps at that time, which was characterized by a spirit of camaraderie and by practices which are suggestive of chivalry. The adversary who had been brought down in flames was entitled, not to bullets, but to a salute as he went down, to wishes for his recovery if he were wounded, and flowers if he were dead.
- 1634** Such manifestations of a bygone age only stood up to the turmoil of the Second World War on rare occasions. On the contrary, all too often the adverse airforces confronted each other in merciless combat, even opening fire on an enemy in distress, parachuting down or shipwrecked, or action was taken to prevent the enemy's parachute from opening. Sometimes the attacker even rammed his adversary, which clearly left no possibility for anyone to survive.¹ Despite such excesses, the spirit of earlier times was not crushed in airmen at all times during the Second World War. There were cases where, notwithstanding the tragic evolution of the role of aviation after 1918, certain rules were observed with respect to the occupants of aircraft parachuting down to save their lives. There were even cases in which the victor actually used his own lifeboat craft to help the enemy who had been brought down over the sea.
- 1635** Part IV of the Protocol is essentially aimed at calling a halt to the devastation and indiscriminate effects wrought by air forces in modern warfare. The task assigned to air forces should be restricted to the destruction of military objectives, as is the case for land forces. Article 42 is meant to protect airmen who are *hors de combat*. In other words, it prohibits anyone from "hitting below the belt". However, Article 42 was the only provision in this Section not to have been adopted by consensus.
- 1636** The problem arose during the second session of the Conference of Government Experts. While a number of proposals were tabled to supplement the text presented by the ICRC² with the purpose of giving airmen in distress the possibility of surrendering when they had landed in enemy territory,³ one delegation suggested that the article should be entirely deleted.⁴ Under these conditions the ICRC endeavoured to present a more flexible text – though it was hardly less vulnerable⁵ – in the final draft submitted to the Conference. In fact,

¹ For further details, see particularly J.M. Spaight, *op. cit.*, pp. 118-119 and 158-168.

² Based on a proposal of a delegation, but considerably simplified, see *CE 1971, Report*, p. 105, *CE/COM III/C 3* for the ICRC text, *CE 1972, Report*, Vol. II, p. 6, Art. 36.

³ See, for example, *CE 1972, Report*, Vol. II, p. 52, *CE/COM III/C 10*.

⁴ *Ibid.*, p. 59, *CE/COM III/C 49*.

⁵ *Article 39 – Aircraft occupants*

"1. The occupants of aircraft in distress shall never be attacked when they are obviously *hors de combat*, whether or not they have abandoned the aircraft in distress. An aircraft is not considered to be in distress solely on account of the fact that its means of combat are out of commission.

2. The use of misleading signals and messages of distress is forbidden."

this was also largely based on other proposals presented by experts. In addition, the ICRC considered that Article 42 should be joined to Article 41 (*Safeguard of an enemy hors de combat*). This point of view was shared by most of the delegations,⁶ but it was precisely with regard to this matter that difficulties seemed bound to arise. Many representatives considered that a person parachuting from an aircraft in distress and landing on territory controlled by the Party to which he belongs, or by an ally of this Party, could not be considered to be *hors de combat*. While some advocated a clear and strict rule to guarantee immunity to airmen in distress in all circumstances, and to guarantee them the possibility of surrendering on the ground in case they land on enemy territory, others refused immunity to pilot who in fact is escaping. The matter was settled in this sense, i.e., with this important exception, at the third session, with 28 votes for, 21 against and 21 abstentions,⁷ but the problem was taken up again at the fourth session with the opposite result, with 51 votes for, 12 against and 14 abstentions.⁸ The opponents did not admit defeat, and resumed the argument at the final plenary meetings. After a spirited intervention by the ICRC,⁹ the amendment was rejected, having gained only 23 votes to 47, while 26 delegations abstained.¹⁰ The article as a whole was finally adopted with 71 votes to 12, and 11 abstentions.¹¹

- 1637** This article is entirely new. The Hague Regulations of 1907, produced at a time when air warfare did not exist, was obviously not concerned with this problem. However, military manuals already contained prohibitions on firing on airmen in distress, in this way confirming its customary law character.¹² An analagous provision can be found in Article 20 of the Hague Rules on air warfare.¹³ There is absolutely no doubt that the majority considered that airmen in distress are comparable to the shipwrecked persons protected by the Second Convention.
- 1638** Paragraph 1 protects any person parachuting from an aircraft in distress during his descent. Paragraph 2 ensures the safety of this person on the ground, and paragraph 3 excludes airborne troops from the scope of this article.

⁶ O.R. XIV, pp. 287-292, CDDH/III/SR.30.

⁷ O.R. XV, p. 90, CDDH/III/SR.47, para. 25 and p. 386, CDDH/236/Rev.1, para. 29.

⁸ *Ibid.*, p. 210, CDDH/III/SR.59, paras. 6-8, and p. 519, CDDH/III/391.

⁹ O.R. VI, pp. 106-107, CDDH/SR.39, paras. 88-90.

¹⁰ *Ibid.*, p. 110, para. 110.

¹¹ *Ibid.*, para. 113.

¹² For example, the French *Règlement de discipline générale dans les armées*, mentioned above, Art. 34, para. 2: "De plus il [...] est interdit: de tirer sur l'équipage et les passagers d'avions civils ou militaires sautant en parachute d'avions en détresse, sauf lorsqu'ils participent à une opération aéroportée". ("Moreover, it is prohibited to fire at the crew and passengers of civilian or military aircraft when they are parachuting from an aircraft in distress except when they are participating in airborne operations".) (translated by the ICRC).

¹³ Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Rules of Aerial Warfare, proposed by a commission of jurists which met in The Hague on 11 December 1922 (see M. Deltenre, *op. cit.*, pp. 818-849). These rules were never formally adopted, but their significance as a reflection of *opinio juris* is recognized to some extent. Art. 20 provides: "In the event of an aircraft being disabled, the persons trying to escape by means of parachutes must not be attacked during their descent". However, an airman who parachutes from the aircraft to save his life is not considered to have surrendered at discretion (see 1 *Law Reports*, "The Dreierwald Case", pp. 85-86, and *infra*, note 36).

Paragraph 1 – Safeguard during descent

- 1639 The text appears to be unequivocal: any person parachuting from an aircraft in distress is protected during his descent.
- 1640 This rule covers both the civilian and the military occupants of an aircraft in distress, whether the aircraft itself is civilian or military.¹⁴ However, as some opposition to such an absolute rule has been apparent throughout the deliberations, as we saw above, it is appropriate to examine the arguments on both sides in more detail.
- 1641 The arguments of those who were opposed to an absolute rule are of two kinds. In the first place, they argued that an airman suspended from his parachute is perfectly capable of committing a hostile act during his descent, for example, by opening fire on persons on the ground, and consequently the text should be amended accordingly.¹⁵ Other delegates contested this view on the basis of their personal experience of parachuting,¹⁶ and the amendment did not gain a sufficient number of votes to be adopted at the plenary meeting.¹⁷ The second argument of the same delegates was that although an airman parachuting from an aircraft may be *hors de combat* during his descent, he is only *hors de combat* temporarily if he lands in friendly territory. Moreover, it is possible that he could try to escape during the descent itself by guiding the direction of the descent, though this also depends on the wind. Additionally, a person who lands in allied territory escapes capture, and therefore the conditions of Article 41 (*Safeguard of an enemy hors de combat*) are no longer fulfilled. To give airmen, who have control of tremendous firing power, this sort of advantage compared to other combatants, is out of proportion to the devastation which these airmen can cause nowadays. Such courtesy is not reconcilable with that owed the civilian population, and practice during the Second World War does not confirm any such rule.¹⁸ Moreover, it is not uncommon for airmen in distress, parachuting not into their own territory, but into enemy territory, to transmit distress signals during their descent intended to alert their own forces and lead to a rescue operation, with the aim of escape. It was stated that this clearly proves that these persons are not *hors de combat* during their descent, and certainly have no intention of surrendering. Consequently the conditions of paragraph 1 of Article 41 (*Safeguard of an enemy hors de combat*) are not fulfilled and the safeguard should not be granted.¹⁹
- 1642 The main speaker to reply to these objections was the representative of the ICRC. He considered that any decision to restrict the safeguard provided for in

¹⁴ As regards the conditions under which fire may be opened on a civilian aircraft, whether it is of neutral or enemy nationality, see *supra*, ad Art. 41, p. 485 and note 20.

¹⁵ *O.R.* III, p. 172, CDDH/413, and *O.R.* VI, p. 104, CDDH/SR.39, para. 71.

¹⁶ *O.R.* VI, p. 105, CDDH/SR.39, para. 77.

¹⁷ *Ibid.*, p. 106, para. 85.

¹⁸ *O.R.* VI, pp. 104-105, 108 and 110, CDDH/SR.39, paras. 72, 96 and 108. The proposed amendment had the following content: “unless it is apparent that he will land in territory controlled by the Party to which he belongs or by an ally of that Party” (*O.R.* III, p. 173. CDDH/414).

¹⁹ *O.R.* XIV, pp. 289-290, CDDH/III/SR.30, paras. 16-17.

paragraph 1 of Article 42 would introduce in the Protocol an element contrary to its purpose and spirit. The Geneva Conventions only contain provisions protecting victims of war, they do not give States rights against these victims. Since 1864, when States adopted the first Geneva Convention for the amelioration of the condition of wounded soldiers in armed forces in the field, they accepted that they would have to sacrifice some of their power for the benefit of human beings, for a compelling humanitarian need. The law in this respect should not be questioned again. On the contrary, it has been extended since then to other categories of victims of hostilities, including airmen in distress who are actually “shipwrecked in the air”, as it were.²⁰ Others argued that the elimination of a few pilots cannot be a decisive way of winning a war.²¹ Finally, the decision favoured by the minority could have a disastrous effect on pilots, who would either tend to avoid the risks necessarily involved in restricting their attack to the assigned military target, or would not bail out but undertake a desperate defence with the means still at their disposal, which would not be to the advantage of the adverse Party.²² A number of delegations explicitly approved the ICRC position, and the proposal of the minority was rejected, as shown above.²³

1643 The rule adopted, admittedly only by majority vote, is therefore clear and without reservations. However, its application can involve difficulties, for it is not always easy, in particular for combatants on the ground or at night, to distinguish between a parachutist in distress and a parachutist who is attacking, or even a spy,²⁴ or to realize that the crew concerned is descending from an aircraft in distress when this is flying at an altitude of 10,000 metres or more. However, these considerations should not constitute an obstacle to the application in good faith of the rule of this paragraph.

Paragraph 2 – Surrender on reaching the ground

1644 The airman who parachutes from an aircraft in distress is therefore temporarily *hors de combat*, just as if he had lost consciousness, until the moment that he lands on the ground, and as long as he is incapacitated.²⁵ Once on the ground, various situations may arise in the case where he lands in territory controlled by the adverse Party. The main problem, which forms the object of this paragraph, consists of giving the airman an opportunity to surrender before he becomes a legitimate object of attack. However, it is self-evident that the other provisions of the Conventions and the Protocol apply in the case where the person concerned

²⁰ O.R. VI, pp. 106-107, CDDH/SR.39, paras. 88-90.

²¹ *Ibid.*, p. 109, para. 104.

²² In this sense, see J.M. Spaight, *op. cit.*, p. 163.

²³ *Supra*, p. 494. See O.R. VI, p. 110, CDDH/SR.39, para. 112, and pp. 113 and 117 for the explanations of vote in favour of the minority position, and p. 116 for similar explanations in favour of the majority position.

²⁴ One delegation had proposed at the second session of the Conference of Government Experts that orange parachutes should be used for the purpose of indicating that those who were using them were intending to surrender (CE 1972, *Report*, Vol. II, p. 52, CE/COM III/C 8).

²⁵ O.R. XV, p. 519, CDDH/III/391.

is wounded, dead or reported missing.²⁶ The provisions of Article 41 (*Safeguard of an enemy hors de combat*) in particular apply fully to any person landing in territory controlled by an adverse Party, after parachuting from an aircraft in distress, under the conditions set out in that article. However, there is one point where this paragraph goes further than Article 41 (*Safeguard of an enemy hors de combat*), viz., with regard to the question of surrender. The intent to surrender is assumed to exist in an airman whose aircraft has been brought down, and any attack should be suspended until the person concerned has had an opportunity of making this intention known.

1645 The most thorny problems in this respect arise with regard to the civilian population. It often happens that airmen in distress do not actually land in an enemy controlled sector of the battlefield, in which case they are captured under similar conditions to those which pertain to other combatants, but altogether outside the zone of military operations. Thus they can be at the mercy of the civilian population, and the history of twentieth century warfare, both in the past and recently, contains a number of examples in which civilians have committed abuses in these circumstances.²⁷

1646 Committee III was concerned with this problem when it examined Article 41, and in the report presented at the end of the third session, the Rapporteur expressed the opinion that:

“Committee II should be asked to consider whether Article 17, which it has already adopted, should be amended by adding a reference to the protection of persons *hors de combat*. Certainly it seems that such persons should be respected by the civilian population.”²⁸

Committee II, which earlier had considered an amendment intended to refer explicitly in Article 17 to combatants *hors de combat*²⁹, examined the problem at the fourth session.³⁰ After a brief debate, it came to the conclusion that:

“the wounded, sick and shipwrecked, whether friend or foe, were protected by Article 17, so that it was not necessary to repeat in Article 17 the protection implicitly provided by paragraph 1 of Article 38 bis [41]”.³¹

²⁶ In this respect, see Arts. 33 and 34.

²⁷ For the Second World War, see J.M. Spaight, *op. cit.*, pp. 143-144, and “Trial of Peter Back”, 3 *Law Reports*, pp. 60-61. In some cases enemy pilots were lynched by the civilian population, with or without the complicity of the military authorities (see J.M. Spaight, *op. cit.*, pp. 61-62, and “The Essen Lynching Case”, 1 *Law Reports*, pp. 88-92). In some cases the police force was involved in this (*cf.* “Trial of Albert Bury and Wilhelm Hafner”, 3 *Law Reports*, pp. 62-64). Also see “CICR, Les représailles contre les prisonniers de guerre”, *RICR*, November 1947, p. 863, especially pp. 865-866.

²⁸ *O.R.* XV, p. 384, CDDH/236/Rev.1, para. 25.

²⁹ *O.R.* III, p. 83, CDDH/II/14.

³⁰ *O.R.* XII, pp. 466-467, CDDH/II/SR.99, paras. 9-16.

³¹ *Ibid.*, paras. 13 and 16. When Art. 17 was adopted at the final plenary meetings, one delegation specifically declared that “in accordance with the views expressed in Committees II and III, the protection provided by Article 17 applies also to persons parachuting from an aircraft in distress and to other persons *hors de combat*” (*O.R.* VI, p. 79, CDDH/SR.37, Annex (Israel)).

- 1647 It is therefore perfectly clear that the obligation to respect persons who are *hors de combat* applies to civilians as much as it does to combatants, and that this protection is also due to airmen who land after parachuting from an aircraft in distress. It is up to the Contracting Parties to take all measures required for this purpose, particularly by instructing the civilian population in an appropriate manner and by giving realistic directives on the conduct that should be observed in these circumstances,³² for example, by giving local authorities the competence to accept a surrender. The same should apply with respect to the police or any other armed force charged with imposing respect for domestic order. As they are combatants, these airmen are actually entitled to be treated as prisoners of war from the moment of their capture or surrender.³³ The same applies if their status is doubtful (Article 45 – *Protection of persons who have taken part in hostilities*, paragraph 1), or if the persons concerned are civilian air crews (Third Convention, Article 1A(5)). Civilians are entitled, at the very least, to the minimum guarantees laid down in Article 75 (*Fundamental guarantees*). Spies who are caught in the act cannot be punished without a previous trial (Hague Regulations, Article 30).³⁴
- 1648 *A priori*, fire must therefore not be opened on the ground against persons who have parachuted from an aircraft in distress, whether they land in or behind the enemy lines. These airmen are presumed to have the intention of surrendering, and all possible measures should be taken to enable this surrender to take place under appropriate conditions.³⁵
- 1649 There are two exceptions to this rule. The first concerns airborne troops (paragraph 3). The second is expressed in paragraph 2 by the phrase “unless it is apparent that he is engaging in a hostile act”. The Rapporteur made the following comment on this phrase:

“The Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act. On the other hand, merely moving in the direction of his own lines would not, by itself, mean that he should not be given an

³² See *Commentary I ad Art. 18*, p. 187. However, civilians are apparently not expected to go so far as to retrieve the dead themselves (*O.R. XI*, p. 486, CDDH/II/SR.44, para. 8).

³³ Since 1949 there are no longer any exceptions to this rule. This was not the case under the 1929 Convention, which in the case of operations at sea or in the air, made allowance for such exceptions (derogations) as the conditions of such capture render inevitable (Art. 1, para. 2).

³⁴ The problem of uniform has sometimes led to a degree of confusion in this respect (see J.M. Spaight, *op. cit.*, pp. 104-105, and *supra ad Art. 39*, pp. 465-469). Part of the difficulty arises from the fact that the uniforms of airmen are not necessarily the same as those of the troops on the ground. However, if airmen wear not their own but enemy uniform (*ibid.*), they are probably spies or saboteurs and therefore airborne troops who are not protected by this Article (para. 3), though they are covered by the general rule of Article 41. This means that they are protected under the conditions specified in that article, but no further (see para. 3).

³⁵ It is quite common for women to serve in the airforce (see J.M. Spaight, *op. cit.*, p. 107).

opportunity to surrender, for he might not know in which direction he was going or that he was visible to enemy armed forces.”³⁶

Obviously the problem does not arise with regard to a pilot who has come down in the sea, but it has frequently happened that the Party to the conflict to which this pilot belongs has attempted to rescue him, particularly by means of hydroplanes or ships marked with the red cross emblem. During the Second World War, some belligerents refused to recognize the immunity of these medical aircraft and rescue craft,³⁷ but it is self-evident that fire could not be opened on the shipwrecked pilots under any circumstances. Article 28 of the Protocol (*Restrictions on operations of medical aircraft*), paragraph 4, prohibits the use of medical aircraft, including helicopters, to search for the wounded, sick and shipwrecked, except by prior agreement with the adverse Party. Thus, if a pilot is shot down, the Party to the conflict to which he belongs must, unless there is an agreement to the contrary, attempt to retrieve him *manu militari*, if it attempts to retrieve him, and this act undeniably constitutes a hostile act in territory under the control of the enemy, though it is not a hostile act on the part of the pilot himself. The latter only loses his right to safeguard if he actively and knowingly participates in the rescue operation mounted on his behalf.³⁸

1650 If a plane is forced to land in enemy territory, the crew's instructions oblige them to destroy the aircraft, but it is also the duty and the right of the adversary to try and prevent this, if necessary by force of arms.³⁹ This therefore constitutes a hostile act.

1651 It is appropriate to emphasize once more that if an airman in distress refuses to lay down arms or to surrender, tries to escape or engages in any other way in an obviously hostile act when he reaches the ground, only such force as is

³⁶ O.R. XV, p. 386, CDDH/236/Rev.1, para. 30. Von der Heydte, for his part, expresses the view that a pilot who parachutes from an aircraft is not considered to be captured as long as he is not under the control of the adversary, i.e., as long as he has not fallen into the power of persons who are qualified in the sense of international law to detain him. Up to that point they are combatants in the same way as members of enemy patrols who penetrate enemy territory. Therefore they must be in uniform or display a distinctive emblem and must bear arms openly. On the other hand, they can disguise themselves in order to escape capture, and they may resort to ruses of war. The adversary must treat them as any other enemy combatant and if they resort to the use of arms, the use of force is permitted. If they surrender, they become prisoners of war (See F.A. von der Heydte, in Bernhardt (ed.) *op. cit.*, Instalment 3, 1982, p. 6).

³⁷ J.M. Spaight, *op. cit.*, pp. 167-168 and 361-362, and R.L. Dunn, "Air-Sea Rescue Operations in Europe during World War II: Historical Perspective on a Footnote in International Law", 21 *The Air Force Law Review*, No. 4. 1979, pp. 602-619. Art. 18 of the First Convention of 1929 did not give any immunity to medical aircraft in these situations "in the absence of special and express permission" but cf. *RICR*, December 1940, pp. 992-995.

³⁸ It has been said in this respect that the transmission of distress signals by a pilot who has been brought down, does not in itself constitute proof that the person concerned does not intend to surrender because these signals are transmitted automatically when the pilot parachutes from the aircraft. For the statements made by one delegation, also see O.R. XIV, pp. 289-290, CDDH/III/SR.30, paras. 15-17.

³⁹ J.M. Spaight, *op. cit.*, pp. 139-142.

necessary in the circumstances to capture him or render him *hors de combat* may be used.⁴⁰ Any act of vengeance is prohibited.

Paragraph 3 – Airborne troops

1652 This paragraph excludes airborne troops from the scope of the protection of this article. This means that it is not prohibited to open fire on airborne troops, either from the ground, or from an aircraft, during the descent by parachute. This is perfectly understandable, for in these circumstances parachuting from an aircraft constitutes an attack, and not a situation of shipwreck. However, in his report, the Rapporteur states that this exception also applies if the troops leave their aircraft because it is in distress.⁴¹ In practice, it is actually difficult to see, during an airborne attack, when anti-aircraft batteries enter into play, how one could distinguish between parachutists who have left their aircraft of their own free will, and those who have been forced to do so by enemy fire, at least when the event takes place in the same location as the attack. Conversely, if the aircraft transporting airborne troops is brought down away from the target of the airborne attack, it will be difficult to distinguish, during their descent, these parachutists from the crew of any other aircraft in distress.

1653 Once on the ground, airborne troops are governed by Article 41 (*Safeguard of the enemy hors de combat*) and not by Article 42. Thus, the safeguard only applies under the conditions and within the limitations provided for in Article 41 (*Safeguard of the enemy hors de combat*) and there is no presumption vis-à-vis these troops that they have the intention of surrendering. Moreover, it is not possible to exclude the possibility that the civilian population could rise up *en masse* to oppose the action of airborne troops.⁴² However, the safeguard is obligatory from the moment they are rendered *hors de combat*. It applies to all persons and consequently includes parachutists who are on a “special mission”.⁴³ The term “airborne troops” can have a wide range of interpretations and covers units of infantry dropped from the air, as well as groups of commandos instructed to penetrate behind the enemy lines, liaison officers, spies, technical experts accompanying materiel dropped by parachute, groups of saboteurs or propagandists etc.

1654 All such persons and all other categories which may play a role in modern conflicts, including rescue teams entrusted with missions such as retrieving a pilot who has been brought down or liberating prisoners of war, are entitled to the guarantees of Article 41 (*Safeguard of the enemy hors de combat*) from the moment that they are *hors de combat*.

⁴⁰ Cf. *supra*, ad Art. 41, para. 2, cipher 4, p. 488.

⁴¹ O.R. XV, p. 386, CDDH/236/Rev.1, para. 29; M. Bothe, K. Ipsen, K.J. Partsch, *op. cit.*, p. 29, note 75, confirm that this was certainly the Committee’s intention.

⁴² Hague Regulations, Art. 2. This seems to have been the case in Crete during the Second World War, although these combatants were not considered to be prisoners of war after they were captured.

⁴³ Cf. *supra*, ad Art. 40, p. 476; for the Second World War, see J.M. Spaight, *op. cit.*, pp. 104-105 and 313-317.

Conclusion

- 1655** – Any person parachuting from an aircraft in distress is protected during his descent towards the ground, whether he lands in territory controlled by the enemy or by friendly forces.
- 1656** – In the event that he lands in territory controlled by an adverse Party, the provisions of the Conventions apply in case the person concerned is wounded or missing. He is presumed to have the intention to surrender, and any attack should be suspended until he has had an opportunity of revealing such intent. Appropriate instructions should be given to the civilian population.
- 1657** – The safeguard of airborne troops is governed by Article 41 (*Safeguard of the enemy hors de combat*) and not by Article 42, under consideration here.

J. de P.

Part III, Section II – Combatant and prisoner-of-war status

Commentary

1658 In the draft presented by the ICRC at the Diplomatic Conference this Section, entitled “Prisoner-of-war status”, contained a single article (42) entitled: “New category of prisoners of war”.¹ It was accompanied by a footnote which opened the door to the possibility of later adding a clause relating to national liberation movements.² This last point is dealt with in Article 1 (*General principles and scope of application*), paragraph 4, which places armed conflicts for self-determination as defined in that article within the scope of application of the Conventions and the Protocol. As regards Section II, this was considerably extended during the deliberations at the Conference, and now contains five articles, admittedly after some subjects, which the ICRC Draft had included under the heading *Methods and means of combat* (Article 40 – Independent missions; Article 41 – Organization and discipline), were transferred to this Section. However, on the whole Articles 43-47 certainly represent new directions and original solutions for which the Conference itself can take the credit and the responsibility.

J. de P.

¹ This draft article read as follows:

“1. In addition to the persons mentioned in Article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfil the following conditions:

- a) that they are under a command responsible to a Party to the conflict for its subordinates;
- b) that they distinguish themselves from the civilian population in military operations;
- c) that they conduct their military operations in accordance with the Conventions and the present Protocol.

2. Non-fulfilment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by the Third Convention and, even if sentenced, retain the status of prisoners of war.”

² “3. In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war for as long as they are detained.” For the amendments proposed to Article 42 of the ICRC Draft, see *O.R.* III, pp. 178-186. For the historical background to the origin of the ICRC proposals, see M. Veuthey. *Guérilla et droit humanitaire*, Geneva, 1976, pp. 249-259, and *id.*, “Guerilla Warfare and Humanitarian Law”, *IRRC*, June 1976, p. 277.

Protocol I

Article 43 – Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Documentary references

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Other references

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1972, Basic Texts, p. 15 (Art. 39). *CE 1972, Commentaries*, Part I, pp. 73-74 (Art. 39). *CE 1972, Report*, vol. I, p. 135, paras. 3.70-3.72 (Art. 39); vol. II, pp. 54-55, CE/COM III/C 19 and C 21; p. 63, CE/COM III/C 64. *CRCE 1972, Report*, p. 41 (Art. 39). *Commentary Drafts*, p. 47 (Art. 41).

Commentary

Paragraph 1 – Definition of armed forces

Introduction

1659 This article defines “the armed forces of a Party to a conflict”, and provides that the members of such armed forces are combatants, subject to some exceptions. It implies that the concept of “Party to a conflict” in the sense of the Protocol is a known concept, as is the concept of armed conflict.

1660 In the terms of Article 2 common to the Geneva Conventions of 1949, these Conventions apply, apart from cases of military occupation of an area, even if such occupation meets with no resistance, in “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. Thus this covers not only armed conflict or war in the formal sense, but also any *de facto* armed conflict, even if it is not recognized as such. An attempt has been made to define this as follows:

“Material war implies a continuous clash of arms conducted by organized armies which engage the responsibility of governments. It does not presume the condition that the belligerents must be States. The existence of war in the material sense is something to be judged by evidence not of intention, but of the activities of military forces in the field.”¹

1661 However, this must not become an expedient designed to avoid the application of *jus in bello*. A Party to a war which is not recognized as such is therefore not necessarily a State, nor even an authority representing a State. In fact, this distinction was not yet made in the texts of the Conventions, which, though they are not limited to the state of war in a legal sense,² are limited, as far as

¹ L. Kotsch, *The Concept of War in Contemporary History and International Law* (thesis), Geneva, 1956, p. 56, quoted by D.W. Bowett, *United Nations Forces*, London, 1964, p. 498. Without necessarily covering all situations, this definition seems to include the essential elements of war in a non-technical sense. For the United States, the involvement in north Vietnam was certainly a war *de facto*, even though it was not one *de jure*. Other examples include the conflict over the Falkland Islands (Malvinas) in which the United Kingdom and Argentina were opposed in 1982, and the Sino-Indian conflict of 1962-63.

² In fact, in the Geneva Conventions, any dispute, however serious, which may arise between two States and result in the intervention of members of their armed forces, is an armed conflict in the sense of Article 2, even if one of the Parties denies that there is a state of belligerency. The duration of the conflict and the more or less fatal character of its effects are irrelevant. The respect owed to human beings cannot be measured by the number of victims (see *Commentary I*, p. 32). However, when signing the Protocols, the United Kingdom made the following declaration

(continued on next page)

international conflicts are concerned, to clashes arising between two or more contracting Parties, i.e., States. However, it is clear that Article 2, paragraph 3, of the Conventions provides the possibility for their application to a Power which is not a Party to the Conventions, “if the latter accepts and applies the provisions thereof”. Some writers now consider that the term “Power” can refer to entities that are not States.³ However, it is perfectly clear that the Protocol has extended its field of application to entities which are not States (Article 1 – *General principles and scope of application*, paragraph 4). If they conform to the requirements of the present article, liberation movements fighting against colonial domination (provided that they make a declaration under Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, and resistance movements representing a pre-existing subject of international law may be “Parties to the conflict” within the meaning of the Conventions and the Protocol. However, the authority which represents them must have certain characteristics of a government, at least in relation to its armed forces. Nor is it out of the question that the United Nations could be a “Party to an armed conflict” in the material sense, although the problem of the accession of the United Nations to the Geneva Conventions and the Protocol remains a delicate question which has not yet been resolved.⁴ Moreover, it cannot necessarily be deduced from the text that the scope of Article 1 (*General principles and scope of application*), paragraph 4, of the Protocol is limited to cases of decolonization and occupation still in existence at the time that the Diplomatic Conference concluded its deliberations.⁵ Theoretically at least, the notion of “Party to the conflict”, within the meaning of the Protocol, is fairly wide, involving not only resistance movements representing a pre-existing subject of international law and governments in exile, but also those fighting for conflicts of “self-determination” or “national liberation”. Those who consider this distinction to be fundamental might fear that this could result in some confusion between international conflicts and conflicts which are not international.

- 1662 At any rate it is to be feared that we shall have to face in future clashes of views with one of the adversaries claiming to be a Party to the conflict in the sense of the Protocol and the other one refuting such a claim. The clause allowing such a Party to the conflict to be “represented by a government or an authority not recognized by an adverse Party” will not in fact help to resolve the problem if the refutation is based on a denial of the status of Party to a conflict. In the view of

regarding Article 1 of the Protocol: “that the term ‘armed conflict’ of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions and the Protocols are to apply to any given situation and that this level of intensity cannot be less than that required for the application of Protocol II, by virtue of Article 1 of that Protocol, to internal conflicts”.

³ See D. Schindler, “The Different Types of Armed Conflicts...”, *op. cit.*, p. 136.

⁴ See D. Schindler, “Die Anwendung der Genfer Rotkreuzabkommen seit 1949”, 22 *ASDI*, 1965, pp. 75-120; F. Seyersted, *United Nations Forces in the Law of Peace and War*, Leyden, 1966; Institute of International Law, “Les conditions d’application des lois de la guerre aux opérations militaires des Nations Unies”, 55 *Annuaire IDI*, vol. II, 1971, pp. 149-288.

⁵ E. Kussbach, “Status der Guerillakämpfer und Söldner in bewaffneten Konflikten”, 17 *Wiener Blätter zur Friedensforschung*, 1978, p. 4. See also J.J.A. Salmon, *op. cit.*, p. 84.

the ICRC – the originator of this proposal – the clause referred to should in no way nullify the distinction between international conflicts and conflicts which are not international. According to the commentary of the 1973 draft articles of the ICRC,

“the non-recognized government or authority must represent, or must claim to represent, a subject of international law recognized as such by the other Party to the conflict; as a rule, the subject of law will have existed prior to the conflict, which will therefore from the outset be of an international character; exceptionally, however, it may also be established in the course of the conflict, either because of its recognition as a State by the other Party to the conflict or because of its recognition as a belligerent, whereby the other Party to the conflict confers upon the recognized subject a certain limited and provisional international personality. In any case, the mere existence of a government or resistance movement is not sufficient evidence of the international character of the conflict, nor does it establish that character and hence render the application of the present Protocol mandatory”.⁶

If a resistance movement cannot be considered as a Party to the conflict within the meaning of the Protocol, it must belong to a Party to the conflict, within the meaning of Article 4A(2) of the Third Convention.

- 1663** According to the Conventions, combatant status is given to regular forces only which profess allegiance to a government or authority which is not recognized by the adversary, but which claims to represent a State which is a Party to the conflict.⁷ In the Protocol, entities which are not States, but which should, at least to some extent, be subjects of international law, may in certain circumstances become Parties to the conflict. Whether such Parties to the conflict claim to be a State or an entity which is not yet a State, they may take the form of an authority which is not recognized by the adversary. In any case, it is not impossible that various authorities might all claim to represent one and the same Party to the conflict, such as a “people” fighting against “alien occupation”, for example. Such authorities can take part in the fight, not only through the regular army, but through “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.” This is where the new definition of armed forces actually comes in.

⁶ *Commentary Drafts*, p. 50.

⁷ See Art. 4A(3) of the Third Convention. During the Second World War, i.e., before the 1949 Conventions were adopted, Germany had resolved the problem by considering the French regular army fighting under General de Gaulle as fighting for England, a Party to the conflict recognized by Germany. On the recognition of the political authority of the Free French during the Second World War, see Ch. Rousseau, *Droit international public*, Vol. III, Paris, 1977, pp. 595-596, and on their recognition as a nation, *ibid.*, pp. 607-611.

*First sentence – Composition of the armed forces**The historical background*

- 1664 “The fact that the development of aviation and the use of new arms has almost wiped out the fundamental distinction between combatants and civilians during the last World War, can in no event justify even indirectly a state of affairs which is disastrous for civilization and for human life itself. If the law of war – to the extent that it endeavours to limit the means used for conducting hostilities – is to be a reality, it is essential to re-establish the fundamental concept, which has actually never been explicitly rejected, of the military objective, and to reaffirm the basic distinction between combatants and civilians.”⁸
- 1665 This was certainly the view of the XXth International Conference of the Red Cross when it adopted a resolution in 1965, which contained a solemn declaration addressed to all governments and other authorities with responsibility for action in armed conflicts. It stressed that a “distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible”. During the 23rd session of the United Nations General Assembly, this principle was expressly endorsed and was affirmed in Resolution 2444 mentioned above.⁹ In order to be able to make a distinction between persons participating in hostilities and the civilian population (Article 48 – *Basic rule*), it is necessary to begin by giving suitable definitions of these terms. The Protocol does not actually define the civilian population, but merely states that any person who does not belong to the categories included under the armed forces must be considered as a civilian (Article 50 – *Definition of civilians and civilian population*). For this reason alone, it is therefore already necessary to define armed forces.
- 1666 This was the solution adopted by the Hague Regulations of 1907 (Articles 1-3), which begin with a chapter devoted to the qualification of belligerents. These

⁸ Translated by the ICRC; original text: “Que le développement de l’aviation et l’emploi d’armes nouvelles aient presque effacé, au cours du dernier conflit mondial, la distinction fondamentale entre combattants et civils, ce fait en aucun cas ne peut consacrer, même indirectement, un état de choses désastreux pour la civilisation et pour la vie humaine elle-même. Si le droit de la guerre – pour autant qu’il tend à limiter les moyens de conduire les hostilités – doit être une réalité, il est nécessaire de rétablir la notion fondamentale, et qui d’ailleurs n’a jamais été expressément abandonnée, de l’objectif militaire et de réaffirmer la distinction essentielle qui existe entre combattants et civils.” M. Huber, “Quelques considérations...”, *op. cit.*, p. 431.

⁹ Moreover, it would be incorrect to think that the principle of this distinction has an exclusively western origin or arose recently. Thus some participants at the Diplomatic Conference recalled that a clear distinction between combatants and non-combatants had always been a principle of Islamic law (see, for example, *O.R.* V, p. 92, CDDH/SR.10, para. 9), and a number of laws adopted in Western Europe during the Middle Ages reflect the same concern (see F. Berber, *op. cit.*, pp. 68-70). One might wonder whether this rule is still understood at the present time. To take one example, members of the armed forces of national liberation movements are combatants in the sense of the Protocol; therefore they cannot claim the status of refugees under the terms of Article 1, para. 2, of the 1969 Convention of the OAU on refugees; if, nevertheless, they wish to be considered as refugees, they will definitively lose their status as combatants and, under Article 3 of that Convention, can no longer commit hostile acts against another State.

articles lay down that the laws, rights and duties of war apply only to armies and to militia and volunteer corps which form part of the army. The militia and volunteer corps which do not form part of the army should fulfil the following conditions (Article 1):

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

1667 The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops, without having had time to organize themselves in accordance with the above-mentioned rules, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war (Article 2 – *Levée en masse*). The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy, both have a right to be treated as prisoners of war (Article 3).

1668 These rules governed the two World Wars of the twentieth century. However, though the rules remained the same after 1907, the conduct of hostilities altered radically, as we have already indicated.¹⁰ Nevertheless, in 1949 during the drafting of the Third Convention, the above-mentioned rules were confirmed (Article 4). The only alterations consisted of conferring the status of prisoners of war, to members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power – so that they will have the status of combatants and will be entitled to take part directly in hostilities – (Article 4A(3)), and extending such status also to resistance movements in occupied territories, provided that such movements belong to a Party to the conflict (Article 4A(2)).¹¹

1669 Without abrogating the rules referred to above,¹² this article of the Protocol actually introduces entirely new concepts, though these have been the subject of discussion since the Brussels Conference of 1874.

1670 As stated at The Hague,¹³ this is a question of enormous importance; anyone whose status as a member of the armed forces is recognized, is entitled to be treated as a prisoner of war in the event that he is captured; anyone who takes up arms without being able to claim this status will be left to be dealt with by the enemy and its military tribunals in the event that he is captured. Some wished to impose strict conditions on the definition of the status of members of the armed

¹⁰ *Supra*, introduction to this Part, p. 383.

¹¹ For a review of these rules, see R. Lapidoth, “Qui a droit au statut de prisonnier de guerre?”, *RGDIP*, No. 1, January-March 1978, pp. 4-13.

¹² Article 50 refers explicitly to Article 4A(1), (2) and (6) of the Third Convention, as well as to Article 43 under consideration here. And Article 44, paragraph 6, provides that “this Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.”

¹³ A. Mechelynck, *op. cit.*, pp. 117-118.

forces, bearing in mind the necessities of war; others would not allow any restriction to the right and duty of taking up arms, apart from the organization required to maintain the basic rules of good faith pertaining to warfare and to prevent banditry. Finally the question was resolved at The Hague along the lines indicated above, which means that for combatants who do not fulfil the conditions imposed, nothing is provided in the Regulations, either in their favour or against them.¹⁴ These are rules of unwritten law, in accordance with the principles of the law of nations referred to in the Preamble (Martens clause). Therefore it is clear that nothing in the Regulations should be considered as tending to lessen “or suppress the right that belongs to the population of an invaded country, to carry out its duty of opposing to the invaders by any lawful means the most energetic patriotic resistance”.¹⁵

- 1671 However some countries do not trust unwritten law.¹⁶ They consider the principle of self-determination, exercised in accordance with the United Nations Charter, to be a principle of international law and they have been successful in their efforts to have it written into the definition of the scope of application of the Protocol, namely a reference to fighting undertaken in order to bring the above-mentioned principle to fruition (Article 1 – *General principles and scope of application*, paragraph 4). Peoples conduct such armed conflicts themselves. All combatants who are taken prisoner should consequently be accorded the prisoner-of-war status¹⁷ and this should be done in the form of a specific provision. This is the object of the provision with which we are concerned here, except that its scope is not limited to conflicts for self-determination which form the object of Article 1 (*General principles and scope of application*), paragraph 4; it generally applies to any Party to an armed conflict in the sense of the Protocol. However, as stated above, this does not invalidate the norms of the Hague Regulations and Article 4 of the Third Convention. Nevertheless, one might say that this provision does not only respond to the concerns of national liberation movements, but also to those which have been expressed since 1874, and which were briefly outlined above.

Scope of application of the provision

- 1672 In his report, the Rapporteur considers that the text which the Committee finally adopted “is relatively clear and requires little explanation”.¹⁸ This could mean that one should read in this text all that is written into it, and nothing but what is written into it. Only a few explanations follow below. The expression “armed forces” means “members of the armed forces”, i.e., persons, as explicitly

¹⁴ *Ibid.*, pp. 118, 120, 121.

¹⁵ *Ibid.*, pp. 118, 165.

¹⁶ *Supra*, introduction to this Part, p. 384.

¹⁷ Resolution 3103 (XXVIII) of the United Nations General Assembly, Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, 12 December 1973; see also the general debate during the second session of Committee III, *O.R.* XIV, pp. 317-385, CDDH/III/SR.33-36.

¹⁸ *O.R.* XV, p. 390, CDDH/236/Rev.1, para. 42.

stated in paragraph 2. In itself it therefore does not allow, for example, the use of animals trained to attack, who are incapable of distinguishing between an able-bodied enemy and an enemy who is *hors de combat* (Article 41 – *Safeguard of an enemy hors de combat*). The term “organized”¹⁹ is obviously rather flexible, as there are a large number of degrees of organization. In the first place, this should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training. A “responsible” command cannot be conceived of without the persons who make up the command structure being familiar with the law applicable in armed conflict. In this respect, Article 77 of the Protocol (*Protection of children*) requires that all feasible measures are taken to prevent children under fifteen years of age from taking a direct part in hostilities, and therefore from being recruited into the armed forces. It is also appropriate to recall that the Hague Regulations (Article 23, paragraph 2), as well as the Fourth Geneva Convention (Article 51) prohibit the forced enrolment into its armed forces of nationals of the adverse Party. The particular problem of mercenaries will be examined in connection with Article 47 (*Mercenaries*). All armed forces, groups and units are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations.²⁰ In other words, all of them are subordinate to a command and to a Party to the conflict, without exception, for it is not permissible for any group to wage a private war.²¹ Under these conditions, as well as those of the second sentence of this paragraph, all armed forces are “regular”, whether they are established by a State in pursuance of appropriate laws, or by another Party to the conflict using its own methods, or even if they have risen spontaneously. Wearing or not a uniform or outfit is not a decisive criterion for the status of the individual concerned, as we will see in the examination of Article 44 (*Combatants and*

¹⁹ See *Commentary III*, p. 58, and *Commentary Drafts*, pp. 49-50. Some consider that this condition requires in any armed unit the existence of a system of authority and responsibility, in other words, a military structure such as that found in regular armies which should characteristically include a hierarchy, responsibility and discipline (see P. Verri, “Combattants armés ne pouvant se distinguer de la population civile”, 21 *RDPMG*, No. 1-4, 1982, p. 345, at p. 354).

²⁰ This clause expresses in full the generally accepted interpretation of the word “responsible” in Article 1 of the Hague Regulations: responsible to the authority or State on whose behalf the fighting is conducted, although some also occasionally wished to detect a more general responsibility, with respect to the principles of international law, or even with respect to public opinion, which seems necessary if there is no juridical link between the combatants and the Party to the conflict to which they profess allegiance (Third Convention, Article 4A(2)). As regards the responsibility of a commanding officer for the activities of his subordinates, see J.-P. Maunoir, *La répression des crimes de guerre devant les tribunaux français et alliés*, Geneva, 1956, pp. 312-388, especially p. 346. In general, the exercise of such responsibility implies the exercise of effective control over subordinates (see also Art. 87).

²¹ In this sense, see P. Verri, “Combattants armés...”, *op. cit.*, p. 355. This type of hostilities includes terrorist methods, such as taking diplomats or businessmen as hostages or kidnapping sports or political personalities, hijacking civilian aircraft etc., all such acts having no direct link with military operations and not being directed against combatants (for examples, see M. Veuthey, *op. cit.*, pp. 115-127 and 147).

prisoners of war), even though the command must require, subject to certain exceptions, that it be worn. Neither can a decisive criterion be found in the fact that individual combatants effectively respect the rules of international law applicable in cases of armed conflict (Article 44 – *Combatants and prisoners of war*, paragraph 2), but such respect is incumbent upon the armed forces as such. According to one delegate at the Diplomatic Conference, the armed forces recognized by the Protocol therefore consist of “regular” and “irregular regular” combatants. In doing this the Conference thus took full account of the new forces which have appeared on the modern battlefield in the course of the last few decades.

- 1673 This radical solution, although it caused some surprise, barely provoked any debate at this stage. However, one delegation remarked that it had modified existing law, and when the article was adopted by consensus at a final plenary meeting, it chose to indicate its position fully in this respect.²²
- 1674 In the Hague system, the State guarantees that the rules of international law will be respected. When such guarantee is lacking, the conduct of the combatants in the field is the decisive factor. The Protocol eliminates this distinction, but subordinates every combatant, even combatants belonging to a resistance movement, to a Party to the conflict, which is not the case in the Third Geneva Convention, in Article 4A(2).

*Second sentence – Conditions of discipline*²³

- 1675 Although a member of the armed forces who does not respect the rules of international law applicable in armed conflict does not, as we have seen, thereby lose his combatant status and his right to be treated as a prisoner of war (which does not mean that he cannot be punished) the armed forces to which he belongs as such are indissolubly bound by these rules. This was already the view of the drafters of Hague Convention IV of 1907, when they provided in Article 1 of this Convention that “the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention”. This requirement is rendered here with the expression “internal disciplinary system”, which covers the field of military disciplinary law as well as that of military penal law. The modern trend is to regard violations of rules of the Protocol and of

²² “With regard to Article 41 [43], paragraph 1, of draft Additional Protocol I, the delegation of Israel wishes to declare that the enforcement of compliance with the rules of international law applicable in armed conflict is a *conditio sine qua non* for qualification as armed forces. Moreover, it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance with the laws of war, but – as the expression ‘shall enforce’ indicates – there has to be effective compliance with this system in the field.” (O.R. VI, p. 116, CDDH/SR.39).

²³ The text of Art. 41 of the ICRC draft devoted to the same subject read as follows: “Armed forces, including the armed forces of resistance movements covered by Article 42, shall be organized and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect for the present rules and for the other rules of international law applicable in armed conflicts.”

other rules of international law as matters primarily of military penal law.²⁴ The principle of the inclusion of this rule in the Protocol was from the beginning unanimously approved,²⁵ as it is clearly impossible to comply with the requirements of the Protocol without discipline.²⁶ The expression “rules of international law applicable in armed conflict” is defined in Article 2 (*Definitions*), sub-paragraph (*b*), as indicated above. Article 86 (*Failure to act*), which concerns the repression of breaches resulting from a failure to act when under a duty to do so, and Article 87 (*Duty of commanders*), which defines the duties of commanders with regard to breaches of the Conventions and the Protocol, supplement the provision with which we are concerned here. Anyone who participates directly in hostilities without being subordinate to an organized movement under a Party to the conflict, and enforcing compliance with these rules,²⁷ is a civilian who can be punished for the sole fact that he has taken up arms,²⁸ unless he falls under one of the categories listed under (2) and (6) of Article 4A of the Third Convention (categories (1) and (3), which cover the regular armed forces, should automatically fulfil these requirements).

Paragraph 2 – Combatants

1676 The object of paragraph 1 is to establish a common denominator applicable to all, supplementing the specific rules of Article 4 of the Third Convention, without however setting them aside, with a view to defining who are members of the armed forces, as opposed to civilians.

²⁴ *O.R. XIV*, p. 295, CDDH/III/SR.30, para. 38.

²⁵ *Ibid.*, pp. 294-298.

²⁶ Cf. the remark of one delegation: “Discipline is a characteristic of the soldier, and if the internal disciplinary system includes the order to apply the rules of international humanitarian law in armed conflicts, soldiers would carry out that order.” (*Ibid.*, p. 295, para. 39). See also Ph. Bretton, “La mise en œuvre des Protocoles de Genève de 1977”, 95 *Revue de Droit Public et de la Science Politique en France et à l’Etranger*, No. 2, March-April 1979, p. 379, at pp. 390-392 and 417-420.

²⁷ For the view according to which these four conditions are inseparable and must be complied with as a whole, totally and continuously, see P. Verri, “Combattants armés...”, *op. cit.*, p. 356, and in the same sense, R. Lapidoth, *op. cit.*, p. 26. For the affirmation that these conditions together form the necessary criterion for the essential distinction between combatants and civilians, “a fundamental rule of the law of war of Islam”, see H. Sultan, “La conception islamique du droit international humanitaire dans les conflits armés”, 34 *Revue égyptienne de droit international*, 1978, p. 13.

²⁸ This problem also raised a number of questions in Committee III, in conjunction with a questionnaire on fifteen points submitted by the Rapporteur (CDDH/III/GT/75). Question No. 7 asked whether groups were obliged to act in accordance with the rules governing armed conflict; question No. 8 asked whether this was an effective obligation and whether it had to be complied with part of the time, all the time, or most of the time. The members of the Working Group gave an affirmative answer to question No. 7. With regard to question No. 8, some answered “all the time”, others answered “in combat” or “when committing a hostile act”. One delegation expressed the view that if a group did not wish to comply with the law, it put itself outside the law. For other delegations the respect for these laws by the group is a minimum or an essential condition. For the statement by Israel at a final plenary meeting, see *supra*, note 22. The ICRC in its draft provided that the rules of law have to be complied with “in military operations” (Article 42).

- 1677 The provision under consideration here goes one step further in declaring that members of the armed forces have the status of combatants, with two exceptions: medical and religious personnel. In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture. The Hague Regulations expressed it more clearly in attributing the “rights and duties of war” to members of armies and similar bodies (Article 1). The Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the above-mentioned exceptions) can participate directly in hostilities, i.e., attack and be attacked. The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants, is therefore no longer used. In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants.²⁹ This should therefore dispense with the concept of “quasi-combatants”, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).
- 1678 Any interpretation which would allow combatants as meant in Article 43 to “demobilize” at will in order to return to their status as civilians and to take up their status as combatants once again, as the situation changes or as military operations may require, would have the effect of cancelling any progress that this article has achieved. Undoubtedly the success of guerrilla operations depends on the requirements of flexibility and mobility which are largely dealt with in Article 44 (*Combatants and prisoners of war*), as we will see. However, this concept of mobility could not be extended into the legal field without falling fatally back into the “presumption of illegality”,³⁰ of which guerrilla fighters have justifiably complained, and which Articles 43-45 of the Protocol have endeavoured to

²⁹ For civil defence personnel, see Art. 67, which provides that members of the armed forces who form part of civil defence shall be respected and protected, provided that they do not participate directly in hostilities (para. 1(e)).

³⁰ M. Veuthey, *Guérilla et droit humanitaire*, op. cit., p. 37.

remove. The Protocol exceptionally allows a guerrilla combatant to wear purely civilian dress, if the nature of the hostilities requires it (Article 44 – *Combatants and prisoners of war*, paragraph 3). However, it does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times.³¹ It does not recognize combatant status “on demand”. On the other hand, it puts all combatants on an equal legal footing, in accordance with a desire expressed long ago, as we have seen.

- 1679 According to the text, these combatants “have the right to participate directly in hostilities”.³² In this respect the Rapporteur points out that a number of delegations have expressed the wish that the report should record that, in their view, the term “hostilities”, used in paragraph 2, covers the preparations for combat and the return from combat.³³ With regard to the ICRC, it expressed the view, when introducing these terms in Article 46 of its draft (now Article 51 – *Protection of the civilian population*, paragraph 3) that they cover acts of war which are intended by their nature or their purpose to hit specifically the personnel and the *matériel* of the armed forces of the adverse Party.³⁴ Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad,³⁵ as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants, although their possible presence near military objectives (Article 52 – *General protection of civilian objects*, paragraph 2) does expose them to incidental risk. The same applies to guerrilla warfare where combatant forces can be organized at different levels, while assuring some cooperation of the civilian population.³⁶ An effective distinction between combatants and non-combatants may be more difficult as a result, but not to the point of becoming impossible. Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place. However, it would be desirable for the various Parties to a conflict to inform each other completely regarding the composition of their respective armed forces, even if this were only done through the communication of the laws and regulations which they have had to adopt to ensure compliance with the Protocol, as provided in Article 84 (*Rules of application*).

³¹ The text of Art. 44, para. 3, specifies that the guerrilla combatant “shall retain” his status as a combatant in such situations, which confirms that he has acquired it independently of the activities as such, solely on the basis of his being a member of the armed forces of a Party to the conflict.

³² Resolution 2675 (XXV) of the United Nations General Assembly entitled “Basic principles for the protection of civilian populations in armed conflicts” makes a distinction between “persons actively taking part in the hostilities and civilian populations”.

³³ O.R. XV, p. 330. CDDH/III/224.

³⁴ *Commentary Drafts*, p. 58.

³⁵ CE 1972, *Report*, Vol. I, pp. 143-144, para. 3.116 and 3.120.

³⁶ For examples, see M. Veuthey, *op. cit.*, pp. 195-197 and 271-274.

- 1680 It should not be forgotten that under the terms of Article 85 (*Repression of breaches of this Protocol*), paragraph 3(a), the wilful attack on a civilian population or individual civilians is included among the grave breaches.
- 1681 *To summarize:* the conditions which should all be met to participate directly in hostilities are the following: a) subordination to a “Party to the conflict” which represents a collective entity which is, at least in part, a subject of international law; b) an organization of a military character; c) a responsible command exercising effective control over the members of the organization; d) respect for the rules of international law applicable in armed conflict. These four conditions should be fulfilled effectively and in combination in the field.

Paragraph 3 – Incorporation of police forces

- 1682 During the discussions on Article 43 a proposal was made by a delegation³⁷ to specify that police forces should be excluded from the armed forces, unless national legislation has otherwise provided and the other Parties to the conflict have been notified accordingly. A long discussion followed, relating on the one hand to the meaning of the term “police force” (which can cover uniformed units as well as plain clothes policemen) and, on the other, to the incompatibility of any possible duplication of the function of internal lawkeeping and that of combatant; even the relevance of the proposed notification procedure and whether there should be any provisions on this subject were discussed. Finally the terms “para-military” and “armed law enforcement agency” were substituted for the expression “police forces”, particularly to take into account the differences in internal organization in many States. The problem of any possible duplication of functions referred to above was not explicitly solved, though some may consider that such duplication is impossible.³⁸ In his report the Rapporteur indicates that:

“the Committee recognized that, where a State had a law providing for the automatic incorporation of such forces into its armed forces in time of war, the notice requirement might be satisfied by notification to all Parties to the Protocol, through the depositary”.³⁹

³⁷ In the Federal Republic of Germany the “Bundesgrenzschutz” is an agency which acts as a law enforcement agency and frontier guard during peacetime and which may participate directly in hostilities during wartime.

³⁸ Cf. Arts. 59, para. 3, and 60, para. 4 of the Protocol.

³⁹ O.R. XV, p. 390, CDDH/236/Rev.1, para. 44. The Declaration on the police by the Parliamentary Assembly of the Council of Europe provides that in case of war and occupation, members of the police force should continue to carry out their role of protecting persons and property in the interests of the civilian population, and should therefore not have the status of combatants (31st ordinary session, Recommendation 858 (1979), and Resolution 690 (1979), Annex, sub. C(1). However, the Committee of Ministers did record some reservations on this document).

1683 In conclusion, uniformed units of law enforcement agencies can be members of the armed forces if the adverse Party has been notified of this, so that there is no confusion on its part.

J. de P.

Article 44 – Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - (a) during each military engagement, and
 - (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the

conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Documentary references

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Commentary

General remarks

- 1684 Although not explicitly stated, this article is mainly aimed at dealing with combatants using methods of guerrilla warfare. On the modern battlefield,

guerrilla warfare is a phenomenon which exists for various reasons, all equally valid, cannot ignore it. Guerrilla fighters will not simply disappear by putting them outside the law applicable in armed conflict, on the basis that they are incapable of complying with the traditional rules of such law. Neither would this encourage them to at least comply with those rules which they are in a position to comply with, as this would not benefit them in any way. The Diplomatic Conference has therefore made an effort to identify this phenomenon and cannot be criticised for so doing. The rules for armed conflict are not static; on the contrary, they must be adapted to a constantly changing world by means of appropriate modifications. This is the specific aim of Article 44, one of the most bitterly disputed articles at the Conference. Almost fifty speakers put their points of view to the Third Committee during the first debate, which took place at the second session.¹ Thirteen amendments² were aimed explicitly at modifying the text proposed by the ICRC in Article 42 of its Draft,³ which dealt with the substance of the present Article 44 as well as with that of Article 43 (*Armed forces*) of the Protocol. However, numerous other amendments tried indirectly to achieve the same by virtue of the fact that there is a certain correlation between the various proposals put forward, on the one hand in the ICRC Draft, and on the other by the delegates themselves.⁴ The essence of the debate took place at the third session, within the Working Group of Committee III. After a month of sustained effort, the text of the present Article 44 was finally established. However, it was not until the fourth session that the article was adopted by Committee III with 66 votes in favour, 2 against, and 18 abstentions,⁵ before being passed in the final plenary meeting by roll-call, with 73 votes in favour, 1 against, and 21 abstentions.⁶ Not surprisingly these votes were followed by numerous explanations of vote.⁷ In addition to giving the reasons which had led the various delegations to approve the proposed text – or, on the other hand, to abstain or even reject it – these explanations of vote contain in many cases statements on interpretation. Furthermore, many delegations felt obliged to

¹ See *O.R.* XIV, pp. 317-385, CDDH/III/SR.33-36 and, for the text *in extenso* of the statements of most of the delegations, *ibid.*, pp. 447-556.

² *O.R.* III, pp. 178-186.

³ For the text presented by the ICRC, see *supra*, ad Section II, p. 503, note 1.

⁴ This refers to Articles 35, 40 and 41 of the ICRC draft, (*O.R.* III, pp. 162-165 and pp. 174-177), and also to the proposals for Articles 42 *bis* (a) and (b) and 42 *ter*, which, with the exception of the proposal for 42 *bis* (b), were finally withdrawn by their sponsors. For the texts of these proposals, see *O.R.* III, pp. 187-191. In the face of such a diversity of proposals, the Rapporteur of Committee III drew up a questionnaire on 15 points (CDDH/III/GT/75), listing the principal questions for discussion, and intended as a guide, at least to begin with, for the debates of the Working Group.

⁵ *O.R.* XV, pp. 155-156, CDDH/III/SR.55.

⁶ *O.R.* VI, p. 121, CDDH/SR.40.

⁷ See *O.R.* XV, pp. 155-187, CDDH/III/SR.55 and 56, and *O.R.* VI, pp. 121-155, 178-181, 183-184, 185-186, 189-192, 196, CDDH/SR.40 and 41.

state, either during the plenary meetings or in Committee, that they would not accept reservations to Article 44 by other contracting Parties.⁸

1685 The text of Article 44 is a compromise, probably the best compromise that could have been achieved at the time. It is aimed at increasing the legal protection of guerrilla fighters as far as possible, and thereby encouraging them to comply with the applicable rules of armed conflict, without at the same time reducing the protection of the civilian population in an unacceptable manner. Whatever the text, one might still consider that, when all is said and done, the protection of the civilian population is not assured unless both Parties to the conflict are genuinely concerned about this.

1686 Article 44, which is divided into eight paragraphs, deals successively with prisoner-of-war status, compliance with the rules of international law applicable in armed conflict, the obligation for a guerrilla combatant to distinguish himself from the civilian population, the sanction on non-compliance with this obligation, and the scope of the obligation. The provisions of Article 4 of the Third Convention are fully preserved, the wearing of a uniform for members of a regular army is confirmed, and all combatants are guaranteed the benefits of the First and Second Conventions.

Paragraph 1 – Prisoner-of-war status

1687 At first sight, this paragraph is perfectly clear. Those combatants complying with the general conditions laid down in Article 43 (*Armed forces*), which gives an overall definition of armed forces, have the right, when captured, to prisoner-of-war status. In reality matters are perhaps not as straightforward as this. It has been said that the problem is no longer one of knowing how to obtain the status of combatant (and prisoner-of-war status). The real problem is probably knowing what to do to avoid forfeiting this status. This risk particularly concerns guerrillas and the requirement of a régime of internal discipline for armed forces to ensure that they comply with the rules of international law applicable in armed conflict (Article 43 – *Armed forces*, paragraph 1, second sentence). This expression refers to the rules set forth in international agreements to which the Parties to the conflict are Parties, and the generally recognized principles and rules of international law applicable to armed conflict (Article 2 – *Definitions*, subparagraph (b)). This means that these rules must be complied with by the armed forces as such, at the risk of disqualification. As Article 44 is mainly concerned with guerrilla combatants, it is therefore appropriate to devote some attention to this issue in the context of guerrilla warfare. The problem of combatants

⁸ For the plenary meetings, see *O.R.* VI, CDDH/SR.40, p. 125, para. 37; p. 127, para. 45; p. 129, para. 57; p. 133, para. 77; pp. 138-139 (Annex) and CDDH/SR.41, p. 153, para. 49; p. 154, para. 54; p. 155, para. 59; p. 156, para. 64; pp. 190-191 (Annex). One delegation explicitly referred to Article 19(c) of the Vienna Convention on the Law of Treaties (reservations incompatible with the object and purpose of the treaty), while others referred to this implicitly. One representative considered that Articles 1, 43, 44, 45 and 96 of the Protocol should not be the object of reservations. See also *infra*, note 15.

distinguishing themselves visually is dealt with in paragraphs 3 and 4 of Article 44, while that of individual violations of the rules of armed conflict is dealt with in paragraph 2, so that the subject should be approached with these considerations in mind. However, the problem as a whole must be considered, for if the status of the group is contested, it will be the individuals who will be deprived of combatant or prisoner-of-war status.⁹

- 1688 It cannot be denied that guerrilla movements do not have the same characteristics as so-called regular forces, but this is not a new problem. It already existed in 1949 with regard to resistance movements, whose members are equally required to comply with the “laws and customs of war”. When Article 4A(2)(d) of the Third Convention states that members of militias, volunteer corps and resistance movements should conduct their operations in accordance with the laws and customs of war, this means that they must have been directed against resort to perfidy, ill-treatment of prisoners, wounded or dead, improper use of the flag of truce, and unnecessary violence or destruction.¹⁰ Thus there is no question – if this interpretation is accepted – of requiring compliance with all the rules of international humanitarian law applicable in cases of armed conflict, many of which require the machinery of the State for their full application. As has been stated, it would be misguided to expect equality where inequality exists,¹¹ and it is neither unreasonable nor unjust to postulate compliance with the rules in a less extensive and detailed manner when they are imposed upon guerrilla combatants than when they are imposed upon the so-called regular army.¹² The principle of good faith should be uppermost as much in the interpretation of treaties as in their implementation.¹³ Thus the requirement of assuring the respect of the rules of international humanitarian law is not asking the impossible for those guerrilla groups who wish to benefit from Article 43.¹⁴ The minimum threshold of rules whose application can always be required, whatever the situation, cannot be lower than that defined in Article 85 (*Repression of breaches of this Protocol*) and in the corresponding articles of the

⁹ There is a risk of abuse here which did not escape the notice of some delegations. See *O.R.* XIV, p. 333, CDDH/III/SR.33, para. 72, and pp. 361-362, CDDH/III/SR.35, para. 24; see also *O.R.* III, pp. 185-186, CDDH/III/259.

¹⁰ Cf. *Manual of Military Law, part III*, The Law of War on Land, para. 95 (London, HMSO, 1958). However, it has been claimed that members of national liberation movements cannot always fulfil all the conditions with which members of resistance movements can comply, though this statement was probably about the sign of visibility (*O.R.* XIV, pp. 320-321, CDDH/III/SR.33, para. 22). See, in addition, *O.R.* V, p. 70, CDDH/SR. 7, para. 30; p. 96, CDDH/SR.10, para. 35 and p. 98, para. 43.

¹¹ See J.J.A. Salmon, *op. cit.*, p. 81.

¹² See H. Meyrowitz, “Le droit de la guerre dans le conflit vietnamien”, 13 *AFDI*, 1967, particularly p. 176, and the statement of the NLF (National Liberation Front), in October 1965, that the Geneva Conventions contained provisions which did not correspond to either the activities or the organization of its armed forces (IRRC, August 1966, p. 400). However, the NLF nevertheless claimed that it employed a humanitarian and charitable policy towards prisoners that fell into its hands (*ibid.*, see also M. Veuthey, *op. cit.*, p. 341).

¹³ Vienna Convention on the Law of Treaties, Articles 26 and 31, para. 1.

¹⁴ However, one delegation affirmed that they should show that they were “in a position to respect, and were respecting the rules of humanitarian law” (*O.R.* XIV, pp. 371-372, CDDH/III/SR.35, para. 80).

Conventions dealing with grave breaches (First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 147). To accept that it could fall below this minimum could only compromise the object and purpose of the Conventions and the Protocol. As one delegate stated “the long list contained in Article 74 [85][...] constitutes a mini-penal code of humanitarian law”. The International Law Commission observed that it is no accident that the obligations “whose breach entails the personal punishment of the perpetrators correspond largely to the obligation imposed by certain rules of *jus cogens*”.¹⁵ However, a Party to the conflict cannot invoke impossibility of performance without a valid reason, nor use as a pretext the constraints of the other Party in order to justify possible derogations of its own.¹⁶ No doubt much will be written on this subject in the future. It is perhaps appropriate here to refer once more to the views expressed by the Norwegian representative:

“If international humanitarian law applicable in armed conflict was not to become a dead letter, it was essential first, that the rules of that law should place the Parties on an equal footing – in other words, that the rules should be equally binding on all the Parties to the conflict; secondly, that those rules should constitute a well-balanced compromise between humanitarian considerations and military necessity; lastly, that they should be drafted in such a way as to ensure that all the Parties to the conflict would have an equal interest in their application.”¹⁷

Finally, the Rapporteur in his report points out:

“Several representatives suggested, for example, that it should be stated clearly that, if a group of combatants announced that it would not respect the laws and in fact consistently violated them, all members of the group should forfeit their right to prisoner-of-war status. Others argued, however, that such behaviour by a group was unlikely given the requirements of Article

¹⁵ O.R. VI, pp. 299-300, CDDH/SR.44, and *ILC Yearbook*, 1976, vol. II, Part II, p. 104, para. 21. The Protocol, like the Conventions, does not contain provisions on reservations, and therefore general international law applies, including the Vienna Convention, of which Article 19(c) prohibits any reservation incompatible with the object and purpose of the treaty. Although a number of delegations came out against the possibility of making any reservations to Article 44 (*cf. supra*, pp. 520-522, and note 8), no statement to this effect was made in respect of Article 85. However, it is noteworthy that none of the Parties to the Conventions formulated any reservations regarding grave breaches, as defined in them, and which correspond to the principles laid down in Nuremberg and by the United Nations International Law Commission in 1950. In Article 85 of its draft the ICRC had proposed that all reservations should be forbidden in respect of Articles 5[5], 10[10], 20[20], 33[35], 35, paragraph 1, first sentence [37], 38, paragraph 1, first sentence [41], 41[43], 46[51] and 47[52]. This proposal was not retained by the Conference. At a more general level, see also the introduction to Part VI, *infra*, p. 1059.

¹⁶ An illustration of this principle can be found in para. 3 of Article 44 which allows a derogation from the obligation to distinguish oneself from the civilian population in exceptional circumstances for as long as such circumstances apply, and only in favour of such categories of combatants as cannot submit to the obligation because of the nature of the hostilities.

¹⁷ O.R. XIV, pp. 260-261, CDDH/III/SR.28, para. 8.

41 [43], that we did no need to provide specifically for it, and that in any event, there were other and better methods for punishing and deterring such behaviour and that prisoners of war could, of course, be punished for criminal offences.”¹⁸

However, this in no way detracts from the fact that armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such forces, within the meaning of Article 43 (*Armed forces*).

Paragraph 2 – Compliance with the rules of international law applicable in armed conflict

1689 Under the terms of Article 85 of the Third Convention, prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention.¹⁹ This means that violation by a combatant of the rules of international law applicable in armed conflict, does not deprive such a combatant of his right to be treated as a prisoner of war. However, under the Hague Regulations, this did not apply to members of militias and volunteer corps, unless they gave evidence in the

¹⁸ O.R. XV, p. 402, CDDH/236/Rev.1, para. 86.

¹⁹ A reservation was made in this respect by the following countries: Albania, Angola, Bulgaria, Byelorussian SSR, People's Democratic Republic of China, Czechoslovakia, German Democratic Republic, Hungary, Democratic People's Republic of Korea, Poland, Romania, the Ukraine, USSR, Socialist Republic of Viet Nam. The text of the reservation made by the USSR was as follows: "The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg Trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment."

The United Nations International Law Commission has defined war crimes on the basis of the Nuremberg principles as: "Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

As regards crimes against humanity, these were defined by the International Law Commission as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime." (Report of the ILC covering the work of its second session, 1950, supplement No. 12 (A/1316). On this point, see also the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Resolution 2840 (XXVI) of the United Nations General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity and Resolution XII of the XXIst International Conference of the Red Cross (Istanbul, 1969), "War crimes and crimes against humanity". The reservations made by the above-mentioned countries to Article 85 of the Third Convention are in no way set aside by the Protocol. In addition, See C. Pilloud, "Reservations to the Geneva Conventions of 1949", *op. cit.*

field that they did indeed fulfil the conditions listed in Article 1 of the Regulations. Thus they had to prove that they acted in accordance with the laws and customs of war in their operations.²⁰ Article 4A(2) of the Third Convention does not seem to have modified this situation²¹ with regard to members of resistance movements, so that the paragraph under consideration here actually constitutes an amendment to that article on this point. In fact, this paragraph is perfectly clear and abolishes any distinction; whether it concerns a guerrilla fighter or a uniformed soldier of the regular army, if such a combatant has violated the rules of international law applicable in armed conflict, that fact by itself shall not deprive him of his status. Any other solution would have been considered to be unjust²², or completely inappropriate²³, because it would be seen as tending to encourage the escalation of violence. This is not without prejudice to the problem of civilian population. This forms the object of paragraphs 3 and 4 of this article.

1690 As regards members of regular armed forces, the Protocol therefore does not change the situation provided for in the Third Convention. They remain prisoners of war, even after they have been convicted for breach of the law applicable in armed conflict, unless they have been captured by a Party to the conflict which has made a reservation to Article 85 of the Third Convention.²⁴ In this case prisoner of war status is withdrawn in the case of a “war crime”.²⁵ All members of armed forces recognized by the Protocol practising guerrilla warfare, benefit from the same prerogatives and are subject to the same restrictions. However, such guerrilla fighters can never be prosecuted for the mere fact of taking up arms, as before capture they had the status of legitimate combatants.²⁶ Finally, the obligation for all combatants to comply with the rules of international law applicable in armed conflict remains in its entirety, for such combatants can be punished in case of breach. This certainly indicates that in this article the Protocol in no way legalizes terrorism, as has sometimes been claimed.²⁷

²⁰ See “The Hostages Trial”, 8 *Law Reports*, pp. 57-59 and 75.

²¹ See, for example, W.J. Ford, “Resistance Movements and International Law”, *IRRC*, October 1967 to January 1968, particularly December 1967, pp. 628-629; for the discussion of the problem, see A. Rosas, *op. cit.*, pp. 333-338 and pp. 361-375. This requirement also applied to a *levée en masse* (Third Convention, Article 4A(6) for which the conditions remain unchanged since it does not concern members of armed forces organized in accordance with Article 43 (see, in addition, *supra*, ad Art. 43, p. 510 and *infra*, pp. 532-533).

²² See in particular, O.R. XIV, pp. 444-556, CDDH/III/SR.33-36, Annex, in particular pp. 519-520, para. 6.

²³ *Ibid.*, p. 520, paras. 7 and 8, and pp. 547-548, para. 14; for the opposite point of view, see O.R. XV, p. 122, CDDH/III/51, paras. 5 and 6, and pp. 137-138, CDDH/III/SR.53, paras. 16-20.

²⁴ O.R. XV, p. 402, CDDH/236/Rev.1, para. 87.

²⁵ *Supra*, note 19.

²⁶ See also O.R. XIV, pp. 321-322, CDDH/III/SR.33, paras. 26-28.

²⁷ In this context, terrorism is understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack.

Paragraph 3 – Distinction between combatants and the civilian population

1691 This paragraph comprises three sentences. The first sentence expresses the fundamental rule that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. The second sentence contains an exception to the general rule, which is itself mitigated by a concession to this rule.²⁸ The third sentence is a safeguard clause intended to prevent acts from being considered as acts of perfidy if they comply with the requirements provided for in the second sentence. Thus combatants are obliged to distinguish themselves from the civilian population, albeit not in all circumstances.

First sentence – The fundamental obligation for combatants to distinguish themselves from the civilian population

1692 This provision imposes the fundamental rule that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack, or in any action carried out with a view to combat. It would be a mistake to see it as a purely perfunctory statement or a provision which, at best, refers to so-called regular military operations and not to guerrilla tactics. In reality, under normal conditions members of so-called regular forces wear uniform more or less permanently and this article is not intended to change this practice (paragraph 7). Thus it is guerrilla fighters who are the chief concern of this provision. The wording in particular has the advantage of unambiguously indicating that the exception provided for in the second sentence is certainly only an exception.²⁹

1693 According to some delegations, this distinction should be clearly recognizable,³⁰ as in Article 4A(2) (b) of the Third Convention,³¹ and throughout military operations.³² Others considered that this general rule does not “seem to differ from universally acknowledged standards”.³³ The minimum conclusion which can be drawn from these indications is that any armed combatant (see the wording of the exception in the second sentence) should, in the context of this provision, clearly distinguish himself from the civilian population by means of a

²⁸ This procedure is not exceptional in any way; see, for example, Art. 33, para. 2, of the First Convention and *Commentary I*, p. 275.

²⁹ See *O.R.* XV, CDDH/III/SR.55, p. 158, para. 17, and p. 159, para. 24; and CDDH/III/SR.56, p. 175, para. 36, and p. 186, para. 82; *O.R.* VI, CDDH/SR.40, p. 134, paras. 79 and 83; and CDDH/SR.41, p. 144, para. 19; p. 146, para. 26; p. 149, para. 41; p. 150, para. 44.

³⁰ *O.R.* XV, p. 166, CDDH/III/SR.55, para. 63; *O.R.* VI, p. 136, CDDH/SR.40, and p. 150, CDDH/SR.41, para. 44.

³¹ *O.R.* XV, p. 172, CDDH/III/SR.56, para. 19.

³² *O.R.* VI, p. 132, CDDH/SR.40, para. 74.

³³ *O.R.* XV, p. 158, CDDH/III/SR.55, para. 17.

characteristic piece of clothing which is visible, as long as he is armed, and whatever the nature of his arms.³⁴

1694 On the other hand, it seems doubtful, in the light of the wording of the second sentence of this paragraph, which deals only with “armed” combatants, that the obligation also extends to members of a guerrilla movement who are not armed and whose participation in military operations may or may not be limited, but remains indirect. As a general rule, combatants of this category, whose activity may indicate their status,³⁵ should be taken under fire only if there is no other way of neutralizing them.³⁶ However, it is self-evident that if they are in an area of military objectives, they run the risks to which these military objectives are exposed. If they are caught in the act of spying, they may be treated as spies. When they are captured, they may be treated as spies, if there are grounds to do so.

1695 Finally, the *ratio legis* of this provision is given by the clause which states that it is “in order to promote the protection of the civilian population from the effects of hostilities” that combatants are obliged to distinguish themselves. Since the adversary is obliged at all times to make a distinction between the civilian population and combatants, in order to ensure respect for and protection of the civilian population (Article 48 – *Basic rule*), such a distinction must be made possible. If, for example, the invader is confronted during his advance (the problem of occupation will be examined in the second sentence) by a combined resistance of regular forces presenting identifiable military targets, and the harassment of guerrilla forces which are indistinguishable from the civilian population, it is more or less certain that the security of this population will end up by being seriously threatened. One delegation went so far as to affirm that in unoccupied territory a guerrilla fighter can always manage to distinguish himself from the civilian population when he is engaged in a military operation.³⁷ It is certain that the humanitarian principle requiring appropriate clothing, applies throughout military operations³⁸ in all cases which are not covered by the second sentence of this paragraph.

1696 With one exception, the sanction for a guerrilla fighter failing to comply with the obligation to distinguish himself from the civilian population in accordance with this provision, when required to do so, will be “merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner of war status”.

³⁴ However, it would no longer be possible to deny the status of combatant and prisoner of war to a guerrilla fighter armed only, for example, with a pistol or hand grenade, possibly concealed, by alleging that he is not carrying his arms openly (cf. *British Military Manual* quoted above, para. 94, which denies the status of combatant to a guerrilla fighter armed in this way).

³⁵ The function of such unarmed combatants can consist of carrying out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla fighters (F.A. von der Heydte, *Annuaire IDI*, 1969, vol. 2, p. 56, quoted by M. Veuthey, *op. cit.*, p. 307)(see also *supra*, ad Art. 43, p. 515).

³⁶ Whether one considers the obligations imposed on armed guerrilla fighters, limited to the period of military operations, or the situation of unarmed guerrilla fighters, it should be noted that in either case it amounts to an amendment of Article 4A(2)(b) of the Third Convention. For the view that such limitations were already implicitly contained either partly or wholly in the above-mentioned provision, see A. Rosas, *op. cit.*, pp. 349-352.

³⁷ O.R. XV, p. 157, CDDH/III/SR.55, para. 12.

³⁸ And in particular, as stated above, as soon as a combatant is armed.

The exception leading to loss of status relates to “the guerrilla fighter who relies on his civilian attire and lack of distinction to take advantage of his adversary in preparing and launching an attack”.³⁹ It will be examined in detail in the context of the second sentence of this paragraph and of paragraph 4. Suffice it to say here that the combatant can lose his status just as easily when he fails to carry his arms openly in the exceptional situations referred to in the second sentence, as when he abusively assumes the existence of an exceptional situation and fails to wear a distinctive sign in combat.

Second sentence – Exception to the fundamental obligation and limitations on this exception

1697 The first part of this provision specifies, or endeavours to specify situations in which a guerrilla fighter cannot be required to distinguish himself from the civilian population under the conditions laid down in the first sentence. The second part of the sentence imposes the obligation on this guerrilla fighter to carry his arms openly, not only during a military engagement, but also during the period preceding the engagement, if he wishes to retain his status. These two points will be examined in turn below.

a) Situations where, owing to the nature of the hostilities, an armed combatant cannot distinguish himself from the civilian population

1698 As stated before, we are dealing with an exception. According to the Rapporteur,

“That exception recognized that situations could occur in occupied territory and in wars of national liberation in which a guerrilla fighter could not distinguish himself [from the civilian population] throughout his military operations and still retain any chance of success.”⁴⁰

³⁹ Report of the Rapporteur, *O.R.* XV, p. 453, CDDH/407/Rev.1, para. 19.

⁴⁰ *O.R.* XV, p. 453, CDDH/407/Rev.1, para. 19. As stated above, guerrilla warfare is caused “en partie par les inégalités existant entre les moyens militaires et logistiques des occupants et ceux des résistants: la guérilla s’efforce de compenser ces inégalités par des procédés de lutte spécifiques. La surprise, l’embuscade, le sabotage, le combat de rues ou le combat au maquis se substituent à la guerre en rase campagne et à l’affrontement d’unités militaires comparables. Dans ces procédés, le port d’armes apparent et le signe distinctif peuvent ou bien n’avoir pas de signification (pour le sabotage ou l’embuscade par exemple), ou bien être réellement incompatibles avec l’efficacité de la lutte (par exemple lorsque les guérilleros s’appuient sur la population ou sont mêlés à elle). Dès lors, refuser les procédés spécifiques, c’est refuser la guérilla. Le droit humanitaire, pour être objectif et crédible, doit laisser à chaque partie des chances égales dans le combat: si une norme de ce droit est incompatible avec ce principe et rend impossible d’avance, pour l’une des parties, la perspective de la victoire, mieux vaut renoncer à établir la norme” (“partly by the inequality existing between the military and logistic means of the occupying forces and those of the resistance forces: the guerrilla fighter attempts to compensate for such inequality by specific procedures in combat. Surprise tactics, ambushes, sabotage, street fighting or fighting in the maquis take the place of war conducted in open country and
(continued on next page)

For many delegations such situations were above all the wars of national liberation referred to in Article 1 (*General principles and scope of application*), paragraph 4.⁴¹ Some even wished to make an explicit reference to this in the context of the provision under consideration here. However, this proposal was strongly opposed by others.⁴² Thus, according to the text, it is “the nature of the hostilities” that is the determining factor (see *supra*, note 40), without explicit reference to either wars of national liberation or to occupied territory. However, for the majority of those delegations who expressed their views on this point, this clause does actually refer to situations which can only arise in occupied territory, apart from wars of national liberation, which in any case, it could be claimed, also take place in occupied territory.⁴³ Some delegations stated that this rule can only

confrontations between comparable military units. In such procedures the visible carrying of arms and distinguishing signs may either have no significance (for example, in sabotage or in an ambush), or they may really be incompatible with the practicalities of the action (for example, if the guerrilla fighters use the population for support or are intermingled with it). Because of this, refusing to allow specific procedures would be to refuse guerrilla warfare. In order to remain objective and credible, humanitarian law must allow every party an equal chance in combat. If a norm of this body of law is incompatible with this principle and makes it impossible from the outset for one of the parties to have any prospect of victory, it is better not to draft such a norm at all”) (translated by the ICRC) Ch. Chaumont, “La recherche d’un critère pour l’intégration de la guérilla au droit international humanitaire contemporain”, in *Mélanges offerts à Charles Rousseau*, Paris, 1974, p. 43, at p. 50, quoted by J.J.A. Salmon, *op. cit.*, p. 89. However, it should be noted that the Conference did not follow these views to the point of dropping the requirement of carrying arms openly.

⁴¹ For the discussions in Committee III, see *O.R. XV*, CDDH/III/SR.55, p. 161, para. 37; p. 162, paras. 42 and 43; p. 163, paras. 45 and 49; p. 165, para. 58; p. 168, para. 69; and CDDH/III/SR.56, p. 169, para. 2; p. 170, para. 6; p. 171, para. 12; p. 175, para. 33; p. 180, paras. 57 and 61; p. 183, para. 71; p. 185, paras. 77 and 79. For the discussions in the plenary meetings on Article 44 in general, see *O.R. VI*, CDDH/SR.40, p. 125, paras. 35-37; p. 126, para. 40; p. 129, paras. 58 and 61; p. 132, para. 75, pp. 138-139 (Annex); and CDDH/SR.41, p. 141, para. 2; p. 142, para. 8; p. 144, para. 14; p. 146, paras. 25-26; p. 149, paras. 38 and 41; p. 150, para. 47; p. 151, paras. 48-49; p. 152, para. 55; p. 153, para. 56; p. 154, paras. 62 and 65; p. 183 (Annex); p. 185, pp. 189-191 and 196. These references do not take into account the preliminary discussions (*O.R. XIV*, pp. 317-385, and pp. 445-556, CDDH/III/SR.33-36).

⁴² In the questionnaire submitted by the Rapporteur to the Working Group of Committee III, (see *supra*, ad Art. 43, note 28), the following question was asked under number 11: Should there be distinct norms regarding the right to prisoner-of-war status of combatants who do not comply with the requirements of Article 4 of the Third Convention, or should there only be a single norm applicable to all members of the armed forces of a Party to the conflict? Most of the delegations wanted only a single norm.

⁴³ See, for example, the declaration of understanding made by the United Kingdom, when it signed the Protocol on 12 December 1977 (1c): “that the situation described in the second sentence of paragraph 3 of the Article [44] can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1”; see also, *O.R. XV*, CDDH/III/SR.56, p. 172, para. 19; p. 174, para. 28; p. 176, para. 39; p. 179, para. 53 for the discussions in the Committee, and for the plenary meetings, *O.R. VI*, CDDH/SR.40, p. 123, para. 22; CDDH/SR.41, p. 146, para. 24; p. 150, para. 45; however, some of these delegations abstained from the vote on Article 44 (see *supra*, note 6). Others considered that “situations of armed conflict in which, because of the hostilities, the combatants were unable to distinguish themselves from the civilian population were not defined, but left to each party to appraise as it pleased and arbitrarily” (*O.R. VI*, pp. 130-131, CDDH/SR.40, para. 68). One delegation referred to the concept of “national and social liberation movements” (*ibid.*, p. 153, CDDH/SR.41, para. 60).

cover exceptional cases such as those which arise in occupied territories, or alternatively extremely exceptional cases which can only arise in occupied territories.⁴⁴ On the other hand, other delegations were less restrictive and envisaged “certain situations here, for instance in occupied territories”,⁴⁵ or simply “situations of guerrilla warfare”, i.e., situation in warfare to which “the weaker party normally would have to resort in the context of resistance against the domination of a territory by alien forces”, and even defence against an aggressor.⁴⁶

The problem of occupation

- 1699 These reservations can perhaps be partly explained by the fact that it is not always easy to determine exactly whether or not a territory is occupied in the sense of *occupatio bellica*, or from what moment that can be considered to be the case.⁴⁷ With the exception of certain cases of concealed occupation, it does not seem that there can be a question of occupation except where organized military resistance has been defeated, where the sovereign exercise of power conferred by law on the government has become impossible, and where an administration has been established for the purpose of maintaining law and order:

“The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.”⁴⁸

- 1700 However, as soon as control of the occupied territory is once more put in doubt as a result of fighting, whether or not this is in conjunction with forces from outside the occupied territory, the status of occupation ceases to exist in the region concerned:

“Any part of territory in which the occupant has been deprived of actual means for carrying out normal administration by the presence of opposing military forces would not have the status of “occupied” territory within the terms of Articles 2 and 42 of the Hague Regulations. The fact that other parts of the occupied country, as a whole, are under effective enemy occupation would not affect this situation.”⁴⁹

⁴⁴ See *O.R.* XV, p. 166, CDDH/III/SR.55, para. 63 and p. 186, CDDH/III/SR.56, para. 83; *O.R.* VI, CDDH/SR.40, p. 123, para. 22; p. 127, para. 47; p. 136, para. 2b (Annex); CDDH/SR.41, p. 152, para. 53.

⁴⁵ See *O.R.* XV, p. 182, CDDH/III/SR.56, para. 67.

⁴⁶ *Ibid.*, pp. 158 and 159, CDDH/III/SR.55, paras. 17 and 24; see also *ibid.*, p. 163, para. 49.

⁴⁷ When ratifying the Protocol on 11 June 1979, Yugoslavia made a declaration that under the terms of the Yugoslav Constitution, “no one shall have the right to acknowledge or sign an act of capitulation nor to accept or recognize the occupation of the Socialist Federal Republic of Yugoslavia or of any of its individual parts”. See also *O.R.* XIII, p. 120, CDDH/II/SR.65, para. 21.

⁴⁸ “The Hostages Trial”, 8 *Law Reports*, pp. 55-56.

⁴⁹ “Trial of Carl Bauer, Ernst Schrameck and Herbert Falten”, 8 *Law Reports*, p. 18.

- 1701 Consequently the concept of occupation can have some degree of flexibility, if only according to the development of the military situation. Apart from this, these concepts do not necessarily influence the conditions of the applicability of the Fourth Convention; as they fall into the power of the invader, the inhabitants of the invaded territory become protected persons.
- 1702 The interpretation of the clause that “the nature of the hostilities” determines the extent of the exception, would be easier to resolve if the type of combatant involved in the fighting – the guerrilla combatant – were considered in the context of a military situation which leaves no alternative⁵⁰ to one or other of the Parties to the conflict apart from guerrilla warfare. This implies either that there are no armed forces comparable to those of the adversary and capable of stopping the invasion or preventing occupation, or that the resistance of such forces has completely ceased. It would seem that only the responsible command mentioned in Article 43 (*Armed forces*) is in a position to determine the existence of such a situation and that consequently this provision is applicable for the members of the armed forces concerned.

Governmental armed forces

- 1703 However,

“Regulars who are assigned to tasks where they must wear civilian clothes, as may be the case, for example, with advisers assigned to certain resistance units, are not required to wear the uniform when on such assignments”.⁵¹

This means that the possibility for a combatant to distinguish himself from the civilian population solely by carrying arms openly, also exists for members of the regular armed forces, though only under the same exceptional circumstances as for members of so-called guerrilla forces.⁵²

Levée en masse

- 1704 Finally, in case of certain Parties to the conflict limiting the applicability of this provision strictly to occupied territories, the concept of *levée en masse* (mass

⁵⁰ To keep to the text, the key to this provision seems to lie in the reference to situations in which an armed combatant (an unarmed combatant can never lose his status unless he is a spy or mercenary): “cannot so distinguish himself [from the civilian population]”. Such situations may result from the occupation and the security measures taken by the occupying forces relating to the possession of arms by the inhabitants of the occupied territory, for example, but they are not restricted to this aspect. In fact, they cover methods of war which have become common, so-called asymmetrical conditions of combat, where the balance of power is out of all proportion in favour of one of the Parties, whether or not the legal régime applicable to occupation is in force, accepted or contested, recognized or denied (see *O.R.* XIV, p. 324, CDDH/III/SR.33, para. 37; p. 339, CDDH/III/SR.34; p. 374, CDDH/III/SR.36, paras. 8-9; *O.R.* VI, p. 124, CDDH/SR.40, para. 28; p. 127, para. 44; pp. 132-133, paras. 75-76).

⁵¹ Report of the Rapporteur, *O.R.* XV, p. 401, CDDH/236/Rev.1, para. 84.

⁵² See *O.R.* VI, CDDH/SR.41, p. 146, para. 24 and p. 149, para. 43.

uprising) could be invoked⁵³. It cannot be overlooked, as it allows the combatants to distinguish themselves solely by carrying their arms openly. It seems to be accepted nowadays that a *levée en masse* can take place in any part of the territory which is not yet occupied, even when the rest of the country is occupied, or in an area where the Occupying Power has lost control over the administration of the territory and is attempting to regain it.⁵⁴ On the other hand, it does not seem conceivable with regard to a retreating enemy, as this is manifestly no longer an invading army.

1705 According to the traditional interpretation, it is not necessary for the population engaged in the *levée en masse* to be surprised by the invasion; the provision on the *levée en masse* is also to the advantage of a population which has been forewarned, provided that it has not had time to organize itself in accordance with the requirements laid down in Article 43 (*Armed forces*). This benefit is also accorded to a population acting on the orders of its government, for example, obeying orders given by radio or through the media. The requirement of carrying arms openly must probably be understood as an obligation to always carry them visibly.

b) *Conditions under which the combatant must carry his arms openly*

1706 This obligation to carry arms openly applies:

- “(a) during each military engagement; and
- (b) during such time as he [the combatant] is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”

1707 The possibility for the combatant referred to in this provision not to always distinguish himself from the civilian population by his clothing, as indicated above, is in his interests. The obligation to respect at least the minimum conditions now indicated, is in the interests of the civilian population. The Rapporteur expressed it very well:

“The purpose of this requirement is to identify the individual as a combatant. Implicitly, the rule requires that the combatant knows, or should know, that he is visible. The purpose of this rule, of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that),

⁵³ “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war” have the right to prisoner-of-war status in the event of capture (Third Convention, Article 4A(6)).

⁵⁴ See “Trial of Carl Bauer, Ernst Schrameck and Herbert Falten”, 8 *Law Reports*, p. 18; see also A. Rosas, *op. cit.*, pp. 377-378.

but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.”⁵⁵

1708 Sub-paragraph (a): The point about carrying arms openly during all military engagements is self-evident. It means that the arms must be carried openly during the battle itself, whether it is of an offensive or defensive nature. In fact, sub-paragraph (b) is usually concerned with offensive action where the combatant concerned takes the initiative, which is certainly not typical of all combat operations. It is even possible that a skirmish might continue during retreat, in which case a guerrilla combatant must incontestably carry his arms openly, particularly when he is surrounded by civilians in flight. While combatants take up a defensive position they must carry arms openly when intending to open fire. This does not exclude the possibility of an ambush, but an ambush is subject to the same conditions as those which apply to uniformed troops. It is the natural or artificial environment which should camouflage the combatant engaged in the ambush, and not his civilian clothing, and he should carry his arms in the same way as a soldier of the regular army would in the same situation.⁵⁶

1709 Sub-paragraph (b): As stated above, deployment usually means offensive action. However, there was a considerable difference of opinion during the Conference on its interpretation. The Rapporteur summarized these views as follows:

“Some delegations stated that they understood it as meaning any movement toward a place from which an attack was to be launched.⁵⁷ Other delegations stated that it included only a final movement to firing positions.⁵⁸ Several delegations stated that they understood it as covering only the moments immediately prior to attack”.⁵⁹

1710 For supporters of the first interpretation, deployment would have commenced when the person or persons concerned moved out from an assembly point or

⁵⁵ *O.R.* XV, pp. 402-403, CDDH/236/ Rev.1, para. 88.

⁵⁶ See, for example, *Reaffirmation*, “Conclusions and Recommendations of World Veterans Federation, 1967”, p. 072, para. 5(c) (Annex XIX).

⁵⁷ In this sense, see, in the plenary meetings, *O.R.* VI, p. 123, CDDH/SR.40, para. 23; p. 128, para. 53; p. 132, para. 74; p. 136, para. 2c; and p. 142, CDDH/SR.41, para. 6; p. 146, para. 24; p. 150, para. 46; p. 152, para. 53. When signing the Protocol on 12 December 1977, the United States and the United Kingdom made a declaration of understanding stating that the term “deployment” signifies “any movement towards a place from which an attack is to be launched”. On depositing its instruments of ratification on 15 January 1982, the Republic of Korea made the following declaration: “In relation to Article 44 of Protocol I, the situation described in the second sentence of para. 3 of the Article can exist only in occupied territory or in armed conflicts covered by para. 4 of Article 1, and the Government of the Republic of Korea will interpret the word ‘deployment’ in para. 3(b) of the Article as meaning ‘any movement towards a place from which an attack is to be launched’.”

⁵⁸ To some extent, see in this sense, in the plenary meetings, the statement that “military deployment meant the last step when the combatants were taking their firing positions just before the commencement of hostilities” (*O.R.* VI, p. 145, CDDH/SR.41, para. 21; see also *ibid.*, p. 146, para. 25).

⁵⁹ In this sense, see in the plenary meetings, *O.R.* VI, p. 147, CDDH/SR.41, para. 31. For the quotation from the Rapporteur’s Report, see *O.R.* XV, p. 453, CDDH/407/Rev.1, para. 20.

rendezvous, with the intention of advancing on their objective, and at that point, regardless of risks, arms must be carried openly;⁶⁰ the words meant “any uninterrupted tactical movement towards a place from which an attack was to be launched”,⁶¹ a movement in which combatants could not use their failure to distinguish themselves from civilians as an element of surprise in the attack.⁶²

1711 The question is important: there is more than a subtle difference between “any movement toward a place from which an attack is to be launched” and the “military deployment preceding the launching of an attack”,⁶³ “the last step when the combatants were taking their firing positions just before the commencement of hostilities”⁶⁴ and the deployment “immediately before the attack, often coinciding with the actual beginning of the attack”.⁶⁵ Now the violation of this provision entails the application of paragraph 4, which opens the way to sanctions.⁶⁶

1712 However, such military deployment is only subject to the rule on the open carrying of arms by a combatant taking part in it, “during such time as he is visible to the adversary”. This clause implies that the combatant knows or should know that he is visible to the adversary,⁶⁷ and failing this, the obligation does not apply.⁶⁸ One delegation which expressed its view on this matter in plenary meeting considered that the guerrilla combatant only has to carry his arms openly “when within range of the natural vision of his adversary”.⁶⁹ A representative of a national liberation movement added, “visible to the naked eye”,⁷⁰ which would exclude electronic means of surveillance and of observation. This interpretation is justified by the fact that it is mainly in cases when he can be seen directly,⁷¹ that a guerrilla fighter can open fire and that his adversary is immediately threatened. It is therefore at that moment that the distinction between an armed combatant and an innocuous civilian should be perfectly clear, if a confusion

⁶⁰ O.R. XV, p. 176, CDDH/III/SR. 56, para. 38.

⁶¹ *Ibid.*, p. 167, CDDH/III/SR.55, para. 64; M. Bothe, K. Ipsen and K.J. Partsch give the following version in German: “[...] während des dem Angriffsbeginn vorausgehenden Aufmarsches”, *op. cit.*, p. 34.

⁶² O.R. XV, p. 179, CDDH/III/SR.56, para. 53.

⁶³ *Ibid.*, p. 174, para. 29.

⁶⁴ *Cf. supra*, note 58.

⁶⁵ See O.R. VI, pp. 147-148, CDDH/SR.41, para. 31.

⁶⁶ One expedient for those who cannot agree with the interpretation of the United States and the United Kingdom would be to accept that in all cases arms must be carried openly, at least from the moment that they are loaded.

⁶⁷ Report of the Rapporteur, O.R. XV, p. 402, CDDH/236/Rev.1, para. 88.

⁶⁸ O.R. XV, p. 161, CDDH/III/SR.55, para. 37. As the guerrilla fighter does not normally have any appropriate detectors, it seems difficult to accept that this clause could include “any form of surveillance, electronic or otherwise, used to keep a member of the forces of an adversary under observation” (*ibid.*, p. 165, para. 55; see also, p. 157, para. 13; p. 176, CDDH/III/SR.56, para. 38). However, this seemed to be the view of some delegations.

⁶⁹ O.R. VI, p. 145, CDDH/SR.41, para. 21.

⁷⁰ *Ibid.*, p. 147, para. 31.

⁷¹ In fact, it seems reasonable to accept that this rule only covers light arms with a short firing range. Heavy arms (mortars etc.) are generally camouflaged, even when they are fired, particularly against aerial view, and it is their position, not their concealment, which could compromise the security of the civilian population.

between civilians and combatants is to be avoided; the Protocol would then fail to achieve its aim (Article 48 – *Basic rule*). It is also the acceptance by the guerrilla fighter of the risk of being recognized as a legitimate military target from this moment on that distinguishes him from a terrorist.⁷²

1713 On the other hand, the formula of the open carrying of arms and of deployment does not provide an adequate answer in cases where a combatant in civilian clothing uses arms which must not be prematurely revealed if they are to be effective, for example, a hidden device consisting of a bomb in a suitcase, and this fact was not overlooked.⁷³ However, in this respect the situation is not fundamentally different from that which applies to mines and booby-traps which are also used by regular forces. Thus it is only by wearing a distinguishing sign when placing these devices in position, that these combatants can be distinguished from the civilian population.⁷⁴

1714 *In conclusion*, the wording of the second sentence of paragraph 3 represents a compromise which was only achieved after long and patient negotiation. The Rapporteur made the following remark regarding the article as a whole, which applies particularly to this point:

“it represented a major development in the law to make it conform more closely to reality, while at the same time giving the guerrilla fighter an incentive to distinguish himself from the civilian population where he reasonably could be expected to do so”.⁷⁵

However, it is a fact that no delegation at the Conference finally got precisely the terms it wished, whether this was because of the lack of explicit mention of national liberation movements or occupied territory, which some would have wanted, or of guerrilla combatants, which others would have wanted. The interpretation of the term “deployment” remained the subject of divergent views. Although the rule does not specify exactly its scope of application with regard to specific situations, it does not exclude any particular situation once reality, and consequently humanity, requires that the rule applies. From the practical point of view, the fundamental interests of the civilian population and the concern of both Parties to the conflict not to alienate this population by conduct which could lead to most serious errors or the worst abuses, should dictate the most reasonable and consistent interpretation that is possible in any specific situation. Perhaps solutions can best be found in specific situations as the outcome of a sort of interaction, i.e., the search from both sides for an intermediate interpretation that is acceptable in practice. The obligation to carry arms openly during any deployment preceding the launching of an attack should in reality, in order to be effective, present itself as an equation offering, in the final analysis, comparable advantages to both Parties to the conflict.

⁷² See *O.R.* XIV, p. 328, CDDH/III/SR.33, para. 47.

⁷³ *O.R.* VI, CDDH/SR.40, p. 121, para. 17 and p. 124, para. 31.

⁷⁴ Cf. the remark of one delegation which stated that the term “arms” should mean any military arms of any sort whatsoever (*O.R.* XV, p. 161, CDDH/III/SR.55, para. 37).

⁷⁵ Report of the Rapporteur, *O.R.* XV, p. 454, CDDH/407/Rev.1, para. 21.

Third sentence – Saving clause against the unfounded accusation of perfidy

- 1715 There is a certain contradiction in the terms between the provisions of the first two sentences of this paragraph and the text of Article 37 (*Prohibition of perfidy*), paragraph 1(c). Amongst the examples of perfidy, this article cites the “feigning of civilian, non-combatant status”. The combatants referred to in Article 44 are not always obliged to reveal their status. Certain delegations therefore made their acceptance of the above-mentioned text of Article 37 (*Prohibition of perfidy*) subject to the insertion of this safeguard clause: acts which comply with the requirements laid down in this paragraph are not perfidious. However, it follows that those which do not comply with these requirements are, or may be, perfidious. Hence the fundamental importance of a consistent interpretation of the preceding rules by the Parties to the conflict. Moreover, in all cases where the captor considers that the provisions of this paragraph have been violated, it is up to him to furnish proof (Article 75 – *Fundamental guarantees*, paragraph 4(d)).⁷⁶

Paragraph 4 – Sanctions in case of violation of the requirements laid down in the second sentence of paragraph 3

- 1716 The introduction of this paragraph gave rise to some difficulties. Being concerned essentially with the protection of the civilian population, certain delegations simply wanted to deprive any combatants who do not comply with the minimum requirement of visibility laid down in paragraph 3 of their combatant and prisoner-of-war status. To this, other delegations replied that combatants without visible signs are not more indifferent of the civilian population than others, and that in these circumstances all combatants who do not respect the civilian population should be deprived of their status. In addition, representatives of national liberation movements claimed that members of these movements derive their status exclusively from Article 1 (*General principles and scope of application*), paragraph 4, and considered any other solution as discrimination against them.
- 1717 However, towards the end of the third session of the Conference, the text of paragraph 4 finally emerged from these opposing views,⁷⁷ which had for a long time seemed irreconcilable. According to the Rapporteur, it

“[...] was considered as the best basis for a compromise. It obtained a considerable degree of support. In essence, paragraph 4 provides a separate, but equal, status for combatants who are captured while failing to observe even the minimum rule of distinction set forth in the second sentence of paragraph 3. They are not to be prisoners of war (and under paragraph 3, they will have forfeited their combatant status), but they shall benefit from

⁷⁶ On this point, see also *infra*, ad Art. 45, p. 543.

⁷⁷ See particularly O.R. XIV, pp. 464-467, CDDH/III/SR. 33-36, paras. 4-16; p. 476, para. 5; pp. 476-477, para. 7; p. 481, para. 6; p. 500, para. 7; pp. 513-514, para. 5; p. 515, para. 2; p. 522, paras. 10-11; p. 536, para. 7; pp. 552-553, paras. 11-15.

procedural and substantive protections equivalent to those accorded prisoners of war by the Third Geneva Convention and Protocol I. Several representatives made the point that this paragraph is not, in any event, intended to protect terrorists who act clandestinely to attack the civilian population.”⁷⁸

- 1718** The first sentence contains the principle that the combatant who has violated the provisions of the second sentence of paragraph 3, loses his right to prisoner-of-war status, but preserves the right to be treated as one. The second sentence assures this prisoner the procedural guarantees laid down in the Third Convention in the event that he is tried and punished for any offences he may have committed.

First sentence – Loss of prisoner-of-war status and treatment as a prisoner of war

- 1719** This provision covers combatants whose membership of armed forces organized in accordance with Article 43 (*Armed forces*) is not in doubt, whether or not this problem of membership is resolved by reason of the presumptions established by Article 45 (*Protection of persons who have taken part in hostilities*), paragraph 1.⁷⁹ It applies to combatants captured *flagrante delicto*⁸⁰ of a breach of the second sentence of paragraph 3. Thus this could be a combatant who distinguishes himself from the civilian population solely by openly carrying his arms in a situation where the exception allowed in paragraph 3 does not apply, or a combatant whose exceptional situation is certainly recognized, but who does not carry his arms openly under the stated minimum requirements. The text is explicit: the combatant loses his right to be considered as a prisoner of war, but he is treated as a prisoner of war (“he shall nevertheless be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol”). In fact, if one refers to the wording of the second sentence of paragraph 3 (“[...] he shall retain his status as a combatant, provided that, in such situations, [...]”), it should be remembered that, above all, this person has lost his status as a combatant. Thus criminal prosecution becomes possible, even for hostile acts which would not be punishable in other circumstances. In other words, such a prisoner can be made subject to the provisions of the ordinary penal code of the Party to the conflict which has captured him. At least, this is the view of the majority of the delegations.⁸¹ However, one representative was less formalistic as he merely declared that “theoretically”, such a combatant no longer had the status of prisoner of

⁷⁸ O.R. XV, p. 403, CDDH/236/Rev.1, para. 90.

⁷⁹ See *infra*, p. 546.

⁸⁰ See *infra*, ad para. 5, p. 539.

⁸¹ See for the discussions of the Committee, O.R. XV, p. 157, CDDH/III/SR.55, para. 14; p. 159, para. 21; p. 165, para. 56; and p. 171, CDDH/III/SR.56, para. 14; p. 177, para. 45; p. 179, para. 55; p. 182, para. 68, and, for the plenary meetings, O.R. VI, p. 128, CDDH/SR.40, para. 52; p. 132, para. 74; and p. 146, CDDH/SR.41, para. 24; p. 151, para. 48, and p. 152, para. 53.

war.⁸² Whichever view one supports, criminal proceedings always remain available in the case of a breach of Article 37 (*Prohibition of perfidy*), i.e., in case the combatant in question would be accused of having killed or injured an adversary by resorting to perfidy.

Second sentence – Procedural guarantees in the event of penal proceedings

1720 This provision does not require a great deal of explanation. As a combatant captured while he was not complying with the requirements laid down in the second sentence of paragraph 3 is entitled to treatment as a prisoner of war, he is also entitled to all the guarantees laid down in the Third Convention regarding penal and disciplinary proceedings (Articles 82-108).⁸³ However, this also means that whenever the laws, regulations and other measures of general application in force for the armed forces of the Detaining Power do not recognize in a specific case the applicability of the rule for exceptional situations of paragraph 3, or the adversary's interpretation of it, penal proceedings can be instigated (Third Convention, Articles 82 and 85), provided that they apply equally, for a similar breach, to members of the armed forces of this Power (*ibid.*, Article 82, paragraph 2).⁸⁴ In fact, the latter is obliged to ensure compliance with the applicable law by its own troops, and in particular, to give all appropriate instructions in this respect to its military commanders (Article 87).

Paragraph 5 – Limitation of the applicability of the sanction laid down in paragraph 4 to combatants captured in the act

1721 The Rapporteur explains this provision as follows:

“Paragraph 5 is an important innovation developed within the Working Group. It would ensure that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack retains his rights as a combatant and a prisoner of war whether or not he may have violated in the past the rule of the second sentence of paragraph 3. This rule should, in many cases, cover the great majority of prisoners and will protect them from any efforts to find or to fabricate past histories to deprive them of their protection.”⁸⁵

⁸² O.R. VI, p. 153, CDDH/SR.41, para. 56. The representative of a national liberation movement, considered that the clause that such a combatant would receive the same protection as that accorded to prisoners of war by the Third Convention and the Protocol “[...] should not be regarded as a concession or a favour and that a member of a national liberation movement would be in exactly the same position as a regular combatant so far as these instruments were concerned” (O.R. XV, p. 184, CDDH/III/SR.56, para. 74), and that, consequently, such protection could not be reduced at the captor's will (O.R. VI, p. 148, CDDH/SR.41, para. 32).

⁸³ See *Commentary III*, pp. 406-505.

⁸⁴ With regard to compliance in general with the rules of international law applicable in armed conflict, see *supra*, ad paras. 1 and 2, p. 522.

⁸⁵ O.R. XV, p. 403, CDDH/236/Rev.1, para. 91.

Thus only a member of the armed forces captured in the act can be deprived of his status as a combatant and of his right to be a prisoner of war. For paragraph 4 to be applicable, it is necessary that the violation was committed at the time of capture or directly before the capture. The link in time between violation and capture must be so close as to permit those making the capture to take note of it themselves. Thus this is a case of *flagrante delicto*.⁸⁶ There is no doubt that this is, *mutatis mutandis*, analogous to the situation of the spy, and consequently there is some relationship with the concept of an unprivileged belligerent.⁸⁷ Like a spy, the combatant who does not carry his arms openly must be caught in the act for the sanction to be applicable to him. Similarly, like him, the combatant who is captured while he is not committing this breach, does not incur any responsibility for acts which he committed previously. However, it should be noted that in contrast to espionage, which is not prohibited by the law of armed conflict, but is merely made punishable, it is prohibited in the Protocol for a combatant not to carry his arms openly, and in principle the Protocol makes him responsible for this. However, in practical terms the adversary cannot do anything against him as a matter of criminal law unless he has surprised him *flagrante delicto* at the moment of capture. The prohibition exists, but the sanction can only be applied under this condition. A combatant who commits this breach preserves, at least temporarily, his status as a combatant, and his right to prisoner-of-war status. If he is captured while he is not committing this breach, he is a prisoner of war and punishment can only be meted out in accordance with paragraph 2.

⁸⁶ For a discussion of the problem in the context of the events of the Second World War and the breaches of the Hague Regulations, see J.-P. Maunoir, *op. cit.*, pp. 178-182.

⁸⁷ The concept of an unprivileged belligerent comes from a conflict of law which was peculiarly characteristic of the Hague system. Articles 1 and 2 of the Regulations clearly defined the conditions with which those who wish to participate in the hostilities should comply to be entitled to the status of belligerent and of prisoner of war in the event of capture. However, the Regulations did not prohibit the population of an invaded country from taking up arms against the occupying forces (see *supra*, *ad Art.* 43, p. 510). This resulted in a contradiction which was highlighted in Nuremberg in the Hostages' Trial. It was found that "just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerillas may render great services to their country and in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance." (8 *Law Reports*, p. 58, and W.J. Ford, *op. cit.*, December 1967, pp. 630-631). However, the use of the term "war criminal" by the Tribunal was unfortunate in that the persons referred to did not violate the laws of war as such and indeed, as pointed out, rendered their country a great service. They were thus rather "unprivileged belligerents" as they were denied the status of prisoner of war. Under the Protocol, this is still the case with regard to spies (Article 46), but the Diplomatic Conference wished to end the situation whereby guerrillas may be acting lawfully and even with the approval of the government and yet be denied prisoner-of-war status. Therefore the definition of combatant is now wide enough to cover all means of assuming a country's legitimate defence and consequently a Party to the conflict may no longer support combat tactics which do not comply with the criteria laid down in Articles 43 and 44.

Paragraph 6 – Without prejudice to Article 4 of the Third Convention

1722 According to the Rapporteur, this paragraph

“[...] is a savings clause designed to make clear that Article 42 is not intended to supplant Article 4 of the Third Geneva Convention of 1949 in cases where the latter would entitle a prisoner to prisoner-of-war status.”⁸⁸

In other words, Article 4, particularly its paragraph A(2), which refers to the four well-known conditions laid down in the Hague Regulations, remains in force and coexists with the rules of the Protocol, although Article 44 covers all situations with which a guerrilla fighter may be confronted. During the discussions of the Working Group, some delegations seemed to regret that this provision was not included in Article 43 (*Armed forces*). This concern appeared to spring from the question of *levée en masse*, as those taking part in it are combatants even when they do not comply with the conditions laid down in Article 43, particularly with regard to their organization. One might possibly conclude that although Article 44 does not deprive any of the categories laid down in Article 4 of the Third Convention of these persons' right to the status of prisoner of war, Article 43 (*Armed forces*), which does not contain the same savings clause, certainly has the effect of withholding recognition from the *levée en masse*. Thus there would be a contradiction on this point between these two articles of the Protocol. However, as nothing during the discussions could have given rise to the thought that the Conference had the intention of no longer recognizing the *levée en masse*, such an intention should not be presumed, and the rule of Article 4A(6) of the Third Convention has survived intact.⁸⁹ It would not actually seem very reasonable if the Conference should have intended to suppress this possibility of defence at a time when the risks of unexpected invasions of any territory, by whoever it may be, are greater than ever, as a result of air forces and airborne troops (also see *supra*, *ad* paragraph 3, second sentence, p. 532).

⁸⁸ O.R. XV, p. 403, CDDH/236/Rev.1, para. 92; this refers particularly to those categories listed under Article 4 of this Convention which are not covered by Article 44 under consideration here. However, according to some views at least, this provision can also cover the members of the armed forces under paragraph 1 of the said Article 4A, which would preserve their right to prisoner-of-war status, regardless of the violation they had committed, except for States which have made a reservation in this respect (Third Convention, Article 85).

⁸⁹ Article 32 of the Vienna Convention on the Law of Treaties states that recourse may be had to supplementary means of interpretation, including to the *travaux préparatoires*, when the interpretation in accordance with the general rule (Article 31 of the Convention) leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Moreover, one delegation explicitly stated that the definition of combatant given in Article 43 would also cover the *levée en masse*, and this claim did not give rise to any objection (O.R. XV, p. 161, CDDH/III/SR.55, para. 37). Moreover, the principle *ut res magis valeat quam pereat*, the “principle of efficacy”, could also be invoked.

Paragraph 7 – Confirmation of the practice concerning the wearing of a uniform by regular troops

- 1723 The general character of the heading of the Section “Combatant and prisoner-of-war status” and the wording of the article itself, which refrains from referring explicitly to national liberation movements and to resistance movements, led to some concern amongst some delegations. They felt that this might lead to the interpretation that the generally accepted practice of States concerning the wearing of a uniform by combatants belonging to regular armies might be put into question. This was not the intention of the Conference, as is clearly indicated in this paragraph. Thus nothing has changed on this point regarding the recognized practice of States: a combatant of the regular army who engages in hostile acts in civilian clothing, without being able to rely on the conditions described in the second sentence of paragraph 3, is open to the accusation of perfidy (*Article 37 – Prohibition of perfidy*, paragraph 1(c)).⁹⁰ This does not mean that a combatant of a regular army can never dispense with wearing a uniform while he is engaged in hostile acts. However, this possibility is open to him, as we have seen above,⁹¹ only in the same situations and under the same exceptional conditions as those which apply to members of guerrilla forces. Although not explicitly stated, this article is primarily aimed at guerrilla fighters.

Paragraph 8 – Extension of the benefits available under the First and Second Conventions to all combatants as defined in Article 43

- 1724 Article 13 of the First Convention and Article 13 of the Second Convention provide a list of categories of persons protected by these Conventions, which reproduce Article 4A of the Third Convention. This might lead to the fear that this list constitutes a *numerus clausus*, excluding all the categories of persons not included there from the scope of the First and Second Conventions.⁹² The present provision of paragraph 8, which declares that all members of the armed forces of a Party to the conflict, as defined in Article 43 (*Armed forces*), shall be entitled to the protection granted by the First and Second Conventions, removes any ambiguity. It is equally clear that such protection is due to all prisoners, whether or not they have the prisoner-of-war status at the time of capture.

J. de P.

⁹⁰ O.R. XV, p. 160, CDDH/III/SR.55, para. 28. During the First and Second World Wars combatants captured when they were not wearing uniform were considered as “francs-tireurs” and because of this did not have the right to prisoner-of-war status, even if they were members of the armed forces (See A.M. de Zayas, “Combatants”, in Bernhard (ed.), *op. cit.*, Instalment 3, 1982, p. 117). However, for pilots whose aircraft had been brought down, see *supra ad Art. 42*, note 36. The decisive element was found in Article 23(b) of the Hague Regulations.

⁹¹ *Supra ad para. 3*, second sentence, letter a), p. 529.

⁹² In fact, the list of persons belonging to the armed forces is only of theoretical value in the First and Second Conventions. It does not have an exhaustive character, as might be the case in the Third Convention, and was only included for the sake of precision (see *Commentary I*, p. 145).

Protocol I

Article 45 – Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.
2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held *in camera* in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.
3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Documentary references

Official Records

O.R. I, Part I, pp. 144-145. *O.R.* III, pp. 187-190. *O.R.* VI, p. 155, CDDH/SR.41, paras. 68-70; p. 189, *id.*, Annex (Israel). *O.R.* XIV, pp. 317-334, CDDH/III/SR.33; pp. 335-338, CDDH/III/SR.34, paras. 1-13 and 21-22; p. 344, para. 53; p. 346, para. 67; pp. 350-353, paras. 81-86, 88 and 93; pp. 356-360, CDDH/III/

SR.35, paras. 4, 7, 11, 14-15 and 18-19; p. 362, para. 25; p. 364, para. 37; pp. 366-367, paras. 45 and 51; p. 369, para. 63; p. 377, CDDH/III/SR.36, para. 16; p. 385, para. 45; pp. 472-473, CDDH/III/SR.33-36, Annex, paras. 5-7; pp. 484-486, paras. 1-11; pp. 488-489, paras. 7-11; p. 492, para. 15; p. 527, para. 9. *O.R.* XV, pp. 91-92, CDDH/III/SR.47, paras. 36-37; pp. 95-96, paras. 53-59; p. 98, para. 73; p. 103, CDDH/III/SR.48, para. 11; pp. 391-392, CDDH/236/Rev.1, paras. 47-52; p. 433, CDDH/III/338 (Art. 42 *bis*); p. 448, CDDH/407/Rev.1, para. 6.

Other references

CE/6b, pp. 52-53. *CE 1972, Basic Texts*, p. 15 (Art. 38, para. 3). *CE 1972, Report*, vol. I, p. 135, paras. 3.68-3.69 (Art. 38, para. 3); vol. II, pp. 53-54, *CE/COM III/C 12* and *C 15*; pp. 58-59, *CE/COM III/C 39-43*; pp. 59-60, *CE/COM III/C 48-54*; pp. 62-64, *CE/COM III/C 63*, *C 66* and *C 72*.

Commentary

General remarks

- 1725** A number of considerable political upheavals accompanied the military operations of the Second World War: occupations, armistices, reversals of alliances and the disappearance, exile and creation of a number of governments. This resulted in abnormal and confused situations, characterized by an inextricable tangle of legal relations under international law. Some national formations continued to take an active part in hostilities, while the adversary denied them the right to do so, refusing to consider them as regular combatants, but as *francs-tireurs*, i.e., as individuals participating in military operations of their own volition, without forming part of the armed forces.
- 1726** The ICRC, which expended a great deal of effort to guarantee these combatants a minimum degree of protection when they were captured by adversaries, proposed in 1949 to include a provision to this effect in the Third Convention. This is Article 5, paragraph 2, which provides that if there is any doubt regarding the status of prisoner of war for a person who has committed a belligerent act and who has fallen into enemy hands, such a person shall enjoy the protection of the Third Convention until his status has been determined by a competent tribunal. To this text, which was still rather imprecise and at an embryonic stage despite the undeniable progress which it represented in 1949, the Protocol adds Article 45, the article under consideration here, which marks an important development.
- 1727** According to some delegations, the adoption of Article 1 (*General principles and scope of application*), paragraph 4, and of Article 43 (*Armed forces*) and Article 44 (*Combatants and prisoners of war*) – which give legal recognition to combatants of guerrilla warfare, and to the methods of guerrilla warfare, had

brought to light the problems of resistance under alien occupation. Consequently the guarantees of Article 5, paragraph 2, of the Third Convention still appeared to be insufficient. They were insufficient because the 1949 authors had preferred it that way, not wanting to encourage a disproportionate increase in the number of categories of persons entitled to the status of prisoner of war, nor wanting to allow too much room for the inevitable disagreements regarding the qualifications for such status which would ensue.

1728 However, this concern, laudable though it was, could no longer stand in the way of the realities of modern warfare in 1976. Since the Conference wished to take into account the various categories of combatants which had appeared in the most recent conflicts,¹ it was therefore also necessary to establish procedures which were more likely to guarantee that this status would be granted them. If this were not done, this concession would have been a sham. Thus one representative did not hesitate to state that it was in order to save the humanitarian cause² that so many delegations had presented proposals relating to the protection of persons taking part in hostilities.³ The reason is quite simple: anyone who commits a hostile act without belonging to armed forces recognized by the adversary risks being punished severely by the latter, and may even be sentenced to death.⁴ It follows that the classification used by the “competent tribunal” of Article 5 of the Third Convention will act, in the words of one delegate, as “a finger of destiny for the prisoner concerned”,⁵ whose conduct will be interpreted not in terms of his own concepts, but in terms of those of his enemy.⁶

1729 Paragraph 1 relates to the status of prisoner of war at the time of capture. Paragraph 2 deals with legal proceedings which may in due course be instituted if a captured person is not detained as a prisoner of war. Paragraph 3 guarantees

¹ Cf. *O.R.* XIV, p. 475, CDDH/III/SR.33-36, Annex, para. 1.

² *Ibid.*, p. 486, para. 11; it was obviously a case of finding a way of overcoming the differences of opinion and the uncertainty to which Article 44 could give rise in its application (in this sense, see *O.R.* XIV, p. 527, CDDH/III/SR.33-36, Annex, para. 9).

³ This concerned, more in particular, the amendment CDDH/III/260, and Add.1, presented by sixteen delegations which, in its entirety, lies at the root of this article (*O.R.* III, p. 200). Another amendment (CDDH/III/256) provided in particular that non-fulfilment of the conditions provided for in Art. 43, para. 1, first sentence, “may only be presumed if it has become clear from declarations or instructions emanating from the responsible command of an irregular force or from declarations of its members that the force is not willing or able to respect the rules and principles of international law applicable in armed conflict” (*O.R.* III, p. 183); yet another amendment (CDDH/III/82) provided that combatants who are not covered by the Protocol shall “be afforded guarantees not less favourable than those laid down in Article 3, common to the Conventions” (*O.R.* III, p. 180).

⁴ Cf., for example, Art. 88 of the Swiss Military Penal Code. In fact, during the course of the Second World War, many of these partisans who were captured were shot without any formalities; see W. Schätzel, “Le franc-tireur capturé a-t-il droit à un jugement régulier?”, 17 *Revue internationale française du droit des gens*, 1948, pp. 18-19.

⁵ *O.R.* XIV, p. 485, CDDH/III/SR.33-36, Annex, para. 5.

⁶ On this problem, see the work of P. Boissier, *L'épée et la balance*, Geneva, 1953, in particular pp. 65-96, and also *infra*, note 38.

protection under Article 75 (*Fundamental guarantees*) to any person who does not have the right to the status of prisoner of war.⁷

Paragraph 1 – The status of prisoner of war at the time of capture

- 1730** Contrary to Article 5, paragraph 2, of the Third Convention, which provides only for cases in which there is doubt (though it is often claimed that doubt exists only in the mind of the captor), this paragraph lists the cases where doubt regarding the status of the combatant concerned must give way to a presumption of prisoner-of-war status. If nevertheless the doubt still exists, the rule is the same as that of Article 5 quoted above, although the burden of proof falls upon the captor.

First sentence – Cases where a presumption of prisoner-of-war status applies

- 1731** As a general rule, members of the armed forces distinguish themselves by wearing a uniform (Article 44 – *Combatants and prisoners of war*, paragraph 7).⁸ Article 17 of the Third Convention also urges every Party to a conflict to provide any person under its jurisdiction who could become a prisoner of war, with an identity card.⁹ When these rules are complied with, and there is no argument regarding the status of the armed forces observing them, the problem of the status of prisoner of war is automatically resolved.
- 1732** The same does not apply to guerrilla fighters who lack such forms of evidence, either partly or wholly, for reasons which actually characterize guerrilla warfare. To put upon a guerrilla fighter the burden of proof at the moment of capture might be tantamount to taking away with one hand the benefits given with the other in Article 44 (*Combatants and prisoners of war*). Therefore, the provision under consideration here distinguishes various circumstances, and provides for three cases. However, before examining these three cases, it would be appropriate to fully understand the problems which must ultimately be resolved. The combatant of Article 43 (*Armed forces*) is not necessarily captured while taking part in a military operation, a situation in which he must distinguish himself from the civilian population, at least during the engagement itself and during a period preceding the engagement.¹⁰ It is perfectly possible, in the context of Article 44 (*Combatants and prisoners of war*) for him to fall into the power of the adversary while he is going about his normal everyday civilian activities, and at this time nothing would distinguish him from any other civilian. If the person

⁷ There is an excellent exposé of the origin of this provision in an article by G. Genot, a member of the Belgian delegation at the Conference, "Quelques garanties nouvelles offertes au combattant capturé", 13 *RBDI*, Nos. 1-2, 1977, pp. 298-313.

⁸ On this point, see also *supra* ad Art. 39, para. 2, p. 465.

⁹ Such identity cards do not in any way establish a person's status as a member of the armed forces, but simply represent a piece of evidence.

¹⁰ See commentary Art. 44, para. 3, *supra*, pp. 527 and 533.

concerned is actually a member of the armed forces in the sense of Article 43 (*Armed forces*), he is undeniably entitled to prisoner-of-war status, regardless of his previous activities (Article 44 – *Combatants and prisoners of war*, paragraph 5). Conversely he may also fall into the power of the adversary while he is engaged in a military operation preceding an attack; in other words, while he is armed, but at a stage where he is not necessarily obliged to carry his arms openly or to display a distinguishing sign. In this case his status as a prisoner of war cannot be denied either, if he is a member of the armed forces of a Party to the conflict. Finally, it is self-evident that such a combatant could also be captured during the military engagement itself, whether the attack is directed against a military objective or not. He is entitled to the status of prisoner of war under all circumstances, whatever the cause (Article 44 – *Combatants and prisoners of war*, paragraph 2), with the sole proviso that he has a distinctive sign or that he carries his arms openly (Article 44 – *Combatants and prisoners of war*, paragraph 3, second sentence, and paragraph 4).

1733 In other words, the capture can occur in conditions when the captor has no way of finding out whether or not the person concerned is a prisoner of war, or perhaps in circumstances which give him some indication, but no proof on this point. This provision has therefore introduced a system of legal presumptions in favour of the prisoner. If the captor wants to contest such a presumption, it is up to him to present evidence that the person concerned is not a prisoner of war (this procedure is dealt with in the second sentence of this paragraph). In fact, as has been remarked, it would be unthinkable to require a prisoner, for example, in a case of urban resistance, to reveal the name of his commanding officer, and then the whole hierarchy of the organization to which he belongs, simply in order to furnish proof that he is entitled to the status of prisoner of war.¹¹ Thus there will be a legal presumption in favour of the prisoner:

a) *If he claims prisoner-of-war status*

1734 A simple statement of claim suffices. Taking into account the situations which may arise, not only in guerrilla warfare,¹² but also in other circumstances mentioned above, this condition finally appeared to be the simplest and most secure, although some feared that this would leave the door wide open to common law criminals. One delegate to the Conference showed that if it is certain that the person concerned cannot belong to armed forces organized in accordance with Article 43 (*Armed forces*) – possibly because such forces do not exist in the

¹¹ O.R. XIV, p. 492, CDDH/III/SR.33-36, Annex, para. 15. To save oneself and sacrifice the others, or to sacrifice oneself and save the others is a dilemma in which many resistance fighters found themselves.

¹² The rule can also gain significance in other situations; for example, an escaped prisoner of war in civilian clothes who has been recaptured, a pilot whose aircraft has been brought down and who is wearing a flying suit similar to civilian dress, shipwrecked persons, civilians authorized to accompany the armed forces who have lost their identity card. What about the many civilians who are employed on large military bases and who live there, sometimes with their whole family? The problem does not yet seem to have been resolved, but warrants a solution.

captor's view – the claim would be inoperative.¹³ However, it is quite possible that the individual who has been captured abstains from claiming prisoner-of-war status for fear of betraying the organization to which he belongs, or even because he is wounded to such an extent that he is no longer able to express himself. In this case he should receive the care required for his condition. If the person concerned remains silent of his own accord regarding his right to prisoner-of-war status, he may be classified under the category of civilians, although this is not necessarily the case. In practical terms, the solution may depend on the conditions listed below under b) and c). Moreover, though it is conceivable that a prisoner might forego exercising his right to prisoner-of-war status, he cannot renounce the right as such, as this is an inalienable right in accordance with Article 7 of the Third Convention. The Conference certainly did not intend to make any proposal constituting a derogation from this provision.¹⁴ The principle of legal parity between members of so-called “regular” armed forces and other members of the armed forces of a Party to the conflict is thus integrally respected.

b) *If he appears to be entitled to the status of prisoner of war*

1735 A soldier in uniform who is captured on the battlefield, whether he is able-bodied or *hors de combat*, whether or not he is able to give his name and other personal details, is automatically considered as a prisoner of war. The provision under consideration here extends this rule to all combatants of armed forces organized in accordance with Article 43 (*Armed forces*). The open carrying of arms during combat, or a visible distinguishing sign, can take the place of a uniform. If capture takes place outside the combat situation, an appropriate identification document is sufficient to indicate the position of its holder and his right to the status of prisoner of war. If such a document, distinguishing sign and arms are lacking, being present at a place which is a characteristic or important military objective (command post, fortified position) or the discovery of a muster-roll which includes the names of those concerned, or orders, plans of a military character which they are carrying, must lead to the same conclusion. In all such situations and in analogous situations, doubt is in principle excluded, whether or not the person concerned claims prisoner-of-war status, and there is no need to resort to Article 5, paragraph 2, of the Third Convention or to the rule expressed in the second sentence of this paragraph.¹⁵ It is normally up to the commanding

¹³ O.R. VI, p. 189, CDDH/III/SR.41.

¹⁴ O.R. XV, p. 433, CDDH/III/338.

¹⁵ In practice, it is above all since the Algerian conflict that combatants captured while carrying weapons in their hands (known in France as “PAM”, for “*pris les armes à la main*”) were considered as prisoners of war. However, in Malaysia and Kenya the British gave similar treatment only to guerrilla fighters who voluntarily surrendered. In Viet Nam from 1965 the United States granted not only the treatment, but also the status of prisoner of war to combatants of the NLF (National Liberation Front) captured while carrying weapons in their hands. The same applied to all those for whom there was any evidence to show that they belonged to a military unit, even a secret one, and who had taken part in an act of war of any nature, including propaganda or protection missions etc., whether these were full-time or part-time activities (see M. Veuthey, *Guérilla et droit humanitaire*, op. cit., pp. 226-232 and in note 195 on p. 231 the relevant official sources).

officer at the place where the capture takes place to determine the facts and to draw the necessary conclusions.

- 1736 However, if doubt still prevails – for example, because of the absence of a distinguishing sign, in a situation where the members of guerrilla groups generally wear one, a breach of the obligation to carry arms openly, contradictory statements, suspicion of espionage or mercenary activities etc. – the person concerned is nevertheless treated as a prisoner of war (Third Convention, Article 5, paragraph 2; see also the second sentence of this paragraph). However, the commanding officer at the place of capture must take care that all scraps of evidence available at the time are gathered together and are not lost, whichever way they point. If necessary, he should be able to call in security services which are in a position to assist him.¹⁶
- 1737 But it is also possible that there is no doubt, in the sense that it is certain that the person who has been apprehended did not participate in hostilities. In this case, this provision does not apply.¹⁷ On the other hand, in all cases where it would seem that the person apprehended is a civilian who has participated in hostilities, the second sentence of this provision applies.
- 1738 It should also be remembered that under the terms of Article 44 (*Combatants and prisoners of war*), paragraph 2, the violation of the rules applicable in the case of armed conflict does not deprive a combatant of his right to be a prisoner of war.¹⁸

c) *If the Party on which the person concerned depends claims the status of prisoner of war on his behalf*

- 1739 The subordination of the person concerned to a force organized in accordance with the provisions of the Protocol is a fundamental and unconditional requirement of the status of combatant, as we saw in the analysis of Article 43 (*Armed forces*). There is no question of granting this status to an isolated person carrying on an individual fight.
- 1740 Thus it might seem surprising at first sight that a claim made by the Party on which the person concerned depends, whether this is by means of a notification to the Power detaining him or to the Protecting Power, is not the primary consideration. In fact, some delegations considered that it would be far more

¹⁶ It is essential that such services, sometimes consisting of military police units, and which are often granted an authority similar to that of the commanding officer at the place of capture, have a thorough knowledge of the applicable rules, i.e., the appropriate rules of the Geneva Conventions and the Protocol.

¹⁷ Obviously this does not exclude the granting of the status of prisoner of war when there is occasion for this, for example, by the application of Article 4A(4) and (5) of the Third Convention, or Article 67, paragraph 2, of this Protocol. As regards medical and religious personnel, see the Third Convention, Article 4C and Article 33. In other cases the person is a civilian who will be simply released or considered as a civilian internee (Fourth Convention, Art. 78).

¹⁸ The same applies, even if there may have been a conviction, in accordance with Article 85 of the Third Convention, except for those countries which have made a reservation on this point (see *supra ad Art. 44*, note 19).

important than a statement by the prisoner himself. However, it is a fact that such notification can take some time, that it is not always possible, and that the Protecting Power, if it exists, is not always available where and when it is required. There was also a fear that a Party to a conflict would claim or would abstain from claiming the status of prisoner of war for one of its nationals for opportunist reasons. All in all, it appeared that the best guarantee lay in the prisoner's own statement, but it is self-evident that confirmation by the Party on which he depends may be decisive in cases of doubt.¹⁹

- 1741 *In conclusion*, the Conference wished to take into account the fact that it is at the moment of capture that prisoners are exposed to the gravest danger. Prisoners suffer on the way from the place of capture to the camps, or they suffer as a result of decisions taken there and then with regard to their status: the price paid by prisoners has always been heavy and the Third Convention endeavoured to remedy this situation.²⁰ This provision takes an additional step forward in eliminating in the great majority of cases the possibility of a fatal doubt, and its consequences in criminal law; it achieves this by means of a system of presumptions which operate automatically in favour of the prisoner. In these various cases the question must be considered to have been definitively solved; the person concerned is entitled to the status of prisoner of war.²¹
- 1742 If any doubtful cases remain, these are dealt with in the second sentence of this paragraph and in paragraph 2 in case criminal law proceedings are involved.

Second sentence – Prisoners whose status is in doubt at the time of capture

- 1743 Despite the precautions taken by the drafters of this article, and all the presumptions which were outlined above, it is clear that cases of doubt may occur at the time of capture. There may be doubt regarding the individual capacity of the person concerned to be granted the status of prisoner of war, as well as regarding the status of the armed forces to which he belongs, or claims to belong, which should be organized in accordance with Article 43 (*Armed forces*). However, one thing is certain, and on this point the provision is quite clear: all persons who are captured and who are not considered either as prisoners of war or as civilians who have not participated in the hostilities, are treated there and then as prisoners of war until such time as their status has been determined by a competent tribunal.

¹⁹ Provided of course that the doubt does not relate to either the legitimacy of the Party to the conflict which makes the claim (see *supra ad* Art. 43, p. 507), or to the armed forces of this Party being subject to an internal disciplinary system which ensures that the rules of international law applicable in the case of armed conflict are complied with (Art. 43, para. 1, second sentence). If there are such doubts, a claim by such a Party or quasi-Party to the conflict could do more harm than good. Moreover, the possibility is not excluded that the prisoner might rightly or wrongly contest the claim presented in this way.

²⁰ See *Commentary III*, pp. 155 ff., in particular, pp. 173-174.

²¹ For the conflict in Viet Nam, where similar rules were applied, see "Contemporary Practice of the United States Relating to International Law", 62 *AJIL*, 1968, p. 767.

- 1744 In certain cases, as we have seen, elements required for a legal presumption on the status of prisoner of war may be lacking: communications from the Party to the conflict on which the person concerned depends may be missing or may be delayed,²² lack of factual evidence, the silence or denials of the person concerned, whose attitude may be contradicted by the facts or by statements of his comrades,²³ suspicion without conclusive evidence of espionage or mercenary activity or sabotage, etc. – in other words, the doubt may concern the presumption itself.
- 1745 Independently of these uncertainties on an individual level, there is also uncertainty at a collective level. A combatant does not lose his right to the status of prisoner of war in case of capture for breaches of the law of armed conflict which he may have committed (Article 44 – *Combatants and prisoners of war*, paragraph 2). However, the organization or armed forces to which he belongs are subject to the rules of that law without restriction (Article 43 – *Armed forces*, paragraph 1, second sentence). His own disqualification for the status of combatant and of prisoner of war depends on the possible disqualification of the armed forces to which he belongs.²⁴ This point has never been doubted, even if individually the member of the said organization or armed force complies with the conditions which he is capable of fulfilling.²⁵ However, it is also necessary to establish both that the organization or armed force concerned does not submit to the rules applicable in armed conflict, and that the prisoner concerned effectively belongs to that organization or force. Therefore a “competent tribunal” is, under the terms of this provision, called upon in all these cases to determine the status of the person who has been captured. This rule is more or less based on Article 5, paragraph 2, of the Third Convention²⁶ and the question which arises is

²² Cf., for the Second World War, the declaration of General Eisenhower of 15 July 1944, whereby he recognized the French Forces of the Interior, and took them under his command (see L. Nurick and R. Barnett, “Legality of Guerilla Forces Under the Laws of War”, 40 *AJIL*, 1946, p. 581).

²³ It should be noted that since the person concerned should be treated as a prisoner of war, even in cases of doubt, no form of coercion may be inflicted to secure information (Third Convention, Art. 17, paragraph 4).

²⁴ In this respect the following case was mentioned, namely, where it has become clear from statements or instructions emanating from the responsible command of the irregular force or from statements of its members, that the force is not willing or able to respect in its operations the rules and principles of international law applicable in armed conflict (*O.R.* XIV, p. 473, CDDH/III/SR.33-36, Annex, para. 7 and *supra* note 3). However, the same representative considered that too easily evidence to the contrary might be concluded by following an inductive reasoning, that since some members of the force (how many? two, five, twenty?) have violated one or more rules of international law applicable in armed conflict, this can be attributed to the whole irregular force as its general policy, even if one has no idea about the actual size of the force (*ibid.*, para. 6). However, also see *supra*, note 3, and *ad* Art. 43, para. 1, in particular p. 513.

²⁵ *Commentary Drafts*, p. 52 and *supra*, *ad* Art. 44, para. 1, p. 523.

²⁶ This article of the Third Convention represents an important step forward, but not because persons who have committed a belligerent act without belonging to any of the categories listed in Article 4 of the Third Convention thereby escape sanctions. Recognized as civilians by the “competent tribunal”, they henceforth fall under the Fourth Convention, and in fact Article 68 does not exclude sanctions and even capital punishment for illegal participation in hostilities. Furthermore it is self-evident, as shown above, that this “competent tribunal” will be all too likely
(continued on next page)

obviously that of knowing what is meant by a “competent tribunal”. This problem had already arisen for the drafters of Article 5 of the Third Convention, who had successively suggested a “responsible authority” or a “military tribunal”. The latter solution was finally rejected as it might lead to the most serious consequences for anyone brought before such a tribunal (a court martial), in wartime and virtually on the battlefield. The consequences would be tantamount to simply depriving him of all benefits afforded by the Third Convention.²⁷ The drafters finally agreed upon the expression “competent tribunal”,²⁸ and the Rapporteur indicated in his report that “as in the case of Article 5, such a tribunal may be administrative in nature”,²⁹ which includes, in particular, military commissions.³⁰ The importance of setting up such tribunals in good time cannot be overemphasized, particularly in the case of confrontations with guerrilla fighters. However, during the course of the debates it was stated that such a tribunal should be able to draw up some guidelines, even if these are primarily related to the actual circumstances and features of the particular armed conflict.³¹ It was also remarked that guarantees should be furnished regarding its competence, its composition and its procedures,³² and that it should be impartial and effective.³³ This is a great deal to ask, so close to the frontline.³⁴ Therefore the Conference finally stipulated that each time a prisoner who is not detained as a prisoner of war is to be judged for an offence related to the hostilities,³⁵ the intervention of a judiciary tribunal is required, even for deciding the status of the person concerned, if need be, as we shall see in the analysis of paragraph 2.

to consider the facts from its own point of view and to interpret the rules in accordance with its own ideas, even though Article 4 of the Third Convention is clearer in its wording than some of the text of Article 44 of the Protocol. However, at least all captives are given the assurance that their case will be examined, that the real position of those who have not in fact committed any belligerent act will be recognized, and that they will not be executed without a tribunal set up according to the rules (Fourth Convention, Art. 66) has had a chance to judge the case.

²⁷ See *Commentary III*, p. 77.

²⁸ Experience of the Second World War had shown that decisions regarding the right of a captive to benefit or not from the protection of the Convention Relative to the Treatment of Prisoners of War had sometimes simply been taken by non-commissioned officers, particularly corporals. See J.-P. Maunoir, *op. cit.*, p. 191.

²⁹ O.R. XV, p. 392, CDDH/236/Rev.1, para. 48. In the conflict in Viet Nam the United States delegated this task of the classification of captives to tribunals consisting of three officers. In general it is considered that those who pronounce judgment on the conduct of members of the armed forces should be qualified, and, for example, that only officers of at least equal rank can judge the conduct of an enemy commanding officer (*cf.*, for example, the guarantees of Art. 102 of the Third Convention) and that the participation of at least one officer trained in law is essential (*cf.* W.H. Parks, “The Law of War Adviser”, 31 *The JAG Journal*, No. 1, Summer, 1980, p. 14).

³⁰ For examples, see M. Greenspan, *op. cit.*, p. 505, and 4 *Law Reports*, pp. 38 ff.

³¹ O.R. XIV, p. 472, CDDH/III/SR.33-36, Annex, para. 5.

³² *Ibid.*, p. 484, para. 4.

³³ *Ibid.*, p. 488, para. 11; p. 362, CDDH/III/SR.35, para. 25; and p. 350, CDDH/III/SR.34, para. 82.

³⁴ For this reason, for example, a requirement allowing the Protecting Power to be present at the deliberations was considered to be impossible.

³⁵ Unlike a civilian, a prisoner of war is obviously not liable for any sanctions for his participation in hostilities. In the case of violations committed before his capture, the judicial guarantees of the Third Convention, Arts. 82 ff., are assured.

- 1746 *In conclusion*, it is obvious that in the present paragraph the authors of the Protocol intended to reduce to a minimum those cases in which a captor could arbitrarily deny the status of prisoner of war to a person who had been apprehended. To this purpose they introduced a complete set of legal presumptions which automatically operate in favour of persons who have been captured. By means of this system they have therefore reversed the burden of proof by putting it on a “competent tribunal”, in contrast with Article 5 of the Third Convention. It is up to this tribunal to furnish proof to the contrary every time that the presumption exists and it wishes to contest it. This will often be difficult, not least when it is a question of proving that the person who has been apprehended does not belong to the armed forces on which he is deemed to depend.³⁶
- 1747 However, the captor can also cast doubt by referring directly to Article 43 (*Armed forces*) and by alleging that the armed forces of the adverse Party may not qualify as such.³⁷ This problem was not resolved by the presumptions of this provision.
- 1748 Finally, without casting any doubt on the status of the armed forces of the adverse Party and the membership of the person concerned of these armed forces, the captor might have his own ideas regarding the way in which Articles 43 (*Armed forces*), 44 (*Combatants and prisoners of war*), paragraph 3, 46 (*Spies*), and 47 (*Mercenaries*) should be interpreted. Some did not fail to point out this danger,³⁸ which is all the more real as unrestrained guerrilla operations can imperil the whole regime of occupation introduced in the Fourth Convention.
- 1749 As regards the commander in the field, he has no alternative but to either release the captive (for example, if he considers that the latter is obviously a civilian and in no way implicated in any hostile act) or to treat him as a prisoner

³⁶ This is a case of proving that something has not happened (*probatio diabolica*), which, in the large majority of cases, has proved to be impossible (see J.- P. Maunoir, *op. cit.*, in particular p. 440).

³⁷ Without referring to the problem that may arise about the status of the Party to the conflict itself, for example, when this is a contested national liberation movement. Also see *supra*, note 19, and Y. Sandoz, “La place des Protocoles additionnels aux Conventions de Genève du 12 août 1949 dans le droit humanitaire”, *Revue des droits de l’homme*, 1978, pp. 138 ff.

³⁸ “While the policy of Protocol I represents a broad international consensus, its administration is substantially national in many important respects. Thus the criteria of articles 1, 43, 44, 46 and 47 are to be interpreted and applied in practice by the enemy power that has captured the individual who claims privileged combatant status. The temptation to indulge in idiosyncratic national interpretations exists during peacetime. In time of international conflict, immediate military advantage, or national misperceptions concerning it, can lead to interpretations that would substantially frustrate the policy of Protocol I. An enlightened and aroused world public opinion, however, can promote the achievement of human rights by making an impact on national decision makers even in wartime. In the same way, public opinion can compel states-parties to the Protocol ‘to respect and to ensure respect for this Protocol in all circumstances’. An effective sanctioning process, like the multilateral law-making process in Geneva from 1974-1977, is dependent upon the identification and implementation of common values, not upon common ideologies.” (W.T. Mallison and S.V. Mallison, *op. cit.*, p. 31).

The consensus procedure can justifiably be reproached for sometimes resulting in flexible texts which permit very different interpretations. However, it should also be taken into account that those who are involved in armed conflict are very often those who do not share the same ideas, and that texts adopted by majority vote would be even less helpful.

of war. In this case the captive is not in principle released until the end of the hostilities.

Paragraph 2 – The conditions under which a person who is not held as a prisoner of war can be tried

1750 Under the system of the 1949 Conventions, when a person has been classified as a civilian by the “competent tribunal” (which, it should be remembered, may be an administrative authority) of Article 5, paragraph 2, of the Third Convention, he falls under the protection of the Fourth Convention. However, if he has committed hostile acts, he may become liable to proceedings or even serious sanctions on the basis of Article 68 of this Convention.³⁹ This only guarantees the person concerned trial by a military, non-political tribunal that is properly constituted (Article 66), in accordance with general principles of law (Article 67), in the course of a regular procedure (Articles 71-75), with the right of attendance of the Protecting Power, apart from exceptional cases (Article 74).⁴⁰ If the person concerned has indeed committed hostile acts, the determination made by the “competent tribunal” continues to determine his fate, as stated above. It is with regard to this point that the paragraph under consideration here radically modifies the system established in 1949.

First sentence – The right of the accused to assert his entitlement to prisoner-of-war status

1751 If the prisoner-of-war status of the person concerned, and consequently his combatant status, have not or have not yet been established, he runs a double risk:

- a) to be accused of acts which are not necessarily offences (in the case of simply participating in the hostilities);
- b) to be deprived of the procedural guarantees to which prisoners of war are entitled, even when the acts of which he is accused are punishable.⁴¹

Thus it becomes essential for the accused to have the opportunity to assert his entitlement to prisoner-of-war status under such condition as will provide all generally recognized guarantees as to proper judiciary procedures. It would

³⁹ Article 70 of the Fourth Convention provides that protected persons may be prosecuted or convicted for breaches of the laws and customs of war.

⁴⁰ Since before 1949 the spy and the prisoner of war who have been liberated on parole and later have taken up arms in contravention of their word can only be punished by tribunals, according to international law (Hague Regulations, Arts. 12 and 30). This did not apply to civilians who had illegally participated in hostilities to the extent that in Nuremberg the guilt for absence of judicial procedure was not retained in this case (W. Schätzel, *op. cit.*, p. 19).

⁴¹ This preoccupation was already included in Article 42, paragraph 2 of the draft submitted by the ICRC: “Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by the Third Convention and, even if sentenced, retain the status of prisoner of war.”

undoubtedly have been easier, in theory, to provide for such guarantees right at the first stage, when the status of prisoners is determined by the “competent tribunal”. However, as we have seen, it did not seem feasible to burden a tribunal called upon to intervene on the battlefield with such a difficult task.

1752 However, as the Rapporteur of Committee III indicated, it is a fact that this provision establishes

“a new procedural right [...] for persons who are not considered prisoners of war and who are to be tried for a criminal offense arising out of the hostilities. Such persons are given the right to assert their entitlement to prisoner-of-war status and to have that question adjudicated *de novo* by a judicial tribunal, without regard to any decision reached pursuant to paragraph 1. [...] The judicial tribunal may be either the same one that tries the offence or another one. It may be either a civilian or military tribunal, the term ‘judicial’ meaning merely a criminal tribunal offering the normal guarantees of judicial procedure.”⁴²

1753 In the first instance, the tribunal called upon to decide the prisoner-of-war status of the accused may be either a civilian or a military tribunal. However, it seems quite logical to admit that from the moment that the prisoner-of-war status is recognized vis-à-vis the person concerned, Articles 84 and 102 of the Third Convention apply if the accusation is maintained. This means that strictly speaking the prisoner of war can only be tried by a military tribunal acting according to procedures which guarantee him the rights and means of defence provided for by the Third Convention. Moreover, the composition of the tribunal and the procedure must be the same as for members of the armed forces of the Detaining Power.⁴³ Finally, the fundamental guarantees laid down in paragraphs 4, 7 and 8 of Article 75 (*Fundamental guarantees*) must be fulfilled. To deprive a prisoner of war of his right to be tried correctly and impartially constitutes a grave breach of both the Third Convention and the Protocol (Article 85 – *Repression of breaches of this Protocol*, paragraph 4(e)).

1754 However, there is no guarantee that it will be possible to determine the prisoner-of-war status of the person concerned before the judgment is taken on the offence of which he is accused, as evidenced by the second sentence of this paragraph. As we saw in the analysis of paragraph 1, the offence for which he is charged may depend on factual evidence which may be interpreted in the light of national legislation (Third Convention – Article 85; Fourth Convention, Article 64) which must conform with the applicable international rule. If the national legislation merely transcribes the international rule, the tribunal should apply the

⁴² O.R. XV, p. 433, CDDH/III/338. At this stage administrative authorities, military or other commissions were therefore excluded (see *supra*, note 29).

⁴³ As a general rule codes of military justice provide that the composition of a tribunal depends on the rank of the accused (see for examples, the French Military Code of Justice, J.-P. Maunoir, *op. cit.*, pp. 159-161 and on the controversies which resulted from these problems after the Second World War, not only in France but also in the United States, *ibid.*, pp. 162-173).

latter.⁴⁴ It is no less true that the entitlement to prisoner-of-war status of the accused may depend not only on facts, for example, the submission of a list, but also on the interpretation given to the rules of the Protocol by the Detaining Power, whether this concerns Articles 43 (*Armed forces*) and 44 (*Combatants and prisoners of war*), or even Article 1 (*General principles and scope of application*), paragraph 4. Thus a formidable barrier may present itself to the accused, if the respective interpretations of the Parties to the conflict diverge too widely. However, the fact remains that the tribunal called upon to determine the status must be a judicial tribunal providing all the requisite guarantees,⁴⁵ whether these are pursuant to the Third or the Fourth Convention and, otherwise, pursuant to Article 75 (*Fundamental guarantees*).

Second sentence – The preliminary nature of the procedure to determine status

- 1755 There is no doubt that in principle it is preferable to determine the status of the accused with regard to the protection of the Third Convention, i.e., to make a decision regarding his status as a combatant and prisoner of war, before deciding on the merits of the case. In the case of an affirmative finding, the charges will automatically lapse if the person concerned is simply being tried for participation in the hostilities. If the accusation is related to a violation of the rules governing the conduct of hostilities, the status of prisoner of war guarantees the accused the benefit of all procedural provisions laid down in the Third Convention. However, the Rapporteur stated:

“In view of the great differences in national judicial procedures, it was not thought possible to establish a firm rule that this question must be decided before the trial for the offense, but it should be so decided if at all possible, because on it depend the whole array of procedural protections accorded to prisoners of war by the Third Convention, and the issue may go to the jurisdiction of the tribunal.”⁴⁶

⁴⁴ However, the tribunal is not entirely free, for it seems to be agreed that it must conform with the official interpretation of the government whenever treaty provisions in dispute are concerned with questions of international public order (see the joint session of the Chambers of the French *Cour de Cassation*, cited by J.-P. Maunoir, *op. cit.*, p. 170). On the general problem of the concept of direct application of international law, particularly as regards the so-called “non-self-sufficient” rules and their interpretation, J. Verhoeven, “La notion d’‘applicabilité directe’ du droit international”, 15 *RBDI*, 1980-2, p. 243, at pp. 248-249, and W.J. Ganshof Van der Meersch, “La règle d’application directe”, *ibid.*, p. 345.

⁴⁵ Aware of the problems, the sponsors of amendment CDDH/III/260 and Add.1 had provided: “4. In the event that there is no Protecting Power, any notification required by Article 104 of the Third Convention or by Article 71 of the Fourth Convention shall be given to the International Committee of the Red Cross. On receipt of such a notification, that Committee shall be entitled to exercise all the functions of a Protecting Power in relation to the trial of the person in respect of whom the notification has been given.” (*O.R. III*, p. 190).

However, some delegations were utterly opposed to this proposal. Nevertheless, the intervention of the ICRC still remains possible pursuant to Article 9 or even 10 of the Third Convention and Articles 5 and 81 of the Protocol.

⁴⁶ *O.R. XV*, p. 433, CDDH/III/338.

Thus it is this aspect of the problem that is meant by the phrase “whenever possible under the applicable procedure”. However, it is true that the problem can be a complex one in the sense that in certain cases it will only be possible to determine the status of the person concerned by deciding first on the merits of the accusation (compliance with the conditions relating to the open carrying of arms etc.: see *supra*, p. 538).⁴⁷ Moreover, the accused has a right of appeal whether he is tried as a prisoner of war or as a civilian (Third Convention, Article 106; Fourth Convention, Articles 126 and 73).

- 1756** As regards the procedure followed by the tribunal, it should be remembered, and indeed it is touched on in this provision, that it should either, as a minimum, be in accordance with the corresponding rules of the Fourth Convention (Articles 64-75) (for, failing prisoner-of-war status, and until such status may be accorded him, the accused is protected by this Convention) or it should comply with the rules of Article 75 (*Fundamental guarantees*) of the Protocol. In fact, it is possible that the protection of the Fourth Convention may be denied the accused, at least at this stage of the proceedings, for example, if he has the nationality of the captor. For wars of national liberation the criterion of nationality is inoperative. However, to deprive a person protected by this provision of his right to a fair and regular trial, even when his prisoner-of-war status has not yet been determined, constitutes a grave breach (Article 85 – *Repression of breaches of this Protocol*, paragraphs 2 and 4(e)).

Third sentence – Right of the Protecting Power to attend the proceedings

- 1757** As regards the text, this rule reproduces almost literally Article 105, paragraph 5, first sentence, of the Third Convention and Article 74, paragraph 1, of the Fourth Convention. Its inclusion in this article is justified by the fact that it covers the proceedings concerned with the right of the accused to prisoner-of-war status, proceedings which should in principle precede those relating to the offence itself, as we have just seen. Reference should also be made to the commentary on Article 105 of the Third Convention.⁴⁸

Fourth sentence – Notification of proceedings

- 1758** This rule also reproduces the text of Article 105, paragraph 5 (second sentence), of the Third Convention, for the same reasons as those indicated above. This notification procedure is set out in detail in Article 104 of the Third

⁴⁷ Cf. the remark of one delegation: “Paragraph 2 obliged the tribunal seized with an offence arising out of the hostilities to admit any objections by the accused to the effect that he had been entitled to participate in combat. Such plea must be examined in accordance with judicial, not administrative, procedures, and, if possible, on a preliminary basis” (*ibid.*, p. 95, CDDH/III/SR. 47, para. 56).

⁴⁸ *Commentary III*, p. 491.

Convention⁴⁹ (and Article 71, paragraph 4, of the Fourth Convention). These rules are also applied in the context of the present Article 45, at least to the extent that the situation requires it (principle of effectiveness).⁵⁰

Paragraph 3 – The conditions under which a person who is not entitled to prisoner-of-war status may be put on trial

- 1759 This paragraph relates to persons who, while being prosecuted for their participation in hostilities, are refused prisoner-of-war status.
- 1760 However, it should be noted straight away that this paragraph does not cover combatants who are denied prisoner-of-war status by application of paragraph 4 of Article 44 (*Combatants and prisoners of war*). The latter in fact continue to fall under the scope of the procedural guarantees of the Third Convention, whereas the provision under consideration here concerns persons who are refused these guarantees. It may apply, for example, to persons who simply do not belong to armed forces constituted in accordance with the requirements of the Protocol (Article 43 – *Armed forces*) or even to spies or mercenaries.⁵¹ In addition, the paragraph provides for an explicit derogation from the régime introduced by the Fourth Convention for occupied territories.

First sentence – Fundamental guarantees

- 1761 In armed conflict with an international character, a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of the armed conflicts of Article 1 (*General principles and scope of application*), paragraph 4, as the adversaries can have the same nationality.⁵² Moreover, the concept of alien occupation often becomes rather fluid in guerrilla operations as no fixed legal border delineates the areas held by either Party, and this may result in insurmountable technical difficulties with regard to the application of some of the provisions of the Fourth Convention.⁵³ This is one of the reasons why the paragraph under consideration here provides that in the absence of more favourable treatment in accordance with the Fourth Convention, the accused is

⁴⁹ See *Commentary III*, pp. 480-484.

⁵⁰ Committee III was divided with regard to the question whether this paragraph should not preferably be included in Article 75 (Fundamental guarantees) (see *O.R.* XV, p. 433, CDDH/III/338).

⁵¹ See commentary Arts. 46 and 47, *infra*, pp. 561 and 571, as well as the second sentence of this paragraph.

⁵² Article 4 of the Fourth Convention provides that “persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

⁵³ Thus, for example, Article 66 providing that the court of the Occupying Power should sit in the occupied country.

entitled at all times to the protection of Article 75 of the Protocol (*Fundamental guarantees*). This rule is confirmed in paragraph 7(b) of the said Article 75.⁵⁴ However, it is also possible that, without being denied the protection of the Fourth Convention, the accused may fall under the scope of Article 5 of the same Convention, which lays down some important derogations. In this case the guarantees of Article 75 (*Fundamental guarantees*) continue to apply in their entirety.⁵⁵ Finally, the latter also apply to the person concerned when the Fourth Convention as a whole applies to him, whenever the treatment resulting from this would be more favourable to him, whether or not the crimes of which he is accused are grave breaches of the Conventions or the Protocol (Article 75 – *Fundamental guarantees*, paragraph 7(b)). This also applies, for example, to aliens in the territory of a Party to the conflict who may have taken part in hostilities against this Party, as the Fourth Convention does not indicate what judicial guarantees they are entitled to.

Second sentence – Occupied territory

1762 This provision is concerned only with occupied territory and those persons with regard to whom the application of the Fourth Convention is not in dispute. Except as regards spies, it effectively cancels the second paragraph of Article 5 of this Convention, which provides that where:

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

1763 Thus we see here the abrogation of an important concession made in 1949 for reasons of state, a concession which made it possible to keep certain detained persons secretly. However, it does not apply to persons detained for espionage, as the Conference considered that it would not be realistic to try to guarantee a spy's right to communicate.

1764 The other provisions of Article 5 of the Fourth Convention are not affected by this paragraph and consequently still apply,⁵⁶ at least to the extent that they do not conflict with the fundamental guarantees of Article 75 (*Fundamental guarantees*), paragraph 7(b).

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⁵⁴ In the case of a war of national liberation one could think, in default of the application of the Fourth Convention, of those who claim allegiance to a Party to the conflict without forming part of its armed forces.

⁵⁵ For example, in favour of a spy with a foreign nationality who is not a member of the armed forces. In the territory of a Party to the conflict such derogations could refer to “rights and privileges” which, if exercised, would be prejudicial to the security of the State (Fourth Convention, Art. 5, para. 1).

⁵⁶ For a commentary on this article, which reveals some differences between the French and the English versions, see *Commentary IV*, pp. 52-58.

Protocol I

Article 46 – Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.
2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.
3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.
4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Documentary references

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Commentary**General remarks**

- 1765** Under the terms of Article 24 of the Hague Regulations, the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. This information may often be obtained by methods which, if not always detected, are at least openly employed for this purpose: a listening post, aerial photography, surface exploration etc. However, despite enormous technical progress, particularly in the field of listening-in devices and aerial photography (satellites), these methods occasionally prove to be incapable of penetrating well guarded secrets. This is where espionage comes in, i.e., resorting to the secret agent, which is not prohibited by either written or customary international law applicable in case of armed conflict, though States are left free to punish spies who are acting against their interests. Thus in times of armed conflict a spy does not engage the international responsibility of the State which sends him.
- 1766** Espionage in the true sense, whether it entails a civilian or a member of the armed forces acting in secret,¹ is traditionally distinguished from what was formerly known as “war treason”, which takes place particularly, though not exclusively, when a civilian living in occupied territory gives information to the enemy of the occupying forces.² The “war traitor” violates the law of the occupier. As such, he commits a violation of the law which the Occupying Power is entitled to promulgate,³ on the understanding that the latter shall, on its part,

¹ On this concept, see *infra*, paras. 2 and 3.

² War treason also includes all acts of sabotage and collaboration with the enemy when they are committed by persons resident in occupied territory who are not members of the armed forces, such as: the destruction of means of communication, assistance to prisoners of war who are escaping, propaganda favourable to the adversary, furnishing the latter with means of transport, abusing the function of a guide for the purpose of misleading occupying troops etc.

³ Cf. Fourth Convention, Articles 5, 64 (paragraph 2), 68. As regards nationals of a Party to the conflict who engage in acts of espionage for the benefit of the enemy, they are generally accused of high treason and are subject to national law (on the applicability of the guarantees of Article 75, see the commentary on that article). This is without prejudice to provisions of human rights legislation.

act in accordance with the rules in force, particularly the 1907 Hague Regulations (Articles 42-56) and the Fourth Convention (particularly Articles 47-78).

- 1767** Paragraphs 1 and 2 of this article confirm the traditional rules on espionage by reaffirming the essential principles of these rules. The specific object of paragraphs 3 and 4 is to extend, for members of the armed forces, the application of these rules to occupied territory. As regards persons who are not members of the armed forces, they are entitled to the guarantees laid down in Section III of Part IV of the Protocol, particularly those of Article 75 (*Fundamental guarantees*) which, in the case of arrest, supplement the other guarantees already laid down in the Fourth Convention. It is understood that the derogations contained in Article 5 continue to apply in occupied territory (Article 45, paragraph 3, second sentence). As regards this matter, the same applies to a spy who is a member of the armed forces captured in the act.

Paragraph 1 – The sanction for espionage

- 1768** This paragraph illustrates what has been termed the dialectics of espionage. As we have seen, resorting to this method of combat is not prohibited. Yet, despite (“notwithstanding”) the other provisions of the Conventions and the Protocol, any member of the armed forces who is caught while he is engaged in espionage may be deprived of his prisoner-of-war status and punished. In law this appears contradictory. In fact, the Parties to the conflict are here given a means of defence against a particularly dangerous method of combat.⁴ However, it is quite clear that this is not an obligation, but merely a power: “shall not have the right to the status of prisoner of war and may be treated as a spy”.⁵ Nevertheless, this does not mean that the corresponding provisions of the First and Second Conventions do not apply in full when a spy is wounded, sick or shipwrecked. Moreover, a spy who has been deprived of his prisoner-of-war status, like any other spy who is not a member of the armed forces, is a civilian protected by the Fourth Convention, though Article 5 considerably reduces the guarantees in this particular case. Similarly it is on this point that other provisions of the Protocol contain substantial guarantees, particularly in Article 75 (*Fundamental guarantees*). In the territory of a Party to the conflict these guarantees are also assured to a protected person who is personally subject to a legitimate suspicion that he is engaged in an activity which endangers State security or if it is established that he is in fact engaged in such activities. The Fourth Convention, Article 5, paragraph 1, provides that such persons, who may also be spies or

⁴ Cf. F. Lieber, *op. cit.*: “While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them” (Article 101).

⁵ It will be noted that this expression “shall not have the right” is also used in Article 47 (“shall not have the right to be a combatant or a prisoner of war”) with regard to mercenaries; Article 44, paragraph 4, deals with the case in which a combatant “shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects”.

persons suspected of espionage, are not entitled to claim such rights and privileges under that Convention as would, if exercised in the favour of such persons, be prejudicial to the security of the State, though it is understood that they are not deprived of the rights of fair and regular trial (paragraph 3). In occupied territory, in accordance with the same Article 5, the spy may be deprived of his rights of communication, and this restriction is not removed by Article 75 (*Fundamental guarantees*) of the Protocol (see Article 45 – *Protection of persons who have taken part in hostilities*, paragraph 3).

- 1769 Nevertheless, if a person suspected of espionage appears to be a member of the armed forces,⁶ he should have the benefit of prisoner-of-war status as long as there is any doubt regarding the matter of his right to such status, and until a competent tribunal has decided on this matter (Article 45 – *Protection of persons who have taken part in hostilities*, paragraph 1). In short, there may exist two conflicting presumptions simultaneously: prisoner of war or spy. The presumption of prisoner-of-war status should prevail, at any rate whenever the person concerned has not been charged on the basis of *prima facie* evidence.⁷
- 1770 The deprivation of prisoner-of-war status already constitutes a punishment in itself and can therefore only take place following the tribunal's decision.⁸ This applies *a fortiori* to the deprivation of prisoner-of-war treatment. Furthermore, the Conference did not intend to change the substance of the traditional rules of espionage adopted in The Hague, but merely sought to supplement and elaborate them.⁹ This conclusion was confirmed by the wording of Article 39 (*Emblems of nationality*), paragraph 3, which refers to the "existing generally recognized rules of international law applicable to espionage".
- 1771 Under the terms of the Hague Regulations, "a spy taken in the act shall not be punished without previous trial" (Article 30). Does this mean that the spy can only be punished as such if he is caught in the act? In fact, this is certainly the sense of the Regulations, as Article 31 provides that, "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage".¹⁰

⁶ See *supra*, ad Art. 45, para. 1, p. 546.

⁷ This solution does not affect security measures which the Detaining Power might consider to be necessary "for reasons of imperative military necessity", whether this concerns supervision (Third Convention, Art. 126, para. 2), correspondence (Art. 76, para. 3), or trial *in camera* (Art. 105, para. 5). Such derogations should be as short as possible. The problem of the "capture card" (Art. 70) is more delicate, even though it is not obligatory, but the prisoner must be registered (Art. 122).

⁸ Moreover, there may be justifiable concern to avoid abuses during periods of psychological tension which are characteristic of armed conflict, favouring what could be called "spy mania", i.e., the fact of considering any foreigner to be a spy without a valid reason, or on the flimsiest pretext. Moreover, Art. 44, paragraph 3, increases the risk of confusion. It has even happened that escaped prisoners of war have been considered to be spies.

⁹ See O.R. XV, p. 99, CDDH/III/SR.47, para. 80, and p. 430, CDDH/III/338.

¹⁰ The analogy with Article 91 of the Third Convention should be noted. It provides that prisoners of war who have made good their escape and who are recaptured shall not be liable to any punishment in respect of their previous escape. However, this immunity does not extend to violations committed during the escape, if these are not linked with the escape, or if they entailed violence against persons (Art. 93, para. 2).

- 1772 The text of the Protocol is equally explicit when it states in the present paragraph that, when a member of the armed forces falls into the power of an adverse Party “while engaging in espionage”,¹¹ he “shall not have the right to the status of prisoner of war and may be treated as a spy”.
- 1773 As regards the tribunal, it is in no way obliged to take into account the motives of the accused, and may convict him equally whether he has acted from patriotic motives or for reasons of personal gain.¹² In many cases the tribunal will have to pronounce sentence merely on the basis of a presumption. The use of perfidious means such as the misuse of the flag of truce, the red cross emblem, signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict,¹³ can constitute an aggravating circumstance. This may also apply to the employment for purposes of espionage of medical aircraft, which under the terms of Article 28 (*Restrictions on operations of medical aircraft*), paragraph 2, “shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes”.¹⁴

Paragraph 2 – Definition of a spy¹⁵

- 1774 In fact this paragraph does not give a definition of a spy. Moreover, some considered that such a definition does not belong in a text of humanitarian law. However, by giving a sufficiently precise description of those who shall not be considered as spies, it is possible to deduce the constitutive elements of espionage in any specific case, by means of *a contrario* reasoning. Supplemented by the provisions of paragraph 3, which relate to occupied territory, these elements do give, after all, the complete characteristics of the spy as he is defined in the Hague Regulations.¹⁶ The resulting definition, without being fundamentally different, is nevertheless wider than that of the Regulations, and corresponds to that which is

¹¹ According to Mechelynck, and the deliberations which took place in The Hague, Article 31 of the Regulations does not only apply to members of the armed forces, but also to civilians. The inhabitant of an area which is not occupied, who seeks information in the enemy's area of operations and returns to his own area after completing his mission, may not be prosecuted if his area falls into the hands of the enemy at a later date (A. Mechelynck, *op. cit.*, p. 302). As regards Article 30, this protects the inhabitant of occupied territory on the same basis as any other person arrested as a spy (*ibid.*, p. 299).

¹² A. Mechelynck, *op. cit.*, p. 294.

¹³ Cf. Art. 37, para. 1(a) and (d), and Art. 85, para. 3(f).

¹⁴ On the general problem of medical confidentiality, see commentary Art. 16, para. 3, *supra*, p. 204.

¹⁵ Article 40 of the ICRC draft was worded as follows: “1. Members of armed forces in uniform and other combatants referred to in Article 4 of the Third Convention, as well as those combatants referred to in Article 42 who, in their operations, distinguish themselves from the civilian population and who, having entered enemy-controlled territory or having remained therein, gather or attempt to gather military information for further transmission shall not be considered as spies.”

¹⁶ The spy is defined there in a negative and restrictive form: “A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information, in the zone of operations of a belligerent, with the intention of communicating it to the hostile party” (Art. 29, para. 1).

found today in most military manuals. Strictly speaking, this paragraph corresponds to the second paragraph of Article 29 of the Hague Regulations, which also gives a description of those who shall not be considered as spies, though admittedly in a form which is in some respects rather outmoded.¹⁷

1775 In the sense in which spies are generally understood today, the spy corresponds to the definition that was already given by Lieber: “a person who secretly, in disguise or under false pretence,¹⁸ seeks information with the intention of communicating it to the enemy” (Article 88). It logically follows that anyone who seeks information while dressed in the uniform of his armed forces, cannot be a spy. But the expression “gathers or attempts to gather”, which is used in the present paragraph, as it is with other words (“obtains or endeavours to obtain”) in the definition of the Regulations, clearly shows that no distinction is made between the attempt and the successful operation. As regards the territorial field of application of the rule, there is no longer an intent to limit it to the area of operations. It covers all “territory controlled by an adverse Party”: national or occupied territory, area of operations (on land, at sea, or in the air), including the territorial sea. In paragraph 2, the nature of the information is not defined, while paragraph 3, which deals with occupied territory, specifies that this should be “information of military value”. This distinction in the wording is deliberate, as inhabitants of occupied territory should not be open to the accusation of espionage for no good reason. Thus it is up to each Party to the conflict to determine what information could fall under the scope of this paragraph.¹⁹ However, in general, it is accepted that nowadays information can create a military advantage, even when it does not have a military character.

1776 The problem of uniform is possibly an even more vexed question.²⁰ One delegate at a plenary meeting asked what significance it should be given “in the case of combatants who were not required to wear uniform, and who, in any case, had no chance of wearing one”.²¹ The question was by no means irrelevant, although it is understood that the word “uniform” applied not only to a uniform in the conventional sense, but to any distinguishing sign which warranted that the activity in question had nothing clandestine about it. In addition, the Rapporteur declared that this means that: “any customary uniform which clearly distinguished the member wearing it from a non-member [of the armed forces], should

¹⁷ “Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy’s army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.”

¹⁸ Paragraph 3, using a similar wording to the Hague Regulations on this point (Art. 29), uses the expression “through an act of false pretences or deliberately in a clandestine manner”.

¹⁹ Thus Article 86 of the Swiss military penal code incriminates anyone who has spied on facts, dispositions, procedures or objects which are kept secret in the interests of national defence in order to pass them or make them accessible to a foreign State, one of its agents, or the public.

²⁰ On this point see also *supra*, ad Art. 39, para. 3, p. 469.

²¹ O.R. VI, p. 111, CDDH/SR.39, para. 115.

suffice”.²² All the same, that does not alter the fact that certain categories of combatants can, as we have seen,²³ be exempt from all distinguishing signs with the exception of the open carrying of arms.²⁴ However, as the majority of delegations only seemed to be able to envisage such an eventuality in occupied territory, this problem will be examined in the context of paragraph 3. It should suffice here to remember that, in the view of several experts, the characteristic feature of the spy is not primarily the clandestine nature of his activities, for the search for information is often carried out at night or in order to avoid capture, observers camouflage themselves, etc. The spy employs pretence and deceit, and this, depending on the circumstances, could constitute an unlawful ruse of war or even an act of perfidy within the meaning of Article 37 (*Prohibition of perfidy*).

Paragraph 3 – Occupied territory

1777 At first sight the text of this paragraph seems to express a self-evident fact, i.e., that only a spy can be considered to be a spy in occupied territory, and then only if he is caught in the act. In reality the situation in occupied territory is complex, and the rules needed to be clarified. This provision covers only residents of occupied territory who are members of armed forces, and not the civilian population.²⁵ Paragraph 4 deals with the non-resident, so the concept of residence is common to paragraph 3 and paragraph 4. The Rapporteur states that the Working Group did not devote much attention to the question who will be considered to be a resident. A number of delegations would have preferred to add qualifications such as “usual” or “ordinary” to the word “resident” in order to exclude from the benefits of paragraph 3 any person sent to the occupied territory in order to engage in espionage. However, the Rapporteur points out that such a person can always claim to have been sent there to engage in hostile acts, and that in this case, it would be impossible to furnish the proof.²⁶ The fact remains that this paragraph concerns only residents, i.e., the inhabitants of occupied territory, whether nationals or not, who are properly entitled to live in

²² *Ibid.*, para. 116, and *O.R.* XV, p. 388. CDDH/236/Rev.1, para. 35, and *supra*, commentary Art. 39, para. 2, p. 468.

²³ *Supra*, ad Art. 44, para. 3, p. 527.

²⁴ One delegation claimed in the Working Group that this was a false problem, as the fact that a spy is wearing purely civilian dress does not constitute a threat for the civilian population, since the spy has no intention of opening fire and may not even be armed.

²⁵ According to the Hague Regulations, the situation of an inhabitant of occupied territory was more or less similar to that of a prisoner on parole. He sees everything that happens, but this does not authorize him to reveal it (in this respect, see A. Mechelynck, *op. cit.*, pp. 262-263). However, it should be mentioned that the population of occupied territory owes no allegiance to the Occupying Power (Fourth Convention, Art. 68). See also *supra*, note 11. In addition, Art. 31 of the Fourth Convention states that “no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”. On the other hand, the Occupying Power may subject the population of the occupied territory to provisions which are essential to ensure its security (Fourth Convention, Art. 64, para. 2).

²⁶ *O.R.* XV, p. 431, CDDH/III/338.

this territory either permanently or on a long-term and ordinary basis,²⁷ which corresponds with the concept of ordinary residence.²⁸

First sentence – Definition of the spy who is a resident of occupied territory

1778 The formulation of this provision is in many respects similar to the general definition of the spy given in Article 29, paragraph 1, of the Hague Regulations. This is primarily because of the negative turn of phrase which gives the provision a restrictive scope. It should also be noted that the territorial field of application of the rule is precisely circumscribed as it refers only to occupied territory. Finally, it does not contain any mention of uniform or the absence of uniform (obviously a spy could attempt to carry out his activities under cover of the uniform of the adverse Party) but refers to the fact that he is acting under “false pretences or deliberately in a clandestine manner”. This expression is virtually identical to the text of the Hague Regulations. As stated above, the information which falls under the prohibition is specified here, whereas it is not specified in paragraph 2: it is information of military value.²⁹

1779 Now this is the crux of the matter: though the person concerned, a member of the armed forces, gathers or attempts to gather information of a military nature, he need not necessarily be a spy, even when he is not wearing a uniform. In other words, the absence of uniform or what takes the place of uniform, is not automatically equivalent to an activity undertaken “through an act of false pretences or deliberately in a clandestine manner”,³⁰ since in certain situations which arise particularly or exclusively in occupied territory, guerrilla combatants are expressly exempt from the obligation to distinguish themselves from the civilian population (Article 44 – *Combatants and prisoners of war*, paragraph 3). Admittedly such combatants are obliged to carry their arms openly in combat and preparatory to combat, and they are perfectly capable of attempting to gather information while carrying their arms openly. They are then excluded from being considered as spies. However, apart from this situation, residents who are members of armed forces

“will almost necessarily in their everyday life come across information of value to the armed forces to which they belong, and this should not make

²⁷ However, one delegation wished to make a statement to the effect that the term “resident” should be understood to include persons who had had to leave the territory as a result of excesses on the part of the Occupying Power as well as persons evacuated by the occupying authorities (see *O.R.* XV, p. 93, CDDH/III/SR.47, para. 46).

²⁸ Cf. the advisory opinion of the Permanent Court of International Justice of 21 February 1925 on the exchange of Greek and Turkish populations where the concept of “établissement” was considered to include two factors: residence and stability (W. Benedek, “Exchange of Greek and Turkish populations (Advisory opinion)”, in Bernhardt (ed.), *op. cit.*, Instalment 2, p. 92).

²⁹ It is understood that information which is not of a military nature, but, for example, economic or political, can be of military value.

³⁰ Cf. the remark of one delegation: “A member of a liberation or resistance movement would not be considered to be acting under false pretences simply because he was wearing civilian clothing” (*O.R.* XV, p. 93, CDDH/III/SR.47, para. 46).

them spies or serve as a pretext for denying them protection as prisoners of war. On the other hand, it was agreed that, if they disguised themselves in order to gain access to secret information or in other ways used false pretences or deliberate clandestine acts in order to obtain such information, they would be spies. For example, the resident who observes military movements while walking along the street or who takes photographs from his residence would not be engaged in espionage; whereas the resident who uses a forged pass to enter a military base or who, if lawfully on the base, illegally brings a camera with him, would be engaging in espionage”.³¹

Second sentence – Sanction for espionage in occupied territory

1780 The analysis of paragraph 1 revealed that the spy who rejoins the army to which he belongs does not incur any responsibility for his previous acts of espionage if he is captured by the enemy later. For a member of the armed forces who is resident in occupied territory, there is no such possibility of actually escaping from the power of the adverse Party, and thus of setting aside the jurisdiction of the latter in the matter of espionage. Does this then mean that if he is captured, a member of the armed forces who is a resident of occupied territory and who has committed an act of espionage, loses all his rights to prisoner-of-war status until hostilities cease? This is not the case, and this provision gives the appropriate guarantees.

1781 It is in fact only insofar as he is captured in the act of espionage, that the spy who is a resident of occupied territory loses his right to prisoner-of-war status. This condition is rendered here by the expression “unless he is captured while engaging in espionage”. It follows that “the spy who is a resident of occupied territory may be considered as rejoining his forces whenever he ceases to engage in espionage”.³² In this context the Rapporteur adds that:

“Although no attempt has been made by the Working Group to define more precisely when a resident may be considered as engaging in espionage, several delegates suggested that each act of espionage would end when the information obtained had been transmitted by the spy to his armed forces.³³ This approach was commended, as it would reduce the possibility that an Occupying Power could improperly deprive captured members of underground armed forces of their rights to be prisoners of war by asserting that they were captured while engaging in espionage.”³⁴

Finally, the considerations relating to Article 46, paragraph 1, apply *a fortiori* in occupied territory.

³¹ Rapporteur's Report, *O.R.* XV, p. 430, CDDH/III/338.

³² *O.R.* XV, pp. 430-431, CDDH/III/338.

³³ Cf. the statement of a delegation at a plenary meeting, that the formula “while engaging in espionage” includes all the stages of the act of espionage until the completion of the transmission of the information to the enemy (*O.R.* VI, p. 116, CDDH/SR.39).

³⁴ *O.R.* XV, p. 431, CDDH/III/338.

Paragraph 4 – Espionage in occupied territory by a non-resident

- 1782** In the case of espionage in occupied territory by a member of the armed forces who is not a resident of this territory, the rule contained in this paragraph corresponds to that of Article 31 of the Hague Regulations. Thus a spy loses his right to the status of prisoner of war and may be treated as a spy only if he is captured before rejoining the armed forces to which he belongs. This condition will not be deemed to be fulfilled whenever the spy succeeds in leaving the occupied territory and regaining either the territory of the Power to which he belongs or that of an Allied Power, or neutral territory. If he rejoins within occupied territory the clause implies the presence, if only temporarily, of adverse armed forces organized in accordance with Article 43 (*Armed forces*), whether they consist of a commando raid, a mobile column, a reconnaissance unit or a forceful search operation. Such operations do not have the effect of changing the status of the territory in which they take place, which consequently remains occupied territory subject to the jurisdiction of the Occupying Power. However, the armed forces which carry out such operations assure the spy who rejoins them the safeguards provided for in this paragraph.
- 1783** In addition, reference should be made to the commentary on paragraphs 1 and 3 above.

Conclusion

- 1784** – Only someone who gathers or attempts to gather information through an act of false pretences or deliberately in a clandestine manner, with the intention of transmitting it to the enemy, shall be considered as a spy.
- 1785** – The spy captured in the act does not have the right to prisoner-of-war status.
- 1786** – The spy captured after rejoining his armed forces is a prisoner of war. A resident of occupied territory who is captured, but not whilst engaging in espionage, should also be considered as a prisoner of war.
- 1787** – The spy who is denied the status of prisoner of war is a civilian protected by the Fourth Convention (except that in occupied territory may lose his rights of communication (Article 5)), and by Article 75 (*Fundamental Guarantees*) of the Protocol.
- 1788** – In cases of doubt, the person concerned is treated as a prisoner of war pending a decision regarding his status by a competent tribunal. Penal sanctions can only be imposed by a judicial tribunal.

J. de P.

Protocol I

Article 47 – Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Documentary references

Official Records

O.R. I, Part I, p. 145. *O.R.* III, p. 192 (Art. 42 *quater*). *O.R.* VI, pp. 156-161, CDDH/SR.41, paras. 76-107; p. 175, *id.*, Annex (Afghanistan and Australia); pp. 179-180 (Colombia); pp. 183-84 (Cuba); pp. 185-186 (Democratic Yemen); pp. 190-192 (Mauritania and Mexico); pp. 193-195 (Mozambique and Netherlands); pp. 197-198 (Senegal and Sweden); pp. 199-200 (Socialist People's Libyan Arab Jamahiriya); pp. 200-202 (USSR). *O.R.* XIV, pp. 342-344, CDDH/III/SR.43, paras. 47-53 and 56; p. 348, para. 75; p. 351, para. 85; pp. 356-357, CDDH/III/SR.35, para. 6; p. 360, para. 18; pp. 361-363, paras. 24 and 26; pp. 369-370, paras. 63 and 68; pp. 373-374, CDDH/III/SR.36, paras. 1-4; p. 375, para. 10; p. 377, para. 19; p. 381, para. 34; p. 384, para. 42. *O.R.* XV, pp. 112-113, CDDH/III/SR.49, paras. 24-31; p. 143, CDDH/III/SR.53, para. 50; pp. 189-190, CDDH/III/SR.57, paras. 4-7; pp. 191-202, paras. 12-58; p. 205, CDDH/III/SR.58, para. 12; pp. 404-407, CDDH/236/Rev.1, paras. 95-108; pp. 454-455, CDDH/407/Rev.1, paras. 22-27.

Commentary

General remarks

- 1789 The problem of mercenaries was first raised at the United Nations in 1961 in connection with the Katangese secession.¹ Later on, in 1964, the Congolese government itself recruited mercenaries to suppress an insurrection. When they were subsequently instructed to lay down their arms, most of them refused to do so and openly rebelled against the government (1967). The latter then called upon the Security Council, as well as the Organization of African Unity (OAU), to which it had already appealed in 1964. The Security Council² and the Conference of Heads of State and Government of the OAU requested States to prevent the recruitment of mercenaries in their territory for the purpose of overthrowing the governments of foreign States. The epilogue to this unhappy affair took place in Rwanda, where the mercenaries eventually sought refuge. They were repatriated with the help of the ICRC, on condition that they undertook not to return to the African continent.³
- 1790 Since then, there has scarcely been any conflict involving military operations in which the presence of mercenaries has not played a part in one way or another. Nevertheless, since 1968 the United Nations General Assembly has adopted a firm position stating that the practice of employing mercenaries against national liberation movements is a criminal act,⁴ and the mercenaries themselves are criminals. In 1977 it was once more the Security Council which adopted, by consensus, a resolution condemning the recruitment of mercenaries with the objective to overthrow governments of Member States of the United Nations.⁵ Also in 1977 the Council of Ministers of the OAU adopted a Convention for the Elimination of Mercenarism in Africa at its 29th session in Libreville.⁶ Based partly, as regards the definition of the term “mercenarism” as such, on previous

¹ Security Council Resolutions 161A of 21 February 1961, and 169 of 24 November 1961, and General Assembly Resolution 1599 (XV) of 15 April 1961, calling for the withdrawal of mercenaries from the Congo.

² Resolutions 239 of 10 July 1967, and 241 of 15 November 1967.

³ ICRC annual report 1967, pp. 29-35, and 1968, pp. 20-21.

⁴ Resolution 2465 (XXIII) of 20 December 1968, confirmed in particular by Resolutions 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973, 33/24 of 8 December 1978. See also A.A. Yusuf, “Mercenaries in the Law of Armed Conflict”, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflicts*, *op. cit.*, pp. 119-121.

⁵ Resolution 405 of 16 April 1977.

⁶ Initialed by the representatives of the OAU States at the 14th Summit Conference (Libreville, July 1977), entered into force on 22 April 1985. On this action by the United Nations and the Organization of African Unity, see in particular A. Cassese, “Mercenaries: Lawful Combatants or War Criminals?”, 40 *ZaöRV*, No. 1, 1980, pp. 1-30, and M. Riley, “Mercenaries and the Rule of Law”, 17 *International Commission of Jurists, The Review*, December 1976, pp. 51-57, as well as E.I. Nwogugu, “Recent Developments in the Law Relating to Mercenaries”, XX-1-2 *RDPMDG*, 1981, p. 9.

drafts,⁷ and, with the exception of the problem of payment, on the definition of the term “mercenary” given in the present Article 47, this Convention was a response to the concern of those who see the text of the Protocol as paving “the way for the conclusion of more stringent regional instruments”,⁸ on the assumption that Article 47 was only “the first, and that other more satisfactory international texts would follow”.⁹ In fact, this OAU Convention of 1977 was an attempt to respond to the wishes of some delegations who had participated in the Diplomatic Conference, wishes which could not be met by the demands of the inevitable compromise. It condemns the mercenarism as such, and not only the mercenary himself (Article 1, paragraph 2). It contains a pure and simple prohibition on according a mercenary the status of combatant and prisoner of war (Article 3). Finally, the definition of the term “mercenary” diverges from that of the Protocol on one point, as stated above.¹⁰ At the time of writing, a draft of an “international Convention against the recruitment, use, financing and training of mercenaries” is being formulated within the United Nations.¹¹

- 1791 The draft presented by the ICRC at the Diplomatic Conference did not contain any provisions on mercenaries, which means that they would have been treated like any other categories of combatants and prisoners of war recognized by the Third Convention (Article 4) and by the Protocol (Article 42 of the draft), provided that they complied with the conditions laid down. The Conference, which had shown itself to be fairly liberal, as we have already seen in the analysis of Articles 43 (*Armed forces*) and 44 (*Combatants and prisoners of war*) regarding the granting of combatant or prisoner-of-war status to members of the armed forces of a Party to the conflict, came to a different conclusion on this matter, at least in principle. Whatever conclusions one could actually draw from an analysis of Article 47, the concession made by this article is not without importance, for it is not the task of humanitarian law to make distinctions based on the motives which induce a particular person to participate in an armed conflict. However, as things stand, it could be said that this was no more and no less than reparation –

⁷ Draft Convention on the Elimination of Mercenarism in Africa, presented by a committee of experts of the OAU at the Conference of Heads of State, which met in Rabat in 1972, and Draft Convention on the Prevention and Suppression of Mercenarism, drawn up by an international investigation committee invited to be present at the trial of thirteen mercenaries who had participated in the civil war in Angola, in Luanda in 1976.

⁸ *O.R.* XV, p. 193, CDDH/III/SR.57, para. 22.

⁹ *Ibid.*, p. 201, para. 51; also see *O.R.* VI, pp. 156-158, CDDH/SR.41, and for the Rapporteur's report, *O.R.* XV, pp. 510-511, CDDH/III/369.

¹⁰ Let us recall that the Definition of aggression adopted by the United Nations General Assembly (Res. 3314 (XXIX) of 14 December 1974, adopted without a vote) includes in Article 3, sub-para. (g), amongst the acts which qualify as an act of aggression: “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State” when they are of such gravity as to amount to the acts listed in the preceding sections of the same article, or “substantial involvement” in such acts. It is not the mercenary who is incriminated here, but the State which permits the sending of mercenaries.

¹¹ See in particular, “The Report of the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries”, General Assembly Official Documents, 39th session, supplement No. 43 (A/39/43) (as regards the definition of mercenaries in this draft, see *infra*, note 18).

it could be considered a moral reparation – for past wrongs, and a preventive measure against possible damage in the future. Whatever the facts of the matter, no one, or virtually no one, at first opposed the principle of this provision.¹²

1792 Article 47 was adopted by consensus at a plenary meeting.¹³ The result of a compromise, it was approved by some unquestioningly, though it was criticized by others, who considered it to be timorous, incomplete or of doubtful orientation.¹⁴ One delegation stated that it did not belong in Protocol I, which has an essentially humanitarian character.¹⁵

1793 Paragraph 1 deals with the status of the mercenary, while paragraph 2 is aimed at resolving this most difficult problem of the definition of this category of combatants for the first time in international law.

Paragraph 1 – Status of the mercenary

1794 The refusal to confer prisoner-of-war status to those persons or categories of persons to whom this status should, in principle, be accorded, has been the subject of a number of regrettable precedents in the practice of States.¹⁶ In general, humanitarian law endeavours to extend the protection of the Third Convention to new categories of combatants or to new situations, and not to refuse this protection, as is evident from Articles 43 (*Armed forces*), 44 (*Combatants and prisoners of war*) and 45 (*Protection of persons who have taken part in hostilities*) of the Protocol. The provision under consideration here goes the other way because of the shameful character of mercenary activity.

¹² This does not mean that there were no problems. Independently of the deliberations of the Conference of Government Experts (*CE 1972, Report*, vol. I, p. 28, para. 0.23), it was during the long general debate of the second session of the Conference relating to Articles 42 and 42 *bis* (the present Articles 44 and 45), that the problem of mercenaries was broached for the first time by many delegations who were not prepared to recognize this category of combatants (*O.R. XIV*, pp. 342-343, CDDH/III/SR.34, p. 344, para. 56; p. 348, para. 75; CDDH/III/SR.35, p. 356, para. 6; p. 360, para. 18; pp. 361-362, para. 24; p. 362, para. 26; p. 369, para. 63; p. 370, para. 68; CDDH/III/SR.36, pp. 373-374, paras. 1-4; p. 375, para. 10; p. 377, para. 19; p. 381, para. 34; p. 383, para. 39. At the third session the representative from Nigeria presented a draft of Article 42 *quater* in the Working Group (*O.R. III*, p. 192, CDDH/III/GT/82) which, although it met with hardly any objections in principle, did not gain unanimous approval (*O.R. XV*, pp. 112-113, CDDH/III/SR.49, paras. 24-31), and, at the end of the session the Rapporteur of Committee III presented an extensive report on the discussions of the Working Group on this subject (*ibid.*, pp. 404-407, CDDH/236/Rev.1, paras. 95-108). The problem was then taken up at the fourth session, but with a new approach by way of private consultations between the representative of Nigeria with other delegations. The new draft which emerged from these consultations, the present Article 47, was then adopted without any difficulty by Committee III (*ibid.*, pp. 189-190, CDDH/III/SR.57, paras. 4-7; and pp. 510-511, CDDH/III/369). During the explanations of vote in the Committee, only two delegations indicated that they would have abstained, if the article had been put to the vote; see *ibid.*, pp. 191-202, CDDH/III/SR.57, and particularly p. 195, para. 28 and p. 201, para. 55).

¹³ *O.R. VI*, p. 156, CDDH/SR.41.

¹⁴ *Ibid.*, pp. 156-161, and pp. 175-176, 182, 184-185, 191-194, 197-198, 202-204.

¹⁵ *Ibid.*, p. 158, para. 82.

¹⁶ This was the case during the Second World War (see 12 *Law Reports*, The German High Command Trial), and afterwards (see *Commentary III*, pp. 413-414).

- 1795 However, by providing that a mercenary “shall not have the right” to be a combatant or a prisoner of war, the Conference still resisted the most extreme demands. In fact, many delegations wished the wording to be more stringent, viz., that the mercenary “shall not be accorded” this status.¹⁷ This would have led to a surprising situation for a humanitarian text, since any Contracting Party according such status to a mercenary, would then have violated the Protocol. The result would have been all the more shocking, as the problem was broached in the Protocol in a wider context than that of other international texts relating to the same subject. In the Protocol the problem of mercenaries is actually dealt with without taking into account the cause they serve, which is not the case in the United Nations resolutions.¹⁸ Thus, like Article 46 (*Spies*) concerning spies, the present provision permits a Party to the Protocol to deny the status of combatant and prisoner of war to a mercenary; it does not oblige the Party to deny such status, irrespective of the cause served.¹⁹
- 1796 The effect of the denial of the status of combatant and prisoner of war in case of capture is to deprive the mercenary of the treatment of prisoner of war as laid down in the Third Convention, and to make him liable to criminal prosecution. Such prosecution can be instigated both for acts of violence which would be lawful if performed by a combatant, in the sense of the Protocol, and for the sole fact of having taken a direct part in hostilities (paragraph 2(b)). This is where the crucial question of guarantees arises.
- 1797 Deprived of the status of combatant and prisoner of war, a mercenary is a civilian who could fall under Article 5 of the Fourth Convention. It is precisely this article which removes an important part of the guarantees from any person under legitimate suspicion of being engaged in an activity endangering State security.²⁰ Some delegates, who were anxious that Article 47 might be given a

¹⁷ Cf. the initial proposal of Nigeria, *O.R.* XV, p. 112, CDDH/III/SR.49, para. 24.

¹⁸ Thus Resolution 3103 (XXVIII) of the General Assembly only incriminates mercenarism to the extent that it is employed by colonialist or racist governments or governments of alien occupation against a national liberation movement. The text of the draft UN convention contains a strict version: Mercenaries shall in no case be legitimate combatants and shall not be entitled to prisoner-of-war status (Art. 3). Moreover, it proposes either to take over literally the definition of mercenary given in the Protocol, or to specify that the term “mercenary” means any person specially recruited in order to engage in violence against a (foreign) State or its government (Art. 2). However, other proposals were also advanced (see Report of the *Ad Hoc* Committee of the General Assembly, 39th session, supplement No. 43 (A/39/43, p. 28)).

¹⁹ On this point, see the remarks of E. David, *Mercenaires et volontaires internationaux en droit des gens*, Brussels University, 1978, p. 392. See also, by the same author, “Les mercenaires en droit international (Développements récents)”, 13 *RBDI*, No. 1-2, 1977, p. 197.

²⁰ Account should be taken, however, of the possible diplomatic protection of the State of which the mercenary is a national. Article 4, paragraph 2, of the Fourth Convention does in fact provide that “nationals of a neutral State who find themselves in the territory of a belligerent State [...] shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”. They are not covered by Article 5 of the Fourth Convention.

dissuasive character, wished to leave it at that. However, it still remained necessary for the mercenary status of the person concerned to be established on the basis of the definition of paragraph 2. Meanwhile, i.e., pending determination of the status of such a person by a competent tribunal (Third Convention, Article 5, paragraph 2; Protocol, Article 45 – *Protection of persons who have taken part in hostilities*, paragraphs 1 and 2), he is presumed to be a prisoner of war (Protocol, Article 45 – *Protection of persons who have taken part in hostilities*, paragraph 1) and is consequently protected by the Third Convention (Article 5, paragraph 2).

- 1798 If the tribunal comes to the conclusion that the person concerned is a mercenary in the sense of paragraph 2 of Article 47, Article 75 (*Fundamental guarantees*) applies, and his rights of communication continue to be guaranteed, even in occupied territory, notwithstanding the provisions of Article 5 of the Fourth Convention (Article 45, paragraph 3, of the Protocol). It is regrettable that this qualification is not expressly included in the text of Article 47.²¹ However, it is understood, as the Rapporteur's report reveals that

“although the proposed new article makes no reference to the fundamental protections of Article 65 [75], it was understood by the Working Group that mercenaries would be one of the groups entitled to the protections of Article 65 [75] [...]”²²

This interpretation was expressly accepted at a plenary meeting by the representative of Nigeria.²³ Moreover, it was confirmed by a large number of statements,²⁴ and it should therefore be considered that the question has been unequivocally settled, particularly as it directly ensues from the text of Article 45 (*Protection of persons who have taken part in hostilities*). As regards the above-mentioned OAU Convention, Article 11 of this states that mercenaries “shall be entitled to all the guarantees normally granted to any ordinary person by the State on whose territory he is being tried”. Obviously the guarantees laid down by the International Covenant on Civil and Political Rights, and all other applicable instruments relating to human rights, also continue to apply in the case of participation in this agreement.

- 1799 However, the solution to this problem introduced by the Conference, and Article 47 in its entirety, continued to be criticized for another reason. Several delegations from various quarters declared that the prohibition on using mercenaries should have been based on a prohibition on recruiting and enlisting mercenaries, and therefore apply at the level of States, and not, or not solely, at

²¹ Several delegations openly deplored this at the plenary meeting; see *O.R.* VI, p. 158, CDDH/SR.41, paras. 82 and 88; p. 160, para. 98; p. 161, para. 105; pp. 175, 182, 194-195, 198. The same happened in Committee III; see *O.R.* XV, p. 191, CDDH/III/SR.57, para. 14; p. 194, paras. 25; p. 195, para. 28; p. 198, para. 37; p. 199, para. 41; p. 202, para. 56.

²² *O.R.* XV, p. 511, CDDH/III/369.

²³ *O.R.* VI, p. 157, CDDH/SR.41, para. 81.

²⁴ For the plenary meeting, see *ibid.*, p. 159, para. 92; p. 160, paras. 97-98; pp. 175-176, 192, 194-195.

the level of individuals,²⁵ possibly by means of a special treaty. Some delegations expressed the wish that “the new article would encourage governments which had not yet prepared rules of criminal law prohibiting the recruitment, training, formation and commitment of mercenaries to take the necessary legislative action in order to eliminate completely the crime of the mercenary system”.²⁶

- 1800 One last point deserves a mention. Article 47 forms part of Protocol I, which deals only with international armed conflict to the exclusion of armed conflicts which are not of an international character. Yet the presence of “mercenaries” is frequently noted precisely in armed conflicts with a non-international character. In case of capture, these mercenaries undeniably benefit from the protection of Article 3 of the Conventions, and the corresponding provisions of Protocol II, when the latter is applicable, as well as from the provisions of international human rights legislation, when these apply. In fact, the person concerned will not normally be prosecuted on account of his mercenary status, but for endangering State security.²⁷

Paragraph 2 – Definition of mercenary

- 1801 There are few words which suffer greater misuse these days than the term mercenary. Whenever an armed opposition movement arises against a particular cause, the adversary is immediately defined as a mercenary. In the long run such inexact use of language could constitute a danger with regard to the respect of humanitarian law applicable in cases of international armed conflict, and for this reason alone, it was perhaps useful for the Diplomatic Conference to concern itself with this concept.
- 1802 Mercenaries have existed since time immemorial.²⁸ Nowadays mercenaries only represent one section of the vast category of international volunteers who are defined *lato sensu* as individuals whose voluntary personal membership of an armed force involves certain elements of a foreign character.²⁹ In principle, what

²⁵ In this sense, see in the plenary meeting, *ibid.*, p. 158, paras. 82 and 85; p. 160, para. 100; pp. 189, 193-194, 197-198, 202-204, and for the Rapporteur’s report, *O.R.* XV, p. 454, CDDH/407/Rev.1, para. 24.

²⁶ *O.R.* XV, p. 194, CDDH/III/SR.57, para. 24; p. 198, para. 38; see also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Res. 2625 (XXV)).

²⁷ For example, in 1971 in Khartoum, Rolf Steiner, who had German nationality and had helped the Sudanese rebellion, was considered as a mercenary, though he was prosecuted and sentenced on quite different grounds relating to State security. Since then the intervention of mercenaries has emerged in particular in the Comoros, Angola, Benin, the Seychelles etc.

²⁸ See E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, pp. 5 ff.; O. Tandon, *Legal and Political Status of Mercenaries in History and in the Contemporary World*, dissertation, Dar es Salaam, 1978, pp. 22 ff.; P. Joenniemi, “Two models of Mercenarism: Historical and Contemporary”, *Instant Research on Peace and Violence* (Tampere Peace Research Institute), vol. 7, No. 3-4, 1977, pp. 184-196.

²⁹ Cf. E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, p. 2; for contemporary examples, *ibid.*, pp. 16-21; see also O. Tandon, *op. cit.*, pp. 52-90; T. Boumedra, “International Regulation of the Use of Mercenaries in Armed Conflicts”, XX-1-2 *RDPMG*, 1981, pp. 35-87, provides a contemporary view of the applicable law on this subject.

distinguishes a mercenary from an international volunteer is the cause and the motive which lead him to join up, although this is not always easy to determine.³⁰ We will show that the present provision makes the pursuit of monetary gain virtually the determining factor in defining a mercenary, once the other conditions of the definition are fulfilled.

- 1803** However, before proceeding to examine these conditions, it is appropriate to recall that although, under the terms of the conventional law of neutrality, “corps of combatants must not be formed nor recruiting agencies opened on territory of a neutral Power”,³¹ the responsibility of this Power “is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents”;³² as for the individual concerned, he “shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act”,³³ regardless of the motives, pecuniary or otherwise, which provoked his actions. This traditional rule no longer automatically applies under the terms of paragraph 1 to a mercenary as defined in the present provision, but this holds true only for such a mercenary.
- 1804** The various conditions enumerated sub-paragraphs (a) to (f) are cumulative, and should consequently all be met for the person concerned to qualify as a mercenary.

Sub-paragraph (a) – Being especially recruited locally or abroad in order to fight in an armed conflict

- 1805** This condition excludes volunteers who enter service on a permanent or long-lasting basis in a foreign army, whether as a result of a purely individual enlistment (French Foreign Legion, Spanish Tercio) or an arrangement concluded by their national authorities (for example, the Nepalese Ghurkhas in India, the Swiss Guards of the Vatican). Thus a volunteer who has been specially recruited locally or abroad in order to fight in an armed conflict can be considered as a mercenary in the sense of Article 47, provided that the other conditions mentioned below

³⁰ Cf. E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, p. 3: “les mobiles qui poussent un individu à s’engager dans une force étrangère sont variables: l’argent, l’esprit de “baroud”, le goût de l’aventure, la “fuite” psychologique, les instincts de destruction, l’“idéisme politique” peuvent être énumérés sans qu’il soit toujours facile de discerner la motivation déterminante”. (“The motives which lead an individual to enlist in a foreign force are many and varied: money, fighting spirit, a sense of adventure, psychological ‘escapism’, a destructive instinct, ‘political idealism’ can all be listed, though it is by no means always easy to identify the determining factor.”) (translated by the ICRC).

³¹ The Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in War on Land of 18 October 1907, Article 4. This rule is nowadays also confirmed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (Res. 2625 (XXV) and by the Definition of aggression (Res. 3314 (XXIX)).

³² Hague Convention V, Article 6; this article, which upholds the principle of individual liberty, is nowadays criticized by several authors. Cf. E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, pp. 164 ff.

³³ Hague Convention V, Article 17, para. 2.

are also met; not a volunteer who is a regular member of the armed forces of a belligerent irrespective of the particular armed conflict in which he is participating (see also below, sub-paragraph (e)).

Sub-paragraph (b) – He does, in fact, take a direct part in the hostilities

- 1806** Only a combatant, and a combatant taking a direct part in hostilities, can be considered as a mercenary in the sense of Article 47. Consequently this condition excludes foreign advisers and military technicians, who are found in numerous countries nowadays, even when their presence is motivated by financial gain, as far as they are concerned (sub-paragraph (c) below). The increasingly perfected character of modern weapons, which have spread throughout the world at an ever-increasing rate, requires the presence of such specialists, either for the selection of military personnel, their training or the correct maintenance of the weapons. As long as these experts do not take any direct part in the hostilities,³⁴ they are neither combatants nor mercenaries, but civilians who do not participate in combat.

Sub-paragraph (c) – He is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces

- 1807** For the protagonists of this article, this is the crux of the matter. In contrast to a volunteer who is moved by a noble ideal, the mercenary is considered to offer his services to the highest bidder, since he is essentially motivated by material gain. The highest bidder will normally be found on the richest side. However, as all soldiers of all armies receive a remuneration for maintaining themselves and their families, it was necessary, in order to be consistent, to specify that this remuneration should be substantially higher than that of the members of the army.³⁵

- 1808** Finally, “recognizing that some ranks and functions in armed forces are likely to be paid more than others”, the text provides for:

“an objective test to help determine motivations of persons serving with the armed forces of a Party to the conflict; such persons may not be considered to be motivated essentially by the desire for private gain unless they are promised compensation substantially in excess of that promised or paid to

³⁴ On the meaning of this expression, see also *supra*, ad Art. 43, para. 2, p. 516.

³⁵ It is in particular on this point that the above-mentioned draft Convention of the United Nations (see *supra*, notes 11 and 18) diverges from the text of the Protocol as regards the definition of mercenary. The UN text stops after the words “private gain”, while the Protocol only forbids what could be considered as unjustified enrichment. It was probably the difficulty of furnishing proof of such unjustified enrichment which led the drafters to adopt such a strict attitude (cf. *O.R.* XV, p. 193, CDDH/III/SR.57, para. 21, and *O.R.* VI, p. 160, CDDH/SR.41, para. 101).

combatants of similar rank and function in the armed forces of that Party. Thus, pilots would be judged by the same standards of compensation as other pilots, not by the standard of infantrymen”.³⁶

- 1809** However, this solution gave rise to a number of criticisms. In the first place, because it is far from clear that all mercenaries are essentially motivated by private gain, at least by immediate material gain.³⁷ Moreover, it was argued that this formulation would encourage the appearance of a new category of mercenaries, those who base their actions on ideology.³⁸ In the third place,

“a Party to a conflict would be hard put to it to prove generous remuneration, since mercenaries’ wages were paid either in their own countries or into bank accounts in other countries”.³⁹

However, since the intention in the Protocol, after careful consideration, was, on the one hand, to make a distinction between mercenaries pursuing their own “interests” and selfless international volunteers, and on the other hand, to disregard the particular cause served by the mercenary, and even the fact that he uses his skill to illegal ends, no other path was possible.⁴⁰

- 1810** In conclusion, “mercenaries” who fulfil all the other conditions of Article 47, but who receive a salary identical to that of the combatants of a similar rank and function of the army in which they are serving, are not mercenaries in the sense of the Protocol, even if they are engaged in combat against a Member State of the United Nations in a so-called war of aggression, or against a national liberation movement.

Sub-paragraph (d) – He is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict

- 1811** Whether or not one is sympathetic to the cause that they are serving, nationals of a Party to the conflict who voluntarily engage in combat in the ranks of that Party, are not mercenaries in the sense of the Protocol.⁴¹
- 1812** In many countries the enlistment into the armed forces of residents (i.e., foreigners) is expressly provided for, and even compulsory.⁴² Obviously this does not imply the right to force a prisoner of war or a person protected by the Fourth

³⁶ Report of the Rapporteur, *O.R.* XV, p. 455, CDDH/407/Rev. 1, para. 26, and p. 511, CDDH/III/369.

³⁷ *Cf. supra*, note 30, p. 577; see also *O.R.* XV, p. 200, CDDH/III/SR.57, para. 47.

³⁸ *Ibid.*, p. 193, para. 21.

³⁹ *Ibid.*

⁴⁰ The United States draft Convention not only deals with mercenaries, but also with mercenarism, which it considers as a crime against international peace and security (Art. 10).

⁴¹ For example, the Meos recruited during the conflict in Viet Nam from the country’s mountain tribes (See O. Tandon, *op. cit.*, p. 66). Obviously the same applies to nationals who are regular members of the army of their country, whether this is a professional army or not, even if this army is engaged against a national liberation movement.

⁴² For examples, see E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, pp. 293-295.

Convention to serve in the armed forces of an enemy power (Third Convention, Article 130; Fourth Convention, Article 147, “grave breaches”). However, for foreign residents in the true sense of the word, the Rapporteur explains that: “it was felt that persons in these groups should not be placed at risk of being considered mercenaries”.⁴³

Sub-paragraph (e) – He is not a member of the armed forces of a Party to the conflict

- 1813** Perhaps with some justification it has been said that this clause made the definition of mercenaries completely meaningless.⁴⁴ In fact, it is sufficient for States which employ them, to make them members of their armed forces for them no longer to be mercenaries. Nevertheless, this provision was necessary, because many States enlist foreigners in their armed forces on a regular basis, and without making these into corps as described in sub-paragraph (a).⁴⁵ However, such persons are not always specially recruited to take part in a particular armed conflict (sub-paragraph (a)), and this could form an element distinguishing those foreigners who are “regularly” enlisted and those who are enlisted as mercenaries, although this possibility is often expressly provided for in case of war.⁴⁶ As each of the conditions listed in sub-paragraphs (a) to (f) must be present for the definition to be met, and each State has control over the composition of its armed forces subject to the provisions of Article 43 (*Armed forces*),⁴⁷ it is clear that enlistment in itself is sufficient to prevent the definition being met.

Sub-paragraph (f) – He has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces

- 1814** A mercenary is a volunteer who, at least officially, enlists on his own account and not on behalf of a third State. Thus there is no question of qualifying corps of troops who have been sent by certain States to different parts of the world for one reason or another, as mercenaries, even if they consist of volunteers who are well rewarded and who in case of need are called upon to take a direct part in hostilities.

J. de P.

⁴³ O.R. XV, p. 511, CDDH/III/369, and pp. 454-455, CDDH/407/Rev.1, para. 25.

⁴⁴ O.R. XV, p. 406, CDDH/236/Rev.1, para. 102.

⁴⁵ For examples, see E. David, *Mercenaires et volontaires internationaux...*, *op. cit.*, pp. 202 ff.

⁴⁶ *Ibid.*, p. 293.

⁴⁷ In the sense of Article 43, anyone who is not a member of the armed forces is not a combatant and does not have the right to participate directly in hostilities. However, one could conceive of an act of “aggression” (*cf.*, *supra*, note 10), carried out by mercenaries who are not members of the armed forces of the “aggressor”.

Part IV – Civilian population

Introduction

- 1815 Part IV is the longest of the six parts of Protocol I, containing thirty-two articles divided into three sections and nine chapters, i.e., virtually a third of the whole Protocol.
- 1816 It is also the most important, for Section I, entitled *General protection against effects of hostilities* obviously represents the crowning achievement of the Diplomatic Conference of 1974-1977 and the most significant victory achieved in international humanitarian law since the adoption of the Fourth Geneva Convention in 1949 relative to the Protection of Civilian Persons in Time of War.
- 1817 The contribution of 1977 is a beneficial complement to the work of 1949, which despite its size remained incomplete, at least on this point. In fact the Fourth Convention, which belongs to the whole body of Geneva law aimed at safeguarding soldiers *hors de combat* as well as persons not participating in hostilities, does not offer complete protection to civilians. Apart from some provisions in Part II, it only protects them against arbitrary and wanton acts of the enemy, leaving aside their protection against dangers arising from certain methods of warfare and the use of certain weapons. The Diplomatic Conference of 1949 did not have a mandate to deal with that particularly delicate area, which at that time fell under the Hague law laying down the rights and duties of belligerents in the conduct of military operations and restricting the choice of the means to be used for inflicting damage.
- 1818 Although Geneva law had been developed in great detail in 1949, and adapted to the requirements of the time, the Hague law had not evolved to the same extent, while the techniques of warfare had developed enormously during the two World Wars. The written rules which could be invoked for protecting civilians against the dangers of hostilities dated back to 1907, when aerial bombardment did not yet exist. Such was the tragic absurdity of the situation.
- 1819 Therefore the ICRC, the initiator of the Geneva Conventions, adopted as one of its main objectives the filling of this glaring gap when it decided in 1967 to undertake a new step in the development of humanitarian law, even if this meant going beyond the classical traditions of Geneva law. However, it did so without hesitation because of the paramount importance of the interests at stake. In fact it had always been interested in this distressing problem and had carried out numerous studies on the subject. Its initiative was fully endorsed by the Red Cross Movement, which lent its full support. This resulted in the development of an impressive body of rules which will be examined hereafter, and which finally

provide guarantees for the population of countries involved in conflicts. There can be no doubt that the population is entitled to such guarantees, though it had been deprived of them for far too long.

1820 A welcome addition to the protection for civilians is the protection of the civilian objects (Chapter III). Chapter V deals with non-defended localities, confirming and supplementing the famous Hague rule, and with demilitarized zones. Chapter VI is entirely new and was introduced in this Section after lengthy debate. It deals with so-called civil defence organizations, whose intervention is so very necessary in conflicts, particularly for the search for and aid of victims of bombardment.

1821 Part IV include two more Sections, also for the benefit of civilians, though in entirely different fields, which supplement the Fourth Convention. Section II is aimed at facilitating relief actions. Section III, which is quite lengthy as it comprises Articles 72-79, is concerned with the treatment of persons in the power of a Party to the conflict; its main concerns are measures in the interests of women and children, the reunion of dispersed families, and the protection of journalists. Moreover, the creation of the important Article 75 (*Fundamental guarantees*) is particularly welcome; all those who do not enjoy more favourable treatment under the Conventions and the Protocol can resort to this.

J.P.

Part IV, Section I – General protection against the effects of hostilities

Introduction

1822 Although traces of the principle of the distinction between combatants and non-combatants, made in order to spare the latter, were present in all great civilizations,¹ it took a long time to become established. For centuries it was considered that war was not only waged against States and their armies, but also against their people. As a result, civilians were at the mercy of the conquerors, who all too often, even if they spared their lives, submitted them to forced labour, looted their property and treated them in a way which showed contempt for even the most elementary rights. Especially during a siege, civilians shared the dangers faced by soldiers.

1823 The notion that war is waged between soldiers and that the population should remain outside hostilities was introduced in the sixteenth century and became established by the eighteenth century. The customs of war acquired a more humanitarian character through the process of civilization and as a result of the influence of thinkers and jurists. One of the first codifications of such rules was the work of Francis Lieber, the author of the famous Instructions given to the armed forces of the United States in 1863 when they were engaged in the Civil War. After a reminder that citizens of the opposite side are enemies, Lieber stated:

“Art. 22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”

1824 In Article 25 he added that, in regular wars, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are exceptions.²

¹ Cf. J. Pictet, *Development and Principles of International Humanitarian Law*, Dordrecht-Geneva, 1985, pp. 5-25.

² However, Lieber states in Article 24 that in wars with uncivilized peoples, protection of individuals was the exception.

- 1825 This view, to which the work of Bluntschli³ and the Oxford Manual⁴ subscribed, was gradually adopted by governments. For instance, on 11 August 1870, King Wilhelm of Prussia declared: “I wage war against French soldiers and not against the French people”.
- 1826 Although it was never officially contained in an international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war, established in Brussels in 1874 in the form of a draft,⁵ and later in the Hague Conventions of 1899 and 1907.⁶ These Conventions contain provisions which restrict resort to force and the use of weapons; they were concerned above all with sparing soldiers unnecessary or excessive suffering, by prohibiting the use of means such as poison, or bullets which expand or flatten in the body (“dum-dum” bullets) and conduct such as perfidy. These measures only affected civilians very indirectly. Protection of civilians from arbitrary and oppressive enemy action, outlined in 1899, and later in 1907,⁷ was expressed in its most complete form in the Fourth Geneva Convention of 1949, which is now supplemented by this Protocol.
- 1827 The protection of the civilian population from the dangers created by hostilities was touched on in 1907 only by some brief provisions contained in the Regulations Respecting the Laws and Customs of War on Land.⁸ They included, in particular, a prohibition on attacking towns, villages, dwellings and buildings which are not defended, and respect for certain buildings dedicated to science, charitable purposes etc. It is true that at that time the firing range of artillery was still relatively short and air-power and modern missiles did not yet exist. The importance which projectiles dropped from aircraft or sent by long-range artillery or even self-propelled missiles have assumed since that time, is clear. The First World War revealed the inadequacy of such norms. During the Second World War there was a dramatic turning point in the situation. Although the basic principle still remained unquestioned, the enormous development of the means of warfare jeopardized this principle in practice. Finally, alleging that they were carrying out reprisals,⁹ the belligerents went so far as to wage war almost indiscriminately, which resulted in heavy losses amongst the civilian population and culminated in the dropping of nuclear weapons on Hiroshima and Nagasaki. Since that time physicists have continued to make their formidable discoveries.

³ J.K. Bluntschli, *Das moderne Kriegsrecht der civilisierten Staaten*, 2nd ed., Nördlingen, 1874; *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 5th ed., Nördlingen, 1878; *Das Beuterecht im Krieg und das Seebeuterecht insbesondere; eine völkerrechtliche Untersuchung*, Nördlingen, 1878.

⁴ *The Laws of War on Land*, Manual published by the Institute of International Law, Oxford session, 1880.

⁵ Project of an International Declaration concerning the Laws and Customs of War, 27 August 1874, Brussels Conference of 1874.

⁶ Above all, the Convention respecting the Laws and Customs of War on Land (IInd Convention of 1899 and IVth Convention of 1907).

⁷ Articles 42-52 of the Regulations annexed to the Hague Convention IV of 1907.

⁸ *Ibid.*, Art. 23, para. 1(g), and Arts. 25-28.

⁹ See, for example, G. Best, *Humanity in Warfare*, London, 1980, pp. 242-244.

- 1828** At this point the need for restrictive regulation became necessary. However, it was clear that the Allied Powers, which had won the Second World War, were in no hurry to pursue this path, no doubt in the fear of condemning their own conduct. This trend also emerged in other fields. Thus the war crimes listed in the Charter of the Nuremberg Tribunal¹⁰ include the wanton destruction of towns and villages as well as devastation which cannot be justified by military necessity.¹¹ There was no condemnation of such acts, however, and the attempts made in this direction were abandoned.
- 1829** The 1949 Diplomatic Conference did not have the task of revising the Hague Regulations. When proposals were submitted to prohibit the use of nuclear weapons, the Conference declared that it did not have the authority to deal with such a problem.¹² This is why the 1949 Geneva Conventions only deal with the protection to which the population is entitled against the effects of war in a brief and limited way. Only a short part of the Fourth Convention¹³ broaches this subject and does so without laying down any basic principles.¹⁴
- 1830** The fact that the Hague Regulations were not brought up to date meant that a serious gap remained in codified humanitarian law. This has had harmful effects in many armed conflicts which have occurred since 1949 involving belligerents one side having a powerful airforce while the other side had no, or hardly any, aircraft. In these circumstances, and in the absence of mandatory, clearly formulated treaty rules on bombardment, it was sometimes difficult to enforce compliance with the provisions of humanitarian law as a whole. “How can you ask us to show consideration for captured enemy airmen and treat them as prisoners of war when our wives and children are attacked and massacred in their homes and on the roads?” Such questions were sometimes asked to the ICRC representatives, and it was not easy to answer them.
- 1831** This situation led the ICRC to establish its Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War,¹⁵ which reaffirmed some of the principles of customary law and offered concrete solutions to resolve problems resulting from changes and developments in weaponry.
- 1832** This draft was submitted to the XIXth International Conference of the Red Cross (New Delhi, 1957), which approved it in principle, but there was no follow-up in practical terms by governments. However, many welcomed this draft, which reaffirmed the distinction to be made between persons participating in military operations and those belonging to the civilian population.

¹⁰ Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed on 8 August 1945 by France, the United Kingdom, the USSR and the United States.

¹¹ Charter, Article 6, para. *b*.

¹² Official Records 1949, II, B, pp. 495-509 (draft resolution of the USSR).

¹³ Part II (Arts. 13-26): General protection of populations against certain consequences of war.

¹⁴ These principles can be found in particular in the Preamble of the St. Petersburg Declaration to the Effect of Prohibiting the Use of certain Projectiles in Wartime, signed at St. Petersburg, 29 November - 11 December 1868; in Articles 1 and 7 of the Oxford Manual (*cf. supra*, note 4); in the above-mentioned Articles of the Hague Regulations, *supra*, note 8.

¹⁵ 1st ed., 1956; 2nd ed., 1958.

1833 However, the ICRC did not become discouraged by the lack of interest of governments; adopting another approach, it suggested at the XXth International Conference of the Red Cross (Vienna, 1965) the reaffirmation of certain basic principles; the result was Resolution XXVIII of that Conference, which solemnly declared that:

“all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons”.

1834 These matters attracted the attention of the United Nations, which up to that time had only dealt with, with some reticence, a few questions relating to armed conflict. The International Conference on Human Rights, held in Teheran in 1968, marked a complete reversal in this field. Since then the United Nations has not ceased to approach these problems with unfailing interest. At the 23rd session of the General Assembly in 1968, Resolution 2444 (XXIII) was adopted taking up the principles expressed in Vienna (though with the exception of the last one). Henceforth, the General Assembly devoted one or more resolutions to the reaffirmation and development of humanitarian law at each of its sessions, thus giving important political support to the efforts of the Red Cross.¹⁶ It is appropriate to cite in particular the Resolution entitled “Basic Principles for the Protection of Civilian Populations in Armed Conflicts” (2675 (XXV)).¹⁷ When

¹⁶ 2579 (XXIV); 2673, 2674, 2675, 2676, 2677 (XXV); 2852, 2853, 2854 (XXVI); 3032 (XXVII); 3058, 3112 (XXVIII); 3245, 3318, 3319 (XXIX); 3500 (XXX); 31/19.

¹⁷ “The General Assembly, [...]

Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
4. Civilian populations as such should not be the object of military operations.
5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

(continued on next page)

this Resolution is compared with the text of Protocol I, it is clear that the principles laid down by the General Assembly are incorporated almost in their entirety.

- 1835** Thus Section I of Part IV contains valid solutions to problems of great importance. If it had not been possible to impose limitations on certain methods of combat, there would have been reason to fear that the credibility of humanitarian law would suffer seriously as a consequence. The text which was adopted is not always as clear as one might have wished, but it seemed necessary to leave some margin of appreciation to those who will have to apply the rules. Thus their effectiveness will depend to a large extent on the good faith of the belligerents and on their wish to conform to the requirements of humanity.
- 1836** This Section contains nineteen articles (48-67), divided into six separate chapters. Chapter I (48-49) lays down the basic rule, defines attacks and the scope of application. Chapter II (50-51) contains the rules relating to the protection of the civilian population. Chapter III (52-56) deals with the objects to be respected and defines military objectives in so far as objects are concerned. Precautionary measures to be observed are the subject of Chapter IV (57-58), and localities and zones under special protection are dealt with in Chapter V (59-60).
- 1837** Finally, it is appropriate to make a special mention of Chapter VI (Articles 61-67), which is devoted to civil defence. The regulation which was adopted is the culmination of efforts made over a period of twenty years; the solutions adopted will permit States to organize their civil defence services on a more solid legal basis than hitherto; the definitions given, the international sign laid down, and the possible co-operation with certain military units, will undoubtedly make it possible to save many lives and to give more help to the victims of hostilities.

* * *

- 1838** Before going on to study the articles which comprise this Section, it is appropriate to reflect for a moment on the question of nuclear weapons.
- 1839** The question had already been raised in 1949, but the Diplomatic Conference, presented with a proposal by the USSR delegation meant in particular to outlaw nuclear weapons, declared that it had no authority to deal with this, and the draft resolution was declared inadmissible by a large majority.¹⁸

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application."

¹⁸ *Supra*, p. 585.

1840 When the ICRC formulated its Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War in 1956, it included the following provision (Art. 14, para. 1):

“Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.”

1841 This provision was seen by several governments as a condemnation of nuclear weapons, and it is undoubtedly mainly for this reason that there was no concrete sequel to the ICRC draft.

1842 In view of the development of air warfare and the increasing resort to bombardment, the situation of the population remained a cause for concern, apart from the problem of nuclear weapons, particularly because of the absence of a restrictive definition of military objectives. This led the ICRC to present its draft articles for the Additional Protocols without approaching this problem. In the introduction to the draft of the present Protocol, the ICRC expressed itself as follows (page 2):

“Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems. It should be borne in mind that the Red Cross as a whole, at several International Red Cross Conferences, has clearly made known its condemnation of weapons of mass destruction and has urged governments to reach agreements for the banning of their use.”

1843 In the introduction to the Commentary on the Draft Protocol the ICRC, explaining its position, stated that it had not included in its drafts, apart from some general provisions, a regulation of atomic, bacteriological and chemical weapons.¹⁹ These general provisions are those which already existed in a codified form or as customary law and which were confirmed in the Protocols. They consist mainly of the provisions of Article 33 of the Draft, the present paragraphs 1 and 2 of Article 35 (*Basic rules*) (dealing respectively with the fact that the right to choose methods and means of warfare is not unlimited, and with superfluous injury or unnecessary suffering), and the customary rule confirmed by Article 43 of the Draft, now Article 48 of the present Protocol (*Basic rule*) (dealing with general protection of the civilian population, distinction between the civilian population and civilian objects, on the one hand, and combatants and military objectives, on the other). Obviously the Protocol could not restrict the scope of these already existing provisions. Moreover, in 1965, the International Conference of the Red Cross, as we saw above, had declared that “the general principles of the Law of War apply to nuclear and similar weapons”. It was also

¹⁹ *Commentary Drafts*, p. 2.

in this sense that the ICRC replied to a number of governments which had communicated with it on this matter.

- 1844 During the course of the four sessions of the Diplomatic Conference which produced the Additional Protocols, several delegations expressed their view on nuclear weapons. During the general debate, a series of governments were opposed to the Conference dealing with specific weapons.²⁰ Other delegations urged the Conference to broach the question of nuclear weapons and to prohibit their use.²¹ Finally, four States urged the Conference not to enter into discussion on nuclear weapons.²²
- 1845 The United Kingdom and the United States confirmed their position when signing the Protocols.²³ At the final meetings of the Conference France declared that it did not consider that the rules of the Protocol applied to nuclear weapons.²⁴
- 1846 Finally, when the Conference adopted Article 33 (the present Article 35 – *Basic rules*) by consensus, the delegation from India declared that it had joined the consensus because, in its interpretation, the rules contained in this article applied to all categories of weapons – nuclear, bacteriological, chemical or conventional, or any other categories of arms.²⁵
- 1847 However, this silence should not be interpreted as approval: first, some of these statements are contradictory; secondly, some were not made during the meetings, but submitted at a later date; finally, the maxim that “silence is consent” is not convincing. None of the delegations which had proposed that the Conference should deal with nuclear weapons submitted official proposals, so that there was no discussion on this subject. The same happened when the Conference dealt with Article 56 (*Protection of works and installations containing*

²⁰ O.R. V, p. 86, CDDH/SR.9; para. 28; p. 113, CDDH/SR.11, para. 64; p. 115, para. 73; p. 121, CDDH/SR.12, para. 24; p. 150, CDDH/SR.14, para. 46; p. 179, CDDH/SR.17, para. 36; p. 192, CDDH/SR.18, para. 47.

²¹ *Ibid.*, p. 97, CDDH/SR.10, para. 36; p. 103, CDDH/SR.11, para. 13; p. 120, CDDH/SR.12, para. 18; p. 123, para. 32; p. 195, CDDH/SR.19, para. 5; O.R. IX, p. 258, CDDH/I/SR.60, para. 23; O.R. XIV, p. 70, CDDH/III/SR.8, para. 87; pp. 241-242, CDDH/III/SR.26, para. 31.

²² O.R. V, p. 134, CDDH/SR.13, para. 36, and O.R. VII, p. 303, CDDH/SR.58, para. 119; O.R. V, pp. 145-146, CDDH/SR.14, para. 21; O.R. VII, pp. 192-194, CDDH/SR.56, para. 3; p. 295, CDDH/SR.58, para. 82.

²³ The declaration of the United Kingdom reads as follows:
“[...] The Government of the United Kingdom of Great Britain and Northern Ireland declare that they have signed on the basis of the following understandings:
[...]

(i) that the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons;
[...]

The declaration of the United States reads as follows:

“[...] This signature is subject to the following understandings:

A) Protocol I

1. It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

[...]”.

²⁴ O.R. VII, p. 295, CDDH/SR.56, para. 3, sub-para. 3.

²⁵ O.R. VI, p. 115, CDDH/SR.39, Annex.

dangerous forces), which lays down special protection for installations containing dangerous forces. The inclusion of nuclear electrical generating stations in the list of protected installations did not provoke any special discussion on nuclear weapons. Similarly, when Article 35 (*Basic rules*), paragraph 3 (protection of the natural environment), was adopted, there was no mention of nuclear weapons, although these are capable of profoundly affecting the natural environment.²⁶

1848 The only time at which the Conference concerned itself with this problem was when it had to define the mandate given to an *Ad Hoc* Committee to study certain conventional weapons²⁷ which cause superfluous injury and unnecessary suffering. Two delegations proposed that the word “conventional” be deleted, so that the Committee’s mandate would extend to nuclear, bacteriological and chemical weapons. The Conference approved the text of the mandate with the word “conventional” by 68 votes to 0, with 10 abstentions.²⁸

1849 The *Ad Hoc* Committee expressed itself as follows in its report:

“Nuclear weapons and other weapons of mass destruction were, of course, the most destructive. In that connection, some delegations rejected the view that the debate on those weapons and their possible prohibition should be left to the disarmament discussions, and they urged that the Conference include them in its programme of work. Another delegation expressed its regret at the decision not to consider these weapons. Many other delegations, however, accepted the limitation of the work of this Conference to conventional weapons. As it was pointed out by some, nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers.”²⁹

1850 The Diplomatic Conference formally recorded the *Ad Hoc* Committee’s report without any discussion on this point, and it was not raised again while the Conference lasted.³⁰

1851 Thus, there were no deliberations on the subject of nuclear weapons throughout the Conference, although one might have expected this subject to be broached at least marginally, in view of the positions adopted and the subjects dealt with. What can be deduced from this? There can be no question of a consensus in the current legal sense of the term,³¹ since no decision was taken.

²⁶ Cf. commentary Art. 35, para. 3, *supra*, p. 414, for the relation between that paragraph and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques of 10 October 1976.

²⁷ In French the expression “armes conventionnelles”, which led to the confusion, was replaced by “armes classiques” in the 1980 Convention.

²⁸ O.R. V, pp. 82-90, CDDH/SR.9, paras. 12-54.

²⁹ O.R. XVI, p. 454, CDDH/47/Rev.1, para. 5.

³⁰ Cf. O.R. V, pp. 219-221, CDDH/SR.21, paras. 1-13.

³¹ The definition of *consensus* contained in Article 4 of the Rules of Procedure of the Conference on Security and Cooperation in Europe is: “Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question”. Cf. also J. Monnier, “Observations sur quelques tendances récentes en matière de formation de la volonté sur le plan multilatéral”, 31 *ASDI*, 1975, pp. 31-51.

Could it then be considered as a tacit understanding? Legally, silence is difficult to interpret. Was there an agreement outside the Conference between the principal States concerned? This is not the place to answer such a question, but it does seem, nevertheless, that none of the States which possess nuclear weapons wished to discuss and examine during this Conference the regulation or the possible limitation of their use.

- 1852** What can be concluded from all this? In the first place, there is no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons. Furthermore, there is no doubt that Protocol I of 1977 has not in any way nullified the general rules which apply to all methods and means of combat. As we saw above, these rules are in any case incorporated in the Protocol. These are, first of all, the provisions of the Hague Regulations of 1907, which are a reminder that belligerents do not have an unlimited right to choose the means of injuring the enemy, that it is prohibited to use weapons, projectiles or other devices of a nature to cause superfluous injury and unnecessary suffering. The Protocol also repeats the customary rule which is at the very basis of the laws and customs of war, i.e., the rule that a distinction shall always be made between combatants and military objectives, on the one hand, and the civilian population and civilian objects, on the other hand. Whatever opinion one may have on the scope of application of Protocol I, these rules remain completely valid and continue to apply to nuclear weapons, as they do to all other weapons. Thus it cannot be argued that by repeating such rules the Protocol excludes nuclear weapons from its scope of application.
- 1853** The foregoing is in no way contradicted by the declarations made by the United Kingdom and the United States on signing the Protocol on 12 December 1977.³² The British declaration refers explicitly to *new* rules and therefore implicitly confirms that the rules *reaffirmed* in the Protocol apply to all arms; and it is in accordance with the British Military Manual.³³ The American declaration is less clear on this point, though it should certainly be interpreted in the same way, as confirmed by the United States Military Manual.³⁴
- 1854** The exact limitations of what is prohibited by international humanitarian law as regards the use of nuclear weapons during armed conflict remains to be determined. This question does not really seem to have ever been resolved.
- 1855** In fact, the question of the lawful nature of certain uses of nuclear weapons in wartime was reopened in the Protocol, though its contents were not really modified. It is clear that this is a highly controversial problem. The fact that States did not wish to resolve it in the context of the CDDH is because it has implications

³² See *supra*, note 23.

³³ *Manual of Military Law*, 1958, Part III, para. 113: "There is no rule of international law dealing specifically with the use of nuclear weapons. Their use, therefore, is governed by the general principles laid down in this chapter."

³⁴ *The Law of Land Warfare*, 1956, para. 35: "The use of explosive 'atomic weapons', whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment". In fact, by using the words "as such", the United States Manual affirms that the use of nuclear weapons by itself does not constitute a violation of international law, but does not exclude the possibility that indiscriminate use could constitute such a violation.

beyond the scope of international humanitarian law, as clearly stated in the above-mentioned report of the *Ad Hoc* Committee. However, it was perhaps also because they knew that the problem could not be solved in the short term, and that it would have paralyzed the adoption of the Protocols.

1856 Thus we are not going to end the debate in the context of the Protocol, but to position it as follows:

1857 – The existing principles reaffirmed in the Protocol, particularly in Article 35 (*Basic rules*) and Article 48 (*Basic rule*) do not allow the conclusion that nuclear weapons are prohibited as such by international humanitarian law.

Some writers certainly have good arguments for claiming that they are so prohibited, based in particular on the prohibition of poison and poisonous weapons, or even of chemical weapons. However, the other point of view is confirmed by first, the absence of a treaty specifically prohibiting or restricting the use of nuclear weapons, secondly the fact that the development of science makes it possible to create more accurate nuclear weapons with more circumscribed effects, and thirdly, and this final argument is based on the previous two arguments, the *opinio juris* of other legal experts, and above all, of governments which possess nuclear weapons.³⁵

1858 – The Protocol does not modify existing law with regard to the use of weapons during an armed conflict, but reaffirms and clarifies such law. Clearly, the hypothesis that States acceding to the Protocol bind themselves without wishing to – or even without knowing – with regard to such an important question as the use of nuclear weapons, is not acceptable. The desire not to broach it during the CDDH is a determining factor in this respect.

1859 – As we saw above, no one could take the view that nuclear weapons are “outside” international humanitarian law, i.e., that armed conflicts carried out with conventional weapons are covered by international humanitarian law, while those using nuclear weapons are not.

If the principles reaffirmed in the Protocol do not prohibit the use of nuclear weapons during an armed conflict, they nevertheless severely restrict such use.

The following principles and rules should in particular be taken into consideration:

³⁵ See in particular R.E. Charlier, “Questions juridiques soulevées par l’évolution de la science atomique”, 91 *Hague Recueil*, 1957/I, p. 213; G. Schwarzenberger, *The Legality of Nuclear Weapons*, London, 1958; N. Singh, *Nuclear Weapons and International Law*, London, 1959; United Nations, General Assembly, “Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons”, UN Doc. A/9215, 7 November 1973, vol. I, chapter II; Y. Sandoz, *Des armes interdites en droit de la guerre*, op. cit., Chapter IV, pp. 57-74; C. Pilloud, “Les Conventions de Genève de 1949 pour la protection des victimes de la guerre, les Protocoles additionnels de 1977 et les armes nucléaires”, 21 *GYIL*, 1978, p. 169; H. Meyrowitz, “La stratégie nucléaire et le Protocole additionnel I aux Conventions de Genève de 1949”, 83 *RGDIP* 4, 1979, p. 905; United Nations, General Assembly, “A Comprehensive Study of the Origin, Development, and Present Status of the Various Alternatives Proposed for the Prohibition of the Use of Nuclear Weapons”, UN Doc. A/AC.187/71, 19 August 1977; GIPRI (Geneva International Peace Research Institute), *Nuclear Weapons and International Law*, Actes du colloque préparés par. Z. Mériboute, Turin, 1985.

- the prohibition “to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” (Article 35 – *Basic rule*, paragraph 2);
- the obligation of the Parties to the conflict to “at all times distinguish between the civilian population and combatants” (Article 48 – *Basic rule*);
- the prohibition of “indiscriminate attacks” (Article 51 – *Protection of the civilian population*, paragraph 4) in particular “an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives, located in a city, town, village or other area containing a similar concentration of civilians or civilian objects” (Article 51 – *Protection of the civilian population*, paragraph 5(a)), and “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” (article 51 – *Protection of the civilian population*, paragraph 5(b)).

- 1860 – Within the scope of these rules, and in particular the principle of proportionality, it is difficult to accurately define the borderline between a use of nuclear weapons which may be lawful and a use which is unlawful: this could only be established by means of negotiations between States aimed at determining the scope and consequences, as regards nuclear weapons, of the principles and rules restated in the Protocols. For that matter, it was only possible to begin establishing such limitations with regard to conventional weapons after a diplomatic conference and the adoption of the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons in 1980.³⁶
- 1861 – This uncertainty which exists regarding the scope of international humanitarian law with respect to the use of nuclear weapons is potentially harmful for such law and consequently all the victims that it aims to protect. This danger is all the greater as a first use of nuclear weapons, considered to be lawful by its user, could be considered as a violation by its victim, and clearly entails the risk of uncontrollable escalation. Therefore States ought to enter negotiations to remove such uncertainty.
- 1862 – As emphasized in a passage of the above-mentioned report of the *Ad Hoc* Committee of the CDDH, “nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers”.³⁷

³⁶ Convention on the Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980. Three Protocols are annexed to that Convention: Protocol I on Non-Detectable Fragments; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons.

³⁷ Cf. *supra*, note 29.

This function, currently known as “the nuclear deterrence” is outside the scope of international humanitarian law. Therefore, the problem is not dealt with in the context of this commentary.

C.P./J.P.

Protocol I

Article 48 – Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Documentary references

Official Records

O.R. I, Part I, p. 146; Part III, p. 15 (Art. 43). *O.R.* III, pp. 193-195. *O.R.* VI, p. 161, CDDH/SR.41, paras. 107-108; pp. 186-188, *id.*, Annex (France, India); pp. 200-201 (Ukrainian Soviet Socialist Republic). *O.R.* XIV, pp. 13-14, CDDH/III/SR.2, paras. 2-8; pp. 15-17, paras. 15, 18-23, 26-27 and 29-30; pp. 19-20, CDDH/III/SR.3, paras. 1-3 and 5-8; pp. 22-23, paras. 24-31 and 34-35; p. 24, paras. 40-41; p. 25, CDDH/III/SR.4, paras. 2-3; p. 26, paras. 4 and 8; pp. 27-28, paras. 9-10, 12, 15-23 and 25-26; p. 29, paras. 31-35; p. 30, paras. 39-42; pp. 31-33, paras. 46, 50-53, 56-60; p. 33, paras. 64, 66 and 68; p. 34, para. 74; pp. 77-79, CDDH/III/SR.10, paras. 2-15; p. 93, CDDH/III/SR.12, para. 36; pp. 130-131, CDDH/III/SR.16, paras. 20-21; pp. 408-409, CDDH/III/SR.38, paras. 35 and 38. *O.R.* XV, pp. 234-235, CDDH/50/Rev.1, paras. 16-19.

Other references

CE/3b, pp. 11-16, 24-25, 29-30 and 131. *CE/6b*, pp. 30-32. *CE/8b*, pp. 43-44. *CE 1971, Report*, pp. 75-76, paras. 424-431; p. 80, paras. 454-455; p. 90, *CE/COM III/4-7*; p. 91, *CE/COM III/11-12*, *CE/COM III/17*; pp. 92-93, *CE/COM III/24*, *CE/COM III/27*. *CE 1972, Basic Texts*, p. 15 (Art. 40). *CE 1972, Commentaries*, Part I, pp. 81-82 (Art. 40). *CRCE 1972, Report*, pp. 14 and 31. *CE 1972, Report*, vol. I, pp. 142-143, paras. 3.106-3.113 (Art. 40); pp. 199-200 (Preamble); vol. II, p. 65, *CE/COM III/PC 2*; p. 68, *CE/COM III/PC 21-22*; p. 69, *CE/COM III/PC 29*; p. 71, *CE/COM III/PC 37*; p. 72, *CE/COM III/PC 42*; p. 75, *CE/COM III/PC 62*; p. 81, *CE/COM III/PC 93*. *Commentary Drafts*, pp. 53-54 (Art. 43). *XXIIInd Int. Conf. RC, Report*, pp. 15-16, paras. 47-49.

Commentary

- 1863** The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907¹ and in Geneva from 1864 to 1977² is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles,³ which had stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”. Admittedly this was concerned with preventing superfluous injury or unnecessary suffering to combatants by prohibiting the use of all explosive projectiles under 400 grammes in weight, and was not aimed at specifically protecting the civilian population. However, in this instrument the immunity of the population was confirmed indirectly.
- 1864** In the Hague Conventions of 1899 and 1907, like the Geneva Conventions of 1929 and 1949, the rule of protection is deemed to be generally accepted as a rule of law, though at that time it was not considered necessary to formulate it word for word in the texts themselves. The rule is included in this Protocol to verify the distinction required and the limitation of attacks on military objectives.
- 1865** Up to the First World War there was little need for the practical implementation of this customary rule as the population barely suffered from the use of weapons, unless it was actually in the combat zone itself. The few measures adopted in The Hague in 1899 and 1907 seemed sufficient: a prohibition to attack places which are not defended, the protection of certain buildings, the fate of the population in occupied areas etc.
- 1866** The situation altered radically already during the First World War as a result of the increased range of artillery and the arrival of the first aerial bombardments from aircraft or airships. However, it was above all the development of weaponry after this conflict and its use during the Second World War which radically changed the situation. As a result the customary rule was affected to such an extent that one might have wondered whether it still existed.⁴
- 1867** By the repeated use of reprisals the point was reached where attacks were systematically directed at towns and their inhabitants.

¹ The Conventions and Declarations adopted on 29 July 1899 and 18 October 1907 by the two International Peace Conferences in The Hague include the following:

- Conventions concerning the laws and customs of war on land (II of 1899, IV of 1907);
- Declarations prohibiting the discharge of projectiles and explosives from balloons (1899 and 1907);
- Convention Respecting Bombardment by Naval Forces in Time of War (IX of 1907).

² Cf. General introduction.

³ Declaration to the Effect of Prohibiting the Use of certain Projectiles in Wartime, signed in St. Petersburg, 29 November – 11 December 1868.

⁴ See H. Meyrowitz, “Le Protocole additionnel I et le droit général de la guerre”, in “Forces armées et développement du droit de la guerre”, *Recueil de la Société internationale de droit pénal militaire et de droit de la guerre*. Brussels, 1982, p. 119, in particular p. 124 (with notes).

1868 From the beginning of its work the ICRC considered that it was necessary to explicitly confirm the concept of the distinction in a treaty. For this purpose it proposed the following:

“in the conduct of military operations, a distinction should be made at all times between, on the one hand, persons who directly participate in military operations and, on the other, persons who belong to the civilian population, to the effect that the latter be spared as much as possible.”⁵

1869 Following the debates which took place during the two sessions of the Conference of Government Experts in 1971⁶ and 1972,⁷ the ICRC introduced in the draft prepared for the Diplomatic Conference the following provision:

“Article 43 – Basic rule

In order to ensure respect for the civilian population, the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.”

1870 After several amendments had been proposed,⁸ Committee III finally decided on the present text of the article. The term “military resources” was the main object of criticism; it was thought that this was not quite appropriate in a purely humanitarian convention, and that in view of the imprecise scope of the term, this could be used to justify attacks against certain non-military objectives.⁹

1871 As finally adopted, this article has the great advantage that it clearly establishes the rule that a distinction must always be made between the civilian population and combatants, on the one hand, and between civilian objects and military objectives, on the other, and that it proclaims the respect and protection to which the civilian population and civilian objects are entitled. It was not discussed in the plenary meetings and was adopted by consensus. However, it gave rise to two explanations of vote: one delegation simply stated: “if there had been a vote, it would have abstained therefrom”, because it considered that that article “has direct implications as regards a State’s organization and conduct of defence against an invader”.¹⁰ Another delegate considered that:

“this article will apply within the capability and practical possibility of each party to the conflict. As the capability of the parties to distinguish will depend upon the means and methods available to each party generally or at a particular moment, this article does not require a party to do something which is not within its means or its capability.”¹¹

⁵ CE/3b, p. 24-25; see also pp. 11-16.

⁶ CE 1971, Report, pp. 75-77, paras. 424-439.

⁷ CE 1972, Report, Vol. I, pp. 141-144, paras. 3.97- 3.124.

⁸ Cf. O.R. III, pp. 193-195.

⁹ See O.R. XIV, p. 15, CDDH/III/SR.2, para. 18; p. 20, CDDH/III/SR.3, para. 8; pp. 26-27, CDDH/III/SR.4, paras. 8-9; pp. 31-32, paras. 53 and 57.

¹⁰ O.R. VI, p. 186, CDDH/SR.41, Annex (France).

¹¹ Ibid., p. 188 (India).

In this respect it should be noted that it is the duty of Parties to the conflict to have the means available to respect the rules of the Protocol. In any case, it is reprehensible for a Party possessing such means not to use them, and thus consciously prevent itself from making the required distinction.

1872 The wording used in this article requires some explanation. First, respect and protection are terms which have long been used in the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. In the last version of that Convention (1949) these terms are used with regard to the wounded and sick (Article 12), medical units and establishments (Article 19), and medical personnel (Article 24). In general the word “respect” implies the concept of sparing the persons and objects concerned, and not attacking them, while the word “protection” implies an act of positive aid and support.¹²

1873 The civilian population is defined in Article 50 (*Definition of civilians and civilian population*), paragraph 2; it comprises all persons who are civilians. According to Article 52 (*General protection of civilian objects*), paragraph 1, civilian objects are all objects which are not military objectives as defined in paragraph 2 of the same article. In the sense of Article 43 (*Armed forces*), paragraph 2, combatants are members of the armed forces with the exception of medical personnel and chaplains.

1874 As regards military objectives, these include the armed forces and their installations and transports. As far as objects are concerned, military objectives are limited, according to Article 52 (*General protection of civilian objects*), paragraph 2:

“to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

1875 Finally, the word “operations” should be understood in the context of the whole of the Section; it refers to military operations during which violence is used, and not to ideological, political or religious campaigns. For reasons which have nothing to do with the discussions in the Diplomatic Conference, the adjective “military” was not used with the term “operations”, but this is certainly how the word should be understood. According to the dictionary, “military operations” refers to all movements and acts related to hostilities that are undertaken by armed forces.¹³ This term is used in several articles in this Section, particularly in paragraph 1 of Article 51 (*Protection of the civilian population*) and it may be useful to refer to the commentary thereon.

C.P. / J.P.

¹² For more details, cf. commentary on the articles mentioned and on Art. 10, *supra*, p. 145.

¹³ *The Shorter Oxford Dictionary*, 1973, p. 1452 defines “military operations” as a “series of warlike or strategic acts”. Cf. also the *Grand Dictionnaire encyclopédique Larousse*, 1984, Vol. 7, p. 7592: “ensemble des combats et des manœuvres de toute sorte exécutés par des forces militaires dans une région déterminée en vue d’atteindre un objectif précis” (battles and manœuvres of all kinds, taken as a whole, as carried out by armed forces in a defined area, with a view to gaining a specific objective) (translated by the ICRC).

Protocol I

Article 49 – Definition of attacks and scope of application

1. “Attacks” means acts of violence against the adversary, whether in offence or in defence.
2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.
3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Documentary references

Official Records

O.R. I, Part I, p. 146; Part III, p. 15 (Art. 44); p. 22 (Art. 66). *O.R.* III, pp. 196-197 and 296-297. *O.R.* VI, p. 176, CDDH/SR.41, Annex (Australia); p. 208, CDDH/SR.42, para. 19. *O.R.* XIV, pp. 14-15, CDDH/III/SR.2, paras. 9-13; pp. 15-17, paras. 16, 19-26 and 28-30; p. 20, CDDH/III/SR.3, paras. 4-5 and 9; pp. 21-23, paras. 14-25, 31 and 36-37; p. 25, CDDH/III/SR.4, para. 1; p. 26, paras. 5-7; pp. 27-28, paras. 11, 13, 16-17 and 23; pp. 28-31, paras. 27-31, 36-38, 43-44 and 48-49; p. 32, paras. 54-56 and 59; p. 33, paras. 61, 65, 67 and 69; p. 34, paras. 72 and 74; p. 48, CDDH/III/SR.6, para. 33; p. 78, CDDH/III/SR.10, para. 3; pp. 85-88, CDDH/III/SR.11, paras. 1-30; pp. 90-91, CDDH/III/SR.12; paras. 17-18 and 21; p. 91, paras. 22-24; p. 92, paras. 32-35; p. 93, paras. 44-46; pp. 130-131, CDDH/III/SR.16, paras. 20-21; p. 141, CDDH/III/SR.17, paras. 2-3; pp. 217-218, CDDH/III/SR.24, paras. 2-4; p. 221, para. 26; pp. 222-223, paras. 32-33 and 38; p. 308, CDDH/III/SR.31, para. 60; pp. 395-401, CDDH/III/SR.37, paras. 35-65; pp. 420-421, CDDH/III/SR.39, para. 13. *O.R.* XV, p. 191, CDDH/III/SR.57, para. 11; pp. 235-238, CDDH/50/Rev.1, paras. 20-33; pp. 255-258,

CDDH/III/78/Add.I and Annex; pp. 271-272, CDDH/215/Rev.1, paras. 42-46 and p. 302; pp. 327-328, CDDH/III/224; pp. 462-463, CDDH/407/Rev.1, paras. 49-53; p. 516, CDDH/III/369 (Art. 66).

Other references

CE/3b, p. 21, note 15; p. 050, Annex XIX (Art. 3); p. 058, Annex XIX *bis*. CE 1971, *Report*, p. 86, para. 486; pp. 97-99, CE/COM III/44 (Art. 4). CE 1972, *Basic Texts*, p. 16 (Art. 44). CE 1972, *Commentaries*, Part I, p. 90 (Art. 44). CRCE 1972, *Report*, p. 31 (Art. 40). CE 1972, *Report*, vol. I, p. 148, paras. 3.146-3.149 (Art. 44); vol. II, p. 65, CE/COM III/PC 5; p. 68, CE/COM III/PC 22; pp. 73-74, CE/COM III/PC 51; p. 83, CE/COM III/PC 105. *Commentary Drafts*, pp. 54-55 (Art. 44); pp. 84-85 (Art. 66). *XXIIInd Int. Conf. RC, Report*, p. 16, para. 50.

Commentary

- 1876** Article 44 of the 1973 draft contained the essence of the provisions of paragraphs 1, 3 and 4.¹ The Conference took up these proposals, supplementing and modifying them and adding paragraph 2, which is itself based on other articles in the draft.²

Paragraph 1

- 1877** The term “attacks” is used many times in Part IV. It was appropriate to provide a definition of this term and Committee III, and later the Drafting Committee, restricted themselves to minor changes of the wording. The only aspect which gave rise to controversy was the expression “against the adversary”, but Committee III decided to retain this wording with 38 votes in favour, 18 votes against and 10 abstentions.³ Those who wished to delete the words argued that the provisions of this Section of the Protocol should apply to the civilian population of all the Parties to the conflict, including the civilian population of

¹ “Article 44 – Field of application

1. The provisions contained in the present Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land.

2. These provisions apply to acts of violence committed against the adversary, whether in defence or offence. Such acts are referred to hereafter as ‘attacks’.

3. These provisions are complementary to such other international rules relating to the protection of civilians and civilian objects against effects resulting from hostilities as may be binding upon the High Contracting Parties, in particular to Part II of the Fourth Convention.”

² Draft Articles 48 and 66.

³ O.R. XIV, p. 86, CDDH/III/SR.11, para.11.

the Party concerned. It will be noted that this idea was partially retained in paragraph 2 of the article.

- 1878** The expression “attacks” is not only used in Part IV, but also in other provisions such as Articles 12 (*Protection of medical units*), 39 (*Emblems of nationality*), 41 (*Safeguard of an enemy hors de combat*), 42 (*Occupants of aircraft*), 44 (*Combatants and prisoners of war*) and 85 (*Repression of breaches of this Protocol*). The definition certainly also applies in these cases, even though it is given at the beginning of Part IV. For that matter, there was a proposal to include the definition in Article 2 of the Protocol (*Definitions*), but Committee III and the Drafting Committee considered that it was preferable to include it at the beginning of the Section dealing with the general protection of the civilian population, where the definition has a special significance.
- 1879** It is quite clear that the meaning given here is not exactly the same as the usual meaning of the word. In the larger dictionaries the idea of instigating the combat and striking the first blow is predominant. The second definition given in the Shorter Oxford Dictionary is closest to the meaning of the term as used in the Protocol, “to set upon with hostile action”.⁴ In this respect it is interesting to refer to an investigation conducted amongst its members by the International Society of Military Law and the Law of War.⁵ The questions that were raised included one relating to this question of terminology. In general the replies indicated that the meaning given by the Protocol to the word “attacks” did not give rise to any major problems, even though military instruction manuals in many countries define an attack as an offensive act aimed at destroying enemy forces and gaining ground.
- 1880** The definition given by the Protocol has a wider scope since it – justifiably – covers defensive acts (particularly “counter-attacks”) as well as offensive acts, as both can affect the civilian population. It is for this reason that the final choice was a broad definition. In other words, the term “attack” means “combat action”. This should be taken into account in the instruction of armed forces who should clearly understand that the restrictions imposed by humanitarian law on the use of force should be observed both by troops defending themselves and by those who are engaged in an assault or taking the offensive.
- 1881** During the above-mentioned enquiry the question arose whether the placing of mines constituted an attack. The general feeling was that there is an attack whenever a person is directly endangered by a mine laid.
- 1882** Finally, it is appropriate to note that in the sense of the Protocol an attack is unrelated to the concept of aggression or the first use of armed force;⁶ it refers simply to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. Questions relating to the responsibility for unleashing the conflict are of a completely different nature.

⁴ Shorter Oxford Dictionary, 1978, p. 127.

⁵ Questionnaire on the subject of armed forces and the development of the laws of war, presented during the ninth International Conference of the International Society of Military Law and the Law of War, held at Lausanne from 2-6 September 1982. Text in “Forces armées et développement du droit de la guerre”, *op. cit.*, pp. 51-55; see also p. 303.

⁶ See commentary Preamble, *supra*, p. 28.

Paragraph 2

1883 This paragraph contains a provision which the ICRC had placed in the draft in two virtually identical articles (48 and 66), entitled “Objects indispensable to the survival of the civilian population”, of which the latter read as follows:

“It is prohibited to destroy, render useless or remove objects indispensable to the survival of the civilian population, namely, foodstuffs, food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether to starve out civilians, cause them to move away or for any other reason. They shall not be made the object of reprisals.”

1884 This provision was addressed to the Party to the conflict in whose power were the objects indispensable to the survival of the civilian population. The Conference did not feel that it was necessary to go so far, and Committee III formulated a draft Article 66 in the following terms:

“1. The provisions of this Protocol with respect to attacks apply to all attacks wheresoever conducted, including the national territory belonging to a Party to the conflict but under the control of an adversary.

2. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 of Article 48 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.”⁷

1885 The report of Committee III⁸ notes that because of the adoption of Article 48 in a modified form (Article 54 of the Protocol – *Protection of objects indispensable to the survival of the civilian population*), the proposal was no longer valid, but that the article permitted specifying the scope of application of Article 48 of the draft like other articles limiting or prohibiting attacks.

1886 Finally Committee III decided to allow the Drafting Committee the choice of where to place these two paragraphs (the second limiting the scope of the first) though it made some suggestions which were taken up by the Drafting Committee.

1887 Thus paragraph 1 became paragraph 2 of Article 49, which is under consideration here, while paragraph 2 became paragraph 5 of Article 54 (*Protection of objects indispensable to the survival of the civilian population*).

1888 It clearly follows from this second provision that a belligerent, part of whose territory is controlled by the enemy, cannot mount attacks in such territory against objects indispensable to the survival of the population in violation of the provisions of the Protocol, whereas the belligerent could, in case of imperative military necessity, destroy such objects in the part of its territory under its control in order to counter an invasion. In other words, in certain extreme circumstances the Protocol does not rule out a “scorched earth” policy by a retreating

⁷ O.R. XV, p. 492, CDDH/407/Rev.1, Annex II.

⁸ *Ibid.*, pp. 462-463, CDDH/407/Rev.1, paras. 49-53.

belligerent in his own national territory. On the other hand, an Occupying Power cannot act in this way when it is withdrawing from territory under its control.

1889 The report of Committee III notes that the French term “contrôle” means *de facto* control and not *de jure* control. This is the English sense of the term, i.e., the power to administer, subordinate.⁹ In fact the English text uses the word “control”. It was decided not to use the word “occupied” which could raise legal problems, but instead the word “control” which refers to a factual situation and not a legal concept.

1890 In addition, it should be noted that destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack given in paragraph 1, as such acts, though they may be acts of violence, are not mounted “against the adversary”. Moreover, such destruction is most often carried out by very different means from those used in an attack.

1891 Finally, this paragraph makes it clear, as is implied in paragraph 4, that the provisions of the Protocol relating to attacks and the effects thereof apply to the whole of the population present in the territory of the Party to the conflict, even if it is under enemy control – as does Part II of the Fourth Convention.

Paragraph 3

1892 The first sentence of this paragraph repeats almost literally the text of the first paragraph of Article 44 of the 1973 draft, which gave rise to lengthy discussion during the Diplomatic Conference.¹⁰

1893 The discussions during the first session of the Diplomatic Conference were concerned mainly with three points:

- a) Some delegates wished to replace the word “warfare” (in French, “opérations militaires”) by the term “attacks”. In the end¹¹ Committee III decided to retain the ICRC text on this point. It was mainly a difference of opinion regarding the wording to be used.
- b) The second point related to a matter of substance: the inclusion of the words “against the adversary”. The Committee accepted this insertion.¹²
- c) Finally, many delegations wished to delete the words “on land”. Those who recommended that they be deleted wished the definition to have an effect on the rules of law applicable to the conduct of war at sea or in the air inasmuch as this provision would be more favourable to civilians than the present rule

⁹ The normal meaning of the French verb “contrôler” is to “check” or “verify”.

¹⁰ See particularly *O.R.* XIV, p. 15, CDDH/III/SR.2, para. 11; p. 16, paras. 21 and 24, p. 17, paras. 26, 28-29; p. 20, CDDH/III/SR.3, paras. 4, 9; pp. 21-22, paras. 14-22; p. 23, paras. 31 and 36; p. 25, CDDH/III/SR.4, para. 1; p. 27, paras. 11, 13; pp. 28-29, paras. 27, 29, 31; pp. 29-31, paras. 36-37, 43, 48; p. 32, paras. 54-56, 59; p. 33, paras. 61, 65; p. 34, paras. 72, 74; p. 85, CDDH/III/SR.11, paras. 2, 5-6; pp. 86-88, paras. 16-30; p. 91, CDDH/III/SR.12, paras. 22-24; p. 92, paras. 32-34; p. 93, paras. 44-46; p. 218, CDDH/III/SR.24, para. 4; p. 221, para. 26; p. 223, para. 38.

¹¹ This proposal was rejected by 50 votes against, 10 votes in favour and 5 abstentions. See *O.R.* XIV, p. 86, CDDH/III/SR.11, para. 13.

¹² 31 votes in favour, 22 against, 11 abstentions. See *ibid.*, p. 86, para. 14.

of law¹³. This deletion was rejected by a vote by Committee III,¹⁴ but a discussion arose regarding where the words “on land” should be placed in the sentence.

- 1894** Finally the Committee referred the provision as a whole to the Working Group, which was only able to make a proposal at the second session of the Diplomatic Conference. The words “against the adversary” were not retained.
- 1895** In general the delegates at the Diplomatic Conference were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea or in the air. This is why the words “on land” were retained and a second sentence clearly indicating that the Protocol did not change international law applicable in such situations was added.
- 1896** This concern is understandable: after all, the conditions of sea warfare were radically transformed during the Second World War and in subsequent conflicts. It is therefore difficult to determine exactly which are the rules that still apply.¹⁵ As regards air warfare, there is no precise written law on this subject, apart from some unclear customary law (for example: external marks indicating the nationality of aircraft). The only codified rule is in this Protocol in Article 42 (*Occupants of aircraft*).
- 1897** Admittedly both sea and air warfare are subject to restrictions imposed by treaties of general application, such as, for example, the Hague Convention of 1954 for the Protection of Cultural Property and the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, but there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse.
- 1898** The provision of this paragraph has the advantage of clearly establishing the fact that attacks from the sea or from the air against objectives on land are subject to the restrictions and conditions imposed by the Protocol. It should be noted in passing that according to the Working Group which formulated the text of this provision, the expression “on land” in this context also applies to rivers, canals and lakes.
- 1899** In the English text the first sentence remained unchanged and the word “warfare” was retained, while the first sentence of the French text was slightly modified in that the word “militaire” qualifying the word “opération” was deleted. It is clear that “opération” refers to an operation of war, and in fact the Spanish text refers to “operación de guerra”, i.e., an operation which is almost always of a military nature.

Paragraph 4

- 1900** The Fourth Convention applies in general to protected persons as defined in Article 4 of that Convention, i.e., mainly to enemy nationals in the territory of a

¹³ O.R. XV, p. 328, CDDH/III/224.

¹⁴ By 35 votes against, 33 in favour and 4 abstentions. See O.R. XIV, p. 86, CDDH/III/SR.11, para. 15.

¹⁵ See *infra*, commentary para. 4 of that article.

belligerent and the inhabitants of occupied territory. Part II has a broader scope and covers the whole population of all countries in conflict. This Protocol has a correspondingly broad scope of application.

1901 Other international agreements binding upon the Contracting Parties¹⁶ are primarily the Hague Convention of 1907 Concerning the Laws and Customs of War on Land and the Regulations annexed thereto, the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, the Hague Convention of 1954 for the Protection of Cultural Property, the regional and universal Conventions and Covenants relating to the protection of human rights, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the 1980 Convention on the Prohibition of Certain Conventional Weapons.

1902 All these treaties are concerned with “humanitarian protection” of individuals. As regards “other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air”, we have already seen that as far as air warfare is concerned there are only some customs relating to actual combat; on the other hand, there are no provisions concerning the fate of civilians on board civilian aircraft¹⁷ or military aircraft, except those relating to the civilian wounded, sick or shipwrecked on board medical aircraft.

1903 At sea, civilians on board warships run the risks to which such ships are exposed. If they are on board enemy merchant ships, their fate will depend on the nature of these vessels. According to the London Procès-Verbal of 1936,¹⁸ warships, whether surface vessels or submarines, cannot sink merchant ships or render them incapable of navigation without first placing the crew, passengers and ship’s documents in safety except in the case of persistent refusal to stop or active resistance to inspection. However, during the Second World War enemy merchant ships were often armed and sailed in convoy under military protection, or even transmitted information by radio to warships. These occurrences resulted in the belligerents failing to observe the London Procès-Verbal on this point and attacking merchant vessels without warning.

1904 According to the Nuremberg International Military Tribunal, the rule is still in force, and in particular an attack on neutral merchant vessels without warning constitutes a war crime.¹⁹ All this led to the Government of the United States to give the following instructions to its naval forces:

“Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances:

¹⁶ See commentary Art. 1, para. 1, *supra*, p. 35 and Art. 51, para. 1, *infra*, p. 617.

¹⁷ See, nevertheless, the recent amendment to the Convention on International Civil Aviation cited in the commentary on Art. 41, *supra*, p. 486, note 20.

¹⁸ 1936 London Procès-Verbal. Relating to the Rules of Submarine Warfare, Set Forth in Part IV of the Treaty of London of 22 April 1930, signed in London, 6 November 1936.

¹⁹ *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 1948, vol XXII (discussions of 27 August to 1 October 1946), pp. 557-559 and 562-563.

- 1) Actively resisting visit and search or capture.
- 2) Refusing to stop upon being duly summoned.
- 3) Sailing under convoy of enemy warships or enemy military aircraft.
- 4) If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.
- 5) If incorporated into, or assisting in any way, the intelligence system of an enemy's armed forces.
- 6) If acting in any capacity as a naval or military auxiliary to an enemy's armed forces.”²⁰

1905 To what extent can such rules be observed by air forces attacking enemy ships? This question is difficult to answer as attacks from the air – and perhaps even those from the sea – are often from a great distance, and it is not always possible to be aware of the exact nature of the vessel being attacked. For this reason several belligerent States have had recourse to the concept of zones in which all navigation, even innocent, is prohibited and within which attacks may be mounted against any vessel without warning.

1906 It follows that, while paragraph 3 seems to limit the prohibitions laid down in this Section to objectives on land, paragraph 4 leaves the applicability of both treaty rules and customary rules unimpaired, insofar as such rules are aimed at protecting civilians and civilian objects in air and sea warfare, and this paragraph even tends to supplement these rules. This aspect is confirmed by the provisions of Article 57 (*Precautions in attack*), of which paragraph 4 urges Parties to the conflict to take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects in the conduct of military operations at sea or in the air.

C.P. / J.P.

²⁰ United States Navy Manual, *The Law of Naval Warfare*, 1955, para. 503 b.(3). Text in R.W. Tucker, “The Law of War and Neutrality at Sea”, *International Law Studies* 1955, Vol. XLX, Washington, 1957, p. 397.

Protocol I

Article 50 – Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1),(2),(3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Documentary references

Official Records

O.R. I, Part I, pp. 146-147; Part III, p. 15 (Art. 45). *O.R.* III, pp. 198-199. *O.R.* VI, p. 161, CDDH/SR.41, para. 109; p. 178, *id.*, Annex (Canada). *O.R.* XIV, p. 16, CDDH/III/SR.2, para. 21; pp. 35-36, CDDH/III/SR.5, paras. 1-6; pp. 37-41, paras. 15-46; pp. 43-46, CDDH/III/SR.6, paras. 1-2, 4-7, 9-12, 14-18 and 20-22; pp. 79-81, CDDH/III/SR.10, paras. 16-31; p. 330, CDDH/III/SR.33, para. 57, *O.R.* XV, pp. 238-240, CDDH/50/Rev.1, paras. 34-43.

Other references

CE/3b, pp. 17-28; p. 050, Annex XIX (Art. 4); p. 058, Annex XIX *bis*. *CE/6b*, pp. 24-26. *CE 1971, Report*, pp. 76-77, paras. 432-439; p. 90, *CE/COM III/1-2*, *CE/COM III/6*, *CE/COM III/8-9*; p. 91, *CE/COM III/11*; p. 92, *CE/COM III/20*; p. 97, *CE/COM III/44* (Art. 5). *CE 1972, Basic Texts*, pp. 15-16 (Art. 41). *CE 1972, Commentaries*, Part I, pp. 82-85 (Art. 41). *CRCE 1972, Report*, p. 31 (Art. 41). *CE 1972, Report*, vol. I, pp. 143-144, paras. 3.114-3.125 (Art. 41); vol. II, p. 70, *CE/COM III/PC 3*; p. 74, *CE/COM III/PC 21-22* and 24; p. 75, *CE/COM III/PC 29*; p. 77, *CE/COM III/PC 35-36*; pp. 78-79, *CE/COM III/PC 43*; p. 80, *CE/COM III/PC 49* and 51-52; p. 82, *CE/COM III/PC 62-63* and 67; p. 84, *CE/COM III/PC 68*; p. 85, *CE/COM III/PC 78*. *Commentary Drafts*, pp. 55-56 (Art. 45).

Commentary

- 1907 This article reproduces almost word for word the provision contained in the 1973 draft (Article 45). It became clear that this very important Section of the Protocol required a definition of the persons to whom it applies in one of its first articles.
- 1908 Article 4 of the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War contains a definition of the persons protected by that Convention against arbitrary and wanton enemy action when they are in the power of the enemy; this is the main object of the Convention. However, Part II, entitled “General protection of populations against certain consequences of war” has a wider field of application; according to Article 13, that Part covers “the whole of the populations of the countries in conflict”. That definition is close to the definition of the civilian population given in Article 50 of the Protocol under consideration here.
- 1909 In protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves. The definition covers civilians individually as well as collectively when they are referred to as the “civilian population”, a concept which can be found in many articles in the Protocol.
- 1910 Some delegates wished the definition to be included in Article 2 (*Definitions*),¹ but the Conference preferred the present arrangement.

Paragraph 1

- 1911 As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories.
- 1912 In the course of history many definitions of the civilian population have been formulated, and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definition, particularly as the categories of persons they cover has varied.
- 1913 Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.
- 1914 This definition has the great advantage of being *ne varietur*. Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other, and that the latter constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations

¹ See O.R. XIV, p. 80, CDDH/III/SR.10, para. 18 (with reference to doc. CDDH/III/66, not published in the Official Records).

of States. Therefore it was worth taking advantage of this possibility. It is clear that a negative definition of the civilian population implies that the meaning given to “armed forces” must be pointed out. This provision of the Protocol refers to the relevant article of the Third Convention and to Article 43 of the Protocol (*Armed forces*), which supplements it.

1915 The paragraph under consideration here therefore follows a process of elimination and removes from the definition those persons who could by and large be termed “combatants”. Therefore, according to Article 4 A of the Third Convention, the following are excluded:

- “1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a) that of being commanded by a person responsible for his subordinates;
 - b) that of having a fixed distinctive sign recognizable at a distance;
 - c) that of carrying arms openly;
 - d) that of conducting their operations in accordance with the laws and customs of war.
- 3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. [...]
- 6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

1916 Paragraph 1 also refers to Article 43 of the Protocol (*Armed forces*), which contains a new definition of armed forces covering the different categories of the above-mentioned Article 4 of the Third Convention.

1917 In other words, apart from members of the armed forces, everybody physically present in a territory is a civilian.

1918 The last sentence of paragraph 1 gave rise to some discussion in the Diplomatic Conference. According to the ICRC draft there was a “presumption” of civilian status, but this concept led to some problems and the Working Group decided to replace “presumed” by “considered”.²

1919 Other delegates thought that the definition might be in conflict with Article 5 of the Third Geneva Convention. Paragraph 2 of that article reads as follows:

² O.R. XV, p. 239, CDDH/50/Rev.1, para. 39.

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

1920 The result of the discussions which took place on this subject was that there could be no contradiction between the two definitions, which are concerned with very different situations.³ In the case of the Third Convention the persons concerned have committed a belligerent act and claim the status of combatants, and therefore ask to be treated as prisoners of war. Article 50 of the Protocol concerns persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked.

1921 The methods combatants use will certainly have an influence on the application of this provision. Thus, for example, if combatants do not clearly distinguish themselves from the civilian population in accordance with the provisions of Article 44 (*Combatants and prisoners of war*), this could result in a weakening of the immunity granted civilians and the civilian population.

Paragraphs 2 and 3

1922 The second paragraph provides that “the civilian population comprises all persons who are civilians”. However, in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population. It is also clear that as laid down in Article 58 (*Precautions against the effects of attacks*) belligerents should remove the civilian population, civilians and civilian objects under their authority from the vicinity of military objectives. A military unit is by definition a military objective and should not be placed in the middle of a civilian population.

C.P. / J.P.

³ *Ibid.*

Protocol I

Article 51 – Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
 - (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
 - (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.
8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and

civilians, including the obligation to take the precautionary measures provided for in Article 57.

Documentary references

Official Records

O.R. I, Part I, p. 147; Part III, p. 16 (Art. 46). *O.R.* III, pp. 200-207. *O.R.* VI, pp. 161-168, CDDH/SR.41, paras. 110-148; pp. 177-179, *id.*, Annex (Byelorussian Soviet Socialist Republic, Canada); pp. 182-183 (Colombia); pp. 187-188 (Federal Republic of Germany, German Democratic Republic); pp. 192-193 (Mexico); pp. 194-195 (Netherlands); pp. 196-197 (Romania); pp. 198-199 (Sweden); pp. 201-202 (Ukrainian Soviet Socialist Republic); p. 234, CDDH/SR.42, Annex (Qatar). *O.R.* IX, pp. 58-66, DDH/I/SR.46, paras. 15-55; pp. 70-81, CDDH/I/SR.47, paras. 20-62; pp. 83-95, CDDH/I/SR.48; pp. 417-418, CDDH/I/SR.72, paras. 2-11; pp. 436-437, CDDH/I/SR.73, Annex (Canada); p. 443 (France); pp. 449-450 (Mexico); p. 452 (Poland); pp. 454-455 (United Republic of Cameroon); pp. 457-458 (Yugoslavia). *O.R.* XIV, pp. 29-30, CDDH/III/SR.4, paras. 36-37; pp. 36-37, CDDH/III/SR.5, paras. 5 and 7-12; p. 49, CDDH/III/SR.6, paras. 43-44; pp. 51-58, CDDH/III/SR.7, paras. 1-50 and 52-58; pp. 59-63, CDDH/III/SR.8, paras. 1-39; pp. 67-70, paras. 41-52, 54-64, 67-71 and 73-89; p. 72, CDDH/III/SR.9, paras. 8 and 10; p. 73, para. 14; p. 74, paras. 25-26; p. 118, CDDH/III/SR.15, para. 7; p. 128, CDDH/III/SR.16, para. 8; p. 130, para. 17; p. 166, CDDH/III/SR.19, para. 17; p. 182, CDDH/III/SR.21, para. 5; p. 185, para. 20; p. 187, para. 37; p. 188, para. 42; p. 191, para. 68; p. 193, paras. 81-82; pp. 218-219, CDDH/III/SR.24, paras. 5-14; p. 221, para. 27; pp. 222-223, paras. 34-37 and 39; p. 235, CDDH/III/SR.26, para. 7; p. 272, CDDH/III/SR.29, para. 10; pp. 299-300, CDDH/III/SR.31, paras. 1-7; pp. 305-306, paras. 42-43; p. 307, paras. 50-51, p. 308, paras. 56-58 and 61; p. 330, CDDH/III/SR.33, para. 57; pp. 399-400, CDDH/III/SR.37, paras. 58-60; pp. 420-421, CDDH/III/SR.39, para. 13. *O.R.* XV, p. 210, CDDH/III/SR.59, para. 9; pp. 240-242, CDDH/50/Rev.1, paras. 44-50; pp. 272-275, CDDH/215/Rev.1, paras. 47-60; pp. 304-305, *id.*, Annex (Art. 46); pp. 327-333, CDDH/III/224; pp. 347-348, CDDH/III/264/Rev.1; p. 455, CDDH/407/Rev.1, para. 28; pp. 519-520, CDDH/III/391.

Other references

CE/3b, pp. 29-40 and 103-109; pp. 03-033, Annex XI; pp. 035-036, Annex XII. *CE/6b*, pp. 30-32 and 42-44. *CE/8b*, pp. 47-48, Annex XI. *CE 1971, Report*, pp. 77-80, paras. 440-453. *CE 1972, Basic Texts*, pp. 16-17 (Art. 45-46). *CE 1972, Commentaries*, Part I, pp. 93-96 (Arts. 45-46). *CRCE 1972, Report*, pp. 32-33. *CE 1972, Report*, vol. I, pp. 148-150, paras. 3.152-3.169; vol. II, p. 65, *CE/COM III/PC 6-7*; pp. 67-68, *CE/COM III/PC 20* and 22; p. 69, *CE/COM III/PC 25* and 29; pp. 70-71, *CE/COM III/PC 33*; p. 72, *CE/COM III/PC 39*; p. 73, *CE/COM III/PC 46* and 50-51; p. 75, *CE/COM III/PC 61*; p. 76, *CE/COM III/PC 67*; p. 77,

CE/COM III/PC 70-71 and 75; p. 78, CE/COM III/PC 79; pp. 80-81, CE/COM III/PC 93; p. 83, CE/COM III/PC 106. *Commentary Drafts*, pp. 56-59 (Art. 46). *XXIInd Int. Conf. RC, Report*, p. 16, paras. 51-52 (Art. 46).

Commentary

General remarks

- 1923** Article 51 is one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities. This general rule is accompanied by rules of application.
- 1924** Committee III of the Diplomatic Conference began examining this article in 1974 and referred it, with the ten amendments which had been submitted, to a Working Group. Committee III adopted the text of this article by consensus. Voting took place in a plenary meeting in 1977 and the article was adopted with 77 votes in favour, 1 against and 16 abstentions.¹
- 1925** The delegation which voted against justified its vote by arguing that the article could seriously hinder the conduct of military operations against an invader and compromise the exercise of the right to self-defence recognized in Article 51 of the Charter of the United Nations. According to this delegation, the provisions relating to indiscriminate attacks should not be such as to prevent a State from defending its territory against an invader, even if this were to entail losses in its own population. Several delegations made similar statements.²
- 1926** Such fears do not seem justified. Article 51 of the Charter of the United Nations reads as follows:
- “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [...]”
- 1927** However, it seems clear that the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 “in all circumstances”; the Preamble of the Protocol reaffirms that their application must be “without any adverse

¹ *O.R.* VI, pp. 165-166, CDDH/SR.41, para. 118.

² *Ibid.*, p. 162. One delegation emphasized that the Charter of the United Nations recognizes the right of individual or collective self-defence in the case of armed attack and that international law cannot restrict the legitimate right of a victim of aggression and occupation to defend itself (*ibid.*, p. 196, Annex (Romania)).

distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict”.

- 1928** It is true that in the preparatory work and during the discussions in the Diplomatic Conference the possibility was referred to of making a distinction between the rules applicable by an aggressor, on the one hand, and by the victim of the aggression, on the other.³ However, several delegations opposed this point of view.⁴ In any case, the Conference did not adopt this suggestion; on the contrary, in the above-mentioned paragraph of the Preamble of the Protocol it confirmed the equality of the Parties to the conflict with regard to the obligations laid down by humanitarian law. This is wholly reasonable, as the distinction between *jus ad bellum* and *jus in bello* is fundamental and should always be respected.
- 1929** Several delegations made spoken or written statements, during the final debate, on the meaning to be given to some of the provisions contained in this article. They will be examined with regard to the paragraphs concerned.
- 1930** In the draft the ICRC had provided that Article 51 (46 of the draft) would be among the provisions to which no reservations could be made. Finally the Conference deleted all provisions relating to reservations, but in the discussions Article 51 had been included in the list of articles to which reservations were prohibited.⁵ In the absence of a specific provision it is therefore general international law that applies, in particular the Vienna Convention on the Law of Treaties (Articles 19-23). It may be recalled that that Convention prohibits reservations which are incompatible with the object and purpose of the treaty.⁶
- 1931** During the course of the discussions and in the written statements some delegations indicated that in their view reservations to this article would be incompatible with the object and purpose of the treaty.⁷ There is no doubt that, as stated above, Article 51 is a key article in the Protocol. It constitutes a reasonable balance which was achieved with difficulty between the divergent views that emerged in the Diplomatic Conference. That is why reservations, even partial ones, could jeopardize this balance and in this way go against the object and purpose of this indispensable provision.
- 1932** The importance attached by the Diplomatic Conference to this article is corroborated by the fact that violation of several of its provisions is qualified as a grave breach. In fact Article 85 (*Repression of breaches of this Protocol*), paragraph 3, qualifies as a grave breach the act of wilfully making the civilian population or individual civilians the object of attack if this causes death or serious injury to body or health.
- 1933** The same applies for wilful indiscriminate attacks affecting the civilian population or civilian objects (or against installations containing dangerous

³ See, for example, *O.R. V*, pp. 119-121, CDDH/SR.12, paras. 13-21, and *O.R. VI*, p. 196, CDDH/SR.41, Annex (Romania).

⁴ See, for example, *O.R. V*, pp. 109-110, CDDH/SR.11, paras. 44-50; pp. 137-138, CDDH/SR.13, paras. 51-57.

⁵ *O.R. X*, p. 251, CDDH/405/Rev.1.

⁶ Cf. introduction to Part VI, *infra*, p. 1061.

⁷ *O.R. VI*, p. 167, CDDH/SR.41, paras. 135-137; p. 187, *ibid.*, Annex (GDR); pp. 192-193 (Mexico).

forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57 (*Precautions in attack*), paragraph 2(a)(iii).

- 1934 Thus in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.

Paragraph 1

- 1935 This is an introductory paragraph which confirms the principle of the general protection of civilians against dangers arising from military operations. There is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum. Such is the aim of the following paragraphs.

- 1936 According to dictionaries, the term “military operations”, which is also used in several other articles in the Protocol, means all the movements and activities carried out by armed forces related to hostilities.⁸ A mixed group of the Diplomatic Conference gave the following definition of the expression “zone of military operations”: “in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located”.⁹

- 1937 The second sentence refers to the “other applicable rules of international law”:¹⁰ apart from some customary rules and, of course, the other relevant provisions of the Protocol, these are mainly the Hague Regulations annexed to Hague Convention IV of 1907 and the Fourth Geneva Convention of 1949. In addition, mention could be made of the rules contained in the Geneva Protocol of 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, as well as the Hague Convention of 1954 for the Protection of Cultural Property. Although they are not aimed directly at the protection of the civilian population, these two treaties can have a positive influence on the fate of the civilian population in time of armed conflict. The Convention concluded in 1980 on the Prohibition or Restrictions on the Use of Certain Conventional Weapons contains corresponding provisions with respect to the civilian population.¹¹

⁸ Cf. the definitions given *supra*, commentary Art. 48, note 13, p. 600.

⁹ O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A.

¹⁰ We also refer to the commentary Art. 49, para. 4, *supra*, p. 606, and Art. 2, sub-para. (b), *supra*, p. 60.

¹¹ Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

– Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Art. 3, paras. 2, 3(c) and 4; Art. 4, para. 2; Art. 5, para. 2; Art. 7, para. 3(a)(i).

– Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Art. 2.

For participation in this Convention, cf. *infra*, p. 1549.

Paragraph 2

- 1938 The first sentence gives substance to the principle of general immunity formulated in the preceding paragraph by explicitly prohibiting attacks directed against the civilian population as such, as well as against individual civilians. By using the words “directed” and “as such” it emphasizes that the population must never be used as a target or as a tactical objective.
- 1939 It should be noted that “attacks” are defined in Article 49 (*Definition of attacks and scope of application*), paragraph 1.
- 1940 In the second sentence the Conference wished to indicate that the prohibition covers acts intended to spread terror; there is no doubt that acts of violence related to a state of war almost always give rise to some degree of terror among the population and sometimes also among the armed forces. It also happens that attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender. This is not the sort of terror envisaged here.¹² This provision is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage. It is interesting to note that threats of such acts are also prohibited. This calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations.
- 1941 Finally, it is worthy of note that Article 85 (*Repression of breaches of this Protocol*), paragraph 3(a), defines the act of making the civilian population or individual civilians the object of attack as a grave breach, when it results in death or serious injury to body or health.

Paragraph 3

- 1942 The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities. If the civilian is captured while he is committing hostile acts, the rules governing his fate are laid down in Article 45 (*Protection of persons who have taken part in hostilities*).
- 1943 During the course of the discussions several delegations indicated that the expression “hostilities” used in this article included preparations for combat and the return from combat.¹³ Similar problems arose in Article 44 (*Combatants and prisoners of war*) with regard to the expression “military deployment preceding the launching of an attack”. It seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example,

¹² O.R. XV, p. 274, CDDH/215/Rev.1, para. 51.

¹³ *Ibid.*, p. 330, CDDH/III/224.

the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. If a civilian is captured or arrested in such circumstances, he may have recourse to paragraph 1 of Article 45 (*Protection of persons who have taken part in hostilities*) and claim prisoner-of-war status; he must be treated as such pending determination of his status by a competent tribunal.

1944 What is the exact meaning of the term “*direct*” in the expression “take a direct part in hostilities”? A similar expression is already used in paragraph 2 of Article 43 (*Armed forces*). In general the immunity afforded civilians is subject to a very stringent condition: that they do not participate directly in hostilities, i.e., that they do not become combatants, on pain of losing their protection. Thus “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. However, there is nothing to prevent the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45 (*Protection of persons who have taken part in hostilities*) or on the basis of the provisions of the Fourth Convention (assigned residence, internment etc.) if his civilian status is recognized. Further it may be noted that members of the armed forces feigning civilian non-combatant status are guilty of perfidy under Article 37 (*Prohibition of perfidy*), paragraph 1(c).

1945 There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.

Paragraph 4

1946 This provision is very important; it confirms the unlawful character of certain regrettable practices during the Second World War and subsequent armed conflicts. Far too often the purpose of attacks was to destroy all life in a particular area or to raze a town to the ground without this resulting, in most cases, in any substantial military advantages.

1947 On this subject the general rule was formulated in Article 48 (*Basic rule*): belligerents may direct their operations only against military objectives. The first specification is added in paragraph 2 of the present Article 51: attacks against the civilian population as such and against individual civilians are prohibited.

1948 Up to now the matter is fairly clear in theory, but it is less so in practice. In fact, civilians may be inside or in the immediate proximity of military objectives, whether these consist of persons or objects; moreover, purely civilian objects may in combat conditions become military objectives, thereby endangering the

persons near them. Paragraphs 4 and 5 attempt to cover such situations. The need to achieve a consensus has led those drafting these provisions to formulate them in a way that is sometimes ambiguous. Several delegates remarked on this when the article was adopted.¹⁴

- 1949** At a more general level, other delegations pointed out that, like the whole of the Section, this provision should not be such as to inhibit the capacity for defence of a State which has to counter aggression. Yet it is well-known how difficult it is in armed conflict to determine objectively who is the aggressor. Moreover, it should be recalled that the State which is a victim of aggression is in no way exempted from the obligations incumbent upon it under treaty or customary rules of law.
- 1950** The provision begins with a general prohibition on indiscriminate attacks, i.e., attacks in which no distinction is made. Some may think that this general rule should have sufficed, but the Conference considered that it should define the three types of attack covered by the general expression “indiscriminate attacks”.

Sub-paragraph (a)

- 1951** This refers in the first place to attacks which are not directed at a specific military objective. Article 52 (*General protection of civilian objects*), paragraph 2, defines military objectives, as far as objects are concerned, limiting them

“to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

Obviously military objectives also include, indeed principally so, the armed forces, their members, installations, equipment and transports.

- 1952** The military character of an objective can sometimes be recognized visually, but most frequently those who give the order or take the decision to attack will do so on information provided by the competent services of the army. In the majority of cases they will not themselves have the opportunity to check the accuracy of such information; they should at least make sure that the information is precise and recent, and that the precautions and restrictions laid down in Article 57 (*Precautions in attack*) are observed. In case of doubt, additional information must be requested.
- 1953** The armed forces and their installations are objectives that may be attacked wherever they are, except when the attack could incidentally result in loss of human life among the civilian population, injuries to civilians, and damage to civilian objects which would be excessive in relation to the expected direct and specific military advantage. In combat areas¹⁵ it often happens that purely civilian

¹⁴ See, for example, *O.R.* VI, pp. 164-165, CDDH/SR.41, para. 122.

¹⁵ The Mixed Group defined this concept as follows: “In an armed conflict, that area where the armed forces of the adverse Parties actually engaged in combat, and those directly supporting them, are located”. *O.R.* XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A.

buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings – for which Article 52 (*General protection of civilian objects*), paragraph 3, lays down a presumption regarding their civilian use – will inevitably become military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.

1954 Outside the combat area the military character of objectives that are to be attacked must be clearly established and verified. Similarly the limits of such objectives must be precisely determined.

1955 The question arose what the situation would be if a belligerent in a combat area wished to prevent the enemy army from establishing itself in a particular area or from passing through that area, for example, by means of barrage fire. There can be little doubt in such a case that the area must be considered as a military objective and treated as such. Yet, during the Diplomatic Conference several delegations insisted on confirming this interpretation in their statements.¹⁶ Of course, such a situation could only concern limited areas and not vast stretches of territory. It applies primarily to narrow passages, bridgeheads or strategic points such as hills or mountain passes.

Sub-paragraph (b)

1956 This concerns attacks which employ a method or means of combat which cannot be directed at a specific military objective.¹⁷

1957 The term “means of combat” or “means of warfare” (*cf.* Article 35 – *Basic rules*) generally refers to the weapons being used, while the expression “methods of combat” generally refers to the way in which such weapons are used.

1958 As regards the weapons, those relevant here are primarily long-range missiles which cannot be aimed exactly at the objective. The V2 rockets used at the end of the Second World War are an example of this. It should be noted that most armies endeavour to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. Thereby the margin of error of missiles is gradually reduced. Here, military interests and humanitarian requirements coincide.

1959 From the point of view of the protection of civilians, the use of land or sea mines raises some problems. There were lengthy discussions in the *Ad Hoc* Committee on Conventional Weapons of the Conference. The work of this Committee¹⁸ served as a basis for the Conference convened by the United

¹⁶ See commentary Art. 52, para. 2, *infra*, p. 635.

¹⁷ A note on the drafting of the French text: the use of the pronoun “on” is unusual in French legal draftsmanship as it is rather indeterminate. This is avoided in the English wording where the word “attacks” is the subject of the sentence.

¹⁸ See *O.R.* XVI.

Nations in 1979 and 1980. That Conference adopted a Convention (10 October 1980) and three Protocols, one of which was on the prohibition or restrictions on the use of mines, booby-traps and other devices.¹⁹ Briefly, this Protocol requires Parties to take measures to keep adequate records and to give proper warning when minefields are laid, so that the population is not endangered. As regards mine-laying by aircraft or remotely-delivered mines, such operations are prohibited in principle unless such mines are only used in an area that constitutes a military objective or that contains military objectives; even in that situation the location of mines that are laid must be recorded, or the mines must be equipped with a remotely-controlled mechanism to detonate then or must self-destruct when they have lost their military value.²⁰

- 1960 However, the question may arise at what point the use of mines constitutes an attack in the sense of this provision. Is it when the mine is laid, when it is armed, when a person is endangered by it, or when it finally explodes? The participants at the meeting of the International Society of Military Law and the Law of War (Lausanne, 1982) conceded that from the legal point of view the use of mines constituted an attack in the sense of the Protocol when a person was directly endangered by such a mine.²¹ It may be considered that mines also come within the scope of sub-paragraph (c) discussed below.

Sub-paragraph (c)

- 1961 This sub-paragraph concerns attacks which employ a method or means of combat the effects of which cannot be limited as required by this Protocol. Like sub-paragraph (b) this provision was not contained in such a precise manner in the ICRC draft; the Working Group of Committee III presented a more elaborate text which was referred back to the Working Group, and finally Committee III adopted an article which contains all the elements of the present article,²² although the wording has been revised and modified reasonably successfully by the Drafting Committee of the Conference.
- 1962 On this provision the report of Committee III contains the following passage:

“The main problem was that of defining the term ‘indiscriminate attacks’. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means

¹⁹ Cf. *supra*, note 11.

²⁰ Art. 5 of the above-mentioned Protocol II. Also see Y. Sandoz, “A New Step Forward in International Law – Prohibition and Restrictions on the Use of Certain Conventional Weapons”, *IRRC*, January-February 1981, p. 3 (offprint available with the text of the Final Act of the said United Nations Conference, originally published *ibid.*, pp. 41-55).

²¹ See “Forces armées et développement du droit de la guerre”, *op.cit.*, p. 303.

²² O.R. XV, pp. 304-305, CDDH/215/Rev.1, Annex.

or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.”²³

- 1963** However, there are some means of warfare of which the effects cannot be limited in any circumstances. It is different with regard to other means, such as fire²⁴ or water²⁵ which, depending on the circumstances of their use, can have either a restricted effect or, on the contrary, be completely out of the control of those using them, causing significant losses among the civilian population and extensive damage to civilian objects. The nature of the means used is not the only criterion: the power of the weapons used can have the same consequences. For example, if a 10 ton bomb is used to destroy a single building, it is inevitable that the effects will be very extensive and will annihilate or damage neighbouring buildings, while a less powerful missile would suffice to destroy the building. There are also methods which by their very nature have an indiscriminate character, such as poisoning wells.
- 1964** Several delegations considered that it was necessary to confirm the views expressed by the Rapporteur²⁶ in their explanations of vote. According to these delegations the provision does not mean that there are means of combat of which the use would constitute an indiscriminate attack in all circumstances.
- 1965** This point was discussed above; it is true that in most cases the indiscriminate character of an attack does not depend on the nature of the weapons concerned, but on the way in which they are used. However, as stated above, there are some weapons which by their very nature have an indiscriminate effect. The example of bacteriological means of warfare is an obvious illustration of this point. There are also other weapons which have similar indiscriminate effects, such as poisoning sources of drinking water. Of course, bacteriological means of warfare have been prohibited since 1925, and the use of poison was prohibited in 1899 by the Hague Regulations.
- 1966** Nevertheless, States in making such statements were more concerned with nuclear weapons. A thorough analysis of the connection between the Protocol and the use that may be made of nuclear weapons is included in the introduction to this Section, and we refer the reader to that text.²⁷

Paragraph 5

- 1967** The attacks which form the subject of this paragraph fall under the general prohibition of indiscriminate attacks laid down at the beginning of paragraph 4. Two types of attack in particular are envisaged here.

²³ *Ibid.*, p. 274, para. 55.

²⁴ Cf. the Protocol II referred to *supra*, note 11.

²⁵ On this subject reference may be made to Article 56 of this Protocol.

²⁶ See *O.R.* VI, pp. 168-172, CDDH/SR.41.

²⁷ See *supra*, p. 589.

- 1968** The *first type* includes area bombardment, sometimes known as carpet bombing or saturation bombing. It is characteristic of such bombing that it destroys all life in a specific area and razes to the ground all buildings situated there. There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries, and it is understandable that the drafters of the Protocol wished to mention it specifically, even though such attacks already fall under the general prohibition contained in paragraph 4. According to the report of Committee III, the expression “bombardment by any method or means” means all attacks by fire-arms or projectiles (except for direct fire by small arms) and the use of any type of projectile.²⁸
- 1969** This paragraph was adopted with some difficulty; the expression “clearly separated and distinct” in particular led to lengthy discussions. In their first report the Working Group had given Committee III a choice between various proposals: “widely separated”, “distinct”; or alternatively the introduction of a final phrase, “unless the objectives are too close together to be capable of being attacked separately”.²⁹
- 1970** Rather than going on to vote on these various proposals, Committee III decided to refer the subject back to the Working Group and requested it to try and come up with an expression that might meet with general approval. The Group presented the Committee with a new draft which had been accepted by consensus within the Group.³⁰ Committee III adopted this proposal without further discussion and it forms the present text of paragraph 5.
- 1971** It will be noted that the Conference adopted a wording very similar to that which the ICRC had proposed, namely, “at some distance from each other”. It was decided not to add the phrase cited above, no doubt through fear of encouraging area bombardment, for in such a case the attacking forces could use their own judgment, taking into account the weapons available and the circumstances, as to whether the individual objectives were too close together to be attacked separately.
- 1972** Having said that, the interpretation of the words “clearly separated and distinct” leaves some degree of latitude to those mounting an attack; in case of doubt they can refer to sub-paragraph (b) and assess whether the attack is of a nature to cause losses and damage which would be excessive in relation to the military advantage anticipated.
- 1973** The question may also arise whether the prohibition formulated here is not already covered by paragraph 4(a), which prohibits attacks not directed at a specific military objective. In fact, areas of land between military objectives are not themselves military objectives. It must be accepted that in open areas which are sparsely populated, such as forests, attacks may be mounted against the whole of the area if it has been established that enemy armed forces are present. On the other hand, in a town, village or any other area where there is a similar

²⁸ Cf. O.R. XV, p. 275, CDDH/215/Rev.1, para. 56.

²⁹ Ibid, p. 329, CDDH/III/224.

³⁰ O.R. XIV, p. 30, CDDH/III/SR.31, para. 5.

concentration of civilian persons and objects, the military objectives in that area may only be attacked separately without leading to civilian losses outside the military objectives themselves. This also applies for temporary concentrations of civilians, such as refugee camps.

- 1974** As stated above, the size of the area over which military objectives are spread and the distance separating them are relatively subjective notions. In case of doubt, the general rule of respect for the civilian population must always be observed.
- 1975** When the distance separating two military objectives is sufficient for them to be attacked separately, taking into account the means available, the rule should be fully applied. However, even if the distance is insufficient, excessive losses that might result from the attack should be taken into account.
- 1976** The *second type of attack* envisaged in paragraph 5 includes those which have excessive effects in relation to the concrete and direct military advantage anticipated. Once again there were long discussions in the Diplomatic Conference and it was difficult to come to an agreement. The formula that was adopted is very similar to that proposed by the ICRC.³¹ It is based on the wording of Article 57 (*Precautions in attack*) relating to precautionary measures. Committee III had suggested either a straightforward reference to Article 57 (*Precautions in attack*) or reproducing the formula used in that article. Finally, the Drafting Committee, which was requested to resolve the question, opted for the second solution. Thus reference may be made to Article 57 (*Precautions in attack*) for further details.
- 1977** Paragraphs 4 and 5 were criticized in the Diplomatic Conference and subsequently. The criticism was directed particularly at the imprecise wording and terminology. For example, according to some, the Protocol fails to specify the size of the area over which military objectives may be spread and the distance which must separate them. It was also pointed out that modern electronic means made it possible to locate military objectives, but that they did not provide information on the presence of civilian elements within or in the vicinity of such objectives.
- 1978** Such criticisms are justified, at least to some extent. Putting these provisions into practice, or, for that matter, any others in Part IV, will require complete good faith on the part of the belligerents, as well as the desire to conform with the general principle of respect for the civilian population.
- 1979** Comments were also made in various quarters that paragraph 5(b) authorized any type of attack, provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated. This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; *moreover*, even after those conditions are fulfilled, the incidental civilian losses

³¹ “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated” (draft, Art. 46, para. 3 (b)).

and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

- 1980 The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.
- 1981 This clearly shows the importance attached by the drafters of the Protocol to this article; these provisions should therefore lead those responsible for such attacks to take all necessary precautions before making their decision, even in the difficult constraints of battle conditions.

Paragraph 6

- 1982 This provision is very important. In fact, the belligerents in the Second World War recognized in their public declarations that attacks may be directed only at military objectives, but on the pretext that their own population had been hit by attacks carried out by the adversary, they went so far, by way of reprisals, as to wage war almost indiscriminately, and this resulted in countless civilian victims.³²
- 1983 The text is that proposed by the ICRC. During the discussions in the Conference the question of reprisals was examined with regard to several articles and in each of these a clause prohibiting reprisals was included (see also Articles 20 – *Prohibition of reprisals*; 52 – *General protection of civilian objects*; 53 – *Protection of cultural objects and of places of worship*; 54 – *Protection of objects indispensable to the survival of the civilian population*; 55 – *Protection of the natural environment* and 56 – *Protection of works and installations containing dangerous forces*). This is why several delegates raised the question during the discussions whether a single general provision might not suffice, while others considered that it was not very realistic to prohibit all reprisals, and that it was better to try and restrain them by laying down specific rules. Finally Committee I was charged with examining the general problem.³³ It decided to leave the specific clauses prohibiting reprisals in the articles where they occurred, and not to draft a general prohibition.³⁴
- 1984 The prohibition contained in this article is not subject to any conditions and it therefore has a peremptory character; in particular it leaves out the possibility of derogating from this rule by invoking military necessity. As in the 1949

³² Cf. G. Best, *Humanity in Warfare*, London, 1980, pp. 273-277.

³³ O.R. XIV, p. 414, CDDH/III/SR.38, para. 65; O.R. V, p. 375, CDDH/SR.31, paras. 20-23; O.R. X, pp. 184-185, CDDH/405/Rev.1, paras. 21-30.

³⁴ On the general question of reprisals, cf. *infra*, p. 981, introduction to Part V, Section II.

Conventions, this provision confirms the right of an individual not to be punished for acts which he has not himself committed.

- 1985 This prohibition of attacks by way of reprisals and other prohibitions of the same type contained in the Protocol and in the Conventions have considerably reduced the scope for reprisals in time of war. At most, such measures could now be envisaged in the choice of weapons and in methods of combat used against military objectives.

Paragraph 7

- 1986 This provision affords measures of protection to the whole of the civilian population and all civilians, thus extending to them measures which already exist for two categories of persons: prisoners of war and civilians protected by the Fourth Convention. In fact, according to Article 23 of the Third Convention, prisoners of war may not be used to render certain points or areas immune from military operations.
- 1987 As regards persons protected by the Fourth Convention, Article 28 of the latter provides that they may not be used to render certain points or areas immune from military operations. Article 19 of the First Convention and Article 12 of the present Protocol (*Protection of medical units*) contain a similar rule with regard to medical units. For its part, Article 58 of the Protocol (*Precautions against the effects of attack*) also deals with measures to be taken to remove the population from the vicinity of military objectives, and we refer the reader to the commentary thereon.
- 1988 This paragraph develops and clarifies these various rules. The term “movements” in particular is a new one; this is intended to cover cases where the civilian population moves of its own accord. The second sentence concerns cases where the movement of the population takes place in accordance with instructions from the competent authorities, and is particularly concerned with movements ordered by an Occupying Power, although it certainly also applies to transfers of prisoners of war, and civilian enemy subjects ordered by the authorities of a belligerent Power to move within its own territory.

Paragraph 8

- 1989 The ICRC had proposed in its draft the following provision which related to the provision contained in paragraph 7:

“If a Party to the conflict, in violation of the foregoing provision, uses civilians with the aim of shielding military objectives from attack, the other Party to the conflict shall take the precautionary measures provided for in Article 50.”³⁵

³⁵ Now Art. 57 of the Protocol.

- 1990** It is fairly clear from the deliberations and the report of Committee III³⁶ that the prohibitions referred to in paragraph 8 are those contained in paragraph 7. Military objectives are defined as far as objects are concerned in Article 52 (*General protection of civilian objects*), paragraph 2. Thus, even if civilians were intentionally brought or kept in the vicinity of military objectives, the attacker should take the measures provided for in Article 57 (*Precautions in attack*), especially those set out in paragraph 2 (a)(ii) and (iii) and (c). It is clear that in such cases a warning to the population is particularly appropriate as civilians are themselves rarely capable of assessing the danger in which they are placed.
- 1991** This provision is concerned with the situation in which other provisions of the Protocol are not complied with. It is an attempt to safeguard the population even when the appropriate authorities do not take the required measures of protection with regard to them.
- 1992** Article 60 of the Vienna Convention on the Law of Treaties provides that a material breach of a multilateral treaty entitles a Party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. Without even going into the question whether non-compliance with paragraph 7 constitutes a material breach of the Protocol, it is pleasing to note the tenor of the last paragraph of the same Article 60:
- “5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”³⁷
- 1993** Thus, in the case of this Protocol, it is compulsory to apply it, even if another Party has committed a violation. It should be noted that provisions protecting the human person now bear the stamp of customary law.

C.P. / J.P.

³⁶ *O.R.* XV, p. 275, CDDH/215/Rev.1, para. 59.

³⁷ For more details, see commentary Art. 1, para. 1, *supra* p. 34, and the introduction to Part V, Section II (section concerning reprisals), *infra*, p. 981.

Protocol I

Article 52 – General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Documentary references

Official Records

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Other references

CE/3b, pp. 66-70 and 133-134; pp. 049-050, Annex XIX (Art. 7); pp. 059-062, Annex XX. *CE 1971, Report*, pp. 80-81, paras. 454-459; pp. 92-93, CE/COM III/24-25 and 27-28; p. 94, CE/COM III/30-31; p. 95, CE/COM III/38; p. 97, CE/COM III/44 (Arts. 11-12). *CE 1972, Basic Texts*, p. 16 (Arts. 42-43); p. 17 (Art. 47). *CE 1972, Commentaries*, Part I, pp. 85-90 (Arts. 42-43); p. 97 (Art. 47). *CRCE 1972, Report*, pp. 31-32 (Arts. 42-43); p. 33 (Art. 47). *CE 1972, Report*, vol. I, pp. 145-147, paras. 3.126-3.145 (Arts. 42-43); p. 150, paras. 3.170-3.174 (Art. 47); vol. II, pp. 65-66, CE/COM III/PC 4, CE/COM III/PC 8; p. 68, CE/COM III/PC 22-23; p. 69, CE/COM III/PC 29; p. 70, CE/COM III/PC 32; pp. 71-74, CE/COM III/PC 34, CE/COM III/PC 38, CE/COM III/PC 40-41, CE/COM III/PC 44-45, CE/COM III/PC 47-48, CE/COM III/PC 51-52; p. 75, CE/COM III/PC 62; p. 76, CE/COM III/PC 64, CE/COM III/PC 66; p. 77, CE/COM III/PC 69, CE/COM III/PC 72, CE/COM III/PC 76; pp. 80-81, CE/COM III/PC 93; p. 85, CE/COM III/PC 115-116. *Commentary Drafts*, pp. 60-62 (Art. 47).

Commentary

1994 This article is of considerable importance. In fact, in order to apply the basic rule contained in Article 48 (*Basic rule*), it is necessary to know what constitutes civilian objects, on the one hand, and military objectives, on the other. For a long time attempts have been made to define military objectives.

1995 For example, Hague Convention IX of 1907 Concerning Bombardment by Naval Forces in Time of War¹ contains the following provisions:

“Article 1 - The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden [...]

Article 2 - Military works, military or naval establishments, depots of arms or war *matériel*, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition [...]

1996 These rules are accompanied by provisions relating to the warning which must be given before attacks; they have rarely been applied, but they give some idea of what was meant by military objectives at that time.

1997 The Commission of Jurists which met in The Hague in 1922 with the task of examining a partial revision of the laws of war, drew up a draft², Article 24 of which is devoted to the definition of civilian objects and military objectives:

¹ The Hague Conference of 1899 had not adopted a convention on this subject.

² This Commission was constituted in accordance with a resolution of the Washington Conference (1922) on the limitation of armaments; it was intended to lay down draft rules relating to air warfare and the use of radio in time of war. Experts from France, Italy, Japan, the Netherlands, United Kingdom and the United States attended.

“Article 24

1. An air bombardment is legitimate only when directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent;
2. Such bombardment is legitimate only when directed exclusively against the following objectives: military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centers for the production of arms, ammunition or characterized military supplies, lines of communication or transport which are used for military purposes;
3. Any bombardment of cities, towns, villages, habitations and buildings which are not situated in the immediate vicinity of the operations of land forces is forbidden [...];
4. In the immediate vicinity of the operations of the land forces, the bombardment of cities, towns, villages, habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed [...].”

1998 This attempt to define civilian objects and military objectives was not followed by a codification and the two Geneva Conventions of 1929 relating to the wounded and sick and to prisoners of war did not contain any provisions on this matter, even though they were based on the existence of a distinction between combatants and military objectives, on the one hand, and civilians and civilian objects, on the other.

1999 The same was true in 1949 in Geneva during the drafting of the four 1949 Conventions. Nevertheless, military objectives are repeatedly referred to explicitly in the 1949 Conventions. For example, Article 19 of the First Convention requires that the responsible authorities ensure that medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety. Article 18 of the Fourth Convention contains a similar provision for the benefit of civilian hospitals.

2000 Although States in general recognized that attacks should only be directed against military objectives, there was no agreed definition of such objectives, and in fact, during the Second World War and during several armed conflicts which have taken place since then, each belligerent determined what should be understood by such objectives as it pleased. It should be noted that their ideas often differed considerably, depending on whether the territory concerned was their own, enemy territory, or territory of an ally occupied by enemy forces. Thus a restrictive definition was necessary if the essential distinction between combatants and civilians and between civilian objects and military objectives was to be maintained.

2001 A partial definition was offered incidentally by the Hague Convention of 1954 for the Protection of Cultural Property. Article 8, paragraph 1, of that Convention reads as follows:

- “1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of

armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

- a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
- b) are not used for military purposes.”

2002 In 1956 the ICRC submitted its Draft Rules for the Limitation of Dangers incurred by the Civilian Population in Time of War, Article 7 of which provided that:

“Article 7

In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.

Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules.

However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.”³

³ Here is the list drawn up by the ICRC with the help of military experts and presented as a model, subject to modification.

List of Categories of Military Objectives according to Article 7, paragraph 2:

“I. The objectives belonging to the following categories are those considered to be of generally recognized military importance:

- (1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.
- (2) Positions, installations or constructions occupied by the forces indicated in sub-paragraph 1 above, as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
- (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
- (4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicles parks.
- (5) Airfields, rocket launching ramps and naval base installations.
- (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
- (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
- (8) Industries of fundamental importance for the conduct of the war:
 - (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
 - (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;

(continued on next page)

2003 The Institute of International Law, which met in Edinburgh in 1969 in order to study weapons of mass destruction, included in its definition of military objectives

“only those which by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them”.⁴

2004 When the ICRC was called upon to draw up the Draft Protocol in 1970-1971, it faced a difficult problem. Should it define civilian objects which may not be attacked, or, on the contrary, should it define military objectives which may be attacked? Finally a compromise was achieved. The ICRC draft reads as follows:

“*Article 47 – General protection of civilian objects*

1. Attacks shall be strictly limited to military objectives, namely, to those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.

2. Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort.”

2005 The Diplomatic Conference finally adopted a similar formula which combines the two possibilities; it begins by declaring civilian objects immune and continues with an *a contrario* definition in defining military objectives.⁵

2006 Before discussing the three paragraphs which this article comprises, it might be appropriate to devote some attention to the terminology used.

2007 The English text uses the word “objects”, which means “something placed before the eyes, or presented to the sight or other sense, an individual thing seen, or perceived, or that may be seen or perceived; a material thing”.⁶ The French

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- (c) factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;
 - (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c);
 - (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
- (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.
- II. The following however, are excepted from the foregoing list:
- (1) Persons, constructions, installations or transports which are protected under the Geneva Conventions I, II, III, of August 12, 1949;
 - (2) Non-combatants in the armed forces who obviously take no active or direct part in hostilities.
- III. The above list will be reviewed at intervals of not more than ten years by a group of Experts composed of persons with a sound grasp of military strategy and of others concerned with the protection of the civilian population.”

⁴ 53 *Annuaire IDI* 2, Edinburgh session, 1969, p. 376.

⁵ This was the first time that a military objective was defined in an international treaty.

⁶ *The Oxford English Dictionary*, Oxford, 1970, Vol. VII, p. 14.

text uses the word “biens”, which means “choses tangibles, susceptibles d’appropriation”.⁷

2008 It is clear that in both English and French the word means something that is visible and tangible.

2009 As regards the word “objective”, in English this is an abbreviation of the expression “objective point”, defined by the Oxford Dictionary as follows: “the point towards which the advance of troops is directed; hence, [...] the point aimed at”.⁸

2010 In French the word “objectif” is defined as follows in the Dictionnaire Robert: “point contre lequel est dirigé une opération stratégique ou tactique; par extension: résultat qu’on se propose d’atteindre par une opération militaire”.⁹ There is however no doubt that in this article both the English and French texts intended tangible and visible things by the word “objective”, and not the general objective (in the sense of aim or purpose) of a military operation; therefore the extended meaning given by the Dictionnaire Robert is not included in this article.

Paragraph 1

2011 The first sentence lays down the general principle of immunity of civilian objects. Attacks are defined in Article 49 (*Definition of attacks and scope of application*). As regards the prohibition of reprisals, reference may be made to what was said above with regard to Article 51 (*Protection of the civilian population*), paragraph 6.

2012 The second sentence defines civilian objects by means of a negative method, which is already used in Article 50 (*Definition of civilians and civilian population*) to define the civilian population. This method is justified by the fact that there are far more civilian objects than military objectives.

2013 A vote was taken in Committee III on retaining the words “nor of reprisals” in this paragraph; the Committee decided to retain them.¹⁰ In explaining why it abstained from voting on this article at the plenary meeting, one delegation indicated that it was opposed to a prohibition of reprisals against civilian objects that would apply in all circumstances; it considered that “the availability of this sanction may persuade an adversary not to commit violations of the law in the first place”;¹¹ but, as stated above, the Conference did not share this point of view.

⁷ P. Robert, *Dictionnaire alphabétique et analogique de la langue française*, Paris, 1971, Vol. 1, p. 469.

⁸ *The Oxford English Dictionary*, *op. cit.*, p. 17.

⁹ P. Robert, *op. cit.*, Vol. 4, p. 684.

¹⁰ With 58 votes in favour, 3 against and 9 abstentions; see O.R. XIV, p. 219, CDDH/III/SR.24, para. 16.

¹¹ O.R. VI, pp. 175-176, CDDH/SR.41, Annex (Australia).

Paragraph 2

2014 The first sentence confirms the principle laid down in paragraph 1.

2015 The second sentence raised a problem of a moral nature for many, particularly for the ICRC: should a humanitarian treaty describe objects which may be attacked? After a great deal of thought it seemed impossible to ensure effective protection for the civilian population without indicating what objectives could legitimately be attacked. Therefore in the draft the ICRC used the wording that is found in this text, which includes a definition of military objectives. This definition will prove useful for the population itself, for it is in the latter's interests to know whether or not it should avoid certain points that the adversary could legitimately attack.

2016 The definition of military objectives had been the object of study for a long time, and the solution adopted by the Diplomatic Conference is broadly based on earlier drafts. The text of this paragraph certainly constitutes a valuable guide, but it will not always be easy to interpret, particularly for those who have to decide about an attack and on the means and methods to be used.

2017 It should be noted that the definition is limited to objects but it is clear that members of the armed forces are military objectives, for, as the Preamble of the Declaration of St. Petersburg states:

“the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; [...] for this purpose it is sufficient to disable the greatest possible number of men”.

Article 43 (*Armed forces*) defines armed forces and provides that members of such forces are combatants, that is to say, they have the right to participate directly in hostilities; the corollary is that they may be the object of hostile acts.

2018 The definition comprises two elements:

- a) the nature, location, purpose or use which makes an effective contribution to military action;
- b) the total or partial destruction, capture or neutralization which in the circumstances ruling at the time offers a definite military advantage.

Whenever these two elements are simultaneously present, there is a military objective in the sense of the Protocol.

2019 The ICRC proposal contained one element which was not retained: the objects should be recognized to be of military interest. On the other hand, the definition adopted introduces an additional element: the location. Similarly the concepts of “capture” and “neutralization” were added. According to the Rapporteur, the adjective “definite” was discussed at length. The adjectives considered and rejected included the words: “distinct” (distinct), “direct” (direct), “clear” (net), “immediate” (immédiat), “obvious” (évident), “specific” (spécifique) and “substantial” (substantiel). The Rapporteur of the Working Group added that he was not very clear about the reasons for the choice of words that was made.¹²

¹² O.R. XV, p. 332. CDDH/III/224.

- 2020 A closer look at the various criteria used reveals that the first refers to objects which, by their *nature*, make an effective contribution to military action. This category comprises all objects directly used by the armed forces: weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communications centres etc.
- 2021 The second criterion is concerned with the *location* of objects. Clearly, there are objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action. This may be, for example, a bridge or other construction, or it could also be, as mentioned above,¹³ a site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it. It should be noted that the Working Group of Committee III introduced the location criterion without giving reasons.
- 2022 The criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives. It is clear from paragraph 3 that in case of doubt, such places must be presumed to serve civilian purposes.
- 2023 Other establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military. In such situations the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must be expected among the civilian population and the damage which would be caused to civilian objects.
- 2024 Finally, destruction, capture or neutralization must offer a *definite military advantage* in the circumstances ruling at the time. In other words, it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.
- 2025 Some statements and declarations were made with regard to the interpretation of this paragraph in the final discussion or when the Protocols were signed. The statements related to two points:
- a) a specific area can constitute a legitimate military objective in view of its location and the circumstances (Canada, Federal Republic of Germany, The Netherlands, United States).¹⁴ The United Kingdom made a similar statement in a plenary meeting,¹⁵ and repeated this in a written declaration when signing Protocols;

¹³ *Supra*, p. 620.

¹⁴ *O.R.* VI, pp. 175-176, CDDH/SR.41, Annex (Australia); pp. 178-179 (Canada); pp. 186-188 (France, FRG); pp. 192-193 (Mexico); pp. 194-195 (The Netherlands); p. 204 (United States).

¹⁵ *Ibid.*, p. 169, CDDH/SR.41, para. 153.

b) the paragraph is not intended to deal with the question of damage caused incidentally by attacks directed against military objectives.¹⁶

2026 These interpretations were not discussed during the Diplomatic Conference; nevertheless, they appear to be reasonable. Of course, an area as described under a) can only be of a limited size. In addition, this concept is only valid in the combat area.

2027 It should be noted that the expression “a definite military advantage” is very similar to the terms used in Articles 51 (*Protection of the civilian population*), paragraph 5(b) and 57 (*Precautions in attack*), paragraph 2 (a)(iii) and (b). These articles use the expression “concrete and direct military advantage anticipated”.¹⁷ In the draft the ICRC had used the same expression in both articles: “distinct and substantial military advantage”. The documents of the Diplomatic Conference do not contain any indication about the reasons why different expressions were preferred. One is therefore left to analyze the meaning of the words used.

2028 In the case of Article 52 there must be a definite military advantage for every military objective that is attacked. In the case of Article 57 (*Precautions in attack*) this condition must also be fulfilled, but in addition, the military advantage which should also be concrete and direct must be weighed against the civilian losses and damage which could result from an attack.

Paragraph 3

2029 This is a rule which was not contained in the ICRC draft, or at least not in this form. The amendments submitted during the Conference did not contain it either; it was introduced in the draft presented by the Working Group of Committee III.¹⁸

2030 The presumption established here constitutes an important step forward in the protection of the civilian population, for in many conflicts the belligerents have “shot first and asked questions later”.

2031 When the paragraph was presented to Committee III it contained *in fine* a phrase which did not meet with general agreement. It provided that the normal presumption of civilian use for objects would not apply in contact areas when the security of the armed forces made such an exception necessary.

2032 The Rapporteur of the Working Group commented on this phrase as follows:

“[...] infantry soldiers could not be expected to place their lives in great risk because of such a presumption and [...] in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works. The phrase was criticized by other delegates on the ground that it would unduly endanger civilian objects to permit any exceptions to the presumption”.¹⁹

¹⁶ Cf. *supra*, notes 14 and 15.

¹⁷ See *supra*, p. 625.

¹⁸ O.R. XV, p. 332, CDDH/III/224.

¹⁹ *Ibid.*

- 2033 Finally Committee III decided to delete this phrase²⁰ and since then the paragraph has not been altered except for some editorial changes.
- 2034 Therefore even in contact areas there is a presumption that civilian buildings located there are not used by the armed forces, and consequently it is prohibited to attack them unless it is certain that they accommodate enemy combatants or military objects. Strict compliance with the precautions laid down in Article 57 (*Precautions in attack*) will in most cases bring to light the doubt referred to in this provision or the certainty that it is a military objective.
- 2035 This article was adopted only after long and difficult discussions. Many delegations would have wished for a more precise definition, possibly containing a list of examples of civilian objects and military objectives. The Conference preferred a general definition. The three examples of civilian objects given in paragraph 3 was as far as it was willing to go.
- 2036 It is true that a more pragmatic definition would have been useful, and the ICRC paved the way for this in the 1956 Draft Rules.²¹ However, it soon became clear that drawing up a list of military objectives or civilian objects would have raised insuperable problems, and the ICRC therefore abandoned the attempt.
- 2037 However, it remains the case that the text adopted by the Diplomatic Conference largely relies on the judgment of soldiers who will have to apply these provisions. It is true that there are clear-cut situations where there is no possibility of doubt, but there are also borderline cases where the responsible authorities could hesitate. In such circumstances the general aim of the Protocol should be borne in mind, i.e., the protection of the civilian population. In any case an essential step forward has been taken in that belligerents can no longer arbitrarily and unilaterally declare as a military objective any civilian object, as happened all too often in the past.
- 2038 During the final debate some delegations remarked that in their opinion the article was insufficiently precise on too many points and that it would give rise to controversy.²² Finally one delegation remarked that, in its opinion, this article, like Article 51 (*Protection of the civilian population*), could not be made the object of reservations as it is fundamental.²³

C.P./J.P.

²⁰ O.R. XIV, p. 220, CDDH/III/SR. 24 para. 18.

²¹ See *supra*, p. 632.

²² O.R. VI, p. 186, CDDH/SR.41, Annex (France)

²³ *Ibid.*, pp. 192-193 (Mexico); see also the introduction to Part VI, *infra*, p. 1059.

Protocol I

Article 53 – Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

Documentary references

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CE/3b, pp. 70-71; pp. 022-023, Annex VIII. *CRCE 1972, Report*, p. 68 (Annex I, point 08). J. de Breucker, "Pour les 20 ans de la Convention de La Haye du 14 mai 1954 pour la protection des biens culturels", *XI RBDI*, 1975/2, p. 525. S.E. Nahlik, "La protection internationale des biens culturels en cas de conflit armé", 120 *Hague Recueil*, 1967/II, p. 61.

Commentary**General remarks**

- 2039 In the draft the ICRC did not include a provision relating to the protection of cultural objects as this had been provided for by an international instrument especially designed for this purpose already in 1954, i.e., the Hague Convention concluded under the auspices of UNESCO.¹
- 2040 However, the Diplomatic Conference considered that the Protocol should contain a provision of this type thereby revealing its concern for the cultural heritage of humanity. In this respect the fact that the 1954 Convention had by no means entered into force worldwide was taken into consideration.² In any case the article is short, limited to the essential points, prohibiting the making of cultural objects into military objectives, as well as prohibiting their destruction.
- 2041 Thus during the second session a proposal was submitted as an amendment³ to Committee III. It formed the basis of this article.
- 2042 Although all the delegations quickly agreed to the protection of historic monuments and works of art, the question of places of worship led to lengthy discussions. Some considered that all places of worship should be protected without exception, while others considered that this should apply only to some important places of worship which constitute the “heritage of peoples”.
- 2043 Committee III adopted a first draft⁴ which opted for the second solution, i.e., that only some important places of worship were covered. In the light of discussion on the same subject when Article 16 of Protocol II (*Protection of cultural objects and of places of worship*)⁵ was examined, Committee III returned to this matter and adopted a second version of the article⁶ in which any reference to places of worship had disappeared.⁷ In fact places of worship had been mentioned without restriction in Article 52 (*General protection of civilian objects*), paragraph 3, as one of several examples of objects normally used for civilian purposes – and they must therefore be presumed to have a civilian character and enjoy the general protection to which such objects are entitled. In addition, places of worship which fall under historic monuments or works of art covered by Article 53 would benefit from the protection accorded under this article.
- 2044 In the plenary meetings the Conference considered that it was useful to reintroduce the reference to places of worship, specifying that the provision only

¹ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

² At 31 December 1984, 72 States were Party to the 1954 Convention, *cf. infra*, p. 1549.

³ O.R. III, p. 213, CDDH/III/17.

⁴ O.R. XV, p. 307, CDDH/215/Rev.1, Annex.

⁵ *Ibid.*, pp. 394-395, CDDH/236/Rev.1, paras. 60-63.

⁶ *Ibid.*, p. 485, CDDH/407/Rev.1, Annex.

⁷ *Ibid.*, p. 456, CDDH/407/Rev.1, para. 30.

applies to those which constitute the “spiritual heritage of peoples”.⁸ The article was finally adopted by consensus.⁹

- 2045 The first few words of the article specify that it is not aimed at replacing the relevant existing international instruments. The second part lays down three prohibitions which constitute special protection for the protected objects.

First part – Reference to other international instruments

- 2046 The protection laid down in this article is accorded “without prejudice”¹⁰ to the provisions of other relevant international instruments. From the beginning of the discussions regarding Article 53 it was agreed that there was no need to revise the existing rules on the subject, but that the protection and respect for cultural objects should be confirmed. It was therefore necessary to state at the beginning of the article that it did not modify the relevant existing instruments. For example, this means that in case of a contradiction between this article and a rule of the 1954 Convention the latter is applicable, though of course only insofar as the Parties concerned are bound by that Convention. If one of the Parties is not bound by the Convention, Article 53 applies. Moreover, Article 53 applies even if all the Parties concerned are bound by another international instrument insofar as it supplements the rules of that instrument.
- 2047 The Diplomatic Conference adopted Resolution 20, which stresses the fundamental importance of the Hague Convention of 1954, and states that the adoption of Article 53 will not detract from the application of that Convention in any way; moreover, it urges States which have not yet done so to become Parties to it.

The Hague Convention of 1954

- 2048 The Convention is accompanied by Regulations for its execution, which form an integral part of it, as well as a Protocol¹¹ aimed primarily at preventing the export of cultural objects from occupied territory.
- 2049 The Convention contains first of all a definition of cultural property; this covers basically movable or immovable property of great importance to the cultural heritage of peoples.

⁸ O.R. VI, pp. 170-173, CDDH/SR.41, para. 157-181.

⁹ *Ibid.*, pp. 205-206, CDDH/SR.42, paras. 1-11.

¹⁰ In the French text of Article 16 of Protocol II the term “sans préjudice” is replaced by the term “sous réserve”, though there is no difference in meaning; see *Actes VII*, p. 145, CDDH/SR.53, para. 12. The English version of the text uses the same terms in both articles: “without prejudice”.

¹¹ At 31 December 1984, 72 States were Parties to the Convention and 60 to the Protocol, Parts I and II.

2050 The complete definition given in Article 1 of the Convention reads as follows:

“Definition of cultural property

For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositaries of archives, and refuges intended to shelter, in the event of an armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’.”

2051 Protection is accorded automatically to all objects which fall under the definition. It comprises two aspects: safeguarding and respect for such property. The Convention does not specify the form which such *safeguarding* should take; it simply imposes an obligation upon the Contracting Parties to take “such measures as they consider appropriate” in time of peace (Article 3).

2052 Article 4, relating to *respect* is more detailed:

“Respect for cultural property

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where the military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

4. They shall refrain from any act directed by way of reprisals against cultural property.

5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.”

- 2053 The Convention also provides for a system of *special protection*¹² (Articles 8-11; Regulations for Execution, Articles 11-17). Places falling under such protection include refuges intended to shelter movable cultural property in the case of armed conflict, centres containing monuments and other immovable cultural property of very great importance, provided that:
- they are situated at an adequate distance from any important military objective;
 - they are not used for military purposes; and
 - they are entered¹³ in the “International Register of Cultural Property under Special Protection” held by the Director-General of UNESCO.
- 2054 Property under special protection granted immunity by the Convention must be marked with a special emblem¹⁴ and be subject to international control.
- 2055 The Convention also contains important provisions on the transport of cultural property and the personnel assigned to the protection of cultural property.

¹² Art. 9:

“Immunity of cultural property under special protection

The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes.”

Art. 11:

“Withdrawal of immunity

1. If one of the High Contracting Parties commits, in respect of any item of cultural property under special protection, a violation of the obligations under Article 9, the opposing Party shall, so long as this violation persists, be released from the obligation to ensure the immunity of the property concerned. Nevertheless, whenever possible, the latter Party shall first request the cessation of such violation within a reasonable time.

2. Apart from the case provided for in paragraph 1 of the present Article, immunity shall be withdrawn from cultural property under special protection only in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.

3. The Party withdrawing immunity shall, as soon as possible, so inform the Commissioner-General for cultural property provided for in the Regulations for the execution of the Convention, in writing, stating the reasons.”

¹³ Article 11 of the Regulations provides an exception for “improvised refuges” set up in the course of a conflict; such refuges may benefit from special protection before they are entered in the Register.

¹⁴ “The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle” (Convention, Art. 16, para. 1). Property under special protection must display this emblem repeated three times; other property may only display the emblem alone (*ibid.*, Art. 17).

*Other instruments**1. The Hague Conventions of 1907*

2056 Two Hague Conventions of 1907 contain provisions relating to cultural property, viz., Convention IV, particularly its Regulations Concerning the Laws and Customs of War on Land,¹⁵ and Convention IX, Respecting Bombardment by Naval Forces in Time of War.¹⁶

2057 Article 27 of the Regulations annexed to Convention IV reads as follows:

“In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.”

2058 Article 5 of Convention IX contains a similar provision, but gives a description of the sign to be used:

“In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.”¹⁷

2059 Article 56 of the Regulations annexed to Convention IV, which applies in the case of occupation, provides that:

“The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, shall be treated as private property.”¹⁸

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings.”

¹⁵ *International Red Cross Handbook*, 12th ed., Geneva, 1983, pp. 322-332.

¹⁶ *Ibid.*, pp. 336-337.

¹⁷ Article 36 of the 1954 Hague Convention provides that the new emblem provided replaces that of Hague Convention IX of 1907.

¹⁸ This is a reference to Article 46: the principle of respect for private property; Article 47: pillage forbidden; and Articles 52 and 53: restrictions on requisitions in kind and seizure.

2060 Even for States Parties to the Hague Convention of 1954 these provisions remain applicable to cultural property not covered by the more recent Convention, i.e., to property referred to in Articles 27 of the Regulations and 5 of Convention IX, which is not of “great importance for the cultural heritage of peoples”, and to buildings dedicated to charitable purposes and education, as well as property of municipalities. In the context of the Protocol such property is protected by virtue of its civilian character (Article 52 – *General protection of civilian objects*).

2. *The Roerich Pact*

2061 Another relevant instrument, with a limited geographical scope, since it was concluded under the auspices of a regional organization, is the Treaty for the Protection, in Time of War and Peace, of Historic Monuments, Museums and Institutions of Arts and Science (Roerich Pact), signed in Washington on 15 April 1935 by the members of the Pan-American Union, which later became the Organization of American States.¹⁹ The main provisions of this treaty are contained in Articles 1 and 5:

“Article 1.

The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.

The same respect and protection shall be due to the personnel of the institutions mentioned above.

The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.”

“Article 5.

The monuments and institutions mentioned in Article 1 shall cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes.”

3. *Two UNESCO Conventions of 1970 and 1972*

2062 Two international conventions adopted by the General Conference of UNESCO deserve a special mention: the Convention on the Means of Prohibiting

¹⁹ This treaty was drawn up at the suggestion of Professor Nicolas Roerich of New York and was discussed by the International Office of Museums of the League of Nations. Private conferences took place in Bruges in 1931 and 1932, and in Washington in 1933, recommending governments to adopt it. In 1933 the 7th Conference of American States recommended its signature, which took place in 1935. Article 36, paragraph 2, of the 1954 Hague Convention supplements the Roerich Pact and substitutes its distinctive emblem (red circle with a triple red sphere in the circle on a white background) by the new emblem. On 31 December 1984, 11 States were Parties to the Pact.

and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted in 1970,²⁰ and the Convention of 16 November 1972 Concerning the Protection of the World Cultural and Natural Heritage.²¹

Second part – Definition of protected objects; three prohibitions

Definition of protected objects

- 2063** The special protection conferred by Article 53 applies to three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples.²² The initial draft referred to the heritage of a country, but it was considered preferable to use the term heritage “of peoples” as problems of tolerance could arise with regard to religions which do not belong to the country in question, and with respect to places where worship takes place.
- 2064** Article 1 of the Hague Convention of 1954 refers to property which is “of great importance to the cultural heritage” and not, as in the present Article 53, to objects which “constitute the cultural or spiritual heritage”. Despite this difference in terminology, the basic idea is the same.²³ However, the reference to places of worship and to the spiritual heritage clarifies the qualification of protected objects by introducing the criterion of spirituality. It was stated that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.²⁴
- 2065** In general the adjective “cultural” applies to historic monuments and works of art, while the adjective “spiritual” applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value. The discussions in the Diplomatic Conference confirmed this. However, whatever the case may be, the expression remains rather subjective. In case of doubt, reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is.
- 2066** Thus all objects of sufficient artistic or religious importance to constitute the heritage of peoples are protected,²⁵ including those which have been renovated or restored.²⁶

²⁰ At 31 December 1984, 53 States were Parties to this Convention.

²¹ At 31 December 1984, 53 States were Parties to this Convention.

²² The concept of a people should be understood here in a cultural sense and not in the legal sense used in Article 1, para. 4, of the Protocol.

²³ During the CDDH there was no question of creating a new category of cultural objects.

²⁴ O.R. XV, p. 220, CDDH/III/SR.59, para. 68.

²⁵ The text of the article is clear. The absence of a comma before the words “which constitute the [...] heritage” clearly shows that only objects complying with this condition are covered. If there were a comma, the clause introduced by the relative pronoun would be a statement or a commentary, which is unusual in an international convention.

²⁶ O.R. XV, pp. 277-278, CDDH/215/Rev.1, paras. 68-70.

- 2067 The Conference rejected the idea which was put forward by some delegations of including any and all places of worship, as such buildings are extremely numerous and often have only a local renown of sanctity which does not extend to the whole nation. Thus the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people. Article 53 lays down a *special* protection which prohibits the objects concerned from being made into military objectives and prohibits their destruction. This protection is additional to the immunity attached to civilian objects; all places of worship, regardless of their importance, enjoy the protection afforded by Article 52 (*General protection of civilian objects*).
- 2068 Historic monuments and works of art must be considered as generic terms: in case of doubt, reference should be made to the detailed definition given in the 1954 Hague Convention.

Sub-paragraph (a)

- 2069 It is prohibited to commit any acts of hostility directed against the protected objects.
- 2070 The 1954 Hague Convention contains a similar provision: “by refraining from any act of hostility directed against such property” (Article 4, paragraph 1). The Roerich Pact simply provides that the objects shall be “respected and protected by belligerents” (Article 1). An act of hostility must be understood as any act arising from the conflict which has or can have a substantial detrimental effect on the protected objects.²⁷ In fact the article prohibits not only substantial detrimental effect, but all acts *directed* against the protected objects. For a violation of the article to take place it is therefore not necessary for there to be any damage.
- 2071 The obligation here is stricter than that in the Hague Regulations of 1907. According to Article 53 of the Protocol: “it is prohibited to commit”, while Article 27 of the Hague Regulations requires: “to spare, as far as possible”.
- 2072 The obligation is also stricter than that imposed by the 1954 Hague Convention, since it does not provide for any derogation, even “where military necessity imperatively requires such a waiver”.²⁸ As long as the object concerned is not made into a military objective by those in control – and that is not allowed – no attack is permitted.
- 2073 As there are no exceptions, the obligation must be considered to apply to all objects concerned, regardless of the territory where they are situated.

²⁷ An act of hostility includes in particular the destruction of any specially protected object by any Party to the conflict, either by way of attack or by demolition of objects “under its control” (cf. M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 334, para. 2.5.2).

²⁸ When the Parties to the Protocol are also Parties to the Hague Convention of 1954, these derogations continue to apply, though it is understood that an attack may never be launched against an objective which is not a military objective in the sense of the Protocol. If one of them is a Party to the Protocol and not to the 1954 Hague Convention, no derogation is possible. Also see *infra*, note 30.

2074 It should be noted that attacks against historic monuments, works of art or places of worship may constitute a grave breach.²⁹

Sub-paragraph (b)

2075 It is prohibited to use protected objects in support of the military effort.

2076 The 1954 Hague Convention contains a similar rule, which seeks to prohibit any use of protected objects which could put them in danger of becoming military objectives: it prohibits “any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict” (Article 4, paragraph 1).

2077 This prohibition forms the essential counterpart for the respect due under sub-paragraph (a): the use of such objects “in support of the military effort” would in fact be clearly incompatible with the obligation for the adversary to respect them.

2078 The “military effort” is a very broad concept, encompassing all military activities connected with the conduct of a war. It is prohibited to benefit from protected objects (passive support), as well as to use them (active support), for example, by including them in a defence position.

2079 If protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the Protocol, though it would not necessarily justify attacking them. To the extent that it is admitted that the right to do so does exist with regard to objects of exceptional value, such a right would depend on their being a military objective, or not, as defined in Article 52 (*General protection of civilian objects*), paragraph 2. A military objective is an object which makes “an effective contribution to military action” for the adversary, and whose total or partial destruction, capture or neutralization “in the circumstances ruling at the time, offers a definite military advantage” for the attacker.³⁰ These conditions are therefore stricter than the simple condition that they must be “in support of the military effort”. For example, it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer used as such. In addition, all preventive measures should be taken to terminate their use in support of the military effort (warnings, injunctions etc.) in order to prevent the destruction or damage of cultural objects. However, if it is decided to attack anyway, the principle of proportionality should be respected, which means that the damage should not be excessive in relation to the concrete and direct military advantage anticipated, and all the precautions required by Article 57 (*Precautions in attack*) should be taken.

²⁹ See Art. 85, para. 4 (d), and the commentary thereon, *infra*, p. 1002.

³⁰ The prohibition on attacking objects which are not military objectives, as well as the definition of the latter given in Article 52, para. 2, also apply when the Hague Convention of 1954 is applicable: thus the effect of Article 52 of Protocol I is to limit the possibilities of derogations allowed by the Hague Convention. This is an important development for the protection of cultural objects.

Sub-paragraph (c)

2080 It is prohibited to make protected objects the object of reprisals.³¹

2081 This reiterates a prohibition which applies to all civilian objects (see Article 52 – *General protection of civilian objects*, paragraph 1).

2082 As in the 1954 Hague Convention there can be no derogation from this prohibition.

C.F.W.

³¹ On the question of reprisals in general, see introduction to Part V, Section II, *infra*, p. 981.

Protocol I

Article 54 – Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
 - (a) as sustenance solely for the members of its armed forces; or
 - (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.
4. These objects shall not be made the object of reprisals.
5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity

Documentary references

Official Records

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III/SR.58, paras. 13-15; pp. 278-280, CDDH/215/Rev.1, paras. 71-77; pp. 348-350, CDDH/III/264/Rev.1; pp. 462-463, CDDH/407/Rev.1, paras. 49-53; p. 516, CDDH/III/369.

Other references

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Commentary

2083 Although the comprehensive protection of civilian objects and the explicit prohibition of the starvation of civilians are new features in codified humanitarian law, it should be noted that the Diplomatic Conference of 1949 had taken the first step in this direction with the adoption of Article 23 of the Fourth Convention, which provides for aid in favour of the most vulnerable categories of the population, and Article 53, which safeguards necessities of life of civilians in occupied territory.

2084 The article under consideration here was profoundly revised by the Diplomatic Conference of 1974-1977. The ICRC draft, which did not contain paragraphs 1, 3 and 5 read as follows:

“Article 48 – Objects indispensable to the survival of the civilian population

It is forbidden to attack or destroy objects indispensable to the survival of the civilian population, namely, foodstuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether it is to starve out civilians, to cause them to move away or for any other reason. These objects shall not be made the object of reprisals.”

2085 The question gave rise to lengthy discussions in the Working Group of Committee III, but it finally succeeded in reconciling the different opinions and the article was adopted by consensus in the Committee and then in the Conference.¹

2086 One point of terminology deserves a mention: the title of the article, like the text (paragraph 2), refers to “objects indispensable to the survival of the civilian population”, while Article 69 (*Basic needs in occupied territories*) refers to

¹ *O.R. XIV*, p. 301, CDDH/II/SR.31, para. 11; *O.R. VI*, p. 208, CDDH/SR.42, para. 19.

“supplies essential to the survival of the civilian population” (while the title uses the term “basic needs”). In the French text of these two articles the difference in terminology is only in the adjective: reference is made to “*biens indispensables*” and “*biens essentiels*”, respectively. In their contexts the two terms must be considered to have the same meaning.²

Paragraph 1

- 2087** It is not sufficient to condemn specific indiscriminate or particularly cruel weapons, since it is possible to use weapons or means that are legitimate in themselves, or to provoke the release of natural phenomena, in a way equally dangerous for the population. It is therefore necessary to prohibit methods of total warfare, and to have done so is one of the great achievements of the Diplomatic Conference.
- 2088** An example of this achievement can be seen here in this succinct paragraph, which prohibits starvation as a method of warfare. There is no doubt that this is a significant step forward. It can also be seen with respect to Article 55 (*Protection of the natural environment*).
- 2089** The term “starvation” is generally understood by everyone.³ To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies. It is clear that activities conducted for this purpose would be incompatible with the general principle of protecting the population, which the Diplomatic Conference was concerned to confirm and reinforce.
- 2090** Starvation is referred to here as a method of warfare, i.e., a weapon to annihilate or weaken the population.
- 2091** As we have seen, the statement of this general principle is innovative, and a significant progress of the law. It arose from an amendment.⁴ However, a general principle only of course becomes fully operative when it is accompanied by rules of application: the remainder of the article is concerned with such application, as are several other articles in the Protocol, particularly those relating to relief actions. This rule could have been placed in Part III, Section I, “Methods and means of warfare”, but as it directly concerns the civilian population, its position seems justified. The principle is applicable both in occupied territories and in territories that are not occupied.
- 2092** According to the Rapporteur of Committee III: “The fact that the paragraph does not change the law of naval blockade is made clear by Article 44,⁵ paragraph 1.” This remark appears to be correct.

² The Robert Dictionary defines “*essentiel*” in everyday language as “*qui est nécessaire, inséparable de quelque chose*” (Vol. II, p. 644) and it refers to “*indispensable*”. The same dictionary defines “*indispensable*” as “*qui est très nécessaire, dont on ne peut se passer*” (Vol. III, p. 703) and it refers back to “*essentiel*”.

³ Starvation is defined by the Shorter Oxford English Dictionary (1973) as the action of starving or subjecting to famine, i.e., to cause to perish of hunger; to deprive of or “keep scantily supplied with food” (p. 2111). The word “starvation” is also used in para. 3(b) *in fine*.

⁴ O.R. III, p. 218, CDDH/III/67.

⁵ In the final text this has become Article 49, para. 3.

- 2093 However, it should be noted that there is some uncertainty as regards the present state of the customary law relating to blockades.⁶ In fact, although they were codified in the Declaration of London of 24 February 1909, this instrument was never ratified. Furthermore, the rules were not always complied with during the Second World War.⁷ Thus it is to be hoped that the rules relating to blockades will be clarified as part of a future revision of certain aspects of the laws of war at sea, a revision for which there is a great need. Such a reexamination should make it possible to duly take into account the principles put forward in the Protocol which prohibit starvation as a method of warfare.
- 2094 Nevertheless, the fact remains that the possibility of a blockade exists provided that some conditions are fulfilled. Thus, it must be preceded by a declaration indicating its duration and the area covered; it must be effective and applied impartially to ships of all countries; neutral States must be informed of blockades which have been implemented against a Party to the conflict.
- 2095 It should be emphasized that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. Unfortunately it is a well-known fact that all too often civilians, and above all children, suffer most as a result. If the effects of the blockade lead to such results, reference should be made to Article 70 of the Protocol (*Relief actions*), which provides that relief actions should be undertaken when the civilian population is not adequately provided with food and medical supplies, clothing, bedding, means of shelter and other supplies essential to its survival. Such actions may be very extensive.⁸
- 2096 Moreover, if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area that is particularly weak, the principle of the prohibition of starvation should henceforth dictate the evacuation of such persons; this was already made possible, though not prescribed, by Article 17 of the Fourth Convention.
- 2097 Finally it should be mentioned that an action aimed at causing starvation would constitute a violation of this Protocol, but it could also be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, according to the terms of the Genocide Convention.⁹

⁶ O.R. XV, p. 279, CDDH/215/Rev.1, para. 73.

⁷ The Nuremberg Tribunal acquitted Admiral Doenitz of the accusations brought against him relating to his conduct of submarine warfare against British armed merchant vessels, but, although he was found guilty of a violation of the Protocol in relation to neutral vessels, he was not sentenced on the ground of his breaches of the law of submarine warfare on the basis of the *tu quoque* principle, as the adverse Parties had also used practices of which he was accused.

⁸ Thus, for example, from 1942 to 1944 the population of Greece enjoyed considerable aid requiring the intervention of a whole fleet. See the final report of the commission administering aid to Greece under the auspices of the ICRC, Athens 1949.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, particularly Art. II(c).

Paragraph 2

- 2098 This provision develops the principle formulated in paragraph 1 of prohibiting starvation of the civilian population; it describes the most usual ways in which this may be applied.¹⁰
- 2099 The adopted text is very similar to the ICRC draft, although some important details were incorporated which led to lengthy discussion.
- 2100 The Conference added removal and rendering useless of objects indispensable to the survival of the civilian population to the prohibition on their attack or destruction. With regard to rendering such objects useless, this refers mainly to irrigation works and installations.
- 2101 It should be noted that the verbs “attack”, “destroy”, “remove” and “render useless” are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs, or destruction of crops by defoliants, and also because the verb “attack” refers, either in offence or defence, to acts of violence against the adversary, according to Article 49 (*Definition of attacks and scope of application*), paragraph 1.
- 2102 As regards the objects which are especially protected, the Conference mentioned agricultural areas for the production of foodstuffs, drinking water installations and supplies, and crops, which should be interpreted in the widest sense, in order to cover the infinite variety of needs of populations in all geographical areas.
- 2103 Furthermore, the words “such as” show that the list of protected objects is merely illustrative. An exhaustive list could have led to omissions or an arbitrary selection. As the text reveals, the objects concerned are basically objects for subsistence. General protection of civilian objects follows from Article 52 (*General protection of civilian objects*). However, it cannot be excluded that as a result of climate or other circumstances, objects such as shelter or clothing must be considered as indispensable to survival.
- 2104 The clause “for the specific purpose of denying them for their sustenance value” led to lengthy discussion. The Working Group¹¹ and then Committee III¹² had adopted the words “for the purpose of denying them as such”.¹³ The Drafting

¹⁰ The relationship between these two provisions is particularly clear in Article 14 of Protocol II, the second sentence of which begins with the words “It is therefore prohibited”.

¹¹ O.R. XV, p. 249, CDDH/III/264/Rev.1.

¹² *Ibid.*, p. 279, CDDH/215/Rev.1, para. 74.

¹³ In this respect it is appropriate to quote the report of the Committee: “In paragraph 2, drafting problems were posed by the fact that two of the objects listed – food-producing areas and irrigation works – might be useful to combatants for purposes other than directly for sustenance. Thus, the phrase in paragraph 2 ‘for the purpose of denying them as such’ was designed to cover both the denial of food and drink as sustenance and the denial of food-producing areas and irrigation works for their contribution to the production of sustenance. On the other hand, it was not intended to cover their denial to the enemy for other purposes, including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissible, whether or not the area produces food, but the deliberate destruction of food-producing areas in order to prevent the enemy from growing food on them is forbidden. Similarly, destroying a field of crops in order to clear a field for fire or to

(continued on next page)

Committee finally proposed the present wording, which was adopted in the Conference by consensus.¹⁴

- 2105 Even if the wording is not perfect, the meaning is clear: the objects indicated must be respected in order to guarantee the survival of the population, unless – following paragraphs 3 and 5 – military necessity requires that they be attacked, destroyed, removed or rendered useless. On this subject the examples given by the Rapporteur are meaningful.¹⁵ The restrictions laid down in Article 57 (*Precautions in attack*) must of course be respected.
- 2106 It will be seen, when examining paragraph 3(b), that even if the objects listed here were used in direct support of military action, the adverse Party should, when using force, ensure that the population is not reduced to starvation or compelled to move. This requirement must be considered *a fortiori* as applying here with regard to objects intended exclusively for the population.
- 2107 The text continues: “for the specific purpose of denying [...] the civilian population or [...] the adverse Party.” Why should it mention the adverse Party? To understand this, reference should be made to paragraph 3, which makes an exception to the rule of paragraph 2 if objects are used in a certain way “by an adverse Party”. Thus the provision under consideration here means that it is prohibited to attack etc. objects indispensable to the survival of the civilian population wherever it is, or to deprive the enemy State of such objects indispensable to the civilian population.

Paragraph 3

- 2108 This provision was not contained in the ICRC draft; it appears to be the result of an amendment.¹⁶
- 2109 Sub-paragraph (a) is undoubtedly concerned with foodstuffs and the agricultural areas producing them, crops, livestock and supplies of drinking water, but not with installations for drinking water or irrigation works.
- 2110 It is important to determine how foodstuffs, crops, livestock and supplies of drinking water could be used in direct support of military action, as suggested in

prevent the enemy using it for cover is permissible, but destroying it to prevent the enemy from consuming the crops is forbidden. This is a heavy burden of meaning to be carried by the two words ‘as such’, and several representatives expressed the hope that the Drafting Committee would ultimately find a clearer form of words.”

(O.R. XV, p. 279, CDDH/215/Rev.1, para. 74).

¹⁴ O.R. VI, p. 208, CDDH/SR.42, para. 19.

¹⁵ Cf. *supra*, note 13.

¹⁶ O.R. III, p. 219, CDDH/III/74. The Rapporteur of Committee III expressed himself as follows in this respect: “The phrasing of paragraph 3 is only slightly more satisfying than that of paragraph 2. Here the drafter continues to be plagued by the necessity of distinguishing between uses of the objects as sustenance and other uses. Paragraph 2(a) was intended to apply only to those objects which clearly are assigned solely for the sustenance of the armed forces. The term ‘civilian population’ referred to in paragraph 2(b) was not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the size of the area was not defined.” (O.R. XV, p. 280, CDDH/215/Rev.1, para. 76). It should be noted that the passage quoted above incorrectly refers to 2(a) and 2(b) while it should refer to 3(a) and 3(b).

sub-paragraph (b). Although some supplies of foodstuffs or drinking water can serve to sustain the armed forces, this possibility does not seem sufficient reason for depriving such objects of the protection it was agreed to afford them, and the restriction contained at the end of this sub-paragraph confirms this point of view. The phrase “direct support of military action” in sub-paragraph (b) refers to the type of military operation quoted in footnote 13 above, namely, bombarding a food-producing area to prevent the enemy from advancing through it, or attacking a food-storage barn which is being used by the enemy for cover or as an arms depot etc.

2111 If the civilian population is reduced to starvation or forced to move, acts of destruction are prohibited in any case; in this situation it should also be recalled that under Article 70 (*Relief actions*), relief actions must be undertaken provided that the agreement has been obtained from the Parties concerned with such relief actions.

2112 To summarize, the following rules can be laid down:

1. Supplies of foodstuffs intended for the sole use of the armed forces may be attacked and destroyed (agricultural areas or drinking water installations are hardly likely to be used solely for the benefit of armed forces).
2. When objects are used for a purpose other than the subsistence of members of the armed forces and such use is in direct support of military action, attacks and acts of destruction are legitimate unless they are bound to have serious effects on supplies for the civilian population and the latter would thereby be reduced to starvation or forced to move away.

2113 Finally, a general remark may be made which is common to the first three paragraphs: objects indispensable to the survival of the civilian population are protected by this article when they are located in the territory held by the Party to the conflict concerned or that of a co-belligerent as well as in enemy territory.

2114 If they come by sea, the fate of such objects depends on the provisions of the laws of war applicable to ships transporting them. As the Rapporteur of Committee III stated, this article does not replace the recognized rules on naval blockades. One may also note in passing that the objects referred to in paragraph 2 do not fall in the category known as “absolute contraband of war”, and that consequently ships of neutral countries which transport foodstuff destined exclusively for the civilian population may do so without risk of seizure or confiscation.

Paragraph 4

2115 This provision was contained in the ICRC draft and the Conference decided to make it into a separate paragraph. Again it was preferred to repeat this prohibition of reprisals here, rather than grouping together everything related to reprisals in a separate article.¹⁷ On the general problem of reprisals reference should be made to the introduction to Part V, Section II (*infra*, p. 981).

¹⁷ O.R. VI, pp. 219-220, CDDH/SR.42, Annex (Australia).

Paragraph 5

- 2116** This provision was not contained in the ICRC draft. At the Diplomatic Conference it soon became clear that many States did not wish to limit the means available to them of defending their national territory against an invader, including carrying out “scorched earth” actions which would prevent or slow down the advance of the adverse forces. There have been some notorious examples of such “total defence” in the recent past which have often resulted in significant long-term damage for the country and its population: forest fires, breaching dykes, flooding cultivated land with sea water, destroying bridges, roads or other means of communication, factories, food supplies etc.¹⁸
- 2117** The suggestion of the Rapporteur was taken into account and, after an examination of Article 66 of the draft, Committee III adopted a new text whose paragraph 2 became this paragraph after being revised by the Drafting Committee, which had been asked to ascertain where this provision could best be placed. Paragraph 1 became paragraph 2 of Article 49 of the Protocol (*Definition of attacks and scope of application*).¹⁹
- 2118** The words “under its own control” refer to *de facto* control, i.e., the ability to exercise effective control. In the French text the word “contrôle” is used in the English sense implying a power to direct and take decisions, though the usual French meaning of this word is to “supervise” or “check”.
- 2119** It follows from this provision that a belligerent Power, while preserving the interests of its own population, may carry out destructions in that part of its own territory where it exercises authority, but that it may not do so in any part of its territory that may be under enemy control, any more than it may do so in the territory of the enemy Power itself, for that matter.

¹⁸ When he presented Article 48 the Rapporteur of Committee III expressed himself as follows: “Finally, Article 48 raised the question whether the prohibitions in paragraph 2 other than that on attack (which by definition is against the adversary) apply to acts by a State against objects under its control and within its own national territory. A number of representatives expressed the view that it was not intended to have such an effect and that an express reservation of rights within one’s own territory was unnecessary. At the suggestion of the Rapporteur, it was agreed to review subsequently the extent to which the provisions of this Section were intended to have such an effect within a State’s own territory and reflect the conclusions of the Group in some appropriate way in the text. It is apparent that some provisions, for example Article 46, paragraph 5, on movement of civilians to shield military operations, are intended to apply to a State within its own territory. This review will be made in the context of Article 66.” (*O.R.* XV, p. 280, CDDH/215/Rev.1, para. 77).

¹⁹ On this subject the Rapporteur stated: “Paragraph 2 [of draft Art. 66] proved relatively easy to agree upon once it was phrased in terms that recognized the vital requirements of a State defending its national territory against invasion. The Committee generally considered that it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a State were being forced to retreat within the national territory of that State, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48, paragraph 2 only where required by imperative military necessity. Several representatives expressed dissatisfaction with that standard because of its apparent anti-humanitarian implications, but it was generally regarded as the most demanding standard that would be acceptable.” (*Off. Records* XV, p. 462, CDDH/407/Rev.1, para. 51).

- 2120** As regards Occupying Powers, Article 53 of the Fourth Geneva Convention of 1949 prohibits the destruction of real or personal property, except where such destruction is rendered absolutely necessary by military operations. This is a general rule which is now supplemented by the provisions of Article 54 of the Protocol as regards objects indispensable to the survival of the civilian population.
- 2121** “Scorched earth” policies exercised by an Occupying Power withdrawing from occupied territory were judged legitimate if required by imperative military necessity.²⁰ Article 54 does not change that situation except as regards objects indispensable to the survival of the civilian population. In other words, an occupation army which is withdrawing may, if military operations render it absolutely necessary, carry out destructions (bridges, railways, roads, airports, ports etc.) with a view to preventing or slowing down the advance of enemy troops, but may not destroy indispensable objects such as supplies of foodstuffs, crops ripe for harvesting, drinking water reservoirs and water distribution systems or remove livestock. To summarize:
- 2122** – In the case of imperative military necessity a belligerent Power may in an extreme case even destroy objects indispensable to the survival of the civilian population in that part of its own territory which is under its control. On the other hand, it may not carry out such destruction in the part of its territory which is under enemy control.
- 2123** – An Occupying Power may not destroy objects located in occupied territory which are indispensable to the survival of the civilian population. Any “scorched earth” policy carried out by an Occupying Power, even when withdrawing from such territory, must not affect such objects.

C.P. / J.P.

²⁰ See in particular, 8 *Law Reports*, pp. 67-69.

Protocol I

Article 55 – Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

Documentary references

Official Records

O.R. I, Part I, p. 149. *O.R.* III, pp. 220-221 (Art. 48 *bis*). *O.R.* V, p. 105, CDDH/SR.11, para. 22; p. 121, CDDH/SR.12, para. 23; p. 139, CDDH/SR.13, para. 61; p. 149, CDDH/SR.14, para. 42. *O.R.* VI, p. 100, CDDH/SR.39, para. 49; p. 114, *id.*, Annex (Egypt); p. 115 (Federal Republic of Germany); p. 118 (United Kingdom, Venezuela); pp. 208-209, CDDH/SR.42, paras. 20-28; pp. 219-220, *id.*, Annex (Argentina, Australia); p. 223 (Byelorussian Soviet Socialist Republic); p. 225 (France); p. 228 (Hungary); p. 234 (Qatar). *O.R.* XIV, p. 139, CDDH/III/SR.16, para. 55; p. 142, CDDH/III/SR.17, paras. 5-6; p. 143, paras. 10-11; pp. 144-145, paras. 14-16; pp. 146-147, paras. 22, 24, 26-27 and 29; p. 148, paras. 33 and 35; p. 152, CDDH/III/SR.18, paras. 4-6; p. 155, para. 25; p. 169, CDDH/III/SR.19, paras. 35-37; pp. 171-175, CDDH/III/SR.20, paras. 1-27; p. 177, para. 44; p. 234, CDDH/III/SR.26, para. 6; pp. 405-406, CDDH/III/SR.38, paras. 14-17; p. 408, para. 35; p. 410, paras. 41 and 44-46; p. 412, para. 52; p. 414, paras. 61 and 63; pp. 434-435, CDDH/III/SR.40, paras. 84-97. *O.R.* XV, pp. 268-269, CDDH/215/Rev.1, paras. 23-28; pp. 280-281, paras. 78-83; p. 309, *id.*, Annex (Art. 48 *bis*); pp. 358-360, CDDH/III/275.

Other references

CE/3b, p. 116. CE 1972, *Report*, vol. I, pp. 128-129, para. 3.19; vol. II, p. 51, CE/COM III/C 2; p. 52, CE/COM III/C 6; p. 54, CE/COM III/C 17.

Commentary

- 2124 As we have said before, one of the great merits of the Diplomatic Conference is that it condemned methods of total warfare: the prohibition of starvation is followed by this prohibition on causing damage to the natural environment.¹
- 2125 Once again, this is a new feature. Respect for the environment, even in peacetime, has only recently become a matter of concern,² but today it is foremost in the conscience of nations. Threatened at all times by natural disasters, such as drought, or human scourges such as pollution, what would become of mankind if in time of conflict, wilful destruction resulting from man's ruinous actions were added to all this ?
- 2126 The concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living. It does not consist merely of the objects indispensable to survival mentioned in Article 54 (*Protection of objects indispensable to the survival of the civilian population*) – foodstuffs, agricultural areas, drinking water, livestock – but also includes forests and other vegetation mentioned in the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons,³ as well as fauna, flora and other biological or climatic elements.
- 2127 On 10 December 1976 the United Nations General Assembly approved the text of the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques. The following definition is contained in Article 2:

“[...] the term ‘environmental modification techniques’ refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space.”

- 2128 The protection of the environment was already dealt with in Article 35 (*Basic rules*), paragraph 3, of this Protocol and we refer to the commentary on that article.

Paragraph 1

- 2129 The ICRC draft did not contain provisions aimed at safeguarding the environment specifically, although several of the articles proposed, in calling for general protection, implied respect for natural resources and, in particular, for objects indispensable to the population.

¹ See G. Herczegh, “La protection de l’environnement naturel et le droit humanitaire”, and A. Kiss, “Les Protocoles additionnels aux Conventions de Genève de 1977 et la protection des biens de l’environnement”, in *Studies and Essays in Honour of Jean Pictet, op. cit.*, p. 725 and p. 181 respectively.

² The ecological concerns expressed previously by isolated but prophetic thinkers were recognized at an international level in 1972 (Stockholm Declaration). The massive use of defoliants during the war in Viet Nam is not unrelated to this.

³ In its Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Art. 2, para. 4.

- 2130 However, several delegations considered that this concern should be mentioned explicitly in a separate provision. As a result two proposals were put forward.⁴ The Working Group of Committee III, to which these amendments were referred after a debate in Committee, drew up a text which finally became Article 55 after being adopted by consensus by the Committee and in plenary.⁵
- 2131 The text drawn up by the Working Group contained in the first paragraph the words “to such a degree as to disturb the stability of the ecosystem”. Committee III decided to delete these words. On the other hand, it decided to retain the second part of the phrase “health or”, though a proposal had been made to delete it.⁶
- 2132 The Conference had also been presented with similar proposals with regard to Article 33 (the present Article 35 – *Basic rules*); they were examined at the same time as those which resulted in Article 55. Finally, on the basis of the report of its Working Group,⁷ Committee III decided to adopt the two articles proposed.⁸ According to the report of the Working Group, the use of the same words, “widespread, long-term and severe damage”, ensures that the two provisions are coherent.
- 2133 While Article 35 (*Basic rules*) broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent, and their tenor is similar, they do not duplicate each other.⁹ It will be noted that the text begins with the words “care shall be taken in warfare to protect the natural environment”. To some extent this formula seems to reduce the effect of the provision by allowing some latitude of judgment. However, the second sentence of the paragraph refers explicitly to a *prohibition*, which strengthens the provision. Moreover, that sentence emphasizes the duty incumbent upon Parties to be vigilant. It should be noted that the expression “care shall be taken” is not used in Article 35 (*Basic rules*), paragraph 3, which is therefore more stringent. On the other hand, it is used in Article 57 (*Precautions in attack*), paragraph 1.
- 2134 It will also be noted that the population is mentioned without the use of the qualifying adjective “civilian”, the way in which the expression is used in many other articles in the Protocol. According to the report of Committee III, this omission is deliberate; it serves to emphasize the fact that damage caused to the environment may continue for a long time and affect the whole population without any distinction.¹⁰
- 2135 The word “health” is used to indicate that the provision is concerned not only with acts which jeopardize the survival of the population, but also with those which could seriously prejudice health, such as congenital defects, degenerations

⁴ O.R. III, pp. 220-221, CDDH/III/60 and CDDH/III/64.

⁵ O.R. XIV, p. 406, CDDH/III/SR.38, para. 17; O.R. VI, p. 209, CDDH/SR.42, para. 28.

⁶ O.R. XIV, pp. 405-406, CDDH/III/SR.38, paras. 16-17.

⁷ O.R. XV, p. 358, CDDH/III/275.

⁸ O.R. XIV, pp. 404-406, CDDH/III/SR.38, paras. 7 and 16-17.

⁹ Cf. commentary on Art. 35, where these problems are studied in detail, as well as the relationship between the Protocol and the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (*supra*, pp. 410-420).

¹⁰ O.R. XV, p. 360, CDDH/III/275.

or deformities. Temporary or short-term effects are not taken into account in the prohibitions laid down in this article.¹¹

2136 In the final debate several delegations indicated that in their opinion the words “widespread, long-term and severe” do not have the same meaning in the Protocol as the corresponding words in the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.¹²

2137 One delegation stressed that in its opinion the article clearly prohibited all forms of ecological warfare.¹³

2138 Finally, mention should be made of the efforts made during the Diplomatic Conference with regard to the protection of natural resources. The Working Group of Committee III submitted a draft Article 48 *ter* which was as follows:

“Article 48 *ter*

Publicly recognized nature reserves with adequate markings and boundaries declared as such to the adversary shall be protected and respected except when such reserves are used specifically for military purposes.”¹⁴

2139 This proposal was not unanimously accepted in the Working Group¹⁵ and did not meet with a very enthusiastic response in Committee III. The report of that Committee on its second session mentions its referral to the Working Group,¹⁶ but since then the Official Records of the Conference have remained silent on this draft article, which is not contained in the final text of the Protocol.

Paragraph 2

2140 This provision specifies that attacks against the environment made by way of reprisals are also prohibited.

2141 In this respect we refer to the commentary on Article 51 (*Protection of the civilian population*), paragraph 6. On the general problem of reprisals, reference can be made to the introduction to Part V, Section II (*infra*, p. 981).

C.P. / J.P.

¹¹ *Ibid.*, p. 281, CDDH/215/Rev.1, para. 82.

¹² O.R. VI, pp. 208-209, CDDH/SR.42, paras. 20-21 and 25-27; p. 219, *ibid.*, Annex (Argentina). See also *supra*, note 9.

¹³ *Ibid.*, p. 228, CDDH/SR.42, Annex (Hungary).

¹⁴ CDDH/III/276 (this draft article is not contained in the *Official Records*).

¹⁵ O.R. XV, p. 358, CDDH/III/275.

¹⁶ O.R. XIV, pp. 406-407, CDDH/III/SR.38, paras. 18-27; O.R. XV, p. 266, CDDH/215/Rev.1, para. 16.

Protocol I

Article 56 – Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided by paragraph 1 shall cease:
 - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.
3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.
4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.
5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.
7. In order to facilitate the identification of the objects protected by this Article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

Documentary references

Official Records

O.R. I, Part I, pp. 149-150; Part III, p. 16 (Art. 49). *O.R.* III, pp. 222-226. *O.R.* VI, pp. 209-211, CDDH/SR.42, paras. 29-37; p. 221, *id.*, Annex (Australia); pp. 226-227 (Ghana); p. 234 (Qatar); p. 235 (Romania). *O.R.* XIV, p. 16, CDDH/III/SR.2, para. 21; pp. 113-114, CDDH/III/SR.14, para. 26; pp. 154-160, CDDH/III/SR.18, paras. 16-48; pp. 161-169, CDDH/III/SR.19, paras. 1-40; p. 177, CDDH/III/SR.20, para. 39; p. 178, para. 49; pp. 301-302, CDDH/III/SR.31, paras. 12-19; p. 305, para. 40; p. 306, paras. 45-48; pp. 307-308, paras. 52-56 and 61; pp. 399-400, CDDH/III/SR.37, paras. 58-60; pp. 420-421, CDDH/III/SR.39, para. 13. *O.R.* XV, p. 211, CDDH/III/SR.59, paras. 12-13; p. 218, para. 56; pp. 281-284, CDDH/215/Rev. 1, paras. 84-95; pp. 350-352, CDDH/III/264/Rev.1; p. 456, CDDH/407/Rev.1, para. 31; p. 520, CDDH/III/391; pp. 526-529, *id.*, Annex.

Other references

CE/3b, pp. 70-71; p. 056, Annex XIX (Art. 17). *CE 1971, Report*, p. 81, para. 459; p. 93, *CE/COM III/26*. *CE 1972, Basic Texts*, p. 20 (Art. 55). *CE 1972, Commentaries*, Part I, pp. 117-118 (Art. 55). *CE 1972, Report*, vol. I, p. 146, paras. 3.136-3.137; p. 157, paras. 3.224-3.227; vol. II, p. 70, *CE/COM III/PC 32*; p. 74, *CE/COM III/PC 56*; p. 76, *CE/COM III/PC 66*; p. 79, *CE/COM III/PC 86*; p. 82, *CE/COM III/PC 104*. *Commentary Drafts*, pp. 62-63 (Art. 49). *XXIInd Int. Conf. RC, Report*, p. 17, para. 55 (Art. 49).

Commentary

- 2142 In time of combat man has always tried to strike at his adversary by releasing natural or artificial forces. Without going right back to Archimedes, it is worth recalling the Battle of Morgarten in 1315 when the Swiss made rocks and tree trunks hurtle down a steep slope to cause panic in the ranks of the adverse Party,

which decided the victory. At the same time, though in a different part of the world, belligerents were using a new weapon, “Greek fire”,¹ to set fire to enemy ships or fortified buildings occupied by the adversary. Nearer to our time it will be remembered that in the seventeenth century the Dutch, despite protests from the peasants, did not hesitate to flood part of their cultivated land by breaching the dykes in order to prevent the advance of adverse troops. In 1938 the Chinese authorities breached the dykes of the Yellow River near Chang-Chow to stop the Japanese troops, resulting in extensive losses and widespread damage. In 1944, again in the Netherlands, German troops flooded many thousands of hectares of agricultural land with sea water to prevent the advance of the enemy.

- 2143 It was also during the Second World War that deliberate attacks were mounted against hydro-electric dams. The best known are those which destroyed the dams in the Eder and the Möhne in Germany in May 1943. These operations resulted in considerable damage: 125 factories were destroyed or seriously damaged and in addition 3,000 hectares of cultivated land were lost for the harvest of that year, 1,300 persons were killed, including some deported persons and allied prisoners, and finally, 6,500 head of livestock were lost.²
- 2144 During the war in Korea aircraft attacked dams used for irrigation in the north of the country. In the Viet Nam War attacks were mounted against dams and dykes, though the United States declared that the damage caused, insofar as this was established, was accidental or secondary.³ According to the delegate from the Democratic Republic of Viet Nam at the Diplomatic Conference, 661 sections of dyke had been either damaged or destroyed during the course of the war.⁴
- 2145 Public opinion had reacted against such forms of warfare and for that reason the ICRC, when it presented its Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War in 1956, had already introduced an article on the protection of installations containing dangerous forces.⁵ In fact it was only an invitation to governments to seek agreement on granting such installations general immunity. To dams and dykes the provision added nuclear power stations, a new potential source of danger which had appeared since the end of the Second World War. Following the failure of the Draft Rules, the ICRC undertook in 1968 to develop new proposals. It went back to the text of Article 17 and presented it to the meetings of experts which it had called. That provision was considered too weak by the experts, which led the ICRC to present an article to the Diplomatic Conference containing a prohibition, without room for exceptions, on attacks or destruction of dams,

¹ A mixture of saltpetre, sulphur, resin and other inflammable materials which had the virtue of adhering to objects and burning them without allowing water to penetrate.

² See P. Brickhill, *Dam Busters*.

³ See in particular, “Ecological Consequences of the Second Indochina War”, *SIPRI Yearbook*, 1976, pp. 57-58, and “Weapons of Mass Destruction and the Environment”, *ibid.*, 1977, pp. 54-55.

⁴ O.R. XIV, p. 161, CDDH/III/SR.19, para. 2.

⁵ Article 17 – Installations containing dangerous forces.

dykes, and nuclear generating stations.⁶ After a long discussion in a Working Group that provision led to the text of the present article, which was accepted by the Diplomatic Conference by consensus.⁷ The importance of the new provision should be underlined and the prohibition on reprisals which it contains should be welcomed.

Paragraph 1

- 2146 The definition of works and installations to be protected gave rise to a number of discussions.
- 2147 According to some amendments, the list which is given should have been merely illustrative.⁸ However, as the Rapporteur indicated, it was only after it was decided to limit the special protection granted by the article to dams, dykes and nuclear electrical generating stations and other military objectives located at or in the vicinity of these works or installations, that it was possible to draw up a text which was generally acceptable.⁹
- 2148 It is clear that there are other works or installations which can release dangerous forces in the case of attack; for example, one need think only of factories manufacturing toxic products which, if released as a gas, could endanger an entire region; such incidents, which can sometimes be serious, have recently occurred in various countries in peacetime.
- 2149 Several delegations wished to include other installations in the list, in particular oil production installations and storage facilities for oil products.¹⁰
- 2150 It appears that the consultations were not successful, as the sponsors of the proposals in this field finally withdrew them.¹¹ There is no doubt that Article 55 (*Protection of the natural environment*) will apply to the destruction of oil rigs resulting in oil gushing into the sea and leading to extensive damage such as that

⁶ "Article 49 – Works and installations containing dangerous forces

1. It is forbidden to attack or destroy works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations. These objects shall not be made the object of reprisals.

2. The Parties to the conflict shall endeavour to avoid locating any military objectives in the immediate vicinity of the objects mentioned in paragraph 1.

3. In order to facilitate their identification, the Parties to the conflict may mark works and installations containing dangerous forces with a special sign consisting of two oblique red bands on a white ground. Absence of such marking in no way relieves a Party from its obligations under paragraphs 1 and 2 of this article."

⁷ O.R. VI, p. 209, CDDH/SR.42, para. 30.

⁸ Cf. O.R. III, p. 225, CDDH/III/59/Rev.1 and p. 224, CDDH/III/76.

⁹ O.R. XV, p. 282, CDDH/215/Rev.1, para. 85.

¹⁰ On this subject the Rapporteur of the Working Group expressed himself as follows: "Finally, it should be noted that some representatives requested the inclusion in this article of special protection for oil rigs, petroleum storage facilities, and oil refineries. It was agreed that these were not objects containing dangerous forces within the meaning of this article and that, if these objects are to be given any special protection by the Protocol, it should be done by another article, perhaps by a special article for that purpose. The Rapporteur has agreed to consult further with interested representatives on this question." (O.R. XV, p. 352, CDDH/III/264/Rev.1).

¹¹ *Ibid.*, p. 449, CDDH/407/Rev.1, para. 12.

described in that article. As regards the destruction and setting alight of refineries and petroleum storage facilities, it is hardly necessary to stress the grave danger that may ensue for the civilian population. Extending the special protection to such installations would undoubtedly have posed virtually insoluble problems, and it is understandable that the Conference, when it adopted these important prohibitions, limited them to specific objects.

2151 The Protocol does not mention fire as a “dangerous force”, for it is difficult to see how it can be unleashed by works and installations. However, it should be recalled that the Convention of 10 October 1980 on the prohibition of certain conventional weapons prohibits the use of incendiary weapons against civilians and even against military objectives situated in an area where civilians are concentrated.

2152 The works and installations covered are protected against attacks, i.e., according to Article 49 (*Definition of attacks and scope of application*), acts of violence against the adversary. It should also be recalled that in accordance with Article 49 (*Definition of attacks and scope of application*), paragraph 2, the prohibition of attacks contained in Article 56 also applies to a Party’s own territory under the control of the adverse Party. On the other hand, the works and installations are not protected against destruction, removal or being rendered useless, as in Article 54 (*Protection of objects indispensable to the survival of the civilian population*), with regard to objects indispensable to the survival of the civilian population. It therefore clearly follows that if circumstances so require, a government may destroy works and installations located in that part of its own territory which is under its control or may render them useless. It is up to the government to take all necessary measures to ensure that the civilian population is not affected. Similarly, an Occupying Power, or another Power which has control of a region, may destroy property or render it useless in certain cases if, as provided in Article 53 of the Fourth Convention, such destruction is rendered absolutely necessary by military operations. In such circumstances the Power concerned must ensure that there is no damage to the civilian population, and exceptionally this may require the evacuation of the civilian population in the circumstances laid down in Article 49 of the Fourth Convention. According to Article 46 of the Hague Regulations annexed to Hague Convention IV of 1907 the Occupying Power has a general duty to respect the life of individuals in occupied territories.

2153 The works and installations concerned are civilian objects *a priori*, and may therefore not be attacked. If they become military objectives, as defined in Article 52 (*General protection of civilian objects*), they enjoy special protection and may not be attacked when such attacks may cause severe losses among the civilian population because of the release of dangerous forces. If such an attack cannot cause severe losses it is legitimate, provided that the works or installation which is attacked has clearly become a military objective in the sense of Article 52 (*General protection of civilian objects*), i.e., provided that it makes an effective contribution to military action and its total or partial destruction, in the circumstances ruling at the time, offers a definite military advantage.

2154 The word “severe” is equivalent to “important” or “heavy”. As so often in this Chapter, this concept is a matter of common sense and it must be applied in good faith on the basis of objective elements such as the proximity of inhabited

areas, the density of population, the lie of the land etc.

- 2155** The second sentence of the paragraph deals with military objectives located at or in the vicinity of such works or installations, which, if attacked, could lead to the release of dangerous forces. This does not refer to military forces assigned to guard or defend the works or installation – they are dealt with in paragraph 5 of the article – but to objectives which are either incorporated in the installation or located in the immediate vicinity.
- 2156** As an example, the Rapporteur cites a hydro-electric power station incorporated in a dam or located in the immediate vicinity. If such an installation has become a military objective under the terms of Article 52 (*General protection of civilian objects*) as a result of the circumstances of the conflict, it cannot be attacked if such an attack could lead to the destruction of the dam.
- 2157** It is conceivable that a dam, dyke or nuclear electrical generating station is situated in the immediate vicinity of some civil engineering works, for example, a bridge or a railway line, and that, in the circumstances of conflict, that bridge or a section of that line could become an important military objective. In this case too, no attack may be undertaken against such a bridge or railway line if the attack could affect the dam, dyke or nuclear electrical generating station, and in this way cause the release of dangerous forces.
- 2158** It should be noted that launching an attack against works or installations containing dangerous forces under certain conditions is condemned by Article 85 (*Repression of breaches of this Protocol*), paragraph 3(c), of the Protocol as a grave breach.

Paragraph 2

- 2159** This provision envisages situations in which the protection laid down in paragraph 1 might cease. However, it should be stressed at the outset that in such cases where the highest human interests are at stake, the decision to deprive them of protection can only be taken at a high military level.
- 2160** In the French text, it may be noted that the word “prévues” (provided), contained in the first line, should be in the singular, referring to the protection and not to the attacks. However, the meaning is not affected by this.

Sub-paragraph (a)

- 2161** This sub-paragraph deals with dams and dykes. The use of words calls for some comment. First, the term “military operations” should be understood to mean movements, manœuvres and actions of any sort carried out by armed forces with a view to combat.¹² Then, the expression “other than its normal function” means that the dam or dyke is used for a purpose other than containing an actual or

¹² Cf. commentary Art. 48, note 13, *supra*, p. 600.

potential mass of water, which is the normal function of such a structure; if the dam or dyke is not used for any other purpose, it must not be attacked under any circumstances.

2162 It may happen that a dyke forms part of a system of fortifications, or that there is a road across the top of a dam which could, in combat conditions, become an essential route for the movement of armed forces. Even in such circumstances protection may cease only if the dam or the dyke constitutes a regular, significant and direct support of military operations, and if such an attack is the only feasible way of terminating such support. The language used indicates that the support given to military operations must be at the same time regular, significant and direct. This triple qualification, which is also found in sub-paragraphs (b) and (c), may seem to be subject to subjective interpretation, but these terms merely express common sense, i.e., their meaning is fairly clear to everyone. They need to be interpreted in good faith on the basis of objective elements. The word “regular” relates to time. It means that accidental or sporadic use is not sufficient; there must be some continuity in the use, or at least some rhythm. The word “significant” is less precise, but must be understood in relation to a scale of degrees of significance that may be established. The support must not be negligible nor should it be merely an incidental circumstance, but it must be sizeable having a real and effective impact. The term “direct” means: not in an intermediate or a roundabout way. Thus the relation between the act and its effect must be close and immediate. What is meant is support which would benefit military operations themselves and not merely intermediary objectives which themselves would be related to such operations. It is clear that the termination of special protection can occur only in the event that a number of very restrictive conditions are all met at the same time.

2163 In addition, it should be noted that some dams and dykes are irrigation works in the sense of Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 2; some works have a combined function serving partly for irrigation and partly to generate electricity. Thus an attack on such works is subject to the additional condition imposed by paragraph 3 of Article 54 (*Protection of objects indispensable to the survival of the civilian population*), namely, that they are used only for the subsistence of members of the armed forces or otherwise in direct support of military action. Even in these cases it is still prohibited to take action against such objects when such action may be expected to leave so little food or water for the civilian population that it will be reduced to starvation or forced to move away.

Sub-paragraph (b)

2164 This sub-paragraph is concerned with nuclear electrical generating stations. If these were bombed, this could affect stocks of radioactive products, or even the core of the installation, and in this way releasing lethal radiation. The condition imposed for the special protection to cease is that such a station produces electricity in regular, significant and direct support of military operations, and that such attack is the only feasible way to terminate such support.

- 2165 In general, electricity is conducted to various different types of destinations, civilian or military, which are closely interwoven, particularly as grids are often integrated, thus pooling generating capacity. It would not be reasonable to claim that merely supplying electricity constitutes direct support of military operations in accordance with the definition given above. Moreover, troops on the move use virtually no electricity, or if they do, they generate it themselves. The Rapporteur of Committee III¹³ considered that the expression “military operations” could cover factories producing armaments, ammunition and military equipment.¹⁴ We consider this interpretation to be excessive. If it had been the intention to include such supplies, an explicit provision should have been made. However, the Rapporteur added that the expression does not cover the production of civilian objects, even if they are also used by the armed forces.
- 2166 It may be added that in the case of nuclear electrical generating stations it is relatively easy to stop electricity reaching its destination by attacking the electricity lines. In this way the desired result is achieved without the risk of releasing dangerous forces.

Sub-paragraph (c)

- 2167 This sub-paragraph deals with military objectives located at or in the vicinity of the works or installations in question. With regard to these, reference should be made to what was said above regarding the second sentence of paragraph 1. The restrictive conditions imposed on the cessation of special protection are the same in this case as sub-paragraph (b).

Paragraph 3

- 2168 It seemed appropriate to specify that in any attack directed against a dam, dyke or nuclear electrical generating station which had ceased to enjoy special protection, all other rules protecting the civilian population must be respected.
- 2169 These are mainly the general rules contained in Article 51 (*Protection of the civilian population*) and the precautions prescribed in Article 57 (*Precautions in attack*).¹⁵ In particular, even if the conditions imposed for special protection to cease are all met, the attacker must always respect the principle of proportionality between losses inflicted and military advantage gained from the destruction of the objective.¹⁶

¹³ O.R. XV, p. 283, CDDH/215/Rev.1, para. 91.

¹⁴ The expression “military operations” also occurs in Article 59, para. 2(d). Article 54, para. 3(b) refers to “military action”, which appears to be an equivalent term. Article 60, para. 3(d), refers to activity linked to the military effort; this expression seems to have a wider scope.

¹⁵ Cf. commentary Art. 51, *supra*, p. 613 and commentary Art. 57, *infra*, p. 677.

¹⁶ On this subject the Rapporteur expressed himself as follows: “In the case of a dam or dyke, for example, where a great many people would be killed and much damage done by its destruction, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.” (O.R. XV, p. 282, CDDH/215/Rev.1, para. 86).

- 2170 In the case of an attack on an objective which has lost special protection, belligerents must take all practical precautions to prevent dangerous forces from being released. On this subject the Rapporteur remarked that given the panoply of weapons available to modern armies, this provision should ensure real protection against the catastrophic release of dangerous forces.¹⁷

Paragraph 4

- 2171 The prohibition of reprisals against dykes, dams and nuclear electrical generating stations supplements the foregoing provisions harmoniously. The ICRC draft did not go as far as this, but the Conference included a prohibition of reprisals in nearly all the rules in Part IV. In the final meetings some delegations expressed some doubts regarding the advisability of prohibiting all reprisals in this field, but a large majority was in support of such prohibitions.¹⁸ The introduction to Part V, Section II, contains an account of the way the problem of reprisals was dealt with by the Diplomatic Conference.¹⁹

Paragraph 5

- 2172 This provision is completely new. In 1973 the ICRC restricted itself to presenting the problem without going so far as to submit specific proposals.²⁰
- 2173 As we see, the Conference surmounted the real difficulties inherent in this problem and adopted a seemingly realistic solution. In fact it does not seem very likely that in time of war security and defence measures should fail to be taken for dykes, dams and nuclear electrical generating stations, if only to protect them against acts of sabotage from whatever source. It may therefore be taken for granted that any works or installation of any importance would at least be assigned a picket guard, and probably the protection of an anti-aircraft battery.
- 2174 Two of the amendments submitted to the Conference contained in embryonic form the concept which underlies this paragraph.²¹ According to the Rapporteur, the type of weapons authorized for defence were discussed at length in the Working Group. In the end it was decided not to adopt any other limitations than

¹⁷ *Ibid.*, p. 284, para. 92.

¹⁸ *O.R.* VI, pp. 205 ff., CDDH/SR.42.

¹⁹ *Infra*, p. 981.

²⁰ It therefore pointed out that according to some experts, belligerents might be afraid to rely only on the prohibition contained in paragraph 1 for the protection of their works containing dangerous forces; in order to shield their population from the very serious consequences of attacks launched either by mistake or in violation of that rule, they might, for example, be led to position anti-aircraft guns for the sole purpose of defending the works concerned. In the view of these experts the article should authorize setting up a defence. In the ICRC's view the problem with this lies in the fact that it is not possible to judge objectively what is the intention of the Parties to the conflict, particularly the Party taking such "defensive" measures (*Commentary Drafts*, p. 63).

²¹ *O.R.* III, p. 222, CDDH/III/10 and p. 224, CDDH/III/65.

those mentioned at the end of the provision, i.e., that they must be weapons capable only of repelling hostile action against the protected works or installations.²²

2175 If the works or installations are at a distance from the combat area, it is mainly a matter of defending them against attacks mounted by combatants who have been infiltrated or parachuted, or against attacks by guided missiles or projectiles dropped from aircraft. Thus there will be needed, on the one hand, a military guard equipped with light individual weapons, and on the other hand, anti-aircraft artillery. In the second case such artillery may only be used against aircraft which are out to attack the protected works or installations, but not against aircraft flying over the works or installations on their way to attacking another military objective. It cannot be denied that this could pose serious difficulties of judgment.

2176 If the works or installations are located within the combat area, the military guard and the anti-aircraft artillery protecting them will of course be part and parcel of the total military system, and it will be difficult to make a clear distinction between military deployments designed to defend the works and installations and other troops fighting in the area. In such circumstances the Parties to the conflict may be induced to take preventive measures, such as emptying reservoirs or closing down nuclear electrical generating stations; they may also envisage the possibility of not defending such works or installations so that these can be occupied by the adversary without destructive attacks which could release dangerous forces.

Paragraph 6

2177 The invitation made to Parties to conclude further agreements to ensure the protection of objects containing dangerous forces is undoubtedly very useful. One might think of extending special protection by agreement to objects other than dams, dykes and nuclear electrical generating stations. As we saw above, there are many establishments or installations whose wanton destruction would expose the civilian population to severe losses, such as, for example, fuel storage installations, factories producing toxic products etc. One could also conceive of the neutralization of dams, dykes and nuclear electrical generating stations and the surrounding areas with the supervision of the Protecting Powers or other organizations. Such an agreement could also set out the conditions of implementation of this article.

2178 However, it should be recalled that concluding agreements in time of war is no easy matter, and it is better to rely on already existing provisions which can be directly applied. Parties to a conflict which have resorted to war do not frequently negotiate with the enemy, even about humanitarian matters. Moreover, hostilities render the procedures slow and uncertain. This was the case on many occasions, particularly during the Second World War. Such agreements are provided for in the Conventions in common Article 6/6/6/7.

²² O.R. XV, p. 284, CDDH/215/Rev.1, para. 92.

Paragraph 7

2179 In the draft the ICRC had provided that the Parties to the conflict would have the possibility of marking dykes, dams and nuclear electrical generating stations entitled to special protection by means of a sign consisting of two oblique red bands on a white ground. This sign was already prescribed in the Draft agreement relating to safety zones annexed to the Fourth Convention. The 1973 draft also provided for the marking of non-defended and neutralized localities. The Conference did not take up these proposals. For non-defended localities and demilitarized zones the way in which they are to be marked should be established by agreement with the adversary.²³ For works and installations entitled to special protection the concept of a special sign was retained and the responsibility for determining what this should be was entrusted to a special Sub-Group of the Working Group. This Sub-Group adopted the following directing principles:

- a) the distinctive sign must be as simple as possible;
- b) it must be of no political or religious relevance whatsoever;
- c) it must not be confused with any other distinctive sign already in use;
- d) it should be visible and distinguishable as such from all directions and from as far away as possible;
- e) the choice of colour should be made according to available technical knowledge,²⁴ which had led the Sub-Group to choose bright orange.

2180 Taking into account various proposals the Sub-Group chose a sign consisting of three bright orange circles and drafted paragraph 7 accordingly as well as Article 16 (*International special sign*) of the Regulations concerning identification annexed to the Protocol.²⁵

2181 It may be noted that in accordance with paragraph 6 the Parties may agree on another method of marking, or even add other means of identification to the marking prescribed, such as, for example, the transmission of radio or electronic signals.

2182 Marking is optional; the special protection is therefore due even if the works or installations are not marked. Yet it seems clear that it is in the interests of a Party to the conflict which wishes its dams, dykes or nuclear electrical generating stations to be respected to communicate a list of them with their geographical location to the adversary through the intermediary of the Protecting Powers or organizations replacing them.

2183 Finally, it should be noted that, subject to certain conditions, Article 85 (*Repression of breaches of this Protocol*), paragraph 3(f), of the Protocol condemns the perfidious use of protective emblems as a grave breach.

C.P. / J.P.

²³ See commentary Arts. 59, para. 6, *infra*, p. 705, and 60, para. 5, *infra*, p. 712. There is nothing to prevent the Parties concerned from adopting the sign of red bands on a white ground provided by the Fourth Convention of 1949.

²⁴ *O.R.* XV, p. 471, CDDH/407/Rev.1, Annex I, para. 2.

²⁵ *Cf.* commentary Annex I, Art. 16, *infra*, p. 1295.

Protocol I

Article 57 – Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
 - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

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Commentary

- 2184** This article was a subject that required lengthy discussions and difficult negotiations in the Diplomatic Conference, and the text which was finally agreed upon is the fruit of laborious compromise between the various points of view.
- 2185** In the first place, it will be noted that no distinction is made here between various situations that may occur. In the early stages of the discussions on the codification of the law of bombardments, the possibility had been entertained of expressly providing the standard of precision required for bombardments on towns and cities which were not closely linked with military operations on land or at sea (i.e., those well behind the lines), as it was feared that the general rule of bombardments of reducing incidental loss to a minimum was insufficient for this particular situation.¹

¹ See, for example, *Draft Rules*, 1956, Art. 9, para. 2, and *ICRC Memorandum*, May 1967.

- 2186 During the *travaux préparatoires* the differences of opinion were such that the ICRC had to present a draft containing two alternative solutions for the steps to be taken for the identification of objectives.²
- 2187 The differences of opinion were mainly related to the very heavy burden of responsibility imposed by this article on military commanders, particularly as the various provisions are relatively imprecise and are open to a fairly broad margin of judgment. These concerns were reinforced by the fact that, according to Article 85 (*Repression of breaches of this Protocol*), failure to comply with the rules of Article 57 may constitute a grave breach and may be prosecuted as such. Those who favoured a greater degree of precision argued that in the field of penal law it is necessary to be precise, so that anyone violating the provisions would know that he was committing a grave breach. As we will see below, several delegations considered that this condition was not met and that the article was dangerously imprecise.³
- 2188 Two delegations argued that in their opinion Article 57 imposed stricter precautions on the aggressor than on the victim of aggression.⁴ Without even dwelling on the difficulty of how to impartially designate an aggressor, there is no doubt that such a view is contrary to the wording of this article and to the general principles underlying the Protocol (Article 1 – *General principles and scope of application*). Moreover, the last paragraph of the Preamble specifies that the provisions of the Protocol apply to the persons concerned, without any adverse distinction based on the nature or origin of the armed conflict, or on the causes espoused by or attributed to the Parties to the conflict. On the level of the *jus in bello*, Article 49 (*Definition of attacks and scope of application*) defines attacks as covering both offensive and defensive acts, i.e., all combat activity. All these considerations mean that Article 57 applies to all attacks, whether they are acts of aggression or a response to aggression. The fact that a Party considers itself to be the victim of aggression does not exempt it from any of the precautions to be taken in pursuance of this article. Obviously this does not prejudge in any way the responsibility which may be incurred, at a completely different level, for having committed an act of aggression.
- 2189 Finally, it should be noted that to some extent Article 57 reaffirms rules which are already contained explicitly or implicitly in other articles, in particular: Article 48 (*Basic rule*), which lays down the “basic rule” of distinction, Article 51 (*Protection of the civilian population*), which reiterates the general immunity enjoyed by the civilian population and prohibits indiscriminate attacks, Article 52 (*General protection of civilian objects*), which restricts attacks to military objectives and defines these, and Article 54 (*Protection of objects indispensable to the survival of the civilian population*), which protects indispensable objects. We refer to the commentary on these articles.
- 2190 It is clear that the precautions prescribed here will be of greatest importance in urban areas because such areas are most densely populated.

² Draft, Art. 50.

³ O.R. VI, pp. 219 and 230, CDDH/SR.42, Annex (Afghanistan, Italy).

⁴ *Ibid.*, pp. 232 and 236 (Madagascar, Romania).

Paragraph 1

- 2191** This is a general principle which imposes an important duty on belligerents with respect to civilian populations. This provision appropriately supplements the basic rule of Article 48 (*Basic rule*), which urges Parties to the conflict to always distinguish between the civilian population and combatants, as well as between civilian objects and military objectives. It is quite clear that by respecting this obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects. Even though this is only an enunciation of a general principle which is already recognized in customary law, it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle. The term “military operations” should be understood to mean any movements, manoeuvres and other activities whatsoever carried out by the armed forces with a view to combat.

Paragraph 2*Sub-paragraph (a)(i)*

- 2192** This sub-paragraph is devoted to the identification of military objectives which a Party wishes to attack.
- 2193** The history of the Second World War and subsequent conflicts contains numerous cases of attacks which were launched in error against non-military objectives, or against objectives whose destruction produced only an insufficient military advantage compared with the losses inflicted on civilians.
- 2194** The requirement of a precise identification of objectives should be especially welcomed, as the effective implementation of the safeguard principles expressed in the Protocol largely depends on this. The examination should not only relate to the exact nature of any military objectives and civilian objects, but it should also be verified, as provided in the text, whether or not the objects concerned are subject to special protection, and in particular whether they are cultural objects or places of worship (Article 53 – *Protection of cultural objects and of places of worship*), works and installations containing dangerous forces (Article 56 – *Protection of works and installations containing dangerous forces*), or of course whether they are medical units (Article 12 – *Protection of medical units*).
- 2195** Thus the identification of the objective, particularly when it is located at a great distance, should be carried out with great care. Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information and if need be give orders for further reconnaissance to those of their subordinates and those responsible for supportive weapons (particularly artillery and airforce) whose business this is, and who are answerable to them. In the case of long-distance attacks, information will be obtained in particular from aerial reconnaissance and from intelligence units, which will of

course attempt to gather information about enemy military objectives by various means. The evaluation of the information obtained must include a serious check of its accuracy, particularly as there is nothing to prevent the enemy from setting up fake military objectives or camouflaging the true ones. In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide.

2196 In close combat on land the evaluation of the nature of objectives will be based, in addition, on more direct information: the commanding officer ordering an attack will generally have information supplied by his own troops who are in direct contact with the enemy, and his task will therefore be much easier. In general, the presence of enemy troops in buildings, structures or installations will make an attack against them legitimate, subject to any further precautions prescribed under (ii) and (iii), and to any special protection to which such buildings, structures or installations may be entitled. It is clear that a belligerent who accommodates troops in purely civilian buildings, for example, in dwellings or schools, or who uses such buildings as a base for combat, exposes them and the civilians present there to serious danger: even if attacks are directed only against members of the armed forces, it is probable that they will result in significant damage to the buildings.

2197 The terminology used in this provision led to some criticism and explanatory statements. Some considered that the introductory words (“those who plan or decide upon an attack”) could lay a heavy burden of responsibility on subordinate officers who are not always capable of taking such decisions, which should really fall upon higher ranking officers.⁵ This view is not without grounds, but it is clear that a very large majority of delegations at the Diplomatic Conference wished to cover all situations with a single provision, including those which may arise during close combat where commanding officers, even those of subordinate rank, may have to take very serious decisions regarding the fate of the civilian population and civilian objects. It clearly follows that the high command of an army has the duty to instruct personnel adequately so that the latter, even if of low rank, can act correctly in the situations envisaged.

2198 The words “everything feasible” were discussed at length.⁶ When the article was adopted some delegations stated that they understood these words to mean everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of

⁵ O.R. VI, p. 212, CDDH/SR.42, paras. 43 and 46. Switzerland made a reservation to Article 57, para. 2, according to which this provision only creates obligations for commanding officers at the level of battalion or group or above.

⁶ In the draft the ICRC had used the expression “take all reasonable steps”. This wording was not retained by the Diplomatic Conference, which opted for the words “everything feasible”. The translation of “feasible” into French by “possible” did not seem satisfactory, even though this is one meaning of the English term. According to the Oxford Dictionary, feasible means “capable of being done, accomplished or carried out, possible, practicable”. Finally agreement was reached on the present French text “*tout ce qui est pratiquement possible*” which seems to translate the intent of the drafters of the English version.

military operations.⁷ The last-mentioned criterion seems to be too broad, having regard to the requirements of this article. There might be reason to fear that by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed here. Once again the interpretation will be a matter of common sense and good faith. What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.

- 2199 Finally, one delegation remarked that the identification of objectives depended to a large extent on the technical means of detection available to the belligerents.⁸ This remark seems to be correct. For example, some belligerents might have information owing to a modern reconnaissance device, while other belligerents might not have this type of equipment.⁹

Sub-paragraph (a)(ii)

- 2200 This sub-paragraph deals with the choice of means and methods of attack to be used so as to prevent loss or damage to the population. As regards weapons, their precision and range should be taken into account; such precautions coincide with the concerns of military commanders wishing to economise on ammunition and to avoid hitting points of no military interest. When a well-placed 500 kg projectile is sufficient to render a military objective useless, there is no reason to use a 10 ton bomb or a series of projectiles aimed without sufficient precision. However, it is clear that the circumstances of combat and the control of airspace may render it more difficult to observe this rule. Finally, mention may be made of the precautionary measures taken by the Allied forces during bombardments carried out during the Second World War against factories located in territories occupied by German forces; in order to avoid hitting the people working in these factories, the attacks took place on days or at times when the factories were empty; the desired effect was to destroy the factories without killing the workers.
- 2201 In itself this rule does not imply any prohibition of specific weapons. During the *travaux préparatoires* two specific issues were brought up: some proposed that the Parties to the conflict should be obliged to draw up maps of *minefields*, so that they could be communicated to any authority responsible for the safety of the population when hostilities ceased; it was also proposed that Parties to the conflict should fit weapons which are particularly dangerous to the population with safety devices to render them harmless if they fell out of the control of the user.

⁷ O.R. VI, pp. 226 ff., CDDH/SR.42, Annex (*ad Art. 50*).

⁸ *Ibid.*, p. 228 (India).

⁹ Austria made a reservation to Article 57, para. 2, according to which this provision will be applied, provided that the information actually available at the time of the decision is decisive. Switzerland made a similar reservation.

- 2202 The problem of mines, booby-traps and other devices later became the object of Protocol II, annexed to the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.¹⁰ That Protocol gives a definition of the expression “feasible precautions”.¹¹
- 2203 Finally, a remark on drafting: to avoid all ambiguity it would have been better to say “with a view to reducing incidental loss [...] to a minimum”.

Sub-paragraph (a)(iii)

- 2204 The rule of proportionality is laid down in this sub-paragraph. During the Diplomatic Conference this gave rise to lengthy discussions and negotiations between the delegations. The wording which was adopted is very similar to the proposal suggested in the 1973 draft: “not disproportionate to the direct and substantial military advantage anticipated”.
- 2205 The concept of proportionality occurs twice in Article 57: in the sub-paragraph under consideration here and in sub-paragraph (b) following it. However, it is also found in Article 51 (*Protection of the civilian population*), paragraph 5(b). It occurs again in Protocol II (Article 3, paragraph 3(c)) annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, with regard to land mines laid outside military zones. In these four cases the wording used is deliberately identical.
- 2206 The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements. There is no implicit clause in the Conventions which would give priority to military requirements. The principles of the Conventions are precisely aimed at determining where the limits lie; the principle of proportionality contributes to this.
- 2207 This article, like Article 51 (*Protection of the civilian population*), is not concerned with strategic objectives but with the means to be used in a specific tactical operation. In this context proportionality is not quite at the same level as the fundamental principles governing the matter. It appears in a secondary or subsidiary role in Article 51 (*Protection of the civilian population*) as a type of indiscriminate attack, and in Article 57, in the context of precautionary measures. It cannot therefore destroy the structure of the system, nor cast doubt upon the fundamental principles of humanitarian law. The principle of proportionality merely contributes to the clarification of matters, though it is true that this is important. Thus an attack cannot be justified only on grounds of proportionality if it contravenes the above-mentioned principles.
- 2208 Even if this system is based to some extent on a subjective evaluation, the interpretation must above all be a question of common sense and good faith for

¹⁰ On this Convention and its Protocols, *cf.* commentary Art. 35, *supra*, p. 402.

¹¹ Art. 3 – General restrictions of the use of mines, booby-traps and other devices, para. 4, second sentence: “Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

military commanders. In every attack they must carefully weigh up the humanitarian and military interests at stake.

- 2209** However, let us return to a systematic commentary on this paragraph. The terminology used in this provision gave rise to some differences of opinion. Some would have preferred the words “which risks causing” rather than “which may be expected to cause”. Committee III adopted the present wording. The expression “concrete and direct” was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.
- 2210** Despite these clarifications, the provision allows for a fairly broad margin of judgment, as stated above; several delegations regretfully stressed this fact. In contrast, other delegations commended the fact that in future military commanders would have a universally recognized guideline as regards their responsibilities to the civilian population during attacks against military objectives.¹²
- 2211** Some delegates proposed deleting the words “which would be excessive in relation to the concrete and direct military advantage anticipated”, but Committee III decided to retain them.¹³
- 2212** Proportionality is concerned with incidental effects which attacks may have on persons and objects, as appears from the reference to “incidental loss”. The danger incurred by the civilian population and civilian objects depends on various factors: their location (possibly within or in the vicinity of a military objective), the terrain (landslides, floods etc.), accuracy of the weapons used (greater or lesser dispersion, depending on the trajectory, the range, the ammunition used etc.), weather conditions (visibility, wind etc.), the specific nature of the military objectives concerned (ammunition depots, fuel reservoirs, main roads of military importance at or in the vicinity of inhabited areas etc.), technical skill of the combatants (random dropping of bombs when unable to hit the intended target).¹⁴
- 2213** All these factors together must be taken into consideration whenever an attack could hit incidentally civilian persons and objects. Some cases will be clear-cut and the decision easy to take. For example, the presence of a soldier on leave obviously cannot justify the destruction of a village.
- 2214** Conversely, if the destruction of a bridge is of paramount importance for the occupation or non-occupation of a strategic zone, it is understood that some houses may be hit, but not that a whole urban area be levelled.
- 2215** Other more complex situations may pose difficult problems for those responsible. The golden rule to be followed in such cases is that contained in the first paragraph, i.e., the duty to spare civilians and civilian objects in the conduct of military operations.

¹² O.R. VI, pp. 211 ff., CDDH/SR.42.

¹³ O.R. XIV, p. 303, CDDH/III/SR.31, para. 31.

¹⁴ In his book, *Fighter – The True Story of the Battle of Britain*, p. 243, L. Deighton relates how, on 25 August 1940, a German bomber which was to attack fuel storage depots in Thameshaven, lost his way and dropped his bombs on the City of London, which led to the bombing of Berlin by way of reprisal.

- 2216** Article 85 (*Repression of breaches of this Protocol*) provides that a violation of Article 51 (*Protection of the civilian population*) and of paragraph 2(a)(iii) of Article 57 here being considered is a grave breach, i.e., a war crime which may carry severe punishment. It provides for the punishment of those who wilfully launch an indiscriminate attack gravely affecting the civilian population in the knowledge that such attack will cause loss of life, injury to civilians or damage to civilian objects, when such loss, injury or damage is excessive in the sense of this provision. The same reference is made with regard to any attacks launched against works or installations containing dangerous forces, even if these become military objectives; these attacks are qualified as grave breaches when they are launched intentionally in the knowledge that they will cause loss of life, injury to civilians or damage to civilian objects excessive in the sense of this provision, and when they actually do serious harm to the civilian population.
- 2217** During the final adoption of the article the words “in relation to the concrete and direct military advantage anticipated” were made the object of interpretative statements in which several delegations gave their view of the expression’s meaning.¹⁵
- 2218** These statements, which all have the same tenor, seem redundant; it goes without saying that an attack carried out in a concerted manner in numerous places can only be judged in its entirety. However, this does not mean that during such an attack actions may be undertaken which would lead to severe losses among the civilian population or to extensive destruction of civilian objects. Nor does it mean that several clearly distinct military objectives within an urban area may be considered as a single objective. This would be contrary to Article 51 (*Protection of the civilian population*), paragraph 4(a). Moreover, even in a general attack the advantage anticipated must be a military advantage and it must be concrete and direct; there can be no question of creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population. A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces. In addition, it should be noted that the words “concrete and direct” impose stricter conditions on the attacker than those implied by the criteria defining military objectives in Article 52 (*General protection of civilian objects*), paragraph 2.
- 2219** In conclusion, this rule, such as it is, is aimed at establishing an equitable balance between humanitarian requirements and the sad necessities of war. It is by no means as clear as it might have been, but in the circumstances it seems a reasonable compromise between conflicting interests and a praiseworthy attempt to impose some restrictions in the domain where arbitrary behaviour has existed too often.

¹⁵ On this subject we may quote the statement of the Italian delegation: “As to the evaluation of the military advantage expected from an attack, referred to in sub-paragraph 2(a)(iii), the Italian delegation wishes to point out that that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately.” (O.R. VI, p. 231, CDDH/SR.42, Annex (*ad Art. 50*)).

Sub-paragraph (b)

- 2220** The rule set out here, relating to the cancellation or suspension of attacks, applies not only to those planning or deciding upon attacks, but also and primarily, to those executing them. The text is sufficiently clear for lengthy comment to be superfluous. For the meaning of the words “concrete and direct military advantage anticipated” reference may be made to what was said in respect of sub-paragraph (a)(iii). As regards military objectives, they are defined in Article 52 (*General protection of civilian objects*), paragraph 2.¹⁶ As regards the concept of proportionality, reference is made to the commentary on sub-paragraph (a)(iii).
- 2221** It is principally by visual means – in particular, by means of aerial observation – that an attacker will find out that an intended objective is not a military objective, or that it is an object entitled to special protection. Thus, to take a simple example, an airman who has received the order to machine-gun troops travelling along a road, and who finds only children going to school, must abstain from attack. However, with the increased range of weapons, particularly in military operations on land, it may happen that the attacker has no direct view of the objective, either because it is very far away, or because the attack takes place at night. In this case, even greater caution is required.

Sub-paragraph (c)

- 2222** This contains the rule about prior warning in case of attacks. Article 26 of the 1907 Hague Regulations already required that the officer in command of an attacking force should, “before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities”. There have been many examples of such warnings in the past; towns subject to attack were frequently declared open cities; in other cases, the population was evacuated.
- 2223** In the case of bombardment by long-distance projectiles or bombs dropped from aircraft, giving warning may be inconvenient when the element of surprise in the attack is a condition of its success. For this reason the rule allows for derogation: “unless circumstances do not permit”. Committee III had two proposals. The one now in sub-paragraph (c) was adopted by majority, but other delegations would have preferred the expression “whenever circumstances permit”, or even no derogation.¹⁷
- 2224** During the Second World War, particularly in the case of objectives situated in occupied territory, warnings were made by radio or by means of pamphlets; there were also cases in which aircraft flew very low over the objective, giving civilians, workers or just townspeople, time to leave. Of course the possibility of giving such warning depends to a large extent on who has air control and on

¹⁶ See *supra*, p. 635.

¹⁷ O.R. XIV, p. 303, CDHH/III/SR.31, para. 29.

what air defences there are. An example was given during the Diplomatic Conference.¹⁸

- 2225 Warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked. Even though ruses of war are not prohibited in this field, they would be unacceptable if they were to deceive the population and nullify the proper function of warnings, which is to give civilians the chance to protect themselves.

Paragraph 3

- 2226 This rule, described “as the lesser of two evils”, was already in the Draft Rules of 1956 (Article 8(a), paragraph 2). It was included in the 1973 draft and the Conference accepted it without much discussion. It is in accordance with the actual practices of belligerents in certain cases, particularly with respect to occupied allied countries.
- 2227 In this field mention could be made of attacks launched against enemy road and rail traffic; some belligerents have tried to attack the adversary only when this would not result in severe damage for the population. Instead of attacking railway stations, which are usually located in towns, the railway lines were hit at crucial points, but away from inhabited areas; the same action was taken with respect to roads.
- 2228 Such examples show that it is possible to choose objectives so that their destruction does not imperil the population and civilian objects, while still gaining the same military advantage. There is no doubt with regard to economic target of military importance, that it is possible to attack only certain parts the destruction of which will result in paralyzing the whole structure.

Paragraph 4

- 2229 This rule was not in the ICRC draft or in the various amendments presented during the Diplomatic Conference. It appeared for the first time in a report of the Working Group of Committee III.¹⁹
- 2230 The provisions of this Section apply to any attack from the sea or from the air, directed against objectives on land. This is set out in paragraph 3 of Article 49 (*Definition of attacks and scope of application*). Therefore that is not what is meant here. This provision is more concerned with the effects on the civilian

¹⁸ *Ibid.*, p. 186, CDDH/III/SR.21, para. 27.

¹⁹ *O.R.* XV, p. 353, CDDH/III/264/Rev.1. The report of Committee III on this subject reads as follows: “In recognition of the limitation of the scope of this Section, as set forth in Article 44, paragraph 1 [the present Art. 49 – Definition of attacks and scope of application – para. 3] on the effect on the law applicable to armed conflict at sea or in the air, paragraph 4 was added to Article 50 to ensure that all reasonable precautions would nevertheless be taken in the conduct of armed conflict at sea and in the air.” (*Ibid.*, p. 285, CDDH/215/Rev.1, para. 99).

population and civilian objects of military operations at sea or in the air. It is regrettable that in the debates during the Conference no practical examples were given. However, one could conceive that hostilities between adverse fleets could endanger the civilian population, with or without the intervention of the airforce, because missiles could miss their target or civilian ships or aircraft could get mixed up in the battle. Similarly, fighting between adverse military aircraft could have incidental repercussions on the civilian population – for example, when a crippled aircraft crashes. It should be noted that “all reasonable precautions” must be taken, which is undoubtedly slightly different from and a little less far-reaching than the expression “take all feasible precautions”, used in paragraph 2. As the nuance is tenuous, the purpose of the provision appears to be to reaffirm the rules that exist to protect civilians in such situations.

2231 As regards the rules of international law applicable in armed conflict, these are defined in Article 2 of the Protocol (*Definitions*), sub-paragraph (b).

2232 The rules of international law governing war at sea are rather uncertain. Hague Convention VIII of 1907 Relative to the Laying of Automatic Submarine Contact Mines had laid down a number of provisions, and the London Procès-Verbal of 1936, was mainly aimed at laying down certain restrictions on submarine warfare. The international military tribunal which sat at Nuremberg examined the application of the provisions of that Procès-verbal, taking into account the attitude adopted by the allied naval forces, but it remains uncertain to what extent these provisions have binding force. The same doubt continues to exist with regard to mines on the high seas.

2233 On the other hand, no one can doubt the rules concerning the shipwrecked, hospital ships and coastal rescue craft. These were first expressed in Hague Convention III of 1899 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864. This Convention was revised in 1907 (Xth Convention), and in 1949 it became the Second Geneva Convention. Finally, this Protocol has developed the rules relative to hospital ships and coastal rescue craft in Articles 22 (*Hospital ships and coastal rescue craft*) and 23 (*Other medical ships and craft*). Mention should be made in particular of the fact that the provisions on protection are extended to cover civilian wounded, sick and shipwrecked.

2234 As regards air warfare, this has not so far been regulated in a special instrument, as has war on land and to some extent, war at sea.²⁰ However, reference could be made to the Rules of Aerial Warfare drafted by a commission of jurists convened at The Hague in 1922 to 1923. Although these Rules did not take the form of a treaty binding upon States, some of them are of importance as an expression of customary law. They contain some interesting definitions and deal in particular with the identification of aircraft, overflight of foreign countries, aerial bombardment, protection of civilians and certain buildings, the powers of military authorities over enemy aircraft, and the right of visit, search and capture by these authorities.

²⁰ The *Bibliography of International Humanitarian Law Applicable in Armed Conflict*, Geneva 1980, p. 169, contains a list of works relating to air warfare. Reference should be made in particular to J.M. Spaight, *op. cit.*

- 2235 Since then some usages have become established but which do not necessarily have the binding nature of customary law. Thus, for example, it is customary for an aircraft to be equipped with an emblem showing the nationality of the armed forces to which it belongs. The usefulness of this rule is doubtful in a time when modern aircraft fly at supersonic speeds. Recognizing to which Party an aircraft belongs is hardly ever done visually, but usually by wireless transmission systems, particularly the “friend or foe” system. Another usage is for crippled aircraft wishing to make an emergency landing on an enemy airfield to show their intention by tipping their wings or lowering their landing-gear. However, the enormous speed of modern aircraft renders such practices problematic.
- 2236 According to another customary practice, members of the crew of a crippled aircraft parachuting out to save themselves, should not be attacked. This is incorporated in Article 42 of this Protocol (*Occupants of aircraft*).
- 2237 On the other hand, medical aircraft were made the object of provisions relating to their protection in the Geneva Convention of 27 July 1929. However, these rules, which were revised and developed in 1949, did not allow for such aircraft to fly in conditions of sufficient security. Fortunately this Protocol has now improved the situation; in fact, Articles 24-31 make it possible for medical aircraft to fly over areas under the control of their own forces without the necessity of resorting to prior notification and receiving the agreement of the adverse Party, which had up to then, according to one medical officer, “nailed” medical aviation to the ground. The reader is referred to the commentary on these articles. As medical aircraft may carry wounded and sick civilians as well as military wounded and sick, their activities will in future be of direct concern to the population at large, particularly as medical aircraft may henceforth be civilian aircraft.

Paragraph 5

- 2238 This paragraph, possibly self-evident, is a confirmation. The law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things. However, in view of the wording of some of the provisions of this article which take into account military necessity, it is understandable that the Diplomatic Conference wished to stress that these provisions may not be construed so as to justify attacks against the civilian population.

C.P. / J.P.

Protocol I

Article 58 – Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Documentary references

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Commentary

- 2239** This article is a corollary to the numerous articles contained in the Protocol for the benefit of the population of enemy countries. It is not concerned with laying down rules for the conduct to be observed in attacks on territory under the control of the adversary, but with measures which every Power must take in its own territory in favour of its nationals, or in territory under its control.
- 2240** Belligerents may expect their adversaries to conduct themselves fully in accordance with their treaty obligations and to respect the civilian population, but they themselves must also cooperate by taking all possible precautions for the benefit of their own population as is in any case in their own interest.
- 2241** From the beginning of its work the ICRC has felt the need to lay down provisions for “passive” precautions, apart from active precautions, if the civilian population is to be adequately protected. Article 11 of the 1956 Draft Rules already contained the norms expressed in this provision.
- 2242** The experts who convened in 1971 and 1972¹ generally confirmed that such a provision would be appropriate, and Article 51 of the 1973 draft, with some modifications, has become the present article.
- 2243** This article did not give rise to as much discussion during the negotiations as did Article 57 (*Precautions in attack*). However, during the final debate several delegations indicated that in the view of their governments, this article should in no way affect the freedom of a State Party to the Protocol to organize its national defence to the best of its ability and in the most effective way.²
- 2244** Nevertheless, the fact remains that States have subscribed here to a triple duty to act, which must imperatively be translated into instructions to be given, and first of all into measures to be taken already in peacetime, even though, strictly speaking, the article is only addressed to Parties to a conflict. Some of these measures have a preventive or precautionary character since they are concerned with preventing the construction of certain buildings in particular places, or removing objectives from an area where such buildings are located, or otherwise separating the population and their homes from dangerous places. For that matter, as stated above, it is in their own interest that States should take such measures.

Introductory sentence

- 2245** Once again the term “feasible” is used.³ In fact the Diplomatic Conference often used this expression to illustrate the fact that no one can be required to do the impossible. In this case it is clear that precautions should not go beyond the point where the life of the population would become difficult or even impossible.

¹ *CE 1972, Report*, Vol. I, pp. 153-154.

² *O.R.* VI, pp. 213-214, CDDH/SR.42, paras. 55, 57 and 60; pp. 231, 234-235 and 239, *ibid.*, Annex (Italy, Republic of Korea, United Republic of Cameroon).

³ In French “pratiquement possible”. On the meaning of these words, see *supra*, commentary Art. 57, p. 681.

2246 Moreover, a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary; several delegations raised this point during the discussion of the article. For example, one delegate, while accepting the article, explained his position as follows:

“With regard to the interpretation of the provision, with particular reference to sub-paragraph (b), it is the understanding of my delegation that this provision does not constitute a restriction on a State’s military installations on its own territory. We consider that military facilities necessary for a country’s national defence should be decided on the basis of the actual needs and other considerations of that particular country. An attempt to regulate a country’s requirements and the fulfilment of those requirements in this connexion would not conform to actualities.”⁴

Sub-paragraph (a)

2247 It is clear that authorities with a sense of duty will endeavour to remove the civilian population from areas where the risk of attack is greatest. Sometimes only certain categories of the population may be removed in this way: children, mothers, the elderly, the sick etc. Evacuation requires preparatory measures, often taken even in peacetime. Sometimes the whole of the population is evacuated.

2248 In this field Occupying Powers only have limited freedom and must comply with the provisions of Article 49 of the Fourth Convention: imperative military reasons, security of the population, proper accommodation to receive the persons concerned, satisfactory conditions of transfer (hygiene, health, safety, nutrition, members of the same family not separated, the Protecting Power be kept informed). In addition, the Occupying Power may not detain civilians in any area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand. It is conceivable that a Party to the conflict would not wish to jeopardize movement of its own armed forces by allowing civilians to take over the roads and trains.

2249 As regards civilian objects, it seems clear that moveable objects should be removed whenever possible away from military objectives; thus a food depot intended for the civilian population should not be placed next to a fortified position or other defensive installations. However, the circumstances of war can change very rapidly and a building or installation which does not seem to be of any military interest can quickly become a major military objective. It will be recalled that Article 52 (*General protection of civilian objects*), paragraph 2, defines military objectives as:

⁴ O.R. VI, pp. 234-235, CDDH/SR.42, Annex (Republic of Korea). It should be noted here that with regard to Article 58, Austria and Switzerland made similar reservations indicating that because of the term “to the maximum extent feasible”, sub-paragraphs (a) and (b) will be applied subject to requirements for the defence of the national territory.

“objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.

- 2250** Immovable objects cannot be removed and are therefore endangered as a result of being in the vicinity of military objectives; if the persons located there are to be protected, they must be evacuated.

Sub-paragraph (b)

- 2251** This sub-paragraph covers both permanent and mobile objectives. As regards permanent objectives, governments should endeavour to find places away from densely populated areas to site them. These concerns should already be taken into consideration in peacetime. For example, a barracks or a store of military equipment or ammunition should not be built in the middle of a town.
- 2252** As regards mobile objectives, care should be taken in particular during the conflict to avoid placing troops, equipment or transports in densely populated areas.
- 2253** In both cases it is likely that governments are sufficiently concerned with sparing their own population and that they will therefore act in the best interests of that population.
- 2254** In this context we refer briefly to the problem of camouflage. If military objectives located in an urban area are camouflaged, for example, so as to appear to be inoffensive buildings, but the adversary knows that they exist, the danger for the population is increased, particularly because of the incidental damage caused by bombing or artillery fire.
- 2255** The provision contained in sub-paragraph (b) is also addressed to Occupying Powers which might be inclined to ignore the fate of the population of the occupied territory and only take into account the fate and the safety of their own troops. It should be recalled that in this respect Article 28 of the Fourth Convention prohibits Occupying Powers from using protected persons to shield certain points or areas from military operations. The same provision is contained in much greater detail in Article 51 (*Protection of the civilian population*), paragraph 7, of the Protocol.
- 2256** Several delegates at the Diplomatic Conference stressed the fact that for densely populated countries this provision was difficult to apply.

Sub-paragraph (c)

- 2257** As regards persons, the other measures that can be taken by a Party to the conflict consist mainly of making available to the civilian population shelters which provide adequate protection against the effects of weapons. In some countries real efforts are made to supply the population with such shelters, both collectively and individually, the latter when every dwelling includes a shelter for

the occupants. The organization of well-trained civil defence services, adequately equipped, can also alleviate the fate of the civilian population.

2258 As regards objects, those which are entitled to special protection should be kept in mind, such as monuments, hospitals, works containing dangerous forces, civil defence installations etc. There too the presence of well-trained civil defence services will serve to limit damage, for example, through effective fire-fighting.

C.P. / J.P.

Part IV, Section I, Chapter V – Localities and zones under special protection

- 2259 It should be noted that the possibility of creating places of refuge, as an option, was already provided for in the Geneva Conventions. Thus Article 23 of the First Convention provides for “hospital zones and localities” for protecting the wounded and sick of the armed forces. In addition, the Fourth Convention provides for the establishment of “hospital and safety zones and localities” in order to shelter the civilian sick, children, the elderly etc. Article 15 adds the possibility of establishing “neutralized zones” in regions where fighting is taking place intended to shelter from danger not only the wounded and sick, but also civilians not participating in hostilities.¹
- 2260 The Protocol supplements these provisions with the present Chapter, which comprises two articles dealing with non-defended localities and demilitarized zones, respectively. These are not specifically concerned with sheltering particular categories of the population such as those who are especially vulnerable (the wounded and sick, children etc.) – although there is nothing to prevent these from being allowed in. The intention is rather to place certain localities or zones with their entire population, apart from combatants, outside the theatre of war, as was already the case with the neutralized zones of the Fourth Convention (Article 15).
- 2261 The reason why the Diplomatic Conference, on the ICRC’s initiative, decided to lay down new rules is that the 1949 provisions were not applied in practice as had been the intention. However, the ICRC had achieved various temporary solutions to this effect, in Dacca in 1971, Nicosia in 1974, Saigon and Phnom-Penh in 1975, Nicaragua in 1979 and the Falkland Islands (Malvinas) in 1982.²
- 2262 Experience has shown that it is very difficult for States to prepare places of refuge already in time of peace, and if they do so, they take care to keep it confidential. In truth the only way in which it is possible to establish protected zones or places of refuge is in the “heat of the moment”, i.e., when the fighting comes close and the defence of the particular locality or zone is of no military interest or of relatively minor interest in comparison with the civilian losses which

¹ The “Jacquinot zone” established in Shanghai in 1937 and the neutralization by the ICRC of a large hotel in Jerusalem in 1948 have been mentioned as examples of such places of refuge. *Commentary IV*, pp. 121-124 gives a historical background on places of refuge which it was possible to set up on various occasions with limited degrees of success.

² Cf. Y. Sandoz, “Localités et zones sous protection spéciale”, a study presented at the Tenth Round Table of the International Institute of Humanitarian Law, San Remo, 1984, in *Quatre études du droit international humanitaire*, Geneva, 1985, p. 35; S.-S. Junod, *Protection of the Victims of Armed Conflict Falkland – Malvinas Islands...*, *op. cit.*, pp. 33-34.

might result from a protracted defence. This convinced the ICRC that the creation of a non-defended locality should be possible unilaterally and very rapidly. The Conference followed these proposals to a very large extent, as evidenced by the fact that a declaration of an open city will have effect if it is not immediately contested. This represents an important reaffirmation of and elaboration on customary law. The other achievements of this Chapter are certainly useful, but since they are subject to the agreement of the Parties to the conflict, they have less chance of being put into practice as it is often difficult to conclude agreements once the Parties are actively engaged in hostilities.

C.P. / J.P.

Protocol I

Article 59 – Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:
 - (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
 - (b) no hostile use shall be made of fixed military installations or establishments;
 - (c) no acts of hostility shall be committed by the authorities or by the population; and
 - (d) no activities in support of military operations shall be undertaken.
3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.
4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.
5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.
6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.
7. A locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in

paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Documentary references

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Other references

CE/3b, pp. 98-102; pp. 055-056, Annex XIX (Art. 16). *CE 1971, Report*, pp. 82-83, paras. 468-471. *CE 1972, Basic Texts*, pp. 18-19 (Art. 53). *CE 1972, Commentaries*, Part I, pp. 108-113 (Art. 53). *CRCE 1972, Report*, p. 35. *CE 1972, Report*, vol. I, pp. 154-155, paras. 3.204-3.216; vol. II, p. 65, CE/COM III/PC 1; p. 79, CE/COM III/PC 87; p. 84, CE/COM III/PC 113. *Commentary Drafts*, p. 67 (Art. 52).

Commentary

Paragraph 1

2263 This paragraph reiterates almost entirely the rule contained in Article 25 of the Hague Regulations of 1907.¹ Under this paragraph, which confirms and codifies customary law, a locality becomes a non-defended locality whenever the

¹ “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” (Article 25 of the Hague Regulations of 1907. *Cf.* also Article 1 of the 1907 Convention Respecting Bombardment by Naval Forces in Time of War, which provides that:

“The bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbour.”

conditions laid down in the following paragraphs are met. Unilateral declarations and agreements merely serve to confirm this situation. This is an important difference with the provisions laid down regarding demilitarized zones in Article 60 (*Demilitarized zones*) in which the status of such a zone depends on an express agreement.

- 2264** Moreover, it should be noted that even if a locality contains military objectives and hostile acts are perpetrated from such objectives, that does not in any way justify the total destruction of the buildings in that locality. In fact, it may be recalled that Article 51 (*Protection of the civilian population*), paragraph 5(a), prohibits treating as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.
- 2265** This refers to acts of violence committed by means of projectiles fired from a distance. If the combat is taking place within a city or a town, and there is fighting from house to house, which is frequently the case, it is clear that the situation becomes very different and that any building sheltering combatants becomes a military objective.
- 2266** Defended localities include not only fortified towns or those equipped with a fixed defence system, but also localities in or around which troops have taken up position.

Paragraph 2

- 2267** Paragraph 1 lays down the rule, which must be obeyed even in the absence of a declaration or an agreement and the article continues by defining the conditions with which a non-defended locality must comply.
- 2268** The introductory sentence lays down two conditions which could just as easily have been included in the list that follows:
- the inhabited place must be near or in a zone where armed forces are in contact. The words used are based on a definition given by a special Working Group of the Diplomatic Conference;²
 - the inhabited place must be open for occupation.³ This condition is essential and all practical steps must be taken in advance to ensure its implementation, such as, for example, opening up road blocks or removing mines. Once the

² Report of a mixed group, March 1975, *cf. O.R. XV*, p. 338, CDDH/II/266-CDDH/III/255, Annex A: “*Contact Area* means, in an armed conflict, that area where the most forward elements of the armed forces of the adverse Parties are in contact with each other.”

³ The French and Spanish texts of the Protocol, contained in the Final Act, used the word “open” in the feminine form of that adjective (“*ouverte*” and “*abierta*”). However, it was the masculine form that was adopted by Committee III (*cf. O.R. XV*, p. 315, CDDH/215/Rev.1) and the plenary Conference finally adopted it by consensus, without a modification (*cf. O.R. VI*, p. 214, CDDH/SR.42, para. 62). There is no doubt that in the English version the adjective “open” qualifies “any inhabited place” – as is only logical. A proposal to correct the error was put forward on 20 January 1981 by the depositary; as the latter did not receive any objections within the prescribed period of 90 days the depositary notified the correction of the authentic French and Spanish texts on 8 May 1981, changing the adjective into its masculine form, “*ouvert*”.

declaration of a non-defended locality has been transmitted, it is clearly no longer possible to go back on it without giving sufficient prior warning to the adversary – otherwise the declaration could be considered as an act of perfidy (see Article 37 – *Prohibition of perfidy*).

- 2269** It may happen that the circumstances of combat change and that in the end the locality is not occupied by the adversary. However, it will retain its status as long as the declaration is not withdrawn or the adversary does not object.
- 2270** The four conditions laid down sub-paragraphs (a)-(d) do not require much comment. The fact that all combatants and military equipment must be evacuated is self-evident. Fixed military installations must not be used for any hostile purpose. Thus refugees may be sheltered in barracks, but military air traffic control stations may not continue to operate.
- 2271** It is clear that factories situated in the locality should abstain from manufacturing weapons, ammunition or other objects of military use.
- 2272** It is also clear that roads and railways passing through the non-defended locality must not be used for the movement of combatants or military equipment, not even for transit purposes.
- 2273** Works containing dangerous forces must not be used in regular, significant and direct support of military operations as this could expose them to attack under the terms of Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 2.
- 2274** Finally, the intention was to prevent the area declared as a non-defended locality from being used as a logistic base by groups of combatants, whether or not in uniform, who would carry out raids and then hide in the locality dressed as civilians.
- 2275** Article 59 is silent on the question of overflight of non-defended localities by friendly or enemy aircraft. In the absence of a specific provision it must be accepted that such overflight is possible and does not compromise the status of the non-defended locality.

Paragraph 3

- 2276** This provision refers to certain categories of persons whose presence in the locality will not deprive it of its status. In the first place, this applies to wounded or sick members of the national armed forces and prisoners of war who are being treated in military or civilian medical institutions. Military medical personnel looking after them are also included, as well as chaplains. Medical establishments, whether fixed or mobile, may continue to function wherever they are, even if they belong to the military.
- 2277** Special mention should be made of civil defence personnel as defined in Articles 61-68 amongst the categories of persons enjoying special protection under the Conventions and this Protocol, as well as of civilian medical and religious personnel. Although Article 59 does not mention this explicitly, it is clear that personnel assigned to the protection of cultural objects defined by the Hague Convention of 1954 are also covered by this paragraph.
- 2278** As regards police forces left behind in the locality, this can only refer to members of uniformed police units which form part of the armed forces of the

State as laid down in paragraph 3 of Article 43 (*Armed forces*). In fact the civilian police force falls under the civilian population and therefore does not need to be evacuated when the locality is declared a non-defended locality.

2279 In many countries the municipal, provincial or national police is purely civilian. In other countries the national police forms part of the armed forces.⁴

2280 The presence in a non-defended locality of police forces which are part of the armed forces could pose some problems if the locality is occupied; in any case, members of such police forces should refrain from any hostile act. However, the question remains what their status will be when they fall under the control of the adversary. If they are captured, they are entitled to prisoner-of-war status, but in many cases they will be required to continue their function under the Occupying Power. In this respect reference could be made to Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*), paragraph 2, which has dealt with the question of military personnel serving in civil defence organizations: they will be considered to be prisoners of war, but in occupied territory they may be employed on civil defence tasks.

2281 To avoid all problems it would seem preferable to entrust police tasks in a non-defended locality to the municipal police or another purely civilian police corps. In any event the presence of and effective action by a police force are essential in such difficult circumstances to maintain law and order, protect lives and property and, if need be, prevent the locality from being overrun by unauthorized elements.

Paragraph 4

2282 The adverse Party must be notified. The use of the word “addressed” was intended to show that a public declaration is not sufficient. Various channels are conceivable: direct transmission by a parlementaire bearing the flag of truce in the actual field of operations, contact through telecommunication, transmission through a Protecting Power, another State not Party to the conflict, inter-governmental organizations such as the United Nations or regional organizations, or alternatively through a humanitarian organization, such as the ICRC.

Who must send the declaration ?

2283 In principle the declaration must be sent by the authority capable of ensuring compliance with the terms of the declaration. In general this will be the government itself, but it may happen that in difficult circumstances the declaration could come from a local military commander, or even from a local

⁴ For example, this is the case in Italy with the “Carabinieri”, in France with the “Gendarmerie nationale” and the “Compagnies républicaines de sécurité”; in the Federal Republic of Germany the “Grenzschutztruppen” are under the control of the Minister of the Interior in peacetime, but are transferred to the control of the Minister of Defence in time of armed conflict and therefore become part of the national armed force.

civil authority such as a mayor, burgomaster or prefect. Of course, if the declaration comes from a local civil authority, it must be made in full agreement with the military authorities who alone have the means of ensuring that the terms of the declaration are complied with.

Contents of the declaration

- 2284** The paragraph only mentions the geographical limits of the non-defended locality, but other elements can certainly be taken into consideration, such as the time from which the conditions laid down in paragraph 2 will be met. To avoid any misunderstanding it seems preferable to wait until the conditions have been met before making the declaration. If the limits of the locality are visually marked, the declaration must indicate what marking is used, by day and night, for acceptance by the adversary. The same applies for the conditions of supervision.

Obligations of the adverse Party

- 2285** The adverse Party must acknowledge receipt of the declaration. In fact it is necessary for the other Party to know that its declaration has arrived at its destination. Acknowledgement of receipt does not create the protection which is accorded to that locality, but it is an important element of security. At the same time the adverse Party must accord the locality the treatment due to non-defended localities. If the adverse Party considers that the conditions laid down are not fulfilled, it must immediately so inform the Party making the declaration. Any unnecessary delay would be contrary to good faith. If it sends a negative response, the adverse Party must indicate the exact points on which the conditions laid down have not been fulfilled, in such a way that those who made the declaration can remedy them, and then make another declaration. In fact, this could also result in negotiations as described in paragraphs 5 and 6. However, it should be noted that the objections of the adverse Party may only relate to the fulfilment of the conditions laid down in paragraph 2. If those conditions are fulfilled, the non-defended locality has the status of a protected locality and the adverse Party cannot impose any other conditions.
- 2286** The last part of the paragraph is an appropriate reminder that even in the event that the declaration is validly rejected, the locality continues to enjoy protection under other provisions of the Protocol and other rules of international law applicable in armed conflict. In the first place, there is no doubt that a locality which fulfils the conditions laid down in paragraph 2, but about which a declaration has not been sent, may not be attacked in any way. If some conditions cannot be fulfilled, for example, if it is impossible to remove all military objectives or to put a complete halt to the transit of combatants and military equipment, all the precautions laid down in Articles 50-57 must be applied. According to Article 51 (*Protection of the civilian population*), paragraph 5, the presence of military objectives does not justify a general attack against a locality. If it is considered to be essential from a military point of view to disrupt the lines of communication,

this must be done, wherever possible, at points where the population is not endangered.

Paragraph 5

2287 This paragraph deals with a second case envisaged by this article: the conditions laid down in paragraph 2 are not fulfilled and the Parties to the conflict, possibly after the rejection of a unilateral declaration, conclude an agreement to grant a locality the status of a non-defended locality. No special form is prescribed for such an agreement, but undoubtedly an agreement in writing is preferable; it could be concluded directly in the field by parlementaires negotiating under the flag of truce or at a diplomatic level through the intermediary or on the initiative of Protecting Powers or a humanitarian organization such as the ICRC.

2288 The principal points of such an agreement should be:

- a) exact geographical limits (generally to be shown on a detailed map);
- b) date and time of entry into force;
- c) duration;
- d) rules on marking the limits and the type of marking to be used;
- e) persons authorized to enter the locality;
- f) if necessary, the methods of supervision;
- g) ultimate fate of the locality, possibly the conditions under which it may be occupied by enemy troops.

Paragraph 6

2289 This provision is perfectly clear and requires hardly any comment. It will be recalled that the Draft agreement annexed to the Fourth Convention provided that hospital and safety zones should be marked by means of oblique red bands on a white ground, placed on buildings and outer precincts.⁵ Paragraph 6 now provides that the signs to be used should be agreed with the adverse Party, though without defining such signs even approximately.

2290 There is nothing to prevent the Parties to the conflict concerned from adopting the sign laid down in the Fourth Convention (oblique red bands on a white ground), but they may also choose another sign.

2291 It is evident that any signs used must be as visible as possible, even though in the case of non-defended localities the geographical position is known to the adverse Party, which can therefore easily spot them.

2292 To mark the limits on main roads, flags bearing the colours or coat-of-arms of the town could be used, as this emblem is often readily available. This form of marking is sufficient for armed forces on land who generally depend on what they can see, but it is probably insufficient for the airforce. For the latter, the agreed signs could be painted on the highways at the limits of the locality, on inclined

⁵ See commentary Art. 56, para. 7, *supra*, p. 675.

panels on the approaches to the locality or on the roofs or courtyards of buildings situated on the perimeter.

2293 Such signs are relatively efficient for daytime use. At night it is necessary to use other means, and particularly to ensure that there is adequate lighting, at least along the perimeter of the locality. However, the presence of an “island of light” in the middle of the darkness can pose difficult problems of military security and the agreement must deal with this point.

2294 Finally, it is also possible for the non-defended locality to identify itself by means of the transmission of distinctive radio signals or by electronic means, in the same way as those laid down in Articles 5-8 of the Regulations annexed to this Protocol⁶ for the identification of medical units and transports. There too, an agreement between the Parties to the conflict is required.

Paragraph 7

2295 This paragraph seems to be self-evident: if one or more of the conditions laid down in paragraph 2 is not fulfilled, the defended locality loses its status.⁷ However, if the zone where armies are in contact becomes further removed from the locality, it does not seem that the status of the locality should be affected, provided that the other conditions continue to be fulfilled.

2296 The most frequent case is, of course, that in which the locality is occupied by adverse forces; it may be that the adversary decides to allow the locality to retain its character of a non-defended locality. In this situation the adversary's own armed forces should obviously not be installed in the locality, and the adversary should confine itself to setting up a system of administration. It remains to be seen whether the national government will accept the extension of the non-defended locality status. Its decision will no doubt depend on the strict observation by the Occupying Power of the conditions laid down in paragraph 2.

2297 There is no doubt that when a non-defended locality loses its status, it continues to enjoy protection under other treaty or customary rules. On this subject reference can be made to the definition given in Article 2 (*Definitions*), subparagraph (b), of the Protocol, and what was said above on paragraph 4.

C.P. / J.P.

⁶ Cf. *infra*, commentary Annex I, Arts. 5-8, p. 1199.

⁷ However, it is recommended that before taking measures against a locality a declaration should be made or reasonable notice should be given with a view to recreating a situation compatible with paragraph 2.

Protocol I

Article 60 – Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.
2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.
3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:
 - (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
 - (b) no hostile use shall be made of fixed military installations or establishments;
 - (c) no acts of hostility shall be committed by the authorities or by the population; and
 - (d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in sub-paragraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.
4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.
5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.
6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.
7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of

demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

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Commentary

2298 The Rapporteur of Committee III noted that it was difficult to find an adequate term to describe the protected zones which it was felt should be created. The terms discussed included “neutralized zones”, “non-militarized zones” and in French even the term “zones civilisées”, but finally the term “demilitarized zones” was adopted.¹

2299 In fact, this expression is not in itself very accurate; to be precise, it ought to be “delimitarized zones in the sense of Article 60 of the Protocol”. Demilitarized zones could actually mean very different institutions. Thus, for example, some peace treaties have imposed on the defeated Party the demilitarization of certain areas. Articles 42-44 of the Treaty of Versailles of 1919 laid down that Germany could have no fortification or military establishment of any sort on the left bank of the Rhine and in an area fifty kilometres east from that river. The Peace Treaty signed in 1947 by the Allied Powers and Italy provides that certain territories,

¹ *O.R.* XV, p. 287, CDDH/215/Rev.1, para. 110.

in particular islands such as Pantelleria, should be demilitarized and remain so; the same Treaty provides that the Dodecanese Islands, ceded by Italy to Greece, should be demilitarized and remain so under the new sovereignty. Annex VIII, Article D, of that Treaty gives a definition of the terms “demilitarization” and “demilitarized”.²

2300 In other cases two or more States have agreed to provide in an international treaty that a particular territory should be demilitarized. This occurred, for example, with regard to the Åland Islands, situated between Sweden and Finland, in the Gulf of Bothnia. It also applies to Antarctica pursuant to the Treaty concluded in Washington on 1 December 1959.

2301 Finally there is a third category of demilitarized zones: those established following an armistice, which are generally known as “buffer zones”. The main objective of such zones is to prevent the adverse armed forces from being in contact, and they are often placed under the authority of an armistice commission, or in some cases, of a peacekeeping force of the United Nations. The best known recent cases are the demilitarized zones in Korea and in the Middle East between Israel and its neighbours.

2302 It is quite clear that the drafters of Article 60 did not have such zones in mind, even though they provided that demilitarized zones could be created already in time of peace. In fact, such different types of demilitarized zones, created by treaty, as mentioned above, are not created for wartime but for peacetime, or at least for an armistice.

2303 In fact, this is the essential character of the zones created in Article 60: they have a humanitarian and not a political aim; they are specially intended to protect the population living there against attacks. Admittedly, there is nothing to prevent a demilitarized zone created by a peace treaty, armistice or any other international agreement, from becoming a demilitarized zone in accordance with Article 60 in the case of armed conflict, provided this is done by means of a new agreement.

Paragraph 1

2304 This paragraph contains the basic rules relating to demilitarized zones. In the first place, such zones can only be created by agreement: in other words, a simple unilateral declaration is not sufficient, even if the zone fulfils the other conditions laid down in the article. The prohibition concerns the extension of military operations to such zones. It does not, as in the preceding article (*Non-defended*

² This is the definition given in Annex XII, Definitions: D) definition of the terms “demilitarisation” and “demilitarized”: “For the purpose of the present Treaty the terms ‘demilitarisation’ and ‘demilitarized’ shall be deemed to prohibit, in the territory and territorial waters concerned, all naval, military and military air installations, fortifications and their armaments; artificial military, naval and air obstacles; the basing or the permanent or temporary stationing of military, naval and military air units; military training in any form; and the production of war material. This does not prohibit internal security personnel restricted in number to meeting tasks of an internal character and equipped with weapons which can be carried and operated by one person, and the necessary military training of such personnel.”

localities), refer to attacks. Should this different formulation be seen as an intention to lay down different rules in this field? To answer this question it is necessary to analyze the meaning of the words used. The expression “military operations” should be understood as all movements and activities related to hostilities, carried out by armed forces. The zone of military operations was defined by a mixed Working Group of the Diplomatic Conference in the following way: “in an armed conflict, the territory where the armed forces of the adverse Parties taking a direct or an indirect part in current military operations, are located”.³

2305 From the preceding it follows that the Party to the conflict in whose territory the demilitarized zone is located cannot set up military installations there or quarter troops participating in military operations in that zone, nor are such troops allowed to go through the zone. Such activity would be contrary to the very conditions underlying the creation of the zone. However, when the agreement by which the zone is created provides that it will continue to apply even if the adversary reaches the periphery, the latter must restrict itself to establishing a civil administration there without introducing troops or establishments which would be contrary to the nature of the zone. Failing such a provision, the adversary, upon arriving at the periphery of the zone, may at its discretion accept and respect the status of the zone or, on the contrary, make use of it in planning its military operations by quartering troops and setting up installations there.

2306 In conclusion, it is clear that a prohibition on extending military operations to demilitarized zones includes the prohibition on attacking them and also covers bringing in troops or military installations into such a zone by the belligerent controlling the territory. What happens to the zone in case it changes hands depends on the terms of the agreement by which it was established.

Paragraph 2

2307 This paragraph clearly says that the agreement cannot be a tacit one: it requires that a *consensus ad idem* of the Parties be clearly expressed. The mere notification, when it remains unanswered, is insufficient. However, it must be admitted that in certain urgent cases good faith requires a rapid response. The form of the agreement, the manner in which it is concluded and its contents, are left to the judgment of the Parties to the conflict. The paragraph specifically requires that the geographical limits should be described, and that the methods of supervision should be laid down. Undoubtedly efforts will be made to ensure that the limits of the zone coincide with natural boundaries whenever possible.

2308 Finally, it is provided that the agreement may be concluded in peacetime. However, it is unlikely that two or more States will agree in advance to keep one or more zones clear of military operations in the event of a conflict breaking out between them: this seems, at least, a rather theoretical point.

³ O.R. XV, p. 338, CDDH/II/266-CDDH/III/255, Annex A.

2309 According to the Rapporteur, the article, and in particular, this paragraph, covers not only zones from which military forces have been withdrawn in order to fulfil the conditions laid down by this article and by the agreement establishing the zones,⁴ but also those zones where there were no military forces to start with, and which in other respects, too, satisfy the conditions laid down in the article and in the agreement creating the zones. This view seems to be correct.

Paragraph 3

2310 The conditions laid down here are almost the same as those for non-defended localities (Article 59 – *Non-defended localities*, paragraph 2), and reference may be made to what was said above in this respect. According to the Rapporteur, the word “normally” in the introductory sentence was introduced to permit the Parties to agree about zones which do not fulfil all the conditions of this paragraph.⁵

2311 Finally, there is a slight difference from Article 59 (*Non-defended localities*). In fact, that article lays down the condition that no activity in support of military operations may be undertaken while the paragraph under consideration here provides that any activity linked to the military effort must have ceased. The language used in Article 60 has a slightly wider scope, and undoubtedly covers those factories which are mainly operating for the armed forces. However, this condition is not absolutely clear and that is why the Parties to the conflict are invited to include in the agreement an interpretation of this condition; such an interpretation may cover different categories of activities; it may also designate by name the businesses or establishments which must cease or modify their production.

Paragraph 4

2312 Again reference may be made to what was said with regard to paragraph 3 of Article 59 (*Non-defended localities*), which is worded in the same terms. However, the Parties to the conflict are invited to indicate in the agreement they conclude what other categories of persons will be admitted into the demilitarized zone. This will almost always be persons who are particularly weak or deserving of protection, such as children, the elderly, mothers of young children, pregnant women etc. Such a clarification is necessary, for in principle the zones provided for in this article are primarily concerned with protecting the population residing there and do not constitute places of refuge, as do the safety zones provided for in the Fourth Convention.

⁴ O.R. XV, p. 287, CDDH/215/Rev.1, para. 110.

⁵ *Ibid.*, p. 287, para. 111.

Paragraph 5

2313 This paragraph is identical to paragraph 6 of Article 59 (*Non-defended localities*), and we refer to the commentary thereon.⁶

Paragraph 6

2314 This paragraph only applies if the Parties to the conflict have provided, in the agreement establishing the zone, that it will remain in existence, even if the adversary takes possession of the territory in which the zone is located. Without such a provision the belligerent occupying the territory surrounding the zone could maintain or abolish it as it wished. If it decides to maintain it, it must notify the adverse Party, which may object.

Paragraph 7

2315 It is not often that the Geneva Conventions envisage the consequences which would be incurred by violation of their provisions or of agreements entered into pursuant to the Conventions. Examples in Protocol I are Articles 51 (*Protection of the civilian population*), paragraph 8, and Article 77 (*Protection of children*).

2316 This is also the case here, where it is provided that a material breach may lead to the end of the demilitarized zone. However, the peaceful population should not suffer because of this. Therefore, although the provision does not say so explicitly, the spirit of the Geneva Conventions requires that prior warning is given whenever possible, in order to allow the Party alleged to have committed the breach, the time to remedy the situation and put an end to the breach.

2317 It is clear, for it is a humanitarian imperative, that even if the zone loses its status, the adversary will not be exempt from observing the other provisions for protection enjoyed by the civilian population under the Protocol, particularly under Part IV (*Civilian population*) and the other rules of international law applicable in armed conflict. The expression “rules of international law applicable in armed conflict” is defined in Article 2 (*Definitions*), sub-paragraph (b), and we refer the reader to the commentary thereon.

2318 However, the fact that a zone is deprived of its privileged status does increase the risks to which the population is exposed in practice. Therefore the adverse Party must take the requisite precautionary measures and remember that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”.⁷

C. P./J. P.

⁶ Cf. *supra*, p. 705.

⁷ Art. 57, para. 1.

Part IV, Section I, Chapter VI – Civil defence

Introduction

- 2319 Civil defence¹ has an important place in the effort undertaken by international humanitarian law to mitigate the losses, damage and suffering inflicted on the civilian population by the dramatic developments of the means and methods of warfare, particularly when modern weaponry is used in violation of the principles and rules of the law of armed conflict.
- 2320 As a matter of fact, it was natural for international humanitarian law to contribute to promoting civil defence; the need and efficacy of this were widely demonstrated particularly during the Second World War and in subsequent conflicts. Civilian losses were certainly fewer in bombed towns where civil defence had been organized than in those where it had not.²
- 2321 From the point of view of international humanitarian law it is basically a matter of granting civil defence organizations a status ensuring them protection in the performance of their task,³ and a distinctive sign enabling them to be identified. Such a legal development is perfectly in accordance with the objectives of the Conventions which, as the ICRC stated in 1971, “do not merely demand that belligerents respect and treat certain categories of persons humanely”, but “from as early as 1864, the very first of the Geneva Conventions, and its subsequent versions, have endeavoured to provide protection and special facilities to the personnel and organizations which help war victims”.⁴

¹ As regards the terminology, a distinction should really be made between civil defence in the broad sense (in French “*protection civile*”) and civil defence in the narrow sense (in French “*défense civile*”). As the ICRC had already noted in a report in 1965, civil defence in the broad sense generally comprises all measures for national defence which are not of a military nature (including, in particular, measures to safeguard the position of public authorities, to maintain public order, public services including the health service, the maintenance of public morale and the protection of the war industry), while civil defence in the narrow sense constitutes only part of this (measures aimed at saving lives and limiting damage). The English term “civil defence”, which is mainly used in this narrow sense, and it will be exclusively used in this narrow sense in this commentary. Cf. *Status of Personnel of Civil Defence Organisation*, report submitted by the ICRC at the XXth International Conference of the Red Cross (Vienna, 1965), Geneva, May 1965, p. 1.

² In this sense, cf. particularly O. R. XII, p. 73, CDDH/II/SR.61, paras. 24-25; p. 80, para. 59.

³ In this sense, cf. particularly *ibid.*, p. 74, para. 32.

⁴ CE/3b, p. 140.

2322 The concern to strengthen the protection of personnel coming to the aid of the civilian population in general made it possible for the 1949 Conventions to provide special protection for personnel of civilian hospitals and for civilian medical transports.⁵ However, as we pointed out,⁶ the rules devoted to the general protection of civilian populations against the effects of hostilities were not greatly developed during the Diplomatic Conference of 1949. In fact, apart from occupied territories, that Conference did not deal with the question of civil defence personnel. Yet these people are also indispensable for the protection and survival of the population, as shown by the following words written by the ICRC when in 1971 it described them:

“namely those persons who rescue civilian wounded from under ruined buildings to take them to first aid posts or hospitals; the persons who fight fires, who provide displaced persons with emergency relief and social assistance and who take precautionary measures for the protection of the population”.⁷

2323 In fact the Fourth Convention broaches the question of civil defence only in the context of occupied territories. Article 63, paragraph 2, of that Convention grants civil defence organizations and their personnel, like National Red Cross and Red Crescent Societies, the right to pursue their activities even under foreign occupation.⁸

2324 However, studies carried out by the ICRC since 1954 on the general strengthening of protection for the civilian population, from the beginning showed “the provisions of Article 63 to be inadequate in the opinion of many experts”.⁹

2325 To be effective, civil defence activities should be safeguarded everywhere and not only in occupied territory. However, according to such experts, there should be a “clearer distinction between the civil defence services performing solely civilian duties and the units on civil defence duties which were military or of military status”.¹⁰

2326 The ICRC then introduced into the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (1956),¹¹ Article 12, paragraph 1, which reads as follows: “Parties to the conflict should facilitate the work of the civilian bodies exclusively engaged in protecting and assisting the civilian population in case of attack.”

⁵ Cf. Arts. 20-22, Fourth Convention.

⁶ Cf. particularly introduction to this Section, *supra*, p. 587.

⁷ CE/3b, p. 141.

⁸ For more details, cf. *Commentary IV*, p. 330 (Art. 63).

⁹ CE/3b, p. 142.

¹⁰ *Ibid.*

¹¹ On this subject, cf. introduction to this, *supra*, pp. 587-588.

- 2327 Although the Draft Rules were not followed up by governmental action, “the authorities in several countries, at that time or later, displayed considerable interest in that article”.¹² This led the ICRC to study this subject in depth.¹³
- 2328 A first report was submitted to the XXth International Conference of the Red Cross (Vienna, 1965).¹⁴ This Conference recognized “the necessity of strengthening the protection provided by international law to civil defence bodies”, and requested the ICRC “to continue its work in this field”.¹⁵
- 2329 A subsequent report submitted to the XXIst International Conference of the Red Cross (Istanbul, 1969) led the Conference to invite the ICRC to convene a meeting of government experts “with a view to submitting to Governments, for approval, regulations supplementing the provisions of the existing humanitarian conventions”.¹⁶
- 2330 The question was taken up by the ICRC in the Conference of Government Experts which met in 1971 and 1972, and Articles 54-59 of the 1973 draft, devoted to civil defence, were written on the basis of the work of that Conference.
- 2331 It should be added that the work of the CDDH was made all the more difficult for, as shown by the Rapporteur of the Drafting Committee of Committee II,
- “while civil defence was an almost entirely new subject in the system of Geneva law, it was an area in which considerable developments had taken place at the national level over recent years. Those two facts made it very difficult to find an appropriate international solution to the related problems”.¹⁷
- 2332 The CDDH in general, and Committee II in particular, deserve all the more credit for coming up with this solution.¹⁸
- 2333 In conclusion, three further remarks should be made with respect to this Chapter on civil defence.
- 2334 First, the provisions of this Chapter do not in any way seek to have an impact on the options that present themselves in the field of civil defence, in particular whether to provide shelters for the civilian population where they live, or to evacuate them.¹⁹ Civil defence tasks are protected irrespective of the solution that will be adopted.

¹² CE/3b, p. 143.

¹³ See in particular, *Status of Personnel of Civil Defence Organisation*, *op. cit.*, and with some additions, *Status of Civil Defence Service Personnel*, document presented by the ICRC at the XXIst International Conference of the Red Cross (Istanbul, 1969), Geneva, May 1969.

¹⁴ *Status of Personnel of Civil Defence Organisation*, *op. cit.*

¹⁵ Resolution XXIX.

¹⁶ Resolution XV.

¹⁷ O.R. XII, p. 272, CDDH/II/SR.80, para. 31.

¹⁸ On civil defence in Protocol I and on the work which ended with the adoption of Articles 61-67, *cf.*, in particular, E. Schultz, *Civil Defence in International Law*, Copenhagen, 1977; B. Jakovljević, *New International Status of Civil Defence*, The Hague-Boston-London, 1983; *Handbuch des Deutschen Roten Kreuzes zum IV. Genfer Rotkreuz-Abkommen und zu den Zusatzprotokollen – Zivilschutz*, Bonn, 1981.

¹⁹ On this subject, *cf.* *Handbuch des Deutschen Roten Kreuzes.... op. cit.*, p. 37.

- 2335** Secondly, it should be stressed that respect for the provisions concerning civil defence is in itself quite inadequate if it does not go together with respect for the rules relating to the conduct of hostilities: methods such as successive bombardments of the same place, or the use of time bombs in densely populated areas would make any civil defence activities very hazardous and virtually suicidal.
- 2336** Finally, efforts made with regard to civil defence also fall under the more general heading of precautions to be taken against the effects of attacks in order to protect the civilian population.²⁰

Y.S.

²⁰ Cf. Art. 58, sub-para. (c).

Protocol I

Article 61 – Definitions and scope

For the purposes of this Protocol:

- (a) “Civil defence” means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:
- (i) warning;
 - (ii) evacuation;
 - (iii) management of shelters;
 - (iv) management of blackout measures;
 - (v) rescue;
 - (vi) medical services, including first aid, and religious assistance;
 - (vii) fire-fighting;
 - (viii) detection and marking of danger areas;
 - (ix) decontamination and similar protective measures;
 - (x) provision of emergency accommodation and supplies;
 - (xi) emergency assistance in the restoration and maintenance of order in distressed areas;
 - (xii) emergency repair of indispensable public utilities;
 - (xiii) emergency disposal of the dead;
 - (xiv) assistance in the preservation of objects essential for survival;
 - (xv) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;
- (b) “civil defence organizations” means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under sub-paragraph (a), and which are assigned and devoted exclusively to such tasks;
- (c) “personnel” of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under sub-paragraph (a), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;
- (d) “*matériel*” of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under sub-paragraph (a).

Documentary references

Official Records

O.R. III, pp. 244-249, *O.R.* VI, p. 215, CDDH/SR.42, paras. 63-64; pp. 229-230, *id.*, Annex (Indonesia, Israel); pp. 237-238 (USSR). *O.R.* XI, pp. 578-586, CDDH/II/SR.51, paras. 3-4, 7-8, 10, 42, 44 and 46-47. *O.R.* XII, pp. 58-65, CDDH/II/SR.60, paras. 29-30, 32, 41, 51-52 and 59-60; pp. 70-84, CDDH/II/SR.61, paras. 3, 13, 27, 32, 42, 44, 47, 51-54 and 62-82; pp. 85-94, CDDH/II/SR.62; pp. 95-99, CDDH/II/SR.63, paras. 1-29; p. 105, CDDH/II/SR.64, para. 2; pp. 106-107, paras. 6, 10-11 and 13; pp. 109-110, paras. 23-25; pp. 110-111, paras. 30-35; p. 115, para. 56; pp. 322-325, CDDH/II/SR.85, paras. 5-15 and 19-23; pp. 373-375, CDDH/II/SR.91, paras. 2-16; pp. 477-479, CDDH/II/SR.100, paras. 39-50. *O.R.* XIII, pp. 309-314, CDDH/235/Rev.1, Annex II (Art. 54); pp. 361-376, CDDH/406/Rev.1, paras. 34-67; pp. 427-429 and 432-434, CDDH/II/439/Rev.1.

Other references

CE/3b, pp. 140-161. *CRCE 1971, Report*, p. 38, *CE 1971, Report*, pp. 87-89; pp. 95-96, *CE/COM III/39-40*, *CE/COM III/42*. *CE 1972, Basic Texts*, p. 23 (Art. 67). *CE 1972, Commentaries*, Part I, pp. 136-139 (Art. 67). *CRCE 1972, Report*, p. 38 (Art. 67). *CE 1972, Report*, vol. I, pp. 162-166, paras. 3.281-3.315; p. 170, Annex (Arts. 67-67bis); vol. II, pp. 10-11 (Art. 67); pp. 91-96, *CE/COM III/OPC 2-5*, 7-11, 15 and 19-20. *Commentary Drafts*, pp. 71-72 (Art. 54). *XXIIInd Int. Conf. RC, Report*, pp. 17-18 (Art. 54).

Commentary

- 2337** Article 61 gives a definition of civil defence, of civil defence organizations and of civil defence personnel and *matériel*.
- 2338** The title of the article was discussed, some considering that it would be better and more precise to limit it to “definitions”, while others considered that, on the contrary, the term “scope” encompassed definitions.¹ In fact, these definitions clearly outline the scope of protected civil defence activities, as well as of the protected persons and objects. However, to be precise it should be indicated that the scope of these concepts is clarified by elements which can be found in almost all the other articles of the Chapter.
- 2339** Moreover, the definitions as a whole are given “for the purposes of this Protocol”, which clearly emphasizes that rights are only granted and duties are only imposed by Protocol I in situations of armed conflict which are covered by

¹ Cf. in particular *O.R.* XII, pp. 88-91, CDDH/II/SR.62, paras. 20, 22, 27, 29 and 35.

this instrument, although the creation of civil defence organizations should obviously be encouraged even in peacetime. For that matter, this reference highlights the fact that Articles 61-67 do not oblige States Parties to the Protocol to change the structure of their civil defence in peacetime, even though it is desirable whenever necessary to adapt such structures to the requirements imposed in time of armed conflict.

Sub-paragraph (a)

General remarks

2340 The 1973 draft had already based the definition of civil defence “on the criterion of the functions exercised”.² In fact, to define civil defence it was easier to use the tasks as a starting point, rather than the civil defence organizations themselves, given the disparate character of such organizations in different countries.³ The justification for that approach was repeatedly confirmed during the Diplomatic Conference.⁴ In particular it has the advantage of providing for:

“the possibility that in case of need civil defence functions might be performed by any civilian at the request of the authorities, so that civil defence should not become the monopoly of specialized organizations”.⁵

It was also stressed that this definition, based on functional criteria, was more in accord with the situation existing in many countries which did not have a developed civil defence infrastructure.⁶

2341 Given this approach, should a non-exhaustive list of the functions of civil defence be included, or, on the contrary, an exhaustive list? The 1973 draft opted for the first solution in including the term “*inter alia*” at the beginning of the list, thereby indicating that other activities than those mentioned could also fall under the heading of civil defence.⁷ This question caused a great deal of controversy during the Diplomatic Conference.⁸

2342 Those who preferred a non-exhaustive list thought, on the one hand, that the limitation imposed in the definition by making functions subject to an objective indicated in general terms, was sufficient to remove any danger that civil defence would be interpreted too broadly; on the other hand, that laying down an exhaustive list might result in “burning bridges” without being certain that nothing important had been forgotten. A compromise could have been reached

² *Commentary Drafts*, pp. 71-72 (Art. 54).

³ Cf. O.R. XI, p. 578, CDDH/II/SR.51, para. 4.

⁴ Cf. in particular O.R. XII, p. 58, CDDH/II/SR.60, para. 29; p. 65, para. 59; p. 77, CDDH/II/SR.61, paras. 44 and 47.

⁵ *Ibid.*, p. 58, CDDH/II/SR.60, para. 29.

⁶ Cf. *ibid.*, p. 77, CDDH/II/SR.61, para. 44.

⁷ Cf. Art. 54 of the draft.

⁸ On this subject, cf. particularly O.R. XII, pp. 58-59 and 63, CDDH/II/SR.60, paras. 30 and 51; p. 82, CDDH/II/SR.61, paras. 70-71, 76; pp. 86-90, CDDH/II/SR.62, paras. 7-13, 18, 23-25, 33.

by deleting the term “*inter alia*” in the introductory sentence, whilst adding the words “other humanitarian tasks of a similar nature” at the end of the list.⁹

- 2343 In the end an exhaustive list was chosen nevertheless.¹⁰ One of the main reasons was the fear that a non-exhaustive list would allow functions to be included which were not specifically of a humanitarian nature and this could compromise all the efforts made to improve the protection of civil defence organizations. This fear was all the more justified, as in many countries the tasks of civil defence organizations include “aspects relating to the economy, defence, supplies and the protection of vital industries”,¹¹ and States cannot be expected to accept protection for the performance of such functions on the same basis as the protection given to the exclusively humanitarian functions of civil defence.

Introductory sentence

- 2344 The introductory sentence confirms that the list that follows is exhaustive. The tasks concerned must be all or some of those mentioned and cannot be any other tasks.
- 2345 It is not necessary that all the tasks are performed for civil defence to be said to exist, but it was not accepted that fulfilling only one of the tasks would be sufficient. In fact, this is a hypothetical case which could no longer be described as civil defence, for it is clear that it would inadequately fulfil the aim of civil defence, which is to protect the population against the dangers of hostilities. On the other hand, civil defence organizations may perform only one of the tasks mentioned,¹² provided that other tasks are fulfilled in other ways.
- 2346 The tasks listed are defined as being *humanitarian*. This is important, since some of the tasks listed may not be exclusively humanitarian, and it is a matter of clearly defining what aspect of the task should be assigned to civil defence, so that this can be unequivocally distinguished from anything which might be considered as a contribution to the war effort,¹³ such as air raid warnings, blackout measures or fire-fighting.¹⁴
- 2347 In addition, the tasks must have one of the following aims:

1) *To protect the civilian population against the dangers of hostilities or disasters*

- 2348 Basically this refers to the preventive tasks comprising the first four points of the list, i.e., warning, evacuation, management of shelters and management of blackout measures. With the exception of the blackout measures, which were not

⁹ Cf. O.R. III, p. 246, CDDH/II/344.

¹⁰ However, see commentary sub-para. (a)(xv), *infra*, pp. 731-732.

¹¹ O.R. XII, p. 63, CDDH/II/SR.60, para. 51; cf. also p. 78, CDDH/II/SR.61, para. 53.

¹² Cf. commentary sub-para. (b), *infra*, p. 732.

¹³ In this sense, cf. particularly O.R. XII, p. 63, CDDH/II/SR.60, para. 51; p. 79, CDDH/II/SR.61, para. 54.

¹⁴ Cf. commentary sub-para (a)(i), (iv) and (vii), *infra*, pp. 722, 724 and 726.

mentioned, these tasks were grouped under sub-paragraph (f) of the 1973 draft as examples of preventive measures.¹⁵

- 2349** Protection is to be provided not only against dangers resulting from hostilities (such as bombardments), but also against those resulting from disasters. From the observations made in Working Group A of Committee II, which are set out in the report of that Group,¹⁶ it is clear that the term “disasters” in the introductory sentence should be broadly construed. “It covers natural disasters as well as any other calamity not caused by hostilities.”¹⁷ This means, for example, that civil defence tasks related to a tidal wave (natural disaster) or to clouds of gas escaping from a chemical factory (disaster caused by human error) unrelated to hostilities, but occurring in a country involved in armed conflict, are also covered by the provisions of the Protocol.¹⁸ This is entirely logical, but it was appropriate to point out specifically that it was the case.
- 2350** In this respect an additional question was discussed, namely, the question whether civil defence tasks should be protected in the case of *civil strife*. Unfortunately the debate was not properly structured because it was opened on the basis of a suggestion proposing that the definition of civil defence should be made wider “in order that the greatest measure of civil assistance and welfare measures could be extended to the civilian population in the event of hostilities, civil strife and disaster”.¹⁹
- 2351** Formulated in this way the suggestion could obviously not be accepted as it exceeded the scope of the Protocol.²⁰ It was therefore rejected and, moreover, one delegate stated that this point did not come within the scope of Protocol II either, “which specified in Article 1, paragraph 2, that situations of internal disturbances and tensions were excluded from its material field of application”.²¹ Various other proposals of this kind²² led the President to put the matter to a vote, which resulted in a decision not to mention civil strife.²³
- 2352** However, this incorrect approach to the matter should not have any influence on the solution of a real problem: if, during an international armed conflict in the sense of this Protocol, there is internal strife (whether or not related to the armed

¹⁵ Cf. *Commentary Drafts*, pp. 71-72 (Art. 54). A link is also to be made between the tasks which flow from this obligation and those imposed by Article 58, sub-para. (c).

¹⁶ The Rapporteur of the Working Group stated on this subject that these observations constituted “a part of the preparatory work for the draft articles and should be taken into account when interpreting the texts”, *O.R.* XII, p. 373, CDDH/II/SR.91, para. 3. As these observations were included in the report of Committee II at the end of the fourth session of the Diplomatic Conference, we will only refer below to that report.

¹⁷ *O.R.* XIII, p. 364, CDDH/406/Rev.1, para. 41.

¹⁸ On this subject, cf. particularly *O.R.* XI, p. 578, CDDH/II/SR.51, para. 7; *O.R.* XII, p. 58, CDDH/II/SR.60, para. 29; p. 74, CDDH/II/SR.61, para. 27; p. 76, para. 42; p. 95, CDDH/II/SR.63, para. 2.

¹⁹ *O.R.* XII, p. 81, CDDH/II/SR.61, para. 63.

²⁰ Cf. Article 1, paras. 3-4, and the commentary thereon, *supra*, pp. 39-56.

²¹ *O.R.* XII, p. 82, CDDH/II/SR.61, para. 74.

²² Cf. particularly *ibid.*, p. 83, CDDH/II/SR.61, paras. 77-78; pp. 88 and 90, CDDH/II/SR.62, paras. 21 and 31.

²³ *Ibid.*, p. 92, CDDH/II/SR.62, para. 46; the amendment was rejected by 43 votes to 1, with 12 abstentions.

conflict) which results in acts of sabotage leading to disaster, civil defence functions are protected as they are in any other disaster. Common sense, like the text of the Protocol as it was finally adopted, requires an affirmative reply.

2) *To help the civilian population to recover from the immediate effects of hostilities or disasters*

2353 With the exception of the task referred to under sub-paragraph (a) (xiv) – and without referring to those under sub-paragraph (a) (xv) – all other tasks referred to under sub-paragraph (a) (v)-(xiii) have this function.

2354 The adjective “immediate” emphasizes the fact that civil defence should be restricted to urgent tasks and should not on a long-term basis fulfil functions normally performed by others.²⁴ Moreover, this restriction, related to the urgency of the tasks, is repeated several times by referring in individual items to emergency action.

3) *To provide the conditions necessary for the survival of the civilian population*

2355 This task has a more specifically preventive character. It covers some of the tasks which have been already mentioned: for example, the provision of shelters is an immediately protective measure, while their management is a measure related to ensure survival or could be seen as a more long-term protective measure. In addition, this task more specifically covers “assistance in the preservation of objects essential for survival” referred to under sub-paragraph (a) (xiv).

2356 Let us now examine the various tasks which are mentioned:

Sub-paragraph (a)(i)

2357 This refers primarily to the warning system implemented in case of air-raids. It may also refer to warning the population and making appropriate recommendations in the case of the approach of enemy army units.

2358 Characteristically the introductory sentence is of great importance here: the protected task is that of warning *the civilian population for humanitarian purposes*. This general aim, reiterated in the report of Committee II, was correctly illustrated in that context by the term “warning”, which is commented upon here, and which “means warning of the civilian population, in particular with respect to forthcoming attacks or natural disasters”.²⁵ For example, a warning given in a barracks is therefore clearly excluded from this definition.

²⁴ In this sense, cf. particularly O.R. XI, p. 579, CDDH/II/SR.51, para. 10; O.R. XII, p. 71, CDDH/II/SR.61, para. 13; pp. 92-93, CDDH/II/SR.62, paras. 48 and 50.

²⁵ O.R. XIII, p. 364, CDDH/406/Rev.1, para. 41.

Sub-paragraph (a)(ii)

2359 This function was already mentioned in the 1973 draft as a preventive measure.²⁶ It may consist of organizing and facilitating a necessary evacuation from a dangerous zone and of contributing to carrying it out in as humane a way as possible. The measure may actually be preventive, for example, in the case of a threatened tidal wave, landslide, avalanche, a river about to overflow its banks, or, at a military level, the invasion of enemy troops. However, it may also be necessary after the event, as in the case of the evacuation of an area affected by floods or which has been bombed. In the case of armed conflict the evacuation may also be carried out into safety zones²⁷ and civil defence can also contribute to the organization of such zones.

2360 If force has to be used with respect to persons refusing to be evacuated, this does not fall under the competence of civil defence, at least in the first instance.²⁸ However, in this respect it is mainly a question of preventing civil defence organizations from being assigned to carry out decisions which are basically of a political nature. In fact, although evacuation of the population before the advance of enemy troops can have a purely humanitarian motive, particularly when such troops have already shown by their actions that they do not respect civilians, it can also have a political motivation, in which case civil defence organizations should not be involved.

Sub-paragraph (a)(iii)

2361 This is the third example of preventive measures given in the 1973 draft.²⁹

2362 Although improvised measures in this field in the case of emergencies cannot be ruled out, and are certainly preferable to no measures being taken, it must be said that the task mentioned here should be prepared well in advance, in principle even in peacetime, if there is to be any real chance of it being effective.

2363 For that matter the construction and organization of shelters is one of the essential preventive tasks to be performed by civil defence organizations in peacetime in those countries where there is a developed system. On the one hand, this consists of constructing shelters (their construction may be compulsory) able to accommodate the civilian population and protect them from the effects of war and, on the other hand, it consists of making provisions for the organization of such shelters, i.e., the allocation of the population and the provision of supplies essential for the survival of those in shelters.

2364 However, the question whether shelters should be constructed in peacetime, or how to define the type of construction (e.g., should they be resistant to highly radioactive fall-out?) is more particularly a matter of the internal policies of each

²⁶ Cf. *Commentary Drafts*, pp. 71-72 (Art. 54).

²⁷ Cf. in particular Fourth Convention, Article 14 (Hospital and safety zones and localities) and Annex I (Draft agreement relating to hospital and safety zones and localities).

²⁸ Cf., however, commentary sub-para. (a)(xi), *infra*, pp. 728-729.

²⁹ Cf. *Commentary Drafts*, pp. 71-72 (Art. 54).

State and depends on the means available, its priorities and its choice of defence measures.

Sub-paragraph (a)(iv)

- 2365** This preventive measure could also be of benefit to the protection of military personnel or objects, in the same way that a warning could, and to an even greater extent. For this reason reference is only made to the *management* of blackout measures, and not to the concept as such. The civil defence task therefore consists of ensuring that civilians observe the blackout measures imposed in order to enhance their own safety, particularly in the case of air raids.

Sub-paragraph (a)(v)

- 2366** This is a typical civil defence task which may take very different forms, depending on the type of rescue to be performed and requires an extensive range of skills. The rescue operation may consist of searching for persons buried under the rubble of buildings destroyed by bombs or in an earthquake, of going to the aid of people who have been marooned through flooding, imprisoned in a building on fire, buried under an avalanche, trapped in contaminated areas... It is difficult to prepare for every type of disaster and the choice obviously depends on local conditions, whether natural (area prone to earthquakes, tidal waves, floods, volcanic eruptions, avalanches etc.) or man-made (agricultural, urban areas, flimsy construction of buildings, inflammable materials, skyscrapers etc.).
- 2367** In general rescue operations will be undertaken by teams, including members able to give first aid or even to give spiritual succour to the dying. In some cases this should be done in close collaboration with fire-fighting activities, and should also be coordinated with the formation of medical units to which those in need of medical care can be evacuated.
- 2368** Finally, it should be mentioned that effective protection of rescue tasks during armed conflict implies the observation of certain rules in the general conduct of hostilities. For example, the systematic practice of a second wave of bombing following closely on the first, or the use of time bombs would seriously impede or even prevent rescue tasks.

Sub-paragraph (a)(vi)

- 2369** In the “interim report of the Drafting Committee/Working Group on Civil Defence”³⁰ the proposal was accepted to exclude from the list the task mentioned

³⁰ The report is reproduced as an Annex to the report drawn up by Committee II at the end of the third session of the Diplomatic Conference: *O.R.* XIII, pp. 309-314, CDDH/235/Rev.1, Annex II.

here, but to add the following paragraph: “2. Medical services and assistance including first aid rendered by civil defence bodies and personnel are covered by Part II of Protocol I”.³¹

- 2370 Nevertheless, this activity was finally included in the list, mainly for the following reason: to enjoy protection, medical personnel protected by Part II of the Protocol must be *exclusively* assigned to medical purposes.³² In fact, it frequently happens that persons assigned to civil defence do not exclusively fulfil medical tasks, but do so in addition to other civil defence tasks. In such cases it is therefore important that they are protected as personnel of civil defence organizations, in the event that they are not already protected as medical personnel.³³
- 2371 The expression “medical services” should be understood in a broad sense and covers both medical transportation and medical care. Even though it most often consists of first aid, it was prudent not to exclude more extensive care, which may prove to be necessary *in situ* in some circumstances.
- 2372 The question whether reference should also be made to aid for *military* wounded was discussed at some length.³⁴ In fact, the introductory phrase states that the task of civil defence is the protection of only the *civilian* population, and it was recalled that this Chapter forms part of Part IV, devoted to the civilian population.³⁵ However, it is quite clear that civil defence personnel who come across wounded soldiers ought to help them. The very nature of international humanitarian law imposes the duty to respect and protect the wounded and to treat them humanely, in the first instance by providing the medical care required without making any distinction among them founded on any grounds other than medical ones.³⁶
- 2373 Rather than making an explicit reference in this sub-paragraph to the possibility of giving aid to wounded soldiers, it was preferred to mention it as an act which will not deprive civil defence organizations and their personnel of protection.³⁷
- 2374 The reference to religious assistance was added, in accordance with an amendment submitted at the fourth session of the Diplomatic Conference.³⁸ When this amendment was submitted the delegation in question stated in particular that the losses suffered by the civilian population in armed conflict “justified the presence, alongside rescue, medical and first aid personnel, of religious personnel rendering spiritual assistance to the dying and wounded and enjoying proper protection”.³⁹ In addition, one delegation stated that it was not

³¹ *Ibid.*, p. 312 (Art. 54, para. 2)

³² *Cf.* Art. 8, sub-para. (c), and the commentary thereon, *supra*, pp. 124-127.

³³ In this sense, *cf.* M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 395, para. 2.2.2.1. As regards the identification of such personnel, *cf.* commentary Art. 66, para. 9, *infra*, pp. 788-789.

³⁴ *O.R.* XII, pp. 96-99, CDDH/II/SR.63, paras. 7, 17, 22, 27-28.

³⁵ *Cf. ibid.*, p. 99, para. 28.

³⁶ *Cf.* particularly Art. 10, para. 2.

³⁷ *Cf.* commentary Art. 65, para. 2(c), *infra*, p. 774.

³⁸ *Cf. O.R.* III, p. 248, CDDH/II/413.

³⁹ *O.R.* XII, p. 322, CDDH/II/SR.85, para. 6.

its intention “to impose religious civil defence personnel upon States, but merely to ensure that such personnel were respected where they existed”.⁴⁰

Sub-paragraph (a)(vii)

2375 One has only to think of the terrible bombardments during the Second World War and of so many other bombardments to understand the importance of this task. When fire-fighting is necessary, it is closely related to the task of rescue.

2376 The importance of the introductory sentence was particularly stressed with regard to this task. In particular as a result of a proposal made in 1972 during the second session of the Conference of Government Experts,⁴¹ the ICRC felt that the commentary on the 1973 draft should point out that

“in the context of this definition, fire-fighting should provide assistance in rescuing or protecting only civilians and military personnel *hors de combat*, and preventing damage to civilian objects”.⁴²

2377 This idea was further clarified during the Diplomatic Conference when it was stated that “civil defence personnel could not take advantage of the protection granted it under that chapter in order to put out a fire which was raging, for example, at a military airport”.⁴³

2378 However, the distinction between fire-fighting covered by the definition – and therefore protected – and fire-fighting which is not covered, is not always an easy one. A fire in a military objective can actually endanger the lives of able-bodied civilians or of wounded soldiers or of civilians who happen to be in the vicinity. In this case, if it is done with a view to protecting such persons, the fire-fighting must be considered to be a civil defence task.⁴⁴ On the other hand, persons specifically charged with protecting military objectives from fire cannot claim protection accorded to civil defence tasks.

Sub-paragraph (a)(viii)

2379 The French text of the 1973 draft referred to “détection”⁴⁵ rather than “repérage”, though the meaning is the same, and the same English term “detection” was used in both the draft and the final text of the Protocol. The civil defence task consists of marking danger areas in principle so as to be able to deny access to persons not specifically authorized to enter.

2380 Such danger may be the direct result of hostilities (bombed or contaminated areas etc.). However, in this respect the interim report of the Drafting Committee

⁴⁰ *Ibid.*, p. 323, para. 8.

⁴¹ Cf. *CE 1972, Report*, Vol. II, p. 93, CE/COM III/OPC 8.

⁴² *Commentary Drafts*, p. 72 (Art. 54, sub-para. (a)).

⁴³ *O.R.* XII, p. 58, CDDH/II/SR.60, para. 30.

⁴⁴ In this sense, cf. E. Schultz, *op. cit.*, p. 12.

⁴⁵ Cf. draft Art. 54, sub-para. (g).

and the Working Group on civil defence stated that “this sub-paragraph does not cover the detection, marking or removal of minefields during combat operations”.⁴⁶ This clarification follows from a concern to keep civil defence separate from any activity which has an effect on the development of hostilities. On the other hand, once it is known that an area is mined, there should be no restriction on the initiative of civil defence organizations to prohibit access to such areas to civilians.

2381 However, the danger existing in some areas may also be the result of events which are not related to the conflict (volcanic areas, unsound buildings following an earthquake, flooding rivers etc.).

2382 In both cases the function of civil defence with regard to such areas is of a dynamic nature. It must take the initiative in determining which areas are dangerous for the civilian population, analyse the nature of such danger and act accordingly.

Sub-paragraph (a)(ix)

2383 This task was not included in the 1973 draft and was introduced in the interim report mentioned above, though it was placed in square brackets,⁴⁷ because of the absence of agreement on this subject.

2384 Finally one delegate explained his reason for opposing any reference to this task, namely because of the fact that “such operations were generally carried out after danger areas had been detected and marked and the population evacuated”.⁴⁸

2385 However, a wider view of the role of civil defence finally prevailed, and led to retaining this task. The preventive character which civil defence also has is emphasized in this way. To take just one example, it is perfectly logical that civil defence should not only be concerned with caring for victims of contaminated water, but also be concerned with decontaminating that water. Decontamination can take various forms (special washing of contaminated persons, purification of water, incineration of contaminated objects etc.) and we will not go into further detail here. The phrase “similar protective measures” allows for some latitude in this task, which is often of paramount importance in time of conflict, to prevent the spread of disease. Measures such as the placing in quarantine of contaminated persons or the banning of certain dangerous products could be included among such measures.

⁴⁶ O.R. XIII, p. 310, CDDH/235/Rev.1, Annex II, para. 8.

⁴⁷ *Ibid.*, p. 312 (Art. 54, sub-para (g)).

⁴⁸ O.R. XII, p. 324, CDDH/II/SR.85, para. 10.

Sub-paragraph (a)(x)

2386 The reference to this task was included as a result of an amendment.⁴⁹ The 1973 draft referred to “emergency material and social assistance” and to “provision of shelters”,⁵⁰ but it was necessary to make a distinction between the provision of shelters providing temporary protection against danger (particularly air-raid shelters) and more long-term accommodation which may become necessary because of the destruction of dwellings. However, it is quite clear that civil defence can only provide temporary solutions, such as erecting tents or pre-fabricated buildings. As regards supplies, well-protected stocks of non-perishable foodstuffs should allow civil defence organizations to fulfil the most urgent needs in the event of the destruction or contamination of food or other essential objects.⁵¹

Sub-paragraph (a)(xi)

2387 This activity was mentioned in the 1973 draft in a way that was at the same time more categorical and more restrictive: “maintenance of public order in disaster areas”.⁵² The draft in fact referred to *maintenance of order*, and not only to *emergency assistance* in the maintenance of order; on the other hand, the draft was restricted to *disaster areas* while the task as finally defined was extended to all *distressed areas*.

2388 These divergent versions reflect the fact that the reference to this task resulted in a great deal of discussion, which is understandable. It became quite clear from the beginning of these discussions that this task actually requires a clarification of the role of the police in connection with civil defence.⁵³ It also poses the problem of arming members of civil defence organizations.⁵⁴

2389 These questions were answered. The present wording was proposed, following an amendment,⁵⁵ in order to clarify that Chapter VI does not envisage the protection of the police.⁵⁶ As the task of maintaining order undeniably falls under the responsibility of the police, the amendment “therefore referred simply to ‘assistance’, to cover cases where civil defence units assisted the police in keeping public order in disaster areas”.⁵⁷

⁴⁹ O.R. III, p. 247, CDDH/II/402 (Art. 54 (g)(iii)); cf. also p. 249, CDDH/II/414 (Art. 54 (h)).

⁵⁰ Draft Art. 54, sub-para. (c) and (f).

⁵¹ On this concept, cf. sub-para. (a)(xiv), *infra*, pp. 730-731.

⁵² Cf. draft Art. 54, sub-para. (e).

⁵³ Cf. O.R. XI, p. 586, CDDH/II/SR.51, para. 46.

⁵⁴ Cf. O.R. XII, pp. 58-59, CDDH/II/SR.60, para. 30.

⁵⁵ O.R. III, p. 246, CDDH/II/344, para. 2.

⁵⁶ Cf. O.R. XII, p. 63, CDDH/II/SR.60, para. 52.

⁵⁷ *Ibid.*; cf. also p. 65, para. 59; p. 76, CDDH/II/SR.61, para. 42; p. 93, CDDH/II/SR.62, para. 52; p. 95, CDDH/II/SR.63, para. 3; pp. 96-97, paras. 8-11.

- 2390 This question later formed the object of a comprehensive statement in the report of Committee II,⁵⁸ which clarifies the meaning to be given to the expression “emergency” by indicating situations where such assistance may take place, and its exceptional character. In addition, it provides an interpretation of the expression “distressed areas”, which shows that this can be practically any area in time of armed conflict, and that the criterion whether any assistance should be given is, primarily, the deficiencies of the public administration.
- 2391 Of course, the task mentioned is only an example. Assistance in enforcing a prohibition to enter certain danger areas, in the evacuation of such areas,⁵⁹ in guarding stores of supplies essential to survival, in the control of distribution thereof, are other examples of activities which may be undertaken under the heading of this sub-paragraph (a)(xi).
- 2392 Finally, although the question of arming personnel performing civil defence tasks was broached in the debate occasioned by this sub-paragraph (a)(xi),⁶⁰ it was not settled at that time; this was left to later when the present Article 65 (*Cessation of protection*) was discussed.⁶¹

Sub-paragraph (a)(xii)

- 2393 This task was included in the draft in a slightly different form.⁶²
- 2394 The report of Committee II specified that the expression “public utilities” includes, “*inter alia*, water control works (e.g., dams, dykes, drainage and discharge canals, outlets, sluices, locks, floodgates and pumping installations)”.⁶³
- 2395 In addition, it should be mentioned that civil defence is limited to *emergency* repair of *indispensable* public utilities. Thus it does not have to make good every deficiency of such utilities, but should be limited to essential tasks, for example, if the distribution of drinking water were cut off, or if malfunction of the sewers resulted in the risk of an epidemic.
- 2396 This restriction of civil defence to indispensable emergency tasks follows from the concern that it should not go beyond the aim of protecting the civilian population, a concern which also led Committee II to delete “emergency social

⁵⁸ This stresses that “nothing in the definition of civil defence alters the position of the civil police, who are protected as civilians. Ordinary police functions are not civil defence functions. But in distressed areas, that is areas stricken by hostilities or disasters, where the normal functioning of public administration has broken down, civil defence organizations may, as an exceptional measure, assist also in the maintenance of order. Such assistance may include the direction of movements of refugees within or from distressed areas”: *O.R. XIII*, p. 364, CDDH/406/Rev.1, para. 41.

⁵⁹ Cf. E. Schultz, *op. cit.*, p. 13.

⁶⁰ Cf. particularly *O.R. XII*, pp. 58-59, CDDH/II/SR.60, para. 30, and p. 93, CDDH/II/SR.62, para. 52.

⁶¹ Cf. commentary Art. 65, para. 3, *infra*, pp. 774-778.

⁶² “Emergency repair of public services indispensable to the civilian population” (draft Art. 54, sub-para.(d)).

⁶³ *O.R. XIII*, p. 364, CDDH/406/Rev.1, para. 41. Moreover, cf. the expression “public utility services” used in Article 51 (Enlistment, labour), paragraph 2, of the Fourth Convention. For the meaning of this expression, cf. *Commentary IV*, p. 295.

assistance”, provided for in the 1973 draft,⁶⁴ from the list of civil defence tasks. It was feared in particular that including that item might have increased the range of civil defence tasks too much, as it could even cover services such as unemployment benefit and sick leave, and in doing so would detract from the emergency character which is an essential part of civil defence.⁶⁵

Sub-paragraph (a)(xiii)

2397 This task was not explicitly included in the 1973 draft, but may be considered to be part of the “public utilities” mentioned in the preceding sub-paragraph (a)(xii).

2398 This item was inserted as the result of an amendment.⁶⁶ The sponsor of this amendment considered succinctly that there were “compelling humanitarian, aesthetic, customary and hygienic reasons”⁶⁷ for its inclusion. The proposal was supported by another delegation⁶⁸ and nobody opposed it.

2399 With regard to this task, it should be noted that any burial (or cremation) of the dead has an urgent character, if only for obvious reasons of hygiene. Thus the reference to the emergency character should be interpreted merely as an intent to emphasize the auxiliary role of civil defence when it performs this activity, which falls under the responsibility of the public administration.

Sub-paragraph (a)(xiv)

2400 The 1973 draft called it “safeguard of objects indispensable to the survival of the civilian population”,⁶⁹ in this way intending to cover the same objects as those mentioned in Article 48 of the draft (the present Article 54 – *Protection of objects indispensable to the survival of the civilian population*),⁷⁰ i.e., objects “such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.⁷¹

2401 However, Committee II did not adopt this point of view. Its report indicated that the word “essential” was chosen to avoid confusion with the expression “objects indispensable to the survival” used in Article 48 (the present Article 54 – *Protection of objects indispensable to the survival of the civilian population*), and because “it has a broader scope than the term ‘indispensable’”.⁷²

2402 Thus the intention here was to cover a broader category of objects than that covered by Article 54 (*Protection of objects indispensable to the survival of the*

⁶⁴ Cf. Art. 54, sub-para.(c), of the draft.

⁶⁵ Cf. O.R. XIII, p. 92, CDDH/II/SR.62, paras. 47-48. However, see also p. 81, CDDH/II/SR.61, paras. 63 and 66, as well as p. 90, CDDH/II/SR.62, para. 32.

⁶⁶ Cf. O.R. III, p. 244, CDDH/II/44, para. 2. Cf. also Art. 34, para. 1.

⁶⁷ O.R. XII, p. 81, CDDH/II/SR.61, para. 65.

⁶⁸ *Ibid.*, p. 82, para. 73.

⁶⁹ Art. 54, sub-para. (b), of the draft.

⁷⁰ Cf. *Commentary Drafts*, p. 71 (Art. 54, sub-para. (b)).

⁷¹ Cf. Art. 54, para. 2, Protocol I.

⁷² O.R. XIII, p. 365, CDDH/406/Rev.1, para. 41. Cf. also commentary Art. 54, *supra*, pp. 652-653.

civilian population), although this is a nuance of little practical importance. Once again common sense must prevail and it is not worth quibbling about whether soap, for example, is essential or indispensable.

- 2403** On the other hand, in contrast to the draft, this item refers to “assistance in the preservation”, instead of to “safeguard”. To some extent this distinction is related to the limits assigned the role of civil defence for the restoration and maintenance of public order.⁷³ Responsibility for preservation or safeguard as a whole would, in fact, undeniably include a police task. The report of Committee II indicates that “the assistance referred to does not involve guard duties or require the use of weapons”.⁷⁴

Sub-paragraph (a)(xv)

- 2404** The last point of the list is to some extent the result of a compromise between those in favour of an exhaustive list and those preferring an illustrative list.⁷⁵
- 2405** The list remains exhaustive, but some flexibility is introduced: activities which are not specifically mentioned may be covered, provided they are activities complementary to those in the list, i.e., they must be necessary to carry out any of the tasks listed, and they may not go beyond that.
- 2406** These tasks include planning and organization. Thus administrative civil defence activities, such as accounting, payment of salaries, administration of equipment, organization and planning of operations, are clearly covered. This is perfectly logical, as such tasks are also necessary for activity to be effective. For that matter, this is in accordance with provisions regarding hospitals, for example, where administrative personnel enjoy the same protection as medical personnel.⁷⁶
- 2407** However, it is further stated that such complementary activities are not limited to planning and organization. This is sensible, for on the one hand, other activities directly related to civil defence also deserve to be protected, such as training of personnel, while on the other hand, activities which apparently have no direct link may become indispensable, such as the installation of an *ad hoc* lighting system to continue searching for people buried in rubble at night.⁷⁷ Yet it is important that such tasks do not extend beyond what is necessary for carrying out any of the primary civil defence tasks.
- 2408** The report of Committee II indicates that the expression “mentioned above” “relates not only to the list of civil defence tasks, but also to the introductory sentence” of sub-paragraph (a).⁷⁸ This observation could lead to some

⁷³ Cf. commentary sub-para. (a)(xi), *supra*, pp. 728-729.

⁷⁴ O.R. XIII, p. 365, CDDH/406/Rev.1, para. 41. Moreover, an example is given to illustrate the type of assistance concerned: the temporary repair of an agricultural silo.

⁷⁵ On this subject, cf. *supra*, pp. 719-720 and note 8.

⁷⁶ Cf. in particular Fourth Convention, Art. 20.

⁷⁷ In this sense, cf. E. Schultz, *op. cit.*, pp. 13-14; M. Bothe, W.A. Solf, K.J. Partsch, *op. cit.*, pp. 396-397.

⁷⁸ O.R. XIII, p. 365, CDDH/406/Rev.1, para. 41.

confusion, insofar as it might call into question the exhaustive character of the list, if it should be interpreted as allowing any other task which could be classified within the confines of civil defence.⁷⁹ However, this is not the case, for the introductory sentence clearly restricts the scope to “the undermentioned humanitarian tasks”. This “observation” therefore, on the contrary, confirms that an activity is only covered by sub-paragraph (a)(xv) if it is complementary to a task which is included in the list, on the one hand, and which is in accordance with the introductory sentence of the sub-paragraph, on the other hand. In fact, it has been seen that tasks such as fire-fighting are only partially covered, i.e., when they fulfil the conditions listed in the introductory sentence.

Sub-paragraph (b)

- 2409** This sub-paragraph defines civil defence organizations, although belonging to such an organization is not a necessary condition for protection,⁸⁰ as it had been decided to give protection on the basis of function rather than on the basis of membership of an organization.⁸¹
- 2410** The question therefore arises whether there is any point in defining such organizations. One delegate answered this question, stating that it would be justified “to grant [...] in the first place protection to specialized bodies in civil defence tasks, because in the normal case, civil defence functions would be entrusted to specialized civil defence bodies”.⁸² In addition, to mention such an organization makes it easier to define the material objects (buildings, transports, equipment) on which the civil defence emblem can be placed.
- 2411** The expression “establishments and other units” is not very clear in itself. It should be understood in its material sense, for which it can be compared with the definition of medical units;⁸³ but it should also be understood to cover the institutions themselves, which are covered here irrespective of their legal form and whether they are subject to public or private law. Nevertheless, if they have not been established by the competent authorities of a Party to the conflict, such units must be *authorized* by those authorities (organizations which are established by the competent authorities are usually subject to public law). This is important, for as in the case of the use of the red cross or red crescent emblem, the use of the distinctive sign of civil defence thus falls in time of armed conflict under the responsibility of those authorities and they must repress abuse and may withdraw their authorization.
- 2412** The organizations concerned may be small or large, particularly as carrying out even one of the tasks listed means that they can be accorded protection. It could also be the civil defence department of an organization which also deals with

⁷⁹ In the broader sense, cf. also B. Jakovljević, *op. cit.*, p. 35.

⁸⁰ Cf. commentary Art. 62, para. 2, *infra*, pp. 740-741.

⁸¹ Cf. *ad* sub-para. (a), *supra*, p. 719.

⁸² O.R. XII, p. 59, CDDH/II/SR.60, para. 32.

⁸³ Cf. Art. 8, sub-para (e), and the commentary thereon, *supra*, pp. 128-129.

other activities.⁸⁴ This obviously raises the question whether there is *exclusive* assignment to civil defence tasks.

- 2413** In fact, to be recognized as civil defence organizations they must be “assigned and devoted exclusively” to civil defence tasks. This expression requires explanation. Exclusive assignment or devotion does not mean an unlimited assignment in time. Although this is not specified here, it may be of a temporary nature. In fact, the report of Committee II specified that organizations were included:

“which are assigned and devoted to such tasks only for a limited period, even if that period is a relatively short one, provided, however, that they are assigned or devoted exclusively to those tasks, during that period”.⁸⁵

- 2414** The system adopted is a combination of the strict requirement of exclusive assignment to civil defence tasks to be entitled to the special protection accorded civil defence, and some flexibility regarding the duration of such assignment.
- 2415** Civil defence personnel may therefore be assigned alternately to civil defence tasks and to other tasks, but only on two conditions: on the one hand, such other tasks must not be harmful to the enemy;⁸⁶ if they are, such personnel would probably lose the right to protection, even if they once more carried out civil defence tasks;⁸⁷ on the other hand, such personnel only enjoy protection – and the right to use the sign of civil defence – while they carry out civil defence tasks. As regards buildings, they may only be marked with the distinctive sign if they are exclusively assigned to civil defence tasks, including the complementary tasks mentioned in sub-paragraph (a)(xv).
- 2416** In practice, it is not always easy to make this distinction. It is especially at the moment when a mission is assigned that it should be determined whether this mission does or does not fall under the definition of civil defence. In contrast, it is not very realistic to envisage a change in the middle of a task. For example, if a team discovers wounded combatants during an assignment to recover wounded civilians who are buried under the rubble from a building, it will obviously care for those combatants and cannot be expected to remove the civil defence sign.⁸⁸ On the other hand, if it is assigned to a task of recovering the wounded buried under the rubble of a barracks, who are all or nearly all combatants, it will not enjoy the protection of the blue triangle.⁸⁹
- 2417** A more delicate question arises when a civil defence task can be considered as being harmful to the enemy. In this case there can of course be no question of

⁸⁴ In this sense, cf. M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 397, para. 2.2.3.

⁸⁵ O.R. XIII, p. 365, CDDH/406/Rev.1., para. 41. On the meaning of exclusive temporary assignment, reference should also be made to the definition given for medical personnel, units and transports: cf. commentary Art. 8, sub-para. (k), *supra*, pp. 132-133.

⁸⁶ On the concept “acts harmful to the enemy”, cf. commentary Art. 65, para. 1, *infra*, p. 770.

⁸⁷ On this subject, cf., however, *infra*.

⁸⁸ On this subject, cf., in addition, commentary sub-para. (a)(vi), *supra*, pp. 724-726.

⁸⁹ On the other hand, it should be noted that the protection given to medical services by the distinctive emblem of the red cross or red crescent is of course given for any action for the benefit of the wounded, whether they are military or civilians. Cf. also commentary Art. 66 (Identification), para. 9, *infra*, pp. 788-789.

carrying out the task under cover of the protective sign and it should not even be carried out at all, because of the risk of finally losing all right to protection. In borderline cases, particularly in the field of fire-fighting,⁹⁰ activities should be undertaken with both common sense and circumspection. Some have recommended that in this respect the principle of proportionality between the military interest in the activity and the humanitarian advantage resulting for civilian victims should be applied.⁹¹

2418 This therefore represents a subtly graduated system which can be summarized as follows:

- assignment exclusively to civil defence tasks and performing exclusively such tasks: right to special protection;
- assignment exclusively to civil defence tasks but occasionally performing other tasks not harmful to the enemy: right to special protection (although the text might be interpreted more restrictively);
- temporary assignment to tasks other than civil defence tasks, but which are not harmful to the enemy: no right to special protection during the performance of such other tasks, though there is a right to such protection in case of assignment to civil defence tasks later on;
- assignment to tasks harmful to the enemy or performance of tasks which can clearly be identified as being harmful to the enemy: no right to special protection, and probably permanent loss of this right.⁹²

2419 However, this last point requires clarification. An individual devoting himself in turn to civil defence tasks and to activities harmful to the enemy cannot be tolerated, particularly as the only individuals concerned here are civilians; the military assigned to civil defence are governed by a separate article.⁹³ Further the report of Committee II supports this conclusion, since it allows for the possibility of performing tasks covered by sub-paragraph (a) and other tasks in turn, and then again enjoying protection, “provided that these tasks do not constitute acts harmful to the enemy”.⁹⁴ Thus, the performance of tasks harmful to the enemy should result in the loss of the possibility of enjoying protection under this Chapter for the duration of the conflict. However, it seems justified to allow individuals who, in exceptional cases and in good faith, have performed activities which they had not recognized as being harmful to the enemy, or even permanently demobilized soldiers assigned to civil defence *as civilians*, the right to enjoy special protection once again. An amendment relating to this point was indeed proposed.⁹⁵ This led to discussions⁹⁶ and was not finally adopted but no negative decision was taken as regards its substance. In conclusion, it should be

⁹⁰ On this subject, *cf.*, in addition, commentary sub-para. (a)(vii), *supra*, p. 726.

⁹¹ *Cf.* M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 395. *Cf.* in addition commentary Art. 65, *infra*, p. 769.

⁹² In this sense, *cf.* M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 397.

⁹³ *Cf.* Art. 67.

⁹⁴ *O.R.* XIII, p. 365, CDDH/406/Rev.1, para. 41.

⁹⁵ *Cf.* *O.R.* III, pp. 263-264, CDDH/II/325, 325/Rev.1, 342.

⁹⁶ *Cf.* in particular *O.R.* XII, p. 105, CDDH/II/SR.64, para. 2; pp. 110-111, paras. 30-32; pp. 130-131, CDDH/II/SR.66, paras. 25-31.

pointed out that nothing expressly prohibits this possibility, which must therefore be accepted, as those concerned are indisputably civilians, even though the Third Convention provides for prisoner-of-war treatment for those who have belonged to the armed forces when they are interned by the Occupying Power while in occupied territory.⁹⁷

- 2420 Finally, as explained above, more restrictive rules are imposed on members of the armed forces assigned to civil defence, and for them the possibility of a temporary assignment was not adopted.⁹⁸

Sub-paragraph (c)

- 2421 This sub-paragraph defines civil defence personnel, though without specifying that the individuals concerned must belong to civil defence *organizations*. Thus it is taken for granted that one cannot have an *assignment* to civil defence tasks on an individual basis, outside any organization. This is accepted all the more willingly, since on the one hand such organizations are defined in very flexible terms,⁹⁹ and on the other hand, the possibility, in case of need, of appealing to the civilian population outside any organization remains open.¹⁰⁰
- 2422 Such personnel must be assigned *exclusively*¹⁰¹ to the performance of civil defence tasks, and must be so assigned by the Party to the conflict concerned.¹⁰²
- 2423 The inclusion of the fact that persons assigned exclusively to the *administration* of these civil defence organizations are also covered is superfluous. However, it does remove any possible ambiguity about administration being included in the complementary activities mentioned under sub-paragraph (a)(xv). The term “administration” should be understood in a broad sense to include all activities necessary for the running of civil defence organizations and the maintenance of their buildings and materials. However, here again, the assignment of such buildings and materials must be exclusive.
- 2424 Apart from this, the difference between the terms “Party to the conflict” and “competent authority of that Party” is without legal significance.
- 2425 Finally, as regards the relationship between personnel covered here and personnel in occupied territory covered by Article 63 of the Fourth Convention, the remark made in the report of Committee II is worthy of note:

“The definition of ‘civil defence organizations’ in this article in no way deprives individuals carrying out civil defence tasks of their rights under this Chapter, so long as they are part of, or under contract to, an organization of

⁹⁷ Cf. Third Convention, Art. 4B(1).

⁹⁸ Cf. commentary Art. 67, para. 1(a) and (b), *infra*, pp. 796-797.

⁹⁹ On this subject, cf. commentary sub-para. (b), *supra*, pp. 732-735.

¹⁰⁰ Cf. Art. 62, para. 2, and the commentary thereon, *infra*, pp. 740-741.

¹⁰¹ On the scope of this expression, cf. commentary sub-para. (b), *supra*, pp. 732-735. The report of Committee II also states that “the word ‘exclusively’ is used in order to indicate that these personnel, while assigned to civil defence tasks, must not exercise any other functions”. O.R. XIII, p. 365, CDDH/406/Rev.1, para. 41.

¹⁰² On this subject, cf. commentary sub-para. (b), *supra*, pp. 732-733.

the type referred to in Article 63 of the Fourth Geneva Convention of 1949; and there is no need for them to belong to or be embodied in a formal unit.”¹⁰³

Sub-paragraph (d)

- 2426 The term “*matériel*” defined here should be understood in a broader sense than in the First Convention, where it is distinguished from transports.¹⁰⁴
- 2427 In this instance it covers equipment, i.e., the boots and helmets of persons assigned to fire-fighting activities, as well as bookkeepers’ calculators; supplies, i.e., all food supplies, stocks of medicines, clothing etc.; and land, water and air transports of any sort.¹⁰⁵
- 2428 However, to fall under the definition, such equipment, supplies and transports must, of course, be used “for the performance of the tasks mentioned under sub-paragraph (a)”. The term *exclusively* is not mentioned here, but it is clear that the distinctive sign of civil defence must only be used to identify such *matériel* while it is exclusively assigned to such tasks. For example, a vehicle must not be assigned to any task that is not covered, even if it does not constitute an act that is harmful to the enemy under Article 65 (*Cessation of protection*), unless all traces of the distinctive sign have first been removed.
- 2429 On this subject it should be noted that the sponsors of one amendment proposed the exclusion of air transport by mentioning only “vehicles and watercraft”,¹⁰⁶ because they were afraid that rules regarding air transport would meet with difficulties, and because “civil defence was essentially land-based”.¹⁰⁷
- 2430 However, this proposal, which was supported by various delegations,¹⁰⁸ was not adopted because, as one delegate stated, there are mountainous regions “where emergency aid could be sent only by air”.¹⁰⁹
- 2431 Finally, it should be mentioned that a proposal was made to also mention protection of “the means of communication” used by civil defence.¹¹⁰
- 2432 This proposal was not adopted either. One delegate considered in particular that the obligation to protect civil defence means of communication could encourage abuse.¹¹¹ However, it is to be hoped that everything will be done to facilitate their functioning, which is often essential for the effective performance of civil defence tasks.

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¹⁰³ O.R. XIII, p. 365, CDDH/406/Rev.1, para. 41.

¹⁰⁴ Cf. Chapters V and VI, First Convention.

¹⁰⁵ On this subject, cf., by analogy, the definition of medical transportation and medical transports with the commentary thereon, Art. 8, sub-paras. (f) and (g), *supra*, pp. 130-131.

¹⁰⁶ Cf. O.R. III, p. 252, CDDH/II/322, sub-para. (c).

¹⁰⁷ Cf. O.R. XII, p. 101, CDDH/II/SR.63, para. 41.

¹⁰⁸ Cf. in particular *ibid.*, p. 107, CDDH/II/SR.64, para. 11; p. 111, para. 35; p. 115, para. 56.

¹⁰⁹ *Ibid.*, p. 106, para. 6.

¹¹⁰ Cf. O.R. III, p. 252, CDDH/II/358.

¹¹¹ O.R. XII, p. 109, CDDH/II/SR.64, para. 23.

Protocol I

Article 62 – General protection

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this Section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and *matériel* used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

Documentary references

Official Records

O.R. III, pp. 250-253. *O.R.* VI, pp. 215-216, CDDH/SR.42, paras. 65-69; p. 225, *id.*, Annex (Egypte); pp. 233-234 (Netherlands). *O.R.* XI, p. 579, CDDH/II/SR.51, para. 10; p. 582, para. 20; p. 583, para. 28; p. 584, para. 38; p. 585, paras. 41 and 45. *O.R.* XII, pp. 59-65, CDDH/II/SR.60, paras. 31-34, 53-54 and 60-61; pp. 70-74, CDDH/II/SR.61, paras. 4, 11 and 31; pp. 99-104, CDDH/II/SR.63, paras. 31-54; pp. 105-116, CDDH/II/SR.64, paras. 1-60; pp. 375-380, CDDH/II/SR.91, paras. 17-55; pp. 479-480, CDDH/II/SR.100, paras. 51-56. *O.R.* XIII, pp. 309 and 315, CDDH/235/Rev.1, Annex II and Appendix; pp. 429 and 433, CDDH/II/439/Rev.1.

Other references

Remark: the general references to civil defence are cited with Article 61.
CE 1972, Commentaries, Part I, pp. 139-141 (Art. 68). *CE 1972, Report*, vol. I, pp. 166-167, paras. 3.316-3.319; p. 171, Annex (Art. 68); vol. II, p. 11 (Art. 68); pp. 91-94, *CE/COM III/OPC 3*, 7, 15 and 17 (Art. 68). *Commentary Drafts*, pp. 72-73 (Art. 55).

Commentary

General remarks

2433 This article has undergone quite a few changes through various drafts put forward prior to the Diplomatic Conference and then during that Conference. In fact, the article as finally adopted is in some respects closer to the draft put before the second session of the Conference of Government Experts in 1972, than to the 1973 draft. Its modification during the Conference resulted to a large extent from an important amendment presented at the beginning of the discussions on civil defence, and later from a second amendment submitted to replace the first.¹

Title and scope of the article

2434 One important point on which the Conference went back to the 1972 draft is the title of this article, and consequently its scope. The 1973 draft was entitled “zones of military operations”, with a view to distinguishing, on the one hand, situations where military operations are taking place, including “combat zones” and, on the other hand, occupied territories.²

2435 The discussion in Committee II was concerned first of all with the definition of zones of military operations. Some wished to indicate more precisely that these were zones “where fighting is taking place”, and even more specifically, “land” fighting because it was held that “civil defence was essentially land-based”.³ This point was contested by a delegation which pointed out that land areas may be “affected by aerial or naval action”.⁴

2436 However, this proposal was also contested more fundamentally by a delegate who pointed out that occupied territories are also subject to military operations.⁵ This observation in particular led Committee II to revert to a general concept of protection, the provisions of this article covering all forms of civil defence, while Article 63 (*Civil defence in occupied territories*), which is about occupied territories, does not replace it, but supplements it as far as occupied territories are concerned.⁶ However, Article 62 is not concerned with military civil defence units.

¹ Cf. O.R. III, pp. 251-252, CDDH/II/322, and p. 253, CDDH/II/403 and Add.1.

² Cf. *Commentary Drafts*, pp. 72-73 (Art. 55). Cf. also CE 1972, *Report*, Vol. I, p. 167, para. 3.317.

³ Cf. O.R. III, p. 251, CDDH/II/322, and O.R. XII, pp. 100-101, CDDH/II/SR.63, para. 39; cf. also p. 74, CDDH/II/SR.61, para. 31; p. 112, CDDH/II/SR.64, para. 42; p. 113, para. 47; O.R. XIII, p. 315, CDDH/235/Rev.1, Appendix (Art. 55).

⁴ Cf. O.R. XII, p. 106, CDDH/II/SR.64, para. 5; cf. also p. 107, para. 11.

⁵ *Ibid.*, p. 70, CDDH/II/SR.61, para. 4.

⁶ Cf. O.R. XIII, p. 369, CDDH/406/Rev.1, para.49.

Military civil defence units

2437 In the commentary on the 1973 draft the ICRC included a paragraph on this question, by way of information, which set out the views of some of the experts who had been consulted.⁷ The problem was discussed at length during the Conference. As it forms a separate article in the text which was finally adopted (Article 67 – *Members of the armed forces and military units assigned to civil defence organizations*), it will be dealt with under the commentary on that article.⁸

Paragraph 1*First sentence – Respect and protection*

2438 Article 61 (*Definitions and scope*) defines civil defence organizations,⁹ while this paragraph is only concerned with *civilian* civil defence organizations. The use of this adjective was closely linked to the introduction of a special article on members of the armed forces and military units.

2439 The personnel of civil defence organizations is defined above.¹⁰

2440 The concepts of respect and protection have also been examined above.¹¹ Respect and protection are due to civilian civil defence organizations and their personnel “subject to the provisions of this Protocol, particularly the provisions of this Section”. As the report of Committee II clearly shows, it was wished to indicate that members of civil defence personnel are firstly “protected as civilians under this Protocol”, and as such they are protected in particular by the provisions included in Part IV, Section I; they are then more particularly covered by Articles 61-66, which therefore supplement, though do not replace, the general provisions.¹²

2441 This reminder of the general protection which members of civilian civil defence organizations enjoy as *civilians* means that it was unnecessary to mention that they should not be made the object of attack, or as the 1973 draft in particular recommended, they should not be *deliberately attacked*.¹³ As mentioned above, the provisions of Part IV, Section I, particularly those of Article 51 (*Protection of the civilian population*), are the ones which actually apply in this respect.¹⁴

⁷ Cf. *Commentary Drafts*, pp. 72-73 (Art. 55).

⁸ Cf. *infra*, p. 791.

⁹ Cf. commentary Art. 61, sub-para. (b), *supra*, pp. 732-735.

¹⁰ Cf. commentary Art. 61, sub-para. (c), *supra*, pp. 735-736.

¹¹ Cf. commentary Art. 10, para. 1, *supra*, p. 146.

¹² Cf. O.R. XIII, p. 367, CDDH/406/Rev.1, para. 46.

¹³ Cf. CE 1972, Report, Vol. I, p. 167, para. 3.318; draft, Art. 55, para. 1.

¹⁴ On this subject, cf. in addition O.R. XII, p. 100, CDDH/II/SR.63, para. 36; p. 107, CDDH/II/SR.64, para. 9; p. 113, para. 43.

Second sentence – Circumscription of activities

- 2442 This sentence grants civil defence organizations and their personnel the right to perform their civil defence tasks. The report of Working Group A stated that this was a “formula, designed to ensure the freedom of civil defence organizations”.¹⁵ The expression of this principle is important, particularly in occupied territories. Its implementation in these areas is elaborated in Article 63 (*Civil defence in occupied territories*). As regards the relationship between civilian civil defence organizations and the authorities under which they operate, this should not in principle cause any problem, as it is entirely in the authorities’ interests for the civil defence tasks to be performed.
- 2443 Nevertheless, if there were any disputes, the fact is that these organizations must be “organized or authorized” by such authorities.¹⁶ Thus their “freedom” does not seem to be very great.
- 2444 However, this sentence can be seen as an exhortation of such authorities not to arbitrarily refuse the right to perform such tasks to organizations fulfilling the required conditions, nor to arbitrarily withdraw that right from such organizations, particularly when there is an urgent need for them.¹⁷
- 2445 Subject to these remarks, the right can only be withdrawn – or, more often, curtailed – in case of “imperative military necessity”.¹⁸ This expression is not explained here, but what it amounts to is that such tasks may only be forbidden or curtailed when the authorities are placed before the alternative of either changing major operational plans or doing without civil defence personnel. An example might be works that must be carried out in an area where security cannot be guaranteed because of availability of resources and in the light of imperative operational choices. In such cases the choice must be based on the principles laid down particularly in Articles 51 (*Protection of the civilian population*) and 57 (*Precautions in attack*).¹⁹
- 2446 Finally, it should be noted that the right of civil defence personnel to perform their civil defence tasks also clearly implies that they will not be interned unless the security of the Occupying Power renders internment absolutely necessary.²⁰

Paragraph 2

- 2447 This paragraph is taken from the 1973 draft,²¹ with some drafting modifications. For that matter, the idea of protecting those persons performing

¹⁵ *Ibid.*, p. 375, CDDH/II/SR.91, para. 19.

¹⁶ *Cf.* commentary Art. 61, sub-para. (c), *supra*, pp. 735-736.

¹⁷ However, it is worth noting the remark of one delegate, who considered that this sentence “did not restrict the right of Governments to use personnel belonging to civilian civil defence organizations as they saw fit”: *O.R.* VI, p. 216, CDDH/SR.42, para. 67.

¹⁸ On this subject, *cf.* commentary Art. 54, para. 5, *supra*, pp. 658-659.

¹⁹ *Cf. supra*, pp. 613 and 677.

²⁰ *Cf.* Fourth Convention, Art. 42, para. 1.

²¹ *Cf.* draft Art. 55, para. 2.

civil defence tasks, outside civil defence organizations, had already been proposed during the second session of the Conference of Government Experts.²²

2448 As was stated when the draft article was submitted in Committee II, this paragraph is the “logical corollary” of paragraph 1, as, although it seemed justified “to grant [...] in the first place protection to specialized bodies”, the occasional use of persons who do not belong to such organizations should not be prohibited.²³

2449 The possibility of appealing to the civilian population in case of need is also laid down in Article 18 of the First Convention and in Article 17 (*Role of the civilian population and of aid societies*) of the Protocol. However, it is limited there to collecting the wounded and sick and to caring for them. The present paragraph therefore allows for an extension, where necessary, of the scope of activities performed by the population when an appeal is made to it.

2450 However, no reference is made, as in Article 18 of the First Convention, to the possibility of the population acting spontaneously. In order to be protected the civil defence action must always be made *in response to* an appeal from the “competent authorities” i.e., the authorities which form part of the government established in the territory concerned, and *under the control* of those authorities. Thus the special protection does not extend beyond such action. This restriction is understandable, for although spontaneous activity towards the wounded left without care should indisputably be encouraged, civil defence tasks sometimes have a more technical or more ambiguous character, as was shown above in the examination of those tasks.²⁴ To encourage the civilian population to act spontaneously in the performance of such tasks as, for example, assistance in maintaining public order could lead to delicate or even dangerous situations.

2451 Nevertheless, in practice it is to be hoped that there will be some flexibility in the implementation of this provision; for example, it would be regrettable to condemn the initiative of a civilian who had succeeded in preventing a fire on a farm.

2452 However, the requirement that control must be in the hands of the authorities is also a way of reminding the latter of their responsibility in this field, which is, on the one hand, to ensure the proper functioning of civil defence, if necessary with the assistance of the civilian population, and on the other hand, to prevent any abuse: respect for the distinctive sign depends on this.

Paragraph 3

2453 Paragraph 3 deals with the protection of buildings and *matériel* used for civil defence purposes, and with civil defence shelters.

²² Cf. particularly *CE 1972, Report*, Vol. II, p. 94, CE/COM III/OPC 15 (draft Art. 68) and p. 95, CE/COM III/OPC 17 (draft Art. 68).

²³ Cf. *O.R. XII*, p. 59, CDDH/II/SR.60, para. 32. One delegate even insisted that “it should be possible for any civilian to participate in civil defence activities”. Cf. *O.R. XII*, p. 81, CDDH/II/SR.61, para. 63.

²⁴ Cf. commentary Art. 61, sub-para. (a), *supra*, pp. 719-732.

- 2454 The buildings concerned are those accommodating civil defence organizations, i.e., primarily their administrative services, but also the locations for personnel on guard duty, stores for *matériel*, garages housing vehicles intended for civil defence etc.
- 2455 The *matériel*, is that defined in Article 61 (*Definitions and scope*), sub-paragraph (d).²⁵ What is important is not the type of *matériel* but its use for civil defence purposes. As stated by one delegate,²⁶ this reminder was actually quite unnecessary, since “*matériel*” materials is defined as such in Article 61 (*Definitions and scope*), sub-paragraph (d).
- 2456 Finally, the shelters referred to are those serving to protect the civilian population during attacks, particularly air raids. These are covered here, whether or not they are organized and made available by civil defence organizations.²⁷
- 2457 As regards the respect to which such objects are entitled, the 1973 draft provided that they “shall not be intentionally attacked or destroyed”.²⁸
- 2458 During the second session of the Conference of Government Experts the view was expressed that the prohibition should be limited to “deliberate attacks”.²⁹ In this way it would be prohibited to attack such objects as such, but this would not include incidental damages which they might suffer.
- 2459 During the Diplomatic Conference the position of the Chapter on civil defence in Part IV, Section II, of the Protocol was, in particular, put forward as an argument in favour of the idea that reference could simply be made, as regards the protection of such objects, to the article on the general protection of civilian objects, as that article provides a more specific and complete definition of protection.³⁰ This point of view finally prevailed. Thus civil defence objects are subject to the same rules as other civilian objects,³¹ and the efficacy of their protection depends to a large extent on their distance from any military objective. The only “advantage” that these objects have, compared with other civilian objects, is that they can be marked with the distinctive sign of civil defence (provided of course that they are *exclusively* assigned to civil defence tasks),³² and thus be identified as civilian objects with a special right to protection. Moreover, in this respect these objects are comparable to other objects authorized to display a distinctive protective emblem, such as medical objects and cultural objects. In common with medical objects, they also have similar provisions specifying when the right to protection ceases, and how this should be carried out.³³

²⁵ Cf. commentary Art. 61, sub-para. (d), *supra*, p. 736.

²⁶ Cf. O.R. XII, p. 375, CDDH/II/SR.91, para. 20.

²⁷ Cf. commentary Art. 61, sub-para. (a)(iii), *supra*, pp. 723-724.

²⁸ Draft Art. 55, para. 3.

²⁹ Cf. CE 1972, Report, Vol. II, p. 167, para. 3.318.

³⁰ Cf. O.R. XII, p. 104, CDDH/II/SR.63, paras. 52-53; p. 113, CDDH/II/SR.64, para. 43; p. 375, CDDH/II/SR.91, para. 21.

³¹ In this respect cf. particularly commentary Arts. 52, 57-58, *supra*, pp. 629 and 677.

³² Cf. commentary Art. 66, para. 1, *infra*, pp. 780-782.

³³ Cf. particularly Arts. 13 and 65.

- 2460 The second sentence of the paragraph addresses a different problem, namely, the right of the authority under whose control the civil defence objects are, to use them for other purposes or to destroy them, and the scope of that right.
- 2461 Objects should be understood to mean all that is connected with civil defence, except for personnel, i.e., buildings on the one hand, and *matériel* as defined in this Chapter,³⁴ on the other.
- 2462 The right to destroy objects used for civil defence purposes or to divert them from their proper use is only granted to “the Party to which they belong”. This clearly shows that the possibility for an Occupying Power to destroy or divert such objects from their proper use is not dealt with, this problem being dealt with in Article 63 (*Civil defence in occupied territories*).³⁵
- 2463 Here the question is in particular to allow the armed forces of a State not to leave to the enemy objects designed for civil defence purposes, but to apply a “scorched earth” policy in this respect, as accepted implicitly in Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 5.³⁶
- 2464 The delicate question which then arises is if there are any limitations upon this right to destroy objects used for civil defence purposes or to divert them from their proper use. The text adopted by consensus by Committee II³⁷ restricted this right to cases of “imperative military necessity”. Several delegates had stressed the importance of these words, for that matter.³⁸
- 2465 An amendment submitted at one of the final plenary meetings³⁹ called for the deletion of the reference “in the case of imperative military necessity”. The reason for this amendment was probably a desire not to encroach on national sovereignty in this field.⁴⁰
- 2466 Although it cannot be precisely defined, it may nevertheless be assumed that there is a limit on the right of the authorities concerned to destroy objects used for civil defence purposes or to divert them from their proper use.
- 2467 The principles of international humanitarian law and the rules on the wounded and sick, which may be referred to by way of analogy, suggest that this limit is exceeded on the one hand, when the destruction or diversion does not fulfil

³⁴ Cf. Art. 61, sub-para. (d).

³⁵ Cf. commentary Art. 63, paras. 4-6, *infra*, pp. 754-758.

³⁶ In this sense, cf. O.R. XII, p. 376, CDDH/II/SR.91, para. 25.; pp. 377-378, paras. 35-37.

³⁷ Cf. O.R. XIII, p. 402, CDDH/406/Rev.1, Annex: Articles adopted by Committee II (Art. 55).

³⁸ Cf. particularly O.R. XII, p. 378, CDDH/II/SR.91, para. 39.

³⁹ Cf. O.R. III, p. 253, CDDH/417.

⁴⁰ However, this amendment provoked a criticism from one delegation, which pointed out that the result “is that the obligations on behalf of the civilian population with regard to the availability of shelters and the civil defence equipment and *matériel* have been weakened”: O.R. VI, p. 233, CDDH/SR.42, Annex (Netherlands). Another delegation interpreted the deletion differently and considered that “the postulation of military necessity as the sole ground on which an exception could be made would encourage the spirit of militarism”; moreover, it regretted that this possibility of diverting or destroying objects assigned to civil defence should not be limited by other conditions, and stated that “presumably, however, humanitarian aims would be taken into consideration” (*ibid.*, p. 215, CDDH/SR.42, para. 66).

imperative military necessity, and on the other hand when, over and above such necessity, it manifestly causes harm to those persons to whose protection the objects should have contributed.

2468 Thus to use *matériel* intended for civil defence purposes for other purposes is not unacceptable – provided of course that the distinctive sign has been removed – if the remaining *matériel* assigned to civil defence organizations is sufficient for the latter to continue to perform their tasks equally effectively. On the other hand, such use is not acceptable if it prejudices the activities of such organizations. In that case it would also constitute a breach of Article 58 (*Precautions against the effects of attacks*), sub-paragraph (c).⁴¹

Y.S.

⁴¹ On this subject, *cf. supra*, pp. 694-695.

Protocol I

Article 63 – Civil defence in occupied territories

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.
2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.
3. The Occupying Power may disarm civil defence personnel for reasons of security.
4. The Occupying Power shall neither divert from their proper use nor requisition buildings or *matériel* belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.
5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
 - (a) that the buildings or *matériel* are necessary for other needs of the civilian population; and
 - (b) that the requisition or diversion continues only while such necessity exists.
6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

Documentary references

Official Records

O.R. I, Part I, p. 154; Part III, p. 19 (Art. 56). *O.R.* III, pp. 254-258. *O.R.* VI, p. 216, CDDH/SR.42, paras. 70-71; p. 224, *id.*, Annex (Cyprus); p. 229 (Indonesia); pp. 236-237 (Romania); pp. 241-242 (Yugoslavia). *O.R.* XI, p. 578, CDDH/II/SR.51, para. 6; pp. 581-582, para. 19; p. 584, para. 38. *O.R.* XII, p. 59, CDDH/II/SR.60, para. 31; p. 60, para. 35; pp. 63-64, para. 53; p. 65, para.

61; p. 70, CDDH/II/SR.61; para. 4; p. 71, para. 11; pp. 117-125, CDDH/II/SR.65, paras. 1-47; pp. 305-307, CDDH/II/SR.83, paras. 5 and 14-15; p. 324, CDDH/II/SR.85, paras. 11-12; p. 325, para. 18; pp. 327-328, CDDH/II/SR.86, paras. 2-8; p. 330, paras. 16-17; pp. 381-382, CDDH/II/SR.91, paras. 57-67; pp. 480-481, CDDH/II/SR.100, paras. 57-59. *O.R. XIII*, pp. 309-311, CDDH/235/Rev.1, Annex II, paras. 3 and 10-13; pp. 367-369, CDDH/406/Rev.1, paras. 47-49; pp. 429-430, CDDH/II/439/Rev.1 (Art. 56); p. 433, *id.* (Observations Art. 56).

Other references

CE/3b, pp. 153-154. *CE 1972, Basic Texts*, pp. 23-24 (Art. 69). *CE 1972, Commentaries*, Part I, pp. 141-142 (Art. 69). *CRCE 1972, Report*, p. 38 (Art. 69). *CE 1972, Report*, vol. I, p. 167, paras. 3.320-3.324; p. 171, Annex (Art. 69); vol. II, p. 11 (Art. 69); pp. 91-95, *CE/COM III/OPC 3*, 12 and 17-18. *Commentary Drafts*, pp. 73-74 (Art. 56).

Commentary

General remarks

2469 When it adopted this article, Committee II also adopted the following comments¹ (Articles 55 and 56 referred to being the present Articles 62 (*General protection*) and 63):

“Article 55 applies to both occupied and non-occupied territory. Article 56 is thus supplementary to Article 55 as far as occupied territories are concerned. Article 63 of the Fourth Geneva Convention of 1949 is also applicable. It was emphasized in the debate that this article is not intended to strengthen the position of an Occupying Power.”

2470 The comments therefore contain three points which were repeatedly raised during the CDDH:

- the *supplementary* character of Article 63 in relation to Article 62 (*General protection*);²
- the equally supplementary character of Article 63 in relation to Article 63, paragraph 2, of the Fourth Convention;³

¹ *O. R. XIII*, p. 369, CDDH/406/Rev.1, para. 49.

² On this subject, *cf.* also in particular *O.R. XII*, p. 65, CDDH/II/SR.60, para. 61; p. 71, CDDH/II/SR.61, para. 11; p. 121, CDDH/II/SR.65, para. 25; p. 122, para. 29; *cf.* also commentary Art. 62, *supra*, pp. 738-739.

³ On this subject, *cf.* also in particular *O.R. XII*, p. 60, CDDH/II/SR.60, para. 35; p. 119, CDDH/II/SR.65, para. 17; p. 121, paras. 26-27; p. 125, para. 46.

- the intent not to strengthen the rights of the Occupying Power.⁴

2471 These comments should be borne in mind in an examination of the various provisions of the article.

2472 Finally, it will be noted that the article of the 1973 draft has been considerably expanded from two to six paragraphs, particularly in the light of numerous amendments and during the deliberations of the Group set up by Committee II to examine the Chapter on civil defence.

2473 In fact the substantive changes are less far-reaching than they seem to be:

- paragraph 1 is fairly closely based on paragraph 1 of the 1973 draft;
- the substance of paragraph 2 was almost entirely included in paragraph 1 of Article 56 of the 1973 draft;
- although paragraph 3, relating to the disarming of civil defence personnel by the Occupying Power, had indeed not been mentioned, it could legitimately be considered to be self-evident;
- paragraphs 4 and 5 are developed from paragraph 2 of the 1973 draft, concerning requisition or diversion of civil defence *matériel* by the Occupying Power, a problem which was discussed at length in Committee II;
- finally, paragraph 6 appropriately specifies that under no circumstances may shelters provided for civil defence be requisitioned or diverted from their proper use, even if they do not belong to civil defence organizations. The 1973 draft did not include this provision.

Paragraph 1 – Facilities which the Occupying Power must provide

First sentence

2474 Despite a question from one delegate,⁵ the concept of occupied territories was not re-examined with respect to civil defence.⁶

2475 Civil defence organizations are those which were defined in Article 61 (*Definitions and scope*), sub-paragraph (b). However, only *civilian* organizations are covered here. The question of military personnel who, while serving within civil defence organizations, have fallen into the power of the enemy in occupied territory, is dealt with in Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*).⁷

2476 The authorities concerned here are those of the Occupying Power or those appointed by the latter.

2477 This first sentence is of a general character, while the other sentences of the paragraph specify its instances of application.⁸ However, the “facilities

⁴ On this subject, *cf.* also in particular *O.R.* VI, pp. 236-237, CDDH/II/SR.42, Annex (Romania); pp. 241-242 (Yugoslavia).

⁵ *Cf.* *O.R.* XII, p. 70, CDDH/II/SR.61, para. 4.

⁶ On this question, *cf.* *Commentary IV*, in particular pp. 21-22 (Art. 2, para. 2) and pp. 274-276 (Art. 47).

⁷ *Cf.* commentary Art. 67, para. 2, *infra*, pp. 799-802.

⁸ In this sense, *cf.* *Commentary Drafts*, p. 73 (Art. 56, para. 1).

necessary” for the performance of civil defence tasks are not listed or explained, either in this sentence or in the rest of the paragraph. The phrase refers above all to making the performance of the civil defence mission possible; on the one hand, by authorizing access to places where the tasks must be performed and by allowing personnel assigned to civil defence to carry out their activities, on the other hand, by authorizing and even assisting civil defence organizations in procuring the *matériel* necessary for such tasks, such as blankets or other objects essential for shelter, and equipment essential for fire-fighting such as boots or spare parts for vehicles.

- 2478 Nevertheless, the difficulty with this question is not so much what precisely is included in the rule, but how far it reaches.
- 2479 The “Outline for Draft Regulations” on civil defence presented to the Conference of Government Experts (referred to below as “Outline”) indicated that civil defence organizations would be granted in occupied territory “every facility for them to carry out their tasks, subject to temporary and exceptional measures that may be imposed by the Occupying Power for urgent reasons of security”.⁹
- 2480 In the same vein, the words “to the extent feasible” were added in an amendment submitted in Committee II¹⁰ because, according to the sponsors of the amendment, it is not very realistic to provide such an obligation “without qualification”.¹¹
- 2481 Finally, another amendment provided that “the provisions of the present article are subject to such temporary and exceptional measures in derogation as may be necessary for urgent reasons of security of the Occupying Power”.¹² The sponsor of the amendment based his proposal in this respect on Article 63 of the Fourth Convention, which actually imposes obligations on the Occupying Power “subject to [...] urgent reasons of security”.¹³
- 2482 However, the expression “to the extent feasible” was rejected, particularly because it was considered that this weakened the text,¹⁴ and “the occupying authorities must not be left free to interpret the situation in a sense which went against the interests of the civilian population.”¹⁵
- 2483 This decision does indeed show how rigorous the obligation imposed on the Occupying Power is. And yet it cannot be claimed that it is imposed without taking into account the circumstances and the material possibilities of fulfilling it: no one can be required to do the impossible. However, by rejecting this amendment the Diplomatic Conference emphasized that the argument that something is impossible should not be too readily adopted as an excuse.
- 2484 For that matter, if the situation really does render impossible the concession of certain facilities, the obligations of the Occupying Power with regard to civil

⁹ CE/3b, p. 154.

¹⁰ Cf. O.R. III, p. 255, CDDH/II/323.

¹¹ Cf. O.R. XII, p. 119, CDDH/II/SR.65, para. 14.

¹² O.R. III, p. 256, CDDH/II/346.

¹³ Cf. Art 63 of the Fourth Convention, introductory sentence, and O.R. XII, p. 121, CDDH/II/SR.65, para. 26.

¹⁴ Cf. O.R. XII, p. 328, CDDH/II/SR.86, para. 5.

¹⁵ *Ibid.*, p. 330, para. 16.

defence organizations are only secondary as compared with its obligations towards the civilian population. It is in particular by authorizing civil defence and relief actions coming from outside that the Occupying Power could try to compensate for its own deficiencies¹⁶

Second sentence

- 2485** The “Outline” provided that personnel permanently assigned to civil defence tasks could not be forced to undertake other activities against their will, but that personnel assigned to such tasks on a temporary basis could be employed on work as laid down in Article 51 of the Fourth Convention, provided that such work would not jeopardize their civil defence tasks.¹⁷ The text presented at the second session of the Conference of Government Experts further added that permanent civil defence personnel could not be compelled to serve outside occupied territory.¹⁸ During the second session it was decided to remove the distinction between permanent and temporary personnel and not to permit any such personnel to be compelled to perform tasks other than civil defence tasks or to serve outside occupied territory.¹⁹ The 1973 draft was worded in this sense, even laying down a prohibition on *all* relocation, i.e., including transfers within occupied territory.
- 2486** The text which was finally accepted is based on an amendment.²⁰ It places greater emphasis on the end result – the proper execution of tasks – than on the personnel themselves. For that matter, this concern was apparent when the above-mentioned amendment was submitted and one of the co-sponsors remarked that a prohibition against compelling personnel to undertake “activities unconnected with their functions” went too far, and that the text proposed by the amendment included “all that was required from the civil defence stand point”.²¹
- 2487** In fact, the freedom of the Occupying Power is quite limited, despite the apparently less restrictive wording which was adopted.
- 2488** First of all, the question of relocation of civil defence personnel was in the end left out. This question is actually covered by Article 49 of the Fourth Convention, which applies in occupied territories to civilian civil defence personnel, as well as to all civilians: that article clearly prohibits forced transfers, except where “imperative military reasons” so demand, and in such cases movement outside the bounds of the occupied territory is prohibited, “except when for material reasons it is impossible to avoid such displacement”.²²
- 2489** Then, with regard to the question of imposing an obligation to work on civil defence personnel, the general provisions of Article 51 of the Fourth Convention

¹⁶ On this subject, *cf.* in particular Arts. 64 and 70, para. 1.

¹⁷ *Cf.* CE/3b, pp. 154-155.

¹⁸ *Cf.* CE 1972, *Commentaries*, Part I, pp. 141-142 (Art. 69, para. 2).

¹⁹ *Cf.* CE 1972, *Report*, Vol. I, p. 167, paras. 3.323-3.324.

²⁰ *Cf.* O.R. III, p. 257, CDDH/II/404.

²¹ *Cf.* O.R. XII, p. 119, CDDH/II/SR.65, para. 15.

²² For further details on this subject *cf.* *Commentary IV*, pp. 279-282 (Art. 49).

are to be taken into consideration. These provisions lay down specifically that “the legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work” etc. shall be applicable.

- 2490 These general rules, added to the rule under consideration here, show that it will be practically impossible to impose legitimately other work on persons assigned full-time to civil defence tasks (the laws on working hours contained in the legislation of the occupied territory would probably prohibit this); and that the possibility of compelling personnel assigned to such tasks on a part-time basis to do other work is limited on the one hand by the prohibition of forcibly transferring such persons, and on the other hand, by the obligation under the labour law of the occupied territory to leave them sufficient time to perform their civil defence tasks.

Third sentence

- 2491 This third sentence repeats almost word for word Article 63, paragraph 1(b), of the Fourth Convention.²³ In a slightly different form it was included in the “Outline”²⁴ and it is virtually the same as the 1973 draft.
- 2492 However, in Committee II a draft amendment was introduced which would have seriously modified its meaning.²⁵ It proposed to end the sentence after the word “organizations”, i.e., to purely and simply prohibit the Occupying Power from changing in anything the structure or personnel of civil defence organizations from the way they were before the occupation.
- 2493 The *raison d’être* of this proposal was clearly explained: “it was intended not to leave the Occupying Power as sole judge of the desirability of making changes in the structure and personnel of civil defence bodies.”²⁶
- 2494 This proposal was finally not adopted, particularly because it seemed necessary to many delegates to maintain a balance between rights and duties of the Occupying Power, if there was to be any chance of these provisions being applied.²⁷
- 2495 This provision admittedly has the disadvantage of leaving a broad margin of interpretation and therefore to the subjective judgment of the Occupying Power.

²³ Sub-paragraph (b) provides:

“The Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities”.

²⁴ In fact it provided that the Occupying Power may not “make in the personnel or management of the organizations any changes that might prejudice the efficient discharge of their tasks” (CE/3b, p. 154).

²⁵ Cf. O.R. III, p. 257, CDDH/II/424.

²⁶ Cf. O.R. XII, p. 327, CDDH/II/SR.86, para. 2.

²⁷ Cf. in particular *ibid.*, pp. 123-124, CDDH/II/SR.65, paras. 37 and 41.

However, seen in the context of the article as a whole, which is severe upon the Occupying Power, it does not allow any underhand abuses.²⁸

Fourth sentence

- 2496** Although it is expressed in a rather different way, the concept contained in this sentence was present already in the “Outline”.²⁹
- 2497** The 1973 draft also provided that the Occupying Power could not demand that civil defence bodies and their personnel “give the nationals of the Occupying Power priority”.³⁰
- 2498** During the Diplomatic Conference an amendment was proposed to delete this sentence³¹ because it was “superfluous and in contradiction with the Geneva Conventions’ system”.³² On this point it is true that the provision practically flows from the other provisions of the paragraph, and more generally, from other rules and principles of international humanitarian law: as the transfer of the Occupying Power’s own civilian population into occupied territory is prohibited by the Fourth Convention,³³ there should really only be *military* nationals of the Occupying Power in such territory, apart perhaps from exception of some civilians who had settled there before the occupation. As civil defence should be restricted to tasks intended to protect the civilian population,³⁴ it would lose its special status if military nationals of the Occupying Power were given priority. From a more general point of view, moreover, international humanitarian law protects victims as such, and not on the basis of criteria such as that of nationality.³⁵
- 2499** However, the concern not to allow any ambiguity in this respect finally prevailed, and following two amendments,³⁶ a sentence was even added stipulating that no obligation may be imposed on civil defence organizations to give priority to the interests of the Occupying Power. From the point of view of the organizations themselves we may add that their obligation not to give priority applies both to nationals of the Occupying Power and, *a fortiori*, to the interests of the Occupying Power, if they wish to retain their special status.

²⁸ As regards the purpose of this provision, it is also interesting to refer to the following passage from the commentary on Article 63 of the Fourth Convention, which applies to civilian civil defence organizations: “The clause aims at prohibiting arbitrary removal of the directors of a Society, the introduction of new officials or, in general, any measures whose object is to make the Societies conform to the policy of the Occupying Power [...]” (*Commentary IV*, p. 332).

²⁹ Cf. CE/3b, p. 154, sub-para. (a)(iii).

³⁰ Cf. draft Art. 56, para. 1, last sentence.

³¹ Cf. O.R. III, p. 256, CDDH/II/358.

³² Cf. O.R. XII, p. 121, CDDH/II/SR.65, para. 24.

³³ Cf. Fourth Convention, Art. 49, para. 6.

³⁴ On this subject, cf. commentary Art. 61, sub-para. (a), *supra*, pp. 720-722.

³⁵ On this subject, cf. particularly commentary Art. 9, para. 1, *supra*, pp. 138-140.

³⁶ Cf. O.R. III, p. 255, CDDH/II/323; p. 257, CDDH/II/404.

Paragraph 2 – Prohibition of coercion prejudicial to the civilian population

- 2500 Paragraph 1 is basically aimed at enabling civil defence organizations to perform their tasks, on the one hand, by granting them the necessary facilities, and on the other hand, by allowing them to retain their structure and by keeping them from tasks which do not fall within their competence.
- 2501 Paragraph 2 deals with interference of the Occupying Power with the *manner* of performing civil defence tasks.
- 2502 It could be considered that such a concern was present in the text of the 1973 draft, though it had never been clearly expressed.
- 2503 In fact, this paragraph addresses a fundamental question, though only partially. The amendment from which it was developed actually proposed the addition of a paragraph to provide that: “the Occupying Power shall not compel civil defence bodies to perform their activities”.³⁷
- 2504 At first sight this proposal seems to serve the interests of civil defence organizations more than those of the civilian population. In fact, its *raison d’être* was not solely based on reasons related to the purposes of international humanitarian law, i.e., to ensure the most extensive and effective protection possible to victims of armed conflict. It followed from the view of a government whose “citizens were forbidden to accept and recognize occupation”.³⁸
- 2505 This approach clearly fell outside the field of international humanitarian law, and the wording which was finally adopted replaces it in this context by placing the emphasis on the interests of the civilian population. In fact, it does not prohibit the Occupying Power from compelling, coercing or inducing civil defence organizations to perform their tasks if this is in the interests of the civilian population. It only purports to prevent the performance of tasks *prejudicial to the interests* of the civilian population.
- 2506 Of course, this allows for a margin of judgment. However, it is clear that in the context of international humanitarian law it is only legitimate to refer to material or immaterial prejudicial effects when they are unrelated to the political situation. To give a precise example, it is not legitimate to claim that lack of action of a civil defence organization with regard to flood victims is in the interests of the population because in disorganizing the Occupying Power it would be bringing the liberation of the territory nearer: international humanitarian law only has any chance of being observed if such considerations are scrupulously avoided and not taken into account in interpreting its provisions.
- 2507 The question arises how far the Occupying Power can go to make civil defence organizations perform their tasks in the interests of the civilian population. *To compel* means to impose by means of rules or regulations which have the force of law, in general on pain of punishment; *to coerce* means to impose by force; *to*

³⁷ *Ibid.*, p. 255, CDDH/II/340.

³⁸ According to this view, civil defence organizations are obliged, even in the case of occupation, to obey the orders from the authorities of their own government who direct “the general defence of the people. That obligation also applied to the civil defence system which was not to become a part of the aggressor’s machinery”. Cf. *O.R.* XII, pp. 120-121, CDDH/II/SR.65, paras. 20-24.

induce means to bring pressure bearing with promises to give advantages or threats to remove them.

2508 The way in which tasks are imposed on civil defence organizations should of course be within acceptable limits, but this is not the place for defining such limits. In fact, they are the same limits as those set out in Article 51 of the Fourth Convention concerning compulsory labour, which is allowed in particular when the work concerned is necessary for public utility services.³⁹

2509 In fact, there is a choice between two alternatives: either members of civil defence organizations do their best to accomplish their tasks and the Occupying Power should hardly ever intervene; or they engage in passive resistance by refusing to perform such tasks and the Occupying Power may intervene to safeguard the interests of the civilian population; it can do so either in the context of paragraph 2, or, where necessary, through measures affecting the structure or personnel of civil defence organizations.⁴⁰

2510 However, two points should be added. First, the choice is presented in a completely neutral way in the context of this commentary: there is no question here of taking sides in a matter of conscience and of inducing people in an occupied country to perform work for the benefit of the civilian population, or conversely to refuse to perform such work, with the aim of resisting the Occupying Power either passively or actively. We simply want to indicate that certain rights or obligations of the Occupying Power depend on this choice.

2511 Furthermore, the situation mentioned above is based on the presumption that the Occupying Power acts in accordance with the law, which is of course not always the case. The real problem is that of an Occupying Power which uses the interests of the civilian population as a pretext for imposing modifications on the structure or personnel or on the courses of action of civil defence organizations when such modifications are actually not in the interests of that population. It is to avoid this type of abuse that one delegation stated in its explanation of vote that these provisions “guarantee civil defence organizations the right to decide whether or not in the specific case of occupation, continuation of their activities is in the interest of the civilian population”.⁴¹

2512 Admittedly, the texts are too clear to be able to give legal support to this view. However, this point of view, which was not an isolated one,⁴² should induce any Occupying Power to act with great caution before interfering with civil defence organizations, and it should induce the Protecting Powers or their substitutes to be vigilant with regard to the proper motives for such interference.

³⁹ On this subject, cf. *Commentary IV*, pp. 293-298.

⁴⁰ Cf. commentary para. 1, third sentence, *supra*, pp. 750-751. Cf. in addition Art. 43 of the Hague Regulations of 1907.

⁴¹ 41. Cf. *O.R.* VI, pp. 241-242, CDDH/SR.42, Annex (Yugoslavia).

⁴² Cf. also *ibid.*, pp. 236-237 (Romania) and, especially, the last sentence of the commentaries adopted by Committee II with that article: *supra*, p. 746.

Paragraph 3 – Disarming civil defence personnel

- 2513 The question of civil defence personnel bearing arms was not discussed in the context of this article, but with regard to Articles 65 (*Cessation of protection*) and 67 (*Members of the armed forces and military units assigned to civil defence organizations*).⁴³
- 2514 However, as some delegations were doubtful about the advisability of permitting civil defence personnel to carry arms, a compromise was achieved with the introduction of this paragraph which explicitly grants the Occupying Power the right to disarm such personnel.⁴⁴ According to the Rapporteur of Working Group A, the words “for reasons of security” are self-explanatory and serve to reassure the Occupying Power, “if it noticed that civil defence personnel were armed”.⁴⁵
- 2515 The expression “for reasons of security” should therefore be considered to be self-explanatory and does not constitute a condition to be met by the Occupying Power, which may disarm civil defence personnel without the need for any justification.
- 2516 Finally, the question could arise whether this paragraph is really necessary. One delegation explicitly claimed that this was not the case.⁴⁶ In fact, it must be admitted that it is hardly possible to contest the Occupying Power’s competence to disarm civil defence personnel in occupied territory, even without this paragraph which resulted from a compromise rather than from an argument of logic. For that matter, the absence of such a provision regarding civilian medical personnel in no way implies a prohibition for the Occupying Power to disarm such personnel.⁴⁷
- 2517 What is required of the Occupying Power in both situations is to facilitate the task of such personnel and therefore, if they are disarmed, to ensure in another way their safety and that of persons in their care.

Introduction to paragraphs 4, 5 and 6

- 2518 According to Article 69, paragraph 3, of the 1972 draft, “buildings, equipment and means of transport belonging to civil defence organizations shall remain for the use of the civilian population” and “may only be requisitioned temporarily, in cases of urgent necessity, and provided the requisition does not seriously jeopardize the protection of the civilian population”.⁴⁸
- 2519 This approach was restrictive in that it only covered buildings, *matériel*, and transports “which has been permanently assigned” to civil defence bodies.⁴⁹ On

⁴³ Cf. commentary Art. 65, para. 3, *infra*, pp. 774-778 and Art. 67, para. 1(d), *infra*, pp. 797-798.

⁴⁴ Cf. O.R. XII, p. 382, CDDH/II/SR.91, para. 62.

⁴⁵ *Ibid.*, p. 381, para. 59.

⁴⁶ Cf. O.R. VI, p. 229, CDDH/SR.42, Annex (Indonesia).

⁴⁷ Cf. commentary Art. 15, para. 3, *supra*, p. 194.

⁴⁸ CE 1972, *Report*, vol. I, pp. 167-168.

⁴⁹ Cf. *Commentary Drafts*, p. 74 (Art. 56, para. 2).

the other hand, as regards requisitions, the fact that these were not referred to was not because of an intent to rule them out, but because it was “considered preferable not to touch on this problem, rather than to introduce a prohibition which carried numerous reservations and exceptions that might be abused by the Occupying Power”, and thus, it was therefore “dealt with under the rules of international law with regard to requisitions”, i.e., in particular Article 52 of the Hague Regulations of 1907.⁵⁰

2520 The question of requisitions was discussed at length during the Diplomatic Conference. The approach of the 1973 draft was not adopted in the end, as provisions based on Article 14 (*Limitations on requisition of civilian medical units*), paragraphs 2 and 3, were preferred.⁵¹

2521 Previously a proposal had been made to simply prohibit the requisition of buildings, *matériel* and transports belonging to civil defence organizations;⁵² the reference to the Hague Regulations, which was supported by some,⁵³ was opposed by others;⁵⁴ others still had indicated their preference for not mentioning requisition, but without referring implicitly to the Hague Regulations.⁵⁵

2522 Thus the solution which was adopted was a compromise based on the provisions of Article 14 (*Limitations on requisition of civilian medical units*). It comprises a general rule prohibiting requisitions in one paragraph, and describes the exceptions in a second paragraph.

2523 Moreover, paragraph 6 of the article under consideration here reserves a special treatment for civil defence shelters.⁵⁶

Paragraph 4

2524 The objects covered by this paragraph are buildings, and *matériel* as defined in Article 61 (*Definitions and scope*), sub-paragraph (*d*), which therefore covers transports.

2525 It covers not only buildings and *matériel* “belonging to [...] civil defence bodies”, but also those which are “used by civil defence bodies”. This addition

⁵⁰ Cf. *ibid.* (Art. 56, para. 2 and note 43). Article 52 of the Hague Regulations of 1907 reads: “Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.”

⁵¹ In this sense, cf. *O.R.* XII, p. 381, CDDH/II/SR.91, para. 57.

⁵² Cf. *O.R.* III, p. 254, CDDH/II/70; p. 258, CDDH/II/425.

⁵³ Cf. in particular *O.R.* XII, p. 60, CDDH/II/SR.60, para. 35; p. 117, CDDH/II/SR.65, para. 2; p. 123, para. 38.

⁵⁴ Cf. in particular *O.R.* XI, pp. 581-582, CDDH/II/SR.51, para. 19.

⁵⁵ Cf. in particular *O.R.* XII, p. 125, CDDH/II/SR.65, para. 45.

⁵⁶ Cf. *ibid.*, p. 381, CDDH/II/SR.91, para. 57.

was made following an amendment,⁵⁷ justified by the argument that “it was perfectly conceivable that civil defence bodies might make use of buildings etc. which did not officially belong to them”, and it was therefore also necessary to protect such objects.⁵⁸ The distinction between objects assigned to civil defence on a permanent basis and those not so assigned, which was made in the Commentary on 1973 draft, was therefore not adopted.⁵⁹

- 2526 First of all, it is prohibited to *divert such objects from their proper use*, in other words, to require them to be used for purposes other than that for which they are intended. For example, this would be the case if an ambulance were ordered to transport *matériel*.
- 2527 Secondly, it is prohibited to *requisition* such objects, which means that the Occupying Power may not secure them to meet the needs of the occupying army.
- 2528 However, this prohibition is mitigated inasmuch as it only applies “if such diversion or requisition would be harmful to the civilian population”. Thus in general any diversion or requisition which is not harmful to the civilian population is possible in principle, though it may not necessarily be permitted, for paragraph 5 lays down two additional conditions.
- 2529 This general condition is certainly not always easy to evaluate and requires good faith on the part of those who must apply it. However, it has the great advantage of placing the interests of the civilian population in occupied territory above any others as regards humanitarian considerations.
- 2530 Finally, it should be noted that the detrimental effects should be assessed not only at the time when objects are diverted or requisitioned, but throughout the duration of such diversion or requisition.

Paragraph 5

- 2531 This paragraph is subordinate to the preceding paragraph, to which it adds two cumulative conditions:
- First, buildings and *matériel* diverted from their proper use or requisitioned, must be “necessary for other needs of the civilian population”. This brief formula means that the Occupying Power must use such objects to carry out other obligations that it has vis à vis the civilian population of the occupied territory, and not for its own needs.
 - Secondly, the requisition or diversion should continue only as long as the above-mentioned need for them remains. In other words, diverted or requisitioned objects which are no longer necessary to meet the needs of the civilian population must be returned to their first use, even if they are no longer essential to the performance of civil defence tasks. This provision rules out the possibility that requisitions apparently made in the interests of the civilian population, may be later reassigned to another use.

⁵⁷ Cf. O.R. III, p. 255, CDDH/II/323.

⁵⁸ Cf. O.R. XII, pp. 119-120, CDDH/II/SR.65, para. 19.

⁵⁹ Cf. *supra*, p. 754, and note 49.

- 2532** To summarize, let us take a practical example: a civil defence organization has several trucks to ensure transportation of its personnel in case of emergency. Some of these are not in use because they are not needed. The Occupying Power would be acting legitimately if it requisitioned them as a provisional arrangement to transport pupils from home to school with a view to meeting a technical shortage. In fact, it has a duty to facilitate the proper functioning of institutions devoted to the care and education of children.⁶⁰ However, if a sudden disaster once again rendered the trucks indispensable for civil defence tasks, they should be restored immediately. Finally, if that disaster did not occur, it should in any case restore the trucks to the civil defence organizations, irrespective of the needs of such organizations at the time, as soon as the trucks were no longer necessary for transporting the pupils, for example, if the means of transportation which provided this service previously were repaired.
- 2533** Thus strict limits are imposed on diversion or requisition, although some wished to go even further, either by prohibiting all requisition,⁶¹ or by imposing two apparently more draconian provisions, as did the 1972 draft:⁶² the urgent need for requisition and its temporary character.⁶³
- 2534** However, from the humanitarian point of view, the solution which was adopted seems to be an excellent one, since it best serves the general interests of the civilian population, while preserving the specific interests of civil defence, provided of course that it is applied in good faith.

Paragraph 6

- 2535** The specific mention of shelters provided for the use of the civilian population,⁶⁴ which was not made in the 1973 draft, was introduced by an amendment, though this was limited to the mention of “public shelters”.⁶⁵ One delegation, supporting this proposal, considered that this prohibition on diverting shelters from their proper use or requisitioning them, should be extended to private shelters in the interests of the civilian population.⁶⁶
- 2536** This suggestion was followed and the prohibition on diverting (the expression “from their proper use” being understood) and on requisitioning shelters was extended:
- on the one hand, to all shelters made available to the civilian population, i.e., basically all public shelters, irrespective of any assessment of whether they are needed;

⁶⁰ Cf. Fourth Convention, Art. 50, para. 1.

⁶¹ Cf. *supra*, p. 755.

⁶² Cf. *CE 1972, Report*, Vol. I, p. 167 (Art. 69, para. 3, of the ICRC draft and of the draft of the Sub-Commission).

⁶³ In this sense, cf. *O.R. XII*, p. 123, CDDH/II/SR.65, para. 35.

⁶⁴ On these, cf. commentary Art. 61, sub-para. (a)(iii), *supra*, pp. 723-724.

⁶⁵ Cf. *O.R. III*, p. 254, CDDH/II/307.

⁶⁶ Cf. *O.R. XII*, p. 123, CDDH/II/SR.65, para. 34.

- on the other hand, to all other shelters, including private shelters, this time depending on a criterion of need. In this case, moreover, the *need* should be evaluated according to the way “need” was defined prior to the occupation, and their requisition may not be justified, for example, by the argument that the Occupying Power considers all civil defence efforts superfluous. Thus requisition should remain exceptional: it could apply, for example, to a private individual who had built himself an underground palace.

2537 Moreover, if there were no shelters, or virtually no shelters before the occupation, and the need for shelters arose, particularly because of air raids, the general responsibility of the Occupying Power towards the population of occupied territory requires that a solution be found. This is where the concept of shelters “needed” by the civilian population becomes significant, as every adequate building, particularly underground, should be assigned to shelter the population as a priority. Finally, it should be noted that a separate paragraph has been devoted to shelters because, as we have seen, they do not necessarily come under the responsibility of civil defence organizations, and therefore if all shelters are to be covered, it is necessary to distinguish them from the buildings and *matériel* belonging to such organizations.⁶⁷

Y.S.

⁶⁷ Cf. also Art. 58, sub-para. (c).

Protocol I

Article 64 – Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and *matériel* of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.
2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.
3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

Documentary references

Official Records

O.R. I, Part I, pp. 154-155. Part III, p. 19 (Art. 57). *O.R.* III, pp. 259-262. *O.R.* VI, p. 229, CDDH/SR.42, Annex (Indonesia). *O.R.* XII, pp. 60-62, CDDH/II/SR.60, paras. 36 and 47-48; p. 70, CDDH/II/SR.61, para. 5; pp. 127-130, CDDH/II/SR.66, paras. 2-24; pp. 328-329, CDDH/II/SR.86, paras. 3 and 9-13; pp. 383-390, CDDH/II/SR.92, paras. 1-49; p. 481, CDDH/II/SR.100, para. 60. *O.R.* XIII, pp. 311-314, CDDH/235/Rev.1, Annex II, paras. 14-17; pp. 369-370, CDDH/406/Rev.1, paras. 50-53; p. 404, *id.*, Annex (Art. 57); p. 430, CDDH/II/439/Rev.1 (Art. 57); p. 448, *id.* (Observations Art. 57).

Other references

CE 1972, *Commentaries*, Part I, pp. 141-142 (Art. 70). CE 1972, *Report*, vol. I, p. 168, paras. 3.325-3.332; p. 171, Annex (Art. 70); vol. II, p. 11 (Art. 70); pp. 91-95, CE/COM III/OPC 3, 14 and 17. *Commentary Drafts*, p. 74 (Art. 57).

Commentary**Paragraph 1 – Civilian civil defence organizations of States not Parties to the conflict**

2538 Paragraph 1 deals with civilian civil defence organizations of States not Parties to the conflict which perform civil defence tasks in the territory of a Party to the conflict.

2539 It is similar to Article 27 of the First Convention, which concerns *medical* personnel and units in comparable circumstances.¹

First sentence

2540 It follows from this sentence that:

- only personnel and *matériel* of *civilian* civil defence organizations may be sent into the territory of a Party to the conflict. This therefore excludes support provided on an individual basis and any that might be provided by *military* civil defence organizations;
- *matériel*² and personnel of such organizations cannot be sent into the territory of the Party to the conflict for which they are intended without the consent of the latter;
- that Party *controls* the use of such *matériel* and the work carried out by such personnel which are thus placed *under its responsibility*: this is important particularly in case of abuse.

2541 Moreover, it is indicated that such personnel and *matériel* may come from any State not Party to the conflict, whether or not it enjoys the status of neutrality or of permanent neutrality.³

¹ In this sense, *cf.* O.R. XII, p. 60, CDDH/II/SR.60, para. 36, which emphasizes, moreover, the usefulness of assistance from neutral countries “especially in conflicts taking place in countries which did not possess civil defence services”. *Cf.* also *ibid.*, p. 127, CDDH/II/SR.66, para. 2.

² On the meaning to be given to this word, *cf.* commentary Art. 61, sub-para. (d), *supra*, p. 736.

³ On the meaning of the expression “neutral and other States not Parties to the conflict”, *cf.* commentary Art. 2, sub-para. (c), *supra*, p. 61. In addition one delegation expressed its hesitation because it was afraid of abuses if this were made possible for all States not Parties to the conflict, and not only those enjoying permanent neutrality: *cf.* O.R. VI, p. 229, CDDH/SR.42, Annex (Indonesia, Art. 57).

2542 On the other hand, it is not specifically stated, though it must be assumed that:

- such personnel act with the consent of their own State. This is explicitly mentioned in Article 27 of the First Convention with regard to a similar situation and follows, moreover, from the fact that civil defence organizations must be set up, or authorized to perform their tasks, by the authorities of the Party to which they belong;
- such personnel and *matériel* are exclusively assigned to, and used for civil defence tasks: this follows from the definition of civil defence organizations.⁴

2543 The protection accorded the personnel and *matériel* covered by this paragraph is the same as that which they enjoy when performing their tasks in their own territory: this is achieved simply by including the reference to the relevant articles, i.e., Articles 62 (*General protection*), 63 (*Civil defence in occupied territories*), 65 (*Cessation of protection*) and 66 (*Identification*). However, a detailed examination of these articles reveals that certain points require clarification:

- while civil defence organizations are “entitled to perform their civil defence tasks” as provided in Article 62 (*General protection*), paragraph 1, this right is nevertheless more restricted for an organization acting in territory of a State which is not its own: the Party giving its consent may withdraw such consent without having to give a reason for its decision, with the possible exception of occupied territories;⁵
- Article 62 (*General protection*), paragraph 2, regarding appeals to civilians who are not members of civil defence organizations, does not in principle concern civilians of a State not Party to the conflict;
- In accordance with Article 63 (*Civil defence in occupied territories*), paragraphs 4 and 5, the Occupying Power cannot requisition *matériel* of civil defence organizations of States not Parties to the conflict. If such *matériel* is no longer necessary to perform civil defence tasks in occupied territories, it should be returned to the State from which it came.

Second sentence

2544 The question which was raised here is whether the adverse Party to that receiving assistance from civil defence organizations of States not Parties to the conflict should give its consent to such assistance, or whether it should only be informed of it.⁶

2545 Some were in favour of “the agreement of all conflicting Parties concerned” with a view to ensuring the personnel concerned “the fullest possible protection”.⁷

⁴ Cf. commentary Art. 61, sub-para. (b), *supra*, pp. 732-733. Cf., in addition, commentary on the fourth sentence of this paragraph, *infra*, p. 763.

⁵ Cf. commentary para. 3, *infra*, pp. 766-767.

⁶ Cf. O.R. XII, p. 130, CDDH/II/SR.66, para. 19.

⁷ Cf. O.R. III, p. 260, CDDH/II/349, and O.R. XII, p. 70, CDDH/II/SR.61, para. 5.

- 2546 However, the case for a need to obtain the consent of the adverse Party was defeated, particularly because of the difficulty of obtaining it and the delays this would cause, and because it “would confer upon one Party powers over territory which did not belong to it”.⁸ This last point of view prevailed.
- 2547 Furthermore, the sentence finally adopted requires clarification on two points: is it the Party receiving the assistance or the State granting it which must give the notification? In submitting the draft of Article 57 the ICRC expert had indicated that there was an obligation to do so for the State from which the assistance came.⁹ This approach was justified by the fact that in the draft text notification was a condition of protection.¹⁰
- 2548 In the text which was finally adopted this is clearly not the case, since notification must be given “as soon as possible”. This leads to the conclusion that the *obligation* to give notification is imposed on the benefitting State even though it is also for obvious reasons in the interests of the State sending the assistance to transmit that information itself: on the one hand, to increase the safety of the personnel it has sent, and on the other, to maintain good relations with the Party which is to receive the notification.
- 2549 If necessary, notification by the benefitting Party can be given through the intermediary of the Protecting Power, its substitute or an impartial humanitarian organization.
- 2550 The notification must be given to every adverse Party “concerned”. In general an adverse Party is concerned *a priori* from the time that it is involved in direct hostilities with the benefitting Party.
- 2551 Thus it is only in a large-scale conflict involving several States that there may be adverse Parties which are not concerned, e.g., because they have no direct contact with the benefitting Party.

Third sentence

- 2552 This sentence repeats the concept expressed in Article 27, paragraph 3, of the First Convention. It was taken with a slight textual modification from the 1973 draft. As stated in the commentary on Article 27 mentioned above, this sentence is intended to prevent the assistance concerned from being “wrongly interpreted” and “the subject of criticism based on ignorance or malevolence”.¹¹
- 2553 The phrase “interference in the conflict” means “participation in hostilities” or “a breach of neutrality”.¹²
- 2554 The proposal presented to the Conference of Government Experts to replace the expression “interference in the conflict” with “hostile act”¹³ was not discussed.

⁸ Cf. O.R. XII, p. 129, CDDH/II/SR.66, paras. 15-16.

⁹ *Ibid.*, p. 128, para. 3.

¹⁰ Cf. draft Art. 57, para. 1.

¹¹ *Commentary I*, p. 233.

¹² *Ibid.*, p. 232.

¹³ Cf. CE 1972, *Report*, Vol. I, p. 168, par. 3.331; Vol. II, p. 94, CE/COM III/OPC 14.

2555 In fact, a treaty affects only the *legal* relations between States Parties to that treaty, and to that extent the activity concerned in no way modifies the relations between the Party from which the assistance comes and the adverse Party of the benefitting State.

Fourth sentence

2556 This sentence, which supplements the preceding sentence was added to take into account a proposal to replace the third sentence by: “in no circumstances shall this activity be of such a nature as to constitute interference in the conflict”.¹⁴ This proposal fundamentally altered the preceding sentence,¹⁵ in that it implied that civil defence activities *could* be interference in the conflict, and that precautions should always be taken to ensure that they were not. The adoption of such a provision would have rendered any civil defence activity undertaken by a State not Party to the conflict very risky.

2557 The compromise which was finally achieved therefore consisted of adding the sentence under consideration here to the third sentence, which could then be retained in its original form.¹⁶

2558 The fourth sentence clarifies the preceding sentence, though without diminishing its scope. In other words, if, for one reason or another, the civil defence activity concerned were carried out without due regard to “the security interests of the Parties to the conflict concerned”, this could still not be termed interference in the conflict. In fact, it is only a recommendation.¹⁷

2559 However, there is a limit: the activity must be *civil defence activity*. In this respect great care should be taken to ensure in particular that personnel of civil defence organizations of States not Parties to the conflict are only assigned to tasks which manifestly belong to civil defence and which do not entail any risk of such personnel getting involved in performing other tasks.¹⁸

2560 In this context the expression “Parties to the conflict concerned” refers to the adverse Parties of the benefitting Party. In fact, the interests of the benefitting Party are ensured by the fact that the activities are placed under its control – so that, for example, it can prevent access of the personnel concerned to areas containing strategic objectives.

Paragraph 2 – International co-ordination

2561 This paragraph lays down the principle of international co-ordination of civil defence actions and of the protection of international civil defence organizations.

¹⁴ Cf. *O.R.* XII, p. 385, CDDH/II/SR.92, para. 16.

¹⁵ In this sense, cf. *ibid.*, pp. 386-387, paras. 24-27.

¹⁶ On this subject, cf. *O.R.* XIII, p. 374, CDDH/406/Rev.1, para. 51; *O.R.* XII, pp. 385-389, CDDH/II/SR.92, paras. 16-44.

¹⁷ In this sense, cf. *O.R.* XII, p. 389, CDDH/II/SR.92, paras. 42-44.

¹⁸ On this subject, cf. commentary Art. 61, sub-para. (b), *supra*, pp. 732-735.

These two things should be distinguished, however, since co-ordination may take place even in the absence of international organizations.

First sentence

- 2562 Although protection of international organizations was provided for in the 1973 draft, the question of co-ordination had not been broached. This concept was introduced by Committee II. It was the result of a compromise,¹⁹ as some were afraid to grant international civil defence organizations the power to co-ordinate actions. For them, “relief actions could not be compared with civil defence actions. The latter might constitute interference in the conflict”.²⁰
- 2563 This point of view was contested by others who considered that “there were [...] no grounds for any misgivings about the scope of the aid envisaged”.²¹
- 2564 Finally, international co-ordination of civil defence activities is only *recommended* (in contrast with the international co-ordination of relief actions²²) to Parties receiving assistance and those providing it, if there is reason to do so. In other words, it is admitted that there are cases in which co-ordination is pointless, particularly when only one State supplies aid to a Party to the conflict. In addition, it is agreed that when co-ordination is useful, i.e., particularly if the aid comes from various different sources, it should not be *imposed* upon the Parties concerned.
- 2565 Ideally co-ordination should be carried out, on the one hand, between those providing aid, so as to deal with all the needs of a particular conflict as a whole and avoid overlapping, and on the other hand, in each benefitting Party and under the responsibility of the latter, in order to organize all the activities coherently, taking into account the respective skills and specialized knowledge of the various organizations providing aid.²³

Second sentence

- 2566 The reference to international organizations led to some discussion, on the one hand, because of the distrust felt by some with regard to co-ordination, as seen above, and on the other, because of the lack of specialized organizations capable of ensuring such co-ordination. The reference was introduced in the 1973 draft from a concern to provide for the future.²⁴ In fact, an international organization does already exist: the International Civil Defence Organization (ICDO). The observer for the ICDO indicated in Committee II that his organization “had been seeking to promote the organization by the countries in a given geographical

¹⁹ Cf. O.R. XIII, p. 370, CDDH/406/Rev.1, para. 51.

²⁰ Cf. O.R. XII, p. 387, CDDH/II/SR.92, para. 28.

²¹ *Ibid.*, para. 29.

²² Cf. Art. 70, para. 5.

²³ Cf. also commentary Art. 70, para. 5, *infra*, p. 829.

²⁴ Cf. O.R. XII, p. 128, CDDH/II/SR.66, para. 4.

region of civil defence centres capable of intervening in the event of natural disasters in peacetime”, but that it did not “possess [...] civil defence equipment”.²⁵ The expectation that certain bodies already set up in peacetime would be used in future in times of armed conflict, was also raised as an argument in favour of referring to such organizations.²⁶

2567 The meaning of the expression “in such cases” at the beginning of the sentence is not quite clear. The question is whether the provisions of this Chapter apply to relevant organizations whenever there are matters to be co-ordinated (i.e., “when appropriate”), or only when the Parties concerned *effectively* facilitate co-ordination. In fact, the apparently automatic application of the second sentence once the conditions of the first sentence are fulfilled, is deceptive. As there is only a recommendation to facilitate international co-ordination, there cannot be an obligation to accept relevant international organizations. Thus this provision simply means that if such organizations are accepted – a decision which rests solely with the benefitting State²⁷ – they must be protected in accordance with this Chapter.

2568 Thus, apart from the ICDO to the extent that it is operational, “relevant international organizations” comprise organizations which might be created in the future. Although some other international organizations, both governmental and non-governmental organizations, have already performed tasks which might be considered civil defence tasks, particularly in the field of evacuation, it should not be forgotten that the protection of this Chapter is confined to organizations assigned *exclusively* to such tasks, which therefore eliminates these organizations.

2569 The word “relevant” is used here in the sense of being “specialized in the field”. The French text uses the word “compétent”, but, as the English version shows, this is not intended to give any value judgment and is not used as the opposite of the term “incompétent”.

2570 Moreover, it is self-evident that the organizations concerned must be civilian organizations.²⁸

2571 The reference to “the provisions of this Chapter” is imprecise. What was said with regard to organizations of States not Parties to the conflict in respect of the reference to Articles 62 (*General protection*), 63 (*Civil defence in occupied territories*)²⁹, 65 (*Cessation of protection*) and 66 (*Identification*) also applies here *mutatis mutandis*.

2572 Incidentally, as the organizations under consideration are necessarily civilian, Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*) cannot apply.

²⁵ *Ibid.*, p. 62, CDDH/II/SR.60, para. 48.

²⁶ *Ibid.*, p. 384, CDDH/II/SR.92, paras. 5-8.

²⁷ In this sense, *cf. ibid.*, p. 385, para. 15.

²⁸ *Ibid.*

²⁹ *Cf.* commentary para. 1, first sentence, *supra*, pp. 747-749.

Paragraph 3

- 2573** The object of Article 63 (*Civil defence in occupied territories*) is basically to determine the relationship between the Occupying Power and the civilian civil defence organizations in occupied territory. Therefore it does not clearly lay down the responsibility which falls upon the Occupying Power vis-à-vis the civilian population for ensuring that the necessary civil defence tasks are effectively performed.
- 2574** In fact, this paragraph highlights this responsibility: it imposes on the Occupying Power the obligation to accept aid from outside if it cannot “ensure the adequate performance of civil defence tasks”, which therefore implies the obligation to ensure that such tasks are performed one way or the other.
- 2575** This paragraph was not contained in the 1973 draft. It was proposed in an amendment³⁰ and adopted with only some minor drafting modifications.
- 2576** As the sponsor of this proposal stated, it was “designed to ensure that an Occupying Power could exclude or restrict the civil defence activities” of the organizations concerned only if it could “ensure the adequate performance of those activities itself”.³¹
- 2577** However, this apparently quite strict obligation requires some clarification.
- 2578** First, it only arises when the Occupying Power cannot “ensure the adequate performance of civil defence tasks”, either itself or through existing means available in occupied territory which under Article 63 (*Civil defence in occupied territories*) should stay in operation.
- 2579** This is comparable to the obligation that it has to accept relief actions if it is not able itself to ensure the supplying of objects indispensable for the survival of the civilian population.³² However, it must be admitted that it is difficult to establish exactly what the obligation entails, even more so than in the case of relief actions. In any case it seems clear that there could only be an *obligation* to accept aid in extreme cases, such as the evident inability to evacuate flood victims, to get fires under control or to rescue victims of air raids or earthquakes from under the rubble.
- 2580** Does a State not Party to the conflict or an international co-ordinating organization³³, in such cases, have a right to *impose* aid, even against the wishes of the Occupying Power? It would have been unrealistic to claim that this was the case, and when it adopted its report, Committee II also adopted the following commentary:

³⁰ Cf. O.R. III, p. 259, CDDH/II/324 (Art. 57, para. 2).

³¹ O.R. XII, p. 129, CDDH/II/SR.66, para. 9.

³² Cf. particularly Art. 59, Fourth Convention, and Art. 69, para. 2, of the Protocol.

³³ The reference here to “international co-ordinating organizations” rather than to “relevant international organizations”, as in the preceding paragraph, is not intended to imply different organizations. The organizations referred to here are basically those mentioned in paragraph 2, which do not as yet really exist in practice.

“It is understood that the activities of civil defence bodies of neutral or other States not Parties to the conflict or of international co-ordinating organizations in occupied territories are subject to the consent and control of the Occupying Power.”³⁴

2581 This statement is only apparently in contradiction with the text of the paragraph itself. In fact, there is indeed an obligation on the Occupying Power to ensure that civil defence tasks are performed adequately, if necessary by outside aid: if this is needed, the Protecting Power or its substitute will remind the Occupying Power of it. However, methods of implementation of this obligation cannot be prescribed to the Occupying Power, i.e., which State or States or organizations it should choose to provide the aid required. This involves compelling security considerations which it would not have been wise to ignore.

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³⁴ *O.R. XIII*, p. 370, CDDH/406/Rev.1, para. 53.

Protocol I

Article 65 – Cessation of protection

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and *matériel* are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.
2. The following shall not be considered as acts harmful to the enemy:
 - (a) that civil defence tasks are carried out under the direction or control of military authorities;
 - (b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
 - (c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are *hors de combat*.
3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.
4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

Documentary references

Official Records

O.R. I, Part I, p. 155; Part III, pp. 19-20 (Art. 58). *O.R.* III, pp. 265-269. *O.R.* VI, p. 216, CDDH/SR.42; paras. 72-73; pp. 222-223, *id.*, Annex (Australia); pp. 229-230 (Indonesia, Israel); p. 237 (USSR). *O.R.* XI, p. 580, CDDH/II/SR.51, para. 14; p. 583, para. 29. *O.R.* XII, pp. 60-67, CDDH/II/SR.60, paras. 37, 55,

63 and 66-67; pp. 70-80, CDDH/II/SR.61, paras. 6-7, 21, 29, 43, 50, 54 and 57-58; pp. 131-137, CDDH/II/SR.66, paras. 32-62; pp. 139-142, CDDH/II/SR.67, paras. 1-16; p. 307, CDDH/II/SR.83, para. 16; pp. 420-424, CDDH/II/SR.95, paras. 50-82; pp. 427-430, CDDH/II/SR.96, paras. 1-22; pp. 481-482, CDDH/II/SR.100, paras. 61-72. *O.R.* XIII, pp. 370-373, CDDH/406/Rev.1, paras. 54-58; p. 405, *id.*, Annex (Art. 58); pp. 435-437, CDDH/II/439/Rev.1/Add.1.

Other references

Remark: The general references to civil defence are cited with Article 61. Commentary Drafts, p. 75 (Art. 58).

Commentary

General remarks

- 2582** This article aims at establishing the exact limits of the right to protection. In this respect it is very similar to Article 13 of the Protocol (*Discontinuance of protection of civilian medical units*), as well as to Article 22 of the First Convention, Article 35 of the Second Convention, and Article 19 of the Fourth Convention.
- 2583** Like those articles, Article 65 attempts to achieve this aim by setting out a list of acts which are deemed to be not harmful to the enemy. This list, which is not exhaustive,¹ shows that although the system used in Article 65 is similar to that of the above-mentioned articles, the problems to be solved are very different.
- 2584** Paragraph 2 gives three examples, while a whole paragraph is devoted to each of two particularly delicate problems, namely, the bearing of arms by civil defence personnel (paragraph 3) and the organizational structures that civil defence organizations are allowed to take (paragraph 4).

Paragraph 1 – Conditions and modalities

First sentence

- 2585** The persons and objects entitled to protection, as well as the right itself, were examined above.²

¹ In this sense, *cf.* in particular *O.R.* VI, p. 230, CDDH/SR.42, Annex (Israel). In the same sense regarding Article 13, *cf.* commentary Art. 13, *supra*, p. 173; with regard to the above-mentioned articles of the Conventions, *cf.* in particular *Commentary I*, p. 202 (Art. 22).

² *Cf.* commentary Art. 61, sub-paras. (b), (c) and (d), *supra*, pp. 732-736, and Art. 62, *supra*, p. 737.

- 2586 This right to protection “shall not cease” unless one necessary condition is met. The negative turn of phrase should be noted: this reveals that such a grave measure as the deprivation of protection must retain an exceptional character. Furthermore, even if such measure is taken, its effect will be suspended until a warning has been given and a time-limit has elapsed, giving the recipient of the warning time to obey.³
- 2587 The condition laid down in this provision is that the persons concerned must have committed, or the objects must have been used to commit “acts harmful to the enemy”.
- 2588 This expression was contested by some who would have preferred the term “hostile”, because of its “more specific” character.⁴ It is true that a harmful act can be committed unintentionally and the word “hostile” would have had the advantage of indicating *intent* to harm. However, Parties engaged in a conflict cannot be expected to allow an act harmful to them to continue indefinitely, even if there is no intent to harm. For this reason, and for the sake of harmonization of the terminology with the Conventions, the suggestion to adopt the expression used there and in Article 13 (*Discontinuance of protection of civilian medical units*) was followed.⁵
- 2589 The meaning of the expression “harmful act” has been examined before:⁶ the term is further clarified in this context by listing acts which are *not considered as acts harmful* to the enemy.
- 2590 Harmful acts only result in the cessation of protection if they are committed outside the “proper tasks” of civil defence. Article 13 (*Discontinuance of protection of civilian medical units*) uses the expression “humanitarian function”. The greater precision of the expression in this article can be explained by the fact that civil defence has a more clearly defined role to play and serves only the civilian population, while medical units are intended for assisting all the wounded, whether civilian or military. Moreover, as civil defence has been defined by listing all the tasks that it covers precisely and limitatively, it would have been unduly vague to refer only to the term “humanitarian function”.
- 2591 The fact remains that in the context of Article 65, as in that of Article 13 (*Discontinuance of protection of civilian medical units*), it will be exceptional for acts harmful to the enemy to be committed in the context of humanitarian activities, and then only incidentally.⁷

Second sentence

- 2592 This sentence is the same as the second sentence of Article 13 (*Discontinuance of protection of civilian medical units*), paragraph 1, which was examined above.⁸

³ On this subject, cf. commentary Art. 13, para. 1, *supra*, pp. 175-176.

⁴ Cf. O.R. III, p. 265, CDDH/II/70 and O.R. XII, p. 132, CDDH/II/SR.66, para. 34, and p. 141, CDDH/II/SR.67, para. 9.

⁵ Cf. O.R. XII, p. 136, CDDH/II/SR.66, para. 52.

⁶ Cf. commentary Art. 13, para. 1, *supra*, pp. 174-175.

⁷ On this subject, cf. commentary Art. 13, *supra*, p. 175.

⁸ *Ibid.*

Paragraph 2 – Acts not harmful to the enemy

2593 This paragraph contains the first three examples of acts which should not be considered as acts harmful to the enemy. Two further examples are given in paragraphs 3 and 4, respectively.

Sub-paragraph (a)

2594 The draft referred more briefly to civil defence personnel receiving instructions from military authorities. This question was debated at some length in Committee II, since, as stated in that body, “it was important, in the interests of the personnel involved, to state to what degree they might be permitted to be involved with a military authority”.⁹

2595 Some delegates, insisting that civil defence should not *be dependent* on military authorities,¹⁰ considered that “it was undesirable to ensure protection for civil defence personnel taking orders from the military authorities”.¹¹

2596 The deletion of this example was even formally proposed in an amendment.¹²

2597 However, the possibility for military authorities to give instructions to civil defence personnel in some circumstances was defended by many other delegates.¹³ The basic argument of those who supported this point of view was the need to co-ordinate the activities of civil defence personnel with those of the military, particularly in areas of military operations where “it was essential to make it clear that on the battlefield the military commander was in charge”.¹⁴

2598 Thus the importance of having a right to protection in cases of this type was emphasized,¹⁵ and this point of view prevailed.

2599 However, such instructions and supervision should only take place exceptionally, for if they were permanent, it would amount to genuine *dependence*, and the civilian character of the organizations concerned here would be cast in doubt. This distinction between “receiving instructions” from, and being “responsible to”, military authorities was actually brought out explicitly in the debate: “the idea of dependence evoked an element of permanence, which was absent from the idea of receiving instructions”.¹⁶

⁹ O.R. XI, p. 578, CDDH/II/SR.51, para. 6.

¹⁰ Cf. particularly O.R. XII, p. 67, CDDH/II/SR.60, para. 67; p. 133, CDDH/II/SR.66, para. 42.

¹¹ *Ibid.*, p. 133, para. 43.

¹² Cf. O.R. III, p. 267, CDDH/II/347.

¹³ Cf. particularly O.R. XII, p. 137, CDDH/II/SR.66, para. 58; p. 139, CDDH/II/SR.67, para. 1; p. 140, paras. 3 and 7.

¹⁴ Cf. *ibid.*, p. 139, para. 1.

¹⁵ Cf. *ibid.*, p. 140, para. 7.

¹⁶ Cf. *ibid.*, pp. 141-142, para. 11. In the same sense, cf. in addition commentary para. 4, *infra*, p. 778.

Sub-paragraph (b)

- 2600 Co-operation of civil defence personnel with military personnel was already provided for in the 1973 draft. On the other hand, attachment of military personnel to civilian civil defence organizations was only added during the Diplomatic Conference.
- 2601 In general the discussion on the question of co-operation raised the same arguments as those put forward with regard to sub-paragraph (a).
- 2602 Some considered that the “exceptional” character of such co-operation should be specified, as otherwise the protection granted to civil defence personnel might become “illusory”.¹⁷ In this sense an amendment explicitly proposed to authorize co-operation only “as an exceptional measure”, on the one hand, and only “insofar as such co-operation is indispensable for the protection of the civilian population”, on the other.¹⁸
- 2603 Nevertheless, an obligation to ensure that co-operation would remain an exceptional step was rejected,¹⁹ and this idea was dropped. As regards the condition that such co-operation should be indispensable for the protection of the civilian population, this was not adopted either.
- 2604 However, it must not be forgotten that by its very definition, civil defence consists of tasks “intended to protect the civilian population”, and consequently co-operation could not lawfully be envisaged otherwise.
- 2605 The possibility of assigning military personnel to civil defence organizations was introduced in accordance with an amendment.²⁰ The intention of this amendment was to permit civilian organizations to benefit from the technical expertise of certain specialists difficult to find in time of armed conflict, except in the ranks of military personnel, without losing their civilian character as a result.²¹
- 2606 On the other hand, a proposal to allow attachment of “military units”²² was rejected after a vote²³ particularly because this would “completely modify the intent of the paragraph” and cast into doubt the civilian character of these civil defence organizations.²⁴
- 2607 Finally, it should be noted that military personnel assigned to civil defence organizations, while of course losing their status of combatants, nevertheless benefit from prisoner-of-war status if they fall into the power of the adverse Party.²⁵

¹⁷ Cf. *O.R.* XII, p. 66, CDDH/II/SR.60, para. 63, and p. 134, CDDH/II/SR.66, para. 43.

¹⁸ Cf. *O.R.* III, p. 267, CDDH/II/347.

¹⁹ Cf. in particular *O.R.* XII, p. 140, CDDH/II/SR.67, para. 3.

²⁰ Cf. *O.R.* III, pp. 268-269, CDDH/II/406 and Add. I.

²¹ In this sense, cf. in particular *O.R.* XII, p. 421, CDDH/II/SR.95, para. 58. In the commentary adopted with the report Committee II, moreover, indicated that only a “relatively small number” of members of the armed forces were concerned: *O.R.* XIII, p. 373, CDDH/406/Rev.1, para. 58.

²² Cf. *O.R.* XII, p. 420, CDDH/II/SR.95, para. 54.

²³ *Ibid.*, p. 421, para. 60.

²⁴ *Ibid.*, pp. 420-421, paras. 55-59.

²⁵ On this subject, cf. Art. 67, paras. 1 and 2. Cf. in addition commentary para. 3, *infra*, pp. 777-778.

Sub-paragraph (c)

- 2608 As noted above, civil defence by definition, concerned with tasks intended to protect the *civilian population*.
- 2609 Therefore tasks with the object of assisting military victims do not fall under this definition and are not covered by this Chapter.
- 2610 However, it was important to determine to what extent civil defence personnel could assist military victims without losing their right to protection.
- 2611 The 1973 draft stated bluntly that carrying out “their tasks for the benefit of military victims” should not be considered to be harmful to the enemy.²⁶
- 2612 Although this clause was supported by one delegate,²⁷ most of the proposals made with regard to this subject during the Conference were concerned with restricting this possibility.²⁸
- 2613 The wording as adopted very appropriately uses the term “incidentally”. This means that if civil defence personnel, during activities undertaken to protect the civilian population, happen to come across military victims, they may assist them at the same time, without losing their right to protection. As regards the wounded, medical personnel of civil defence organizations even have a duty to assist wounded soldiers they find incidentally in the same way as civilians.²⁹
- 2614 The addition of the expression “particularly those who are *hors de combat*” is the result of an amendment.³⁰ This may seem strange at first sight, insofar as a member of the armed forces can in principle *only* be a victim if he is *hors de combat*, whether he surrenders and becomes a prisoner or whether he is dead, wounded, sick or shipwrecked.
- 2615 However, it is a sensible addition as some civil defence tasks can effectively benefit members of the armed forces who are not *hors de combat*. For example, the action of civil defence personnel fighting a fire in a town could incidentally be of benefit to some soldiers who happen to be on leave in that town. Thus it was altogether appropriate to specify that such actions indisputably fall under the legitimate scope of civil defence.

Paragraph 3 – The bearing of arms

- 2616 The question of civil defence personnel bearing arms was the subject of heated discussion in Committee II.
- 2617 The draft allowed the bearing of “small-arms” for civil defence personnel, but restricted this to two purposes, namely, maintaining order in a stricken area, and for self-defence. Very divergent opinions were expressed on this subject.

²⁶ Cf. draft Art. 58, para. 2(d).

²⁷ Cf. O.R. XII, p. 137, CDDH/II/SR.66, para. 61.

²⁸ Cf. in particular O.R. III, p. 265, CDDH/II/326; pp. 268-269, CDDH/II/406 and Add.1; O.R. XII, pp. 134-135, CDDH/II/SR.66, para. 47; p. 139, CDDH/II/SR.67, para. 1; p. 140, para. 3; p. 142, para. 13.

²⁹ On this subject, cf. in particular Art. 10.

³⁰ Cf. O.R. III, pp. 265-266, CDDH/II/326.

- 2618 Some wished to completely prohibit civil defence personnel from bearing arms, as they considered this to be more dangerous than useful. In their view the military will be less inclined to respect personnel they know to be armed and whom they therefore have reason to fear.³¹
- 2619 Others considered that bearing arms was useful, if not necessary. However, it was important to establish limits regarding the situations in which arms may be borne, the purposes to be served by bearing arms and the types of arms permitted.
- 2620 As regards the situations, the idea of prohibiting arms in areas of military operations was largely supported.³² However, other delegates considered that this latitude of allowing arms to be carried in some areas and not in others was difficult to apply. For that matter, one delegation asserted that civil defence personnel might just as well be made to contribute to maintain order in combat zones.³³
- 2621 In the end a compromise was achieved by defining the type of weapons authorized in such areas.
- 2622 In addition, the fact that civil defence personnel are not entitled to bear arms if they have received an order to disarm, was also raised in the context of this paragraph.³⁴ However, this question, which could only arise in case of occupation, was dealt with by Article 63 (*Civil defence in occupied territories*), paragraph 3.³⁵
- 2623 With regard to the purpose of bearing arms, some wished to adopt a very general reference: “for the purpose of safeguarding life and property”.³⁶ Others would have preferred a reference based on Article 13 (*Discontinuance of protection of civilian medical units*), paragraph 2(a), i.e., confining the purpose of bearing arms to “ensuring their own defence or that of the civilian population for which they are responsible”.³⁷ The idea of going beyond the objective of maintaining order, and likewise permitting weapons for “guarding installations vital for the survival of the civilian population” was also put forward.³⁸ In the end, after reconsideration, it was decided to return to the functions given for bearing arms in the 1973 draft, with a slight drafting modification. However, as to the purpose of maintaining order, it should be borne in mind that this is an auxiliary function only, to be exercised on a temporary basis.³⁹

³¹ Cf. particularly *O.R. XII*, p. 64, CDDH/II/SR.60, para. 55; p. 74, CDDH/II/SR.61, para. 29; p. 79, para. 54; p. 140, CDDH/II/SR.67, paras. 8 and 10.

³² Cf. *O.R. III*, pp. 265-266, CDDH/II/320 and 326; *O.R. XII*, pp. 72-73, CDDH/II/SR.61, para. 21; p. 79, para. 57; p. 132, CDDH/II/SR.66, para. 37; p. 140, CDDH/II/SR.67, para. 6.

³³ Cf. in particular *O.R. XII*, p. 137, CDDH/II/SR.66, para. 60; p. 142, CDDH/II/SR.67, para. 12.

³⁴ Cf. *O.R. III*, pp. 265-266, CDDH/II/326; *O.R. XII*, p. 132, CDDH/II/SR.66, para. 37.

³⁵ On this subject, cf. *supra*, p. 754.

³⁶ Cf. *O.R. III*, p. 266, CDDH/II/338.

³⁷ Cf. *ibid.*, p. 267, CDDH/II/347; *O.R. XII*, pp. 66-67, CDDH/II/SR.60, para. 66.

³⁸ Cf. *O.R. XII*, p. 78, CDDH/II/SR.61, para. 50.

³⁹ Cf. commentary Art. 61, sub-para. (a)(xi), *supra*, pp. 728-729.

2624 As regards the bearing of arms for the purpose of self-defence, this must be understood in the light of the commentary adopted on this subject by Committee II in its report,⁴⁰ which reads as follows:

“On the question of self-defence, it is understood that civil defence personnel may be armed for self-defence against marauders or other criminal individuals or groups. They may not engage in combat against the adverse Party and may not use force to resist capture. If, however, they are unlawfully attacked by individual members of the adverse Party’s forces, they may use their weapons in self-defence after having made a reasonable effort to identify themselves as civil defence personnel.”⁴¹

2625 Finally, as regards the type of weapons that are permitted, these are only “light individual weapons”, as for medical personnel.⁴² Moreover, it was specifically pointed out that the words “light individual weapons” should be interpreted as in Article 13.⁴³

2626 Working Group A on civil defence of Committee II decided not to give a definition of this expression.⁴⁴ However, one delegate submitted a definition to Committee II, indicating in his own words “what ‘light individual weapons’ were not, rather than what they were”.⁴⁵ This definition, “which was agreeable to a number of military experts of other delegations”,⁴⁶ constitutes a valuable contribution to the definition of this expression. It reads as follows:

“‘light individual weapons’ excludes fragmentation grenades and similar devices, as well as weapons which cannot be fully handled or fired by a single individual, and those basically intended for non-human targets”.⁴⁷

2627 The compromise between, on the one hand, the advocates of not permitting any weapons in any areas or circumstances, or only permitting weapons outside combat areas, and on the other, the advocates of permitting light individual weapons in all areas and circumstances, was resolved by the addition of two sentences to paragraph 3.

2628 The second sentence imposes a restriction in “areas where land fighting is taking place or is likely to take place”. The restriction is logically limited to land

⁴⁰ The commentary on paragraph 3 adopted by Committee II “constituted an agreed interpretation and as such was a ‘document related to the treaty’ within the meaning of Article 31 para. 2(b) of the Vienna Convention on the Law of Treaties (1969)”: *O.R.* XII, p. 420, CDDH/II/SR.95, para. 52. This commentary on paragraph 3 also comprises passages relating to other provisions of this paragraph which are examined below.

⁴¹ *O.R.* XIII, p. 372, CDDH/406/Rev.1, para. 58. This commentary itself led to a reaction from one delegation which feared that the possibility opened by the second sentence of this commentary “would subject civil defence personnel to even greater danger”: *cf. O.R.* VI, pp. 222-223, CDDH/SR.42, Annex (Australia).

⁴² *Cf.* commentary Art. 13, para. 2(a), *supra*, pp. 177-178.

⁴³ *Cf. O.R.* XIII, p. 372, CDDH/406/Rev.1, para. 58. *Cf.* in addition note 40, *supra*.

⁴⁴ *Cf. O.R.* XII, p. 421, CDDH/II/SR.95, para. 63.

⁴⁵ *Ibid.*

⁴⁶ *Cf. O.R.* XIII, p. 372, CDDH/406/Rev.1, para. 56. *Cf.* also *O.R.* XII, p. 422, CDDH/II/SR.95, paras. 64-68 and 70.

⁴⁷ *Cf. O.R.* XIII, p. 372, CDDH/406/Rev.1, para. 56; *cf.* also *O.R.* XII, pp. 421-422, CDDH/II/SR.95, paras. 63-65.

fighting, for it is indeed with respect to land forces that the weapons of civil defence personnel could pose a problem. However, neither the extent of the “areas” where land fighting is “taking place”, nor the way of judging whether such fighting is “likely to take place” in the near future, is defined. A large margin of judgment is thus left to those concerned with this provision. In fact, an objective appraisal reveals that what matters most is to determine the risk of contact with the enemy army, for it is during such contact that protection is essential and that the enemy’s trust in civil defence personnel could be shaken by such personnel being too heavily armed, which would anyway lead to confusion. For that matter, the purpose of the prescribed limitation is explicitly mentioned: it is “in order to assist in distinguishing between civil defence personnel and combatants”.

- 2629** Consequently the weapons of civil defence personnel in areas defined above must be restricted “to handguns, such as pistols or revolvers”, an expression which does not require comment. The question is whether the equipment of civil defence personnel could not have been limited to this type of weapons in all circumstances. In particular, the preference expressed by some delegates for the use of weapons “such as tear-gas grenades or the various non-lethal riot-control grenades used by the police”⁴⁸ for maintaining order led to the rejection of such a solution.
- 2630** The Parties to the conflict must take “the appropriate measures” to restrict the bearing of arms in such areas. For the measures to be effective in practice, this responsibility should be delegated to the authorities directly responsible for civil defence who should in turn entrust the local authorities with this, or be in a position to contact these authorities immediately.
- 2631** The rather vague description of the above-mentioned areas and the purpose of the prescribed restriction on bearing arms – i.e., to enhance the protection of civil defence personnel – made it necessary to specify that such a restriction was not a *condition* of protection in such areas. This is stated in the third sentence of the paragraph.
- 2632** Thus if civil defence personnel carry weapons other than handguns in such areas, they retain their right to respect and protection, provided of course that these are “light individual weapons”. Transportation of heavy weaponry would be considered as harmful to the enemy and would therefore result in the personnel concerned losing their right to protection.
- 2633** Thus the system applied in this paragraph is fairly similar to that of Article 26 (*Medical aircraft in contact or similar zones*). A risk is identified and those at risk are simply cautioned (Article 26 – *Medical aircraft in contact or similar zones*), or they are prohibited from taking the risk (Article 65), but if they do take it anyway, they nevertheless retain the right to protection.
- 2634** Two further clarifications were given by Committee II with regard to paragraph 3.⁴⁹ The expression “respected and protected” “means that the personnel must not knowingly be attacked or unnecessarily be prevented from discharging their proper functions”. In this respect it was correctly said that the interpretation of

⁴⁸ Cf. *ibid.*, p. 422, CDDH/II/SR.95, para. 64.

⁴⁹ Cf. O.R. XIII, p. 372, CDDH/406/Rev.1, para. 58. Cf. also note 40, *supra*, p. 776.

the term “respected and protected” given here applied only in this context.⁵⁰ Moreover:

“For members of the armed forces assigned⁵¹ to civil defence organizations, the last provision of paragraph 3 does not imply any change in their status as prisoners of war, if they fall into the hands of the adverse party.”

This applies, as we stated above, even though they clearly have lost their combatant status because of their being assigned to civil defence.⁵²

2635 In conclusion, it cannot be denied that paragraph 3 is characteristically a text of compromise, which means that it is rather difficult to apply. Several delegations expressed their fear in explanations of vote after the article was adopted by consensus in Committee II, regarding the efficacy of the protection accorded civil defence personnel if they are armed in combat areas.⁵³

2636 It is clear that bearing arms is something that is merely permitted; there is no obligation to do so, in combat areas or anywhere else. There is nothing that prevents Parties which do not wish their civil defence personnel to bear any arms, from stating so plainly.⁵⁴

Paragraph 4

2637 This paragraph was taken, with very slight drafting modifications, from the 1973 draft.

2638 As one delegate stated, it is justified in particular by the fact that in many countries members of civil defence are given ranks similar to those in the army; its provisions “might evoke military-type discipline and hierarchy, but in no case could that mean that civil defence bodies could be placed under the authority of the military”.⁵⁵ The question of the relationship between the military authorities and civil defence personnel is in fact dealt with in paragraph 2.

2639 Another delegate clearly explained the reason for allowing compulsory service: “provision for compulsory civilian service in civil defence units existed in many countries and was entirely divorced from compulsory military service”.⁵⁶

2640 In fact, therefore, this paragraph not only gives another situation which does not deprive personnel of the right to protection, but, more importantly, it recognizes the fact that in many States civil defence structures already in force are in accordance with the provisions of this Chapter.

Y.S.

⁵⁰ Cf. *O.R.* XII, p. 482, CDDH/II/SR.100, para. 64.

⁵¹ The French text of the comment is in *Actes (O.R.) XIII*. At p. 383, there is an error of grammar relating to the word “affectées” (assigned) which gives the impression that it relates to the “armed forces” rather than the “members”. This is clearly incorrect as “assigned” relates to the *members* of the armed forces.

⁵² Cf. commentary para. 2(b), and note 25, *supra*, p. 773.

⁵³ Cf. *O.R.* XII, pp. 427-430, CDDH/SR.96, paras. 1-22.

⁵⁴ Article 14, para. 3, of Annex I should be noted in this connection. This provides: “If civil defence personnel are permitted to carry light individual weapons, an entry to that effect should be made on the card mentioned.”

⁵⁵ *O.R.* XII, p. 135, CDDH/II/SR.66, para. 49.

⁵⁶ *Ibid.*, p. 140, CDDH/II/SR.67, para. 4.

Protocol I

Article 66 – Identification

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and *matériel*, are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.
2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and *matériel* on which the international distinctive sign of civil defence is displayed.
3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.
4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters.
5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.
6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.
7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.
8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.
9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

Documentary references

Official Records

O.R. I, Part I, pp. 155-156; Part III, p. 20 (Art. 59). *O.R.* III, pp. 271-275. *O.R.* XI, p. 578, CDDH/II/SR.51, para. 6; p. 583, para. 30. *O.R.* XII, pp. 60-62, CDDH/II/SR.60, paras. 38-39, 42 and 46; p. 64, para. 56; p. 71, CDDH/II/SR.61, para. 8; p. 72, para. 20; pp. 142-146, CDDH/II/SR.67, paras. 17-41; pp. 355-362,

CDDH/II/SR.89, paras. 1-40; p. 365, CDDH/II/SR.90, paras. 1-2; pp. 390-391, CDDH/II/SR.92, paras. 50-55; p. 485, CDDH/II/SR.101, paras. 2-5. *O.R.* XIII, p. 26, CDDH/49/Rev.1, Annex II, paras. 23-27; pp. 373-375, CDDH/406/Rev.1, paras. 59-62; pp. 406-407, *id.*, Annex (Art. 59); p. 431 and 433-434, CDDH/II/439/Rev.1.

Other references

Remark: The general references to civil defence are cited with Article 61. CE/3b, pp. 155-156. CE 1972, Report, p. 89, paras. 503-506. CE 1971, Commentaries, Part I, pp. 144-145 (Art. 71). CE 1972, Report, vol. I, pp. 168-169, paras. 3.333-3.340; p. 172, Annex (Art. 71); vol. II, p. 11 (Art. 71); pp. 91-92, CE/COM III/OPC 3; pp. 94-95, CE/COM III/OPC 14-16. Commentary Drafts, pp. 75-77 (Art. 59).

Commentary

General remarks

- 2641** Article 66 (*Identification*) deals with marking and other means of identification laid down for civil defence personnel and objects.¹ Its main *raison d'être* is the fact, amply demonstrated for medical personnel and objects, that civil defence personnel and objects cannot be effectively protected if there is no way of identifying them.
- 2642** This article is largely inspired by the provisions laid down in Article 18 (*Identification*), which deals with the same problems for medical personnel and objects and which it follows as closely as possible.² In addition it is supplemented by Chapter V (*Civil defence*) of Annex I.
- 2643** In this commentary we will refer to Article 18 (*Identification*) and Chapter V (*Civil defence*) of Annex I for explanations which we have already given in our comment on those provisions.

Paragraph 1

- 2644** This paragraph lays down the principle that civil defence personnel and objects must be identifiable. The way in which this obligation is to be fulfilled is described elsewhere in this article and in Chapter V (*Civil defence*) of Annex I.

¹ Cf. in addition commentary Art. 18, *supra*, p. 221.

² In this sense, cf. in particular *O.R.* XII, p. 390, CDDH/II/SR.92, para. 50.

*First sentence*³

- 2645** The personnel and objects which must be identifiable are those defined in Article 61 (*Definitions and scope*), sub-paragraphs (b), (c) and (d),⁴ as well as buildings also protected pursuant to Article 62 (*General protection*), paragraph 3. Thus this sentence does not cover civilians who perform civil defence tasks in response to an appeal from the authorities,⁵ but without being attached to a civil defence organization.
- 2646** Such personnel and objects must be identifiable “while they are exclusively devoted to the performance of civil defence tasks”. This wording requires explanation.
- 2647** During the preparatory work the idea had been put forward, first, to distinguish permanent from temporary personnel, and secondly to allow permanent personnel to use the sign permanently, and to allow temporary personnel to use it only for the duration of their assignment to civil defence tasks.⁶ This followed the system adopted in the Geneva Conventions for temporary medical personnel.⁷
- 2648** As we have seen, this distinction between permanent and temporary personnel was not finally adopted in the Protocol for civil defence personnel, particularly because the definition of the tasks performed by organizations responsible for civil defence varies a great deal from country to country and there was no intention to exclude the performance of other tasks, even by personnel permanently assigned to such organizations.⁸
- 2649** On the other hand, it then became essential to specify that the special protection of Chapter VI (*Civil defence*) of Part IV is only granted to personnel while they are exclusively devoted to the performance of civil defence tasks.
- 2650** Thus this provision not only indicates that civil defence personnel and objects must be identifiable by the civil defence sign while they are exclusively devoted to civil defence tasks; *a contrario*, it also implies that they *must not* be identified as such while they are not, or not exclusively, devoted to such tasks.⁹

³ On the general scope of the sentence, cf. commentary Art. 18, para. 1, *supra*, p. 225.

⁴ We refer to the commentary on these, *supra*, pp. 732-736.

⁵ Cf. Art. 62, para. 2.

⁶ Cf. CE/3b, pp. 155-156; CE 1971, *Report*, p. 89, paras. 505-506; CE 1972, *Commentaries*, Part I, p. 145 (Art. 71, para. 3); CE 1972, *Report*, Vol. I, p. 169, para. 3.337; *Commentary Drafts*, p. 76 (Art. 59, para. 7).

⁷ Cf. First Convention, Art. 41.

⁸ On this subject, cf. commentary Art. 61, sub-para. (b), *supra*, pp. 732-735.

⁹ On the meaning of the word “exclusively”, cf. commentary Art. 61, sub-para. (b), *supra*, pp. 732-735.

Second sentence

- 2651 The necessity of identifying shelters is obviously also of great importance. The fact that there is a separate sentence to cover them is because they might not belong to civil defence organizations.¹⁰
- 2652 The expression “similarly identifiable” means, on the one hand, that the means of identification laid down in the remainder of the article and in Chapter V (*Civil defence*) of Annex I should also be used for shelters, and on the other, that they should only be marked when they are *exclusively* devoted to the purpose of sheltering the civilian population.

Paragraph 2

- 2653 This paragraph is the corollary to paragraph 1. If it is necessary to ensure that one’s own civil defence personnel and objects are identifiable, it is also necessary to ensure that those of other Parties can be identified.¹¹
- 2654 It will be noted that this paragraph only deals with identification by means of the distinctive sign of civil defence, but not, as in Article 18 (*Identification*), paragraph 2, by distinctive signals. However, it is clear that it implies an identical obligation with respect to distinctive signals, if the Parties to the conflict agree to use such signals in accordance with the provision of paragraph 5. The fact that it is not mentioned here is probably because, in contrast with Article 18 (*Identification*), this article only allows the use of distinctive signals by agreement between the Parties: therefore adequate methods and procedures of identification may be laid down in the agreements themselves.¹²
- 2655 However, it is precisely with regard to distinctive signals that it is essential to establish methods and procedures, given their technical character.
- 2656 As regards visual identification, the emphasis should first of all be laid on visibility, and the provisions of this paragraph are based in this respect on Chapter II (*The distinctive emblem*) of Annex I. Moreover, the importance of informing the members of the armed forces of their obligations cannot be too often stressed.¹³ It is all the greater in this context, as there is a new international sign of civil defence.

Paragraph 3

- 2657 This paragraph is based on paragraph 3 of Article 18 (*Identification*).¹⁴ However, it merits two specific comments.

¹⁰ On this subject, *cf.* commentary Art. 62, para. 3, *supra*, pp. 741-744, and Art. 63, para. 6, *supra*, pp. 757-758.

¹¹ On the meaning of this paragraph, *cf.* in addition commentary Art. 18, para. 2, *supra*, p. 226.

¹² On this subject, *cf.* commentary para. 5, *infra*, pp. 784-785.

¹³ On this subject, *cf.* commentary Art. 83, *infra*, p. 959.

¹⁴ Reference is made to the commentary thereon, *supra*, pp. 227-228.

- 2658 First, it only concerns *civilian* civil defence personnel. This is explained by the fact that an *obligation* to display the international distinctive sign of civil defence and to carry an identity card certifying their status *rests* at all times on members of the armed forces assigned to civil defence organizations.¹⁵
- 2659 Secondly, the necessity of displaying the sign and carrying an identity card in occupied territories and areas where fighting is taking place, as well as the obligation only to wear the sign and carry the card during missions *exclusively* devoted to civil defence tasks, argue in favour of the exclusive and *permanent* – or at least long-term – assignment of such personnel to civil defence tasks, at any rate in such territories and areas, to avoid any confusion.

Paragraph 4

- 2660 Once the idea of granting special protection to civil defence personnel and objects is accepted, the need to identify them by means of a distinctive sign is evident, just as it was evident from the beginning with regard to medical personnel and objects.
- 2661 During the Conference of Government Experts an *ad hoc* Group, set up to make proposals regarding a special sign for civil defence organizations, came in particular to the following conclusions:
- the sign should not lead to confusion with other emblems: thus this excluded the possibility of extending the use of the red cross and red crescent emblem;¹⁶
 - it should be easily recognizable;
 - it should not conflict with any religious beliefs.¹⁷
- 2662 However, as this group did not propose an emblem, a meeting of experts was organized in Geneva with a view to defining an international distinctive sign of civil defence. The experts finally adopted two signs,¹⁸ and an alternative was proposed in the 1973 draft consisting either of an “equilateral light blue triangle on a light orange background” or of “two or, in case of need, more vertical light blue stripes on a light orange background”.¹⁹ These proposals had been selected on grounds of their practical nature and visibility of the designs and colour.²⁰
- 2663 During the Conference an amendment was put forward proposing yet another sign: “two oblique red bands on a yellow background”.²¹
- 2664 This sign, which was also supported by the International Civil Defence Organization, was proposed particularly because of its resemblance to the

¹⁵ Cf. Article 67, para. 1(c).

¹⁶ In this respect, cf. also CE 1972, *Commentaries*, Part I, p. 145, where this position was supported by the argument that the emblem of the red cross and the red crescent must be reserved for clearly defined activities and that its use should not be too widely extended.

¹⁷ For more details, cf. CE 1972, *Report*, Vol. II, p. 95, CE/COM III/OPC 16.

¹⁸ For further details on this subject, cf. *Meeting of Experts on an International Distinctive Sign for Civil Defence Services, Report*, ICRC, Geneva, 1973 (particularly paras. 25-44).

¹⁹ Cf. draft Art. 59, para. 4.

²⁰ Cf. O.R. XII, p. 143, CDDH/II/SR.67, para. 20.

²¹ Cf. O.R. III, p. 275, CDDH/II/427.

emblem with “oblique red bands on a white ground”, laid down in Article 6 of Annex I to the Fourth Convention, to mark hospital and safety zones and to meet “the concern not to increase the number of protective signs”.²²

2665 The Technical Sub-Committee on Signs and Signals nevertheless declared its preference for a blue triangle on an orange background – i.e., the first proposal in the 1973 draft – though it deleted the adjective “light” from the colours orange and blue.²³

2666 Apart from a controversy regarding the respective visibility of the two signs which remained at issue, the argument of the similarity of the sign with that laid down for marking hospital and safety zones was also used against this sign, as some delegates considered that confusion between the two symbols might reduce the protection of such areas.²⁴

2667 In the end, the proposal contained in the amendment was rejected by a vote in Committee II in favour of the blue triangle on an orange background.²⁵

2668 In addition to the choice of sign, it should be noted that paragraph 4 refers to the *international* distinctive sign of civil defence. In fact, in contrast with the Red Cross or Red Crescent Societies which were created after the adoption of the emblem, civil defence organizations were set up well before the adoption of Protocol I, and in many countries had already adopted other emblems. This article therefore does not impose a new emblem on such organizations even though it permits them to adopt it also in time of peace.²⁶

2669 Finally, paragraph 4 specifies that the equilateral blue triangle on an orange ground can only be considered as the international distinctive sign of civil defence “when used for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters”. This formula is based on that adopted for the definition of the distinctive red cross and red crescent emblem.²⁷ It is all the more understandable for the sign of civil defence as it seems difficult for some States to undertake that this sign – as with the red cross or red crescent emblem – will not be used for any other purposes in time of peace, particularly by organizations or companies which had adopted it previously.²⁸

Paragraph 5

2670 This paragraph lays down the possibility of the use of distinctive signals “for civil defence identification purposes”. Despite this rather vague wording, there is

²² In this sense, *cf.* O.R. XII, p. 357, CDDH/II/SR.89, para. 10, and p. 61, CDDH/II/SR.60, para. 42.

²³ *Cf.* O.R. XIII, p. 26, CDDH/49/Rev.1, Annex II, para. 26.

²⁴ *Cf.* in particular O.R. XII, p. 356, CDDH/II/SR.89, para. 4. As regards the other aspects of this controversy, *cf. ibid.*, pp. 355-362, paras. 1-40.

²⁵ *Cf.* O.R. XII, p. 361, CDDH/II/SR.89, para. 39; *cf.* also p. 365, CDDH/II/SR.90, paras. 1-2, and pp. 390-391, CDDH/II/SR.92, paras. 54-55.

²⁶ *Cf.* commentary para. 7, *infra*, pp. 786-787.

²⁷ On this subject, *cf.* commentary Art. 8, sub-para. (I), *supra*, pp. 134-135.

²⁸ On this subject, *cf.* commentary paras. 7 and 8, *infra*, pp. 786-788.

no doubt that such signals are intended to permit the identification of persons and objects entitled to the protection of the distinctive sign of civil defence.²⁹

2671 This paragraph is inspired by Article 18 (*Identification*), paragraph 5, which is concerned with the use of distinctive signals “to identify medical units and transports”.

2672 However, in contrast with that provision, it does not refer to a chapter of Annex I, and Chapter V of that Annex (*Civil defence*) does not broach the question of distinctive signals. Thus there are no pre-established rules for distinctive civil defence signals.

2673 Consequently, it is quite logical that the use of such signals cannot follow from an unilateral decision: it must result from agreements between the Parties to the conflict.³⁰ Anyway, paragraph 5 only mentions this as a possibility – “Parties to the conflict may agree” – without imposing any obligation upon them, not even that of endeavouring to reach an agreement upon this matter.

2674 Thus the use of distinctive signals for civil defence remains very uncertain from an international point of view. The fact that the Diplomatic Conference did not go further on this point is probably because, on the one hand, the usefulness of such signals is, after all, less obvious for civil defence than for the medical services, particularly medical transports, and on the other hand, because the special protection accorded civil defence is new and has not yet been proven.

2675 Insofar as they wish to reach agreement on distinctive signals for civil defence, the Parties are therefore free to choose those which seem most appropriate to them, provided that these do not infringe the many rules that exist in this field.³¹

2676 The commentary on the 1973 draft mentioned as an example flashing light signals and sirens.³²

2677 Chapter III (*Distinctive signals*) of Annex I, Article 5 (*Optional use*), paragraph 1, states that “the signals specified in this Chapter for exclusive use by medical units and transports shall not be used for any other purpose”, in this way excluding their use as signals for civil defence purposes. However, this is “subject to the provisions of Article 6”, and that article, which deals with “the light signal, consisting of a flashing blue light”, does not, “in the absence of a special agreement between the Parties to the conflict” prohibit “the use of such signals for other vehicles or ships”.³³ Thus a possibility is left open here for adopting signals for the identification of civil defence services.

²⁹ Thus, when it adopted its report Committee II adopted the following comment: “Civil defence identification means the identification of shelters for the civilian population and of civil defence personnel, buildings and *matériel*” (*O.R.* XIII, p. 375, CDDH/406/Rev.1, para. 62).

³⁰ This is contrary to Art. 59, para. 5, of the 1973 draft, as proposed by an amendment: *cf. O.R.* III, p. 272, CDDH/II/327, para. 5.

³¹ On this subject we refer to the commentary on Annex I, *infra*, p. 1137.

³² *Cf. Commentary Drafts*, p. 75 (Art. 58, para. 5).

³³ For more details on this subject, *cf. commentary* Articles 5 and 6, Annex I, *infra*, p. 1199 and p. 1205.

Paragraph 6

- 2678 This paragraph refers to Chapter V (*Civil defence*) of Annex I for the implementation of paragraphs 1 to 4 of the article under consideration here. Rightly, paragraph 5 is not mentioned, since Chapter V (*Civil defence*), as we have shown, does not deal with distinctive signals.
- 2679 Chapter V contains an article giving precise specifications for the identity cards prescribed in paragraph 3 of the article under consideration here.³⁴ In another article it sets out rules on the international distinctive sign of civil defence, and lays down recommendations thereon.³⁵
- 2680 The reference to paragraphs 3 and 4 does not require any explanation since these paragraphs concern the subjects dealt with in Article 14 (*Identity card*) and Article 15 (*International distinctive sign*), respectively, of Annex I.
- 2681 The reference to paragraphs 1 and 2 indicates that the Parties to the conflict in fulfilling the obligations laid down by these paragraphs regarding marking their civil defence services and identifying those of their adversary, have to take into account the technical specifications given in the above-mentioned articles of Annex I.

Paragraph 7

- 2682 The First Convention contains strict rules regarding the use of the distinctive emblem in peacetime.³⁶ In general only the Red Cross or Red Crescent Societies are entitled to use it in peacetime,³⁷ and its commercial use is prohibited.
- 2683 It was only possible to follow the example of these rules to a limited extent. The first Red Cross, and later, Red Crescent Societies were created to facilitate the application of the Geneva Convention of 1864 and then that of 1906. On the other hand, civil defence organizations were created a long time before they were recognized by international humanitarian law, and there are no national “Blue Triangle Societies”. Thus the relation between these organizations and the international distinctive sign of civil defence is not as close as that between the Red Cross or Red Crescent Societies and the emblem intended for the protection of the medical services.
- 2684 Nevertheless, some wished this connection to be strengthened in the future, and to this end considered that civil defence organizations should be permitted – if not encouraged – to adopt this sign even in time of peace. This is what is

³⁴ Art. 14, which on the one hand refers to Article 1 of Annex I, and provides a model in Figure 3 and, on the other hand, recommends that identity cards should mention whether civil defence personnel are authorized to bear light individual weapons.

³⁵ For more details, *cf.* commentary Annex I, Arts. 14 and 15, *infra*, p. 1285 and p. 1289.

³⁶ *Cf.* Articles 44, 53 and 54.

³⁷ It is understood that objects protected by that emblem in time of armed conflict may already be marked in peacetime, and that National Societies may authorize in peacetime the use of the emblem by ambulances and by first aid posts reserved for free treatment.

proposed in this paragraph, which was not included in the 1973 draft, and was the result of an amendment.³⁸

- 2685 However, as paragraph 8 will show, paragraph 7 does not prohibit, even implicitly, the use of the distinctive sign of civil defence for other purposes, when permitting its use in time of peace.
- 2686 In fact, Committee II adopted in its report the following comment applicable to paragraphs 7 and 8: “It is understood that these paragraphs do not deal with other than protective uses of the distinctive sign of civil defence”.³⁹
- 2687 This comment is not easy to understand in relation to paragraph 7, for in time of peace the term “protective use” is meaningless.
- 2688 In fact, the comment indicates that, under paragraph 7, the personnel and objects concerned are those which in time of peace accomplish tasks which would give them the right to use that sign in time of armed conflict for the purpose of their protection.
- 2689 Finally, the meaning of the expression “civil defence identification purposes” was explained above.⁴⁰

Paragraph 8

- 2690 The comment adopted by Committee II in its report⁴¹ is particularly relevant with regard to this paragraph. The supervision, prevention and repression required from the Contracting Parties and Parties to the conflict concern only “protective use” of the sign of civil defence. Thus that obligation is not extended directly to the use of the sign for commercial purposes.⁴²
- 2691 Moreover, an appropriate reminder was given of the existence of Article 38 (*Recognized emblems*), which prohibits the improper use of “emblems, signs or signals provided for by the Conventions or by this Protocol”.⁴³
- 2692 Delegates who wished to prohibit any use of the distinctive sign of civil defence in time of peace other than by civil defence organizations with the agreement of authorities⁴⁴ therefore failed to convince the Conference.

³⁸ Amendment CDDH/II/237 replaced successively by amendments CDDH/II/327 and CDDH/II/408: cf. *O.R.* III, pp. 271-275. This amendment also corresponds to the views expressed by the Technical Sub-Committee on Signs and Signals of Committee II: cf. *O.R.* XIII, p. 26, CDDH/49/Rev.1, Annex II, para. 27.

³⁹ *O.R.* XIII, p. 375, CDDH/406/Rev.1, para. 62.

⁴⁰ Cf. commentary paragraph 5, *supra*, p. 785 and note 29: the comment of Committee II mentioned in that note also applies for the present paragraph.

⁴¹ Cf. *supra* and note 39.

⁴² One delegate, incidentally, argued strongly against the obligation to prohibit the use of the civil defence sign for commercial purposes. In this connection he recalled the great difficulties encountered upon the introduction of a provision of this type on the red cross emblem in the First Geneva Convention of 1929, the reservations this led to, and the delays in the ratification of the 1949 Conventions resulting from objections to Article 53 of the First Convention by some commercial firms who had been using the red cross emblem for years: cf. *O.R.* XII, p. 145, CDDH/II/SR.67, paras. 36-39; cf. also *ibid.*, p. 146, *ibid.*, para. 41.

⁴³ Cf. *O.R.* XII, p. 145, CDDH/II/SR.67, para. 38.

⁴⁴ Cf. *O.R.* III, p. 273, CDDH/II/339, paras. 6-7, and *O.R.* XII, p. 73, CDDH/II/SR.61, para. 22.

- 2693 And yet, is it possible that the Contracting Parties do not have any obligation in this field? We do not think so. First, they are mentioned separately from the Parties to the conflict, which clearly shows that some action is considered necessary even in time of peace. Secondly, and principally, the obligation on the one hand to ensure respect for the distinctive sign of civil defence in time of armed conflict and, on the other hand, to familiarize the population with it, certainly requires some restrictions, also in peacetime. Confusion in time of armed conflict would nullify the protective effect of the distinctive sign of civil defence and this cannot be avoided at such times if it is not also dealt with in time of peace.
- 2694 Apart from this, the idea “to supervise the display” of the distinctive sign and “to prevent and repress any misuse thereof” is taken from Article 18 (*Identification*), paragraph 8, which in turn refers to the provisions of the Conventions and the Protocol.⁴⁵
- 2695 Finally, it should be noted that perfidious use of the international distinctive sign of civil defence causing death or serious injury to body or health is regarded as a grave breach of the Protocol.⁴⁶

Paragraph 9

- 2696 As early as the first session of the Conference of Government Experts in 1971 it was pointed out that the possibility of extending the use of the emblem of the red cross or red crescent to civilian medical personnel authorized by the relevant Party to the conflict made it “possible to allow the emblem to be used also by the medical services of civil defence organizations”.⁴⁷
- 2697 The 1973 draft took up this idea and expressed it unambiguously.⁴⁸
- 2698 The use of the word “also” in the text of paragraph 9 could lead to some hesitation. However, this is removed by the very clear comment adopted with regard to this paragraph by Committee II at the same time as its report:

“Medical and religious personnel as well as medical units and transports of civil defence organizations are covered by Part II of Protocol I. Such personnel may be assisted or even replaced by other civil defence personnel who are able to perform medical functions, but who are primarily assigned to other civil defence tasks. [...] Medical functions may also be performed on a temporary basis by civil defence personnel in cases of emergency where the necessary formalities have not been fulfilled in order to enable them to use the red cross as a distinctive emblem. In such cases, it is desirable that

⁴⁵ On this subject, cf. commentary Art. 18, para. 8, *supra*, pp. 234-235.

⁴⁶ Cf. Art. 85, para. 3(f). Cf. in addition the commentary on that paragraph, *infra*, pp. 998-999.

⁴⁷ Cf. *CE 1971 Report*, p. 89, para. 504.

⁴⁸ Cf. draft Art. 59, para. 8: “The identification of civil defence medical services is governed by Article 18”. The comment on this paragraph is even more eloquent in this respect: “The experts expressed the unanimous opinion that it would be advisable for medical personnel – whether they belong to the civil defence or were simply providing assistance – to be identified by a special sign.” (*Commentary Drafts*, p. 77).

personnel and units performing medical tasks are protected by the international sign of civil defence. This idea is conveyed by the inclusion of the word ‘also’ in this paragraph.”⁴⁹

2699 It follows that, though some medical tasks may occasionally be performed under the distinctive sign of civil defence, medical personnel are in principle identified by the emblem of the red cross or the red crescent, as is actually indicated in the definition of such personnel which includes personnel “assigned to civil defence organizations”.⁵⁰

2700 This distinction between medical personnel and materials of civil defence organizations and other personnel and objects belonging to the same organizations “does not, however, carry any implications with regard to organizational or command structure”.⁵¹

Y.S.

⁴⁹ Cf. *O.R. XIII*, p. 375, CDDH/406/Rev.1, para. 62. Moreover, it should be mentioned with regard to this word that in the French text the Drafting Committee replaced the word “aussi” by “également”.

⁵⁰ Cf. Art. 8, sub-para. (c)(i).

⁵¹ On this subject cf. the note added to the above-mentioned comment of Committee II, note 49: *O.R. XIII*, p. 375, CDDH/II/406/Rev.1, para. 62.

Protocol I

Article 67 – Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
 - (a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
 - (b) if so assigned, such personnel do not perform any other military duties during the conflict;
 - (c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
 - (d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;
 - (e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;
 - (f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.
2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.
3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.
4. The *matériel* and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous

arrangements have been made for adequate provisions for the needs of the civilian population.

Documentary references

Official Records

O.R. I, Part I, pp. 156-157. *O.R.* III, pp. 263-264 and 277-278. *O.R.* VI, pp. 243-244, CDDH/SR.43, paras. 2-11; pp. 261-262, *id.*, Annex (Australia); pp. 263-264 (Australia); p. 266 (Egypt); pp. 268-271 (Federal Republic of Germany, Ghana, Indonesia, Israel); pp. 275-278 (Sweden, Switzerland, USSR, United Kingdom, Yugoslavia). *O.R.* XI, p. 580, CDDH/II/SR.51, para. 14; p. 584, paras. 36 and 38; p. 586, para. 47. *O.R.* XII, p. 59, CDDH/II/SR.60, par. 33; p. 64, para. 54; p. 66, paras. 63-64; pp. 69-70, CDDH/II/SR.61, para. 2; p. 71, para. 10; pp. 72-73, paras. 15 and 21; p. 74, paras. 26-28; p. 75, paras. 37-38; p. 76, para. 41; pp. 77-78, paras. 44 and 48; p. 79, paras. 54 and 58; pp. 105-106, CDDH/II/SR.64, paras. 2-4; pp. 107-116, paras. 12-22, 24, 26-34, 36-37, 39-42, 44-46, 48-51, 53-54 and 57-60; p. 139, CDDH/II/SR.67, para. 1; p. 140, para. 3; p. 141, para. 8; pp. 146-147, paras. 44-46; p. 325, CDDH/II/SR.85, para. 17; pp. 431-438, CDDH/II/SR.96, paras. 23-71; pp. 439-452, CDDH/II/SR.97, paras. 1-76; pp. 486-488, CDDH/II/SR.101, paras. 6-21. *O.R.* XIII, pp. 315-319, CDDH/235/Rev.1, Appendix; pp. 375-377, CDDH/406/Rev.1, paras. 63-67; pp. 407-408, *id.*, Annex (Art. 59 *bis*).

Other references

Remark: the general references to civil defence are cited with Article 61. *CE/3b*, p. 144. *CE 1972, Report*, vol. II, p. 94, *CE/COM III/OPC 13. Commentary Drafts*, pp. 72-73 (Art. 55).

Commentary

General remarks

- 2701 The protection of military civil defence organizations was not envisaged in the documentation presented to the Conference of Government Experts,¹ and it was

¹ The ICRC stated that one of the main difficulties encountered during its work was as follows: "The organization and structure of civil defence services vary considerably from one country to another. Some countries have no such services. Sometimes the services are military or para-military and their personnel may have to discharge the duties of military and combat personnel. By contrast, some of the organizations are purely civilian and their duties purely humanitarian. It goes without saying that it is only for the latter that the Red Cross may contemplate granting protection and special facilities in humanitarian law." (*CE/3b*, p. 144).

only during the second session of that Conference that a series of questions raised by one delegation cast doubt on this approach. It seemed particularly questionable to that delegation that reserve military personnel, mobilized for the sole purpose of serving in civil defence organizations under civilian management, and other members of the armed forces assigned to technical tasks of civil defence “subject to the policy and requirements direction of [...] a civilian” should not be entitled to “the proposed special protections when they are engaged in humanitarian activities, merely because they are in uniform”.²

2702 Based on these considerations and subsequent discussions, the ICRC introduced a remark on Article 55 of the 1973 draft in the commentary:

“Some experts consulted by the ICRC recommended adding here the following paragraph:

‘Personnel of military units assigned exclusively to civil defence tasks shall not be intentionally attacked provided they display the international distinctive sign of civil defence specified in Article 59 below, and bear only small-arms. If they fall into the power of the enemy they shall be considered to be prisoners of war.’”³

2703 This commentary then added:

“This paragraph is based on Articles 25 and 29 of the First Convention relating to the protection and treatment of temporary personnel. It also takes into account the situation prevailing in several countries, namely the developing countries, which quite frequently do not yet possess any specialized bodies and where the civil defence tasks are therefore discharged by the army.”⁴

2704 However, the fact that the proposed provision was put forward only as a remark and was not contained in the draft itself is because of “the difficult problems which would be created by this provision and the opposition of other experts.”⁵

2705 In fact, this problem was one of the most discussed in Committee II, and it seems to us that it would be useful to examine the main arguments advanced on both sides before discussing the provision which was adopted, which is clearly the result of a compromise.

2706 Four principal arguments were advanced in favour of protecting members of the armed forces and of military units assigned to civil defence organizations:

- 1) The protection must be accorded to civil defence tasks and all those fulfilling such tasks must be protected (“functional” protection) independently of their military or civilian status.⁶

² Cf. *CE 1972, Report*, Vol. II, p. 94, CE/COM III/OPC 13, paras. 4-5.

³ *Commentary Drafts*, p. 72.

⁴ *Ibid.*, p. 73.

⁵ *Ibid.*

⁶ Cf. particularly *O.R. XII*, p. 76, CDDH/II/SR.61, para. 41; p. 77, para. 44; p. 78, para. 48.

- 2) In many countries there is no civil defence structure or qualified civilian personnel are too scarce: it is therefore essential that they can count on all the personnel available, even military personnel.⁷
- 3) There is no reason to refuse military civil defence personnel what is granted to military medical personnel.⁸
- 4) Civil defence is organized in some countries along military lines and such countries would not accept changing their arrangements nor would they accept an agreement compelling them to protect civil defence personnel of an adverse Party if their own personnel did not enjoy similar protection.⁹

2707 The main arguments of those who did not wish to grant such personnel protection may be summarized as follows:

- 1) In order to be effective, the rules protecting the civilian population must be simple and clear, which will no longer be the case if military personnel enjoy some degree of protection as well.¹⁰
- 2) In practice it will be difficult to distinguish military personnel assigned to civil defence from other military personnel, particularly if they carry arms, and this confusion will generally tend to impair civil defence tasks.¹¹
- 3) If military personnel enjoyed special protection, this would imply that they renounce participating in hostilities. Such renunciation is hardly likely in the majority of countries lacking qualified personnel for civil defence, as such countries also need the same personnel for military duties. It is therefore preferable that military personnel performing civil defence tasks retain their military status without any special protection and unequivocally.¹²
- 4) Once military personnel are exclusively assigned to civil defence tasks for the duration of the conflict, the problem of structure only consists of having them officially attached and seems easily surmountable.¹³

2708 An examination of the provisions that were finally adopted will reveal the importance attached to these various arguments.

2709 Before doing so, it should be noted that the problems broached in this article were first discussed in the context of the draft article concerning general protection¹⁴ before various amendments proposed that they should be dealt with in a separate article.¹⁵ A compromise solution was also proposed, consisting of adding a paragraph to the article on general protection, confirming the civilian status of personnel “whose liability to military service has definitely and finally ceased” and therefore the possibility of integrating them in civilian civil defence

⁷ Cf. particularly *O.R.* XI, p. 584, CDDH/II/SR.51, para. 38; p. 586, para. 47; *O.R.* XII, p. 77, CDDH/II/SR.61, para. 44.

⁸ Cf. particularly *ibid.*, p. 107, CDDH/II/SR.64, para. 12; p. 112, para. 37; p. 115, paras. 53-54.

⁹ Cf. particularly *ibid.*, p. 114, para. 51.

¹⁰ Cf. particularly *ibid.*, p. 79, CDDH/II/SR.61, para. 54; p. 113, para. 46; p. 114, para. 49.

¹¹ Cf. particularly *ibid.*, p. 108, CDDH/II/SR.64, para. 17; p. 113, para. 45; p. 114, para. 48.

¹² Cf. particularly *ibid.*, pp. 107-108, para. 14; p. 113, para. 44; p. 114, para. 48.

¹³ Cf. particularly *ibid.*, p. 114, para. 50.

¹⁴ Draft Article 55, present Article 62.

¹⁵ Cf. *O.R.* III, p. 277, CDDH/II/335; p. 278, CDDH/II/407 and 419.

organizations.¹⁶ This solution was abandoned: on the one hand, it did not respond to the expectations of the supporters of protection for military civil defence personnel, while on the other, it could, as one delegate stated, in a way have created “a new category of protected civilians (persons whose liability to military service had definitely and finally ceased)”.¹⁷

- 2710 The question was then taken up by a Working Sub-Group which decided, from the various conceivable solutions,¹⁸ to retain that of devoting a special article to members of the armed forces and military units assigned to civil defence organizations and to establish special rules for them.¹⁹

Paragraph 1

Introductory sentence

- 2711 This sentence covers members of the armed forces and “military units” assigned to civil defence organizations. The meaning of *military units* should be understood by analogy with the expression “medical units”.²⁰ Thus they are “establishments and other units [...] organized for [...] purposes”²¹ of civil defence, i.e., which are entrusted with the mission to carry out one or more of the tasks listed in Article 61 (*Definitions and scope*), sub-paragraph (a).
- 2712 The text does not specify whether the organizations to which members of the armed forces and military units are assigned must be civilian, military, or whether they can be either. In fact the last solution should be accepted: Article 65 (*Cessation of protection*) implicitly authorizes the attachment of military personnel to civilian civil defence organizations,²² but there is nothing to prevent the organizations themselves from belonging to the armed forces, provided of course that the conditions listed in this article are fulfilled.
- 2713 If they are, the personnel and units in question will be “respected and protected”. In the comments adopted with its report, Committee II stated that this expression here means that “the personnel must not knowingly be attacked

¹⁶ Cf. *ibid.*, pp. 263-264, CDDH/II/325, 325/Rev.1 and 342.

¹⁷ Cf. *O.R.* XII, p. 110, CDDH/II/SR.64, para. 30. As this delegate also stated, Article 4 B (1) of the Third Geneva Convention, which provides that persons belonging to the armed forces of an occupied country shall be treated as prisoners of war if they are interned, was not decisive in this respect: cf. *ibid.*, para. 31.

¹⁸ I.e., no protection for military civil defence personnel; the new paragraph discussed above which was to be added to the article on general protection; an article (and conditions) relating to military civil defence personnel and units; identical protection for military and civilian civil defence personnel: in the sense of this last solution, cf. in particular *O.R.* XII, p. 116, CDDH/II/SR.64, para. 58.

¹⁹ On the work of the this Sub-Group, cf. in addition *O.R.* XIII, pp. 315-319; CDDH/325/Rev.1, Appendix; pp. 375-377, CDDH/406/Rev.1, paras. 63-66; *O.R.* XII, pp. 431-433, CDDH/II/SR.96, paras. 23-28.

²⁰ Cf. Art. 8, sub-para. (e).

²¹ On the meaning of these expressions, cf. commentary Art. 8, sub-para. (e), *supra*, pp. 128-129.

²² Cf. Art. 65, para. 2(b).

or unnecessarily prevented from discharging their proper functions”,²³ on the understanding that “unnecessarily” relates to absence of “imperative military necessity”.²⁴

Sub-paragraph (a)

- 2714** The personnel and units concerned may be assigned to one or several of the tasks listed in Article 61 (*Definitions and scope*), sub-paragraph (a), but they must be assigned exclusively and permanently.²⁵ Furthermore, it should be recalled that civil defence tasks are intended to protect the civilian population: similar tasks carried out for the benefit of *military personnel* are not covered by this article.

Sub-paragraph (b)

- 2715** Permanent assignment is assignment for an indeterminate period of time, but does not exclude the possibility of a change of assignment during the conflict. Sub-paragraph (b) goes further, since it excludes such change of assignment. It is therefore a key element of the compromise which was achieved in the end for the protection of military personnel devoted to civil defence. In fact it would have been very difficult to ask a Party to the conflict to abstain from hostile acts against military personnel whom it knew could at a later date be recalled to combat.²⁶
- 2716** Moreover, this solution is in accordance with what was decided regarding civilian civil defence personnel: such personnel can in fact enjoy protection under the present Chapter once again after performing tasks other than civil defence tasks, always provided that such other tasks were not “harmful” to the enemy, i.e., equivalent to traditional military tasks.²⁷

²³ Cf. O.R. XIII, p. 377, CDDH/406/Rev.1, para. 67; O.R. XII, pp. 433-434, CDDH/II/SR.96, paras. 31-34; cf. also commentary Art. 65, *supra*, p. 777-778 and note 50.

²⁴ In this sense cf. O.R. XIII, p. 376, CDDH/II/406/Rev.1, para. 67, which contains the proposal of the Working Group and clearly indicates that there was no intention to change the substance of this proposal. Cf. also O.R. XII, pp. 433-434, CDDH/II/SR.96, paras. 32-35. On the meaning of the expression “imperative military necessity”, cf. commentary Art. 62, para. 1, *supra*, p. 740.

²⁵ On the meaning of the words “permanently” and “exclusively” cf. commentary Art. 8, sub-para. (k), *supra*, pp. 132-133.

²⁶ Despite the exception made for auxiliary medical personnel: in fact, that type of personnel is mainly intended to fill a gap in the strength of permanent personnel in emergencies and is little used in practice. Thus this precedent is not decisive.

²⁷ Cf. commentary Art. 61, sub-para. (c), *supra*, pp. 735-736.

- 2717 Although it was adopted by consensus, this solution was the object of many statements at a plenary meeting of the Diplomatic Conference by delegations which were not entirely satisfied.²⁸

Sub-paragraph (c)

- 2718 Civilians must not be made the object of attack, while in principle military personnel are military objectives. Identification of military personnel in their capacity of civil defence personnel is therefore even more important than that of civilian personnel. This is why there is an *obligation* on military personnel, who generally wear the uniform of the armed forces, to display the international distinctive sign of civil defence and carry an identity card certifying their status.
- 2719 In this connection Committee II furthermore adopted the following comment at the same time as its report:

“With regard to the display of the international distinctive sign of civil defence in sub-paragraph (c), it was suggested that a sign of a minimum size on a tabard of about 30 cm. × 30 cm. might be appropriate. The identity card referred to in sub-paragraph (c) will have to be carried in addition to the military identity card provided for in the Third Geneva Convention of 1949.”²⁹

- 2720 It should be stressed that this large sized tabard is of course not a *condition* of protection, but the Committee decided to give such clear indications in order to prevent, as far as possible, the mistakes which would undoubtedly follow from a form of marking that was not so clear.³⁰

Sub-paragraph (d)

- 2721 As regards the carrying of arms, members of the armed forces assigned to civil defence organizations are subject to the same rules as civilian civil defence personnel.
- 2722 However, agreement on this point was not reached without difficulties, as many delegations, already dubious about the fact that military personnel assigned to civil defence are protected, were even more dissatisfied about such personnel

²⁸ We should mention, on the one hand, the view that later assignment to other military tasks should have been permitted: *cf.* in particular *O.R.* VI, pp. 269-270, CDDH/II/SR.43, Annex (Ghana); p. 271 (Indonesia); on the other hand, the doubt expressed about the compatibility of this provision with Article 43, paragraph 2, which gives members of the armed forces the right “to participate directly in hostilities”: *cf. ibid.*, p. 266 (Egypt). However, these two points of view had been previously refuted, the first because of the guarantees which must be given by those protected; the second on the basis that the intention of this provision was precisely for members of the armed forces to which it applied to renounce the right to participate in hostilities in exchange for total protection: *cf. O.R.* XII, pp. 433-434, CDDH/II/SR.96, para. 34.

²⁹ *Cf. O.R.* XIII, p. 377, CDDH/406/Rev.1, para. 67. *Cf.* in addition Annex I, Art. 15.

³⁰ Regarding the identity card, *cf.* Annex I, Art. 14.

being armed in view of “the dangers and difficulties of identifying military units and armed forces assigned to civil defence tasks”.³¹

2723 The purpose of bearing arms – for maintaining order and the self-defence of personnel³² – is recalled. Apart from this, reference is simply made to Article 65 (*Cessation of protection*), paragraph 3, which deals with this question in depth.³³

2724 Finally, it should be noted that, as in the case of civilian personnel, there is nothing to prevent the withholding of all weapons from such personnel, the provisions of Article 65 (*Cessation of protection*), paragraph 3, indicating the maximum allowed.

Sub-paragraph (e)

2725 This sub-paragraph may seem superfluous. As sub-paragraphs (a) and (b) lay down the condition that there must be an exclusive and permanent assignment to civil defence tasks throughout the duration of the conflict, it is difficult to see how the personnel concerned could commit acts harmful to the enemy without infringing the provisions of those sub-paragraphs.

2726 Nevertheless, it has been retained to underline the fact that as all members of the armed forces are combatants and therefore have the right to participate directly in hostilities,³⁴ the object of the paragraph “was to neutralize that right, or to provide that it could not be exercised”³⁵ by the persons concerned here.

2727 Apart from this, the different concepts raised in this sub-paragraph were examined above.³⁶

Sub-paragraph (f)

2728 This is an important condition. It prohibits members of the armed forces of a Party who are assigned to civil defence organizations from:

- being sent to strengthen the civil defence of allied Parties;

³¹ Cf. *O.R.* VI, p. 264, CDDH/SR.43, Annex (Austria); cf. also p. 266 (Egypt); pp. 275-276 (Sweden).

³² In this context it should be noted that the French text uses the expression “propre protection” in Art. 65, para. 3, and the expression “propre défense” in this paragraph. However, this is merely a translation error, as shown by the English text which uses the expression “self-defence” in both articles.

³³ On this subject, cf. commentary Art. 65, para. 3, *supra*, pp. 777-778. In its report the Committee explicitly stated that the comments it had made on Article 65, paragraph 3, were equally applicable to this paragraph, cf. *O.R.* XIII, p. 377, CDDH/406/Rev.1, para. 67.

³⁴ Cf. Art. 43, para. 2.

³⁵ *O.R.* XII, p. 440, CDDH/II/SR.97, para. 6.

³⁶ On the concept of participating directly in hostilities, cf. commentary Art. 43, para. 2, *supra*, pp. 514-517; see also Art. 51, para. 3, which provides that civilians participating directly in hostilities lose their right to protection for so long as the participation lasts, and the commentary thereon, *supra*, pp. 618-619; for the rest of this sub-paragraph, cf. commentary Art. 65, para. 1, *supra*, pp. 770-771.

- being used by that Party in territories it has occupied;³⁷
- being made available by that Party to a Party to a conflict in which it is not involved.

2729 It should be noted that such a restriction to national territory does not apply to medical personnel attached to the armed forces, and that military civil defence personnel are therefore subject to stricter rules in this respect. However, this difference is not illogical: on the one hand, some civil defence tasks are undeniably more delicate than medical tasks; on the other hand, their essential function is to repair the damage caused by the enemy to the detriment of civilians in their own territory, while armies need medical personnel to care for their wounded wherever they are.

Concluding sentence

2730 This sentence is aimed at further strengthening the guarantees that protection accorded members of the armed forces will not give rise to abuse.

2731 By specifically stating that direct participation in hostilities and committing acts harmful to the enemy (*cf.* sub-paragraph (e)) are *prohibited* for members of the armed forces assigned to civil defence organizations in accordance with sub-paragraphs (a) and (b), this sentence shows that in such a case more is involved than the loss of the right to protection. In addition, it constitutes a *breach* of the Protocol, which the Parties to the conflict are obliged to suppress and which may give rise to disciplinary or penal punishment.³⁸

2732 It may even constitute a grave breach if the distinctive sign has been displayed to abuse the enemy, depending on the consequences of such abuse.³⁹ In such a case, penal sanctions are compulsory.

Paragraph 2 – Status of captured personnel

First sentence

2733 The expression “military personnel serving within civil defence organizations” is equivalent to the expression “members of the armed forces and military units assigned to civil defence organizations” used in paragraph 1.

2734 The persons concerned here become prisoners of war when they fall into the power of the adverse Party. They are therefore subject to similar rules to those which apply to temporary medical personnel. This may seem illogical. The reason

³⁷ The question of members of the armed forces of a Party to the conflict whose territory is occupied is a different matter. It is dealt with in paragraph 2.

³⁸ On this subject, *cf.* Art. 85, para. 1, of the Protocol; Art. 49, para. 4, First Convention; Art. 50, para. 4, Second Convention; Art. 129, para. 4, Third Convention; Art. 146, para. 4, Fourth Convention.

³⁹ *Cf.* commentary Art. 85, para. 3(f), *infra*, pp. 998-999.

that temporary medical personnel are not released is actually that they may be used for military tasks and a Party to the conflict cannot be expected to release a person whom it knows may again commit harmful acts against it. Yet this is not the case with regard to military civil defence personnel, since they may not be assigned to other tasks or commit acts harmful to the enemy throughout the duration of the conflict.

2735 In fact, some recommended that such personnel should be treated in the same way as members of permanent military medical personnel, and only joined the consensus on this point with some reluctance.⁴⁰

2736 Moreover, it should be noted that those who recommended prisoner-of-war status for military civil defence personnel initially defended the view that such personnel should not be given any protection before they were captured.⁴¹

2737 Finally, it was the concern to make a clear distinction between military civil defence personnel and civilian civil defence personnel which led to attributing prisoner-of-war status to the former in the compromise which was finally adopted with regard to the protection of military personnel.⁴²

2738 Moreover, it should be noted that in practice the interest of military medical personnel not to be considered as prisoners of war basically lies in the fact that in principle, if they are captured, they should be returned to the Party to whom they belong as soon as there is a way to do so and they are no longer required to care for prisoners of war. But the question does not arise in a comparable way for military civil defence personnel since their activities are confined to national territory.

2739 Thus there is a difficult question as to what will be the fate of such personnel if they are captured when the adverse Party occupies their national territory where they are legitimately performing their activities. This question is dealt with in the second sentence of the paragraph.

Second sentence

2740 This sentence aroused controversy in Committee II. The Chairman of the special Working Sub-Group which was concerned with this article considered that it was not superfluous, although it covered elements dealt with in Articles 50 and 52 of the Third Convention, since it contained “an explicit stimulation addressed to the Detaining Power to make use of the specific abilities of that exceptional category of prisoner of war”.⁴³

⁴⁰ Cf. *O.R.* III, p. 277, CDDH/III/335; *O.R.* VI, p. 276, CDDH/SR.43, Annex (Switzerland); *O.R.* XII, p. 66, CDDH/II/SR.60, para. 64; pp. 111-112, CDDH/II/SR.64, para. 36; p. 115, paras. 53-54.

⁴¹ Cf. particularly *O.R.* XII, p. 64, CDDH/II/SR.60, para. 54; p. 71, CDDH/II/SR.61, para. 10.

⁴² In this sense, cf. particularly *O.R.* XII, p. 74, CDDH/II/SR.61, para. 28.

⁴³ *O.R.* XII, p. 432, CDDH/II/SR.96, para. 27. Cf. also p. 441, CDDH/II/SR.97, para. 19.

- 2741 Other delegations expressed doubts as to how appropriate this sentence was or considered that it was superfluous or even damaging, in that it was “likely to open the door to abuse by the Occupying Power”.⁴⁴ Finally it was adopted by a vote in Committee II.⁴⁵
- 2742 The expression “but only in the interest of the civilian population of that territory” was added later in a spirit of conciliation.⁴⁶
- 2743 In general, it should not be forgotten that for reasons of security prisoners of war are normally kept in the national territory of the captor, and not in occupied territory. As the recommendation made in the second sentence implies that the prisoners concerned remain in occupied territory – which is justified by the non-military functions they fulfil – the possibility of releasing such prisoners of war on parole in accordance with Article 21, paragraphs 2 and 3, of the Third Convention with a view to carrying out civil defence tasks, should be examined.
- 2744 Anyway, this sentence merely offers a possibility without removing any rights inherent in prisoner-of-war status. Therefore it does not give the Occupying Power any right to require those concerned to perform work which is not in accordance with the provisions of Section III of the Third Convention.
- 2745 This provision is similar to Article 29 of the First Convention which deals with the fate of auxiliary medical personnel who have been captured. Such personnel are prisoners of war just like any captured combatant “but shall be employed on their medical duties in so far as the need arises”.
- 2746 The provision under consideration here is slightly more flexible: they *may*, but do not necessarily *have to* be employed on civil defence tasks insofar as the need arises.
- 2747 Apart from this, the proviso that such personnel may not be *requested* to do dangerous work is merely a reminder of the provision of Article 52 of the Third Convention, which is actually even broader, since it refers to “labour which is of an unhealthy or dangerous nature”. Thus a person covered by the article under consideration here could not be obliged to do unhealthy work either. However, the concept of unhealthy or dangerous work was not defined. The Commentary on the Third Convention states that, as external safety measures must always be taken pursuant to Article 51 of the Third Convention, the essential difference between what is authorized and what is not lies “in the nature of the work”.⁴⁷ Yet there is no doubt that some civil defence tasks, such as fire-fighting or marking danger zones, are dangerous by their very nature.
- 2748 The expression “only in the interest of the civilian population of that territory” does not actually add anything to the article, at least in the context of a normal situation: indeed, the Fourth Convention in any case prohibits an Occupying Power from transferring part of its own population into the territory it has occupied.⁴⁸ The meaning of the provision is certainly not to make a distinction between the national population of occupied territory and civilians of other

⁴⁴ On that debate, cf. *O.R.* XII, pp. 441-444, CDDH/II/SR.97, paras. 19-34.

⁴⁵ Cf. *ibid.*, pp. 443-444, para. 34.

⁴⁶ Cf. *ibid.*, p. 444, paras. 35-37 and p. 445, paras. 48-50.

⁴⁷ Cf. *Commentary III*, p. 276. Cf. also *O.R.* XII, p. 443, CDDH/II/SR.97, paras. 31-33.

⁴⁸ Cf. Art. 49, para. 6, Fourth Convention.

nationalities who are there: the very nature of civil defence work prohibits such a distinction, which would not, moreover, be in accordance with one of the fundamental principles of international humanitarian law, i.e., non-discrimination in aiding victims. Thus this expression acts as a reminder that such work should not be carried out for the benefit of soldiers occupying the territory. Apart from being useful to emphasize this point in context, it should be remembered that this condition follows naturally from the definition of civil defence.⁴⁹

- 2749 The Chairman of the Working Sub-Group which examined this article considered that this provision should allow those concerned here to “continue their work within the structure of their own national civil defence organization”.⁵⁰ This solution is certainly desirable. Nevertheless, such prisoners of war must “remain under the control of and administratively part of a prisoner of war camp”, according to the rules laid down by the Third Convention for labour detachments,⁵¹ unless the above-mentioned release on parole is followed.

Paragraph 3 – Marking of buildings and equipment

- 2750 As with personnel, the use of the distinctive sign is mandatory for the buildings, equipment and transports of *military* units assigned to civil defence organizations. As we explained in our comments on paragraph 1, such a strict provision is justified by the military character of the objects in question, which would be military objectives if they were not assigned to civil defence.
- 2751 The list of objects which must be marked does not appear to be very logical in relation to the definition given of “*matériel*” of civil defence organizations, which includes transports,⁵² but this was merely due to a lack of co-ordination; it was not deliberate, as the paragraph was adopted by Committee II without discussion. Thus for this paragraph alone the traditional distinction between buildings, equipment and transport is made once more.⁵³
- 2752 The expression *major items* of equipment and transports was not explained. It is clear with regard to small items of equipment such as boots or bandages that marking is unnecessary. As regards transports, it is clearly important that they should always be marked.
- 2753 As regards the provision that such objects should be *clearly* marked with the distinctive sign, “as large as appropriate”, this follows the logic of all the

⁴⁹ Cf. commentary Art. 61, sub-para. (a), *supra*, pp. 719-722.

⁵⁰ Cf. O.R. XII, p. 442, CDDH/II/SR.97, para. 24.

⁵¹ Cf. Art. 56, Third Convention. However, in this connection, see the explanation of vote of a delegation which, without explicitly giving its view on this question of administrative dependency on a camp, “understands the provision in paragraph 2 to mean that the adverse Party may authorize volunteers from among the personnel described in paragraph 2 to continue their civil defence activities without interruption”, O.R. VI, p. 276, CDDH/SR.43, Annex (Switzerland).

⁵² Cf. Art. 61, sub-para. (d).

⁵³ Cf. particularly Chapters V and VI of the First Convention.

provisions in the Protocol concerning identification, and of Annex I, which emphasizes the need to enhance the visibility of the sign.⁵⁴

Paragraph 4 – Buildings and *matériel* which have fallen into the hands of the adverse Party

- 2754 “*Matériel*”, as mentioned in this paragraph, should once again be understood in the sense of Article 61 (*Definitions and scope*), sub-paragraph (d). Thus it includes transports.
- 2755 While Article 63 (*Civil defence in occupied territories*), paragraphs 4 and 5, lays down very restrictive rules regarding the requisition and diversion of objects of civilian civil defence organizations in occupied territories, the paragraph under consideration here in the first sentence merely refers to the laws of war in case such objects assigned to *military* civil defence units fall into the hands of the adverse Party. However, the second sentence imposes restrictions on the application of the laws of war.
- 2756 Thus, when the paragraph restricts its application to objects *permanently* assigned to the performance of civil defence tasks, it does so with a view to the second sentence. It goes without saying that objects temporarily assigned are also subject to the laws of war, but they are not covered by the second sentence, which moderates the first.
- 2757 The reference to the “laws of war” was contested, and one delegate stated that the term “war” had “been generally replaced by the term ‘armed conflict’”.⁵⁵ However, others raised the point that this expression “was a standard formula which was to be found in all legal handbooks on the subject and appeared also in paragraph 33 of the First Geneva Convention of 1949”, and that it had already been discussed in connection with Article 23 (*Other medical ships and craft*), paragraph 2, of the Protocol.⁵⁶
- 2758 The rules laid down with regard to military civil defence objects are quite similar to those laid down in the First Convention, particularly for medical buildings, materials and transports.⁵⁷
- 2759 In fact, the reference to the “laws of war” is essentially a reference to the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907. In short, the Regulations prohibit the destruction or seizing of the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war. It also prohibits pillage. On the other hand, it admits the right to booty, but this right may be exercised only with regard to any movable property of the enemy State, and in respect of such booty there is no obligation of restitution or compensation.⁵⁸

⁵⁴ In this respect, *cf.* particularly commentary Annex I, Art. 15, para. 3, *infra*, p. 1293.

⁵⁵ *Cf.* O.R. XII, p. 444, CDDH/II/SR.97, para. 43.

⁵⁶ *Cf. ibid.*, p. 445, paras. 44-45.

⁵⁷ *Cf.* First Convention, Articles 33 to 35.

⁵⁸ *Cf.* Hague Regulations, Arts. 23, para. 1(g); 28; 47; 53, para. 1 and 56; *cf.* also *Commentary I*, p. 275 (Art. 33, para. 2).

- 2760** Subject to the second sentence, a Party to the conflict in whose power the movable objects concerned here fall, may therefore use them as it sees fit.
- 2761** On the other hand, immovable property of the enemy is not war booty. Nevertheless, the Occupying State may make use of buildings, though only as administrator and usufructuary,⁵⁹ and still subject to the second sentence.
- 2762** The second sentence therefore mitigates the strict application of the first sentence. Although the Occupying State may use the objects concerned here as it wishes, this applies only under certain conditions.
- 2763** One needs either:
- an “imperative military necessity”⁶⁰ to divert such objects; or
 - the objects must be no longer required for the performance of civil defence tasks; or
 - finally, if the objects are still required for the performance of civil defence tasks, previous arrangements must have been made for adequate provision for the needs of the civilian population.
- 2764** Nevertheless, all these conditions, which are similar to those contained in Article 14 (*Limitations on requisition of civilian medical units*), paragraph 3, for the requisition of civilian medical units, leave some margin of judgment, and it is important that this judgment should be made in good faith. It follows from the spirit of the provision that in principle the civilian population should not suffer as a result of the requisition or diversion of the objects concerned here. If, in exceptional cases, it does suffer, this may only be for reasons of imperative military necessity, which must respect the principle of proportionality between the military advantage anticipated and the damage caused to the civilian population.⁶¹

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⁵⁹ Cf. Hague Regulations, Art. 55.

⁶⁰ On the meaning of this expression, cf. commentary Art. 62, para. 1, *supra*, p. 740.

⁶¹ On the concept of proportionality, cf., by analogy, commentary Art. 51, para. 5(b), *supra*, pp. 623-626.

Part IV, Section II – Relief in favour of the civilian population

Introduction

- 2765** Providing supplies for the civilian population in time of armed conflict is a basic problem, as events have frequently and cruelly shown.
- 2766** The Fourth Convention contains numerous provisions – Articles 47-78 – relating to the obligations of an Occupying Power with respect to the population of the occupied territory. Moreover, Article 23 of this Convention deals with the free passage to be allowed to consignments intended for the civilian population of the Parties to the conflict. However, this article imposes fairly narrow limits with regard to the persons who may benefit from relief and regarding the nature of the relief.
- 2767** A major area of concern with regard to this problem became apparent within the context of the Red Cross, and more generally, to the whole of the international community. The XXIst International Conference of the Red Cross (Istanbul, 1969) adopted in Resolution XXVI a “Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations”.¹ In Resolution 2675 (XXV) of 9 December 1970 the United

¹ The Declaration is as follows:

- “1. The fundamental concern of mankind and of the international community in disaster situations is the protection and welfare of the individual and the safeguarding of basic human rights.
2. Relief by impartial international humanitarian organizations for civilian populations in natural or other disaster situations should as far as possible be treated as a humanitarian and non-political matter and should be so organized as to avoid prejudicing sovereign and other legal rights in order that the confidence of the Parties to a conflict in the impartiality of such organizations may be preserved.
3. The activities of impartial international humanitarian organizations for the benefit of civilian populations should be coordinated in order to secure prompt action and effective allocation of resources and to avoid duplication of effort.
4. Disaster relief for the benefit of civilian populations is to be provided without discrimination and the offer of such relief by an impartial international humanitarian organization ought not to be regarded as an unfriendly act.
5. All States are requested to exercise their sovereign and other legal rights so as to facilitate the transit, admission and distribution of relief supplies provided by impartial international humanitarian organizations for the benefit of civilian populations in disaster areas when disaster situations imperil the life and welfare of such populations.
6. All authorities in disaster areas should facilitate disaster relief activities by impartial international humanitarian organizations for the benefit of civilian populations.”

Nations General Assembly, “*convinced* that civilian populations are in special need of increased protection in time of armed conflicts”, reaffirmed eight fundamental principles relating to the protection of the civilian population in time of armed conflict, of which the eighth² confirms the applicability of the Declaration mentioned above in the case of armed conflict.

- 2768** The question was discussed during the drafting of the Draft Protocols, particularly in the Conferences of Government Experts and Red Cross Experts. As it considered that the problem of relief in occupied territory was adequately dealt with in the Fourth Convention, the 1973 draft laid the emphasis on the needs of civilian populations who were not in occupied territory, i.e., essentially of the population on the territory of a Party to the conflict. The first article determined the field of application of the Section, and was followed by an article underlining the responsibility of the Parties to the conflict to secure supplies for the civilian population, and a third article laying down the principle that relief actions should be undertaken and accepted when a Party to the conflict does not manage to secure such supplies. In addition, this article laid down the ways in which these actions are to be undertaken.
- 2769** During the Diplomatic Conference some delegations, in the name of the principle of national sovereignty, took issue over the propriety of an article reminding a Party to the conflict of its obligations to secure supplies for its own population. In fact, it could be argued that such a question is an issue of human rights rather than international humanitarian law.
- 2770** Moreover, some considered that a Party to the conflict could not be prevented from according, in this field, priorities based on military necessity rather than humanitarian criteria (for example, privileges accorded to members of the armed forces to ensure their health). Therefore, as the Parties to the conflict could not be forced to fulfil this obligation *without adverse distinction*, they did not consider it worth mentioning.³
- 2771** On the other hand, there was a considerable body of opinion that the obligation of an Occupying Power to ensure essential supplies for the civilian population of occupied territory should be supplemented, despite the existence of the many provisions relating to such territory in the Fourth Convention. Consequently, in order to meet this concern – and not because it was logically required by the general framework of the draft – the article was finally formulated.
- 2772** However, the large majority of the civilian population, who are not in occupied territory in time of armed conflict, was not forgotten. Though the Conference did not consider it appropriate to introduce an article on the responsibility of each Party to the conflict to secure supplies for its own population, as we have just

² The complete text of this eighth principle is as follows: “The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in Resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.”

³ On the points mentioned in this paragraph and the preceding paragraph, cf. *O.R.* XII, p. 316, CDDH/II/SR.84, paras. 31-35.

seen, it did, on the other hand, agree to lay down the principle that relief actions must be undertaken in favour of all civilian populations with insufficient supplies, as laid down in the draft. Moreover, the ways in which this principle is to be applied are broadly described.

2773 Finally, the Conference added an article on the question of personnel participating in relief actions, which was not broached either in the Conventions or in the 1973 draft.

2774 In conclusion, compared with the Conventions, the Protocol is characterized by enlarging the range of supplies deemed essential to the civilian population of occupied territory; by an extension of the benefit of this relief to the whole of the civilian population; by an emphasis on the obligation – even though still relative – for the Parties to the conflict to accept relief in case of necessity; by provisions relating to the personnel participating in relief actions, who had been hitherto ignored.

Y.S.

Protocol I

Article 68 - Field of application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

Documentary references

Official Records

O.R. I, Part I, p. 157; Part III, p. 20 (Art. 60). *O.R.* III, p. 280. *O.R.* VI, p. 244, CDDH/SR.43, paras. 12-13. *O.R.* XII, pp. 311-315, CDDH/II/SR.84, paras. 3-28; p. 333, CDDH/II/SR.87, paras. 1-3; p. 334, para. 9. *O.R.* XIII, pp. 354-358, CDDH/406/Rev.1, paras. 6-11 and 18-20; pp. 377-378, paras. 68-70; p. 447, CDDH/II/430 (Art. 60); p. 450, paras. 1-2.

Other references

CE/3b, pp. 121-122. *CRCE 1971, Report*, pp. 39-41. *CE 1971, Report*, pp. 84-86, paras. 478-486. *CE 1972, Basic Texts*, p. 22. *CE 1972, Commentaries*, Part I, pp. 129-130 (introduction to Chapter II). *CRCE 1972, Report*, pp. 36-37 (Art. 64). *CE 1972, Report*, vol. I, pp. 160-161, paras. 3.263-3.265; p. 162, para. 3.279 (Art. 66). *Commentary Drafts*, p. 77 (Art. 60).

Commentary

- 2775 This article determines the personal field of application of Section II which applies “to the civilian population as defined in this Protocol”. The civilian population is defined in Article 50 (*Definition of civilians and civilian population*), paragraph 2, as comprising “all persons who are civilians”. As regards civilians, they are defined in Article 50 (*Definition of civilians and civilian population*), paragraph 1, as “any person who does not belong to one of the categories of

persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol”.¹

2776 Moreover, it specifies that the provisions of this Section “are supplementary to” the relevant provisions of the Fourth Convention. As the provisions of the Protocol contain not only a reaffirmation of some rules, but also a development, it is clear that for the Parties to the Protocol the provisions of the Conventions should be read together with the supplementary provisions of Protocol I. This applies, for instance, to the obligations of the Occupying Power to ensure the necessary supplies for the civilian population of the occupied territory, obligations which are augmented in Article 69 (*Basic needs in occupied territories*). The same also applies to the fact that relief actions for the benefit of a Party to the conflict can be provided for the civilian population as a whole, and not only certain categories. This is important, as under the régime of the Conventions, an action for the benefit of a Party to the conflict which is not limited to the prescribed categories could have been challenged by the adverse Party. Moreover, if the relief came by sea, it could have been included in actions impeded by a blockade, or could have been treated as contraband.²

2777 Article 68 mentions the most important provisions of the Fourth Convention to be supplemented by this Section. These are Article 23, which deals with the consignment of medical stores, foodstuffs and clothing to a Party to a conflict; Article 55, which establishes the duty of the Occupying Power to ensure the food and medical supplies of the population of the occupied territory; Article 59, which deals with relief schemes on behalf of the population of the occupied territory; Article 60, which is a reminder that relief consignments to a territory shall in no way relieve the Occupying Power of any of its responsibilities towards the civilian population, and which prohibits the diversion of such relief consignments; Article 61, which deals with the distribution of relief consignments; and Article 62, which in principle grants the civilian population in occupied territory, and other protected persons in occupied territories the right to receive individual relief consignments sent to them.

2778 These are the most important articles supplemented by this Section, but there are other articles in the Fourth Convention which are affected to a greater or lesser extent, and Article 68 clearly shows that the enumeration is not exhaustive by stating that the Section also supplements the “other relevant provisions of the Fourth Convention”. On the other hand, the Diplomatic Conference refrained from specifying – as in the 1973 draft – that this Section is complementary “to such international rules concerning relief as may be binding upon the High Contracting Parties”. It went along with the opinion of one delegate who considered that this was “somewhat vaguely worded”, and who consequently requested that only the relevant provisions of the Fourth Convention be mentioned.³

Y.S.

¹ For further details on this subject, cf. commentary Art. 50, *supra*, p. 609.

² On this subject, cf., in particular, K.J. Skubiszewski, “Use of Force by States”, in M. Sørensen (ed.), *Manual of Public International Law*, New York, 1968, pp. 836-839; cf. also commentary Art. 54, *supra*, p. 651, and commentary Art. 14, Protocol II, *infra*, p. 1455.

³ Cf. O.R. XII, p. 315, CDDH/II/SR.84, paras. 24-25.

Protocol I

Article 69 - Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Documentary references

Official Records

O.R. I, Part I, p. 157; Part III, p. 20 (Art. 61). *O.R.* III, p. 281. *O.R.* VI, p. 245, CDDH/SR.43, paras. 14-16. *O.R.* XII, pp. 312-314, CDDH/II/SR.84, paras. 5-18; pp. 316-318, paras. 29-39; pp. 333-336, CDDH/II/SR.87, paras. 1-23. *O.R.* XIII, pp. 354-358, CDDH/406/Rev.1, paras. 6-9 and 18-20; pp. 377-378, paras. 68-69 and 71; p. 410, *id.*, Annex (Art. 61); p. 447, CDDH/II/430 (Art. 61).

Other references

CE/3b, pp. 121-122. *CRCE 1971, Report*, pp. 39-41. *CE 1971, Report*, pp. 84-86, paras. 478-486. *CE 1972, Basic Texts*, p. 22 (Art. 63). *CE 1972, Commentaries*, Part I, pp. 130-131 (Art. 63). *CE 1972, Report*, vol. I, p. 161, paras. 3.266-3.267 (Art. 63); vol. II, p. 75, *CE/COM II/PC 58. Commentary Drafts*, pp. 77-78 (Art. 61).

Commentary**Paragraph 1 – Duties of the Occupying Power**

- 2779** This paragraph supplements paragraph 1 of Article 55 of the Fourth Convention, which imposes on the Occupying Power the obligation “of ensuring the food and medical supplies of the population” of the occupied territory. It sets out from the idea that it is too restrictive to limit this obligation to supplying the population of the occupied territory only with food and medical supplies. Thus mention is made here in addition of the provision of clothing, bedding, and means of shelter. In fact, it is quite possible to suffer, and even die, from heat or cold, and it is essential that the civilian population has adequate clothing, bedding and shelter. Urgent action to provide shelter applies particularly if the occupied territory has suffered damage from bombing. The immediate provision of makeshift shelters (tents, prefabricated or other forms of housing), is an essential preliminary step to more long-term reconstruction.
- 2780** However, the article does not contain an exhaustive list, and it places the responsibility upon the Occupying Power to provide all the “other supplies essential to the survival of the civilian population”. The word “other” clearly shows that this list was not intended to be exhaustive. This is no more than common sense. In fact, it depends on the local conditions whether certain supplies are essential or not. Thus fuel might be essential in a cold region, and some form of craft for an isolated island. The duty of the Occupying Power therefore depends on the local conditions.
- 2781** Moreover, the obligation also extends to objects necessary for religious worship. In this respect the Occupying Power already had an obligation laid down in Article 58 of the Fourth Convention to *accept* the “consignments of books and articles required for religious needs” and to *facilitate* “their distribution in occupied territory”. Article 69 of the Protocol therefore goes a little further since it imposes the obligation on the Occupying Power itself to provide these objects in the situation where the population of the occupied territory is deprived of them, and is unable to obtain them itself. Obviously the objects themselves are not described, as these depend on the religion of the population concerned.
- 2782** If the occupied territory has insufficient supplies, the Occupying Power must import supplies. This obligation, following from the obligation to ensure the food and medical supplies in accordance with Article 55, paragraph 1, of the Fourth Convention, extends here to all the essential supplies mentioned above.
- 2783** However, the obligation imposed on the Occupying Power only applies “to the fullest extent of the means available to it”. This restriction was already contained in Article 55, paragraph 1, of the Fourth Convention. During the Diplomatic Conference it was proposed to delete it. The delegations which proposed the deletion¹ feared that this restriction would permit the Occupying Power to evade the obligations of this article.² It was finally retained in particular to maintain on

¹ Cf. O.R. III, p. 281, CDDH/II/70.

² O.R. XII, p. 335, CDDH/II/SR.87, para. 17.

this point the indispensable correlation between Article 55 of the Fourth Convention and Article 69 of the Protocol which supplements it. However, in this respect it was clearly specified that there was “a positive, complete requirement on the Occupying Power to use all means available to provide the supplies in question”,³ and that there was an obligation upon the Occupying Power “to arrange for other steps to be taken if it could not supply the requirements in question from its own resources or those of the occupied territory”.⁴

2784 On the basis of these explanations the article was adopted by consensus in Committee II, and it must therefore be interpreted in that light. Thus the existence of an *obligation* on the part of the Occupying Power to accept relief action cannot be denied when it has no other means of meeting the essential needs of the civilian population of the occupied territory. It seems legitimate to recognize that such relief actions should comply with the condition of being humanitarian and impartial in character.⁵ Nevertheless, this criterion must not be abused in order to avoid any action.

2785 Finally, Article 69, paragraph 1, states that the provision of the supplies should be made “without any adverse distinction”, an obligation which applies equally to aid provided directly by the Occupying Power, and to relief actions. Similar comments are made in many other provisions in the Conventions and the Protocols.⁶ As shown above,⁷ some delegates contested the possibility of introducing this principle in the context of a general obligation imposed on the Parties to the conflict, which referred equally to the populations of these Parties. This objection disappeared from the moment it became clear that the article was concerned only with the population of the occupied territory. Moreover, it should be noted that it does not prohibit all distinctions, but only those based on criteria other than medical or humanitarian criteria. To give more blankets to old people or extra food to nursing mothers, for example, is obviously not against the principle, and on the contrary, is in accordance with its spirit.⁸

Paragraph 2 – Relief actions

2786 This paragraph is essentially a cross-reference to the Fourth Convention as regards the relief actions undertaken for the benefit of the populations of occupied territories and a reminder of the relevant provisions of this Convention. These provisions are concerned first of all with collective relief (Article 59) or individual relief (Article 62) intended for the whole population, and they determine the responsibilities of the Occupying Power with respect to such relief

³ *Ibid.*, para. 20.

⁴ *Ibid.*, para. 15.

⁵ On the meaning to be given to this expression, *cf.* commentary Art. 70, *infra*, pp. 817-818.

⁶ *Cf.* in particular Art. 12, First Convention; Art. 12, Second Convention; Art. 16, Third Convention; Art. 27, Fourth Convention; Art. 10, para. 2, and Art. 15, para. 3, and Art. 75, para. 1, Protocol I; Art. 2, para. 1, Protocol II.

⁷ Introduction to the Section, *supra*, p. 806.

⁸ See commentary Art. 70, *infra*, pp. 817-818.

(Article 60), and the means of distribution (Article 61). The extended scope laid down in Article 69, paragraph 1, of the Protocol, of relief considered to be essential, did not need to be mentioned in paragraph 2, as the content of relief consignments is not laid down exhaustively in the Fourth Convention (Article 59 states that these relief schemes “shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing”).

2787 The other provisions mentioned are concerned with relief consignments intended for civilian internees. They lay down the general principles of such consignments (Article 108), and regulate the questions of collective relief (Article 109), exemption from postal and transport charges (Article 110), and special means of transportation (Article 111).⁹

2788 Nevertheless, two additional details are mentioned regarding relief actions for the benefit of the civilian population of occupied territories:

- the provisions on the personnel participating in relief actions, laid down in Article 71 of the Protocol (*Personnel participating in relief actions*) apply to such actions. There is no provision on such personnel in the Fourth Convention. We will examine the content in the context of the commentary on Article 71 (*Personnel participating in relief actions*);¹⁰
- these actions “shall be implemented without delay”. In this way the often urgent character of such actions is underlined. Nevertheless, this expression does not impose a specific obligation upon anyone to undertake such actions. Article 59 of the Fourth Convention specifies that relief actions “may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross”. From this one can deduce a certain responsibility with regard to such actions for States and organizations able to undertake them, but not a specific legal obligation. It is above all reminiscent of the principle of international solidarity¹¹ for these cases of extreme need, which is obviously addressed in the first place to those who have the means and are capable of providing the required aid.

2789 However, the instruction is also addressed, and in a more pressing form, to the Occupying Power which is not able to ensure the provision of supplies for the population, and to those Powers which must permit free passage to relief consignments over their territory. These Powers genuinely have a duty to be diligent and speed up as much as possible the necessary procedures for the proper execution of relief actions. Delays due simply to procedural reasons would be inadmissible.

Y.S.

⁹ For further details on these various provisions, cf. *Commentary IV*.

¹⁰ *Infra*, p. 831.

¹¹ This principle can be deduced in particular from the Declaration adopted in Resolution 2675 of the United Nations General Assembly, mentioned above (cf. *supra*, introduction to this Section, pp. 805-806).

Protocol I

Article 70 - Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
 - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
 - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
 - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Documentary references

Official Records

O.R. I, Part I, pp. 157-158; Part III, pp. 20-21 (Art. 62). *O.R.* III, pp. 282-284. *O.R.* VI, p. 245, CDDH/SR.43, paras. 17-21; p. 270, *id.*, Annex (Holy See).

O.R. XII, pp. 311-314, CDDH/II/SR.84, paras. 3-18; pp. 318-320, paras. 40-51; pp. 333-334, CDDH/II/SR.87, paras. 5-6 and 8; pp. 336-344, paras. 24-96; p. 355, CDDH/II/SR.89. *O.R.* XIII, pp. 377-378, CDDH/406/Rev.1, paras. 68-69; p. 379, para. 72; pp. 447-448, CDDH/II/430 (Art. 62).

Other references

CE/3b, p. 122. *CRCE 1971, Report*, pp. 39-41. *CE 1971, Report*, pp. 84-86, paras. 478 and 480-483; pp. 96-97, *CE/COM III/43-44*. *CE 1972, Basic Texts*, p. 22 (Arts. 64-66). *CE 1972, Commentaries*, Part I, pp. 131-133 (Arts. 64-66). *CRCE 1972, Report*, pp. 36-37 (Art. 64); p. 67, Annex I (Art. 64); pp. 73-74 (Art. 64). *CE 1972, Report*, vol. I, pp. 161-162, paras. 3.268-3.280 (Arts. 64-66); vol. II, p. 67, *CE/COM III/PC 16-18*; pp. 78-82, *CE/COM III/PC 81-83*, 85, 88 and 97-98. *Commentary Drafts*, pp. 78-79 (Art. 62). *XXII Ind. Int. Conf. RC, Report*, p. 18 (Art. 62).

Commentary

Paragraph 1

First sentence – Scope of the principle

2790 Relief actions intended for occupied territories are not covered by this paragraph.¹

2791 The concept of civilian population was defined above.²

2792 What is “a territory under the control of a Party to the conflict, other than occupied territory”? This expression was the result of two major trends which had appeared in the Working Group of Committee II, one of which wished “to place the Parties under a clearly defined obligation with respect to relief”, while the other considered that “such an obligation could not be imposed”.³ One of the consequences of the compromise resulting from this was that a clear distinction was made between the scope of application of Article 69 (*Basic needs in occupied territories*) and Article 70 (61 and 62 of the 1973 draft), the former applying to occupied territories, while the latter applied to territories other than occupied territories. The negative definition means that a territory under the control of a Party to the conflict is definitely covered by one or other of these provisions on relief. There might be some differences of opinion with regard to the concept

¹ On this subject, cf. commentary Art. 69, *supra*, p. 811.

² Cf. commentary Art. 68, *supra*, p. 809, and Art. 50, *supra*, p. 609.

³ *O.R.* XII, p. 333, CDDH/II/SR.87, para. 5.

of occupation,⁴ but it would not be possible to deny at the same time both the application of Article 69 (*Basic needs in occupied territories*) and that of Article 70.

- 2793 In fact, we are obviously concerned primarily here with the national territory of a State involved in a conflict. However, the article also covers the few territories in the world which still have special status,⁵ and, above all, territories under the control of movements fighting in conflicts such as those mentioned in Article 1 (*General principles and scope of application*), paragraph 4. As regards the *control* of territory, this refers here to material control. This should be understood to refer in particular to the capacity of the Party concerned to ensure the execution of its decisions in the whole territory. However, one should not exclude any territory from the scope of application of Articles 69 (*Basic needs in occupied territories*) or 70 on the ground that they are not in fact controlled by anyone, or that control is in dispute, even though it may happen that a relief action is in practice impossible in certain cases.
- 2794 The civilian population must be “not adequately provided with the supplies mentioned in Article 69”, which itself only supplements Article 55 of the Fourth Convention.⁶ The expression “not adequately provided”, similar to the wording of Article 55 of the Fourth Convention, is not very precise, but this is justified. The need for a relief action and the extent of its urgency must be assessed in every case individually, depending on the real requirements. It is the *essential* character of such requirements that must be the determining factor. This is a matter of common sense which cannot be formulated in precise terms.
- 2795 From the moment that the civilian population referred to here is, *in fact*, not adequately provided, the principle of relief actions applies: relief actions “shall be undertaken” (and not: may be undertaken).
- 2796 As in the case of relief actions intended for occupied territories, the question arises as to *whom* this apparent *obligation* is addressed.⁷
- 2797 Relief actions to be undertaken are defined as being “humanitarian and impartial in character” and “conducted without any adverse distinction”. In other words, any action which does not comply with these criteria, which were taken from the 1973 draft, simply would not be covered by Article 70. However, as in the case of relief actions intended for occupied territories, it is obviously essential not to use these conditions as a pretext to avoid accepting relief actions.
- 2798 The *humanitarian* character of the action is fulfilled once it is clear that the action is aimed at bringing relief to victims, i.e., in the present case, the civilian population lacking essential supplies. What matters most of all is to avoid deception, that is to say, using the relief action for other purposes. However, such cases must be assessed on a factual basis, and the humanitarian character of an

⁴ This problem is not dealt with here. Cf. *Commentary IV*, particularly Art. 6, pp. 60 ff.

⁵ The problem of such territories is not dealt with in the context of this commentary. In this respect, cf. in particular the Resolutions of the General Assembly, proposed by the Fourth Committee. Cf. also *UN Chronicle*, October 1979, p. 28; January 1980, p. 51; September 1983, pp. 17-19 (with regard to the last territory under the United Nations Trusteeship System).

⁶ Cf. commentary Art. 69, *supra*, pp. 812-813.

⁷ On this subject, cf. commentary Art. 69, *supra*, p. 814.

action could not be contested merely on the basis of its intention: the only ground for refusing an action would be the failure to comply with the required criteria.

2799 The *impartial* character of the action may be assumed on the basis of fulfilling the obligation, also laid down, to conduct the action “without any adverse distinction” (which is often referred to as the principle of non-discrimination).

2800 The second obligation results from the philosophical concept of the equality of human beings, which is actually a basic consequence of the principle of humanity. This refers to the real object of the action: the persons who are suffering. By contrast, the concept of impartiality refers to the agent of the action: it is a moral quality which must be present in the individual or institution called upon to act for the benefit of those who are suffering. In other words, the principle of non-discrimination removes objective distinctions between individuals, while impartiality removes the subjective distinctions.

2801 Impartiality presupposes the existence of recognized rules which must be applied dispassionately and without prejudice. Such rules conform precisely with the principles of non-discrimination and proportionality: impartiality “endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress”.⁸

2802 In the context of the provision under consideration here, the relief action must observe:

- the principle of non-discrimination, including the principle of proportionality (i.e., the sharing according to needs) as a general aim and an ideal which cannot always be achieved, especially in a limited action;
- impartiality in the real sense of the word: those conducting the action or providing the relief must resist any temptation to divert relief consignments or to favour certain groups or individuals rather than others because of personal preferences.

2803 This in no way excludes the possibility of specific actions, for example, for the benefit of children or handicapped people, nor of unilateral actions undertaken for the benefit of only one Party to the conflict. In particular, an unilateral action cannot be considered as indicating a lack of neutrality. It is important to emphasize this point, as traditional links, or even the geographical situation, may prompt a State to undertake such actions, and it would be stupid to wish to force such a State to abandon the action.

2804 Obviously all this also applies to actions undertaken by impartial humanitarian organizations, such as the ICRC. However, such organizations themselves accept the obligation of adopting an universal approach for all victims of armed conflict in order to preserve their credibility. They do not favour the population of one Party to the conflict to the detriment of that of another Party, except on the basis of purely humanitarian criteria or material constraints. Their actions are based

⁸ This remark is part of the text accompanying the principle of impartiality in the “Proclamation of the Fundamental Principles of the Red Cross”, adopted by Resolution IX of the XXth International Conference of the Red Cross, Vienna 1965. It also applies in the present context. On the subject of this principle, cf. also J. Pictet, *The Fundamental Principles of the Red Cross, Commentary*, Geneva, 1979, pp. 33-51.

on the needs of *all* the victims concerned, regardless of any criteria of nationality, and independently of the Party to which they belong.

2805 Finally, such actions are undertaken only “subject to the agreement of the Parties concerned”. This raises the problem of the degree to which a State can be obliged to accept relief for its own population. This was discussed at length throughout the Conferences of Experts and the CDDH. The 1972 draft laid down the obligation to accept relief, but nevertheless included one important restriction, since this obligation was imposed only “to the fullest extent possible”, an expression which some experts wished to delete. In the 1973 draft the obligation was laid down without any escape clause, provided of course that the conditions justifying such an action were met and the action complied with the criteria examined above. However, a reservation was made with regard to the competence to determine the technical details of the action and to place it under the supervision of a Protecting Power or an impartial humanitarian organization, and such a reservation is indeed also made in the text which was finally adopted. The clause requiring the agreement of the Parties concerned was added during the Conference essentially out of a concern to protect the national sovereignty of the State receiving the relief. Nevertheless it was clearly stated that this reservation:

“did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones”.⁹

Several delegations supported this interpretation of the expression “subject to the agreement of the Parties concerned”, and one of them even stressed that “the present draft, without involving any infringement of the sovereignty of the Parties concerned, suggested that the necessary agreement should not be withheld”.¹⁰ None of the delegations opposed this. Thus the expression should be interpreted in this sense, and this interpretation is actually supported by the provision of Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 1, which prohibits the “starvation of civilians as a method of warfare”.¹¹

2806 However, the receiving Party is not the only Party concerned. If this were the case, it would have been more clearly stated, and there would have been no need to use the plural expression. In fact, three types of Party may be concerned: those from whose territory an action is undertaken or from which relief has been sent, those through whose territory relief consignments pass, and those receiving relief. On the other hand, an adverse Party to that receiving relief, but through whose territory relief consignments do not have to pass, is not among *the Parties concerned* in the sense of this paragraph.

⁹ O.R. XII, p. 336, CDDH/II/SR.87, para. 27.

¹⁰ *Ibid.*, p. 337, para. 30.

¹¹ On this subject, *cf.* in addition commentary Art. 54, *supra*, pp. 653-654.

- 2807** Logically, the second type of Party mentioned above, i.e., a Party through whose territory relief consignments must pass, is also excluded from *the Parties concerned* since it forms the object of a separate paragraph (paragraph 2).¹² This leads to the conclusion that the Parties concerned here, whose agreement is required, are primarily the Parties from which the relief is to come (assuming of course that it is not the government itself which has initiated the relief action or will be sending the relief consignments) and the Parties for which the relief is intended.
- 2808** However, it should be stressed once again that this provision should be read in conjunction with Article 54 (*Protection of objects indispensable to the survival of the civilian population*) which prohibits the starvation of civilians as a method of warfare, and the possibility of refusing a relief action or relief consignments is not a matter of discretion: such refusals should thus remain exceptional.

Second sentence – Non-interference

- 2809** Already in the 1972 draft it had been considered important to emphasize that the offer of relief “shall not be considered as an unfriendly act”, so that humanitarian activities in this field could be undertaken without unnecessary stress.
- 2810** The 1973 draft contained the following expression: “Relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict”. The text which was finally adopted chose to start from the *offer* itself, as even the mere offer must not be regarded as an unfriendly act. Nevertheless, it is obvious that the provision also covers the action itself, provided that, as in the case of a mere offer of relief, the rules with which it must comply and which were examined above, are respected.
- 2811** For the sake of completeness it was specified that such offers (and actions) should not be considered either as “interference in the armed conflict or as unfriendly acts”. The expression “unfriendly acts”, which was not contained in the draft, was added, as a result of an amendment.¹³ It was taken from the fourth principle of the Declaration of Principles adopted by Resolution XXVI of the XXIst International Conference of the Red Cross (Istanbul, 1969).¹⁴
- 2812** These two expressions elucidate, on the one hand, the fact that a relief action will never be considered as a lack of neutrality,¹⁵ and, on the other hand, that such an offer or action should in no way alter the good relations existing between the Party making the offer or undertaking the relief and the adverse Party of that Party whose population is receiving the relief. And *a fortiori* the offer or action cannot be seen as a hostile act, let alone as an act of war.

¹² On this subject, *cf. infra*, pp. 822-823.

¹³ *Cf. O.R. III*, pp. 282-283, CDDH/II/398 and Add.1, and *O.R. XII*, p. 319, CDDH/II/SR.84, para. 45.

¹⁴ On this subject, *cf. introduction to this Section, supra*, p. 805.

¹⁵ On the meaning of neutrality in this context, *cf. commentary Art. 19, supra*, p. 237.

Third sentence – Priorities in distribution

- 2813** Article 70 constitutes an undeniable development of international humanitarian law, when compared with Article 23 of the Fourth Convention, insofar as it extends the circle of those benefitting from the relief actions to the whole of the civilian population affected with regard to all essential supplies (themselves defined more widely than in Article 23) which may be made available by relief actions.
- 2814** It should be recalled that Article 23 of the Fourth Convention allows only for the distribution of medical and hospital stores and objects necessary for religious worship to the civilian population as a whole. As regards consignments of essential foodstuffs, clothing and medicines, these can exclusively be distributed to children under fifteen, expectant mothers, and maternity cases.
- 2815** Thus this restriction on those benefitting from relief is removed, and as stated above, Article 23 of the Fourth Convention must be considered to have been *modified* on this point for the Parties to the Protocol, at least in their reciprocal relations.¹⁶
- 2816** However, this increase in the circle of beneficiaries is accompanied by a reminder that priority with regard to relief must be given to some persons, and that there is even an *obligation* to apply such priorities. The responsibility for ensuring that this obligation is fulfilled falls upon those responsible for the distribution of the relief. These priorities clearly show that the obligation to conduct relief actions without any *adverse* distinction does not mean at all that it is prohibited to favour persons with special needs.
- 2817** The extent of such priorities is not specified, and one has indeed to trust those responsible for distribution in this respect. The reminder of priorities is mainly intended to encourage the search for the persons concerned, who are precisely those who have the most difficulties in standing up for themselves and their needs. In the case of equal needs, such persons should receive relief first.
- 2818** Four categories of persons who must be given priority are specifically mentioned. Three of these are those who were the sole beneficiaries of such relief according to Article 23 of the Fourth Convention, i.e., children, expectant mothers and maternity cases.
- 2819** As regards children, the age – limit of fifteen is not specified here, unlike in Article 23 of the Fourth Convention. It may be deduced from Article 77 of the Protocol (*Protection of children*) that the limit of childhood is set at eighteen years of age. However, special privileges are granted children under fifteen years of age,¹⁷ and others for newborn babies (who fall in the same category as the wounded).¹⁸ The absence of a fixed age – limit here therefore means that children up to eighteen years of age should have priority in receiving aid, but those responsible for distribution must first of all favour the most dependent children, i.e., in general, the youngest children – as common sense dictates.

¹⁶ On this subject, cf. commentary Art. 68, *supra*, p. 809.

¹⁷ Cf. Art. 77, paras. 2 and 3.

¹⁸ Cf. Art. 8, sub-para. (a).

- 2820** A fourth category, namely, nursing mothers, was added at the request of a delegate who stated that “babies needed food, and if mothers were to feed them, they too had to be fed”.¹⁹ This proposal was unanimously accepted, and it was stressed that it was indeed in accordance with the United Nations Declaration of the Rights of the Child (Resolution 1386 (XIV) of the General Assembly).²⁰
- 2821** However, the list is not exhaustive and priority must be given to any persons who, “under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection”. Examples include, in particular, wounded or sick civilians or others falling under these categories, such as the handicapped or other persons with a disability or those suffering physical or mental debilities. Similarly, persons deprived of their freedom as a result of the armed conflict²¹ should also have the benefit of special attention.
- 2822** The question of *military* wounded or sick is all the more delicate, as the Protocol is aimed at abolishing the distinction between the military wounded and sick, on the one hand, and civilians on the other.²² Article 70 clearly refers only to the civilian population, and it would therefore certainly be excessive to maintain that all the relief involved in the actions concerned here could also benefit the military wounded and sick. On the other hand, as *all* the wounded and sick must be cared for, and since it is permitted to send medical stores and equipment for the military wounded and sick,²³ the Parties concerned should not oppose the inclusion of medical stores and equipment intended for the military wounded and sick in this relief. In fact, Article 23 of the Fourth Convention was interpreted in this way in the Commentary on this Convention.²⁴

Paragraph 2 – Passage of relief consignments

- 2823** This paragraph relates to the passage of relief consignments and lays down an obligation with regard to these.
- 2824** The obligation is addressed to the “Parties to the conflict” and to “each High Contracting Party”, always provided that it applies to them, i.e., that their geographical position is such that the passage of relief consignments over their territory is necessary, or even simply useful, and that an appeal has been made to them in this respect.
- 2825** The Parties do not have the competence to refuse such passage. Thus they are *obliged* to permit and to facilitate such passage. However, this obligation does not imply agreement without limitations: the consignments, equipment and personnel concerned must be relief consignments, equipment and personnel (the adjective relates to all three terms)²⁵ “provided in accordance with this Section”,

¹⁹ O.R. XII, p. 336, CDDH/II/SR.87, para. 25.

²⁰ *Ibid.*, p. 337, para. 35.

²¹ On this subject, *cf.* Art. 11.

²² In this respect, *cf.* commentary Art. 8, sub-para. (a), *supra*, pp. 116-118.

²³ *Cf.* particularly Art. 38, Second Convention.

²⁴ *Cf. Commentary IV*, p. 180.

²⁵ *Cf. O.R. XII*, p. 339, CDDH/II/SR.87, para. 48.

i.e., essential for the survival of the civilian population, sent for purely humanitarian reasons and to be distributed without any adverse distinction.

2826 The reference to “this Section” is justified as Article 70 refers back to Article 69 (*Basic needs in occupied territories*) for the description of the supplies covered and the question of personnel participating in relief actions is regulated in Article 71 (*Personnel participating in relief actions*). However, paragraph 2 of Article 70 concerns only the passage of relief consignments intended for civilian populations other than those of occupied territories, as Article 69 (*Basic needs in occupied territories*), paragraph 2, refers back to the relevant articles of the Fourth Convention for the passage of consignments to occupied territories.

2827 Moreover, it is shown below that though the Parties are obliged to allow and facilitate the passage of such relief consignments, they still have the right to require certain guarantees.²⁶

2828 The obligation is addressed to States Parties to Protocol I which are not engaged in the conflict, as well as to the Parties to the conflict themselves: in fact, it is clearly stated that permission must be given, even if the assistance “is destined for the civilian population of the adverse Party”. Thus a Party to the conflict may not impede such assistance by means of a blockade.²⁷

2829 Finally an obligation is imposed to allow and facilitate “rapid and unimpeded passage” of the relief consignments, equipment and personnel. The intention of these words is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous. Customs officials and the police in particular should receive instructions to this effect. The passage referred to may take place over land, water, or by air. However, the speed of the passage and whether it takes place unimpeded depends on local circumstances. Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances. Obviously the passage is in danger of being difficult across territory or through the airspace of a Party to the conflict, and no one is expected to do the impossible: such a Party must do all it can to facilitate the passage of relief consignments. On the other hand, if it does not consider itself to be in a position to guarantee the safety of a consignment, it should say so clearly so that an alternative solution can be sought, or if there is none, the decision to take the risk or to give up the relief action is taken with full knowledge of the facts.

Paragraph 3 – The right of supervision of transit States

2830 As shown above, paragraph 2 imposes an *obligation* to allow and facilitate the passage of relief consignments, but this obligation still depends on a certain number of conditions which may be made by the Parties to which the obligation applies.

²⁶ Cf. commentary para. 3, *infra*.

²⁷ On the question of blockades, cf. commentary Art. 54, *supra*, pp. 653-654. Cf. also commentary Art. 68, *supra*, p. 810, and note 2.

Sub-paragraph (a) – Technical arrangements

2831 First, such Parties have the right to “prescribe the technical arrangements, including search, under which such passage is permitted”. Article 23 of the Fourth Convention contains a similar right (“the right to prescribe the technical arrangements”). As the commentary on the Fourth Convention states:

“No mention is made of the points on which its instructions will bear, but it will be agreed that the Power authorizing free passage is entitled to check the consignments and arrange for their forwarding at prescribed times and on prescribed routes.”²⁸

The arrangements may be prescribed for each case individually, but on the whole a general agreement is preferable, applicable to all consignments within a certain period, if larger scale relief actions are being undertaken. The right to prescribe such arrangements should, moreover, only be used without infringing the obligation to facilitate the rapid and unimpeded passage of relief consignments as laid down in the preceding paragraph.

Sub-paragraph (b) – Supervision of distribution

2832 Next, the Parties may make their agreement to allow such passage conditional “on the distribution of this assistance being made under the local supervision of a Protecting Power”. Obviously this element of supervision is of paramount importance, all the more as the range of relief consignments permitted is far broader than it was under the provisions of the Fourth Convention.²⁹ In fact, if relief, such as, for example, foodstuffs or tents, were to end up in the hands of the armed forces, the relief action would undoubtedly increase the military potential of the receiving Party and would be obviously unacceptable to the adverse Party which had allowed the passage of these goods, but also to a Party to the Conventions not engaged in the conflict, whose status of neutrality would be in danger of being questioned by the adverse Party of the recipient.

2833 Such supervision must be carried out by *a Protecting Power*. The singular is used here, although there could be several Protecting Powers in action in the territory of a Party to the conflict, namely when there are several Parties to the conflict which have designated different Protecting Powers. However, it is clear that the supervisory task cannot fall on any Protecting Power other than that or those who are active in the territory of the receiving Party with the consent of the belligerents.³⁰

2834 The reference to a Protecting Power also covers the substitute appointed in accordance with Article 5 (*Appointment of Protecting Powers and of their substitute*).³¹

²⁸ *Commentary IV*, p. 184.

²⁹ On this subject, *cf.* commentary Art. 68, *supra*, p. 810.

³⁰ In this sense, *cf.* O.R. XII, pp. 339-342. CDDH/II/SR.87, paras. 49-74.

³¹ *Cf.* commentary Art. 5, para. 7, *supra*, p. 89.

- 2835 The draft referred to supervision of a Protecting Power “or an impartial humanitarian organization”. The question of retaining or deleting this expression was subject to discussion during the CDDH.³² Its deletion is actually logical and in accordance with the system of the Protocol.
- 2836 In fact, the system laid down in the Conventions envisages the possibility of failure, not only in the appointment of a Protecting Power, but also that of a substitute, in which case an impartial humanitarian organization, such as the ICRC, would assume “the humanitarian functions performed by Protecting Powers under the present Convention”.³³ In this case, such an organization is not acting officially *in the capacity of a substitute*, even if this difference is not of great practical importance.
- 2837 In the system of the Protocol, failure with regard to the appointment of Protecting Powers is also taken into account, but in this case the Parties to the conflict are *obliged* to accept the offer of the ICRC or of any other “organization which offers all guarantees of impartiality and efficacy [...] to act as a substitute”. As failure to appoint a substitute does not arise in the Protocol, it was not really necessary to provide for an alternative in paragraph 3 under consideration here, i.e., that supervision must be exercised by an impartial humanitarian organization. If such an organization does take over the supervision, it does so as a substitute.³⁴
- 2838 However, the possibility of failure with regard to the appointment of a substitute should not be completely ruled out. In this case there would have been a failure to apply Article 5 (*Appointment of Protecting Powers and of their substitute*), but this should not paralyze the Protocol as a whole. A wholly formalistic approach in this respect would be contrary to the spirit of the Protocol, as stated in the CDDH.³⁵ Thus it is a question of finding an *ad hoc* solution, and the ICRC, whose right of initiative was confirmed and reinforced in the Protocol,³⁶ could play an important role in this context.
- 2839 Moreover, it should be noted that Article 23 of the Fourth Convention mentions supervision of “Protecting Powers”, and that this was not considered to be exclusive in the commentary on the article:

“Although the Convention expressly mentions only the Protecting Powers, they are not alone in being able to assume responsibility for supervising the distribution of the consignments. Recourse might also be had to the good offices of another neutral State or any impartial humanitarian organization.”³⁷

- 2840 The supervision relates to the distribution of the assistance. The way in which such supervision should be carried out is not specified and it is up to the Protecting Power (or its substitute) which is responsible for carrying out the supervision, to

³² Cf. O.R. XII, pp. 339-343, CDDH/II/SR.87, paras. 49-86.

³³ Cf. Art. 10/10/10/11, para. 3, common to the Conventions.

³⁴ For further details on this subject, cf. commentary Art. 5, paras. 3 and 4, *supra*, pp. 82-87.

³⁵ Cf. O.R. XII, p. 340, CDDH/II/SR.87, para. 59.

³⁶ Cf. Art 81, para. 1.

³⁷ *Commentary IV*, p. 183.

establish measures which are sufficiently strict to guarantee that the relief consignments will actually arrive at their legitimate destination. However, a slight loss of supplies should be tolerated in view of the difficulty of the task and this should not be used as a pretext to suspend any relief actions.

- 2841** By way of example, the commentary on Article 23 of the Fourth Convention mentions some measures conducive to ensuring control, such as “receipts for individual consignments, frequent spot checks in depots and warehouses, periodical verification of distribution plans and reports”.³⁸
- 2842** The personnel of the Protecting Power and the personnel mentioned in Article 71 (*Personnel participating in relief actions*) should play an important role in this respect.
- 2843** As regards the ICRC, it has established a very strict system of control for all the relief consignments which it provides.

Sub-paragraph (c) – Rule that relief consignments shall not be diverted and exception

- 2844** The first part of this sub-paragraph (c) does not lay down a right, but emphasizes an obligation: the Parties allowing passage “shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding”. In fact, this is a superfluous reminder, as the obligation is covered by that contained in paragraph 2, namely, to facilitate the rapid and unimpeded passage of all such consignments.
- 2845** However, the exception to this obligation – which indeed is strictly circumscribed – contains an additional right for the Party allowing the transit. In very rare cases, such a Party may delay the relief consignment or even divert it from its destination. Nevertheless, this can only be in “cases of urgent necessity”, i.e., it must be virtually impossible to do otherwise, and such delay or diversion must be in the interests of the civilian population receiving the relief.
- 2846** In concrete terms, the delay can only really be justified if it is impossible for reasons of security to enter the territory where the receiving population is situated, or to cross some part of the territory of the Party allowing the transit, particularly if this is a Party to the conflict.
- 2847** As regards diverting relief consignments, this would be allowed particularly when there is a delay in the transport of perishable foodstuffs, always provided that they are replaced by fresh provisions as soon as normal conditions are restored. It might also be justifiable in the case that a disaster – such as an earthquake, epidemic etc. – affected the Party through whose territory the relief consignment was passing, so that the provisions were even more necessary for the victims of this disaster than for those for whom they had initially been intended. However, in this case the consignment should certainly only be diverted with to the agreement of the donor.³⁹

³⁸ *Ibid.*, p. 183.

³⁹ On the meaning of the expression “except in cases of urgent necessity”, cf. also *ibid.*, Art. 60, p. 323.

2848 Finally, it should be noted with regard to paragraph 3, as for the whole of Article 70, that the conditions which may be imposed by the Party allowing the passage of relief consignments are less restrictive than those in Article 23 of the Fourth Convention, of which the second paragraph, which actually related only to the adverse Party, was simply omitted. Apart from the conditions mentioned above, the Party concerned could also refuse transit through its territory, in the context of Article 23, if it had:

“serious reasons for fearing:

- a) that the consignments may be diverted from their destination,
- b) that the control may not be effective, or
- c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods”.

2849 These conditions have a subjective character, since they depend on the judgment of the Party through whose territory the consignments must pass, regarding the possibility of control by the Protecting Power (sub-paragraph (a)) and, if appropriate, regarding the quality of such control. This should not serve as a *pretext* to refuse passage (despite the reference to “serious reasons”).

2850 Moreover, paragraph 2(c) of Article 23 of the Fourth Convention actually goes even further and virtually allows the blockage of any relief action. In fact it is clear that such an action, even if it all goes to the civilian population needing it, to some extent relieves the burden on the economy of the receiving Party. However, this is a question of proportionality: there is no way in which one could weigh the humanitarian considerations of an action destined to ensure the survival of a civilian population lacking essential supplies against the military advantage that such an action could have for the receiving Party, which would in any case always be minimal and indirect, even though it would be wrong to deny its existence altogether.

2851 Article 70 of the Protocol in this respect modifies Article 23 of the Fourth Convention, and the second paragraph of that article should be considered as obsolete in any armed conflict to which Protocol I applies.

2852 In any case, the reform introduced on this point by the Protocol is perfectly logical.

2853 As the Parties concerned may make their permission to allow the passage of relief consignments through their territory conditional on the supervision of the distribution by a Protecting Power (or its substitute), it becomes the responsibility of the latter once it accepts the mandate, and as soon as the relief reaches the territory of the receiving Party. The Party which has given permission for the passage is relieved of all responsibility from that moment.

2854 If the Protecting Power which has accepted the mandate does not actually exercise effective supervision, it is up to the Party to the conflict which has appointed it to react, or even in extreme cases, to withdraw the mandate which it had given in accordance with Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraph 2, of the Protocol. However, it should not reproach

the Party which has permitted the passage for the ineffective way in which the Protecting Power appointed by it has carried out its task.

2855 Moreover, if the Protecting Power declares that it is unable to carry out the mandate, the condition of paragraph 3(b) of Article 70 is not fulfilled and the Party concerned may refuse to allow the passage of the relief consignments.

2856 Thus, the required guarantees have been retained within the framework of the system introduced in Article 70, while reducing to a minimum the possibility for the Parties which have been requested to allow relief consignments to pass through their territory, to escape their obligations by invoking reasons based on subjective and unverifiable judgments.

Paragraph 4 – Obligation of Parties to the conflict with regard to protection and distribution of relief

2857 This paragraph is addressed to the Party to the conflict receiving the relief. It applies to the extent that the principle of such relief consignments have been accepted by that Party in accordance with paragraph 1.

2858 The obligation to *protect* relief consignments means, on the part of the Party concerned, that it must do its utmost to prevent such relief from being diverted from its legitimate destination, particularly by strictly punishing looting and any other diversion of relief and by providing clear and strict directives to the armed forces.

2859 If the authorities do not have the means to ensure such protection, particularly if they cannot prevent looting and diversion of relief consignments, the whole question whether the relief action can continue is obviously put in jeopardy, first from the point of view of the donors, then the Parties allowing the passage over their territory, and finally, and most of all, the adverse Parties of the receiving Party.

2860 Relief actions undertaken under the auspices of the ICRC, and consequently enjoying the protection of the red cross emblem, raise a special problem with regard to the obligations of the Parties to the conflict benefitting from the relief to ensure the protection of the relief consignments.

2861 The protective emblem should by itself ensure the protection of such consignments and the neutrality of the emblem should preclude them from being escorted by members of the armed forces. On the other hand, the employment of mine disposal vehicles for clearing minefields seems acceptable provided that a respectable distance is maintained between such vehicles and the Red Cross convoy.

2862 If the Party to the conflict benefitting from relief considers that the protection of the emblem is insufficiently effective, it should ask to be explicitly relieved of its responsibility, at least with regard to any abuse by the armed forces of the adverse Party.

2863 When the risk results from a lack of discipline or of knowledge of the emblem by the armed forces of the Party concerned, the latter should undertake a major effort of dissemination to ensure simultaneously that the significance of the protective emblem is understood and that the Red Cross mission is accepted.

- 2864 Finally, as regards banditry or riots which might be brought about by relief operations among a starving population, the ICRC should be able to rely on the support of the police force, if this is necessary, and if it so requests.
- 2865 The Parties to the conflict benefitting from relief consignments also have an obligation to *facilitate their rapid distribution*. This means that they should give all the required facilities to any personnel accompanying the relief consignments and to the Protecting Power (or its substitute) responsible for the supervision of distribution, though without interfering with the distribution itself.

Paragraph 5 – International co-ordination

- 2866 The co-ordination of relief in armed conflicts, as in the case of natural disasters, raises very real problems. All too often the lack of co-ordination has resulted in an imbalance in consignments, some foodstuffs being sent in too large quantities and perishing in warehouses, while others remain lacking; and then perhaps foodstuffs or materials not adapted to the conditions are being sent, and other consignments are being made without taking into account the requirements of the infrastructure (particularly the means of transport) that must be met in order to ensure their distribution.
- 2867 Paragraph 5 lays down the principle of *effective* international co-ordination (of a factual, not merely a formal nature) of relief. The obligation is laid down for all Parties concerned – i.e., donors, transit countries and beneficiaries – and it relates to any action undertaken during an international armed conflict in which the Protocol applies, destined for a territory controlled by a Party to the conflict other than an occupied territory.
- 2868 Nevertheless, it does not lay down a specific system of co-ordination. In the Working Group of Committee II, which discussed this question, some wished to add that international co-ordination should be carried out “by international bodies such as the United Nations or the International Red Cross”.⁴⁰ However, this remark did not meet with the agreement of either the Working Group⁴¹ or the group of representatives of the Red Cross.⁴²
- 2869 Thus the principle of co-ordination is merely mentioned. It allows for *ad hoc* solutions, but obviously does not prevent the adoption of supplementary international agreements aimed at dealing with this problem in a definitive way.⁴³

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⁴⁰ O.R. XII, p. 334, CDDH/II/SR.87, para. 6.

⁴¹ Cf. *ibid.*

⁴² Cf. *ibid.*, p. 344, para. 95.

⁴³ Without going into details with regard to this problem, mention should be made in particular of the creation by Resolution 2816 (XXVI) of the United Nations General Assembly of the “Office of the United Nations Disaster Relief Co-ordinator” (UNDRO); the adoption by the XXIst International Conference of the Red Cross in 1969 of “Principles and Rules for Red Cross Disaster Relief” – in addition to the Declaration of Principles mentioned in the introduction to this Section, *supra*, p. 805 and note 1; the 1969 Principles and Rules were modified in 1973, 1977 and 1981; and the existence of an agreement of 25 April 1969 (and its interpretation of 18 December 1974) between the ICRC and the League “for the purpose of specifying certain of their respective functions”, particularly in the field of relief.

Protocol I

Article 71 - Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.
3. Each Party in receipt of relief consignments shall, to the fullest extent possible, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.
4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Documentary references

Official Records

O.R. I, Part I, p. 158. *O.R.* III, p. 285 (Art. 62 *bis*). *O.R.* VI, p. 245, CDDH/SR.43, para. 21. *O.R.* XII, pp. 319-320, CDDH/II/SR.84, paras. 44, 46-47 and 49; p. 334, CDDH/II/SR.87, para. 7; pp. 345-347, CDDH/II/SR.88, paras. 1-23. *O.R.* XIII, pp. 377-378, CDDH/406/Rev.1, paras. 68-69; p. 379, para. 73; p. 380, para. 78; pp. 448-449, CDDH/II/430 (Art. 62 *bis*).

Commentary

General remarks

2870 This article did not appear in the draft, and the Conventions do not contain special provisions for the personnel engaged in relief actions.

- 2871 Apart from personnel involved in actions under the responsibility of the ICRC, who consequently enjoy the protection of the red cross emblem,¹ personnel participating in relief actions are only protected, outside the régime of the Protocol, by general rules applicable to civilians of States which are not Parties to the conflict. Such persons certainly enjoy the general protection of populations against certain consequences of war,² and, as civilians, may not be attacked, but not all of them are covered by the Fourth Convention which excluded certain categories from its field of application.³ They do not have a *right* to carry out a particular task, and the reason for granting them a status in international humanitarian law is to allow them to *act* effectively for the benefit of a civilian population lacking essential supplies.
- 2872 Personnel participating in relief actions was first mentioned in an amendment to draft Article 62 (present Article 70 – *Relief actions*), aimed at including it amongst the elements for which the Parties concerned must authorize transit,⁴ together with relief provisions and equipment.
- 2873 A proposal was then made to mention it as well in the paragraph devoted to the obligations of the receiving Party.⁵
- 2874 Finally, the question was taken up again by a Working Group of Committee II, which proposed the introduction of a new article especially devoted to the personnel participating in relief actions. This article was adopted with some modifications by Committee II, and then by the Conference.
- 2875 The question of training such personnel already in peacetime is covered by Article 6 (*Qualified persons*).

Paragraph 1 – Aims and conditions

- 2876 The participation of personnel in a relief action, as laid down in this Article 71, covers both actions destined for occupied territories,⁶ and actions for other territories controlled by any of the Parties to the conflict.⁷
- 2877 The participation of such personnel is not automatic. One could envisage relief consignments simply delivered to the receiving Party at an airport, or a port, or in the case of transportation by land, to the border, or simply postal consignments. However, without any personnel involved in the action, the supervision which the Protecting Power or its substitute must exercise is in danger of becoming more difficult, and of requiring a large personnel if it is to be effective.

¹ On this subject *cf. infra*, p. 834.

² *Cf.* Fourth Convention, Part II.

³ *Cf.* Fourth Convention, Art. 4, para. 2. The personnel participating in relief actions in territories other than occupied territories are in fact not covered by the Fourth Convention, save the exceptional case where the State of which the relief personnel are nationals does not have normal diplomatic representation in the receiving State.

⁴ *Cf.* O.R. III, p. 280, CDDH/II/398 and Add.1, para. 2.

⁵ *Cf.* O.R. XII, p. 319, CDDH/II/SR.84, para. 46.

⁶ *Cf.* Art. 69, para. 2.

⁷ *Cf.* Art. 70, para. 1.

- 2878 While relief personnel are involved in the action only *where necessary*, such necessity can therefore be not purely technical, but must respond to the needs of an action conducted *without any adverse distinction*.
- 2879 The qualities required in this personnel are technical – experts in transport, in relief administration, in organization – to allow the relief to be forwarded to its destination in good condition, and to be distributed efficiently. However, there are also personal qualities: in addition to understanding of human feelings required in everyone engaged in humanitarian activity, relief personnel must be capable, if this should be necessary, of cooperating closely with the Protecting Power or the organization responsible for the supervision of the relief distribution.
- 2880 Participation of medical or paramedical personnel is not explicitly mentioned, but it is not excluded, and it should certainly be viewed in a favourable light. Often experts in hygiene and nutrition, nurses, or even doctors, can provide useful – if not essential – additional aid depending on the relief facilities and personnel locally available. Nevertheless, the status of such personnel raises a special problem which will be examined below.⁸
- 2881 Finally, participation of relief personnel “shall be subject to the approval of the Party in whose territory they will carry out their duties”. This should be interpreted to mean the Party which exercises control over this territory, e.g., in the case of occupied territories, the Occupying Power, and not the Party whose territory is occupied.
- 2882 Thus the principle of the participation of personnel is subject to the approval of these Parties, like the principle of the action itself. In fact, there are not two decisions but an overall agreement, and it is understood that participation of personnel is in itself an important element of such an agreement. Moreover, the presence of such personnel may also be considered indispensable by the Protecting Power or the substitute organization responsible for the supervision of the aid distribution, and its refusal could consequently also call into question the agreement of the donors or of the Party authorizing the action.
- 2883 The expression *relief personnel* is quite general, but it should not exclude the possibility for the receiving Party to refuse not the principle of participation of personnel, but participation by a particular person, especially as the right to terminate the mission *of any* member of the relief personnel is explicitly laid down in paragraph 4.⁹
- 2884 It would be reasonable in this case to comply with such a demand, provided that it remains exceptional and is justified, and it does not constitute a subterfuge to obstruct the action itself. In this respect it should be recalled that the approval for action required from the receiving Party does not give this Party the discretionary power to refuse a relief action.¹⁰

⁸ Commentary para. 2, *infra*, p. 834.

⁹ On this subject, *cf.* commentary para. 4, *infra*, pp. 835-836.

¹⁰ *Cf.* commentary Art. 70, para. 1, *supra*, p. 819.

Paragraph 2 – Protection

- 2885** The concepts of *respect* and *protection* have already been examined.¹¹ The obligation to respect and protect relief personnel applies to all the Parties to the conflict, which should, in particular, inform and instruct their armed forces not to attack such personnel.
- 2886** Nevertheless, movements which relief personnel may make into danger zones raise a special problem, since they do not have the right – apart from personnel participating in Red Cross international relief action – to display the protective red cross emblem.
- 2887** Two possible situations could be envisaged if the relief actions have to take place in danger zones, particularly in zones where control is disputed by the Parties to the conflict: in the first case, the action may have the benefit of the distinctive emblem of the red cross. In the context of an armed conflict, this will, in principle, be an action placed under the responsibility of the ICRC. This problem has already been examined.¹²
- 2888** In the second case the convoy does not have the benefit of the protective emblem. In this case it is up to the instigators of the action, the Protecting Power (or its substitute) responsible for its supervision, and the receiving Party to the conflict to decide whether or not they wish to attach an armed escort to the convoy; such escort could certainly be envisaged in this case.
- 2889** Medical personnel participating in relief actions, except those taking place under the auspices of the Red Cross, are not authorized to display the emblem, unless they are placed *under the control* of the receiving Party to the conflict.¹³ If this condition is met, they may enjoy the status of medical personnel. But there is a risk that the instigators of the action or the Protecting Power (or its substitute) responsible for its supervision will find such a condition unacceptable. Nevertheless, it is quite clear that such medical personnel, even though they are not entitled to the protection of the emblem, are entitled to the respect and protection due to all personnel taking part in relief actions.
- 2890** Finally, if personnel participating in relief actions were to fall into the power of the enemy of the receiving Party, they should obviously still be entitled to respect and protection. There is no special provision for their repatriation, but like any civilian of a State not Party to the conflict, they should not be detained, but should be put in a position to return to their own country as soon as possible.
- 2891** Meanwhile, the personnel should be well treated and receive adequate supplies of food, shelter, and if necessary, care.¹⁴

¹¹ Cf. commentary Art. 10, *supra*, p. 146.

¹² Cf. commentary Art. 70, para. 4, *supra*, pp. 828-829.

¹³ Cf. Art. 27, para. 1, First Convention.

¹⁴ In this respect the example should be followed of Article 32 of the First Convention, which deals with the return of medical personnel of States not Parties to the conflict, who have fallen into the hands of the enemy of the Party for whose benefit they were carrying out their mission.

Paragraph 3 – Obligations of the receiving Party

- 2892 This paragraph does not require a great deal of commentary. The general duty to assist should not be confused with the duty of protection of paragraph 2, which was examined above. It is up to the receiving Party to do its utmost to facilitate the task of relief personnel, particularly by simplifying administrative formalities as much as possible, by allowing the personnel to find accommodation if there is any problem with this, and by informing the population and the authorities concerned.
- 2893 Some limitations on the activities and movements of relief personnel are not excluded, but only “in case of imperative military necessity”.¹⁵
- 2894 For example, the limitation of activities could consist of prohibiting distribution to the population when it is known that they are passing foodstuffs onto the armed forces of the adverse Party. Nonetheless, such behaviour could not be permitted either by the Protecting Power or the organization in charge of ensuring supervision, which would also have the duty to intervene.
- 2895 In reality such limitations should be discussed and agreed upon by the receiving Party and the Protecting Power or the organization in charge of ensuring supervision of the action, before any unilateral decision is taken.
- 2896 A limitation on movements of personnel is obviously sometimes justified and it must be possible to make quick decisions to take into account the development of hostilities. Nevertheless, it should not be prolonged beyond what is necessary: it is explicitly stated that the limitation is *temporary* and for any prolongation sound reasons must be given.

Paragraph 4 – Obligations of personnel

- 2897 Though Article 71 as a whole is intended to grant a special status to personnel participating in relief actions, paragraph 4 prescribes the limits of these rights and the obligations involved.
- 2898 The obligation that “under no circumstances may relief personnel exceed the terms of their mission” underlines the necessity for such personnel to allow only legitimate beneficiaries to benefit from relief consignments. This is quite explicitly the aim of their mission. In particular they should not pass any foodstuffs or any other supplies to combatants.
- 2899 On the other hand, relief personnel should not be reproached if such supplies are extorted by combatants. In such a case it would be the action itself or the way in which it is carried out, which would be put into question.
- 2900 Medical care, given by medical personnel participating in a relief action, to wounded combatants they happen to encounter, regardless of the Party to which they belong, should not give rise to reproach either, even if such care does not

¹⁵ On the meaning to be given to this expression, *cf.* commentary Art. 54, para. 5, *supra*, pp. 658-659.

exactly fall within the context of the mission. In fact medical duties enjoy a general protection.¹⁶

- 2901** On the other hand, the duty of discretion for this personnel should be emphasized, particularly if their mission gives them access to information of a military nature. The transmission of such information would certainly exceed the terms of their mission.
- 2902** The security requirements of the Party in whose territory the action is taking place are mentioned in this context. They also imply, on the part of the personnel participating in relief actions, that they must comply with the technical requirements which the authorities could impose (route, schedule, curfews etc.). Naturally these requirements should not be aimed at obstructing the relief action, and the activity of the personnel, as we saw above, should not be limited except in the case of imperative military necessity. However, once these limits have been negotiated and determined, it is no longer up to each member of the personnel participating in the action to make his own judgment about them. He must comply with them.
- 2903** The sanction which may be imposed as a result of actions by a member of personnel which exceed the terms of the mission, is clear: his mission may be terminated. In concrete terms, this means that the member of the personnel concerned may be requested to leave the territory of the receiving Party immediately.
- 2904** This individual application of the measure is a good thing, in the sense that individual behaviour which is in conflict with the Protocol does not necessarily put into question the entire action.
- 2905** Nevertheless, to avoid abuse, such a decision should in principle be taken after the persons responsible for the action have been consulted, and should be duly justified. It is a matter of trust which must survive between the receiving Party and those responsible for the action.
- 2906** The possibility of prosecuting personnel participating in a relief action by the receiving Party is not explicitly excluded. However, it should be avoided as much as possible, in view of the disastrous consequences this could have on the action as a whole.
- 2907** Moreover, it is desirable to provide in the framework of the agreement concerning such action that personnel participating in relief action should enjoy immunity before the courts.

Y.S.

¹⁶ Cf. commentary Art. 16, para. 1, *supra*, pp. 199-202.

Part IV, Section III – Treatment of persons in the power of a Party to the conflict

Introduction

- 2908 Part IV, entitled “Civilian population”, comprises three sections: Section I, “General protection against effects of hostilities”, Section II, “Relief in favour of the civilian population”, and the present Section. The first two Sections deal with the civilian population as a collective concept which, according to Article 50 (*Definition of civilians and civilian population*), covers all civilians. In contrast, the present Section, concerning the “treatment of persons in the power of a Party to the conflict” formulates certain rules for the benefit of civilians as individuals. In this connection it should be recalled that, according to Article 50 (*Definition of civilians and civilian population*), any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention, or in Article 43 of this Protocol (*Armed forces*) is considered to be a civilian.
- 2909 It will be noted that the heading of this Section does not contain the adjective “civilian”. Yet the heading of Part IV (*Civilian population*) and that of Article 72 (*Field of application*) do not leave any room for doubt: the persons concerned are civilians and the fate of members of the armed forces is provided for elsewhere, in particular in Article 43 (*Armed forces*) and the articles following it. However, although combatant and prisoner-of-war status is denied persons who have committed hostile acts, they automatically have the benefit of the provisions of this Section if they do not enjoy more favourable treatment under other provisions. It will be clear from our comments on Article 75 below (*Fundamental guarantees*) which categories of persons are particularly concerned. Moreover, as we shall see, that article offers new guarantees for persons who are already protected.
- 2910 The meaning of the words “in the power of a Party to the conflict” is not immediately clear. Similar phrases were already contained in the Hague Regulations respecting the laws and customs of war on land (1899 and 1907), in Article 4, relating to prisoners of war. They also appear in the First Geneva Convention of 1949 in Articles 5, 14 and 32, in the Third Convention, Article 12, and in the Fourth Convention, Article 4, paragraph 1. In all these cases the persons concerned are in enemy hands or have fallen into the hands or power of the enemy.
- 2911 When the persons concerned are neutral nationals, the same Article 4, paragraph 2, of the Fourth Convention uses the expression “who find themselves in the territory of a belligerent State”. Similarly, the Conventions on the status

of stateless persons and on refugees use the words “in which he finds himself” and not the phrase “in the power of”.¹

2912 Do these different expressions denote a substantive difference in meaning? Should the expression “in the power of” be deemed to have the connotation of opposition, dependence or compulsion? We do not believe that this is so, and consider the above expressions to be equivalent. In our view the expression covers not only persons who have fallen into the hands of a Party to the conflict, but also those over whom it exercises, or would be able to exercise, authority, for the sole reason that they live in territory under its control. If this interpretation is accepted, the nationals of the Party to the conflict concerned may also invoke the provisions of this Section, though some ambiguity remains on this point and the discussions during the Diplomatic Conference, particularly in Committee III, were long and difficult; they did not shed a great deal of light on the precise scope of this Section, particularly Article 75 (*Fundamental guarantees*).

2913 No doubt this led the Finnish government to make the following declaration when it ratified the Protocol on 7 August 1980:

“With reference to [Article 75] of the Protocol, the Finnish Government declare their understanding that under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict [...]”.

2914 This declaration removes any remaining doubt: the Finnish government commits itself to its own population explicitly and binds itself vis-à-vis the other Contracting States from which it expects a similar attitude.

2915 In general it must be conceded that the provisions of this Section apply to a Party to the conflict’s own nationals, except where the article itself indicates otherwise. Thus Article 78 (*Evacuation of children*) excludes from its scope of application children who are nationals of the Party to the conflict arranging for the evacuation. In other articles the provisions would be meaningless if they did not apply to nationals of the Party to the conflict concerned. For example, the reunion of dispersed families almost always concerns persons from both Parties (Article 74 – *Reunion of dispersed families*). Similarly the rule which prohibits Parties to the conflict from recruiting children under fifteen into their armed forces (Article 77 – *Protection of children*, paragraph 2) only makes sense if it applies to children who are nationals of the Party to the conflict concerned. Finally Article 79 (*Measures of protection for journalists*) contains provisions which must be applied by the Party to the conflict of which the journalist is a national.

2916 Having said this, it should be noted that each one of the articles of this Section (with the exception of Article 72 – *Field of application*, which defines the field of application of this Section) contains a brief description of the persons to which it applies.

C.P./J.P.

¹ Convention Relating to the Status of Stateless Persons, Art. 2: “Every stateless person has duties to the country in which he finds himself [...]”; Convention Relating to the Status of Refugees, Art. 2: “Every refugee has duties to the country in which he finds himself [...]”.

Protocol I

Part IV, Section III, Chapter I – Field of application and protection of persons and objects

Commentary

- 2917** The heading of this Chapter is quite clear as far as persons are concerned. As regards objects, there are no specific rules applicable to them in this Section.
- 2918** The Fourth Convention only rarely deals with the property or objects of protected persons. Thus Article 53 prohibits the Occupying Power in principle from destroying the personal property belonging to private persons. Article 33 prohibits pillage and reprisals against protected persons and their property. However, the object of that provision is not to guarantee the rights of ownership of protected persons.
- 2919** As far as the Hague Regulations (1907) are concerned, Articles 28, 46 and 47 rule that private property cannot be confiscated and that pillage is formally forbidden.
- 2920** In practice the private property of civilian enemy nationals is all too often seized as enemy property, contrary to general principles of law. Cases are on record in which, after a conflict, the property of enemy nationals was made the object of negotiation or even of arbitration.

C.P. / J.P.

Protocol I

Article 72 – Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Documentary references

Official Records

O.R. I, Part I, p. 158; Part III, p. 21 (Art. 63). *O.R.* III, p. 286. *O.R.* VI, p. 246, CDDH/SR.43, paras. 22-23. *O.R.* XV, pp. 9-12, CDDH/II/SR.42, paras. 1-17; pp. 189-190, CDDH/III/SR.57, paras. 2 and 8; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; pp. 456-457, CDDH/407/Rev.1, paras. 32-33; p. 512, CDDH/III/369.

Other references

CE/6b, pp. 18-23 and 52-53. *CE 1971, Report*, p. 66, para. 358; p. 69, para. 285; pp. 70-71, para. 398. *CE 1972, Basic Texts*, p. 21 (Art. 62); p. 22 (Art. 66). *CE 1972, Report*, vol. I, p. 160, paras. 3.260-3.262 (Art. 62). *Commentary Drafts*, p. 79 (Art. 63).

Commentary

- 2921 The ICRC draft contained a corresponding provision (Article 63), which was largely adopted by the Diplomatic Conference. The purpose is simply to clarify the general rule formulated in paragraph 3 of Article 1 of the Protocol (*General principles and scope of application*).

- 2922 This article did not lead to much discussion, and only one amendment was submitted.¹ Its purpose was to determine the exact group of people covered in each of the articles in this Section, and in so doing to exclude nationals.
- 2923 The Conference preferred a different formula based on the solution adopted in paragraph 4 of Article 49 (*Definition of attacks and scope of application*), which defines the applicability of Section I (*General protection against effects of hostilities*) by reference to the Fourth Convention, in particular Part II thereof. In Article 72 the reference is especially to Parts I and III of the Fourth Convention, as we are concerned with protecting individuals against arbitrary and oppressive actions of the authority into whose power they have fallen.
- 2924 This similarity to Article 49 (*Definition of attacks and scope of application*) led to the inclusion of civilian objects in the wording used although, as we saw above, objects are hardly referred to in the Section.
- 2925 The adoption of the above-mentioned amendment might have shed more light with regard to those who are beneficiaries of the articles of this Section; however, it should be noted that each of the articles contains a brief definition of the persons to whom it applies (Article 73 – *Refugees and stateless persons*; Article 74 – *Reunion of dispersed families*; Article 75 – *Fundamental guarantees*, for persons affected by situations referred to in Article 1 – *General principles and scope of application*; Article 76 – *Protection of women*; Article 77 – *Protection of children*; Article 78 – *Evacuation of children*; Article 79 – *Measures of protection for journalists*).
- 2926 The reference to Parts I and III of the Fourth Convention shows that civilians confronting the authorities of a country of which they are not nationals were intended to be covered in particular, but the reference to other rules of international law suggests that some provisions of the Section, especially Article 75 (*Fundamental guarantees*), apply to nationals of a State Party to the conflict vis-à-vis that State. At any rate this is the interpretation given of this provision by the Finnish government in the above-mentioned declaration.²
- 2927 What is meant by “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”? As we have seen, this concerns only the protection of persons, and not the protection of objects or property. Thus the various instruments relating to human rights spring to mind first of all. In the first place, there is the Universal Declaration of 1948, but that Declaration represents, in its own words, “a common standard of achievement for all peoples and all nations” and does not constitute a legal obligation upon States.

¹ The text of this amendment (*O.R.* III, p. 286, CDDH/III/313) was as follows: “*Revise the article to read:*

1. Articles 64, 66, 67 and 69 supplement Parts I and III of the Fourth Convention with respect to the protection of civilians and civilian objects in the power of a Party to the conflict of which they are not nationals.

2. Articles 65 and 68 supplement Part II of the Fourth Convention with respect to the whole of the populations of the Parties to the conflict.”

² *Cf. supra*, introduction to this Section, p. 838.

2928 In the field under consideration here, there are three instruments binding the States which are Parties to them:

- a) the International Covenant on Civil and Political Rights (1966);
- b) the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- c) the American Convention on Human Rights (1969).³

2929 These three treaties, of which the first has universal membership while the others are regional, contain fairly similar clauses, although they are sometimes formulated differently. Moreover, they have one point in common: a clause which allows States Parties to suspend application in time of public emergency which threatens the life of the nation (Covenant, Article 4), in time of war or other public emergency threatening the life of the nation (European Convention, Article 15), in time of war, public danger, or other emergency that threatens the independence or security of a State Party (American Convention, Article 27).

2930 Such suspension allows measures to be taken only if they are justified by the circumstances and in no event measures which would be incompatible with other obligations imposed by international law. Moreover, there are exceptions for certain fundamental rights and with regard to these no derogation is permitted.

2931 The enumeration of these inalienable fundamental human rights is different in each of the three agreements.

2932 In the Covenant no derogation is permitted from Articles 6 (right to life), 7 (torture), 8, paragraphs 1 and 2 (slavery and servitude), 11 (imprisonment for debt), 15 (retroactive effect of criminal laws), 16 (recognition as a person), 18 (freedom of thought, conscience and religion).

2933 The agreements listed above continue to apply in the situations referred to in Article 1 of the Protocol (*General principles and scope of application*), but these situations are such as to permit derogation. Therefore it is to be foreseen that States will frequently use the possibility available to them to suspend the application of these agreements for the duration of the armed conflict; thus only the clauses which permit no derogation remain applicable. These are important guarantees, and, as we will see below, Article 75 (*Fundamental guarantees*) introduces a series of additional guarantees which apply, as stated in Article 1 (*General principles and scope of application*) in all circumstances. There is no possibility of derogation.

2934 Finally, we should mention the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968). In fact, according to the Preamble of this Convention, the effective punishment of war crimes is an important element in the protection of human rights and fundamental freedoms. Paragraph 7 of Article 75 (*Fundamental guarantees*) is, for that matter, dedicated to the prosecution and trial of war crimes and crimes against humanity.

³ There is also the African Charter on Human and Peoples' Rights which entered in force on 21 October 1986. In addition, an Arab Charter on Human Rights is in preparation.

2935 As we will see below, in many cases the provisions of this Section were based on those of the Covenant on Civil and Political Rights. The inclusion of these provisions in this Section has the great advantage that there is no derogation possible in the context of the Protocol.

C.P. / J.P.

Article 73 - Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

Documentary references

Official Records

O.R. I, Part I, p. 159; Part III, p. 21 (Art. 64). *O.R.* III, p. 287. *O.R.* VI, pp. 246-247, CDDH/SR.43, paras. 24-30. *O.R.* XV, pp. 12-18, CDDH/III/SR.42, paras. 18-56; p. 190, CDDH/III/SR.57, para. 9; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; pp. 449-450, CDDH/407/Rev.1, para. 13; pp. 457-458, paras. 34-37; p. 488, *id.*, Annex II; p. 513, CDDH/III/369.

Other references

CE 1972, Commentaries, Part I, pp. 83-84 (note 14). *CE 1972, Report*, vol. I, p. 144, para. 3.125; vol. II, p. 82, CE/COM III/PC 103. *Commentary Drafts*, pp. 79-80 (Art. 64).

Commentary

- 2936 “Protected persons” under the Fourth Convention are persons who “find themselves, in case of a conflict or occupation, in the hands¹ of a Party [...] of which they are not nationals” (Article 4, paragraph 1).²

¹ For the meaning of the expression “in the hands” or “in the power”, see introduction to this Section, *supra*, p. 837.

² However, see the other paras. of Art. 4, which restrict or enlarge the group of protected persons: paragraph 2 provides that nationals of a State which is not bound by the Convention are
(continued on next page)

- 2937 Stateless persons³ therefore by implication enjoy the status of protected persons. The present Article 73 explicitly grants them such status.
- 2938 As regards refugees,⁴ the Fourth Convention lays down explicit rules with regard to some relationships only: on the one hand, those with the State of refuge or the State of residence (Articles 44 and 45, paragraph 4), and on the other hand, those with the Occupying Power when the latter is their country of origin (Article 70, paragraph 2; this special provision constitutes an exception to the definition of “protected persons”).
- 2939 Already during the Conference of Government Experts, which preceded the CDDH, the United Nations High Commissioner for Refugees (UNHCR) expressed the opinion, which was shared by the ICRC, that these provisions of the Fourth Convention were insufficient and that it was appropriate to grant refugees a status which would apply with equal force vis-à-vis all Parties to the conflict, i.e., including the Party of which they are nationals.
- 2940 The draft article presented by the ICRC did not meet any opposition on this principle. Only one written amendment of substance was proposed⁵ and accepted (see *infra*, point 2.1).
- 2941 To properly understand the scope of Article 73 it is necessary to first define the protection to which refugees are entitled under the Fourth Convention, either as civilians,⁶ or specifically as refugees. In order to draw a complete picture of the protection of refugees, reference is also made below to the relevant provisions of Protocol I.⁷

1. The situation of refugees under the Fourth Convention and Protocol I (without applying to Article 73)

1.1. Definition

- 2942 The Fourth Convention does not give a definition of the term “refugee”: it merely uses the criterion of *de facto* absence of protection by any government. The term “refugee” is therefore understood in a broad sense.⁸

not protected by it. It also provides that nationals of a neutral State (for the definition of a neutral State, see commentary Art. 2, sub-para. (c), *supra*, p. 61) who are in the territory of a belligerent State, and nationals of a co-belligerent State, will not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. Paragraph 3 refers to Part II, which has a wider scope: it covers all the populations of countries engaged in conflict without any distinction of nationality. Paragraph 4 excludes persons protected by the First, Second or Third Conventions.

³ For the definition of a stateless person, see *infra*, point 2.3, p. 850.

⁴ For the definition of refugees, see *infra*, points 1.1 and 2.4, p. 851.

⁵ O.R. III, p. 287, CDDH/III/306.

⁶ Members of the armed forces are not protected by the Fourth Convention, see *supra*, note 2, *in fine*.

⁷ N.B.: Article 73 extends the scope of application of the rules of the Fourth Convention; it has no effect on the provisions of Protocol I.

⁸ For the definitions of the main international instruments, see *infra*, point 2.4, p. 851.

1.2. *Protection of refugees as civilians*

2943 In the Fourth Convention a distinction can be made between the rules covering the civilian population irrespective of nationality, and those covering “protected persons”, i.e., civilians who are not nationals of the Power in whose hands they find themselves.

2944 As civilians, refugees fall under both categories of rules, of which the main ones are as follows:

a) *Rules applicable to civilians – and to refugees – addressed to all Parties to the conflict (including the State of which they are nationals)*

- general protection against the effects of hostilities (Fourth Convention: Articles 16, 17 and 24; Protocol I: Articles 48 – *Basic rule*, 51 – *Protection of the civilian population*, 57 – *Precautions in attack*, 58 – *Precautions against the effects of attacks*, 76 – *Protection of women*, 77 – *Protection of children*, and 78 – *Evacuation of children*);
- the right to take refuge in protected zones (Fourth Convention: Articles 14 and 15; Protocol I: Articles 59 – *Non-defended localities* and 60 – *Demilitarized zones*);
- the right of families to know the fate of their relatives (Fourth Convention: Articles 25, 26 and 140; Protocol I: Articles 32 – *General principle* and 74 – *Reunion of dispersed families*);
- the right to relief actions (Fourth Convention: Articles 23, 55, 59-62, 108-111, and 142; Protocol I: Articles 69 – *Basic needs in occupied territory* and 70 – *Relief actions*);
- fundamental guarantees, i.e., minimum standard of humane treatment and judicial guarantees (Protocol I: Article 75 – *Fundamental guarantees*).

b) *Rules applicable solely to civilians – and to refugees – who are not nationals of the Power in whose hands they find themselves (i.e., who are “protected persons”)*

- respect for the person and humane treatment (Fourth Convention: Articles 27 and 31-34);
- prohibition on using protected persons to render certain points immune from military operations (Fourth Convention: Article 28);
- the possibility of making application to any relief organization that might assist, for example, the ICRC and UNHCR (Fourth Convention: Article 30);
- retention of status held prior to the conflict (Fourth Convention: Articles 38 and 39);
- the right to leave the territory (Fourth Convention, Articles 35 and 48);
- the most severe measures of control are those of assigned residence and internment (Fourth Convention: Article 41);
- prohibition of deportations from occupied territory (Fourth Convention: Article 49);

- as regards offences committed before occupation, the penal jurisdiction of the Occupying Power is limited to breaches of the laws and customs of war (Fourth Convention: Article 70, paragraph 1).

1.3. *Specific protection of refugees*

2945 Article 44 of the Fourth Convention, which applies to aliens in the territory of a Party to the conflict (Part III, Section II), provides that the State of refuge or the State of residence, when it takes measures of control as laid down in the Convention, must not treat refugees as enemy aliens exclusively on the ground that their nationality *de jure* is that of an enemy State. Article 45, paragraph 4, contained in the same Section, provides that “in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs” (principle of non-refoulement).

2946 Article 70, paragraph 2, applicable to occupied territories (Part III, Section III) provides that the penal jurisdiction of the Occupying Power over its own nationals who have sought refuge in the occupied territory before the conflict is limited to offences committed after the outbreak of hostilities and to offences under normal domestic law committed before the outbreak of hostilities which would have justified extradition in time of peace.

1.4. *Omission with regard to the protection of refugees*

2947 The category of persons protected, as defined in paragraphs 1 and 2 of Article 4 of the Fourth Convention, based on nationality, does not take into account the situation of refugees, who no longer enjoy the protection of the State of which they are nationals.

2948 When the Fourth Convention was adopted in 1949 some speakers remarked that the concept of “nationals” did not cover all cases, and in particular failed to cover the case of individuals who, having fled their country, no longer considered themselves, or were no longer considered as nationals of that country. Despite these remarks, it is for the Power in whose hands they are to decide whether the persons concerned should or should not be regarded as nationals of the country from which they have fled, i.e., as protected persons or not.⁹ This unsatisfactory situation, particularly when the State of refuge is invaded by the refugee’s State of origin, led to the adoption of Article 73 in Protocol I.

⁹ *Commentary IV*, p. 47.

2. Persons covered by Article 73 of Protocol I: Stateless persons and refugees considered as such before the outbreak of hostilities

2.1. General remarks

- 2949** The article specifies how the terms “stateless persons” and “refugees” should be understood: they are persons considered as such, either “under the relevant international instruments” or “under the national legislation of the State of refuge or State of residence”.
- 2950** The State of refuge is the State which has granted to the person in question the status of refugee or stateless person; the State of residence is the State which has permitted the refugee or stateless person to reside in its territory. These two concepts may apply to the same State or to two different States. In the latter case this means that one State – the State of residence – has agreed to harbour in its territory a refugee or stateless person considered as such by another State – the State of refuge.
- 2951** The international instruments referred to are to be understood as acts adopted by an international organization, irrespective of whether they have binding force or not.¹⁰ They include in particular treaties, conventions, agreements, protocols, resolutions, recommendations and declarations. All instruments containing a definition of refugees or stateless persons are relevant.
- 2952** Such instruments must have been “accepted by the Parties concerned”. This phrase, which was not included in the ICRC draft, was introduced to include the substance of the only written amendment proposed with regard to this article. Its object is to clearly establish that international instruments concerning stateless persons and refugees only apply to States which have accepted these instruments, in other words, States which are Parties to them if they are treaties, or States which have given them binding force, or which recognize their binding force, if they are resolutions. There can indeed be no question that States which have not accepted such instruments would be indirectly bound by them on the basis of this Protocol (see also the commentary on Article 32, pp. 346-347).
- 2953** However, every Party to the conflict will of course be obliged to respect decisions taken by another Party granting the status of refugee or stateless person, whether such decisions are taken on the basis of an international instrument, on the basis of national legislation, or on the basis of both. In other words, the decision of the State of refuge or the State of residence is binding upon all Parties to the conflict, even if they have not accepted any relevant international instrument. In fact, a decision based on the national legislation of the State of refuge is clearly sufficient under the terms of the article; a decision based on an international instrument could consequently not have the effect of reducing protection and rendering Article 73 inapplicable. This does not mean that a Party

¹⁰ *Commentary Drafts*, p. 80. See also *O.R.* XV, p. 18, CDDH/III/SR.42, para. 52. In fact, it is in this sense that the term “international instruments” was used during the CDDH; this corresponds with the English concept of legal instruments, and not with the French meaning of this term which is confined to treaties.

to the conflict can be bound indirectly to an international instrument which it has not accepted: it only means respecting a decision taken within the domestic framework of another State, which is, in any case, in accordance with the principle of the inviolability of rights laid down in Articles 38 and 47 of the Fourth Convention.

2.2. *Restriction of the category of beneficiaries in time (ratione temporis)*

- 2954** Article 73 is concerned with persons considered to be stateless persons or refugees “before the beginning of hostilities”.
- 2955** However, as regards stateless persons, we shall see below (point 2.5, letter b)) that even those who only came to be considered as such after the beginning of hostilities are protected, namely under Article 4, paragraph 1, of the Fourth Convention.
- 2956** As regards refugees, the main consequence of the restriction is to limit in practice the field of application of the article *ratione personae* to refugees who have fled from persecution or the threat of persecution. However, other refugees, i.e., persons displaced by the conflict outside or within their own country, will enjoy protection or relief provided for civilians, particularly by Article 75 (*Fundamental guarantees*) (see *supra*, point 1.2). On the other hand, they will also benefit from the relevant provisions of international law on refugees which remain applicable despite the conflict.

2.3. *Definition of stateless persons*

- 2957** One treaty of universal application is entirely devoted to the protection of stateless persons: this is the Convention Relating to the Status of Stateless Persons of 28 September 1954.¹¹ It gives the following definition in Article 1: “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law”. The main causes of statelessness are: lack of harmonization of rules of private international law (conflict of laws), having stateless parents at birth, and disappearance of the State of origin. Thus it is a status created by factual circumstances or legal rules, rather than a status that is conferred.
- 2958** Apart from the 1954 Convention which defines the status of stateless persons, there is another Convention that should be mentioned, one which deals with the actual source of the problem of statelessness: the Convention on the Reduction of Statelessness of 30 August 1961.¹²

¹¹ On 31 December 1984 there were 35 States Parties to this Convention.

¹² On 31 December 1984 there were 13 States Parties to this Convention.

2.4. *Definition of refugees*

2959 In some States there will be concordance between the definitions of international instruments and national definitions, as the national law will have used the definition of an international instrument. In other States there will be a difference, either because the State is not Party to any international treaty giving a definition – so that it is free to have its own definition – or because the definition it has adopted in its own national legislation is more extensive than that of the treaties to which it is a Party. In this last case the national definition will prevail as it is more favourable to the victims.

2960 The following definitions are given in the main relevant international instruments:

a) *Convention Relating to the Status of Refugees of 28 July 1951*¹³

2961 According to Article 1, Section A, paragraph (2), the term “refugee” applies to any person who:

“as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

2962 Section B, paragraph (1) of the same article provides that the words “events occurring before 1 January 1951” are to be understood, as States may elect, to mean either “events occurring in Europe” or “events occurring in Europe or elsewhere”.

2963 In short, they are persons fleeing from persecution or from the threat of persecution.

b) *Protocol Relating to the Status of Refugees of 31 January 1967*¹⁴

2964 In substance the definition in the Protocol is identical to that of the 1951 Convention; the aim of the Protocol is to eliminate the time-limit (“before 1 January 1951”) and the geographical restriction (“in Europe”).

¹³ On 31 December 1984 there were 95 States Parties to this Convention.

¹⁴ It is possible to be party to the Convention or the Protocol, or to both simultaneously. The status of a refugee is identical in all three cases, as the Protocol refers back to the articles of the Convention on this subject. On 31 December 1984 94 States were Parties to the Protocol.

c) *Statute of the Office of the United Nations High Commissioner for Refugees (HCR) of 14 December 1950¹⁵ and resolutions adopted within the framework of the United Nations*

2965 Under the terms of this Statute the UNHCR's competence extends to all persons covered by the definition of the 1951 Convention, and also to:

“any other person, who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the Government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence”.

2966 The substance of this definition is identical to the definition of the 1967 Protocol.

2967 Over the years the UNHCR has been led, on the basis of resolutions of the General Assembly, the Economic and Social Council and the Executive Committee¹⁶ to extend his activities of protection and assistance to other categories of persons in similar situations, particularly to those “who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country”.¹⁷

2968 The UNHCR's mandate therefore extends not only to persons fleeing persecution or the threat of persecution, but also those fleeing from armed conflict or disturbances.

2969 If a State has recognized the competence of the UNHCR with regard to certain persons before the beginning of hostilities, this means that they will benefit from Article 73 independently of the fact whether or not they were considered refugees under a relevant international instrument.

d) *Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969¹⁸*

2970 This Convention provides that the term “refugee” applies to refugees as defined in the 1967 Protocol, as well as:

¹⁵ Adopted as an annex to Resolution 428 (V) of the United Nations General Assembly.

¹⁶ General Assembly Resolutions 1167 (XII), 1388 (XIV), 1501 (XV), 1671 and 1673 (XVI), 1783 and 1784 (XVII), 1959 (XVIII), 2958 (XXVII), 3143 (XXVIII), 3454 and 3455 (XXX), 31/35, 32/67, 32/68, 33/26, 34/60, 35/41, 35/135, 35/187; ECOSOC Resolutions 1655 (LII), 1705 (LIII), 1741 (LIV), 1799 (LV), 1877 (LVII), 2011 (LXI), 1978/39, 1980/8, 1980/54; Conclusions of the Executive Committee of the HCR: see HCR/IP/2/Eng/REV., 1984.

¹⁷ Official documents of the General Assembly, 36th session, supplement No. 12A (A/36/12/Add.1) of 09.11.81, pp. 18 ff. Resolution No. 22 can also be found in the *Conclusions on the international protection of refugees*, HCR/IP/2/Eng/REV., 1984.

¹⁸ On 31 December 1984 there were 29 States Parties to this Convention.

“to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

e) *Principles relating to the treatment of refugees adopted by the Afro-Asian Legal Consultative Committee*¹⁹

2971 The principles adopted in 1966 give the following definition of the refugee:

“A refugee is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

(a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or,

(b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.”

2972 According to an Addendum of 1970, the principles of 1966

“mainly contemplate the status of what may be called political refugees who have been deprived of the protection of their own Government and do not provide adequately for the case of other refugees or displaced persons”.

2973 Consequently the Addendum purports to protect also such other persons, i.e.:

“Any person who because of foreign domination, external aggression or occupation has left his habitual place of residence, or being outside such place, desires to return thereto but is prevented from so doing by the Government or authorities in control of such place of his habitual residence”.

2.5. *The effects of Article 73*

a) *General remarks*

2974 Stateless persons and refugees “shall be protected persons within the meaning of Parts I and III of the Fourth Convention”, provided they are considered as such before the events leading to the application of the Protocol.

2975 In fact, this means that they will enjoy the protection laid down by the Fourth Convention as a whole, as Part II already applies to them in the sense that it covers the whole of the civilian population in the territory of Parties to the conflict without any adverse distinction, in particular of nationality.

2976 Such protection will be given “in all circumstances”, i.e., in all situations where humanitarian law applies. Furthermore it will be granted “without any adverse

¹⁹ Eighth session, Bangkok, 1966, and eleventh session, Accra, 1970.

distinction”, i.e., without any discrimination, unless this is based on a different need for protection or assistance.

2977 It should be noted that acts qualified as grave breaches in the Conventions constitute grave breaches of the Protocol if they are committed against persons protected by Article 73 (see Article 85 – *Repression of breaches of this Protocol*, paragraph 2, and Article 147, Fourth Convention).

b) *Effect on stateless persons*

2978 Although they are not explicitly protected by the 1949 Conventions, stateless persons enjoy the protection of all the provisions of the Fourth Convention by virtue of Article 4, paragraph 1.²⁰ According to this provision, “persons protected by the Conventions are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. On the other hand, they do not fall under the exceptions to the general rule which are contained in paragraphs 2 and 4 of the same Article 4. This proves that they are protected persons under the Fourth Convention. The article under consideration here is therefore merely a formal confirmation of this right.

2979 The fact that Article 73 only covers persons considered as stateless persons “before the beginning of hostilities” cannot have the effect of restricting the protection accorded them by the Fourth Convention, as this would be contrary to the *ratio legis* of the article, which is to improve their protection.

2980 Thus persons who, *before or after* the beginning of hostilities are considered as stateless persons under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or of residence, are protected by the Fourth Convention and Protocol I.²¹ As for refugees, the decision of the State which has acknowledged the status of stateless person is binding upon the other States concerned.

c) *Effect on refugees*

2981 As regards Part I of the Fourth Convention, Article 73 of the Protocol has the effect of modifying Article 4 of that Convention by adding to the list of protected persons “refugees in the sense of Article 73 of the Protocol” and eliminating the restrictions of paragraph 2 in respect of them. Thus refugees enjoy the protection of all the relevant provisions of the Fourth Convention, irrespective of their nationality and regardless of the Party in whose power they have fallen.²²

2982 The reference to Part III might seem superfluous. However, in our view it reveals a willingness to grant refugees the best possible protection and allows each article of the Convention to be interpreted in the most favourable light for refugees. This means, for example, that refugees are entitled to the protection of

²⁰ In this sense, see *Commentary IV*, pp. 45 ff.

²¹ This was not contested during the CDDH.

²² Thus all refugees benefit from the rules quoted above, point 1.2, including those under b).

Article 40, paragraph 2, of the Fourth Convention in all circumstances, even though that article refers to protected persons “of enemy nationality”, and they may also avail themselves of the right to leave the territory as laid down in Article 48 in order to go to a third country, despite the heading of that article, which refers to repatriation.²³

- 2983** The effects with regard to the different Sections of Part III are as follows: the provisions of Part III, Section I (Provisions common to the territories of the Parties to the conflict and to occupied territories) apply to refugees, whether they are in the power of the State of refuge or of the State of residence, which was already the case before Article 73 came into being, or whether they are in the State of which they are nationals, which is a new provision. According to this Section, refugees are entitled in particular to respect for their persons and to be humanely treated (Articles 27 and 31-34) and they are entitled to make application to the services of the Protecting Powers (of the State of refuge) and to relief organizations (Article 30).
- 2984** The provisions of Part III, Section II (Aliens within the territory of a Party to the conflict), already regulated the relations between refugees and the State of refuge; Article 73 merely confirms these provisions. Articles 44 and 45, paragraph 4, which are in this Section are not modified.
- 2985** The provisions of Part III, Section III (Occupied territories), become fully applicable to refugees, and this represents a change in the law when the Occupying Power is the State of which they are nationals. This Section in particular gives them the right to leave the occupied territory (Article 48) and protects them from being forcibly transferred or deported (Article 49). In addition, according to Article 70, paragraph 1, of the Fourth Convention, refugees may not be arrested, prosecuted or convicted for acts committed or for opinions expressed before the occupation, with the exception of breaches of the laws and customs of war. Paragraph 2 of that article is only applicable to nationals of the Occupying Power who sought refuge in the occupied territory before the beginning of hostilities, but without having acquired the status of refugee in the sense of Article 73.

C.F.W.

²³ The headings of the Conventions have in any case no official character: they were added by the Secretariat of the 1949 Conference and were not adopted by the Diplomatic Conference itself.

Article 74 – Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

Documentary references

Official Records

O.R. I, Part I, p. 159. *O.R.* III, p. 288. *O.R.* VI, p. 247, CDDH/SR.43, para. 30. *O.R.* XV, pp. 19-23, CDDH/III/SR.42, paras. 57-85; p. 109, CDDH/III/SR.49, para. 11; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, paras. 8 and 11; p. 393, paras. 53-55; p. 416, *id.*, Annex I.

Other references

CRCE 1972, Report, pp. 62-63.

Commentary

- 2986 Since the Second World War the reunion of dispersed families has become a major concern of humanitarian organizations. That conflict was actually characterized by the enormous numbers of people who were obliged to leave their normal place of residence by various constraints: capture by the enemy, exodus before the invasion following the destructions of war, evacuation ordered by the national or occupation authorities, mass migration of whole populations, forced labour, voluntary or compulsory evacuations, deportation for political or racial reasons, etc.
- 2987 The consequences of such removal from people's normal places of residence were further aggravated by the difficulty, and even impossibility, for them to send news from the place to which they had been moved. In this way family ties were abruptly and sometimes permanently broken.

- 2988** The ICRC endeavoured to put members of a family who had not heard from one another in contact with each other by collecting information regarding the identity of displaced persons. Before it is possible to reunite members of a family, it is of course necessary to find them and reestablish contact. In this field the existence of a fixed information and collection point is essential. With this idea in mind the ICRC created the Central Tracing Agency, which has now become a permanent organization.¹
- 2989** In addition, in 1943 the Allied authorities set up a tracing organization for the purpose of collecting all the documentation on missing persons and dispersed families. In 1947 this organization received the name of International Tracing Service (ITS) and in 1948 it was established in Arolsen (FRG). This organization first depended on the United Nations Relief and Rehabilitation Administration (UNRRA), then to the International Refugee Organization (IRO), and finally to the Allied High Commission for Germany. In 1955 the Allied authorities entrusted the management and administration of this service to the ICRC under an international agreement and the ICRC still continues to run it today. The ITS has assembled the largest collection world-wide of archives on concentration camps, so that, in particular, it is able to provide information and certificates required by former deportees, foreign labour and displaced persons, as well as by their relatives.
- 2990** Once the members of a dispersed family have been put into contact, reuniting them has often posed problems, and the ICRC endeavoured to help them to get together in a place of their choice. It is estimated that after the Second World War it contributed to reuniting approximately 700,000 persons with their families.
- 2991** In this field the United Nations High Commissioner for Refugees has also brought about many reunions of families by facilitating the acceptance of members of a family by a country where one member of that family already was. Obstacles often arose because governments were opposed to their nationals leaving, or refused to allow any more persons to enter their territory, and reunions were often achieved only after long and patient negotiation.
- 2992** Similar situations have arisen many times since the Second World War. For example, the war in Korea led to large-scale migration of the population, so that numerous families were separated. In the Middle East various conflicts have also led to displacement of populations so that members of a family are often separated. Population movement in Southeast Asia took place on a large scale, and many people have sought refuge, and are still seeking refuge in neighbouring countries. In all these situations, and in other cases, the ICRC has endeavoured to make contact between members of dispersed families by setting up special offices either in Geneva where the Central Tracing Agency is established, or at the seat of ICRC delegations in the countries concerned. Thus important services have been rendered to dispersed families.
- 2993** In 1949 the Diplomatic Conference agreed to include Article 26 in the Fourth Convention. This article is devoted to dispersed families and reads as follows:

“Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with

¹ For further details on the Central Tracing Agency, see commentary Art. 78, para. 3, *infra*, p. 914.

one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.”

2994 This provision, which is not a very strong obligation, has been of some use and was frequently invoked by organizations devoted to the reunion of dispersed families, particularly by the ICRC.

2995 However, in 1976 the non-governmental organizations concerned with such problems considered that on the occasion of the adoption of the Protocol it would be appropriate to go slightly further by urging governments to facilitate the reunion of families. Thus the ICRC and the League of Red Cross and Red Crescent Societies, with the support of the United Nations High Commission or for Refugees, agreed on a text and succeeded in persuading several governments to submit it as a new article numbered 64 *bis*. This led to amendment CDDH/III/329, submitted by 28 governments; Committee III adopted it by consensus without any change, and it was also adopted by consensus in plenary. Thus it has become
Article 74.

2996 The article requires very little explanation, as its text is clear.

2997 Yet the question might arise, what is meant by “family”? In the narrow sense, the family covers persons related by blood and living together as one household. In a wider sense it covers all persons with the same ancestry. In the context of Article 74 it would be wrong to opt for an excessively rigid or precise definition; common sense must prevail. Thus the word “family” here of course covers relatives in a direct line – whether their relationship is legal or natural – spouses, brothers and sisters, uncles, aunts, nephews and nieces, but also less closely related relatives, or even unrelated persons, belonging to it because of a shared life or emotional ties (cohabitation, engaged couples etc.). In short, all those who consider themselves and are considered by each other, to be part of a family, and who wish to live together, are deemed to belong to that family.

2998 The main innovation of this article compared with 1949 is the duty imposed on Parties to the conflict and on Contracting Parties to facilitate the reunion of families. This duty is not only imposed on Contracting Parties which are Parties to the conflict, but also on Contracting Parties which are not involved in the conflict. This is quite logical, since it often happens during armed conflict that nationals of a country involved in a conflict seek refuge or are taken to neutral countries.

2999 The second part of the article merely reiterates, with some further details, what was said in 1949: the organizations concerned must act in accordance with the provisions of the Geneva Conventions and of this Protocol. Reference should be made in particular to Article 81 (*Activities of the Red Cross and other humanitarian organizations*). The last part of the article refers to “their respective security regulations”. This clearly refers to security regulations laid down by the Contracting Parties or the Parties to the conflict, and not to security regulations which humanitarian organizations might have been induced to issue. From a grammatical point of view, the possessive pronoun “their” could refer to either, in the English text as well as in the French and Spanish texts, but the intention is quite clear.

Protocol I

Article 75 – Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.
2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
 - (a) violence to the life, health, or physical or mental well-being of persons, in particular:
 - (i) murder;
 - (ii) torture of all kinds, whether physical or mental;
 - (iii) corporal punishment; and
 - (iv) mutilation;
 - (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
 - (c) the taking of hostages;
 - (d) collective punishments; and
 - (e) threats to commit any of the foregoing acts.
3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
 - (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
 - (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
 - (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
 - (e) anyone charged with an offence shall have the right to be tried in his presence;
 - (f) no one shall be compelled to testify against himself or to confess guilt;
 - (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
 - (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
 - (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limit within which they may be exercised.
5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.
6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.
7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
- (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
 - (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

Documentary references

Official Records

O.R. I, Part I, pp. 159-161; Part III, pp. 21-22 (Art. 65). *O.R.* III, pp. 289-295. *O.R.* VI, pp. 248-251, CDDH/SR.43, paras. 31-53; p. 261, *id.*, Annex (Afghanistan); pp. 264-269 (Austria, Belgium, Cyprus, France, German Democratic Republic, Federal Republic of Germany); pp. 272-273 (Japan, Netherlands, Romania); pp. 277-278 (USSR). *O.R.* XI, pp. 358-359, CDDH/II/SR.34, para. 55. *O.R.* XIV, p. 326, CDDH/III/SR.33, para. 40; p. 328, para. 48; p. 337, CDDH/III/SR.34, para. 11; p. 338, para. 21; p. 351, para. 85; p. 398, CDDH/III/SR.37, para. 48. *O.R.* XV, pp. 25-43, CDDH/III/SR.43, paras. 1-63 and 67-106; pp. 45-55, CDDH/III/SR.44, paras. 1-53; pp. 190-191, CDDH/III/SR.57, paras. 10 and 14; p. 193, para. 23; p. 194, paras. 25-26; p. 195, para. 28; pp. 196-197, para. 34; p. 198, para. 37; p. 199, paras. 41-43; p. 201, para. 55; p. 202, para. 57; pp. 203-205, CDDH/III/SR.58, paras. 1-5 and 7-11; pp. 206-208, paras. 17 and 19-31; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; pp. 458-462, CDDH/407/Rev.1, paras. 38-48; pp. 489-491, *id.*, Annex II; pp. 514-516, CDDH/III/369.

Other references

Commentary Drafts, pp. 80-84 (Art. 65).

Commentary

- 3000 This article is one of the longest in the entire Protocol. It was the object of lengthy discussion in the Conference itself and in informal meetings of delegates.¹

¹ The ICRC had submitted a draft article numbered Art. 65, which read as follows:
 “Article 65 – Fundamental guarantees

1. Persons who would not receive more favourable treatment under the Conventions or the present Protocol, namely, nationals of States not bound by the Conventions and the Parties’ own nationals shall, in all circumstances, be treated humanely by the Party in whose power they may be and without any adverse distinction. The present article also applies to persons who are in situations envisaged under Article 5 of the Fourth Convention. All these persons shall enjoy at least the provisions laid down in the following paragraphs.

(continued on next page)

- 3001** When it presented the draft article, the ICRC expressed its concern that a minimum of protection should be granted in time of armed conflict to any person who was, for one reason or another, unable to claim a particular status, such as that of prisoner of war, civilian internee in accordance with the Fourth Convention, wounded, sick or shipwrecked.
- 3002** The article was the object of many amendments and proposals during the deliberations in the Working Group. Several of the amendments were related to details concerning the guarantees to be accorded.
- 3003** On the other hand, two amendments on points of substance are worth mentioning. The first comes from the Finnish delegation.² It has the merit of great clarity. As we saw above,³ the Finnish government made a declaration on the lines of this amendment upon ratification of the Protocol.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder, torture, corporal punishment and mutilation;
- (b) physical or moral coercion, in particular to obtain information;
- (c) medical or scientific experiments, including the removal or transplant of organs, not justified by the medical treatment and not carried out in the patients' own interest;
- (d) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (e) taking of hostages;
- (f) threats to commit any of the foregoing acts.

3. No sentence may be passed or penalty executed on a person found guilty of an offence related to a situation referred to in Article 2 common to the Conventions, except in pursuance of a previous judgment pronounced by an impartial and properly constituted court, affording the following essential guarantees:

- (a) no person may be punished for an offence he or she has not personally committed; collective penalties are prohibited;
- (b) no person may be prosecuted or punished for an offence in respect of which a final judgment has been previously passed, acquitting or convicting that person;
- (c) everyone charged with an offence is presumed to be innocent until proved guilty according to law;
- (d) no person may be sentenced except in pursuance of those provisions of law which were in force at the time the offence was committed, subject to later more favourable provisions.

4. Women whose liberty has been restricted shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. This does not apply to those cases where members of the same family are together in the same place of internment.

5. The persons mentioned in paragraph 1, detained by reason of a situation referred to in Article 2 common to the Conventions and who are released, repatriated or established after the general cessation of hostilities, shall enjoy, in the meantime, the protection of the present article."

² The text reads as follows: "Persons who would not receive more favourable treatment under the Conventions or the present Protocol, namely nationals of States not bound by the Conventions, the Parties' own nationals and nationals of neutral or co-belligerent States having normal diplomatic representation with the Party in whose power they are shall, in all circumstances, be treated humanely by that Party and without any adverse distinction. The present Article also applies to persons who are in situations under Article 5 of the Fourth Convention. All these persons shall enjoy at least the provisions laid down in the following paragraphs." (*O.R. III*, p. 295, CDDH/III/319).

³ Cf. introduction to this Section, *supra*, p. 838.

- 3004** The other amendment came from a group of socialist States and related to the punishment of war crimes.⁴ The Diplomatic Conference took it into account in paragraph 7 of the article.
- 3005** Committee III examined and discussed this provision for over two weeks: the Working Group also spent a great deal of time on this article, which was finally adopted during the last session of the Diplomatic Conference in 1977. The work of the Conference was greatly facilitated by unofficial consultations conducted in March and April 1977, i.e., before the opening of the fourth session of the Conference. They were concerned with sorting out the amendments and amalgamating them so as to reduce their number. Moreover, Committee III was guided by the work done on Protocol II during the second session of the Conference. Committee III decided to include in Article 65 (which has become Article 75) the text drawn up for Articles 4 (*Fundamental guarantees*) and 6 (*Penal prosecutions*) of Protocol II, except where there was a good reason to change the wording in view of the fact that Protocol I deals with international and not non-international conflicts. It should be recalled that Articles 4 (*Fundamental guarantees*) and 6 (*Penal prosecutions*) of Protocol II reproduce, in some cases word for word, the corresponding provisions of the Covenant on Civil and Political Rights (hereafter: the Covenant).
- 3006** As a detailed examination of the text will show, Article 75 contains imprecise and obscure points. However, it represents an important step forward in humanitarian law by laying down several minimum rules of protection for the benefit of all those who find themselves in time of armed conflict in the power of a Party to the conflict, whereas in such circumstances provisions of human rights law are subject to possible derogations.⁵ This article must therefore be seen as a victory for humanitarian law, and its mission is truly to play a role of great importance.
- 3007** In addition, Article 75, even more than common Article 3 of the 1949 Conventions, which was called a “mini Convention”, constitutes a sort of “summary of the law” particularly in the very complex field of judicial guarantees, which will certainly facilitate the dissemination of humanitarian law and the promulgation of its fundamental principles.

⁴ The text read as follows: “None of the provisions of this Protocol may be used to prevent the prosecution and punishment of persons accused of war crimes and crimes against humanity.” (O.R. III, p. 293, CDDH/III/315 and Add.1).

⁵ Covenant, Art. 4; European Convention, Art. 15; American Convention, Art. 27.

Paragraph 1

3008 This paragraph was only adopted after all the others, and after laborious negotiations.⁶ The meaning to be ascribed to this paragraph is not immediately clear. In fact, during the deliberations speakers expressed divergent opinions in this respect.⁷

3009 Under the terms of this paragraph, individuals who are covered must fulfil the following three conditions:

- they must be in the power of a Party to the conflict;
- they must be affected by armed conflict or by occupation;
- they must not benefit from more favourable treatment under the Conventions or under this Protocol.

*Brief analysis of these three concepts**1. Being in the power of a Party to the conflict*

3010 The meaning of these words was determined in the analysis of the title of the Section, which includes these words.⁸ The question is why the expression is repeated here, since the title covers all the articles of the Section. Thus, for example, Article 76 (*Protection of women*) only covers women who are in the power of a Party to the conflict, although that article does not specify this explicitly. These matters seem self-evident, but in this case it was considered appropriate to repeat them.

2. Being affected by armed conflict or occupation

3011 The word “affected” in this context means: touched by or concerned. It remains to determine how far this category of persons extends. When there is armed conflict, all those who find themselves in the territory of the countries at war or in occupied territory, are affected in some way or another. This is very probably

⁶ On this subject the Rapporteur expressed himself as follows: “Paragraph 1 of Article 65 [75] was the last paragraph resolved because it raised a delicate question of whether the protections of the article were to be extended to a Party’s own nationals. At an early stage it was decided that the scope of the article should be restricted to persons affected by the armed conflict and further restricted to the extent that the actions by a Party in whose power they are so affect them. This is the purpose of the introductory clause of the paragraph. Moreover, paragraphs 3 to 7 inclusive are further limited by their own terms to persons affected in specific ways, e.g., persons ‘arrested, detained, or interned for actions related to the armed conflict’ (paragraph 3).”

Nevertheless, the question of whether or not to specify one’s own nationals as protected by the article remained contentious for many days. Ultimately a compromise was reached whereby reference was deleted to all examples of persons covered by the article, at which point the article was quickly approved by the Committee.” (*O.R.* XV, pp. 460-461, CDDH/407/Rev.1, paras. 41-42).

⁷ See particularly *O.R.* VI, pp. 261-278, CDDH/SR.43, Annex.

⁸ See introduction to this Section, *supra*, p. 837.

not what was intended, particularly because of the words “in so far”; it cannot therefore be denied that there are persons who are not affected in the sense of this article. In general those who contravene the normal laws of the State (ordinary criminals) and who are punished on these grounds, are not “affected” within the meaning of this article. On the other hand, if security measures are taken against certain individuals because of their attitude, whether true or alleged, with regard to the conflict, Article 75 certainly applies to them.⁹

3012 The situation may be more complex when internal strife is added to international armed conflict, which might lead to nationals taking up the cause of the adverse nation, and even giving support to its military action. There are numerous examples of such situations in the distant and recent past. The Conference did not express itself on this point, but it should be recalled that the national legislation of many countries includes judicial guarantees equivalent to those of Article 75, and sometimes even goes further.

3013 In the armed conflicts referred to in Article 1 (*General principles and scope of application*), paragraph 4, the situation is different: in that situation the individuals engaged in the conflict technically have the same nationality, but the question whether the guarantees provided will be applied will not depend on this fact alone, for international law overrides the criterion of nationality and any provisions which punish aid to the enemy, treason, insurrection, desertion etc. on the basis of nationality. In fact, captured combatants and civilians who are subject to security measures must be considered as enemy nationals and treated accordingly. They are not actually bound by a duty of allegiance with respect to the State in whose territory they find themselves or of which they bear the nationality. In other words, in such a conflict, captured combatants and civilians interned, arrested or prosecuted because of their attitude towards the conflict, should have the benefit of all the provisions of the Geneva Conventions; combatants must be treated as prisoners of war, and civilians as protected persons under the Fourth Convention.

3014 If in such a situation there were nevertheless cases in which the status of prisoner of war or of protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum.

3. Not benefitting from more favourable treatment under the Conventions or under this Protocol

3015 The protections which follow from Article 75 apply above all to those who cannot lay claim to application of the Conventions or to their application in full, taking into account the derogations provided for in Article 5 of the Fourth Convention. As we have seen with regard to the title of this Section, it covers civilians, and therefore it is the Fourth Convention and the status of persons

⁹ Without pronouncing the legality of the measure, it may be recalled that during the Second World War the United States prohibited all its nationals of Japanese origin from staying in the Pacific Coast States.

protected by that Convention with which we are concerned here. However, cases may occur of civilians who have committed hostile acts claiming prisoner-of-war status and treatment in accordance with Article 4A and Article 5 of the Third Convention.

- 3016 Thus persons protected by the Fourth Convention will therefore be entitled to the treatment provided for them by that Convention. However, as we will see below, situations may arise where Article 75 will contain protections for such persons which are not explicitly provided in the Fourth Convention; it is clear that they may avail themselves of these, since the article is only a minimum standard.
- 3017 During and following the Diplomatic Conference paragraph 1 gave rise to numerous difficult controversies, particularly as regards the application of Article 75 to own nationals. It seems that the Diplomatic Conference did not wish to adopt a more precise wording in order to achieve a consensus, and the decision of the Finnish government to clarify the obligations it took upon itself in this respect upon ratification is understandable.
- 3018 There was in particular a point of view based on the fact that the ICRC draft explicitly mentioned the Party to the conflict's own nationals; the same applied to the above-mentioned Finnish amendment; the amendment to Article 63 of the draft (the present Article 72 – *Field of application*) had the same tenor.¹⁰ This precision disappeared in the text proposed by the Working Group and adopted by Committee III and later by the Conference itself. What conclusion can be drawn from this? Some claim that the fact that the reference to own nationals was deleted reveals an intention to exclude nationals from the application of the provisions of Article 75. Others believe that precisely by virtue of the wording of Article 72 (*Field of application*) and Article 75 there was no need to mention nationals of the Parties to the conflict explicitly.
- 3019 In any case the number of nationals covered by this article will be considerably reduced, since they can only avail themselves of it insofar as they are affected by a situation referred to in Article 1 (*General principles and scope of application*). It is this restriction which, as the Rapporteur indicated, made it possible to adopt the article by consensus.
- 3020 It was also claimed that the Protocol, which is additional to the Conventions, could not modify the basic concepts of the Geneva Conventions. The point is that these Conventions are concerned with protecting the individual from arbitrary and oppressive enemy action and not with determining the relationship between the individual and his own government. This line of argument seems tenuous: it is not clear why the Protocol should not increase the category of protected persons as it does, for example, for certain combatants. Admittedly it would certainly have been very useful to mention explicitly that nationals are included, but no negative conclusions should be drawn from the absence of such mention.
- 3021 It was also argued that here the expression "in the power of a Party to the conflict" is used, while Articles 11 (*Protection of persons*), 44 (*Combatants and prisoners of war*), 45 (*Protection of persons who have taken part in hostilities*) and 46 (*Spies*) use the expression "in the power of an adverse Party". It may justifiably

¹⁰ See commentary Art. 72, *supra*, pp. 841-842.

be considered that the wording of this paragraph covers persons in the power of any Party to the conflict, even that of which the individual is a national. However, it should be noted that the Protocol uses both the terms “Party to the conflict” and “adverse Party” repeatedly without making any difference to the category of persons covered by the two expressions.

Categories of persons covered by Article 75

3022 The Convention did not draw up a systematic list of persons whom it intended should be covered by this article. However, the discussions and drafts provide some idea in this respect, which can be summarized as follows:

1. Nationals of States not Parties to the Conventions

3023 This is highly theoretical since the 1949 Conventions have virtually universal participation.¹¹

2. Nationals of States not Parties to the conflict

3024 As provided in Article 4 of the Fourth Convention, such nationals are not, except in occupied territories, considered as protected persons as long as the State of which they are nationals has normal diplomatic representation in the State in whose power they find themselves.

3025 According to paragraph 8 of Article 75, no provision of the same article may be construed as limiting or infringing any other more favourable provision granting greater protection to persons covered by paragraph 1.

3026 Nationals of States not Parties to the conflict may rely on bilateral treaties on establishment and residence, as well as, where applicable, on the Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

3. Nationals of allied States

3027 Nationals of allied States will normally have the benefit of protection by their own authorities. However, if the State of their nationality does not have normal diplomatic representation in the State in whose power they find themselves, they are protected persons under the Fourth Convention.

4. Refugees and stateless persons

3028 Article 73 (*Refugees and stateless persons*) puts refugees and stateless persons considered as such *before the beginning of hostilities* on the same footing as

¹¹ On 31 December 1984 there were 161 States Parties to the Conventions. See *infra*, p. 1549.

protected persons under the Fourth Convention. Persons who have become refugees *after the beginning of hostilities* are covered by Article 75. Stateless persons enjoy the protection of the Fourth Convention in any event, as shown in the commentary on Article 73 (*Refugees and stateless persons*) (*supra*, p. 854).

5. *Mercenaries*

3029 In its report¹² Committee III expresses itself as follows on the subject of the new article¹³ relating to mercenaries:

“Finally, although the proposed new article makes no reference to the fundamental protections of Article 65, it was understood by the Committee that mercenaries would be one of the groups entitled to the protections of that article which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and Protocol I.”

3030 This explanation given by Committee III is a statement of the obvious, but the discussions had led to some doubts which were now removed. Moreover, although mercenaries may be denied the status of combatant and consequently that of prisoner of war, they are civilians covered by the Fourth Convention.

6. *Other persons denied prisoner-of-war status*

3031 According to Article 45 (*Protection of persons who have taken part in hostilities*), paragraph 3, any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention has the right at all times to the protection of Article 75. This covers persons who not only cannot claim prisoner-of-war status, but are also not protected persons under the Fourth Convention. It will be noted that this definition covers mercenaries who are not covered by Article 4 of the Fourth Convention.

7. *Protected persons subject to Article 5 of the Fourth Convention*

3032 These are persons who, on the basis of Article 5 of the Fourth Convention, are deprived of certain rights laid down by that Convention during detention. There can be no doubt that Article 75 constitutes a minimum standard which does not allow for any exceptions. Such persons must regain all the rights and privileges laid down by the Convention as soon as circumstances permit.

3033 The formula of non-discrimination contained in this paragraph is similar to that used, for example, in Article 2 of Protocol II (*Personal field of application*), Article 12 of the First Convention, Article 16 of the Third Convention, and

¹² O.R. XV, p. 455, CDDH/407/Rev.1, para. 27.

¹³ Article 47, Protocol I.

Article 27 of the Fourth Convention. Comparable formulae can also be found in human rights instruments.¹⁴

3034 As regards respect for the person, honour and religious convictions and practices, this wording was used already in the Geneva Conventions (Articles 14 and 34, Third Convention; Article 27, Fourth Convention). However, as pointed out in the commentary on Article 27 of the Fourth Convention, respect for “religious convictions and practices” should be understood in a broad sense. It covers all philosophical and ethical convictions. We know that in some armies there are nowadays, in addition to chaplains, counsellors on moral matters to whom members of the armed forces can go for assistance. This should be seen as an example of the modern tendency of individuals to look for a moral code also outside religion.

3035 When it discussed Article 67 (the present Article 76 – *Protection of women*), proposals were submitted to Committee III aimed at preventing women from being arrested or imprisoned solely on account of their convictions. In the end the Committee decided not to take into account these proposals in order to avoid the possibility of an *a contrario* argument to the effect that other persons could be legitimately arrested or imprisoned solely on the ground of their convictions. Committee III preferred to deal with this question in a special new article to apply to everyone.¹⁵ These discussions took place during the last session of the Conference and there was no time for Committee III to deal with this problem.¹⁶

3036 The report of the Working Group was not contested in Committee III or during the plenary meetings where this article was adopted. Thus respect for convictions implies that a person professing any particular convictions cannot be arrested or imprisoned for this reason alone. For that matter, this view can be found in human rights instruments, in particular in the Covenant, of which Article 19, paragraph 1, provides that everyone has “the right to hold opinions without interference”. However, Article 19 is not one of the articles from which no derogation may be made.

Paragraph 2

3037 A number of fundamental rules applicable to all persons defined in paragraph 1 are pronounced here. The other paragraphs of the article cover certain more restricted categories which are duly defined. This pronouncement is directly

¹⁴ For example, the Covenant, Article 2, paragraph 1: “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

¹⁵ O.R. XV, pp. 463-464, CDDH/407/Rev.1, para. 55.

¹⁶ On this subject it is interesting to note the commentary of the Rapporteur: “Fourth, the proposal for a new article 65 *bis* [...] failed to achieve a consensus. Despite the fact that all delegations agreed with the principle of the proposal – that no person may be arrested, detained or interned solely because of his convictions – it proved impossible in the time available to work out an agreed text. Ultimately, the Committee agreed to record its consensus that this rule was implicit in Article 65, paragraph 1 [Article 75 of the Protocol], as adopted by the Committee.” (*ibid.*, p. 449, para. 12).

inspired by the text of common Article 3 of the Conventions which applies to conflicts not of an international character; it is also very similar to Article 4, paragraph 2, of Protocol II (*Fundamental guarantees*); as far as possible, Committee III followed the text of that Article 4 (*Fundamental guarantees*), which had already been adopted.

- 3038** The terminology of the French text adopted here is curious: it reads “sont et demeureront prohibés”. Why the use of the future tense as the verb “demeurer” in this context covers the future? The French text of Article 3 common to the Conventions uses the present tense: “sont et demeurent prohibés”, which seems clearer and more logical. At any rate the meaning is the same and the English text uses the same wording as that of common Article 3: “the following acts are and shall remain prohibited”.
- 3039** “At any time and in any place”: the meaning of this expression is not immediately clear. There is no doubt that Article 75, like the Protocol as a whole, only applies in situations as provided for in Article 1 (*General principles and scope of application*) and only in territories of Parties to the conflict or territories under their control. Why then this terminology, which suggests that, following the example of the rules relating to human rights, the article applies in time of peace as well as in time of war? On this point the Conference merely followed the proposals of the ICRC. Apparently one must deduce from this expression that the article applies throughout the situations provided for in Article 1 (*General principles and scope of application*) and in all the territories covered by such situations. A confirmation of the foregoing can be found in the text of Article 3, sub-paragraph (b), of the Protocol (*Beginning and end of application*) and in paragraph 6 of the present Article 75.
- 3040** The reference to civilian or military agents is very useful; this is taken from Article 32 of the Fourth Convention and is concerned with establishing the responsibility of anyone acting in the name of a Party to the conflict.

Sub-paragraph (a)

- 3041** This paragraph gives a number of examples of acts detrimental to life, health or physical or mental well-being.

Sub-paragraph (a)(i)

- 3042** This relates to the wilful or intentional killing of a human being. Article 147 of the Fourth Convention uses the expression “wilful killing”. It covers all cases of manslaughter, including by wilful negligence, such as, for example, cases of a deliberate refusal to administer care with intent to cause death.¹⁷

¹⁷ For breaches by failure to act, see Art. 86.

Sub-paragraph (a)(ii)

3043 According to the Declaration on torture adopted on 9 December 1975 by the United Nations General Assembly (Resolution 3452 (XXX)):

“torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons”.

It may be recalled that the torture of protected persons is prohibited by Article 17 of the Third Convention, Article 32 of the Fourth Convention, as well as by Article 3 common to the Conventions.

3044 In our time torture is universally condemned and in various circles great efforts are being made to eliminate this scourge.¹⁸ Although agreement was easily reached on the principle of prohibiting it, it is more difficult to establish effective methods making it possible for governments to be sure that no acts of torture are committed by agents under their authority. In time of armed conflict it is the responsibility of governments to strengthen the measures of control and the powers of which they dispose if they are to be certain that they will not be held responsible for acts of torture committed by their agents, whether civilian or military.

3045 For its part the Covenant prohibits torture in its Article 7, which does not allow for any derogation.

Sub-paragraph (a)(iii) and (iv)

3046 Article 75 here reiterates prohibitions already contained in the Conventions (common Article 3; Articles 13 and 88 of the Third Convention; Article 32 of the Fourth Convention). The prohibition of mutilation is duplicated in Article 11 of the Protocol (*Protection of persons*).

Sub-paragraph (b)

3047 This refers to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts.

3048 Such provisions are contained in the Conventions (common Article 3; Articles 14 and 52, Third Convention; Article 27, Fourth Convention).

¹⁸ It is interesting to note the various resolutions of the United Nations General Assembly which, though without binding force of law, nevertheless have a real moral value. The 1975 Declaration was mentioned above. In addition on 10 December 1984 the General Assembly adopted a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- 3049** The provision relating in Article 75 to enforced prostitution and indecent assault applies to everybody covered by the article, regardless of sex. Article 76 (*Protection of women*), relating to the special protection to which women are entitled, reiterates the provision relating to enforced prostitution and indecent assault, specifically mentioning rape.
- 3050** Degrading treatment is also prohibited by Article 7 of the Covenant.

Sub-paragraph (c)

- 3051** During recent years the term “hostages” has acquired different meanings. It seems that in Article 75 this term must be understood in the same way as in Article 34 of the Fourth Convention, which prohibits the taking of hostages. We are therefore faced here with the problem of hostages taken by an authority – and not by individuals – and who are detained for the purpose of obtaining certain advantages.
- 3052** This means that hostages are persons who find themselves, willingly or unwillingly, in the power of the enemy and who answer with their freedom or their life for compliance with the orders of the latter and for upholding the security of its armed forces.
- 3053** Article 3 common to the Conventions also contains a prohibition on the taking of hostages.

Sub-paragraph (d)

- 3054** This prohibition was added by the Conference, as it was afraid that collective punishments might be inflicted by processes other than proper judicial procedures and that in that case they would not be covered by paragraph 4(b). Article 33 of the Fourth Convention prohibits collective penalties.
- 3055** The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.

Sub-paragraph (e)

- 3056** This prohibition is actually concerned with intimidation; a similar formula was used in Article 40 of the Protocol (*Quarter*). Measures of intimidation are prohibited by Article 33 of the Fourth Convention.
- 3057** In its draft the ICRC had proposed to also include a prohibition on physical or moral coercion, particularly when applied in order to obtain information; similar clauses exist for prisoners of war (Article 17, Third Convention) and for protected civilians (Article 31, Fourth Convention). According to the Rapporteur of Committee III the prohibition of torture together with the more general prohibition on causing harm to life, health and physical and mental well-being, was considered sufficient to omit a reference to coercion. It might be added that

in this field individuals are also protected by paragraph 4(f) which says that no one may be compelled to confess guilt.

- 3058 Similarly Committee III considered it unnecessary to include separately a prohibition of intimidation, harassment and threats aimed at forced movement or migration of individuals or groups of the population in occupied territories; sub-paragraph (e) of this paragraph covers such situations.

Paragraph 3

- 3059 This paragraph is important, but the terms used are sometimes ambiguous and raise problems of interpretation.
- 3060 The phrase “any person” almost certainly means any person complying with the definition of paragraph 1 of the article. Thus this refers primarily to civilians, as combatants are not covered by Article 75, and, in particular, not by its paragraph 3, unless prisoner-of-war status is refused them in case of capture. In this case, provided for in Article 45 (*Protection of persons who have taken part in hostilities*), paragraph 3, if they do not have the benefit of the Fourth Convention, they have at least the right to the protection of Article 75.
- 3061 “Arrested”: this means the period that a person is in the hands of the police, preceding the trial stage which is dealt with in paragraph 4, or prior to internment.
- 3062 “Detained”: in general this expression refers to deprivation of liberty, usually suffered in prison or other penitentiary institutions; here the term refers to detention prior to sentence or prior to a decision on internment.
- 3063 “Interned”: this term generally means deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned.
- 3064 These three expressions are actually closely related and each refers to a different way in which a person can be deprived of his liberty. In part this terminology can also be found in human rights instruments (Universal Declaration, Article 9; Covenant, Article 9). Internment is the only concept which seems reserved for time of armed conflict.
- 3065 “For actions”: this expression is easy to understand when it refers to persons who have committed criminal acts. However, it often happens that people are subjected to banishment, assigned residence or even internment, without being charged with committing any specific act, but because of their previous activities or their general behaviour, such as having revealed sympathy for the adversary, opposition to the Occupying Power or even pacifist opinions. As regards the State’s own citizens, their ethnic or racial origin has sometimes been used as a legitimate cause for suspicion. Internees will therefore generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. without any specific reasons being given.
- 3066 “Related to the armed conflict”: this phrase leads to the greatest problems for the interpretation of this article, as it uses different expressions several times, though they seem to refer to the same thing.
- 3067 It is the terminology used in all the paragraphs of the article, except in paragraph 1, which refers back to Article 1 of the Protocol (*General principles*

and scope of application) and this in turn refers in particular to the situations provided for in common Article 2 of the Conventions. The interesting point is that paragraph 2 of that common Article 2 covers cases of occupation meeting with no armed resistance. It must therefore be concluded that the expression “armed conflict” was used in the various paragraphs of Article 75 to cover all the situations within the purview of the substantive provisions determining the scope of the Conventions and of the Protocol.

- 3068** First of all, paragraph 1 uses the words “affected by a situation referred to in Article 1”, and we saw above what this means. This formula is equivalent, if slightly broader than that of paragraph 3, since it covers persons who may be affected by armed conflict without having committed any acts related to that conflict, for example, on the basis of their nationality or ethnic origin.
- 3069** Later paragraph 4 refers to “a penal offence related to the armed conflict”. Paragraphs 5 and 6 use the expression “for reasons related to the armed conflict”. Finally, Article 76 (*Protection of women*) also refers to “reasons related to the armed conflict” (although in the French text there is a slight difference between the wording used in paragraphs 5 and 6 of Article 75 and that used in Article 76).
- 3070** The diversity of the expressions used might be considered rather perplexing. In fact, each of the expressions mentioned above refers to acts or reasons, the reasons covering cases of internment, while the acts may lead to criminal prosecution and in due course to internment. Although it is relatively easy to think of reasons for which a State might wish to take security measures such as internment or assigned residence, it is, on the other hand, more difficult to determine how penal offences should be understood in relation to armed conflict. This question is examined in greater detail with regard to paragraph 4.
- 3071** “In a language he understands”. This phrase does not require lengthy explanation. It is a formula which has been used since 1929 in the Geneva Conventions.¹⁹ It covers both written and verbal communications.
- 3072** “Promptly”: unfortunately this expression is rather imprecise. Article 9 of the Covenant provides that anyone who is arrested will be informed at the time of his arrest of the reasons for his arrest. However, Article 9 is not one of the articles from which derogation is not allowed, even in case of war (Article 4). According to Article 71 of the Fourth Convention, anyone who is charged and prosecuted by the Occupying Power will be informed promptly of the charges made against him. These examples reveal the clear intention that those arrested should be advised promptly of the reasons for their arrest; it is difficult to determine a precise time limit, but ten days would seem the maximum period.
- 3073** Legal practice in most countries recognizes preventive custody, i.e., a period during which the police or the public prosecutor can detain a person in custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offences (acts of terrorism) and in time of armed conflict it is often prolonged.

¹⁹ The 1929 Convention Relative to the Treatment of Prisoners of War, Art. 20; Third Convention, Arts. 41, 107, 165; Fourth Convention, Arts. 65, 71, 99.

Useful indications can be found in national legislation. In any case, even in time of armed conflict, detaining a person for longer than, say, ten days without informing the detainee of the reasons for his detention would be contrary to this paragraph.

3074 The second sentence of the paragraph is not very clear and requires some comment.

3075 “Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible”: it seems clear that detainees not charged with a criminal offence within the period mentioned must be released; this is laid down in all national legislation. However, in time of armed conflict States often assume the right to take security measures with regard to certain persons who are considered dangerous.

3076 “And in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist”: this provision is based on Articles 43 and 132 of the Fourth Convention, which are concerned with periodic review of internment decisions. It is understandable that internment decisions are taken because of circumstances (armed conflict, combat in a nearby area, hostile movement in the population etc.). On the other hand, it is difficult to accept that people are arrested or detained because of circumstances; such decisions should be based on a presumption of a criminal offence. Perhaps the intention was to indicate that sometimes internment is preceded by arrest and detention sanctioned by court order. However, the reference to “the circumstances” should not be taken too literally, but these words should be understood as meaning “the facts”.

3077 The Report of Committee III expresses itself as follows on this paragraph:

“Paragraph 3 was added to the ICRC text pursuant to a proposal by the representative of Belgium to cover the period of arrest prior to that dealt with in the judicial safeguards of paragraph 4.”²⁰

3078 The intentions of the drafters are therefore quite clear, even if the wording is not so clear. In conclusion the following points should be recalled:

3079 – Within a period which should not exceed, say, ten days, any one deprived of liberty for actions related to the armed conflict must be informed of the reasons for this measure unless he is released.

3080 – If the person in question is charged with a specific offence, legal proceedings should take their course; if he is to be interned, a decision should duly and properly be taken and communicated to the person concerned.

²⁰ *O.R.* XV, p. 461, CDDH/407/Rev.1, para. 46.

Paragraph 4*Introductory sentence*

- 3081** The scope of application of this paragraph requires us to pause and give it due thought; it refers primarily to civilians in the power of a Party to the conflict who are affected by a situation as referred to in Article 1 (*General principles and scope of application*) and who do not benefit from more favourable treatment under the Conventions or this Protocol; moreover, they must have been found guilty of a penal offence related to the armed conflict.
- 3082** Thus this paragraph does not cover protected persons defined in Article 4 of the Fourth Convention, or persons defined in Article 73 of the Protocol (*Refugees and stateless persons*). It is intended to cover all civilians of foreign nationality who are not protected persons in the sense of Article 4, and who are in the territory of a Party to the conflict, as well as the whole of the civilian population of occupied territories with the exception of those protected by the Fourth Convention. Some combatants who are denied prisoner-of-war status in case of capture are also covered,²¹ if they are not already covered by the Fourth Convention. Finally, the Party to the conflict's own nationals are covered insofar as they fulfil the conditions laid down in paragraph 1.
- 3083** For persons covered by the Fourth Convention the guarantees of this article are of course supplementary. Thus for enemy nationals in another State's national territory, Article 75 contains important improvements; in fact, while the treatment of such persons is generally provided for in Articles 35 to 46, and in case of internment, in Articles 79-141 of the Fourth Convention, no special guarantees are provided in the case they are tried and sentenced for penal offences. For the inhabitants of occupied territories, Articles 64-78 of the Fourth Convention contain guarantees on penal matters which are more or less equivalent to those of Article 75, and indeed go even further, since intervention by the Protecting Power is expressly provided for. However, it should be noted that Article 75 acknowledges a presumption of innocence, a concept which is not contained in the Fourth Convention.
- 3084** The wording of this introductory sentence is based on common Article 3. However, Article 3 refers to a "regularly constituted court", while this paragraph uses the expression "impartial and regularly constituted court". The difference is slight, but it emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value of human life is sometimes small. Article 3 relies on the "judicial guarantees which are recognized as indispensable by civilized peoples", while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent, Article 6 of Protocol II (*Penal prosecutions*), gives valuable indications to help explain the terms of Article 3 on guarantees.
- 3085** For enemy nationals in another State's national territory intervention by the Protecting Power in case of criminal prosecution seems possible on the basis of

²¹ Cf. Art. 45, para. 3, Protocol I (spies, mercenaries etc.).

Articles 9, 30 and 43 of the Fourth Convention; the representatives of the Protecting Power could call upon the guarantees provided for and demand that they are observed. For inhabitants of occupied territories intervention by the Protecting Power is laid down in detail in Articles 71-74 of the Fourth Convention.

3086 Refugees and stateless persons have to be treated as protected persons under the Fourth Convention, in accordance with Article 73 of this Protocol (*Refugees and stateless persons*), and they can therefore fall back on the Protecting Power of the State of refuge, failing which it may reasonably be expected that the United Nations High Commissioner for Refugees will exercise a similar role to that of a Protecting Power in such circumstances.

3087 However, if the High Commissioner for Refugees found it impossible to act, such persons could turn to any organization capable of assisting them, in accordance with Article 30 of the Fourth Convention. The same applies for foreigners in the national territory of a belligerent and for foreign residents of occupied territories who do not have the protection of diplomatic representation or the aid of a Protecting Power.

3088 One organization which could aid such persons is, of course, the International Committee of the Red Cross, which under Article 10 of the Fourth Convention may undertake humanitarian activities for the protection of civilians and for their relief, subject to the consent of the Parties to the conflict concerned.

3089 It is to be hoped that in the difficult circumstances of penal proceedings in time of war, none of the persons referred to above will be deprived of the assistance of a Protecting Power, or at least the assistance of a humanitarian organization.

3090 As regards nationals of the State in the name of which the proceedings and sentencing take place, the situation is more complicated; the accused may avail himself of the guarantees listed in this paragraph, but it is hardly conceivable that a Protecting Power could, or would wish to intervene in the trial and sentence of a national of that State by his own judiciary. On the other hand, intervention by a humanitarian organization such as the ICRC is not excluded, provided that it is accepted by the State concerned. For that matter, the ICRC has played that role many times in the past on the basis of its right of initiative.

3091 Let us add a remark about the judicial system. This introductory sentence assumes that prior to conviction there will be a judgement finding the accused guilty. It is a fact that in several European countries penal proceedings are carried out in two phases: first, the court pronounces its verdict on culpability and subsequently it decides on the punishment to be meted out. However, there are also countries where the court rules on culpability and punishment in the same decision and at the same time. Such a system is not in contradiction with this paragraph.

3092 Most of the guarantees listed in sub-paragraphs (a)-(j) are contained in the Conventions and the Covenant on Human Rights,²² but in each of these treaties there is a clause permitting derogations from the articles in question in time of war. Article 75 is not subject to any possibility of derogation or suspension and consequently it is these provisions which will play a decisive role in the case of

²² Covenant, Art. 14; European Convention, Arts. 5-6; American Convention, Art. 8.

armed conflict. Besides, the provisions in all these instruments are more or less equivalent.

3093 Finally, it is necessary to try and determine what is meant by a penal offence related to the armed conflict. We have tried to determine, with regard to paragraph 1, what should be understood by persons “affected by a situation referred to in Article 1”, and reference can be made to what was said.

3094 As regards penal offences, there is no doubt at all that violations of the normal provisions of criminal law should be excluded, even if they are indirectly linked to the armed conflict: for example, someone who commits a robbery because he has lost his job as a result of the armed conflict and is unable to support himself. On the other hand, it is accepted in general that a State at war may require that its citizens and residents in its territory carry out special tasks and services: the State may impose compulsory military service on men and women; it may compel those who are not drafted into the armed forces to work in factories or on the land; it may also evacuate certain areas, requisition moveable and immoveable property, etc. In other words, in the circumstances of war when the very existence of the nation is at stake, the State may mobilize all the country’s resources for the purpose of survival.

3095 In fact, such distinctions, though seemingly logical, are not based on a clear text, and it would have been preferable for the Protocol itself to have defined the penal offences for which the accused may claim the guarantees of Article 75.

Sub-paragraph (a)

3096 The first part of the sentence repeats to a large extent what was said in paragraph 3. However, according to paragraph 3, the information, whether written or oral, must be given in a language the arrested person understands. That obligation is not repeated here, but the second part of the sentence guarantees the accused all necessary rights and means of defence; it is therefore clear that a defendant who does not understand the language used by the judicial authorities must be provided with an interpreter. By the same token, he must be able to understand the assistance given by a qualified defence lawyer. If these conditions were not fulfilled, the defendant would not have the benefit of all necessary rights and means of defence.

3097 On the other hand, reference is made here to the “particulars of the offence”, a detail which is not contained in paragraph 3.

Sub-paragraph (b)

3098 After the Second World War and ever since, international public opinion has condemned convictions of persons on account of their membership of a group or organization. Objections were also raised against collective punishment inflicted indiscriminately on families or on the population of a district or building. In the same vein, the execution of hostages, which was not prohibited by international law in all circumstances, was considered contrary to the moral rule which should guide international society. It was therefore decided to outlaw all convictions and

punishments which are not based on individual responsibility – in accordance with the now universally accepted principle that no one may be punished for an act he has not personally committed – as well as reprisals. This is the origin of a series of provisions contained in the four Conventions, in particular in Article 33 of the Fourth Convention, which prohibits collective penalties and reprisals and Article 34 of the same Convention, which prohibits the taking of hostages.

- 3099** Of course, this does not cover cases of complicity or incitement, which are punishable offences in themselves and may lead to a conviction; national legislation determines the conditions of punishment and the degree of culpability. However, the Conventions and the Protocol contain two particular provisions regarding punishment of grave breaches. The Conventions provide in case of grave breaches for the punishment both of those who committed them directly, and of those who have given the order to commit them (Articles 49/50/129/146). Article 86 of the Protocol (*Failure to act*) lays down provisions for the punishment of commanders who have not taken the necessary measures to prevent their subordinates from committing grave breaches of the Conventions and the Protocol.
- 3100** Admittedly, *stricto jure*, these provisions are only applicable to grave breaches of the Conventions and the Protocol, but they do provide useful indications to determine whether or not there is an individual penal responsibility.

Sub-paragraph (c)

- 3101** This provision reproduces almost word-for-word paragraph 1 of Article 15 of the Covenant on Civil and Political Rights. According to Article 4 of that Covenant, there is no possibility of derogation from this provision in time of armed conflict. Article 6 of Protocol II (*Penal prosecutions*), paragraph 2(c), contains the same provision. However, the paragraph under consideration here uses a slightly different expression at the beginning: “no one shall be accused or convicted of”, while in the Covenant and in Protocol II the sentence starts as follows: “No one shall be held guilty of”. There is a minor difference between Protocol II and the Covenant in the French text (not in English) which is of no practical significance. On the other hand, by adding the word “accused” the drafters of Article 75 had a specific purpose in mind: several delegations had expressed the fear that the provision would lead persons to be considered guilty before being tried.²³
- 3102** Several delegations considered that the reference to “national or international law” was clear. During the debates which took place on this subject in Committee I with regard to an identical provision in Protocol II (Article 6 – *Penal prosecutions*, paragraph 2(c)), some delegations suggested replacing that expression by “under the applicable law”²⁴ or alternatively by “under applicable

²³ O.R. XV, p. 461, CDDH/407/Rev.1, para. 47.

²⁴ This is the formula used in the American Convention on Human Rights (Art. 9).

domestic or international law”,²⁵ but Committee I retained the present text and Committee III adopted it without further discussion to include it in this article.

- 3103** In matters of criminal law national courts apply primarily their own national legislation; in many countries they can only apply provisions of international conventions insofar as those provisions have been incorporated in the national legislation by a special legislative act. Thus in several European countries the punishment of war crimes and crimes against humanity has, since the Second World War, frequently encountered obstacles which could only be overcome by invoking the need to repress crimes rightly condemned by all nations, even in the absence of rules of application. This reference to international law has often been called the “Nuremberg clause”. The European Human Rights Convention, which contains the same phraseology, clarifies this expression in paragraph 2 of Article 7: “This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.”
- 3104** In fact, although the principle of legality (*nullum crimen, nulla poena sine lege*) is a pillar of domestic criminal law, the *lex* should be understood in the international context as comprising not only written law, but also unwritten law, since international law is in part customary law. Thus the second “principle of Nuremberg” reads: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”²⁶
- 3105** Let us stress that it is in a government’s own interests to adopt the necessary legislation, even in peacetime, for the repression of certain crimes punishable under international law. In this way they can avoid the criticism of acting arbitrarily by promulgating retroactive penal laws, even though international law may authorize them to do so.
- 3106** The second and third sentences of this sub-paragraph express generally recognized principles.

Sub-paragraph (d)

- 3107** This rule is found in all human rights documents.²⁷ It is also included in Article 6 (*Penal prosecutions*) of Protocol II.
- 3108** It is a widely recognized legal principle that it is not the responsibility of the accused to prove he is innocent, but of the accuser to prove he is guilty. This concept may play an important role when criminal prosecutions are brought against persons on the basis of their membership of a group.²⁸

²⁵ O.R. X, p. 144, CDDH/I/317/Rev.2.

²⁶ The formulation adopted in 1950 by the International Law Commission of the principles of international law recognized by the Charter of the Nuremberg Tribunal and in the Judgment of that Tribunal is contained in “The Work of the International Law Commission”, UN Office of Public Information, New York, 1980, pp. 116 ff.

²⁷ Universal Declaration, Art. 11; Covenant, Art. 44; European Convention, Art. 6; American Convention, Art. 8.

²⁸ Cf. commentary sub-paragraph (b), *supra*, p. 880.

Sub-paragraph (e)

- 3109** This rule is contained in a slightly different form in Article 14, paragraph 3(d), of the Covenant (“to be tried in his presence”) and in identical wording in Protocol II, Article 6 (*Penal prosecutions*), paragraph 2(e). The Rapporteur of Committee III noted that it was understood that persistent misconduct by a defendant could justify his removal from the courtroom.²⁹ This sub-paragraph does not exclude sentencing a defendant in his absence if the law of the State permits judgement *in absentia*.
- 3110** In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held *in camera*, and only the verdict is made public. Finally, there are countries where the court’s decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.³⁰

Sub-paragraph (f)

- 3111** The majority of national judiciary systems contain provisions of this nature, but it took many centuries before the legality of torturing defendants to obtain confessions and information on their accomplices was abandoned. However, it was appropriate to include here a reminder of this legal guarantee, which is recognized today, as all too often the police or examining magistrates tend to use questionable means to extract a confession which they consider to be the “final proof”.
- 3112** The Geneva Conventions as a whole are aimed at preventing victims of war from becoming the object of brutality intended to extract information from them or from third parties (Article 17, Third Convention; Article 31, Fourth Convention). Protocol II contains the same rule (Article 6 – *Penal prosecutions*, paragraph 2(f)) as does the Covenant (Article 14, paragraph 3(g)).

²⁹ O.R. XV, p. 462, CDDH/407/Rev.1, para. 48.

³⁰ In an explanation of vote, one delegation declared that its country interpreted this provision as follows: “in the case of penal proceedings occupying two or more instances, in which the purpose of the last instance was to review only the applicable law and not the findings of the previous instance, the court of review had to decide whether or not the accused had to appear before it at the hearing. The court of review could not impose a higher penalty in the absence of the accused, and all the latter’s rights as provided for in Article 65, paragraph 4(e) were therefore fully granted.” (O.R. XV, p. 205, CDDH/III/SR.58, para. 10).

Sub-paragraph (g)

- 3113** This clause has the same wording as the corresponding clause of the Covenant (Article 14, paragraph 3(e)).
- 3114** According to the Rapporteur of Committee III, this provision was worded so as to be compatible with both the system of cross-examination of witnesses and with the inquisitorial system in which the judge himself conducts the interrogation.
- 3115** It is clear that the possibility of examining witnesses is an essential prerequisite for an effective defence.

Sub-paragraph (h)

- 3116** Once again the drafters of the article have tried to stay as close as possible to the Covenant (Article 14, paragraph 7). The Rapporteur expressed himself as follows about it:

“the provision on *ne bis in idem* [...] is drawn from the United Nations Covenant on Civil and Political Rights [...] and is so drafted as to pose the minimum difficulties to States in an area where practice varies widely”.³¹

We would like to believe the Rapporteur, but one cannot help thinking that a defendant could find himself in a difficult situation when subjected to a second trial, after the courts of another Party to the conflict or another State have already tried him on the same charges and he has been acquitted or, if he was convicted, has already served his sentence. In such circumstances defendants could no doubt invoke either the rule contained in the European Convention or that in the Covenant: “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country” (Covenant, Article 14, paragraph 7).

- 3117** Respect for *res judicata* is one of the basic principles of penal procedure, and it is important to uphold this principle.

Sub-paragraph (i)

- 3118** It is an essential element of fair justice that judgments should be pronounced publicly. Of course, a clear distinction should be made between proceedings and judgment. It may be necessary because of the circumstances and the nature of the case to hold the proceedings *in camera*, but the judgment itself must be made in public, unless, as the Rapporteur pointed out, this is prejudicial to the defendant himself; this could be the case for a juvenile offender.³²

³¹ *Ibid.*, p. 462, CDDH/407/Rev.1, para. 48.

³² *Ibid.*

3119 As regards holding oral proceedings *in camera*, Article 14, paragraph 1, of the Covenant gives some clear indications:

“The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

3120 It should be noted that Article 74 of the Fourth Convention gives representatives of the Protecting Power the right to be present at sessions of any court trying a protected person in occupied territories, unless the hearing in exceptional circumstances must take place *in camera* in the interests of the security of the Occupying Power. In this case the Protecting Power must be informed.

Sub-paragraph (j)

3121 The wording of this provision is clear. However, it should be noted that in many countries judgments in penal matters are not subject to appeal; in such cases there is often the possibility of resorting to an appeal on the law (cassation), i.e., of invoking an error in the application of the law. As regards the “other remedies”, this no doubt refers to a pardon or reprieve. In some countries judgments of military courts must be confirmed by a superior military authority.

Paragraph 5

3122 It will be noted at once that the wording is slightly different from that contained in paragraph 3. In paragraph 5 reference is made to “women whose liberty has been restricted for reasons related to the armed conflict”, while paragraph 3 contains the expression “persons arrested, detained or interned for actions related to the armed conflict”. Should the difference in these phrases be seen as indicating a specific intention? This does not seem to be the case. It certainly seems that the word “reasons” is more appropriate for the situations that are intended to be covered. In fact, in cases of internment the decision is often made on the basis of “reasons” and not of “actions”, for example, the political attitude of the internee. Thus, paragraph 5, like paragraph 3, covers women who have been arrested, detained or interned, as the expression “whose liberty has been restricted” covers all three cases.

3123 The idea of granting women special respect is already contained in Articles 27, 76 and 85 of the Fourth Convention. Article 25 of the Third Convention also provides that women must be accommodated separately and benefit from treatment at least as favourable as that granted to men (Articles 14 and 88). Article 108 of the Third Convention provides that women prisoners of war serving a prison sentence must be under the supervision of women. A similar rule is contained in the Standard Minimum Rules for the Treatment of Prisoners in the

version approved by ECOSOC in 1977, Rule 53, paragraph 3 of which provides that “women prisoners shall be attended and supervised only by women officers”.

- 3124** As regards bringing together families in the same premises, this idea is already contained in the Fourth Convention (Article 82).

Paragraph 6

- 3125** This paragraph takes up an idea that was already contained in Article 6 of the Fourth Convention and is repeated in Article 3 of this Protocol (*Beginning and end of application*), sub-paragraph (b).
- 3126** The ICRC draft did not contain such a provision since it was already contained in Article 6 of the Fourth Convention and it was therefore unnecessary to repeat it in the Protocol; on the other hand, there was a proposal to include it in Article 75, which in itself constituted a mini-convention, containing clauses providing for the beginning and end of application. The Conference preferred to repeat the substance of the relevant provision of the Fourth Convention in Article 3 (*Beginning and end of application*) and retained what is now paragraph 6. This has resulted in some repetition, though it is superfluous. It should be noted that while Article 3 (*Beginning and end of application*) covers armed conflicts and occupation, paragraph 6 of Article 75 refers only to the end of the armed conflict; however, as we saw with regard to paragraph 3, this is of no consequence.
- 3127** The usefulness of the provision is clear: frequently people only return to normal conditions after the end of armed conflict; sometimes internment goes on, judgments have not been pronounced immediately, and in some cases the trial of suspects has even been delayed until the end of the conflict. Thus it is logical that the guarantees laid down in this article should continue to apply as long as necessary.
- 3128** The paragraph does not state explicitly that the guarantees provided also apply to persons who might be arrested, detained or interned after the end of armed conflict. For nationals in their own State this is an important matter for the immediate post-war period is often like a day of reckoning, and it is then that suspects have most need of guarantees, both in the judicial and in the administrative field. It seems clear that such guarantees, primarily introduced for time of conflict or occupation, apply *a fortiori* after the end of armed conflict in favour of persons prosecuted for reasons related to the conflict.
- 3129** Article 6 of the Fourth Convention refers to “release”, while Articles 3 (*Beginning and end of application*) and 75 use the term “final release”. This is not a big difference, but we live in a time of overstatement; it is clear that if assigned residence is substituted for internment, this is not a release nor a final release. However, the intention of the drafter is clear: the release must be total.
- 3130** Repatriation obviously refers only to aliens. As regards re-establishment, this concerns persons who cannot be repatriated or simply released where they are and for whom a State of refuge or State of residence must therefore be found.

Paragraph 7

- 3131** As stated above,³³ this paragraph was not contained in the ICRC draft; it is the result of an amendment submitted jointly by a group of countries.³⁴
- 3132** Although they did not oppose the amendment some other delegates doubted its usefulness and even its necessity. Finally, as we see, the Working Group prepared a more detailed text which was accepted without discussion by Committee III and by the Conference itself.
- 3133** However, it is of interest to mention the explanations of some delegations. One delegation stated that:
- “The phrase ‘prosecution and trial in accordance with the applicable rules of international law’ [...] undoubtedly meant that the national law applicable in such cases must be strictly in conformity with the respective rules of international law.”³⁵
- 3134** The position adopted by that delegation seems logical, since, as we have seen, in many countries a suspect cannot be taken to court on the sole basis of the rules of international law.
- 3135** The following statement of a delegation should also be noted. It emphasized that “the provisions laid down in the paragraph in no way obligate any State to act in a way that might constitute a derogation from the general principle *nulla poena sine lege* and due process of law”.³⁶
- 3136** In actual fact this interpretative statement does not seem to be very relevant. The obligation to track down and prosecute persons accused of war crimes or crimes against humanity does not actually arise from Article 75. Such obligations result rather from the provisions of the Geneva Conventions (Articles 49/50/129/146), supplemented by Article 85 of the Protocol (*Repression of breaches of this Protocol*), as well as from international instruments such as the Charter of the Nuremberg Tribunal, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity etc.³⁷

³³ *Supra*, p. 863.

³⁴ When he presented this amendment one of the co-sponsors expressed himself as follows: “It was essential to ensure that no provision of the draft Protocol could be invoked by those criminals in order to escape the punishment they deserved. In fact, some of them had tried to evade that punishment by putting forward interpretations of existing legal principles that were pure casuistry. It should not be possible for the principles laid down in additional Protocols to be used in that way.” (*O.R.* XV, p. 37, CDDH/III/SR.43, para. 60).

³⁵ *O.R.* XV, p. 205, CDDH/III/SR.58, para. 11; *O.R.* VI, p. 269, CDDH/SR.43, Annex (Federal Republic of Germany).

³⁶ *O.R.* VI, p. 272, CDDH/SR.43, Annex (Japan).

³⁷ However, another delegation stated: “We therefore hold the opinion that it is of special importance when, in connexion with the enumeration of fundamental guarantees, Article 65 [85] not only reaffirms the penal responsibility for war crimes and crimes against humanity but requests that persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law.” (*O.R.* VI, p. 268, CDDH/SR.43, Annex (German Democratic Republic)).

3137 Finally, it is relevant to quote an important statement made by one delegation:

“As the Soviet delegation understands Article 65 [75], its effects do not extend to war criminals and spies. National legislation should apply to this category of persons, and they should not enjoy international protection.

We should like to record in this connection the reservation which the USSR made to Article 85 of the 1949 Geneva Convention on the treatment of prisoners of war.

The reservation says, in particular, that persons ‘who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nürnberg Trial, for war crimes and crimes against humanity [...] must be subject to the conditions obtaining in the country in question for those who undergo their punishment’.

The position thus taken by the USSR remains unchanged.”³⁸

3138 This statement requires some comment. The reservation made by the USSR to Article 85 of the Third Convention applies only to the treatment of prisoners of war after they have been convicted for war crimes or crimes against humanity. There is no doubt that the same applies to persons who are not prisoners of war but are convicted of such crimes. The guarantees of Article 75 are in the first place judicial guarantees and they operate before the judgment condemning the defendant; they must therefore apply to persons being prosecuted. Clauses concerning the system of detention, which therefore apply beyond the moment of conviction, are contained in paragraphs 1, 6 and 7.

3139 The relevant common article of the Conventions (49/50/129/146) provides that those who are charged with breaches of these Conventions will have the benefit of judicial and free defence guarantees which are not less favourable than those provided by Articles 105 ff. of the Third Convention.³⁹

3140 “War crimes” should be understood to mean serious breaches of the laws and customs of war.⁴⁰ “Crimes against humanity” are:

“inhumane acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural ground by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.”⁴¹

3141 After all, sub-paragraph 7(a) merely accepts as law the rules of international law which provide for the repression of such crimes, without creating new obligations; thus it should be seen primarily as a confirmation of existing rules.

³⁸ *Ibid.*, pp. 277-278 (USSR).

³⁹ See *Commentary III*. Article 75 contains most of the guarantees provided for in the Third Convention.

⁴⁰ Report of the International Law Commission, third session, 1951, vol. 2, p. 59.

⁴¹ *Ibid.*, thirty-seventh session, 1985, para. 18 (1954 version of the Draft Code of offences against the peace and the security of mankind).

As regards the expression “the applicable rules of international law”, it would seem that the interpretation given above by a delegation is valid.⁴²

3142 Sub-paragraph (b) is subject to any more favourable treatment available under the Conventions or this Protocol. Prisoners of war who have the benefit of important judicial guarantees are of course not covered, since Article 75 does not concern combatants. In accordance with common Article 49/50/129/146, civilians who are guilty of breaches of the Conventions or the Protocol will have the benefit of guarantees not less favourable than those provided for in Articles 105 *et seq.* of the Third Convention. It is not certain whether those guarantees are more favourable than the ones set out in Article 75. In case of doubt, the defendant can always invoke the most favourable provision. In occupied territories, protected persons benefit from the guarantees provided in Articles 64 *et seq.* of the Fourth Convention. Finally, it may happen that civilians are prosecuted for war crimes which constitute a breach of provisions other than those of the Conventions and the Protocol or for crimes against humanity. In that case they would benefit from the standards of treatment provided for in this article.

3143 To summarize: Article 75 is not in any way an obstacle to the prosecution and trial of persons accused of war crimes or crimes against humanity; the text of the Protocol shows this clearly and this paragraph may seem to be redundant. However, it is a fact that often things which are self-evident become even more evident if they are stated. Moreover, the drafters of the provision were right to confirm the guarantees which must apply to trials held for war crimes or crimes against humanity. In fact, it would be deplorable if repression of such crimes were to lead to questionable trials, and public opinion as a result became disappointed and embittered.

⁴² It should be noted that the English expression “applicable rules of international law” seems rather more clear than the French version “règles du droit international applicable”. The Drafting Committee clearly lacked the time to adapt the French text to read “règles applicables du droit international”. In its report, Committee III wrote the word “applicables” with an “s”, which was more logical (CDDH/407/Rev.1). The letter “s” disappeared in the final version, though no reason can be found for this in the Official Records of the Conference. The Spanish text is exactly the same as the English text.

The same remark applies to paragraph 8, where the expression “règles du droit international applicable” is again used. Article 72 correctly uses the expression “normes applicables du droit international” (in English, “applicable rules of international law”). It is to be regretted that the Drafting Committee was careless in these matters, since “rules” is sometimes translated by “normes” and sometimes by “règles”, though the concept referred to was clearly the same.

It should also be noted that in Article 2, sub-paragraph (b), the French version of the Protocol uses the expression “règles du droit international applicable dans les conflits armés” (in English, “rules of international law applicable in armed conflict”). In this case the French spelling is quite correct since the word “applicable” is qualified by the words “dans les conflits armés”.

Paragraph 8

- 3144** To some extent this paragraph repeats what was said in paragraph 1. However, the latter refers to more favourable treatment under the Conventions and the Protocol, while paragraph 8 refers to more favourable provisions under any applicable rules of international law, which is a broader concept. Are there any categories of persons, outside those covered by the Conventions and the Protocol, who benefit from greater protection under rules of international law?
- 3145** First, there are the nationals of neutral States who may have recourse to Hague Convention V of 1907 Respecting the Rights and Duties of Neutral Powers and Persons, and also to international customary practices concerning nationals of neutral States. Another category is formed by the diplomats of enemy or neutral States who may invoke international customary practices as well as some provisions of the Vienna Convention of 18 April 1961 on Diplomatic Relations, in particular Article 44 of that Convention. According to that article, the receiving State must, even in case of armed conflict, grant facilities to enable persons enjoying diplomatic status, other than its own nationals, and members of their families, to leave at the earliest possible moment; it must also make available the necessary transport.⁴³
- 3146** The categories of persons mentioned above are only examples, and other cases may arise; if greater protection results from another Convention or from customary law, those provisions must apply, even if the persons concerned are covered by Article 75.

C.P./J.P.

⁴³ The Vienna Convention of 24 April 1963 on Consular Relations contains a similar provision in its Article 26. On 31 December 1984, 142 and 109 States respectively were Parties to these Conventions. However, the provisions quoted referred to customary law.

Protocol I

Article 76 – Protection of women

1. Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.
2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.
3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Documentary references

Official Records

O.R. I, Part I, p. 161; Part III, p. 22 (Art. 67). *O.R.* III, pp. 298-299. *O.R.* VI, p. 251, CDDH/SR.43, paras. 54-55. *O.R.* XV, pp. 55-61, CDDH/III/SR.44, paras. 54-79; p. 212, CDDH/III/SR.59, paras. 15-16; p. 214, paras. 28-32; pp. 218-219, paras. 54-55 and 57-58; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; pp. 463-464, CDDH/407/Rev.1, paras. 54-57; p. 493, *id.*, Annex II; p. 521, CDDH/III/391.

Other references

CE/3b, pp. 39-42 and 44-45. *CE/7b*, p. 4 (Art. 2); pp. 10-11. *CRCE 1971, Report*, p. 38. *CE 1971, Report*, pp. 77-78, para. 442; p. 79, para. 449. *CE 1972, Basic Texts*, p. 21 (Arts. 59-60). *CE 1972, Commentaries*, Part I, pp. 127-129 (Arts. 59-60). *CE 1972, Report*, vol. I, p. 149, para. 3.164; p. 159, paras. 3.249-3.254 (Art. 60); vol. II, p. 66, *CE/COM III/PC 14*; p. 76, *CE/COM III/PC 65*; p. 81, *CE/COM III/PC 94-95*; p. 83, *CE/COM III/PC 111*. *Commentary Drafts*, pp. 85-86 (Art. 67).

Commentary

- 3147 In the draft the ICRC had proposed a text¹ which was taken up and completed by the Conference. According to the ICRC it was primarily concerned with extending to all women the provisions contained in Article 27, paragraph 2, of the Fourth Convention in favour of women who are protected persons within the meaning of the Convention (“Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”).
- 3148 Furthermore, the ICRC draft adopted the idea contained in Article 6, paragraph 5, of the International Covenant on Civil and Political Rights by providing that the death penalty may not be imposed upon a pregnant woman; in fact, that provision is aimed rather at the unborn child than at the mother herself. This draft was well received by the Conference, where it was discussed at length, and which then went beyond the ICRC proposals. Three amendments had been submitted. The first two were concerned, on the one hand, with prohibiting the death sentence from being pronounced on pregnant women; their sponsors argued that the conviction itself, even if not followed by an execution, could have harmful effects on the mother and the unborn child, and they also required that the death penalty be not pronounced on mothers with young children, or on old persons responsible for their care. Finally, the third amendment proposed that women arrested for patriotism or for their political non-submission should be released as soon as possible and with priority.²
- 3149 Some compromise was achieved and following the report of the Working Group the article was finally adopted by consensus in Committee III and the Plenary Conference approved this decision without further discussion.

Paragraph 1

- 3150 This is almost identical to the text of the ICRC draft; it is also largely a repetition of paragraph 2(b) of Article 75 (*Fundamental guarantees*), with the addition of a reference to rape.
- 3151 The rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict, following the example of Part II of the Fourth Convention. In fact, the provision is not subject to any further specification, unlike most of the rules contained in Section III. Thus it applies both to women affected by the armed conflict, and to others; to women protected by the Fourth Convention and to those who are not.
- 3152 When a special reference to women was introduced in Article 27 of the Fourth Convention in 1949, the drafters of that provision had in mind the abuses

¹ “Article 67 – Protection of women

1. Women shall be the object of special respect and shall be protected, in particular against rape, enforced prostitution, and any other form of indecent assault.
2. The death penalty for an offence referred to in Article 2 common to the Conventions shall not be executed on pregnant women.”

² O.R. III, pp. 298-299, CDDH/III/321-323.

perpetrated particularly during the Second World War, when countless women of all ages had been subjected to terrible outrages. Extending the protection to all women in territories involved in conflict reveals the intent to proscribe such acts in general.

- 3153 The rule relates to respect for the person and honour, as laid down in paragraph 1 of Article 75 (*Fundamental guarantees*). In any case, paragraph 5 of that article provides for special treatment for women whose liberty has been restricted.
- 3154 In conclusion, this provision develops the Fourth Convention by extending the circle of its beneficiaries; it also constitutes a substantial supplement to the International Covenant on Civil and Political Rights, which is less detailed in this respect, as it concentrates above all on the equality of the sexes.

Paragraph 2

- 3155 This paragraph was added by the Conference, as it was concerned to ensure that pregnant women and mothers of young children should be released as soon as possible. The terms used require some explanation. In the first place it should be noted that if a woman claims to be pregnant and her pregnancy is not obvious, a medical examination is required.
- 3156 The question also arises what exactly is meant by the expression “having dependent infants”? On this the Rapporteur records the following:
- “After some discussion, the Committee decided to heed the experience of Committee I in dealing with comparable provisions in draft Protocol II in which that Committee had been unable to reach agreement on an age when infants no longer are dependent on their mothers. It was recognized that this might differ from case to case and from culture to culture. The Committee also decided not to use the term ‘nursing mothers’, but rather the broader term ‘mothers of infants on whom the infants are dependent’.”³
- 3157 Thus all infants are covered who require the presence and care of their mothers and have not yet acquired full independence.
- 3158 In Protocol II this concept can be found in Article 6 (*Penal prosecutions*), paragraph 4 of which provides that the death penalty shall not be carried out on pregnant women and mothers of young children. Thus the concept of dependence was not retained in Protocol II.
- 3159 In the French version the expression “enfants en bas âge” lacks precision and does not refer to a specific age. The Spanish text “niños de corte edad” is similar to the French text and is not very specific either.
- 3160 The English text, “mothers having dependent infants”, seems to shed some light, since the word “infants” is used, rather than “children”. According to the dictionary, the word “infant” often means a child who is not yet walking, but in Great Britain “infant schools” are schools for children between five and seven years old. Finally, in legal terms, the word “infant” means a minor, i.e., a person

³ O.R. XV, p. 464, CDDH/407/Rev.1, para. 56.

under eighteen years of age. Thus no specific criteria can be taken from the English text either.

- 3161** Some more useful indications can be found in the Conventions themselves. For example, Article 50, paragraph 5, of the Fourth Convention provides:

“The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.”

- 3162** Article 14 of the same Convention, concerning safety zones, also mentions mothers of children under seven.
- 3163** In the absence of national rules or customs prescribing a higher age, it may therefore be assumed that the age of seven years is the age under which the provision must be mandatorily applied. However, it must be considered as a minimum. In fact, children often depend on their mother well beyond that age; this should be taken into account and such children should be considered as “dependent infants” beyond the age indicated above.
- 3164** The expression “for reasons related to the armed conflict” also requires some explanation. Paragraph 3 of Article 75 (*Fundamental guarantees*) uses the expression “actions related to the armed conflict”. However, it does not seem that different situations were envisaged by these different wordings: it is more a matter of careless drafting. The French text (“pour des raisons liées au conflit armé”) and the Spanish text (“razones relacionadas con el conflicto armado”) do not shed much light. As we said with regard to paragraph 3 of Article 75 (*Fundamental guarantees*), the term “reasons” seems more appropriate and correct to cover all the cases which may arise: arrest for committing a breach, arrest for the purpose of interrogation, internment for present or past opinions or for any other reasons. Nevertheless, everything we said with regard to paragraph 3 of Article 75 (*Fundamental guarantees*) also applies here. Reference should therefore also be made to the commentary on this provision to determine the meaning of the words “related to the armed conflict” (*supra*, pp. 875-876).
- 3165** “With the utmost priority” is an unusual expression which suggests that there are several degrees of priority. No doubt this means priority in relation to cases of other arrested, detained or interned women who are not pregnant nor have dependent infants, and it is priority in relation to all cases, including men. The word “utmost” was used to emphasize that the provision is mandatory, and to express the intent that pregnant women should be released as soon as possible and that mothers should be reunited with their dependent infants without delay.
- 3166** During the discussions in the Working Group which examined this article and gave it its present form, a proposal was made to add to this paragraph a provision preventing women from being arrested or imprisoned solely on the ground of their convictions. After a lengthy discussion this proposal was not taken up from a concern that it would legitimize the arrest or imprisonment of other persons solely on the grounds of their convictions. However, the Working Group suggested dealing with the problem in a more general way in a separate article, as a provision applicable to everyone. As we saw above with regard to paragraph

1 of Article 75 (*Fundamental guarantees*),⁴ Committee III did not succeed in the limited time available in agreeing on this new article and it was therefore abandoned.

- 3167 During the discussions it was proposed that elderly persons responsible for young children should also be covered by this provision, but no consensus was achieved on this point.

Paragraph 3

- 3168 The discussion on this paragraph, which deals with the death penalty, raised numerous problems. It was relatively easy to agree on the prohibition on execution of pregnant women; in fact, many of the national penal codes which still contain the death penalty include this restriction, and the practice of deferring execution until after the woman had given birth has been abandoned almost everywhere, *de jure* or *de facto*. On the other hand, a prohibition on pronouncing the death penalty on pregnant women or mothers having dependent infants conflicted with specific provisions of national legislation in several countries. The idea of deferring execution in such cases for a period was considered inhumane and therefore unacceptable. Finally, a compromise was agreed upon in the Working Group; it was accepted without discussion by Committee III, and then in plenary.

- 3169 The first sentence looks like a limited obligation, as shown by the series of terms mitigating it: “to the maximum extent feasible”, “shall endeavour”, “avoid”. On the other hand, the second sentence constitutes a clear prohibition and is formulated without qualifications. Thus, if despite the recommendation contained in the first sentence, the death penalty is pronounced on a pregnant woman or mother having dependent infants, it should in no event be executed, even when the child is no longer dependent.

- 3170 The terms used require some explanation: “to the maximum extent feasible” corresponds to the French “dans toute la mesure du possible”, and in Spanish to “en toda la medida de lo posible”. Article 58 (*Precautions against the effects of attacks*) uses the same wording in the English text, though the corresponding French and Spanish texts are different: respectively, “dans toute la mesure de ce qui est pratiquement possible” and “hasta donde sea factible”. It is rather strange that an expression which is the same in English in these two articles should appear with different wording in the French and Spanish texts. Here again, the Drafting Committee did not correct this error through lack of time.

- 3171 The expression was discussed at length with regard to other articles, and the English speaking contingent insisted on using the word “feasible” and on a corresponding translation in other languages; that should serve as a guide in the interpretation of that expression. Thus it should be understood as meaning “capable of being done, accomplished or carried out, possible or practicable”.⁵

⁴ See *supra*, p. 871.

⁵ On the meaning of this expression, see commentary on Arts. 57 and 58, *supra*, pp. 681 and 692.

3172 For the expression “mothers having dependent infants”, reference may be made to what we said on this matter with regard to paragraph 2 of this article. As regards breaches committed that are related to the armed conflict, reference should be made to what was said above with regard to paragraph 4 of Article 75 (*Fundamental guarantees*). It is true that that provision uses the words “a penal offence related to the armed conflict”, which is slightly different from the text of the paragraph under consideration here. However, it is difficult to see how an offence other than a penal offence could be invoked to justify the death penalty. In fact they refer to the same situation.

C.P. / J.P.

Protocol I

Article 77 – Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.
2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Documentary references

Official Records

O.R. I, Part I, p. 161; Part III, p. 22 (Art. 68). *O.R.* III, pp. 300-301, *O.R.* VI, p. 251, CDDH/SR.43, para. 55. *O.R.* XV, pp. 63-71, CDDH/III/SR.45, paras. 3-40; p. 212, CDDH/III/SR.59, paras. 17-18; p. 214, paras. 29-32; pp. 219-220, paras. 58 and 62-63; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; pp. 464-466, CDDH/407/Rev.1, paras. 58-65; pp. 521-522, CDDH/III/391.

Other references

CE/3b, pp. 46-49, *CRCE 1971, Report*, p. 37. *CE 1971, Report*, pp. 77-78, para. 442; p. 79, para. 450; p. 92, CE/COM III/23; p. 94, CE/COM III/32; p. 97, CE/COM III/44 (Art. 9). *CE 1972, Basic Texts*, pp. 20-21 (Arts. 57, 58, 60 and 62). *CE 1972, Commentaries*, Part I, pp. 122-124 (Arts. 57-58); pp. 125-126 (Art. 60). *CRCE 1972, Report*, p. 36 (Art. 58). *CE 1972, Report*, vol. I, pp. 157-159, paras. 3.229-3.248 (Arts. 57-58); p. 159, paras. 3.250-3.251 and 3.254; p. 160, paras. 3.260-3.262 (Art. 62); vol. II, p. 66, CE/COM III/PC 12-15; pp. 67-68, CE/COM III/PC 20; p. 69, CE/COM III/PC 26-28; p. 74, CE/COM III/PC 57; p. 79, CE/COM III/PC 84; p. 80, CE/COM III/PC 92; p. 82, CE/COM III/PC 99-101; p. 83, CE/COM III/PC 111; p. 85, CE/COM III/PC 117. *Commentary Drafts*, pp. 86-87 (Art. 68). *XXIInd Int. Conf. RC, Report*, p. 19, paras. 62-63 (Art. 68).

Commentary

3173 The situation of children in time of armed conflict is covered by several articles in the Fourth Convention. Thus Article 14, concerning safety zones, indicates that such zones may protect in particular children under fifteen. Children are also mentioned in Article 17, which provides for the evacuation of civilians from besieged areas. Article 23, which deals with the free passage of relief consignments intended for the weakest categories of the population, explicitly refers to children under fifteen among the potential beneficiaries. Article 24, which has a similar scope to the article under consideration here, is entirely devoted to children, particularly children under fifteen who are orphaned or who are separated from their families as a result of the war, and to the identification of children under twelve. In Article 38, which applies to protected persons in the national territory of belligerents, children under fifteen are included amongst those persons who should enjoy preferential treatment to the same extent as nationals of the State concerned. Article 50 deals with children in occupied territories and to the institutions devoted to their care. Still in occupied territory, Article 51 prohibits compelling children under eighteen years of age to work, and Article 68 prohibits pronouncing the death penalty on persons under eighteen years of age. Moreover, this last provision, from which no derogation is possible, has been adopted in the International Covenant of 1966 on Civil and Political Rights (Article 6, paragraph 5).

3174 When it presented the draft article,¹ the ICRC's specific purpose was to extend

¹ "Article 68 – Protection of children;

1. Children shall be the object of privileged treatment. The Parties to the conflict shall provide them with the care and aid their age and situation require. Children shall be protected against any form of indecent assault.
2. The Parties to the conflict shall take all necessary measures in order that children aged under fifteen years shall not take part in hostilities and, in particular, they shall refrain from recruiting them in their armed forces or accepting their voluntary enrolment.
3. The death penalty for an offence related to a situation referred to in Article 2 common to the Conventions shall not be pronounced on persons who were under eighteen years at the time the offence was committed."

to all children in territories of States involved in a conflict, some of the provisions of the Fourth Convention which apply in occupied territories (Article 50) and to prohibit the participation of children in armed conflict. It will be shown below that by and large the Diplomatic Conference agreed with these views.

3175 The Working Group of Committee III discussed this article for more than a week; it raised some delicate problems and three amendments had to be examined.² Finally the Working Group achieved a compromise which was adopted by consensus in Committee III and then by the Conference itself, and which has become the present article.

3176 In view of its character, this article serves as a development of both the Fourth Convention and of other rules of international law which govern the protection of fundamental human rights in time of armed conflict, particularly the International Covenant of 1966 on Civil and Political Rights and the Declaration of the Rights of the Child, adopted unanimously in 1959 by the United Nations General Assembly. At the present time a Draft Convention on the Rights of the Child is under discussion in the United Nations.

3177 This article is not subject to any restrictions as regards its scope of application; it therefore applies to all children who are in the territory of States at war, whether or not they are affected by the conflict.

Paragraph 1

3178 The word “children” is not clarified in any way, and this omission is intentional. The Rapporteur said: “It should also be noted that the Committee decided not to place specific age limits in paragraphs 1 and 4 and that there is no precise definition of the term ‘children’.”³

3179 The term “child” does not have a generally accepted definition. According to the Concise Oxford Dictionary the term “child” means a young human being who has not reached the age of discretion, i.e., the age at which one is fit to manage one’s own affairs (7th edition, 1982). According to the Oxford English Dictionary (1970) a child is a human being up to the age of puberty. The French Dictionary Robert indicates that it means a human being from birth up to the age of thirteen; this is followed by adolescence.⁴ The age of puberty varies, depending on climate, race and the individual. However, the limit of fifteen years of age, which is given many times in the Fourth Convention and is also given in paragraphs 2 and 3 of this article, seems to provide a reasonable basis for a definition. Moreover, the article itself in paragraphs 2 and 5 uses the word “persons” in referring to a limit of eighteen years. This does not prevent the fact that some countries have adopted a lower or higher age than fifteen years, but there is no doubt that all human beings under fifteen should, within the meaning of the Fourth Convention and

² See *O.R.* III, pp. 300-301, CDDH/III/304, CDDH/III/324 and Corr.1 and CDDH/III/325.

³ *O.R.* XV, p. 465, CDDH/407/Rev.1, para. 63.

⁴ *Oxford English Dictionary*, 1970, Vol. II, p. 341: “A young person of either sex below the age of puberty”; P. Robert, *Dictionnaire alphabétique et analogique de la langue française*, Paris, 1971, vol. 2, p. 493.

this Protocol, be considered and treated as children. The age of fifteen most often corresponds to such development of the human faculties that special measures are no longer required to the same degree. However, some flexibility is appropriate, for there are individuals who remain children, both physically and mentally, after the age of fifteen. Furthermore, this age of fifteen has been adopted in other international instruments. Thus, for example, in a recommendation of 1965 relating to the minimum age for marriage (Resolution 2018 (XX)) the United Nations General Assembly requested States to determine a minimum age for marriage and specified that that age should in no case be under fifteen years.

- 3180** The meaning of the provision under consideration here is sufficiently clear: at most we should add that according to the Rapporteur the last words, “or for any other reason”, refer to retarded children, or in modern terminology, those who are physically or mentally handicapped.
- 3181** The first sentence is very similar to paragraph 1 of Article 76 (*Protection of women*). Like women, children are entitled to special respect and must be protected against any form of indecent assault. This is a welcome supplement to Article 27 of the Fourth Convention, as experience has shown that children, even the very youngest children, are not immune from sexual assault.
- 3182** The second sentence demands that Parties to the conflict should provide children with the care and aid they require. This may seem self-evident, but it is just as well to state it in black and white.

Paragraph 2

- 3183** Recent conflicts have all too often shown the harrowing spectacle of boys, who have barely left childhood behind them, brandishing rifles and machine-guns and ready to shoot indiscriminately at anything that moves. Participation of children and adolescents in combat is an inhumane practice and the ICRC considered that it should come to an end. It entails mortal danger for the children themselves, but also for the many people who are exposed to their erratic.
- 3184** Nevertheless, the ICRC proposals encountered some opposition, as on this point governments did not wish to undertake unconditional obligations. In fact, the ICRC had suggested that the Parties to the conflict should “take all necessary measures”, which became in the final text, “take all feasible measures”. This formula already exists in other articles, particularly Article 76 (*Protection of women*), and we refer to the commentary thereon.⁵ Although the obligation to refrain from recruiting children under fifteen remains, the one of refusing their voluntary enrolment is no longer explicitly mentioned. In fact, according to the Rapporteur, Committee III noted that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit voluntary participation of children under fifteen.⁶

⁵ For the general meaning of the expression, cf. commentary Arts. 57-58, *supra*, pp. 681 and 692.

⁶ O.R. XV, p. 465, CDDH/407/Rev.1, para. 63.

- 3185 It is possible to understand the point of view adopted by the Diplomatic Conference without fully agreeing with it. It is true that there is no law on military organization anywhere that provides for the recruitment of persons under fifteen, but children of that age have certainly participated in hostilities voluntarily in extreme circumstances, and have sometimes performed acts of heroism, possibly without always being aware of the reasons for the conflict. It is difficult to moderate their enthusiasm and their will to fight. Military and civil authorities will find valid reasons in this provision for refusing the voluntary enrolment of minors under the age of fifteen, and for exhorting them to continue their studies and their education. However, if despite this, such “under fifteens” are intent on participating in hostilities – a case covered by paragraph 3 – the authorities employing or commanding them should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with persons who are not yet sufficiently mature, or even have the necessary discernment of discrimination. Thus they should give them the appropriate instruction on handling weapons, the conduct of combatants and respect for the laws and customs of war.
- 3186 Similarly, even though the authorities may not succeed in preventing young persons from taking part in hostilities, they should at least provide them with uniforms, identity tags indicating their status as minors or, failing these, with distinguishing signs such as, for example, an armlet or a tunic or any other sign showing that the individual wearing it is a combatant.
- 3187 The text refers to taking a *direct* part in hostilities.⁷ The ICRC proposal did not include this word. Can this lead to the conclusion that indirect acts of participation are not covered? Examples would include, in particular, gathering and transmission of military information, transportation of arms and munitions, provision of supplies etc. The intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform such services; if it does happen that children under fifteen spontaneously or on request perform such acts, precautions should at least be taken; for example, in the case of capture by the enemy, they should not be considered as spies, saboteurs or illegal combatants and treated as such. In addition, appropriate instruction is again essential.
- 3188 The second sentence of the paragraph is the result of a compromise; in fact, in an amendment one delegation had proposed that the limit on non-recruitment should be raised from fifteen to eighteen years.⁸ The majority was opposed to extending the prohibition of recruitment beyond fifteen years, but in order to take this proposal into account it was provided that in the case of recruitment of persons between fifteen and eighteen, priority should be given to the oldest.
- 3189 As we see, this provision directly concerns the composition of the armed forces; it is therefore related to Articles 43 (*Armed forces*), 44 (*Combatants and prisoners of war*), 45 (*Protection of persons who have taken part in hostilities*) of the present

⁷ Art. 43, para. 2, attributes the right to participate *directly* in hostilities to members of the armed forces and to them alone. We refer to the commentary on this paragraph, *supra*, p. 514.

⁸ Cf. O.R. III, p. 301, CDDH/III/325.

Protocol, to Articles 51 and 147 of the Fourth Convention, and to Article 23 of the Hague Regulations of 1907.

3190 Up to now there have been no rules in this field, and this article will certainly be very useful, even if it is not mandatory in some circumstances.

3191 Finally it should be noted that this provision is primarily concerned with the nationals of the recruitment State, though without excluding nationals of other States. In other words, this article undoubtedly applies to that State's own nationals, and to some extent protects them from their own authorities. It is conceivable on the basis of this article that a father might oppose the recruitment of his son under fifteen years of age, or request that in the event of his son's voluntary enrolment, such enrolment should not be accepted.

Paragraph 3

3192 One does not often see an international treaty laying down rules governing the situation which would arise if an article of the same treaty were violated. This paragraph is an example of such case. It is intended to cover the case where, despite the prohibitions contained in the first two paragraphs, "under fifteens" were to participate in hostilities. However, the text itself emphasizes the "exceptional" character of such cases.

3193 As we have already said, it is not very likely that such young persons would be recruited on the basis of a law or decree. It is more likely that they would join up as a result of spontaneous actions by individuals or groups such as military academies, volunteer corps or patriotic societies. Spontaneous uprisings to resist an invader (*levée en masse*) are also quite likely.

3194 We also mentioned above the precautionary measures which should be taken by the authorities in such an extreme case, particularly ensuring that such young persons are provided with distinguishing signs displaying their combatant status. A child identified in this way will obviously be treated as a prisoner of war if he is captured. In fact, there is no age-limit for the right to such treatment. Theoretically prisoners of war may be very young or very old. However, according to Article 16 of the Third Convention, age is a factor which justifies privileged treatment. On many occasions the ICRC has intervened in favour of very young prisoners of war, requesting privileged treatment for them during captivity and priority during repatriation.⁹ Even when they are prisoners of war, "under fifteens" will continue to have the benefit of the provisions of this article, particularly paragraphs 1, 4 and 5. The death penalty cannot be pronounced on them, and they must be interned in quarters separate from those of adults.

3195 If a child under fifteen years of age participates in hostilities under such conditions that he does not have the right to prisoner-of-war status, he may fall under the Fourth Convention if he is a protected person within the meaning of

⁹ See *Report of the International Committee of the Red Cross on its Activities during the Second World War (September 1, 1939 – June 30, 1947)*, Vol. I, 1948, pp. 297-300.

that Convention. Finally, if he does not have the right to prisoner-of-war treatment, and he is not a protected person either, he is entitled, according to Article 45 (*Protection of persons who have taken part in hostilities*), paragraph 3, to the protection of Article 75 (*Fundamental guarantees*), which is referred to in paragraph 4 of Article 77. That provision is important, especially with regard to judicial guarantees, as these are only available under the Fourth Convention for protected persons in occupied territory.

- 3196 Finally, all children who are in the situation just referred to can rely on the provisions of Article 77, even if they are prisoners of war or protected persons under the Fourth Convention.

Paragraph 4

- 3197 As in paragraph 1 – we refer to the commentary thereon – no age-limit is laid down, and the word “children” is not defined. However, it is reasonable to assume that children under fifteen years of age must be detained in quarters separate from those of adults, except, obviously where families are accommodated as family units.

- 3198 The situation is less clear with regard to young people between sixteen and eighteen years old. In this respect the Rapporteur of Committee III made the following remark: “Whether persons of sixteen, seventeen or eighteen years of age would thus have to be retained separately from adults, is left to national law, traditions, and the decision of the Parties to a conflict.”¹⁰ Like him, we feel that for this last category it is appropriate to act in accordance with the customs and practices followed in the places of detention of the countries concerned. If there is any uncertainty, the interests of the young people should prevail.

- 3199 To some extent this question is related to the age of criminal responsibility. In some countries no penal sanction may be inflicted on individuals who have not reached a minimum age, which may vary from country to country. In many States, even if the age of criminal responsibility is below the general age of majority, youth constitutes a mitigating factor, and penalties are reduced. Very often offences committed by young people are submitted to juvenile courts, and the penalties are often educational or rehabilitation measures to be served in special establishments. In such cases the separation required by this paragraph is of course automatically achieved.

- 3200 Lodging members of the same family who are being detained in the same quarters is already laid down in Article 82 of the Fourth Convention.

Paragraph 5

- 3201 This is probably the most important paragraph, as the provision is not subject to any restriction; it contains its own definition in terms which are unequivocal.

¹⁰ O.R. XV, p. 465, CDDH/407/Rev.1, para. 63.

In territories at war no person under the age of eighteen years may be executed for an offence related to the armed conflict.

3202 In this field the Fourth Geneva Convention of 1949 paved the way in Article 68, paragraph 4, which provides that, in any case, the death penalty may not be pronounced by the courts of the Occupying Power on a protected person who is under eighteen years of age. The 1966 International Covenant on Civil and Political Rights followed this example, and Article 6 provides that the death sentence cannot be imposed for crimes committed by persons below eighteen years of age. On the other hand, the European Convention (1950) does not contain any provision in this respect. Article 4 of the American Convention (1969) prohibits the death penalty for persons under eighteen years of age or over seventy. To sum up, the present provision fills gaps which still existed, and with regard to time of armed conflict and offences related to conflicts, it can be said that the death penalty for persons under eighteen years of age is ruled out completely.

3203 It should be noted that the provision does not use the word “children”, but the more general term “persons”. The ICRC draft provided that the death penalty should not be “pronounced”, and the Working Group had accepted that text. But one delegate argued that the legislation of his country did not permit a prohibition on the death penalty being pronounced, though a prohibition of its execution could be accepted. Committee III and the Conference itself accepted this objection and the final text takes it into account.

3204 It is to be hoped that this provision will not be abused, especially by urging young people under eighteen to perform highly perfidious or unscrupulous acts which would not carry the death penalty for their perpetrator because of his youth. Such practices could have damaging consequences if they occurred frequently and the authorities responsible might give up attempting to apprehend the perpetrators of such acts, seeking rather to eliminate them. The heavy responsibility upon those who ordered adolescents to commit such acts or tolerated them, should be underlined, for they jeopardize the safety of all young people. In addition, it should be recalled that they would have to account for their acts before the courts.

3205 As regards the words “offence related to the armed conflict”, we have already seen with regard to Article 75 (*Fundamental guarantees*), paragraphs 3 and 4, and Article 76 (*Protection of women*), paragraphs 2 and 3, what is meant by this expression, which in general does not cover ordinary criminal offences. In addition, we would refer to the commentary on the above-mentioned provisions (p. 357 and p. 893 *supra*).

3206 The death penalty is prohibited or restricted in a number of provisions of the Geneva Conventions and the Additional Protocols, and the following summary can be made in this respect:

- 1) A general rule applicable to all civilian or military persons in the territory of the Parties to the conflict prohibits the execution of the death penalty for penal offences related to the armed conflict on persons under eighteen years of age at the time the offence was committed (Protocol I, Article 77). The corresponding rule applicable in non-international conflicts (Protocol II,

Article 6 – *Penal prosecutions*) prohibits the pronouncement of the death penalty in like circumstances.

- 2) A general rule applicable to women prohibits the execution of the death penalty on pregnant women and mothers having dependent infants, for offences related to the conflict (Protocol I, Article 76 – *Protection of women*). The same rule applies in internal conflicts (Protocol II, Article 6 – *Penal prosecutions*).
- 3) Prisoners of war are subject to the legislation of the Detaining Power; they must be informed of offences carrying the death penalty under this legislation; no new offence may be added to that list without the concurrence of the Power on which they depend. Various precautions are laid down in favour of prisoners of war accused of offences carrying the death penalty, and this penalty may not be executed until at least six months after the final judgment (Third Convention, Articles 100 and 101).
- 4) In occupied territories the death penalty can only be pronounced by courts of the Occupying Power against protected persons for a limited number of duly enumerated offences (Fourth Convention, Article 68, paragraph 2). Furthermore, various precautions must be observed, and in the case of conviction, the execution may not take place until after a period of at least six months (Fourth Convention, Article 75). Finally, the Fourth Convention (Article 68, paragraph 4), prohibits the pronouncement (and therefore, like the article under consideration here, the execution) of the death penalty on protected persons under eighteen years of age at the time of the offence.

3207 As we have seen, some very important restrictions have been adopted on the pronouncement and execution of the death penalty; at any rate, there is a general tendency throughout the world to abolish this penalty, and this tendency is reflected in the 1949 Conventions, as well as in the present Protocol.

3208 It is worthy of note that one delegate, without objecting to the article as it was adopted, would have wished to add a sixth paragraph prohibiting any penal prosecution and conviction of children too young at the time of the offence to understand the consequences of their actions. According to the Rapporteur, Committee III agreed that, following a general principle of penal law, a person cannot be convicted of a criminal act if he was not able to understand the consequences of that act at the time he committed it. To some extent this problem is related to the age of criminal responsibility, discussed above with regard to paragraph 3. The Committee therefore decided to leave this question to national legislation.

C.P./J.P.

Protocol I

Article 78 – Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.
2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.
3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:
 - (a) surname(s) of the child;
 - (b) the child's first name(s);
 - (c) the child's sex;
 - (d) the place and date of birth (or, if that date is not known, the approximate age);
 - (e) the father's full name;
 - (f) the mother's full name and her maiden name;
 - (g) the child's next-of-kin;
 - (h) the child's nationality;
 - (i) the child's native language, and any other languages he speaks;
 - (j) the address of the child's family;
 - (k) any identification number for the child;
 - (l) the child's state of health;
 - (m) the child's blood group;
 - (n) any distinguishing features;

- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

Documentary references

Official Records

O.R. I, Part I, pp. 161-162; Part III, pp. 22-23 (Art. 69). *O.R.* III, p. 302. *O.R.* VI, pp. 251-254, CDDH/SR.43, paras. 56-82. *O.R.* XV, pp. 72-75, CDDH/III/SR.45, paras. 41-61; p. 212, CDDH/III/SR.59, para. 19; p. 265, CDDH/215/Rev.1, para. 9; p. 379, CDDH/236/Rev.1, para. 8; p. 466, CDDH/407/Rev.1, paras. 66-67; pp. 494-495, *id.*, Annex II; p. 523, CDDH/III/391.

Other references

CRCE 1971, Report, p. 37, *CE 1972, Basic Texts*, p. 21 (Art. 61). *CE 1972, Commentaries*, Part I, pp. 126-128 (Art. 61). *CE 1972, Report*, vol. I, p. 160, paras. 3.255-3.259 (Art. 61); vol. II, p. 82, CE/COM III/PC 102; pp. 85-86, CE/COM III/PC 117. *Commentary Drafts*, pp. 87-88 (Art. 69).

Commentary

3209 In countries at war special measures are nearly always taken in favour of children for it is desirable to ensure the well-being, upbringing and education of children. Therefore special provisions have been adopted in the field of food supplies, medical care and clothing. Efforts have also been made to accommodate young people in areas or quarters where the dangers of war are reduced. In this context children have often been sent abroad to allied or neutral countries¹ which agreed or offered to accommodate them. In the majority of cases it was a matter of avoiding the dangers resulting from hostilities for children, of ensuring sufficient food, as well as an appropriate upbringing and education. On the whole such evacuations, carried out in an orderly manner, with the agreement of the authorities and the parents, have had good results.

3210 The Fourth Convention encouraged the reception of orphaned children or children separated from their families into neutral countries. Thus Article 24 provides:

¹ By which we mean here and below, "neutral or other State not Party to the conflict"; on this expression, see commentary Art. 2, sub-para. (c), *supra*, p. 61.

“The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or who are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.”

3211 The Diplomatic Conference of 1974-1977 had a more cautious approach. In fact, it has also happened that evacuations have been carried out for other reasons, for example, to educate children according to certain political or religious views, or to prepare them to serve in the armed forces of a State. Sometimes they have been carried out in conditions such as to result in the children losing their identity or being raised in a manner foreign to that of their family or their country.

3212 To a large extent Article 78 takes these aspects into account. While it permits the evacuation of children abroad, it lays down precise conditions which the Parties to the conflict must observe in such situations. In fact, the evacuation of children itself involves serious dangers. In this connection it is useful to recall a study carried out by UNESCO,² quoted by the International Union for Child Welfare in its memorandum presented to the second session of the Conference of Government Experts in 1972:³

“When we study the nature of the psychological suffering of the child who is a victim of war, we discover that it is not the fact of war itself – such as bombings, military operations – which have affected him emotionally; his sense of adventure, his interest for destruction and movement can accommodate itself to the worst dangers, and he is not conscious of his peril if he keeps near him his protector who, in his child’s heart, incarnates security and if, at the same time, he can clasp in his arms some familiar object.

It is the repercussion of events on the family affective ties and the separation with his customary framework of life which affect the child, and more than anything the abrupt separation from his mother.”

3213 It follows from the above that everything possible should be done to avoid separating children (especially young children) from their natural protectors. However, it is clear that in time of war the mother and father are often assigned to military or civilian tasks and are therefore not able to take care of the well-being and upbringing of their child. Frequently the child will be entrusted to the grandparents or other more distant relatives, or otherwise he may be left to reception centres.

² Th. Brosse, *War-Handicapped Children*, UNESCO, Paris, 1950.

³ *CE 1972, Report*, Vol. II, pp. 85-91 (CE/COM III/PC 117).

- 3214** On the basis of its experience, in 1972 the ICRC submitted an article to the Government Experts which merely imposed an obligation upon States receiving children to register them and to supply information to the Central Tracing Agency; in the ICRC's view it was primarily a matter of ensuring and facilitating the children's return to their country and their family. The ICRC modified the draft on the basis of the discussions which took place in 1972.⁴
- 3215** As we will see below, the Diplomatic Conference introduced important clarifications and additions to the ICRC draft. The latter had also introduced provisions relating to the evacuation of children in Article 32 of draft Protocol II, but the Conference only partially adopted these, incorporating them into Article 4 (*Fundamental guarantees*), paragraph 3, of that Protocol. In this connection it should be noted that the evacuation of children under difficult conditions has mainly occurred in cases of internal armed conflict.
- 3216** Thus, for example, at the end of the Spanish Civil War in the years 1938-1939 orphaned Basque children or those separated from their families were evacuated to the USSR, which led to dramatic situations from the personal and family point of view. When they became adults, many of these children wished to return to Spain, and did so during the 1960s. However, many of them did not feel at home in Spain and demanded to be allowed to return to the USSR, which required lengthy negotiations. In fact these people did not feel at home either in Spain or the USSR.

⁴ "Article 69 – Evacuation of children

1. If their condition necessitates their evacuation for reasons of health, in particular to obtain medical treatment or to hasten convalescence, children may be transferred to a foreign country. Where they have not been separated by circumstances from their parents or legal guardians, the latter's consent must be obtained. In the case of evacuation to a foreign country, the operation shall be supervised or directed by the Protecting Power, in agreement with the Parties to the conflict concerned.

2. In the case of evacuation to a foreign country, the Party to the conflict carrying out the evacuation and the authorities of the receiving country shall arrange, if possible, for the children's education to be continued in the language and culture of the country to which they belong.

3. So as to facilitate the return, to their families and country, of children cared for or received abroad, the authorities of the receiving country shall establish for each child a card, with photographs, which they shall communicate to the Central Tracing Agency. Each card shall bear, whenever possible, the following minimum information:

- (a) surname of the child;
- (b) the child's first name;
- (c) the place and date of birth (failing this, the approximate age);
- (d) the father's first name;
- (e) the mother's first name and her maiden name;
- (f) the child's nationality;
- (g) the address of the child's family;
- (h) the date on which and the place where the child was found;
- (i) the date on which and the place from where the child left his country;
- (j) the child's blood group;
- (k) any distinguishing features;
- (l) the child's present address."

- 3217** Another example is the case of some 30,000 Greek children who were moved to various foreign countries at the end of the Greek Civil War of 1945-1946. In 1948 and 1949 the United Nations General Assembly requested the International Committee of the Red Cross and the League of Red Cross Societies to take care of the repatriation of these children. This was a long and difficult process, but finally, during the 1950s, several thousand children were returned to their country.
- 3218** These examples, although relating to internal conflicts, clearly show that when children are evacuated to other countries, all the necessary measures should be taken at the same time to permit their prompt return once the conditions which necessitated the evacuation have disappeared.

Paragraph 1

- 3219** Like several other provisions in this Section, this article contains its own definition of the persons to whom it applies. Thus it covers children – with no further clarification – except that children who are nationals of the Party to the conflict carrying out the evacuation are not included.
- 3220** Thus a Party to the conflict may arrange for the evacuation of its own children to an allied or neutral country without having to act in accordance with the provisions of this article; the same applies to evacuations of children arranged for by a Party to the conflict within its own territory. In the past such evacuations have been frequently undertaken for various different reasons: to remove children from the dangers of war, to provide adequate food and care for them, to ensure their upbringing and education in satisfactory conditions etc.
- 3221** Having said this, there is no doubt that when Parties to the conflict evacuate children in cases other than those provided for in this article it is entirely in their interest to act in accordance with the provisions of paragraphs 2 and 3, even if they are under no legal obligation to do so. In short, these are sound administrative measures. In any case, they are laid down in broad terms in Article 24 of the Fourth Convention.
- 3222** Let us now look at the conditions set out in the article under consideration here. As nationals of the State arranging for the evacuation are not covered, the provision is mainly concerned with children of enemy nationality, of refugees or of stateless persons, and of nationals of States without diplomatic representation. Thus in most cases these are protected persons within the meaning of the Fourth Convention. There may also be child refugees who are not protected persons because they have acquired that status after the outbreak of hostilities, or children who are nationals of States not bound by the Fourth Convention, but such cases are relatively rare. The majority of children concerned therefore fall under the provisions of the Fourth Convention. Thus it is prohibited to evacuate them to the territory of a Power that is not Party to the Convention, and if they are taken to a Power which is Party to the Convention, it is necessary to ensure that it is able and willing to apply the Convention (Article 45, Fourth Convention). The Power arranging for the evacuation remains responsible for the treatment given the persons who are evacuated. Protected persons, to the same extent as nationals

of the State concerned, are free to move when they find themselves in a particularly exposed area (Article 39, sub-paragraph 4).

3223 In occupied territories, Article 49 prohibits forcible transfers from occupied territory. The same does not apply for voluntary transfers. Evacuations within occupied territory are possible only if the security of the population or military necessity so requires. Only when it is impossible for material reasons to avoid it, is a temporary transfer of a population outside occupied territory legitimate and this population should be returned to its own country as soon as hostilities have ceased in that area. In this case too, children will enjoy the guarantees accorded protected persons. In this way families will be kept together.

3224 Finally, let us recall the terms of Article 49, paragraph 6, of the Fourth Convention, which provide that an Occupying Power cannot transfer parts of its own population into the territory it occupies.

3225 The position is rather complicated and we will therefore attempt to summarize it as follows:

- 1) Children who are nationals of the Party to the conflict arranging for the evacuation: that Party is free to make such arrangements as it sees fit, though in the interests of the children it is, of course, highly desirable to apply the rules laid down in the Protocol.
- 2) Children who are not nationals of the Power arranging for the evacuation and who are protected persons under the Fourth Convention: the rules of the Convention and the Protocol apply concurrently.
- 3) Children who are neither nationals of the Power arranging for the evacuation, nor protected persons under the Fourth Convention:⁵ the rules laid down in the Protocol apply.

3226 The reasons given which may justify an evacuation are exhaustive: health, medical treatment or safety. As we said above, the Protocol tends to restrict the evacuation of children, no doubt in the light of negative experiences, some of which were described above. In general an interruption of family and affective ties can have dire effects on the development of children; a balance must be found between opposing needs.

3227 For occupied territories safety was not retained as a condition for evacuation. On this the Rapporteur stated:

“[...] the limitation to evacuation for compelling reasons of health or medical treatment where the evacuation is to be from occupied territory reflects a deep-seated concern among many representatives in the Committee that the dangers of Occupying Powers abusing their discretion are greater than the dangers of prohibiting evacuation for reasons of safety”.⁶

⁵ Children who are nationals of allied countries which have normal diplomatic relations with the Power arranging for the evacuation and whose diplomatic representatives can accomplish their diplomatic mission in favour of their compatriots without hindrance are not protected persons; the same applies, except in occupied territory, to children who are nationals of neutral or other States not Parties to the conflict.

⁶ O.R. XV, p. 466, CDDH/407/Rev.1, para. 66.

- 3228** It may happen that evacuation in itself presents serious danger. In such circumstances the rule contained in Article 127, paragraph 4, of the Fourth Convention may give useful guidance. According to that provision, if the combat zone draws close to a place of internment, internees shall not be transferred unless they are exposed to greater risks by remaining on the spot than by being transferred.
- 3229** In such circumstances the responsible authorities could also consider establishing demilitarized zones or safety zones or otherwise they could declare inhabited areas to be “non-defended localities”. Obviously children should be amongst the first persons to be allowed to enter such protected areas.
- 3230** The adjective “temporary” which is used here is very important; it clearly shows that anyone who makes a decision to evacuate children, must at the same time hold out the prospect of their return and of restoring relations with their family in due course.
- 3231** As regards the authority which decides upon and undertakes the evacuation, the article is not very clear. In its own national territory the government and its organs with responsibility for these questions may give the children the possibility to leave for an allied or neutral country. For voluntary transfers from occupied territory, the initiative most often comes from local authorities, although they can only act with the consent and support of the Occupying Power, on the basis of an offer made by a neutral or allied country to receive children for a reasonably long period. In all these cases the Occupying Power, according to the terms of the article, is the Power arranging for the evacuation.
- 3232** Both in the State’s own national territory and in occupied territories the written consent of parents or guardians, or those who are responsible for the care of the children, is required. It might have been thought that the consent of the Power whose nationals are being evacuated would have been sufficient, but it was argued that some governments are “puppet” governments and that it was therefore necessary to obtain the consent of the family. In general the Diplomatic Conference showed great restraint in this field, especially in the case of occupied territories.
- 3233** In the absence of parents or guardians, consent is required of the persons who by law or custom are primarily responsible for the care of the children; this wording takes into account that in some parts of the world the family has a broader definition than in others.
- 3234** Supervision by the Protecting Power is provided for here: this, of course, refers to the Protecting Power looking after the interests of the belligerent Power of which the children are nationals or, in the case of refugees, the interests of the receiving State; in the absence of a Protecting Power for such refugees, support of the United Nations High Commissioner for Refugees or its representatives is an alternative.
- 3235** Lastly, if the children to be evacuated are not protected persons under the Fourth Convention, or in the absence of a Protecting Power, a humanitarian organization such as the ICRC may deal with the evacuation. The National Red Cross and Red Crescent Societies whose humanitarian activities are laid down in Article 81 (*Activities of the Red Cross and other humanitarian organizations*) can also lend their assistance to such evacuations.

- 3236** The paragraph ends with a sentence inviting Parties to the conflict to take all feasible precautions to avoid endangering the evacuation. The French text is less precise, in that it refers to “jeopardizing the evacuation” (“compromettre l’évacuation”) it is not clear what acts could jeopardize the evacuation. We understand this provision to mean that Parties to the conflict which have organized or accepted the evacuation should, of course, desist from undertaking military operations which would endanger the children being evacuated. Obviously signals can be used to indicate the routes and time of transport by air, sea or land used by the evacuation convoys. It is not impossible for Parties to the conflict to require specific routes to be used and others not to be used. The Protecting Powers can certainly play a useful role in this field.
- 3237** Finally, it should be noted that the article does not contain a definition of “children”. On this point we refer to what was said above on Article 77 (*Protection of children*); in general it may be considered that any human being under fifteen years of age should be considered as a child for the purposes of the Conventions and the Protocol. This does not mean that in certain cases people over the age of fifteen may not also be considered to be children.

Paragraph 2

- 3238** This paragraph lays down obligations but does not indicate to whom they apply. In the first place, it is the duty of the State receiving the children to continue the education of children in accordance with the wishes of their parents. However, the Party to the conflict arranging for the evacuation is also responsible for the fate of the evacuated children and should ensure that the requirements laid down are fulfilled. Any measures aimed at converting children to a religion other than that of their family, even if such conversion is voluntary, are of course prohibited. Similarly, indoctrination must be prohibited.
- 3239** Having said this, it will not always be easy to find a sufficient number of people who are able to ensure the education of children in the same conditions they enjoyed up to that time. Language problems may arise, as well as problems of custom and understanding; nevertheless, all possible measures should be taken.
- 3240** In conclusion, it should be noted that this paragraph lays down duties for receiving States which are often neutral countries and not Parties to the conflict; this is an expression of the solidarity uniting the States bound by the Conventions and their additional Protocol, a solidarity which is found moreover in other provisions, particularly in Article 1 (*General principles and scope of application*), paragraph 1, of the Protocol.

Paragraph 3

- 3241** The text is quite clear and requires very little comment. The Central Tracing Agency is that which is mentioned in Article 123 of the Third Convention and Article 140 of the Fourth Convention as Central Information Agency. The ICRC had established, without a clear legal basis, such an agency in 1914 during the First World War. A new Agency was founded in 1939 on the basis of Article 79 of

the Convention of 27 July 1929 Relative to the Treatment of Prisoners of War. That Agency was also concerned with the fate of civilians. Since the end of the Second World War it has remained active and was made available to Parties to conflicts which have taken place since then. This Agency still deals with enquiries about members of the armed forces or civilians registered during the Second World War.

3242 The information to be shown on every child's card is very full and it will not always be possible to give all of it. Moreover, there are cases where providing certain information could be harmful to the person it concerns and this is why an exception is made whenever it involves risk of harm to the child.

3243 When this paragraph was adopted in plenary, a discussion arose regarding the mother's maiden name: some delegates argued that in their countries such a concept was unknown, as a married woman retained her surname. For this reason the French text uses the word "éventuellement", though this is omitted in the English text.

3244 Some questions arose with regard to the meaning to be given to the word "family" in sub-paragraph (j). The Rapporteur replied that this word meant either the father or mother, or any surviving member of the family .⁷

C.P. / J.P.

⁷ *O.R.* VI, p. 466, CDDH/SR.43, paras. 66-67. See also commentary Art. 32, *supra*, pp. 346-347 and Art. 77, para. 4, *supra*, p. 903.

Protocol I

Article 79 – Measures of protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention.
3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Documentary references

Official Records

O.R. I. Part I, p. 163; Part II, p. 6, CDDH/55. *O.R.* III, p. 303 (new Article to be added after Art. 69). *O.R.* V, p. 223, CDDH/SR.21, paras. 28-31; p. 381, CDDH/SR.33, para. 10. *O.R.* VI, pp. 255-256, CDDH/SR.43, paras. 83-93; pp. 264-265; *id.*, Annex (Austria). *O.R.* VIII, p. 21, CDDH/I/SR.3, paras. 32-33; p. 68, CDDH/I/SR.9, paras. 8-9; pp. 241-245, CDDH/I/SR.25, paras. 7-34; pp. 311-319, CDDH/I/SR.31, paras. 1-53; p. 367-374, CDDH/I/SR.35, paras. 1-41; pp. 431-432, CDDH/I/SR.41, paras. 4 and 6-10; pp. 443-445, paras. 82-99. *O.R.* X, pp. 56-58, CDDH/219/Rev.1, paras. 181-191; pp. 75-91, CDDH/I/237.

Other references

CE 1971, Report, pp. 100-102, paras. 507-513 (and CE/COM III/J 1). *CE 1972, Report*, vol. I, pp. 138-140, paras. 3.73-3.93.

Commentary**General remarks**

- 3245** The circumstances of armed conflict expose journalists exercising their profession in such a situation to dangers which often exceed the level of danger normally encountered by civilians. In some cases the risks are even similar to the dangers encountered by members of the armed forces, although they do not belong to the armed forces. Therefore special rules are required for journalists who are imperilled by their professional duties in the context of armed conflict.¹
- 3246** It must be stressed from the outset that Article 79 is a rule of international *humanitarian* law: it purports to protect journalists engaged on dangerous missions from the harmful effects of armed conflict. Neither the right to seek information nor the right to obtain information are at issue in this provision.

The state of the law before 1977

- 3247** Article 13 of the Hague Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 provides that “Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters” are entitled in case of capture to prisoner-of-war treatment on one condition: that they are in possession of “a certificate from the military authorities of the army which they were accompanying”. This solution was retained by the Geneva Convention of 27 July 1929 Relative to The Treatment of Prisoners of War (Article 81).
- 3248** However, the Third Convention of 12 August 1949 is no longer satisfied with granting analogous treatment but its Article 4A(4) accords captured war correspondents the status of prisoner of war. Thus war correspondents are included among those who accompany the armed forces without actually being members thereof. However, only those correspondents who have special authorization permitting them to accompany the armed forces fall under this category: accredited correspondents. An identity card issued by the military authorities will assist them in proving their status.² Wounded, sick or shipwrecked war correspondents fall under the protection granted by the First and Second Conventions (Article 13).
- 3249** Apart from these special rules for war correspondents authorized to accompany the armed forces, international humanitarian law instruments dating from before 1977 do not contain any special provisions relating to journalists or their mission.

¹ For a general analysis, see H.-P. Gasser, “The Protection of Journalists Engaged in Dangerous Professional Missions”, *IRRC*, January-February 1983, p. 3.

² *Commentary III*, Art. 4A(4), pp. 64-65.

Historical background of this provision

- 3250** The historical background to Article 79 is special in that this provision did not result from the draft of Protocol I submitted to the Diplomatic Conference by the ICRC on the basis of consultations with government experts. It originates elsewhere. In fact, the United Nations General Assembly, on a French initiative, in 1970, authorized the Economic and Social Council, and through it the Human Rights Commission, to draw up a special draft convention with a view to protecting journalists on dangerous missions.³
- 3251** At the request of the General Assembly, successive drafts for such a Convention were submitted by the Human Rights Commission to the two sessions of the Conference of Government Experts for consideration.⁴ The majority of experts welcomed the proposal to provide special protection for journalists in view of the importance of transmitting as much information as possible on events during armed conflict.
- 3252** Invited by the United Nations General Assembly to express its views on the draft articles drawn up by the Human Rights Commission,⁵ the CDDH did so during the second session, though in an unexpected way. Instead of limiting itself to commenting on the United Nations draft, an *ad hoc* Working Group of Committee I considered that the protection of journalists on dangerous missions should be dealt with in the context of an instrument of international humanitarian law and not in a special convention.
- 3253** Thus the Working Group submitted to Committee I a draft article to be included in Protocol I – the future Article 79 – and an annex.⁶ These texts were successively accepted by Committee I⁷ and in plenary⁸ without opposition and without any further modifications except minor drafting changes.
- 3254** However, an interesting controversy arose during the discussion in Committee I: in fact, one delegation submitted an amendment which would have obliged journalists claiming protection under Article 79 to wear a protective emblem clearly visible from a distance in the shape of a bright orange armlet with two black triangles.⁹ This proposal was rejected primarily on the basis of the following argument: by making the wearer of the armlet conspicuous to combatants, such means of identification might make the journalists' mission even more dangerous; similarly it was argued that in this way the journalists would be likely to endanger the surrounding civilian population.¹⁰

³ Resolution 2673 (XXV) of 9 December 1970; cf. C. Pilloud, "Protection of Journalists on Dangerous Missions in Areas of Armed Conflict", *IRRC*, January 1971, p. 3.

⁴ Resolution 2854 (XXVI) of 20 December 1971 and reports of the Conference of Government Experts, first session (paras. 507-515) and second session (Vol. I, para. 3.73-3.93). The final version of the draft United Nations Convention can be found in document A/10147 of 1 August 1975.

⁵ Resolutions 3058 (XXVIII) of 2 November 1973 and 3245 (XXIX) of 29 November 1974.

⁶ Report of the Working Group, *O.R.* X, p. 75, CDDH/I/237.

⁷ *Ibid.*, p. 57, CDDH/219/Rev.1, para. 190.

⁸ *O.R.* VI, p. 256, CDDH/SR.43, para. 93.

⁹ *O.R.* III, p. 303, CDDH/I/242.

¹⁰ *O.R.* VIII, pp. 368-371, CDDH/I/SR.35, paras. 8-23.

- 3255 The information which should be shown on the identity card was also the object of some discussion in Committee I.¹¹
- 3256 In 1975 the United Nations General Assembly acknowledged the solution adopted by the Diplomatic Conference “with satisfaction”.¹² Since then there has been no further action on the initial idea of drafting a special convention on this subject. The specific problems raised by the protection of journalists on the battlefield form part of the whole body of humanitarian problems posed by armed conflict. The Geneva Conventions, and now the 1977 Protocols, are the appropriate framework for any rules on this matter. Moreover, as one delegate remarked during the discussion in Committee I, including the provision on journalists in a humanitarian law instrument should have the effect of making these Geneva Conventions and the Additional Protocols more familiar to those very journalists, since they would be more interested in consulting them.¹³ International humanitarian law can only benefit from this.

Paragraph 1 – Status of journalists

- 3257 Journalists engaged in a professional mission in an area of armed conflict are civilians in the sense of Article 50 (*Definition of civilians and of the civilian population*), paragraph 1, of Protocol I. In other words, a journalist, who is undoubtedly a civilian, does not lose this status by entering an area of armed conflict on a professional mission, even if he is accompanying the armed forces or if he takes advantage of their logistic support. Moreover, paragraph 1 of this article does not create any new law; it clarifies and reaffirms the law in force regarding persons exercising the functions of a journalist in an area of armed conflict without being an accredited correspondent in the sense of Article 4A(4) of the Third Convention.
- 3258 As became clear in the Diplomatic Conference itself, the wording of paragraph 1 is not entirely satisfactory.¹⁴ In fact, a journalist on a professional mission in an area of conflict should not merely be *considered* as a civilian, he *is* a civilian in accordance with the definition contained in Article 50 (*Definition of civilians and of the civilian population*), paragraph 1, of Protocol I. Thus this provision is merely declaratory and does not create a new status. There can be no doubt about this. The fact that Committee I refrained from modifying the wording of this paragraph which the Working Group had proposed, despite the criticisms raised during discussions, does not allow for any alternative conclusion regarding the meaning delegates intended the text to have. The Committee did not want to change the draft because it did not wish to reopen the discussion on a finely balanced text, the result of a compromise taking all the views into account.¹⁵

¹¹ *Ibid.*, pp. 311-319, CDDH/I/SR.31, paras. 1-53.

¹² Resolution 3500 (XXX) of 15 December 1975 and, by implication, Resolution 32/44 of 8 December 1977.

¹³ *O.R.* VIII, p. 313, CDDH/I/SR.31, para. 11.

¹⁴ *Ibid.*, pp. 313-314, paras. 13 and 19.

¹⁵ Statement of the Chairman of the Committee, *ibid.*, p. 319, para. 53.

3259 Indirectly this paragraph at the same time clarifies the status of war correspondents protected by Article 4A(4) of the Third Convention: they are civilians. In fact, Article 50 (*Definition of civilians and of the civilian population*), paragraph 1, of Protocol I, referred to in Article 79, includes the categories of persons mentioned in Article 4A(4) of the Third Convention in its definition of civilians.¹⁶

3260 The text does not define what is meant by a “journalist”.¹⁷ Thus the ordinary meaning of the word must be taken. Although the etymology calls to mind correspondents and reporters writing for a daily newspaper, the present use of the word covers a much wider circle of people working for the press and other media. The definition contained in draft Article 2(a) of the International Convention for the Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict¹⁸ could serve as a guide for the interpretation of Article 79. According to that definition:

“The word ‘journalist’ shall mean any correspondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation [...]”

3261 Thus the term “journalist” is understood in a broad sense.

3262 However, anyone who, as a member of the armed forces, has a function connected with information within the armed forces is not a journalist in the sense of Article 79.¹⁹ He shares the fate of all other members of the armed forces.

3263 What is meant by “dangerous professional missions in areas of armed conflict”? The meaning of the words is clear: any professional activity exercised in an area affected by hostilities is dangerous by its very nature and is thus covered by the rule. It is not necessary to give a precise geographical delimitation of such “areas of armed conflict” from either a legal or a practical point of view. In fact, journalists enjoy the rights to which they are entitled as civilians in all circumstances.

3264 The concept of a “professional mission” covers all activities which normally form part of the journalist’s profession in a broad sense: being on the spot, doing interviews, taking notes, taking photographs or films, sound recording etc. and transmitting them to his newspaper or agency. The military or civil authorities may subject such activities to controls in order to ensure that they comply with the rules they have laid down.

3265 To sum up, a journalist on a dangerous professional mission is a civilian and enjoys the protection granted civilians by the relevant provisions of international humanitarian law. This solution is preferable to the approach chosen by the United Nations draft, namely, of creating a special status for journalists. In fact, any increase in the number of persons with a special status, necessarily

¹⁶ Cf. commentary Art. 50, *supra*, p. 610.

¹⁷ As Art. 4A(4) of the Third Convention does not define the term “war correspondent”.

¹⁸ Document of the United Nations A/10147 of 1 August 1975, Annex I.

¹⁹ Nor, for that matter, within the meaning of Art. 4A(4) of the Third Convention.

accompanied by an increase of protective signs, tends to weaken the protective value of each protected status already accepted, particularly that of medical personnel. In short, the efficacy of protection and the credibility of the whole system of protection would have suffered. By avoiding this pitfall the Diplomatic Conference came to a wise solution.

Paragraph 2 – The protection granted journalists

- 3266** Paragraph 2 lays down the legal consequences of what is said in paragraph 1. As civilians, journalists enjoy the protection afforded civilians: all the provisions of the Conventions and of Protocol I relating to the protection of civilians apply to them.
- 3267** Such protection extends to two factual situations which are governed by rules of international humanitarian law. On the one hand, the journalist who is directly exposed to the dangers of the battlefield enjoys the legal protection granted by the Geneva Conventions, Protocol I and customary law, which protect the individual against the effects of hostilities. Thus, for example, the journalist on the battlefield may not be a target, since all civilians enjoy immunity from attack (Article 51 – *Protection of the civilian population*, paragraph 2). On the other hand, a journalist who falls into the power of a Party to the conflict continues to be subject to the protection of the law applicable to civilians as such, in accordance particularly with the Fourth Convention.
- 3268** Journalists engaged in dangerous professional missions may claim the protection granted by instruments of humanitarian law “provided that they take no action adversely affecting their status as civilians”. Thus it is quite clear that in case of any direct participation in hostilities they would forfeit for the duration of such participation the immunity they enjoy as civilians (Article 51 – *Protection of the civilian population*, paragraph 3). For the interpretation of this restriction on protection, see the commentary on Article 51 (*Protection of the civilian population*), paragraph 3 (*supra*, p. 618).
- 3269** In this context it should also be recalled that a journalist risks losing effective protection (even if he does not lose the *right* to protection to which civilians are entitled) if he closely follows a military unit engaged in action or if he gets too close to a military objective, since these are both legitimate objectives for attack. In the same vein, if he wears clothing which too closely resembles military uniform, he will incur risks of a similar nature. In all these cases he therefore acts at his own risk: in exposing himself to danger in this way he would forfeit protection *de facto*. On the battlefield a combatant cannot reasonably be asked to spare an individual whom he cannot identify as a journalist, i.e., as a protected person.
- 3270** In general it should not be forgotten that the appearance of a journalist on the battlefield is unlikely to have the effect of putting an end to the exchange of fire so that he can do his job. For that matter, Article 79 does not require this.
- 3271** Finally, this paragraph provides that the rules laid down in Article 79 are without prejudice to the “right of war correspondent accredited to the armed forces to the status provided for in Article 4A(4) of the Third Convention”. This makes it clear that the special régime accorded by the Third Convention to

accredited war correspondents is not affected by the new law of 1977, and that it continues to be fully in force. Thus two categories of journalists may be operating in an area of conflict: journalists accredited to the armed forces, and “freelance” journalists. If they were captured, the former would be prisoners of war, while the latter would be civilians protected under the Fourth Convention and this Protocol.

Paragraph 3 – Identity Card

- 3272** The identity card mentioned in paragraph 3 is not a constitutive element in creating the legal status of its bearer. It merely serves to “attest to his status as a journalist”. This card is a means of proving his status when this should be necessary, particularly if he is arrested or captured.
- 3273** It is not obligatory to carry an identity card. Thus failure to possess an identity card should not be prejudicial to a journalist in the power of a Party to the conflict.
- 3274** The card should be issued by the authorities either of his own State or the State of residence or the State where the press agency or organization employing him is situated. Can one deduce from this provision that the applicant has a right to obtain a card? As the status of journalist is not defined in Protocol I, States will act according to their own national rules or practices to define the relevant criteria. Therefore there is in any case some degree of discretion. Taking this margin of appreciation into account, it may be stated that the relevant States (insofar as they are Parties to Protocol I) have an obligation to issue such cards to journalists once the conditions are fulfilled.
- 3275** As the list of competent authorities that may issue such cards is exhaustive, it is clear that it is not up to a supranational organization to do so. Any fears that Article 79 might introduce a system of permits or licences, run by a supranational organization with controls, are unfounded.
- 3276** The format of the identity card is specified in Annex II of the Protocol, and paragraph 3 refers thereto.²⁰ The card and the required information is based on the model identity card provided for persons accompanying the armed forces under Article 4A(4) of the Third Convention (see Annex IV to the Third Convention).
- 3277** The identity card reproduced in Annex II is only a model on which cards to be issued by the competent authorities should be based. Thus States have some degree of latitude as regards the lay-out of their identity cards. However, there are limitations. It seems clear that a card issued by a national authority must contain, in one form or another, all the information specified in the model. Other information may be added where necessary.²¹ It also seems essential that the text

²⁰ On the subject of Annex II, see the correction made by the Swiss Federal Political Department to the original copies of the Protocols (Notification of 6 November 1978) indicating that a heading relating to the names of issuing countries should be added in Russian on the front of the identity card of journalists on dangerous missions.

²¹ Several delegates requested that it should be obligatory for the card to have the thumbprint and the religion of the bearer, but these proposals were not accepted in Committee I (*O.R.* VIII, pp. 311-319, CDDH/I/SR.31, paras. 1-53). National authorities are free to require such items.

entitled “Notice” should be shown on the front of the card. In fact, this “notice” explains in a few sentences the significance of the identity card and the rights of its bearer.²²

3278 Some delegates considered that the card should also be written in the current language of the area where the journalist is engaged on his mission.²³ However, this proposal was not pursued for purely practical reasons, i.e., lack of space on the card. The national authorities have the right to add the local language or languages to the five languages shown on the model, and it is highly desirable that they should do so. They are also free to omit one or other of the languages proposed by Annex II if there is no practical necessity for it being included.

H.P.G.

²² For the model card, see Annex II to Protocol I, *infra*, p. 1303.

²³ For the discussion in Committee I, see *O.R.* VIII, pp. 311-319, CDDH/I/SR.31, paras. 1-53.

Protocol I

Part V – Execution of the Conventions and of this Protocol

Introduction

- 3279 This Part reaffirms and develops the corresponding provisions of the Conventions, clarifying the duty to respect and to ensure respect for the Conventions and the Protocol.
- 3280 Section I (*General provisions*), closely related to Part I, which has the same title, is mainly concerned with preparatory and preventive measures. It contains one general article and some special provisions which either add to the relevant articles of the Conventions or reiterate provisions thereof for the purposes of the Protocol, as the case may be.
- 3281 Section II (*Repression of breaches of the Conventions and of this Protocol*) is basically concerned with repression of breaches. However, it also deals with prevention of breaches and with the responsibility of States. It should be noted with regard to the Commission set up in accordance with Article 90 (*International Fact-Finding Commission*) that States may at any time make an *a priori* declaration on recognition of the competence of that Commission.

B.Z.

Part V, Section I – General Provisions

Introduction

3282 This Section, which is based on the duty of Contracting Parties to respect and to ensure respect for the Conventions and the Protocol, confirms the obligation to take all measures necessary for implementing these instruments.

3283 This is supplemented by a list of particular measures for execution:

- making available legal advisers;
- dissemination of humanitarian law;
- the adoption and the reciprocal communication of translations and necessary laws and regulations.

3284 One article affirms the importance of the activities of the Red Cross and other humanitarian organizations and requires that all such organizations be granted facilities.

3285 This Section adds to the corresponding provisions of the Conventions and in some cases merely reiterates provisions thereof for the purposes of the Protocol. It is also closely related to some of the articles of Part I, also entitled *General provisions*.

B.Z.

Protocol I

Article 80 – Measures for execution

1. The High contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

Documentary references

Official Records

O.R. I, Part I; p. 163; Part III, p. 24 (Art. 70). *O.R.* III, p. 307. *O.R.* VI, p. 253, CDDH/SR.43, para. 93. *O.R.* VIII, p. 384, CDDH/I/SR.37, paras. 2-5; p. 403, CDDH/I/SR.38, paras. 1-2. *O.R.* IX, p. 474, CDDH/I/SR.76, para. 5. *O.R.* X, p. 21, CDDH/219/Rev.1, para. 4; p. 23, para. 12; pp. 44-45, paras. 117-121; p. 99, CDDH/I/285/Rev.1 (Art. 70).

Other references

CE/2b, p. 8 (note 28). *CE 1971, Report*, p. 110, para. 566, *CE 1972, Basic Texts*, p. 25 (Arts. 72 and 75). *CE 1972, Commentaries*, Part I, p. 150 (Art. 73); pp. 153-155 (Art. 75). *CRCE 1972, Report*, p. 51 (Art. 75). *CE 1972, Report*, vol. I, pp. 188-190, paras. 4.123-4.124 and 4.128-4.133 (Art. 73); pp. 191-192, paras. 4.143-4.148 (Art. 75); p. 195, paras. 4.174-4.175 (Art. 73 A); vol. II, pp. 117-122, CE/COM IV/41, CE/COM IV/45-46, CE/COM IV/49, CE/COM IV/54, CE/COM IV/56, CE/COM IV/58-59, CE/COM IV/67. *Commentary Drafts*, p. 91 (Art. 70). *XXIInd Int. Conf. RC, Report*, p. 21, para. 67; p. 75, Annex I (Art. 77).

Commentary

General remarks

- 3286** Under Article 1 (*General principles and scope of application*), paragraph 1, the Contracting Parties undertake to respect and ensure respect for the Protocol in all circumstances; that provision is based on the customary rule *pacta sunt servanda* as enshrined in the Vienna Convention on the Law on Treaties of 23 May 1969.¹
- 3287** The present article emphasizes the duty of Parties to take all necessary measures to this end and to do so without delay, i.e., at the appropriate time for each of these measures, for they do not all have to be taken at the same time. Paragraph 1 lays down the principle; paragraph 2 covers measures which have been more precisely defined.
- 3288** The concept of execution in this article should be understood at two different levels. The first level covers measures introducing all or the relevant parts of the treaty into the legal order of each Contracting Party in accordance with the rules of its constitution (which certainly in all cases prescribe the publication of such a treaty).² This is a legal measure and may, depending on the State, be carried out together with ratification or accession, or, on the other hand, separately from ratification or accession, whether this occurs simultaneously or at a later date.
- 3289** In addition, the application of some provisions requires preparatory steps such as the designation or establishment of organizations and the introduction of procedures. Finally, some treaty provisions require development or clarification to be fully and uniformly effective. These various measures may be taken either at a legislative level or by the executive in its widest sense.
- 3290** The second meaning of “execution”, which is also contained in this article, is that of its actual application. Some measures must be taken continuously, for example, dissemination;³ others are only conceivable in situations falling within the material scope of application of the Protocol, as defined in Article 1 (*General principles and scope of application*), paragraphs 3 and 4.⁴
- 3291** The reference to the Conventions first of all is a reminder of what the Parties to these instruments have already undertaken by accepting them;⁵ such a reference is also and primarily justified by the fact that the new measures to be

¹ For further details and for the text of the article concerned of the Vienna Convention, *cf.* commentary Art. 1, para. 1, *supra*, pp. 35-38. On the scope of the expression “High Contracting Parties” in the Protocol, *cf.* commentary Preamble, *supra*, p. 25.

² Respect for the constitutional order of each Contracting Party is without prejudice to the rule laid down in the first sentence of Article 27 (“Internal law and observance of treaties”) of the above-mentioned Vienna Convention: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

³ *Cf.* the explicit wording of Art. 83, para. 1, and the commentary thereon, *infra*, p. 961.

⁴ With regard to the point in time at which various groups of provisions of the Protocol will become or may become applicable, *cf.* commentary Art. 3, *supra*, pp. 66-67.

⁵ *Cf.* common Article 1 of the Conventions and, in relation to the present Article 80 and to Art. 84 of the Protocol, Arts. 45, 48/46, 49/128/145 of the Conventions.

taken will often have a supplementary function in view of the fact that the Protocol is additional to the Conventions.

3292 Some of the articles of the Protocol, which impose obligations at all times, refer to the “High Contracting Parties”; others, which are concerned only with Contracting Parties involved in an armed conflict, are addressed to the “Parties to the Conflict”. The two paragraphs of this article, like several other articles, refer to “the High Contracting Parties and the Parties to the conflict”, in order to emphasize the crucial importance of ensuring that they will be complied with in time of armed conflict.⁶

3293 Apart from the addition of the words “and the Parties to the conflict” the deletion of two passages from the draft has given the article a more general scope. Article 80 was adopted by consensus both in Committee I and in plenary.⁷

Paragraph 1

3294 This paragraph covers in a general way all necessary measures of a legislative, regulatory or simply practical nature – paragraph 2 covers only one specific aspect of this. Official translations of the Protocol, as well as any laws and regulations that a Party may adopt to ensure its application, shall be communicated to all Parties to the Conventions in accordance with Articles 84 (*Rules of application*) and 100 (*Notifications*), sub-paragraph (c).

3295 As shown by the expression “without delay”, each Party must study the matter and take the necessary measures as soon as the Protocol enters into force for it.⁸ Moreover, it is desirable that for this important task it should take advantage of the six months period between ratification or accession and entry into force; in fact, the consideration given to the Protocol prior to ratification or accession should already include a preliminary study of the necessary measures within the meaning of this article.

3296 Carrying out this task will require the participation of many institutions such as government authorities and other organizations outside public administration. The study and preparation of measures to be taken could usefully be entrusted to an inter-departmental committee and the National Red Cross or Red Crescent Society, for example, could be associated with it.

3297 The following is a non-exhaustive list of provisions which, although not necessarily fully applying to every Contracting Party, may require preparatory action to be taken upon entry into force of the Protocol:⁹

⁶ Even although this is no longer necessary in view of the wording of Article 96, para. 3, the expression “and the Parties to the conflict” was also intended to cover the authorities to which that paragraph applies; *cf.* the commentary thereon, *infra*, p. 1090. *Cf.* also *supra*, note 1, second sentence.

⁷ *Cf.* respectively *O.R.* VIII, p. 403, CDDH/I/SR.38, para. 2 (supplemented by *O.R.* IX, p. 474, CDDH/I/SR.76, para. 5); *O.R.* VI, p. 253, CDDH/SR.43, para. 93.

⁸ *Cf.* Art. 95.

⁹ This list is taken from a memorandum addressed by the ICRC to the Parties to the Protocols, entitled “Implementation of the Protocols” (*IRRC*, July-August 1980, pp. 198-204). Fuller information can be found in the commentary on the provisions cited.

- *Article 6 – Qualified persons*
The training of qualified personnel as envisaged by this article constitutes a permanent task for the Contracting Parties and National Red Cross and Red Crescent Societies.
- *Article 12 – Protection of medical units*
Paragraph 2(b): Civilian medical units must be recognized and authorized as soon as possible.
Paragraph 4: It is necessary to ensure at all times that permanent medical units are so sited that attacks against military objectives will not endanger them.
- *Article 16 – General protection of medical duties*
Only appropriate legislation will make it possible to effectively ensure the protection of medical duties.
- *Article 18 – Identification*
Measures to ensure the identification of medical personnel, units and transports should be taken as soon as possible.
- *Article 22 – Hospital ships and coastal rescue craft and*
- *Article 23 – Other medical ships and craft*
Any rules and regulations issued in application of Chapter III of the Second Convention should be adapted and extended to the ships and craft covered by these articles of the Protocol.
- *Articles 24-31 – Protection of medical aircraft*
The method of notification and of entering into agreements relating to medical aircraft within the meaning of Article 29 must be decided upon in peacetime (see also Article 12 of Annex I). It is in the interests of medical aviation that measures for the identification of medical aircraft be taken (see Articles 5-13 of Annex I).
- *Article 33 – Missing persons*
Preparatory steps should be taken for organizing searches, registration and transmission of information.
- *Article 34 – Remains of deceased*
An organization should be set up to carry out the provisions of this article or an existing organization should be assigned this task.
- *Article 36 – New weapons*
Measures should be taken, in the study, development, acquisition or adoption of a new weapon or of a new means or method of warfare, to determine whether its employment would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the Contracting Party concerned.
- *Article 43 – Armed forces*
The armed forces must have an internal disciplinary system ensuring compliance with the rules of international law applicable in armed conflict. The notification in paragraph 3 may be already made in peacetime.
- *Article 45 – Protection of persons who have taken part in hostilities*
A judicial procedure must be established to determine the possible prisoner-of-war status of persons who are not detained as prisoners of war and who are to be tried for offences arising out of the hostilities.

- *Article 56 – Protection of works and installations containing dangerous forces*
The following rules in particular are applicable at all times: to avoid locating military objectives at or in the vicinity of such works; efforts should be made to improve their protection by means of agreements between the Contracting Parties; the works should be marked with the special sign (see Article 16 of Annex I).
- *Article 58 – Precautions against the effects of attacks*
Fixed military objectives should be constructed as far away as possible from densely populated areas and the necessary measures should be planned to protect the civilian population (the definition of the word “attack” is given in paragraph 1 of Article 49 - *Definition of attacks and scope of application*).
- *Article 60 – Demilitarized zones*
Agreements may be concluded for establishing demilitarized zones even in time of peace.
- *Articles 61-67 – Civil defence*
For civil defence to enjoy the guarantees provided by the Protocol it must be organized in accordance with the requirements of Articles 61-67. Attention should be paid in particular to the problem of identification.
- *Article 74 – Reunion of dispersed families*
Care should be taken to ensure that security regulations that are to apply in time of armed conflict do not impede the reunion of dispersed families.
- *Article 75 – Fundamental guarantees*
Guarantees for humane treatment and judicial guarantees as required by this article must be established at the national level by adequate legislation which will be applicable in time of armed conflict.
- *Article 76 – Protection of women*
The same applies as for Article 75.
- *Article 77 – Protection of children*
The same applies as for Article 75. In particular, all possible measures should be taken in practice to prevent children under 15 from participating directly in hostilities.
- *Article 78 – Evacuation of children*
An organization to be entrusted with this task in time of armed conflict should be designated.
- *Article 79 – Measures of protection for journalists*
Measures should be taken to create the identity card here described, which should be available as soon as the Protocol enters into force.
- *Article 80 – Measures for execution*
This list indicates the measures to be taken in peacetime. In addition, orders and instructions to ensure observance of the Conventions and the Protocol should be dealt with by regulations and military manuals.
- *Article 82 – Legal advisers in armed forces*
Legal advisers should be trained and available already in peacetime.
- *Article 83 – Dissemination*
The dissemination of the Conventions and the Protocol is a permanent obligation. The Contracting Parties should incorporate the study of this in

programmes of military instruction and encourage the civilian population to study these instruments.

– *Article 84 – Rules of application*

Translations of the Protocol, as well as laws and regulations adopted to ensure its application, should be communicated as soon as possible.

– *Article 85 – Repression of breaches of this Protocol*

The national penal legislation must ensure that the breaches listed in this article can be repressed.

– *Article 86 – Failure to act*

National legislation must be adapted in accordance with this provision insofar as necessary.

– *Article 87 – Duty of commanders*

Already in peacetime Contracting Parties must give military commanders appropriate instructions to ensure that the measures laid down in this article are taken, particularly with regard to compliance with the Conventions and the Protocol by their subordinates.

– *Article 88 – Mutual assistance in criminal matters*

Legislation necessary to implement mutual assistance and co-operation on extradition must be passed already in peacetime.

– *Article 90 – International Fact-Finding Commission*

The declaration recognizing the competence of the Commission laid down in paragraph 2(a) and (b) may be made at any time.

– *Article 97 – Amendment*
and

– *Article 98 – Revision of Annex I*

Necessary measures should be taken to give effect to any amendment to the Protocol or its Annex I accepted by the Contracting Party concerned.

– *Annex I – Regulations concerning identification*

See the remarks made with regard to Articles 18, 24-31, 56, 61-67 and 98.

– *Annex II – Identity card for journalists on dangerous professional missions*

See the remark made with regard to Article 79.

Paragraph 2

3298 As we have seen, this concerns a more specific level of immediate and direct application of the Protocol, i.e., orders and instructions given in particular circumstances to specific addressees. In fact, permanent orders and instructions may be deemed to come under paragraph 1. The duty of Parties to supervise their execution is an obligation which would apply even without being stated explicitly and applies equally to paragraph 1, since it follows from the duty to “respect and ensure respect” which, as stated above, forms the basis of this article.

B.Z.

Protocol I

Article 81 – Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.
2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and the Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.
4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict in accordance with the provisions of the Conventions and this Protocol.

Documentary references

Official Records

O.R. I, Part I, pp. 163-164. *O.R.* III, pp. 308-312 (Art. 70 *bis* (a)). *O.R.* VI, p. 256, CDDH/SR.43, paras. 93-94; pp. 262-263, *id.*, Annex (Australia); pp. 271-272 (Israel). *O.R.* VIII, pp. 385-390, CDDH/I/SR.37, paras. 6-36; pp. 403-404, CDDH/I/SR.38, paras. 2-8; p. 441, CDDH/I/SR.41, paras. 70-71. *O.R.* X, pp. 45-46, CDDH/219/Rev.1, paras. 122-125; p. 100, CDDH/I/285/Rev.1.

Other references

CE 1971, Report, pp. 26-27 (supplementary Article); p. 31 (Annex III). *CE 1972, Basic Texts*, p. 22 (Art. 64). *CE 1972, Commentaries*, Part I, pp. 131-132 (Art. 64). *CRCE 1972, Report*, pp. 29-30; p. 73 (Annex I). *CE 1972, Report*, vol. I, p. 52, paras. 1.106-1.110.

Commentary**General remarks**

3299 The first reference to the different Red Cross organizations in humanitarian treaties dates back to 1929. At that time, when a Diplomatic Conference in Geneva drew up the Convention Relative to the Treatment of Prisoners of War, it primarily codified customary practices which had been established during the First World War. As far as the ICRC is concerned, there was recognition of its right to carry out its humanitarian work for the protection of prisoners of war with the consent of the belligerents concerned (Article 88) as well as the opportunity to propose to the Powers concerned the establishment of a Central Agency of Information regarding prisoners of war (Article 79).

3300 In the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, as revised in 1929, Article 10 is entirely devoted to the protection of personnel of voluntary aid societies duly recognized and authorized by their governments. That article concerns primarily the National Red Cross and Red Crescent Societies which are , *par excellence*, voluntary aid societies and recognized by their governments. However, it is concerned with their activities only in time of armed conflict. Therefore, in the Final Act the Diplomatic Conference expressed the following wish:

“The Conference, recognising the importance of the contribution demanded of National Red Cross Societies and the Voluntary Aid Societies in promoting fellowship between nations, considers it highly desirable that, as far as it may be consistent with municipal law, they should be granted all possible facilities and exemptions for their work in time of peace, particularly as regards accommodation, free passage of personnel and property, and their relief activities.”

3301 After the Second World War the Diplomatic Conference of 1949 confirmed the prerogatives entrusted to the ICRC and extended them to the four Conventions. In addition, the ICRC was granted right of access to prisoners of war and protected civilians. Finally, the Conventions mention the ICRC in a series of articles related to various tasks.

3302 The National Societies feature prominently in the First Convention (Articles 26 and 44) and the Second Convention (Article 24). In the Third Convention, Article 125 explicitly deals with relief societies assisting prisoners of war: it is clear that these are primarily National Societies. There is a similar article in the Fourth Convention (Article 142).

3303 The Fourth Convention explicitly mentions National Societies. First, in accordance with Article 30, protected persons should have every facility for making application to the National Society of the country where they may be. Finally and above all, Article 63 provides that:

“Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power:

- a) Recognized National [...] Societies shall be able to pursue their activities in accordance with Red Cross Principles, as defined by the International Red Cross Conferences [...];
- b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities.”

3304 Under this provision, National Societies gained some degree of international recognition. It was of great importance that they were protected against arbitrary measures an Occupying Power might take, in view of what happened in the Second World War, and since the Board of Governors of the League of Red Cross Societies met in Oxford in 1946, members of the Red Cross Movement had been concerned with these problems. The Constitution of the League now contains a provision (Article 5, paragraph 2) according to which the Assembly, or in an emergency, the Council, may take all measures necessary if an internal or external authority were to interfere with the conduct of activities carried out by a member Society in accordance with the fundamental principles of the Red Cross or if actions of that authority were prejudicial to the Society. The ICRC, either alone or together with the League, must also act to protect and re-establish the integrity of the National Societies.

3305 From the beginning of the preparatory studies for the Additional Protocols several National Societies wished to see a new provision to confirm the position of the National Societies and of the League.¹ As several governments had expressed their support for this view, the ICRC considered that it would be best for them to present their proposals to the Diplomatic Conference. Thus the draft Additional Protocol submitted by the ICRC did not contain a special provision on Red Cross organizations.

3306 The XXIInd International Conference of the Red Cross (Teheran, 1973) examined the drafts of the Additional Protocols to the Conventions and adopted Resolution XV on this special point, which states, in particular:

“[...] having examined the two draft Additional Protocols and taken note of the comments made during the debates,

requests the Diplomatic Conference to be held in Geneva in 1974, to introduce the appropriate provisions to strengthen the role and facilitate the humanitarian activities of National Societies and of their Federation, for example by adding

¹ See *CRCE 1971, Report*, pp. 57-59; *ibid.*, 1972, p. 29; *CE 1971, Report*, pp. 26 and 31; *ibid.*, 1972, Vol. I, p. 52, para. 1.109.

1. a general provision inviting the parties to a conflict to grant National Societies all the means and help required to enable them to carry out all their humanitarian activities on behalf of the victims of armed conflicts,
2. special provisions covering the personnel, services and programmes National Societies are in a position to provide in order to make sure that the objectives of the Geneva Conventions and of the Protocols are attained.”

3307 As we know, the Diplomatic Conference opened three months later, in February 1974. Many government delegations included one or more members of the National Society of the country concerned. Very soon these “Red Cross men” met with representatives of the ICRC and the League to examine the points which more particularly concerned the Red Cross. There were lengthy discussions on this article. From the beginning it was clear that such a provision should cover the whole of the Red Cross; and the ICRC, although for its part only concerned with confirming the existing rules, supported these views. Negotiations were conducted with a series of delegations to find out what governments might find acceptable.

3308 These discussions continued during the second session of the Conference in 1975 and concluded with the presentation of a text for a new article which, with some drafting modifications, became Article 81. This proposal had 32 co-sponsors from various parts of the world,² and thus the article was finally adopted by consensus almost without further discussion by Committee I in 1975, and similarly during a plenary meeting in 1977.

Paragraph 1

3309 As we saw, the ICRC considered that the Conventions already provided an adequate and quite precise basis for its main activities: Article 9/9/9/10 common to the Conventions, which recognizes the ICRC’s right of initiative; Articles 126 of the Third Convention and 143 of the Fourth Convention, which grant it access to prisoners of war and civilians deprived of their liberty; similarly the possibility of organizing a Central Information Agency in accordance with Articles 123 of the Third Convention and 140 of the Fourth Convention and the possibility for persons protected under the Fourth Convention to make application to the ICRC in accordance with Article 30 of that Convention; finally, the recognition of the special function of the ICRC with regard to providing relief to victims of war contained in Articles 125 (Third Convention) and 142 (Fourth Convention).

3310 As far as the Protocol is concerned, it mentions some new tasks of the ICRC and grants it the necessary facilities for carrying them out, such as, for example, in Article 5 (*Appointment of Protecting Powers and of their substitute*), paragraphs 3 and 4.

3311 However, the ICRC does not underestimate the importance of the general principle expressed in the first sentence of this paragraph and gratefully welcomed it. The second sentence reiterates the formula contained in Article 9/9/9/10

² O.R. III, pp. 311-312, CDDH/I/263 and Add.1.

common to the four Conventions, using slightly different words. Article VI, paragraphs 5 and 6, of the Statutes of the International Red Cross provide, with regard to the ICRC:

“5. As a neutral institution whose humanitarian work is carried out particularly in time of war, civil war, or internal strife, it endeavours at all times to ensure the protection of and assistance to military and civilian victims of such conflicts and of their direct results. [...]

6. It takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution.”

3312 It should also be noted that the first paragraph of the article under consideration here is addressed to the Parties to the conflict,³ while the aforementioned proposal made by States used the expression “the High Contracting Parties”. The reasons for this change are not given in the Official Records. This in no way alters the fact that the ICRC in some cases has had to request aid or consent from States not involved in the conflict, which are therefore Contracting Parties without being Parties to the conflict; in fact, they have a legal obligation to co-operate in the application of the Protocol, since in subscribing to Article 1 of the Conventions and the Protocol, they undertook to respect them and ensure respect for them in all circumstances.⁴

3313 The first part of the sentence refers to the tasks of giving “protection and assistance to the victims of conflicts”, while the second part of the sentence refers to “any other humanitarian activities in favour of these victims”.

3314 It looks as though the first part of the sentence refers to tasks explicitly laid down in specific provisions of the Conventions and the Protocol, while the second part of the sentence covers what the ICRC might be called upon to undertake in favour of victims of war if it went beyond the text of the Conventions and the Protocol, as laid down in Article 9/9/9/10 common to the Conventions.

Paragraph 2

3315 The terminology used here is of some importance. The text mentions Red Cross or Red Crescent “organizations” rather than National Societies.⁵ This is to cover Red Cross or Red Crescent organizations acting in favour of victims of a conflict when such organizations, because of very precise conditions regarding recognition, cannot be recognized internationally as National Societies, for example, because they are sponsored by entities other than States. In fact, the first of the conditions of recognition provides that any new Society must be

³ Like para. 2, while paras. 3 and 4 refer to “the High Contracting Parties and the Parties to the conflict”.

⁴ It should be noted that other articles of the Protocol concern States not Parties to the conflict.

⁵ The Conventions refer to “National Societies” (First Convention, Article 44; Fourth Convention, Articles 30 and 63). There is no longer a Red Lion and Sun Society, as the only country to use this emblem, Iran, renounced its use in 1980.

constituted in the territory of an independent State and must be the only National Red Cross or Red Crescent Society in that State.⁶ Moreover, the ICRC, which is responsible for recognizing such Societies, adopted a line of conduct in this field under which there can be no recognition during an armed conflict if the country concerned is involved in the conflict.⁷

3316 Having said this, it is clear that in time of armed conflict the assistance of a Red Cross or Red Crescent organization may be very valuable, and this provision to some extent codifies what has happened in recent conflicts, for example, during the war in Algeria where the Algerian Red Crescent organization was established fairly rapidly and rendered important services.

3317 This provision is primarily addressed to public authorities and organizations dependent upon them; they must grant their national organization all facilities necessary for carrying out their humanitarian activities. This recommendation is by no means superfluous, for governments have in the past imposed restrictive measures on their National Societies either through fear or incomprehension. On the other hand, it is quite clear that a Society must show itself to be honest and act impartially.

3318 During the *travaux préparatoires* some National Societies would have liked to obtain greater protection against their own authorities. However, as it concerns wartime conditions, it was difficult to obtain more from governments. The changes that National Societies wanted were particularly concerned with their role in case of internal conflict. On this subject, we would refer to the commentary on Article 18 of Protocol II (*Relief societies and relief actions*). One thing is generally accepted – and this is of paramount importance – namely, the protection granted National Societies in case of occupation in Article 63 of the Fourth Convention.

3319 Humanitarian activities of National Societies in favour of victims of conflicts largely rest on the Conventions themselves: Article 26, First Convention; Article 24, Second Convention; Article 125, Third Convention, and Articles 30 and 142, Fourth Convention. As regards prisoners of war and civilian internees, National Societies are, by their very nature, relief societies which may come to their aid, irrespective whether the victims concerned are their own nationals or whether the relief is for enemy prisoners of war and civilian internees. The XVIIth International Conference of the Red Cross (Stockholm, 1948) recommended that National Societies should contribute to relief in favour of prisoners of war and civilian internees of enemy nationality, and that such relief should be afforded on the basis of the most complete impartiality.⁸ Once again, this recommendation was based on the generous attitude adopted during the Second World War by the few National Societies which had surmounted the hatred engendered by the conflict and acted in the true spirit of the Red Cross.

⁶ The various provisions of the Statutes of the International Red Cross quoted below are taken from the *International Red Cross Handbook*, 12th edition, 1983.

⁷ This line of conduct was approved by the XXIth International Conference of the Red Cross, Resolution XII.

⁸ XVIIth International Conference of the Red Cross, Resolution XXVI.

- 3320** This provision invites National Societies to act in accordance with the fundamental principles of the Red Cross as formulated by the International Conferences. Article 63 of the Fourth Convention of 1949 has almost the identical wording. That article refers to the “Red Cross principles, as defined by the International Red Cross Conferences”. In fact, in 1949 these principles had not yet been explicitly formulated. One of the conditions for recognition of new Societies, which was already in force in 1949, summarized the principles by referring to “the impartiality, the political, religious and economic independence, the universality of the Red Cross and the equality of the National Red Cross Societies”.
- 3321** Later the Red Cross Movement considered that it was necessary to define its ideals more precisely, and after careful consideration, the XXth International Conference (Vienna, 1965) proclaimed the fundamental principles on which Red Cross activities are based.⁹ It also decided that these should be solemnly read out at the opening of every International Conference, and this rule has been duly observed.¹⁰
- 3322** These principles are termed “fundamental principles” because they embody the Red Cross ideal, and also in order to distinguish them from other principles adopted by various International Conferences on specific points. The League, which in 1975 undertook a revision of its Constitution, included these principles in a preamble. It is clear that the principles must be followed by the Red Cross as a whole, and although they are not mentioned in the first paragraph of Article

⁹ The text is given below:

“Humanity

The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

Impartiality

It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

Neutrality

In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence

The Red Cross is independent. The National Societies, while auxiliaries in the humanitarian services of their Governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with Red Cross principles.

Voluntary service

The Red Cross is a voluntary relief organization not prompted in any manner by desire for gain.

Unity

There can be only one Red Cross Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality

The Red Cross is a world-wide institution in which all Societies have equal status and share equal responsibilities and duties in helping each other.”

¹⁰ J. Pictet, *The Fundamental Principles of the Red Cross, Commentary*, Geneva, 1979.

81, the ICRC, the traditional guardian of the Movement's principles, has also to observe them.

- 3323** When this article, and in particular, paragraphs 2 and 3, was adopted by consensus by Committee I, the Israeli delegate in his explanation of vote referred to the situation of the Red Shield of David Society (Magen David Adom). He indicated that that Society had fulfilled the functions and activities of a National Red Cross Society in Israel for many years, but that for historical and religious reasons, it did not use either the red cross emblem or any other emblem accepted at that time. It could not therefore be officially given recognition by the ICRC or be admitted to the League. The delegate expressed the hope that this situation would be rectified and stated that in the interim the Red Shield of David Society would continue to fulfil the functions and obligations of a National Red Cross Society.¹¹

Paragraph 3

- 3324** According to the explanations given by the spokesman for the sponsors of the proposal which became the present article, this paragraph is about facilities to be granted Red Cross and Red Crescent National Societies or organizations of countries which are not Parties to the conflict. This point of view was correct, but the text may also refer to the aid which a National Society of a country at war might desire to give to the victims of the conflict in an allied country; in such a situation the friendly relations between the two allied countries would almost certainly make it unnecessary to invoke the present provision, but a situation could arise where recourse to this article would not be without purpose. The provision is addressed to all contracting Parties, including Parties to the conflict, as they can all be called upon to facilitate the assistance covered by this paragraph.
- 3325** National Societies often give their aid directly to the National Society of the country where the victims of a conflict to be aided are. However, there may also be cases where several National Societies wish to join efforts and want to ensure that their assistance really does go to the victims for whom it is intended. In such situations they generally address themselves in time of war to the ICRC, or sometimes to the League, which is specifically mentioned here. According to Article VII of the Statutes of the International Red Cross:

“2. The object of the League is, within the framework of the present Statutes and subject to the provisions of Article VI,¹² to encourage and facilitate at all times the humanitarian action of the National Societies and to assume the responsibilities incumbent upon it as the federation of those Societies.

3. For this purpose, the functions of the League are:

a) to act as the permanent organ of liaison, co-ordination and study between the National Red Cross Societies and to co-operate with them [...]

¹¹ O.R. VIII, pp. 403-404, CDDH/I/SR.38, paras. 3-8.

¹² Which deals with the ICRC, see *supra*, p. 939.

3326 As the Statutes of the International Red Cross could lead to situations where both institutions could claim competence to act, the ICRC and the League concluded an Agreement in 1952 which was revised in 1969, with a view to specifying in some detail the extent of their respective powers in certain areas, particularly with regard to relief actions for the civilian population. Under the heading “Red Cross Action in the Event of a Conflict”, Article 2 of the Agreement provides:

“In countries where there is an international war, civil war, blockade or military occupation, the ICRC, in virtue of the functions of a neutral intermediary devolving on it under the Geneva Conventions and the Statutes of the International Red Cross, shall assume the general direction of the Red Cross international action.

If, in these countries, as a result of special circumstances or in the event of a natural disaster, the League is, at the request of a National Society, called upon to give assistance to the civilian population of its country, the ways and means of the intervention of the League as well as its co-operation with the ICRC and the National Societies concerned shall be defined from case to case in accordance with Articles 4 and 5 of the present Agreement.

When the intervention of a neutral intermediary is not or is no longer necessary, the ICRC shall reach agreement with the League with a view to associating it with the relief action or even handing over to it the entire responsibility.”

3327 This general provision is subject to rules on application and implementation; in 1974 it was extended by the adoption of specific rules of interpretation. Red Cross relief actions have assumed considerable proportions, and it is important that National Societies know exactly by what means they can despatch aid and how they can ensure that it arrives at its destination intact.

3328 At 31 December 1984 there were 135 National Red Cross or Red Crescent Societies. They were all members of the League.¹³

3329 As regards Red Cross or Red Crescent organizations which, for reasons given above, cannot be immediately recognized so as to become National Societies, the ICRC, like the League, maintains *de facto* relations with them and facilitates their humanitarian activities when they are in accordance with the fundamental principles. Further, it has frequently happened that organizations set up during a conflict have become duly recognized National Societies once hostilities have ceased.

¹³ In accordance with the Statutes of the International Red Cross, recognition of new Societies is pronounced by the ICRC. Their admission into the League is decided upon by the League. However, these two parallel procedures are co-ordinated.

Paragraph 4

- 3330** Once again the provision is addressed both to the Parties to the conflict and to the Contracting Parties, and this is understandable. In fact the Societies concerned here may have a national character and work in favour of their own nationals, or they may work from the outside, i.e., operating from a country not involved in the conflict in favour of nationals of one specific State or they may have a truly international vocation by working without distinction in favour of the victims of war or particular categories of such victims (for example, prisoners of war, civilian internees, invalids, members of a particular religion).
- 3331** The text reads: “facilities similar to those mentioned in paragraphs 2 and 3”. It should be noted that paragraph 2 refers to “necessary” facilities, while paragraph 3 merely talks about “facilitating” certain things. In fact the facilities concerned consist, most of all, of permits for persons and goods, transport facilities for goods and other equipment, exemptions from import taxes and customs duties etc.
- 3332** Paragraph 4 uses the term “as far as possible”, which is less strong than that contained in the first three paragraphs, i.e., “all facilities within their power”, “the facilities necessary”, “in every possible way”. It may be concluded that the provision under consideration here is less urgent.
- 3333** What is meant by the words “humanitarian organizations referred to in the Conventions and this Protocol”?
- 3334** This evidently means in the first place voluntary aid societies which, like National Red Cross or Red Crescent Societies are recognized and authorized by their governments within the meaning of the First Convention to give assistance to medical services. We know that in some countries there are, apart from National Red Cross Societies, other recognized aid societies which come to the assistance of medical services.¹⁴ The position of such societies is dealt with in Articles 26 and 27 of the First Convention and Article 24 of the Second Convention, as well as Articles 9 (*Field of application*) and 17 (*Role of the civilian population and of aid societies*) of Protocol I.
- 3335** The Third and Fourth Conventions also contain provisions on the assistance which aid societies may provide for prisoners of war and for protected persons deprived of their liberty (Article 125, Third Convention; Article 142, Fourth Convention). These articles specify that the societies concerned may be constituted in the territory of the Detaining Power or in another country, or they may have an international character. The number of societies permitted to exercise their activities may be limited by the Detaining Power, provided that effective and sufficient aid is provided for the internees. These provisions are of particular importance in occupied territories.
- 3336** Finally, Article 30 of the Fourth Convention enables protected persons to apply, not only to the Protecting Powers, the ICRC and the National Society, but in addition to any organization that might assist them.
- 3337** Aid societies should exercise their humanitarian activities in accordance with the provisions of the Conventions and of the Protocol. In fact these Conventions

¹⁴ Such as the Order of Malta and the Order of St. John of Jerusalem.

do not contain very much on the subject, but it may be concluded from the provisions as a whole that the activities of aid societies must be impartial and may not compromise military operations. Societies authorized to exercise relief activities must submit themselves to any security rules imposed upon them, and may not use their privileged situation to collect and transmit political or military information.

3338 It should be noted that this concerns organizations which are duly authorized by the Parties to the conflict. It may also be a branch of a national or international relief organization located in territory under the control of a Party to the conflict, and the branch should then be authorized to undertake or continue to perform humanitarian activities.

3339 It is appropriate that in addition to the Red Cross institutions Article 81 mentions the other organizations which can assist victims of war. In fact, in time of conflict, suffering and misery are so great that all goodwill should be encouraged and supported.

C.P./J.P.

Protocol I

Article 82 – Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Documentary references

Official Records

O.R. I, Part V, Section I, p. 164; Part V, Section I, p. 24 (Art. 71). *O.R.* III, p. 314. *O.R.* VI, p. 256, CDDH/I/SR.43, para. 94. *O.R.* VIII, pp. 390-393, CDDH/I/SR.37, paras. 37-53; pp. 404-405, CDDH/I/SR.38, paras. 9-11; pp. 441-442, CDDH/I/SR.41, paras. 72-73. *O.R.* X, pp. 46-47, CDDH/219/Rev.1, paras. 126-134; p. 101, CDDH/I/285/Rev.1.

Other references

CRCE 1971, Report, p. 29. *CRCE 1972, Report*, p. 48; *CE 1972, Report*, vol. I, pp. 183-184, para. 4.91; p. 189, paras. 4.126-4.127 (Art. 75c); p. 192, paras. 4.153-4.155; vol. II, pp. 99-100, CE/COM IV/10; p. 103, CE/COM IV/23. *Commentary Drafts*, p. 91 (Art. 71).

Commentary

- 3340** The establishment of an army, its training, equipment and armaments has no other object than to prepare for the eventuality of armed conflict. If this arises, military operations must be conducted in accordance with the rules set forth in international treaties to which the Parties to the conflict are Parties, and with the generally recognized principles and rules of international law which are applicable to armed conflict (Article 2 – *Definitions*, sub-paragraph (b)).
- 3341** To this end Hague Convention IV of 1907 laid down in Article 1 that “the Contracting Powers shall issue instructions to their armed land forces which

shall be in conformity with the Regulations” that they had adopted. At least until the adoption of the 1949 Conventions it was primarily through the development of military manuals for the use of armed forces that the majority of military Powers implemented the injunction of the Hague Convention to instruct their troops. However, the events of the Second World War and the prosecutions which were instituted when hostilities ceased, showed the extent to which these efforts had been inadequate. Thus in 1949 the drafters of the Geneva Conventions devoted their attention to supplementing the 1907 rule¹ with a provision relative to dissemination², which in the present Protocol is reaffirmed by Article 83 (*Dissemination*). During the 1950s a new tendency emerged in some armies to supplement the written instructions with a group of qualified lawyers who were to lend their assistance. This initiative seemed particularly justified as in many cases military manuals do not restrict themselves to reproducing the texts of the international treaties and do not actually reflect these treaties. In all areas which are not governed by peremptory or uncontested rules of international law, they bear witness to the practices recognized by the State concerned, without assessing whether these practices will be recognized internationally. Whether a custom has been established in a particular sense is a question of fact, not one of the rules adopted by a particular State.³

3342 Similarly, it must be recognized that even when limited to uncontroversial rules directly applicable by military commanders in the field, the law of armed conflict is becoming increasingly complex, detailed and extensive. Thus the Diplomatic Conference during its sessions from 1974 to 1977 added the 130 articles (not counting the Annexes) of Protocols I and II to the 429 articles (not counting the Annexes) of the Geneva Conventions of 12 August 1949 (in 1864 there had been 10 articles in all). Moreover, new texts are being adopted, for example on weapons.⁴ Military commanders can no longer be expected to master the complexity of this law or the documents relating to it, in the same way that they have to master the art of exercising command over their troops. It is evident that a division of tasks is just as necessary in this field as in other sectors of military life.

3343 The proposal to create a post of legal adviser to military commanders was made at the beginning of the preliminary discussions preceding the Diplomatic Conference.⁵ Following the suggestions presented during the two sessions of the Conference of Government Experts it was introduced in Article 71 of the draft presented by the ICRC to the Diplomatic Conference, in a much stronger form

¹ Taken itself from the Hague Convention of 29 July 1899.

² First Convention, Art. 47; Second Convention, Art. 48; Third Convention, Art. 127; Fourth Convention, Art. 144. However, it should be noted that the basic point of the Hague rule, as well as the obligation to inform the civilian population, was already contained in the 1906 Geneva Convention (Art. 26) and in the first Geneva Convention of 1929 (Art. 27).

³ See *US Field Manual*, *op. cit.*, p. 3, para. 1; see also *8 Law Reports*, p. 51.

⁴ See the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980 which entered into force on 2 December 1983; on 31 December 1984, 24 States were Parties to this Conventions.

⁵ See *CRCE 1971, Report*, p. 29.

than that of the article under consideration here.⁶ During the Conference itself its usefulness was not contested. However, whether it was because of a concern that adequate personnel would not be available, or the possibility that legal advisers attached to the armed forces would be assigned supervisory functions which might affect the hierarchy which is indispensable for the proper functioning of military institutions, or whether it was simply the fear of being bound by unduly strict rules on this point, consensus was finally only achieved on a text which was considerably watered down as compared with the original proposal.⁷

- 3344 Nevertheless, the obligatory character of the present provision was maintained. The word “ensure” is a term sometimes used in the Conventions;⁸ it means that the Party in question must make sure that the task is executed. There is therefore no justification for thinking that the task itself might be optional.⁹ To be more precise, Article 82 creates the obligation for the Parties to the Protocol to adopt all appropriate regulations to ensure that legal advisers are available to the armed forces. The fact that the conditions for the use and allocation of these advisers are regulated in particularly flexible terms (“when necessary”, “at the appropriate level”) does not in any way alter the fact that the creation of the post of legal adviser is obligatory. However, the content of the obligation and the extent of the measures to be taken can certainly vary from one country to another, depending on the importance of the role which these legal advisers are called upon to play. Some may wish to appoint these advisers at all – or nearly all – levels of command, while others intend to appoint them only at the headquarters of large units and at military academies, and still others only envisage their participation in exceptional situations. Nevertheless, the obligation for all Parties to the Protocol to create posts for legal advisers to the armed forces applies all the same. In fact, the Protocol even goes so far as to define in broad terms the qualifications which such legal advisers must possess, since they must be capable of advising, when necessary, the military commanders concerned, on the application of the Conventions and the Protocol, and on the appropriate instruction to be given to the armed forces on this subject. There is therefore an obligation for the Parties to the Protocol to ensure that these legal advisers, who are likely to be chosen from legal experts in military law, which all armies have available, get the appropriate training.

⁶ Article 71 – Legal advisers in the armed forces: “The High Contracting Parties shall employ in their armed forces, in time of peace as in time of armed conflict, qualified legal advisers who shall advise military commanders on the application of the Conventions and the present Protocol and who shall ensure that appropriate instruction be given to the armed forces”. See also *CE 1971, Report*, p. 112, para. 579, and *CE 1972, Report*, vol. I, pp. 183-184, para. 491; p. 189, paras. 4.126-4.127; p. 191, para. 4.144; p. 122, paras. 4.153-4.155.

⁷ For the discussion in Committee I, see *O.R. VIII*, pp. 390-393, CDDH/I/SR.37, and pp. 404-405, CDDH/I/SR.38. For the amendments, see *O.R. III*, p. 314.

⁸ See, for example, First Convention, Arts. 17 and 19, para. 2; Fourth Convention, Art. 18, para. 5.

⁹ *Cf. Commentary I*, pp. 176-177.

- 3345** To summarize, the Protocol enjoins the High Contracting Parties to take certain measures to ensure respect for the Conventions and the Protocol¹⁰ and in particular, to make legal advisers available to the armed forces for the purpose of giving appropriate advice in this respect. The conditions for the use of such personnel and the choice of the methods of training them are left to the discretion of the Parties to the Protocol.
- 3346** Some of the reasons which underly this flexibility, particularly with regard to the conditions for the use of the legal advisers concerned, have already been indicated. It was necessary to avoid questioning the validity of an order from a superior whenever the legal adviser had not been consulted, and even to avoid putting into question the whole military hierarchy. It was also important to prevent the incorporation of legal advisers in the armed forces from weakening the sense of responsibility of military commanders, and from encouraging them to become totally disinterested in the rules of international law applicable in cases of armed conflict, on the pretext that this was the business of the lawyers, and not theirs. Such a result would be counter-productive. Although it is regrettable that in recent history military commanders have not always been concerned with the law of armed conflict as much as they should have been, the importance of the role which they have always played in the development and application of this law cannot be denied.¹¹ In many cases appropriate and correct conduct on the battlefield came first, to be followed by the formulation of the corresponding rule. Thus historically, the law of armed conflict was created largely in the heat of battle, and the weight and obligation of its implementation and development rests primarily on the shoulders of those who exercise military command in the field. To withdraw this fundamental responsibility – which has always been that of military commanders – from them, would undoubtedly have constituted a serious error, and the Protocol was careful to avoid this.
- 3347** On the other hand, there is little doubt that a great many military commanders will be relieved by the introduction in their own headquarters or at a higher level, of legal advisers capable of elucidating for them the increasingly complex problems of the law of armed conflict. However, they must first be available, and some countries remarked during the Diplomatic Conference that they

¹⁰ On the obligations of “conduct” or “means”, cf. Report of the International Law Commission on the work of its twenty-ninth session, 1977, United Nations, General Assembly, 32nd session, supplement No. 10 (A/32/10), pp. 21-37.

¹¹ By way of example we give an extract from the proclamation issued by General G.-H. Dufour, who was to be one of the founders of the Red Cross almost twenty years later, to his troops on 5 November 1847 in his capacity as commander-in-chief of the Confederate troops during the Civil War known as the “Sonderbund” war, in Switzerland: “Soldiers, you must emerge from this struggle not only victorious but also irreproachably. Future generations must be able to say of you: ‘When necessary, they fought valiantly, but they showed themselves to be humane and generous’. Therefore I place under your care children and women, old people and ministers of religion. Anyone who lays hands on a harmless person, dishonours himself and defiles his flag. Prisoners, and above all, the wounded deserve your respect and your compassion, the more so as you have often found yourselves with them in the same camps. You shall not do any unnecessary damage in the campaign” (translated by the ICRC) (see O. Reverdin, “Le Général Guillaume-Henri Dufour, précurseur d’Henri Dunant”, in *Studies and Essays in Honour of Jean Pictet*, op. cit., p. 958).

did not have the means of training such specialists. It is a fact that, in the current circumstances at least, a thorough training in humanitarian law applicable in armed conflict cannot easily be obtained in the faculties of law of universities, if only because their programmes are already overloaded.¹² Apart from some countries where the armed forces already have a remarkable range of legal services at their disposal,¹³ and consequently specialized schools where these lawyers are trained not only in disciplinary and administrative subjects, but also in international law, the majority of countries do not (or do not yet) have any such facilities, and will have to create them. This task could be undertaken in conjunction with Article 6 (*Qualified persons*), which enjoins the High Contracting Parties to endeavour to train qualified personnel to facilitate in particular the application of the Conventions and the Protocol.¹⁴ There is no doubt that by means of Article 6 (*Qualified persons*), as well as by means of the present provision, the Protocol wishes to stimulate the training of competent personnel versed in the law of armed conflict. For the Parties to the Protocol this is a very real duty that rests upon them. The general opinion is that this result can be achieved by instituting a very close cooperation between lawyers (military magistrates, officer-lawyers, lawyers of competent ministries, university professors, and professors of the different military schools) and officers exercising command or responsible for the instruction of the armed forces.¹⁵ It is also considered that a good military legal adviser should have some knowledge of military problems. Undoubtedly such an effort implies that certain matters will have to be clarified, for example, in the field of interpretation, preparation or making available of appropriate documentation,¹⁶ participation in courses,

¹² In this respect see the relevant remarks made by M. Bothe, then professor at Hanover University, "Methodological and Didactic Problems Involved in the University Teaching of International Humanitarian Law, Especially in Connexion with the 1977 Geneva Protocols", *European Seminar on Humanitarian Law*, Jagellonian University, Cracow, 1979, p. 61.

¹³ To give some examples: for the United States of America, see J.J. Douglas and T.E. Workman, "The Educational Program for the Service Lawyer", 31 *Federal Bar Journal, Military Law Issue* 1, Winter 1972, p. 7; also see J.J. McGowan, "Training in the Geneva and Hague Conventions: a Dead Issue?", in XIV-1-2 *RDPM DG*, 1975, p. 51, and *infra ad* Art. 87, note 20. In the Soviet armed forces, legal advisers have been reported to exist down to the level of a small unit, with the triple task of instructing, advising and supervising in all the fields related to the application of the law of armed conflicts. Facts relating to the Federal Republic of Germany concerning legal advisers for large units and professors of law attached to military academies can be found in K. Bayer, "L'administration de la justice militaire dans la Bundeswehr", XVII-4 *RDPM DG*, 1978, p. 584; see also D. Fleck, "The Employment of Legal Advisers and Teachers of Law in the Armed Forces", *IRRC*, April 1973, p. 173, and K.J. Partsch, "Rechtsberater in den Streitkräften – Ein neuer juristischer Beruf?", in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 193. See also P. Verri, "Institutions militaires: le problème de l'enseignement du droit des conflits armés et de l'adaptation des règlements à ses prescriptions humanitaires", *ibid.*, p. 603.

¹⁴ For the commentary on Art. 6, see *supra*, p. 92.

¹⁵ Cf. "Seminar on the Teaching of Humanitarian Law to the Armed Forces" (San Remo, 6-18 November 1972), *IRRC*, January 1973, p. 42 and particularly p. 51.

¹⁶ It should be noted in this respect that in some armies all provisions of international law applicable in case of armed conflict have been stored in the memory of a computer. A staff which has a terminal can thus instantly find all legal provisions applicable to a given problem (cf. J.J. Douglas and T.E. Workman, *op. cit.*, p. 21).

seminars, symposia and various exercises,¹⁷ but there is nothing there outside the scope of military organization.

- 3348** An apparently essential prerequisite for the implementation of Article 82 is the creation at every ministry of defence of a division or section, service or office, exclusively devoted to international law applicable in armed conflict. Such a service should be available to armed forces at all times, whether in peacetime or in time of armed conflict. Its first task would be to assemble a complete documentation of applicable texts (with appropriate translations) to develop, under the authority of the ministry on which it is dependent, an appropriate consultation system which would meet the necessary requirements, and finally it should attend to the recruitment and training of candidates.
- 3349** The *consultation system* may vary, in particular according to the functions attributed to the legal advisers. Legal advice in the strict sense of the word is difficult to imagine in subordinate units. It is hardly compatible with the rapid decisions and action required at these levels if the units in question are to carry out such tasks as would normally be assigned them. On the other hand, it seems beyond doubt that the legal adviser could provide considerable and effective assistance for these units in the *instruction* of troops and commanding officers in closest contact with them, or even in the supervision of such instruction. For this purpose it would not seem unreasonable to envisage, if need be by delegating legal advisers attached to the division, the presence of such advisers up to a level relatively close to the fighting soldiers themselves, for example, at regimental level. In many cases the respect for the law of armed conflict depends ultimately on the conduct of the combatant himself, and on him alone. His direct superiors, already burdened with increasingly heavy duties, would perhaps be glad to be able to count on valuable assistance in this field.
- 3350** As regards *legal consultation in the proper sense of the word*, this could bear on the preparation and development of plans, the choice of means, the determination of objectives, and the measures taken to achieve them. It is principally at the top command level – which could be assisted by a real consultative group on the subject of international law – and in large units, that legal advisers will be called upon to give legal advice which may influence the decisions of headquarters staff and commanders.
- 3351** Consequently the consultation system created under Article 82 could take into account this double requirement: the introduction of legal advisers at levels relatively close to the troops, on the one hand, for the essential purpose of participating in their instruction, and on the other hand, in large units and at the top command level for the purpose of consultation in the true sense of the word, for the benefit of commanders and their headquarters staff.
- 3352** As regards the *recruitment* of the personnel called upon to exercise the function of legal adviser in the armed forces, it seems there is a choice between two solutions. First, it is possible to opt for qualified lawyers, who would specialize, if necessary, in the law of armed conflicts. However, such lawyers would lack the essential military knowledge which they would still have to acquire. Another

¹⁷ See, by way of example, “Premier cours international sur le droit de la guerre pour officiers” (International Institute of Humanitarian Law, San Remo), XVI-1 *RDPM DG*, 1977.

solution therefore would be to use military officers and initiate them in the law of armed conflicts.

3353 Whichever solution is preferred, it is important that the legal adviser devotes himself to his mission full time.

3354 A schematic outline of these various possibilities leads us to examine from three different angles the problem posed by the introduction of legal advisers in the armed forces: role, position in the armed forces and selection.

A. Role

1. In peacetime

3355 The legal adviser is essentially called upon to cooperate in the *instruction* of international law applicable in case of armed conflict:

- instruction in military academies;
- instruction of the headquarters staff of the unit to which he is attached;
- instruction of officers of units at lower levels;
- instruction of the troops, particularly in the context of operational exercises.

2. In time of armed conflict

3356 The role of the legal adviser is a preventive one. It is concerned with the application and the respect for the rules of the law of armed conflict. For this reason the legal adviser may be called upon in particular:

- a) to give his *opinion*, even *proprio motu*, on the planned military operations or on operations already being executed;
- b) to provide *expertise* on particular problems (for example, the choice of arms);
- c) to ensure the *functioning* of the procedure of legal consultation, particularly with subordinate levels;
- d) to remind commanders of their *obligations* under the terms of Article 87 of the Protocol (*Duty of commanders*).

3357 Moreover, he may be called upon in particular:

- a) to cooperate in the *training* of assistant legal advisers who may be attached to subordinate units;
- b) to actively participate in the *preparation* of large-scale exercises, the development of plans for wartime operations, to give his evaluation of the legal consequences of their execution, particularly with respect to the methods planned and the means to be used;
- c) to encourage the use of legal *consultation* procedures and to assess their operation;
- d) to supervise the *organization* of instruction in subordinate units, and to assess the extent of the knowledge acquired;
- e) to ensure that the knowledge acquired is kept up permanently and that *instruction* on the subject of the law of armed conflicts is continually maintained.

B. Position in the armed forces (attribution, size, subordination)

3358 For the purpose of this analysis it may be assumed that, by and large, the structure is similar in all armed forces.

1. Level of attribution

3359 In general, it is considered that permanent postings for legal advisers should be limited to the following levels:

- the highest command of the army and its headquarters staff;
- commanders of lower units and headquarters, down to division level or the level of the independent brigade (both inclusive), for the land, sea and air forces;
- commanders of other units intended to operate separately from the rest of the army;
- area commanders (including those in occupied territories) and commanders of military bases and areas.

2. Size

3360 Particularly in consideration of the tasks of instruction which may fall upon legal advisers, it would seem desirable to create in large units a small legal staff group composed of several officers, rather than being limited to a single expert.

3. Subordination

3361 There seem to be two systems:

a) Double subordination

The legal adviser is subordinate both to the commanding officer or to the chief-of-staff concerned, and to the legal service of the ministry of defence. This system simultaneously ensures the independence of the legal adviser (who thus has direct access to the ministry of defence), control over his activities by his professional superior, and some control of the matter by commanding officers. By granting the legal adviser a special status, distinct from that of the officers of the staff to which the adviser is attached, this system could have a negative effect on the atmosphere of trust which is essential for productive collaboration.

b) Single subordination

While receiving general instructions from the service on which he depends, the legal adviser is subordinate only to the commanding officer or to the chief-of-staff of the unit to which he has been assigned. Taking into account his rank, if he is a soldier, his position would be exactly the same as that of the other officers of this unit or staff, but his professional superior would not have direct control over his activities.

- 3362** As regards the rules on the chain of command subordination, whether there is double or single subordination, it may lay down either direct access to the commanding officer or the usual channels via the headquarters.

C. Selection

- 3363** The selection of legal advisers for the armed forces raises the question whether a civilian or a soldier should be appointed to this post. There are advantages and disadvantages to both alternatives.

1. Legal advisers are selected from military personnel

- 3364** There are two possibilities:

a) From combatant military personnel

The choice can be either made from military personnel in active combat service, provided that they are exclusively assigned to their mission of legal adviser, or from reserve officers, or retired officers.

Advantages:

- an understanding of the military environment, its psychology, organization and problems;
- military training, enabling the person concerned to evaluate situations from a tactical or strategic, as well as from a technical point of view;
- an aptitude for making himself understood, for understanding and for creating the essential atmosphere of trust.

Disadvantage:

- difficulty in acquiring the essential legal expertise, particularly at the highest levels.

b) From the personnel of the military judiciary

Advantages:

- thorough legal training, especially in military law;
- authority is automatically conferred by virtue of membership of the military judiciary;

Disadvantages:

- this personnel is already overloaded with tasks of an administrative, disciplinary and penal nature;
- they are not very familiar with the law of armed conflicts.

2. Legal advisers chosen from the civilian population

- 3365** With few exceptions, it is difficult to imagine finding specialists in international law, unless the choice is made from university professors, who by definition are civilians. At the highest levels of command in the army the presence of such experts may be necessary in any case. If they are called upon to advise on fundamental options which will have repercussions at lower levels, it is essential

that they have an uncontested authority in their professional field. Supported by aides who are drawn from the ranks of military officers, they should be capable of giving well-founded, balanced and authoritative opinions. However, this solution cannot always be adopted at all levels where the presence of legal advisers is necessary, for the simple reason that there are never very many of these experts. Moreover, what was said above regarding legal advisers chosen from military personnel, applies *a contrario* to civilian legal advisers:

Advantage:

lawyers already specialized in the law of armed conflicts.

Disadvantages:

- a lack of knowledge of military matters;
- problems with making themselves understood in the military environment;
- relatively low level of credibility and trust, which is unpropitious for the instruction of combatant forces.

3366 Once he has been trained and assigned to a unit or staff, the legal adviser should be available at all times, i.e., in time of peace as well as in time of armed conflict. For national liberation movements the obligation is limited to the period of armed conflict (“the Parties to the conflict in time of armed conflict”).

3367 *In conclusion* we emphasize that the legal adviser should be equally well informed regarding the development of operational plans and their execution,¹⁸ as regarding programmes of instruction, and if necessary, should be able to suggest alternatives to the proposed decisions. In no case should the legal adviser become the commander’s accomplice by giving a semblance of legality to orders which in fact infringe the law of armed conflict.¹⁹ No doubt he is expected to confer some degree of legal security to the military commanders concerned, but this is by complying with the rules, both with their letter and with their spirit. He could also make up for the failure of custom to fulfil its traditional role, when there is not enough time for customs to become established because events move too quickly, or when custom is not confirmed by practice. However, for this it is necessary that legal advisers of the different Parties to the Protocol have concordant opinions on most points, even on controversial questions. This goal should be relatively easy to achieve in the context of an alliance, which would not in the least reduce the value of the attempt. However the problem becomes crucial with regard to a potential adversary. A commander who considers that he has complied with the law of armed conflict and falls into the hands of an adverse Party whose ideas are diametrically opposed to those of the legal adviser whose advice he followed, may find himself being accused of a war crime. Lawyers should be enticed by such eventualities to continue the quest for harmonization which was accomplished throughout the Diplomatic Conference, at an inter-

¹⁸ On this point, see the remarks of G.I.A.D. Draper in “The Role of Legal Advisers in the Armed Forces”, *IRRC*, January-February 1978, pp. 6-17.

¹⁹ On the subject of the relationship between the legal services and the command structure, and on their implications during the trials following the Second World War, see R.J. Fontenot, “Development of the Staff Legal Officer’s Responsibility under the Law of War”, XIV-1-2 *RDPMDG*, 1975, pp. 67-110.

national level and with the support of their governments. If the opportunity arises, negotiations should take place to bring about interpretative agreements on particularly controversial points. This could be done in time of peace or during the armed conflict itself, pursuant to Article 7 of the Protocol (*Meetings*) or Article 6/6/6/7 common to the Conventions.

J. de P.

Protocol I

Article 83 – Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Documentary references

Official Records

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Other references

CE/2, pp. 4-9. *CRCE 1971, Report*, pp. 28-29; p. 02, Annex I. *CE 1971, Report*, pp. 111-112. paras. 578-580. *CE 1972, Basic Texts*, p. 26 (Art. 76). *CE 1972, Commentaries*, Part I, pp. 156-157 (Art. 76). *CE 1972, Report*, vol. I, pp. 192-193, paras. 4.149-4.159; vol. II, pp. 99-100, CE/COM IV/10; pp. 103-104, CE/COM IV/24; p. 109, CE/COM IV/57; pp. 109-110, CE/COM IV/60; p. 111, CE/COM IV/66. *Commentary Drafts*, p. 92 (Art. 72). *XXIIInd Int. Conf. RC Report*, p. 21 (Art. 72).

Commentary

- 3368** In UNESCO's Constitution it is said that: "Since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed". Having regard to that pronouncement, our time calls for an unprecedented effort in the field of education and instruction. Education should "promote understanding, tolerance and friendship among all nations",¹ particularly as scientific discoveries and technological advances created immense possibilities but also entail grave dangers.² Thus, this effort should be generally aimed at a harmonious balance between technical progress and the intellectual and moral advancement of mankind.³ The rules of the Conventions were never forgotten in such pleas for information and the training of minds,⁴ and the Red Cross is asked to pass on its message of humanity, impartiality and neutrality.⁵ Centred on armed conflicts where technical progress has uncovered hitherto unknown dangers, the Conventions are a reminder to everyone that the adversary too, is a human being, since persons *hors de combat* must be treated humanely. Beyond war, engines of death and blind destruction, anonymous forces confronting each other, or preparing to confront each other, there are men, women and children who all have the same dignity, are prey to the same torments and show the same courage. Such is the message of the Conventions, and, today, of the Protocol additional to the Conventions, which appeals to the heart and to the mind, and of which the dissemination "will contribute to the promotion of humanitarian ideals and a spirit of peace among nations".⁶
- 3369** This is why the International Conferences of the Red Cross⁷ have not ceased to attract the attention of the Parties to the Conventions, regarding the necessity of the immediate application of provisions relating to the dissemination of the rules they contain (First Convention, Article 47; Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144). Essentially Article 83 of the Protocol is a reaffirmation of this. A number of resolutions of the United Nations General Assembly also urge all Member States of the

¹ Universal Declaration of Human Rights, Art. 26, para. 2.

² Cf. Proclamation of Teheran, para. 18, International Conference on Human Rights, May 1968.

³ Declaration of the principles of international cultural cooperation, made by the General Conference of UNESCO, 7 November 1966, Article II.

⁴ See, for example, the Resolution of the United Nations General Assembly on Respect for Human Rights in Armed Conflicts, of 19 December 1968 (Res. 2444 (XXIII)).

⁵ Resolution of the United Nations General Assembly of 19 November 1946, drawing the attention of the Member States to the particular importance of enabling the National Red Cross and Red Crescent Societies to exercise their activity in accordance with the principles of the Geneva and Hague Conventions and in the humanitarian spirit of the Red Cross and the Red Crescent.

⁶ Resolution 21, annexed to Protocol 1, "Dissemination of knowledge of international humanitarian law applicable in armed conflicts".

⁷ See Centenary Congress, 1963, Resolution IV; XXth International Conference of the Red Cross, 1965, Resolution XXI; XXIst International Conference of the Red Cross, 1969, Resolution IX; XXIInd International Conference of the Red Cross, 1973, Resolution XII; XXIIIrd International Conference of the Red Cross, 1977, Resolution VII; XXIVth International Conference of the Red Cross, 1981, Resolution X.

Organization to instruct their armed forces and the civilian population in the treaty rules applicable in the case of armed conflict,⁸ and to take effective measures⁹ to this end. The Secretary-General of the Organization was invited a number of times to encourage the study and instruction of the relevant principles by the means at his disposal.¹⁰

- 3370 From the beginning of the preparatory discussions to the Diplomatic Conference, it was the unanimous view of the experts that the dissemination of the treaty rules was of primary importance, and that education was a better guarantee of respect for these rules than any sanction could ever be.¹¹ The ICRC entirely shared this view.¹² Numerous suggestions of a practical nature were presented, both during the first and second sessions of the Conference of Government Experts. We will return to these below. Despite this unanimity, it was not without some hesitation, as we will see below, that Committee I approved the draft presented by the ICRC, on the basis of the deliberations of the Conference of Government Experts.¹³ At a plenary meeting following a narrow vote¹⁴ paragraph 3¹⁵ of Committee I's proposal was removed, while paragraphs 1 and 2, which comprise the present Article 83, were approved by consensus.¹⁶ Finally the Conference adopted Resolution 21, annexed to the Protocols, which is also devoted to dissemination.

Paragraph 1 – Dissemination amongst members of the armed forces and the civilian population

- 3371 The founding of the Red Cross and the adoption of the first Convention in 1864 signify the consecration of a principle in the law of nations by which it is as a human being – and not only as a citizen of a particular State – that the individual is protected. In this sense, as well as from a strictly legal point of view, a true humanitarian law was created at that time. Admittedly this was only done in anticipation of armed conflicts, because the integrity and dignity of human beings are most seriously threatened in these situations.
- 3372 From the time that this body of law was established for the benefit of mankind, it seemed essential that people and not merely administrations were familiar with

⁸ See Res. 2852, "Respect for Human Rights in armed conflict", paras. 6-7 (XXVI, 1971); Res. 3032, para. 3 (XXVII, 1972); Res. 3102, paras. 5-6 (XXVIII, 1973); Res. 3500, para. 2 (XXX, 1975); res. 31/19, para. 2 (1976).

⁹ Res. 32/44, para. 7 (1977).

¹⁰ Cf. *supra*, note 8.

¹¹ *CE 1971, Report*, p. 111, para. 578.

¹² *CE 1972, Report*, vol. I, p. 192, para. 4.149.

¹³ See *CE 1972, Report*, vol I, pp. 192-193, paras. 4.158-4.159, and *O.R. VIII*, pp. 393-398, CDDH/I/SR.37; pp. 405-408, CDDH/I/SR.38.

¹⁴ See *O.R. VI*, pp. 257-260, CDDH/SR.43.

¹⁵ This paragraph (Art. 72) read as follows: "3. The High Contracting Parties shall report to the depositary of the Conventions and to the International Committee of the Red Cross at intervals of four years on the measures they have taken in accordance with their obligations under this article."

¹⁶ *O.R. VI*, p. 260, para. 122; for the explanations of vote, see also *ibid.*, pp. 271 and 274-275.

it. This is the general purport of the obligation laid down in paragraph 1 of Article 83 in which the High Contracting Parties undertake, in time of peace and in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries in such a way that these instruments may become known to the armed forces and to the civilian population. It should be noted, *in passing*, that the English version uses a more imaginative wording than the French version, as it uses the word “disseminate”, which evokes the idea of sowing seeds, and not only the role of spreading information evoked by the French “diffusion”.

“*Convinced* that a sound knowledge of international humanitarian law is an essential factor for its effective application,

Confident that widespread knowledge of that law will contribute to the promotion of humanitarian ideals and a spirit of peace among nations [...]” (Resolution 21, preamble),

the Conference confirms in Article 83 the obligation already contained in the Conventions by which the High Contracting Parties must undertake such dissemination, both in time of peace and in time of armed conflict.¹⁷ This is to say that it extends to all Parties to the Protocol from the moment of ratification or accession, and is not limited to Parties to the conflict nor is the obligation applicable only when there is a conflict. Taking into account the means available, some latitude has still been left to the High Contracting Parties, as revealed by the words “as widely as possible”. In fact some delegations were anxious that these words might lead to confusion between the propagation of rules applicable in case of armed conflict and attempts to justify war.¹⁸ Let us hope that these causes of concern were sufficiently answered at the beginning of the commentary on this article. In addition, Resolution 21 mentioned above, not only does not subscribe to these objections, but actually outlines in broad terms a programme of effective dissemination intended for signatory States, to be undertaken, when necessary, with the help and advice of the ICRC. National Societies are also invited to offer their services.

3373 It should be remembered that a number of other articles of the Protocol also relate directly or indirectly to the dissemination of treaty rules. This applies to Article 6 (*Qualified persons*) which is concerned with the training of qualified personnel. Resolution 21, devoted to dissemination, refers explicitly to this article (paragraph 2 (b)). Article 82 (*Legal advisers in armed forces*) is also concerned with the dissemination of these rules, as is Article 87 (*Duty of commanders*), paragraph 2, which makes this the duty of military commanders.¹⁹ Finally, Article 84 (*Rules of application*) provides, in particular, that the High Contracting Parties are to communicate to one another, as soon as possible, the laws and regulations

¹⁷ This is not the only obligation imposed by the Protocol in time of peace. The same applies for Articles 6, 36, 80, 82, and 84. See also commentary Art. 3, *supra*, p. 65.

¹⁸ See *O.R.* VIII, pp. 394 and 398, CDDH/I/SR.37, paras. 59 and 86.

¹⁹ It should be remembered that Art. 41, para. 1, of the Third Convention and Art. 99, para. 2, of the Fourth Convention require that the text of the Convention shall be posted in a language the prisoners and internees will understand, at places where all may read them, or shall be supplied to any interested persons.

which they may adopt to ensure the application of the Protocol, including those in the field of dissemination. However, the third paragraph of the article proposed by the ICRC,²⁰ which explicitly laid down that the Parties to the Protocol had to report to the depositary of the Conventions and to the ICRC at intervals of four years on the measures taken with regard to dissemination,²¹ had provoked problems in the Committee. It was not accepted in plenary,²² and is therefore not included in the final text. Communication of, for example, military manuals is one of the measures often recommended in this field, and considered appropriate for encouraging a better dissemination of the treaty rules in the armed forces.²³

3374 In fact, the present provision does not merely lay down a general obligation to disseminate the Conventions and the Protocol. It describes this obligation in detail, as did the corresponding provisions in the Conventions, by giving as examples programmes of military instruction and study by the civilian population.

1. Programmes of military instruction

3375 The text is clear: the High Contracting Parties are obliged to include the study of the Conventions and the Protocol in programmes of military instruction. We will not dwell at length here on all the technical aspects of such instruction; setting up the programme for this will probably require decisions at a ministerial level. In any case, the dissemination of such instruction is only conceivable if qualified personnel and adequate material are available. The representatively-attended Seminar held at San Remo in November 1972²⁴ laid down some unofficial “guidelines” in this respect, as well as a “programme of instruction in humanitarian law for the armed forces”,²⁵ from which the Parties to the Protocol could certainly gain inspiration in many respects, even though it was established

²⁰ See *supra*, note 13.

²¹ This proposal was based on Resolution XXI of the XXth International Conference of the Red Cross, which had expressed the desire that governments and National Societies should periodically report to the ICRC on the measures taken in the field of the dissemination of the Conventions. Although there were not many of these reports, some nevertheless constituted extremely detailed contributions of great interest. They were communicated, with the agreement of the governments concerned, to the participants of the XXIst and XXIIInd International Conferences of the Red Cross.

²² See *supra*, p. 961 and note 15. However, see: XXIVth International Conference of the Red Cross, *Dissemination of knowledge and teaching of International Humanitarian Law and of the Principles and Ideals of the Red Cross, Answers from Governments and National Societies to the ICRC Questionnaire*, Geneva, 1981, 246 pages.

²³ On the occasion of the Seminar on the instruction of humanitarian law in military institutions, held in San Remo from 6-18 November 1972, the International Institute of Humanitarian Law in San Remo published an “Annexe documentaire”, which to some extent answered this concern. It contains extracts from the military instruction manual of the Federal Republic of Germany, the United States Field Manual, the French Regulations on general discipline in the armies, the British Manual of Military Law, the Italian “Law of War” and the Swiss Manual on the Laws and Customs of War.

²⁴ See *supra*, note 23.

²⁵ See *IRRC*, January 1973, pp. 47-51.

before the finalization of the Protocol. International courses on the law of war for officers have been organized since 1976, with the collaboration of the ICRC at the same Institute of San Remo.²⁶ Numerous publications²⁷ and excellent instruction materials are already at disposal at an international level, and the ICRC is available, to the extent of its means, to competent authorities to help them develop and put into practice programmes of instruction adapted to national conditions in accordance with the wish expressed in the above-mentioned Resolution 21 (paragraph 2 (a)).²⁸ However, these efforts, which, it is to be hoped, will continue to increase, can never be a substitute for those of governments.

3376 All armies have manuals for military instructors' training courses, which are based on tried and tested principles of "the art of command" or those of military pedagogy. There is no reason why the instruction of international humanitarian law applicable in the case of armed conflict should not be dealt with by the same methods, which have been proven and, consequently, why it should not be directly incorporated in the military instruction as such in exactly the same way as the preparation for combat. Supplementary techniques are always useful: lectures, films, slides, audio-visual methods, war games including questions and answers etc., though for future combatants nothing can ever replace exercises in the field, as shown particularly by the military manoeuvres which take place periodically in all countries. An "assault course", an exercise of attack or defense, can no longer be conceived without the obligation of resolving the problems arising with regard to the law of armed conflict: the presence of the emblem of the red cross or the red crescent and other protective signs, the capture, interrogation and evacuation of prisoners of war, an exchange of the wounded, the burial of the dead, the protection of civilians and civilian objects, the spoils of war etc. Both for soldiers, and for officers of lower or higher ranks, the law of armed conflicts forms one of the elements of decisions which must in general be taken in the field. It is certainly always their mission which dictates their conduct in the first place, but the aim to bear in mind is that in the execution of this mission the law of armed conflicts must never be ignored. In general there is no lack of motivation outside treaty obligations for such behaviour, and the troops will understand these very well when trouble is taken to explain them: effectiveness, which means that all efforts should be concentrated on military objectives; moderation, which allows an adversary wishing to cease combat an opportunity to do so and does not drive him to despair; and finally, discipline, which means that orders are executed without invoking pretexts to try and shirk

²⁶ *Ibid.*, January-February 1978, pp. 18-43 (also available as an off-print, "The Law of War and the Armed Forces", from the Henry Dunant Institute); also see the Annual Reports on ICRC activities 1980, pp. 70-71; 1981, pp. 67-68; 1982, p. 91; 1983, pp. 100-101; 1984, pp. 87-89, and Resolution XI of the XXIVth International Conference of the Red Cross.

²⁷ See *Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, ICRC and Henry Dunant Institute, Geneva, 1980, pp. 285-298.

²⁸ Such measures are included in the Red Cross programme of action, which will be dealt with below, in connection with the study of international humanitarian law by the civilian population. Seminars and courses are provided for members of the armed forces with the collaboration of the ICRC, the International Institute of Humanitarian Law and the Henry Dunant Institute.

them, even if this concerns the conduct or alleged conduct of the adversary. These essential elements of military life and of the battlefield, where the greatest pressure on the psychological resistance of soldiers and their superiors is felt, should form an integral part of the dissemination of treaty rules. Indeed, they are the origin of the law of armed conflict.

2. *Study by the civilian population*

3377 In the articles devoted to dissemination, the Conventions include “the study thereof in their programmes of military and, if possible, civil instruction”. The ICRC was concerned to reinforce this obligation, and following the opinion of the experts on this point, removed the words “if possible” from the draft of Article 72, which was submitted on this point to the Diplomatic Conference. However, the arguments which had been raised in 1949 for the more modest wording were put forward again. A straightforward international obligation to provide instruction for the civilian population creates technical difficulties for federal States in which responsibility for civilian education falls on regional, provincial or other authorities and not on central government.²⁹ Moreover, some delegations did not see how the government of their country could provide such instruction to the entire population anyway.³⁰ As a result of these remarks, the text was therefore revised so that it only obliges the High Contracting Parties to “encourage” the study of the Conventions and the Protocol by the civilian population. This formula is not unknown in domestic law. The authorities of the central government sometimes adopt “incentive legislation” with a view to facilitating activities in various fields which, from the constitutional point of view, fall under the responsibility of provincial and local authorities. The formula therefore implies that the High Contracting Parties should at least take measures conducive to the study of the Conventions and the Protocol by the civilian population, even if this might require special legislation. Resolution 21 annexed to the Protocol makes a number of suggestions in this respect:

- a) encouraging the authorities concerned to plan and give effect, if necessary with the assistance and advice of the ICRC, to arrangements to teach international humanitarian law in a manner suited to international circumstances (paragraph 2 (a));
- b) undertaking the training of suitable persons (sub-paragraph (b));
- c) recommending that the appropriate authorities intensify the teaching of international humanitarian law in universities (faculties of law, political science, medicine etc.) (sub-paragraph (c));
- d) recommending to educational authorities the introduction of courses on the principles of international humanitarian law in secondary and similar schools (sub-paragraph (d)).

²⁹ See *O.R.* VIII, pp. 393-398, CDDH/I/SR.37.

³⁰ *Ibid.*, p. 396, para. 68.

- 3378** These suggestions imply that practical measures, which fall within the competence of the central authority, are effectively taken: the texts must be available in the national language or languages,³¹ appropriate support in the form of materials or personnel should be given to the institutions called upon to provide this instruction in the same way as for any other programme considered to be in the general interest, and coordination measures which, by definition, are solely within the competence of the central authority, must be taken. In this respect, the above-mentioned Resolution 21 also urges National Societies to offer their services to the authorities concerned and invites the ICRC to participate actively in this effort by publishing material that will assist in teaching this subject, and circulating any appropriate information in this respect, and by organizing, on its own initiative, or when requested by governments or National Societies, seminars and courses (paragraphs 3 and 4).
- 3379** Moreover, it should not be forgotten that the activity of the Red Cross in the field of the dissemination of international humanitarian law is laid down in the Statutes of the International Red Cross, of the ICRC, of the League of Red Cross and Red Crescent Societies, and of many National Societies. As stated above, this has been the subject of several resolutions during the International Conferences of the Red Cross.³²
- 3380** Programmes of action were set up by the ICRC and the League in the field of the dissemination of international humanitarian law, based on the provisions of the treaties and constitutional documents referred to, and on Resolution 21 of the Diplomatic Conference.³³ The specific object of these programmes is:
- a) to encourage States to accede to the Protocols;
 - b) to analyse the legal and practical consequences of the provisions of the Protocols;
 - c) to disseminate and encourage the dissemination of international humanitarian law.
- 3381** Finally, it is appropriate to keep in mind that not all States have a federal structure and many grant only a relative degree of autonomy to the educational institutions in their territory. Thus, fairly frequently it is only by means of decisions taken at a ministerial level – whether it is a matter for the central or for a provincial government – that the dissemination of international humanitarian law amongst the civilian population can be realistically ensured. In fact, it would be desirable to set up permanent inter-departmental committees³⁴ in each country to examine and establish the appropriate means for ensuring the

³¹ See, in particular, para. 2 of Art. 83.

³² In these activities the ICRC and the League also procure the assistance of the Henry Dunant Institute and extend their cooperation to specialized institutions, in particular, apart from the International Institute of Humanitarian Law in San Remo, the International Institute of Human Rights (Strasbourg), UNESCO, the Commission médico-juridique de Monaco, etc.

³³ There is a complete account of the activities carried out in this field by the ICRC and by the League during the years following the end of the Diplomatic Conference, in the reports on ICRC activities (see also Resolution X of the XXIVth International Conference of the Red Cross), as well as in the *IRRC*, November-December 1983, pp. 338-359.

³⁴ See also *supra*, p. 931, *ad* Art. 80.

systematic dissemination of international humanitarian law amongst the civilian population, if possible with the support of expert organizations, and in this way to promote the spirit of humanity and consequently a spirit of peace.

Paragraph 2 – Dissemination of the text in times of armed conflict

3382 The Conventions and the Protocol are to be applied in times of armed conflict, and a general training in international humanitarian law, no matter how good this is, is not sufficient then for the civilian or military authorities responsible. In fact, the corresponding provisions of the Third and Fourth Conventions provide that the authorities which would assume responsibility for the application of these Conventions in times of armed conflict, must possess the text.³⁵ This provision is repeated in paragraph 2 of Article 83 with a slightly different wording (“shall be fully acquainted with the text” (of the Conventions and the Protocol)), but it is extended to all military or civilian authorities exercising responsibilities in respect of one or other of the four Conventions (not only the Third and Fourth Conventions) and the Protocol. Thus it applies to all the armed land, sea and air forces, as well as to all the administration on which they depend.³⁶ However, this does not mean that every military commander or representative of the ministry of defence must have a full and detailed knowledge of the text of the 559 articles (not counting the Annexes) of the Conventions and the Protocol. It is sufficient that they have a knowledge of the text of the articles which are concerned with their area of responsibility, and the same applies for any representative of the civilian authorities. However, this obligation should not be interpreted too narrowly as the ordinary meaning given to the terms of a treaty should be understood in the context in which these terms are used, and in the light of the object and purpose of the treaty.³⁷ A general knowledge of the Conventions and the Protocol is therefore always essential, while the depth and breadth of knowledge may vary, depending on the nature and extent of the responsibilities of the person concerned.

3383 Apart from the ministry of defence, paragraph 2 may apply to many other government departments: the ministry of foreign affairs, which is the point of contact for the personnel of the Protecting Power; the ministry of public health, on which the health services depend; the ministry of the interior, which is generally responsible for civil defence and the police; the ministry of transport, on which the execution of relief actions may depend etc.

³⁵ Third Convention, Art. 127, para. 2, and Fourth Convention, Art. 144, para. 2, for the general obligation, and for camp commanders, Third Convention, Art. 39, para. 1, and Fourth Convention, Art. 99, para. 1.

³⁶ In the case of intervention by the United Nations forces, the governments of the countries which furnish contingents must give their troops adequate training on the Conventions and the Protocols before they leave their home country. (Cf. Resolution XXV of the XXth International Conference of the Red Cross, and D. Schindler, “United Nations Forces and International Humanitarian Law”, in *Studies and Essays in Honour of Jean Pictet*, op. cit., p. 524.)

³⁷ Cf. Vienna Convention on the Law of Treaties, Art. 31, para. 1.

3384 Setting up such a programme of dissemination evidently implies the preliminary coordination between the various ministries concerned, not only for the dissemination itself, but also with regard to the allocation of responsibilities.

J. de P.

Article 84 – Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

Documentary references

Official Records

O.R. I, Part I, p. 164; Part III, p. 24 (Art. 73). *O.R.* III, p. 316. *O.R.* VI, p. 260, CDDH/SR.43, para. 122. *O.R.* VIII, pp. 398-399, CDDH/I/SR.37, paras. 90-92; pp. 408-409, CDDH/I/SR.38, paras. 33-35. *O.R.* X, p. 21, CDDH/219/Rev.1, para. 4; p. 23, paras. 12-14; p. 48, paras. 136-140; pp. 99 and 102, CDDH/I/285/Rev.1 (Art. 73).

Other references

CE/2b, pp. 2-3. *CE 1971, Report*, p. 112, para. 580. *CE 1972, Basic Texts*, p. 26 (Art. 77). *CE 1972, Commentaries*, Part I, p. 157 (Art. 77). *CE 1972, Report*, vol. I, p. 193, paras. 4.160-4.164; vol. II, pp. 117-118, *CE/COM IV/46. Commentary Drafts*, p. 93 (Art. 73).

Commentary

General remarks

3385 As we saw with regard to article 80 (*Measures for execution*), every Contracting Party must take a certain number of measures for execution in order for the Protocol to be applied fully. The present article, taken almost word for word from a provision in the Conventions,¹ concerns the reciprocal communication of

¹ Common Article 48/49/128/145.

information by the Contracting Parties about the rules they have drawn up for this purpose.²

- 3386** The object of such information is to inform each Party of the way in which the other Parties understand their obligations and discharge them. This should mainly serve to avoid or reduce errors, discrepancies and contradictions. One could also expect some stimulation and a fruitful exchange of thoughts and experiences.
- 3387** In the absence of a common interpretation, prior knowledge of differences of interpretation may further serve to help avoid misunderstandings, which in some cases could have serious consequences.
- 3388** There were no amendments to the draft of this article. After the addition of the expression “as soon as possible” by the Working Group, the present text was adopted by consensus both in Committee I and in plenary.³

Official translations

- 3389** The authentic texts of the Conventions are those in English and French; to these may be added the official Spanish and Russian translations, produced by the depositary.⁴ In conformity with contemporary practice, there are six authentic texts of the Protocol, viz., in Arabic, Chinese, English, French, Russian and Spanish.⁵
- 3390** The legal system of each Party to the Protocol determines in which language(s) it must have the Protocol translated. These translations, which are official insofar as Contracting Parties issue them or recognize them, certainly constitute one of the necessary measures within the meaning of Article 80 (*Measures for execution*) to execute the obligations arising from the Protocol.
- 3391** These translations may be based on any of the six authentic texts, though there is no doubt that they will be more accurate if a comparison is made between two or several of the authentic texts. On the other hand, although there is no obligation in this respect, it seems desirable that States which have a common language should agree on a common translation.

Laws and regulations

- 3392** The term “laws and regulations” should be understood in the widest possible sense to cover all rules from the legislative and from the executive insofar as

² On the meaning in the Protocol of the expression “High Contracting Parties”, cf. commentary Preamble, *supra*, p. 25. For the present art., cf. *infra*, “Parties to the Conventions not bound by the Protocol”.

³ Cf. respectively *O.R.* VIII, p. 408, CDDH/I/SR.38, para. 33; *O.R.* VI, p. 260, CDDH/SR.43, para. 122.

⁴ Common Article 54/55/133/150. The depositary of the Conventions and the Protocol is the Swiss Federal Council, as stated in Article 93; for its functions as depositary, cf. commentary Art. 100, *infra*, p. 1114.

⁵ In accordance with Art. 102; for further details on the concepts of authentic texts, official translations prescribed by a treaty and official national translations, cf. commentary on that art., *infra*, pp. 1120-1122.

such rules are in any way related to the application of the Protocol, examples for which are given in the commentary on Article 80 (*Measures for execution*), paragraph 1.⁶

Duties of Contracting Parties and of the depositary

- 3393** The obligation arising from this article consists of a duty to mutually communicate information. However, this does not justify one Contracting Party considering itself released from that obligation with regard to another Party on the ground that the latter has not discharged it. The object of this provision, as with humanitarian law as a whole, is sufficiently important to reject any possibility of reciprocity.⁷ Thus each Contracting Party is individually obliged to apply the present article as soon as possible after the rules and translations are passed or adopted.
- 3394** The effect of this article would be increased if the Contracting Parties, whenever necessary, added a translation in an international language of the laws and regulations they communicate. They will decide on the suitability of such a translation and the international language to be used.
- 3395** On the other hand, it clearly follows from the article that the depositary must receive a sufficient number of each document to send at least one copy to each Party to the Conventions, as we will see below; in fact, the depositary is only obliged to pass on what it receives and it is not responsible for translating, nor in principle for reproducing such documents.
- 3396** In addition it would be very useful for all such documents also to be communicated to the ICRC either directly or through the intermediary of the depositary, as was done for the Conventions, even though this is not actually required by the article.

Parties to the Conventions not bound by the Protocol

- 3397** The expression “High Contracting Parties” in this article only covers the Parties to the Protocol, and not Parties only bound by the Conventions. As regards the recipients, there is an omission remedied in Article 100 (*Notifications*), subparagraph (c), which provides that communications received by the depositary in accordance with Article 84 will be also communicated by it to all the Parties to the Conventions.

B.Z.

⁶ Cf. *supra*, p. 931.

⁷ On reciprocity, cf. commentary Art. 1, para. 1, *supra*, p. 37-38.

Part V, Section II – Repression of breaches of the Conventions and of this Protocol

Introduction

3398 This Section supplements the articles of the Conventions relating to the repression of breaches,¹ while extending the application of that system of repression to breaches of the Protocol. It therefore seems necessary to review, in the following order: the system of repression laid down in the Conventions; “grave breaches” as defined by the Conventions; new elements and clarifications introduced by the Protocol; other elements contained in international criminal law.²

¹ First Convention, Arts. 49-54; Second Convention, Arts. 50-53; Third Convention, Arts 129-132; Fourth Convention, Arts. 146-149. In fact these articles also lay down a general duty and specific preventive measures, as does this Section. We will not deal here with Art. 51/50/131/148 common to the Conventions, nor with Art. 91 of the Protocol, which are not about the repression of breaches, but about responsibility of Contracting Parties with regard to reparation.

² In addition to *Commentaries I-IV* and works which are more particularly mentioned with regard to the specific provisions of this Section, we list below a limited selection of works, documents and articles on a) international penal law, b) repression of war crimes and c) repression of breaches of humanitarian law, (subject a) also covers b) and c); subject b) also covers c):

a) *International Penal Law*:

S. Glaser, *Introduction à l'étude du droit international pénal*, Paris, 1954; *id.*, *Droit pénal international conventionnel*, Brussels, 1970; C. Lombois, *Droit pénal international*, Paris, 1971.

b) *Repression of war crimes*:

International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal, History and Analysis*, Doc. A/CN.4/5, 3 March 1949; L. Oppenheim, *op. cit.*, pp. 566-588 (paras. 251-257c); United Nations, *Question of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Doc. E/CN.4/906, 15 February 1966; P. Mertens, *L'imprescriptibilité des crimes de guerre et des crimes contre l'humanité*, Brussels, 1974; H.-H. Jescheck, “Nuremberg Trials”, *Encyclopaedia of Public International Law*, *op. cit.*, Instalment 4, 1982, p. 50; *id.*, “War Crimes”, *ibid.*, p. 294; G.I.A.D. Draper, “War, Laws of, Enforcement”, *ibid.*, p. 323; Ch. Rousseau, *Le droit des conflits armés*, *op. cit.*, pp. 170-187; F. Weiss, “Time Limits for the Prosecution of Crimes Against International Law”, 53 *BYIL*, 1983, p. 163; United Nations General Assembly, *Report of the International Law Commission on the work of its thirty-seventh session*, Official Records, 40th session, supplement No. 10 (A/40/10), 1985, paras. 11-101.

c) *Repression of breaches of humanitarian law*:

W.A. Solf and E.R. Cummings, “A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949”, 9 *Case Western Reserve Journal of International Law* 2, 1977, p. 205; M.C. Bassiouni, “Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949”, 8 *Rutgers Camden Law Journal* 2, 1977, p. 185; J. de Breucker, “La répression des infractions graves aux dispositions du premier Protocole additionnel aux quatre Conventions de Genève du 12 août 1949”, XVI-4

(continued on next page)

3399 In addition, as a proposal for a general article on reprisals had been submitted and discussed in the context of this Section, which was finally rejected, we will devote a special passage to that question.

The repression system of the Conventions

3400 In accordance with the relevant common article of the Conventions (49/50/129/146) the Contracting Parties undertake to:

- a) enact any legislation necessary³ for the repression of grave breaches defined by the Conventions;⁴
- b) suppress all acts contrary to the Conventions other than grave breaches;
- c) prosecute and try persons alleged to have committed, or to have ordered to be committed, any such grave breaches. It is also possible to hand such persons over for trial to another Contracting Party interested in prosecuting them.

RDPMDG, 1977, p. 497; E.J. Roucounas, "Les infractions graves aux droit humanitaire (Article 85 du Protocole additionnel I aux Conventions de Genève)", 31 *Revue Hellénique de droit international* 3-4, 1978, p. 57; B.V.A. Röling, "Aspects of the Criminal Responsibility for Violations of the Laws of War", *The New humanitarian Law of Armed Conflict*, *op. cit.*, p. 199; Ph. Bretton, "La mise en œuvre des Protocoles de Genève de 1977", *op. cit.*; G.I.A.D. Draper, "The Implementation and Enforcement...", *op. cit.*; "Incidences des dispositions pénales du Protocole I additionnel aux Conventions de Genève de 1949 sur le système judiciaire national", XXI-1-2-3-4 *RDPMDG*, 1982, p. 415 (Summary in English, "Effects of the penal provisions of Protocol I additional to the Geneva Conventions of 1949 on the national legal system", p. 430) (Congress held at Lausanne in 1982); M. Aubert, "La répression des crimes de guerre dans le cadre des Conventions de Genève et du Protocole Additionnel I et l'entraide judiciaire accordée par la Suisse", 79 *Revue suisse de jurisprudence* 23, 1983, p. 368; J. Verhaegen, "les nouveaux horizons du droit international pénal des conflits armés", *Revue de droit pénal et de criminologie*, January 1985, p. 25.

³ On this point, Cf. *Commentaries I-IV* (para. 1 of common Art. 49/50/129/146 and Art. 50/51/130/147); ICRC, *Respect of the Geneva Conventions – Measures taken to repress violations* (Reports submitted by the ICRC to the XXth and XXIst International Conferences of the Red Cross), Vol. I (1965) and II (1969), reprinted in 1971; G. Levasseur and R. Merle, "L'état des législations internes au regard de l'application des obligations contenues dans les conventions internationales de droit humanitaire", in Centre de droit international de l'Institut de sociologie de l'Université Libre de Bruxelles (Centre Henri Rolin), *Droit humanitaire et conflits armés, Université Libre de Bruxelles, colloque des 28, 29 et 30 janvier 1970*, Brussels, 1976, p. 217; H.-H. Jescheck, "War Crimes", *op. cit.*, pp. 296-297; "Incidences des dispositions pénales...", *op. cit.*; M. Bothe, "The Role of National Law in the Implementation of International Humanitarian Law", in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 301; J. Verhaegen, "Les nouveaux horizons...", *op. cit.*, pp. 32-33.

⁴ The general obligation to take all measures necessary for the execution of the Conventions and the Protocol is repeated in Art. 80 of the Protocol which is supplemented by Art. 84; reference should be made to commentary Art. 80, *supra*, p. 930, and in particular note 2 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

- 3401 Thus the Conventions make a distinction between grave breaches and other breaches: any conduct⁵ contrary to their provisions constitutes a breach; as for grave breaches, these are listed and individually defined.
- 3402 The Contracting Parties are obliged to “suppress” conduct contrary to their provisions other than grave breaches. The term “suppress” (in French: *faire cesser*, i.e., put an end to...) should be understood in a broad sense: literally of course this means putting an end to such conduct; depending on its gravity and the circumstances,⁶ such conduct can and should lead to administrative, disciplinary or even penal sanctions – in accordance with the general principle that every punishment should be proportional to the severity of the breach.⁷
- 3403 Grave breaches have two special aspects. One is the duty of the Contracting Parties to take any legislative measure necessary to establish adequate penal sanctions to be imposed on persons who have committed, or have ordered to be committed, any such breaches. The other is that such breaches are subject to universal jurisdiction. Each Contracting Party⁸ must search for persons alleged to have committed, or to have ordered to be committed, any such grave breach. In accordance with the principle *aut dedere aut judicare*⁹ it must either bring such persons regardless of their nationality, before its own courts, or, if it prefers, and in accordance with the provisions of its own legislation, it must hand them over for trial to another Contracting Party interested in prosecuting them, provided it has made out a *prima facie* case against them. Regardless of the rules contained in criminal law or the law relating to extradition of each Contracting Party, universal jurisdiction provides an alternative which should not leave any loophole.¹⁰
- 3404 The accused enjoy procedural guarantees and free defence which will ensure them a fair trial and which are at least equivalent to those laid down in Articles 105 ff of the Third Convention; they are entitled, in particular: to assume their defence, to be assisted by a qualified defence lawyer, to intervention by the

⁵ In fact the Conventions use the term “act”, but taking into account the clarification given on this point by Article 86 of the Protocol, this should be understood to mean conduct, as it also covers failure to act (on these concepts, cf. commentary Art. 86, *infra*, p. 1005).

⁶ On this subject, cf. commentary Art. 89 (considerations regarding the expression “serious violations”), *infra*, p. 1033.

⁷ Cf., for example, *Commentary III*, pp. 622 and 624-625 (Art. 129, paras. 1 and 3).

⁸ On the scope of the expression “the High Contracting Parties”, cf. commentary Preamble, *supra*, p. 25. Thus this also covers neutral States or States not Parties to the conflict (on these concepts, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61); in this sense, cf. L. Oppenheim, *op. cit.*, pp. 588-589 (para. 257c), note 4); H.-H. Jescheck, “War Crimes”, *op. cit.*, p. 297; for the opposite view: B.V.A. Röling, “Aspects of the Criminal Responsibility...”, *op. cit.*, p. 202.

⁹ I.e., either hand over or bring to trial; the alternative expression is: *aut dedere aut punire* (either hand over or punish).

¹⁰ The Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties (*Commentary III*, p. 624 (Art. 129, para. 2)); in the same sense: B.V.A. Röling, “Aspects of the Criminal Responsibility...”, *op. cit.*, pp. 200-201; against: G.I.A.D. Draper, “The Implementation ...”, *op. cit.*, pp. 38, 41-42 and “War...”, *op. cit.*, p. 325; for a more balanced view: W.A. Solf and E.R. Cummings, *op. cit.*, p. 238 and note 146, consider that Article 102 of the Third Convention rules out the practice of *ad hoc* tribunals such as those created after the Second World War.

Protecting Power and to appeal against any sentence with a view to quashing or revising it or to the reopening of the trial.

Grave breaches as defined by the Conventions

3405 The following are acts which constitute grave breaches of the Conventions (respectively Arts. 50/51/130/147):¹¹

- wilful killing;
- torture or inhuman treatment, including biological experiments;
- wilfully causing great suffering or serious injury to body or health;
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a protected person under the Fourth Convention to serve in the forces of a hostile Power;
- depriving a prisoner of war or a protected person under the Fourth Convention of the rights of fair and regular trial prescribed in the Conventions;
- taking of hostages;
- unlawful confinement of protected persons under the Fourth Convention;
- unlawful deportation or transfer of protected persons under the Fourth Convention.

3406 In order to constitute grave breaches such acts must be committed against persons or property protected by the Conventions. Protected persons are:

- the wounded and sick, and members of medical and religious personnel (First Convention);
- the wounded, sick and shipwrecked, religious, medical and nursing personnel of hospital ships and their crew, medical and religious personnel of other ships (Second Convention);
- prisoners of war (Third Convention);
- civilians who, in case of conflict or occupation, find themselves in the hands of a Party to the conflict, or of an Occupying Power, of which they are not nationals¹² (Fourth Convention).

¹¹ This list, like that taken from Art. 85, paras. 2-4, of the Protocol, is not illustrative but exhaustive. This means that only the conduct included in the list is subject to universal jurisdiction under the Conventions and the Protocol. It does not mean that other breaches cannot also be subject to universal jurisdiction by reason of customary or treaty law (for examples, *cf.* W.A. Solf and E.R. Cummings, *op. cit.*, p. 217 and note 63, and B.V.A. Röling, “Aspects of the Criminal Responsibility...”, *op. cit.*, p. 212). Nor does it prevent Contracting Parties from providing in their national legislation for the penal repression of yet other breaches; those, however, would only be punishable if committed by members of their own armed forces (*O.R.* VI, p. 292, CDDH/SR.44, para. 76; M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 515, para. 2.10). See also commentary Art. 89, *infra*, pp. 1033-1034.

¹² Including nationals of neutral States or co-belligerent States under the conditions set out in Art. 4, para. 2, of the Fourth Convention. On the meaning of the word “neutral” in the Conventions, *cf.* commentary Art. 2, sub-para. (c), of the Protocol, *supra*, p. 61.

3407 Protected objects are:

- hospitals, ambulances, medical equipment and vehicles (First Convention);
- hospital ships, coastal rescue craft and coastal medical installations (Second Convention);
- civilian hospitals and their equipment and in occupied territory movable or immovable property (Fourth Convention).

New elements and clarifications introduced by the Protocol

3408 These may be summarized as follows:

- the system of repression of the Conventions is supplemented, or clarified on certain points, by Articles 86-91 of the Protocol;
- the system of repression of the Conventions, as supplemented by the Protocol, applies to breaches of the Protocol (Article 85 – *Repression of breaches of this Protocol*, paragraph 1);
- acts described as grave breaches in the Conventions are grave breaches of the Protocol if they are committed against new categories of persons and objects protected under the Protocol (Article 85 – *Repression of breaches of this Protocol*, paragraph 2);
- the list of grave breaches is supplemented (Article 11 – *Protection of persons*, paragraph 4, and Article 85 – *Repression of breaches of this Protocol*, paragraphs 3 and 4);
- judicial guarantees are set out in detail and the list is enlarged (Article 75 – *Fundamental guarantees*, paragraph 4);
- grave breaches of the Conventions and the Protocol are qualified as war crimes (Article 85 – *Repression of breaches of this Protocol*, paragraph 5; Article 75 – *Fundamental guarantees*, paragraph 7); this does not, however, affect the application of these instruments.

International criminal law

3409 On the one hand, penal provisions of international humanitarian law constitute only part of international humanitarian law; on the other hand, they constitute only part of international penal law applicable in case of armed conflict. Below we will first refer to the relevant treaties, other instruments and documents, and thereafter to some aspects of repression regarding which those materials give some enlightenment.

a) Treaties, instruments and documents

- *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, establishing an International Military Tribunal*, concluded

in London on 8 August 1945 between France, the United Kingdom, the United States, and the USSR;¹³

- *Charter of the International Military Tribunal* (Nuremberg), annexed to the above Agreement;
- *Charter of the International Military Tribunal for the Trial of Major War Criminals in the Far East* (Tokyo), 19 January 1946, which contains principles similar to those of the above-mentioned Charter;¹⁴
- *Convention on the Prevention and Punishment of the Crime of Genocide* of 9 December 1948¹⁵
- *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*: in Resolutions 95 (I) of 11 December 1946 and 177 (II) of 21 November 1947 the United Nations General Assembly affirmed the Principles of International Law recognized by the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, and requested the International Law Commission to formulate these principles; this was to be done within or outside the context of a *draft code of offences against the peace and the security of mankind*, which the ILC was also requested to prepare. The formulation of the Principles and the first Draft Code were submitted to the General Assembly in 1950 and 1951 respectively;¹⁶
- *Convention for the Protection of Cultural Property in the Event of Armed Conflict* of 14 May 1954;¹⁷
- *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* of 26 November 1968;¹⁸
- *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* of 3 December 1973;¹⁹
- in addition, mention should be made of the Convention against the taking of hostages and the one on torture, concluded under the auspices of the United

¹³ Under its Article 5, 19 States subsequently became Parties to that agreement. For a list of these States, cf. International Law Commission, *The Charter...*, *op. cit.*, p. 4; L. Oppenheim, *op. cit.*, pp. 581-582 (para. 257 and note 3); D. Schindler and J. Toman, *op. cit.*, p. 831.

¹⁴ This similarity between the two Charters was noted, for example, in the second preambular paragraph of Resolution 95 (I) of the United Nations General Assembly.

¹⁵ Resolution 260 A (III) of the United Nations General Assembly. As of 31 December 1984 95 States were Parties to the Convention.

¹⁶ The whole question was subsequently deferred pending the adoption of a definition of aggression, which was given in 1974 (cf. commentary Preamble, *supra*, p. 28). The examination was taken up again by the General Assembly in 1978 and by the International Law Commission in 1982. The latest stage of developments on this question appears in United Nations, *Report of the ILC on the work of its 37th session*, *op. cit.*, paras. 11-37; the 1950 formulation of the Nuremberg Principles is contained in paragraph 45 and the 1954 version of the Draft Code in paragraph 18.

¹⁷ The sanctions are prescribed in Article 28; on this Convention in general, cf. commentary Art. 53, *supra*, pp. 641-643.

¹⁸ Resolution 2391 (XXIII) of the United Nations General Assembly; as of 31 December 1984 28 States were Parties to this Convention. There is also a European Convention on Non-applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, adopted by the Council of Europe on 25 January 1974; the Convention was not yet in force as of 31 December 1984.

¹⁹ These principles are included in Resolution 3074 (XXVIII) of the United Nations General Assembly.

Nations, as well as the draft convention on terrorism which is being considered by the United Nations;²⁰

- finally, questions such as mutual assistance in judicial matters and extradition are also dealt with in treaties concluded in the context of regional organizations.

b) *Elements contained in the above-mentioned materials*

Relation to humanitarian law

- 3410** Several of the instruments mentioned deal with breaches of humanitarian law, either in a general and descriptive way, or in a concrete and specific way. The Nuremberg Charter, the 1950 version of the Nuremberg Principles and the Draft Code (1954 version) all apply to violations of the laws and customs of war (the first two, with examples). The Convention on statutory limitations explicitly mentions “grave breaches” of the Geneva Conventions.

Penal responsibility

- 3411** Humanitarian law provides that those who have committed a grave breach and those who have ordered a grave breach to be committed must be punished.²¹ Thus the principal (offenders) as well as the secondary parties (joint offenders) are liable to punishment, i.e., those who have personally performed acts (including failure to act), which includes those who did abet or organize the crime.²²
- 3412** It should be recalled that accessory accomplices are also punishable, i.e., anyone who has not taken part as a direct or principal actor in materially committing the breach, but who has helped the offender or joint offenders in preparing or perpetrating the breach and who has incidentally co-operated.²³
- 3413** As formulated by the International Law Commission in 1950, the Nuremberg Principles lay down the responsibility of any persons committing war crimes and any accomplices, all of whom are considered guilty of crimes under international

²⁰ International Convention against the Taking of Hostages of 17 December 1979. As of 31 December 1984, 24 States were Parties to that Convention. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. Three Conventions relating to the security of civil aviation were concluded within the International Civil Aviation Organization. All three are in force and also contain provisions on repression. The Conventions are the Tokyo Convention (1963), the Hague Convention (1970) and the Montreal Convention (1971).

²¹ A proposed amendment to Article 85 of the Protocol had explicitly covered: “(a) complicity in grave breaches, (b) attempt to commit grave breaches, (c) direct incitement or conspiracy to commit grave breaches – if they are committed” (*O.R.* III, p. 320, CDDH/I/304). This proposal was introduced by its sponsor and referred without discussion to the relevant Working Group and Sub-Group; it was not included in the drafts drawn up by these two groups (*cf.* *O.R.* IX, p. 57, CDDH/I/SR.46, para. 9; *O.R.* X, pp. 165-175, CDDH/I/GT/102/Rev.1; pp. 159-160, CDDH/I/324, paras. 1-7).

²² G. Stefani, G. Levasseur, B. Boulloc, *Droit pénal général*, 11th ed., Paris, 1980, pp. 242-245 (paras. 245-249). J.C. Smith, B. Hogan, *Criminal Law*, London, 1983, pp. 118-121.

²³ G. Stefani, G. Levasseur, B. Boulloc, *op. cit.*, pp. 250-251 (para. 254).

law (Principles I, VI and VII).²⁴ The Convention on genocide covers, apart from those who have committed the crime of genocide, also those guilty of conspiracy to commit genocide,²⁵ those guilty of direct and public incitement to commit that crime, and those who are guilty of complicity (Article III). The Convention on statutory limitations covers the same persons in similar terms, as well as representatives of the State who tolerated the commission of the defined crimes (Article II).²⁶

Attempt

- 3414 Humanitarian law does not specify whether the attempt of a grave breach is also punishable, i.e., when the commission of the act in question has begun but has been suspended or has failed to have effect as a result of circumstances outside the control of the person who had begun committing the act.²⁷
- 3415 The Nuremberg Principles do not refer to it in the formulation of 1950.²⁸ The Convention on genocide provides that the attempt is also punishable (Article III). The Convention on statutory limitations applies only to crimes of which the material constitutive elements (i.e., the results) have been realized, except if there was conspiracy: no statutory limitation will apply to conspiracy to commit any of the defined crimes “irrespective of the degree of completion” of the crime (Article II).
- 3416 At the present stage of development of the law we find that under the relevant treaties the attempt to commit a grave breach or a similar crime is not always subject either to universal jurisdiction or to penal suppression. However, the attempt will be subject to penal or disciplinary sanctions under national legislation whenever this is felt to be desirable.

Mutual assistance in criminal matters and extradition

- 3417 These questions will be treated in relation to Article 88 (*Mutual assistance in criminal matters*).²⁹

²⁴ Under the 1954 version of the Draft Code the person who commits the defined crimes is punishable, but also those guilty of conspiracy, direct incitement and complicity (Art. 2, para. 13). The further examination of that article has not yet been taken up by the International Law Commission (*cf.* United Nations, *Report of the ILC on the work of its 37th session*, *op. cit.*, paras. 31, 35, 43-51 and 101). On the concept of conspiracy, *cf.* the following note.

²⁵ The French text uses the words “participeraient à une entente”, which corresponds to the English “conspire”. The concept of *conspiracy* is based on Common Law; this crime is characterized by two constitutive elements: agreement and a common plan, and one or other of these elements or both must be unlawful (*cf.* C. Lombois, *op. cit.*, p. 104 (para. 98) and pp. 113-114 (note 98)). The concept of a common plan or conspiracy (“plan concerté” or “complot” in the French text) applies for all crimes defined in the Charter of the Nuremberg International Military Tribunal (Art. 6); it only applies to crimes against peace in the 1950 formulation of the Principles (Principle VI); it applies for all crimes defined in the Draft Code of 1954 (the above-mentioned Art. 2, para. 13, regarding which, *cf.* remark *supra*, note 24, second sentence).

²⁶ On this aspect, *cf.* Art. 86 of the Protocol.

²⁷ G. Stefani, G. Levasseur, B. Boulloc, *op. cit.*, p. 200 (para. 194). See also *supra*, note 21.

²⁸ The Draft Code of 1954 does include the attempt in the above-mentioned Article 2, paragraph 13, but the remark made *supra*, note 24, second sentence, also applies on this point.

²⁹ See *infra*, p. 1025.

Statutory limitation

- 3418** Humanitarian law does not specify whether the prosecution of persons suspected of having committed grave breaches and whether the execution of sentences pronounced on them can be frustrated by provisions of national law relating to statutory limitation.³⁰
- 3419** Since the end of the Second World War many States and writers have considered that neither the prosecution nor the punishment of war crimes and crimes against humanity can be precluded by lapse of time; in any case many of them hold the view that the statutory limitation of such crimes cannot be invoked because international law, which punishes such crimes, does not mention statutory limitation, which is only an exception or derogation from the ordinary rules of law.³¹
- 3420** National legislation with regard to statutory limitation varies from country to country. Some do not have it at all, others apply it to all crimes, others still exempt war crimes and crimes against humanity from the rules of statutory limitation, or only exempt one of these categories.
- 3421** The limited number of Parties to the United Nations Convention on the Non-Applicability of Statutory Limitations³² and the fact that the European Convention on the same subject is not yet in force, should not be seen in too negative a light. In fact, many of the countries which are not Parties to these conventions do not have statutory limitation or have restricted it in case of war crimes and crimes against humanity.³³
- 3422** We may conclude that there is a general, though not universal recognition of the non-applicability of statutory limitations to such crimes and that the scope of the recognition varies, depending on the treaty or national legislation considered.³⁴

³⁰ A period of limitation for crimes is the preclusion of penal proceedings by reason of lapse of time; the period varies depending on the offence committed. A period of limitation applicable to the penalty is the preclusion of the execution of sentence if it has not started within a certain period after the date of the sentence, or if it has been interrupted for a certain period (*cf.* G. Stefani, G. Levasseur, B. Bouloc, *op. cit.*, pp. 112 (para. 96), 597-599 (para. 687)).

³¹ UN Doc. E/CN.4/906 referred to above note 2, para. 140. On the question of the non-applicability of statutory limitation to war crimes and crimes against humanity, reference may be made to this document as a whole; it reflects in detail the views of States and the writings on this subject.

³² It should be noted that in its Resolution XII the XXIst International Conference of the Red Cross (Istanbul, 1969) requested "the Governments of all States to accede to this Convention which is now inseparable from the system designed to safeguard human rights".

³³ This is true even though, as one writer recently put it, the difference between the various solutions adopted is enormous (G. van den Wijngaert in "Incidences...", *op. cit.*, p. 456).

³⁴ The European Convention is more restrictive than the United Nations Convention, as it applies to violations of the laws and customs of war, including grave breaches of the Geneva Conventions, only "when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences" (Art. 1, para. 2 *in fine*).

Reprisals

- 3423** Contrary to the wishes of a number of the delegations at the Diplomatic Conference, the Protocol does not contain a general provision on reprisals.
- 3424** Two competing proposals were submitted to this end: on the one hand, a prohibition of all reprisals against persons and objects protected under the Conventions and the Protocol; on the other hand, a prohibition subject to exceptions depending on conditions and methods. The simultaneous withdrawal of these two contradictory proposals at an advanced stage in the Conference confirmed the choice made in the draft, namely a series of separate prohibitions in various different articles.³⁵
- 3425** In order to better understand the points of view which emerged at the Conference and the solution which was adopted, it is useful to give a brief historical summary.³⁶

Definition

- 3426** Reprisals are stern measures taken by one State against another for the purpose of putting an end to breaches of the law of which it is the victim or to obtain reparation for them. Although such measures are in principle against the law, they are considered lawful by those who take them in the particular circumstances in which they are taken, i.e., in response to a breach committed by the adversary.
- 3427** In this particular context we do not intend to deal with reprisals in general, but only in the context of armed conflict, i.e., in *jus in bello*. In the law of armed conflicts, reprisals exercised by the belligerents can be defined as compulsory measures, derogating from the ordinary rules of such law, taken by a belligerent following unlawful acts to its detriment committed by another belligerent and which intend to compel the latter, by injuring it, to observe the law.³⁷
- 3428** Reprisals have constituted the most important means of coercion available to States for a long time, particularly in the conduct of hostilities.
- 3429** They should not be confused with measures of retortion, which are also stern measures taken in response to another State's actions and designed to put an end to them, whether or not these actions were lawful, but with the difference that the measures used remain in conformity with the law.
- 3430** A distinction should also be made between reprisals and straightforward reciprocity, which implies identical conduct to that of the adversary, but without necessarily the concept of punishment in response to a violation.³⁸

³⁵ Art. 20; Art. 51, para. 6; Art. 52, para. 1; Art. 53, sub-para. (c); Art. 54, para. 4; Art. 55, para. 2; Art. 56, para. 4.

³⁶ For a list of references to the CDDH on a possible general provision, *cf.* the references *ad* Art. 89, *infra*, p. 1031.

³⁷ CE/2b, p. 49; definition based on one given in the first article of a resolution passed by the Institute of International Law entitled "Régime des représailles en temps de paix" (system of reprisals in time of peace) (*Annuaire IDI*, 1934, Vol. II, p. 708).

³⁸ On the inadmissibility of the principle of reciprocity in applying the Conventions and the Protocol, *cf.* commentary Art. 1, para. 1, *supra*, p. 37-38.

- 3431** Finally, a distinction should be made between reprisals and self-defence. The main difference between them is that in case of self-defence force is used to directly rebut an attack or counter some other form of prejudicial conduct, while reprisals are designed to force the adversary to change its conduct.

*The law up to 1929*³⁹

- 3432** Various attempts to deal with reprisals in the context of the international law of armed conflict had been undertaken without ever reaching the stage of adopting treaty rules. Mention should be made of the draft submitted by Russia at the Brussels Conference of 1874,⁴⁰ and the Oxford Manual adopted by the Institute of International Law in 1880.⁴¹ The Peace Conferences held in The Hague in 1899 and 1907, which adopted the two successive versions of the Convention Respecting the Laws and Customs of War on Land, did not go directly into the question of reprisals nor did they adopt any provision relating to this matter.⁴²
- 3433** However, the idea persisted that reprisals should be prohibited, or at least that they should be subject to rules when it proved impossible to renounce them. In fact measures of reprisal are contrary to the principle that no one may be punished for an act that he has not personally committed; they constitute an inadequate means of restoring respect for the law, particularly in view of the counter-reprisals which they may provoke, and all this is likely to lead to a general escalation of the conflict.
- 3434** During the First World War, reprisals greatly worsened the fate of victims, and in 1916, in a notable appeal, the ICRC put forward the idea of prohibiting them totally against prisoners of war.
- 3435** Subsequently the Diplomatic Conference of 1929 supported the total prohibition of reprisals against prisoners of war. This constituted a considerable step forward in the development of humanitarian law.

The 1949 Conventions

- 3436** In 1949, the prohibition adopted in 1929 was extended to cover reprisals against all categories of persons and objects protected under the four Conventions.⁴³
- 3437** From that time international law established the prohibition of reprisals against any military personnel or civilians protected under the Geneva Conventions; rights conferred by these instruments could no longer be annulled or diminished

³⁹ For a detailed historical background, cf. F. Kalshoven, *Belligerent Reprisals*, *op. cit.*

⁴⁰ Excerpts of texts and discussion, *ibid.*, pp. 46-51.

⁴¹ Relevant materials and discussion, *ibid.*, pp. 51-55. The Oxford Manual of 1880 stated: "In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy." In addition, "they must conform in all cases to the laws of humanity and morality".

⁴² F. Kalshoven, *Belligerent Reprisals*, *op. cit.*, pp. 56-66.

⁴³ Cf. respectively their Articles 46/47/13, para. 3/33, para. 3; for the list of protected persons and objects, cf. *supra*, pp. 976-977.

as a result of breaches of which the protected persons were innocent whatever the original breach may have been. That the Conventions were able to prohibit reprisals was due to the fact that they provided other means of ensuring respect for the law, such as supervision and sanctions.⁴⁴

3438 It should be noted at this point that the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict prohibits any measures of reprisal against cultural property.

3439 However, the question was only resolved within the area indicated above. From the humanitarian point of view the crucial problem to be dealt with was the prohibition of reprisals against the civilian population in the conduct of hostilities.

The Conference of Government Experts (1971-1972)

3440 On the basis of documentation from the ICRC on this subject,⁴⁵ the *first session* of the Conference was divided into two tendencies.

3441 For some, reprisals should no longer be considered as a legitimate means of exacting the application of the law; as reprisals were among the most barbarous methods of the traditional laws of war, they should henceforth be deemed abolished, or at least be made subject to far-reaching restrictions to be defined in as precise a way as possible.

3442 For others reprisals undertaken by belligerents were still part of the law of armed conflict and represented a reasonably effective method in the conduct of hostilities.

3443 For its part the ICRC considered that the restrictions on reprisals imposed by the requirements of humanity in the conduct of hostilities should be forcefully reaffirmed. In this connection it mentioned the three principles of subsidiarity, proportionality and humanity.

3444 Finally, it was recalled that Resolution 2675 (XXV) of the United Nations General Assembly entitled “Basic Principles for the Protection of Civilian Populations in Armed Conflicts” confirms the prohibition of reprisals against the civilian population.⁴⁶

3445 The proposals submitted by the ICRC to the *second session* of the Conference included provisions prohibiting attacks directed by way of reprisals against the civilian population, civilians or objects indispensable to the survival of the civilian population. Another article imposed in particular minimum conditions that would apply to reprisals when a belligerent believed that it had to resort to reprisals in a field where they are not prohibited by the law in force.⁴⁷

⁴⁴ *Commentary IV*, p. 228 (Art. 33, para. 3).

⁴⁵ *CE/2b*, pp. 49-62.

⁴⁶ *CE 1971, Report*, p. 111, paras. 573-577; for the text of Resolution 2675 (XXV), cf. introduction to Part IV, Section I, *supra*, p. 588, note 17.

⁴⁷ For details on these proposals, cf. *CE 1972, Report*, Vol. II, pp. 7 and 12 (drafts Arts. 45, para. 4; 48, para. 1; 74).

- 3446** The views expressed were as divergent as during the first session. Some experts considered any new provision as unnecessary as reprisals were already prohibited. Others were in favour of provisions prohibiting reprisals against civilians and civilian objects and rules to which reprisals taken in the conduct of hostilities would be subject. Others still considered that reprisals should be made subject to general rules.⁴⁸

*The Diplomatic Conference*⁴⁹

- 3447** During the Diplomatic Conference the same views emerged as during the Conference of Government Experts, and its work leaves a number of questions unanswered.
- 3448** Taking into account the opinions expressed by government experts, the ICRC had included, in its draft, provisions prohibiting reprisals against the wounded, sick and shipwrecked, the civilian population, civilians and objects indispensable to the survival of the civilian population. Contrary to the 1972 draft, it had not included provisions reaffirming certain rules regulating and restricting the right of Parties to the conflict to use reprisals not yet prohibited by the law in force in the conduct of hostilities: the ICRC had submitted to the view of the majority of experts.⁵⁰
- 3449** Committees II and III adopted the prohibitions of reprisals in the draft, as well as new prohibitions, each in the Parts with which they were entrusted.⁵¹ After some hesitation the General Committee of the Conference assigned Committee I with the task of examining the problem of reprisals as a whole, taking into account the work already carried out by Committees II and III.⁵²
- 3450** It proved impossible to reconcile the different points of view. Some again confirmed that the use of reprisals, subject to certain exceptions, conditions and means, or, if possible, only the threat of such measures, were and should remain available as a response in the case of serious, manifest and deliberate violations: to deny this would be to benefit the Party violating the law to the detriment of

⁴⁸ *Ibid.*, Vol. I, p. 149, para. 3.161; p. 151, paras. 3.177-3.178; pp. 190-191, paras. 4.134-4.139 and 4.141.

⁴⁹ For the Official Records of the CDDH, *cf. supra*, note 36. Articles which appeared after the CDDH, describing in detail the debates and their results, include S.E. Nahlik, "Le problème des représailles...", *op. cit.*; *id.*, "Belligerent Reprisals as seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva 1974-1977", 42 *Law and Contemporary Problems* 2, 1978, p. 36; F. Kalshoven, "The Belligerent Reprisals in the Light of the 1977 Geneva Protocol", in ICRC, *European Seminar on Humanitarian Law (Jagellonean University, Kraków, 1979)* Geneva, 1980, p. 30; G.H. Aldrich, "New Life for the Laws of War", 75 *AJIL* 4, 1981, p. 764, on pp. 781-782.

⁵⁰ 1973 draft, Art. 20; Art. 46, para 4; Arts. 48 and 66; *Commentary Drafts*, pp. 29, 59, 62; 84-85 and 90 (*ad* these articles and Part V, Section I).

⁵¹ *Cf.* the articles mentioned *supra*, note 35, and the commentary thereon for their historical background and scope.

⁵² *O.R.* V, p. 375, CDDH/SR.31, paras. 20-23.

that respecting it. It was better to discuss a proposal on specific rules than to leave reprisals to the uncertain rules of customary law under which they are allowed.⁵³

3451 Others considered that reprisals were already, or should be, prohibited in general, though it was not always clear from the statements whether this concerned reprisals against protected persons and objects – to be defined – or against all persons and objects; they did not consider reprisals to be an effective means of restoring respect for the law, but a mechanism which could serve as a pretext for the worst abuses, no matter what rules might be adopted.⁵⁴

3452 Finally, some considered that it was not possible to introduce in humanitarian law a legal sanction of the laws of war which had always been considered to be incompatible with the principle of humanity; others still thought that the Conference was only competent to deal with reprisals exercised exclusively against protected persons or objects.⁵⁵

The law which has resulted from the Diplomatic Conference

3453 As the conflicting proposals were withdrawn in a spirit of compromise because of the impossibility of reaching an agreement, the legal situation resulting from the adoption of the Protocol now remains to be determined.

3454 – Reprisals against persons and objects protected by the Conventions are prohibited.⁵⁶

3455 – Reprisals against the persons and objects covered by the following provisions of the Protocol are prohibited:

- Article 20 (*Prohibition of reprisals*) (persons and objects protected by Part II – *Wounded, sick and shipwrecked*);
- Article 51 (*Protection of the civilian population*), paragraph 6;
- Article 52 (*General protection of civilian objects*), paragraph 1;
- Article 53 (*Protection of cultural objects and places of worship*), subparagraph (c);
- Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 4;
- Article 55 (*Protection of the natural environment*), paragraph 2;
- Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 4.

3456 – Some expressed the fear that by adopting provisions prohibiting reprisals in specific cases, some persons and objects might be overlooked.⁵⁷ In fact, apart

⁵³ Cf., e.g., O.R. IX, p. 59, CDDH/I/SR.46, paras. 21 and 24; pp. 64-65, paras. 46 and 49-51; p. 66, para. 54; p. 74, CDDH/I/SR.47, para. 38; pp. 77-78, paras. 48-49 and 51.

⁵⁴ Cf., e.g., *ibid.*, p. 60, CDDH/I/SR.46, para. 28; pp. 61-62, paras. 36 and 39; p. 63, paras. 42-44; pp. 70-71, CDDH/I/SR.47, paras. 20-24; pp. 74-76, paras. 39-40 and 43-46.

⁵⁵ Cf. *ibid.*, p. 78, CDDH/I/SR.47, para. 52; p. 80, para. 58.

⁵⁶ The same applies for property protected under the above-mentioned 1954 Hague Convention; for the list of persons and objects protected under the Conventions, cf. *supra*, pp. 976-977.

⁵⁷ Apart from those who had considered reprisals prohibited in all circumstances. cf. explicit statement O.R. IX, p. 452, CDDH/I/SR.73, Annex (Poland).

from these prohibitions, the Conventions and the Protocol incontestably prohibit any reprisals against any person who is not a combatant in the sense of Article 43 (*Armed forces*),⁵⁸ and against any object which is not a military objective.

3457 – There was one area in which the Conference did not wish to get involved and for which it did not want to lay down explicit rules, namely, the conduct of hostilities between combatants. Yet, the discussions about this have shown agreement on the following minimum restrictions, inspired by customary law and formulated in various ways during the *travaux préparatoires*:⁵⁹

- *subsidiarity*: reprisals may only be taken in the case of imperative necessity when all other means have proved ineffective and after a specific, formal and prior warning has been given that such measures would be taken if the breach did not cease or if it recommenced, and the warning remained ineffective; such a decision can only be taken by the highest authorities of the Party to the conflict; the reprisals will end as soon as they have achieved their purpose, i.e., the cessation of the breach which provoked them;
- *proportionality*: in deciding upon the way in which reprisals will be applied and upon their extent the utmost restraint must be exercised consistent with the purpose they are to serve, namely, to lead the adversary to respect the law; the degree of severity of the reprisals shall in no case exceed that of the breach committed by the enemy;
- *humanity*: in all cases Parties to the conflict must respect the laws of humanity and the dictates of the public conscience.

3458 – Unlawful reprisals do not render lawful the recourse to counter-reprisals by the adversary consisting of measures which are, even as a reprisal, prohibited.

3459 – The prohibition of reprisals cannot be suspended because of material violation of treaties of humanitarian law. This might be derived directly from the definition of reprisals, the *raison d'être* of the specific above-mentioned prohibitions. Any doubt which might arise from Article 60 of the Vienna Convention of 29 May 1969⁶⁰ on the Law of Treaties, which provides for termination or suspension after a material breach of a treaty, is removed by the same article. Indeed this article states that its provisions are subject to specific treaty provisions applicable in the event of a breach (paragraph 4), in particular those relating to the protection of the human person in treaties of a humanitarian character, including provisions prohibiting reprisals (paragraph 5).

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⁵⁸ Or any other person participating directly in hostilities, for the duration of such participation.

⁵⁹ Opposition to the proposed article actually only came from those who did not consider the conditions to be sufficiently strict, or who would have preferred a complete prohibition of reprisals.

⁶⁰ Article 60 is entitled “Termination or suspension of the operation of a treaty as a consequence of its breach”.

Protocol I

Article 85 – Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.
2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.
3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
 - (a) making the civilian population or individual civilians the object of attack;
 - (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
 - (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii);
 - (d) making non-defended localities and demilitarized zones the object of attack;
 - (e) making a person the object of attack in the knowledge that he is *hors de combat*;
 - (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.
4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
 - (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
 - (c) practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
 - (d) making the clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
 - (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.
5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Documentary references

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CE/2b, pp. 35-49. *CRCE 1971, Report*, pp. 31-32. *CE 1971, Report*, p. 110, paras. 556-572. *CE 1972, Basic Texts*, p. 25 (Art. 75, para. 2). *CE 1972, Commentaries*, Part I, pp. 154-155 (Art. 75, para. 2). *CRCE 1972, Report*, p. 51 (Art. 75, para. 2). *CE 1972, Report*, vol. I, pp. 187-189, paras. 4.118-4.127 (supplementary Arts. 75 A and 75 B); vol. II, p. 114, CE/COM IV/27; p. 117, CE/COM IV/43, CE/COM IV/45-46; pp. 119-120, CE/COM IV/54, CE/COM IV/56, CE/COM IV/58-

59. *Commentary Drafts*, pp. 94-95 (Arts. 74-75). *XXIIInd Int. Conf. RC, Report*, pp. 20-21, paras. 65-67; pp. 50-68, DH/4/Corr.13; pp. 70-73, DH/4/Corr. 15-16.

Commentary

General remarks

- 3460 The draft of this article (Article 74) was modest: on the one hand, it made the provisions of the Conventions relating to the repression of breaches, supplemented by this Section, applicable to breaches of the Protocol; on the other hand, it designated any acts defined as grave breaches in the Conventions as grave breaches of the Protocol, if they were committed against the new categories of persons or objects protected under the Protocol. These two aims are the object of paragraphs 1 and 2 of the article adopted by the Conference.
- 3461 In this way the draft Protocol increased the number of situations in which already defined acts would become grave breaches; it only added one new grave breach to the existing list. In fact, a separate draft article (Article 75) covered the perfidious use of protective signs or signals, which the Conference decided to include as paragraph 3(f) of Article 85. The caution evident in these proposals was justified by the thought that the need to improve the effectiveness of the system laid down by the Conventions had priority.
- 3462 Even before introducing draft Article 74 in Committee, the ICRC deemed it useful, particularly in the light of special expert consultations, to submit a new proposal, also containing a list of grave breaches of the Protocol.¹
- 3463 When they had been introduced in Committee, the drafts of this article and of that relating to the perfidious use of protective signs and signals were studied successively, together with the majority of the amendments relating to them,² by Sub-Working Group A and by Working Group A of Committee I.
- 3464 The text drawn up by these two bodies was discussed and adopted, paragraph by paragraph and sub-paragraph by sub-paragraph in Committee, and then the article as a whole was adopted by consensus both in Committee I and in plenary.³
- 3465 In general the delegations which expressed views on the article as adopted considered that it represented an important step forward towards an improved application of humanitarian law. The text was not perfect, but it was a satisfactory compromise.
- 3466 Some regretted that certain breaches which were as grave as those listed in the article had not been included.⁴ Others regretted that the lack of precision of

¹ *O.R.* III, p. 318, CDDH/210/Annex 2, p. 2.

² *Ibid.*, pp. 317-322, 324-327.

³ Respectively: *O.R.* IX, p. 277, CDDH/I/SR.61, para. 50; *O.R.* VI, p. 291, CDDH/SR.44, para. 72.

⁴ For example, the use of means of combat as listed in the proposals CDDH/I/347 and Rev.1 and CDDH/418 (*O.R.* III, p. 322). On the exhaustive character of the list of grave breaches, cf. introduction to this Section, *supra*, p. 976, note 11.

certain rules would make their introduction in national legislation, as well as their application, difficult and possibly not very uniform.⁵

Paragraph 1

3467 The system of repression in the Conventions is not to be replaced, but reinforced and developed by this Section (Articles 85-91), so that it will in future apply to the repression of breaches of both the Protocol and the Conventions.⁶

Paragraph 2

3468 The qualification of grave breaches is extended to acts defined as such in the Conventions when they are committed against the following categories of persons and objects:⁷

- persons who have taken part in hostilities and have fallen into the power of an adverse Party within the meaning of Articles 44 (*Combatants and prisoners of war*) and 45 (*Protection of persons who have taken part in hostilities*): this definition is broader than that of prisoners of war in the Third Convention;
- refugees and stateless persons within the meaning of Article 73 (*Refugees and stateless persons*) (which makes them protected persons under the Fourth Convention);
- the wounded, sick and shipwrecked of the adverse Party: Article 8 (*Terminology*), sub-paragraphs (a) and (b) enlarges the corresponding categories as defined in the Conventions;
- medical or religious personnel, medical units and transports under the control of the adverse Party and protected by the Protocol: the same applies as for the wounded, sick and shipwrecked (*cf.* Article 8 – *Terminology*, sub-paragraphs (c), (d), (e) and (g)). The expression “under the control of the adverse Party” is justified by the fact that such persons and objects may come, for example, from a non-belligerent State, an aid society recognized and authorized by such a State or even an impartial international humanitarian organization which makes them available to a Party to the conflict.

3469 Several delegations would have preferred also to mention Article 75 (*Fundamental guarantees*), which applies to all persons “affected by a situation referred to in Article 1” in the power of a Party to the conflict who do not benefit

⁵ In general, we would refer, with regard to the drafting and scope of this article, to the following works quoted in the introduction to this Section (*supra*, p. 973, note 2): W.A. Solf and E.R. Cummings, *op. cit.*, pp. 221-242; M.C. Bassiouni, “Repression of Breaches...”, *op. cit.*, pp. 199-201; J. de Breucker, “La répression des infractions graves...”, *op. cit.*; E.J. Roucouas, *op. cit.*, pp. 65-133; B.V.A. Röling, “Aspects of the Criminal Responsibility...”, *op. cit.*, pp. 208-209; Ph. Bretton, “La mise en œuvre des Protocoles de Genève de 1977”, *op. cit.*, pp. 405-411.

⁶ On the system of the Conventions, supplemented by the Protocol, *cf.* introduction to this Section, *supra*, pp. 974-976.

⁷ For a more detailed description we refer to the commentary on the provisions mentioned.

from more favourable treatment under the Conventions or the Protocol. They abandoned this idea in a spirit of compromise in the face of opposition from those who were afraid of extending the concept of grave breaches – subject to universal jurisdiction – to breaches committed by a Party to the conflict against its own nationals.⁸

- 3470** One delegation pointed out that the reference to Article 45 (*Protection of persons who have taken part in hostilities*) only concerned persons whose status has not yet been established, but not those whose right to prisoner-of-war status has been rejected in the proper manner.⁹ On this point there is no doubt that, on the one hand the above-mentioned article “protects” those whose status has not yet been established, while on the other hand, those who have been granted prisoner-of-war status are no longer in need of this article; the question is more difficult for those envisaged by that delegation. First, there are those covered by the article concerned in the first sentence of paragraph 3: they are actually referred to rather than protected by that provision, as it merely refers to Article 75 (*Fundamental guarantees*), which is applicable anyway, but was not included in the paragraph under consideration here. As regards persons covered by the second sentence, they are or are not protected by the Fourth Convention in accordance with the provisions of its Article 4. If they are, they enjoy the protection offered by the penal provisions; if they are not, only Article 75 of the Protocol (*Fundamental guarantees*) applies, but subject to the limitations indicated above.

Paragraph 3

- 3471** The significance of the reminder in this paragraph of grave breaches defined in Article 11 (*Protection of persons*) will be explained below. Apart from this reminder, the paragraph deals with breaches related to the conduct of hostilities: hostile acts directed against protected persons or objects, or the effects of which exceed their legitimate objectives, and also the perfidious use of protective signs and signals. A grave breach belonging to the same category is defined in paragraph 4(b).
- 3472** This category is that governed by the body of law traditionally known as the “Hague law”, and it concerns qualified breaches of the provisions of Parts III and IV of the Protocol. Numerous fears were expressed that bringing this category under the system of repression of grave breaches would entail real danger: it would be much more difficult to define grave breaches “on the battlefield” and to try acts committed in the course of hostilities than to deal with acts committed

⁸ O.R. IX, p. 256, CDDH/I/SR.60, paras. 9-11; p. 283, CDDH/I/SR.61, para. 86. It should be noted that according to the commentary on that article, *supra*, pp. 866-870, other categories of persons may be protected by it. Finland's instrument of ratification, as a complement to a declaration on the categories of persons enjoying protection under Article 75, contains a declaration that “the provisions of Article 85 shall be interpreted to apply to nationals of neutral or other States not Parties to the conflict as they apply to those mentioned in paragraph 2”.

⁹ O.R. IX, p. 280, CDDH/I/SR.61, para. 68. In the same sense, J. de Breucker, *op. cit.*, p. 503; E.J. Roucouas, *op. cit.*, p. 93.

against persons or objects in the power of the enemy, as do the Geneva Conventions.¹⁰ However, the Conference considered that it was essential to include in this article rules corresponding to those of Parts III and IV: the differences between the traditional field of the Conventions and that of the Hague law should not entail insurmountable difficulties, as shown by various precedents.¹¹

Opening sentence

3473 In order to list all the grave breaches of the Protocol in this article, a reference is included here to the breach defined in Article 11 (*Protection of persons*), paragraph 4. That breach has its own constitutive elements, slightly different from those laid down in the opening sentence of this paragraph for the sub-paragraphs that it introduces.¹²

3474 Common constitutive elements applicable to all the sub-paragraphs of paragraph 3 are the following:¹³

- *wilfully*: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (“criminal intent” or “malice aforethought”); this encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences¹⁴ (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions);¹⁵

¹⁰ See *O.R. IX*, p. 19, CDDH/I/SR.43, para. 17; pp. 35-36, CDD/I/SR.44, paras. 40-48.

¹¹ *ibid.*, p. 21, CDDH/I/SR.43, paras. 24 and 26; p. 25, para. 47; p. 28, CDDH/I/SR.44, para. 9; p. 32, para. 31.

¹² Art. 11, para. 4, uses the phrase “seriously endangers” and not “causing [...] serious injury”; it should also be noted that, in contrast with this paragraph, it only covers breaches against persons *in the power* of a Party other than that to which they belong.

¹³ We use the noun or the verb “act” below for the sake of clarity, but in the light of Art. 86 this should be understood to mean “conduct”. That article deals with repression of failures to act when there is a duty to act.

¹⁴ On the various concepts which are not all defined identically by national law, *cf.* for example, G. Stefani, G. Levasseur, B. Boulloc, *op. cit.*, pp. 213-234 (paras. 211-239). As regards recklessness, see also *supra*, p. 159, note 15. On failure to act and on negligence, *cf.* also commentary Art. 86, *infra*, p. 1005.

¹⁵ It should be noted that Austria when it ratified the Protocol made a reservation with regard to Articles 85 and 86: “Pour juger toute décision prise par un commandant militaire, les articles 85 et 86 du Protocole I seront appliqués pour autant que les impératifs militaires, la possibilité raisonnable de les reconnaître et les informations effectivement disponibles au moment de la décision soient déterminants.” (“In order to judge any decision taken by military commanders, Articles 85 and 86 of Protocol I will be applied with military imperatives, the reasonable possibility of recognising them and information actually available at the time of the decision, being decisive.” (Translated by the ICRC)).

- *in violation of the relevant provision*: in each of the sub-paragraphs this element refers to specific provisions of Parts III and IV, which we will indicate below in relation to each sub-paragraph;¹⁶
- *causing death or serious injury to body or health*: the effect must be such that, even if it does not cause death, it will affect people in a long-lasting or crucial manner, either as regards their physical integrity or their physical and mental health.¹⁷

Sub-paragraph (a)

3475 According to Article 49 (*Definition of attacks and scope of application*), paragraph 1, the term “attacks” means “acts of violence against the adversary, whether in offence or defence”. As defined in Article 50 (*Definition of civilians and civilian population*), anyone who is not a combatant is a civilian (*cf.* the provisions referred to in that article); in case of doubt regarding the status of a person, that person is to be considered as a civilian. The prohibition on attacking the civilian population and civilians – i.e., isolated civilians – is explicitly laid down in Article 51 (*Protection of the civilian population*), paragraph 2.¹⁸ All precautions must be taken with a view to sparing civilians, both in planning and in carrying out an attack (*cf.* Article 57 – *Precautions in attack*).

3476 It is a grave breach under this sub-paragraph to make the civilian population or individual civilians, knowing their status, the object of attack when the attack is wilfully directed against them and when the consequences defined in the opening sentence follow.

Sub-paragraph (b)

3477 This sub-paragraph is based on the same provisions as the preceding sub-paragraph, and in addition on Article 52 (*General protection of civilian objects*), which defines and generally protects civilian objects. The attacks concerned here are not those directly aimed at the civilian population or individual civilians, but attacks affecting them incidentally; “indiscriminate attacks” are defined and prohibited by Article 51 (*Protection of the civilian population*), paragraphs 4 and 5.

3478 The criterion of proportionality used in the same article, paragraph 5(b), to describe an example of such attacks, is defined here with reference to Article 57 (*Precautions in attack*); it weighs up “the concrete and direct military advantage anticipated” (paragraph 2(a)(iii)) and the obligation of “avoiding, and in any

¹⁶ For further details we refer also to the commentary on the provisions concerned.

¹⁷ Causing serious injury to body or health of persons protected under the Conventions is already qualified as a grave breach; *cf.* also *supra*, note 12, and commentary Art. 11, para. 4, *supra*, p. 158.

¹⁸ According to paragraph 3 of that article, a civilian who participates directly in hostilities would not be protected during such participation.

event [...] minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects” (paragraph 2(a)(ii)).

- 3479** This sub-paragraph 3(b), like sub-paragraph 3(c), adds the words “in the knowledge” to the common constitutive elements set out in the opening sentence: therefore there is only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness.
- 3480** It should also be noted that damage to objects, which is dealt with only to a limited extent in Article 147 of the Fourth Convention, is only mentioned in relation to the state of mind of the person committing the breach. The actual consequences defined by the opening sentence of the paragraph as constitutive elements of a breach, are death or serious injury to body or health in excess of what would be justified under the principle of proportionality.
- 3481** A grave breach, according to this sub-paragraph, is an indiscriminate attack wilfully launched in the knowledge that its consequences will be excessive as described in this sub-paragraph, and which produces the effects described in the opening sentence to such an extent as to be in violation of the principle of proportionality.¹⁹

Sub-paragraph (c)

- 3482** In addition to the above-mentioned provisions, Article 56 (*Protection of works and installations containing dangerous force*), must be referred to here; it grants special protection to works and installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations.²⁰ Even if they constitute military objectives they must not be made the object of attack if such attack may cause the release of forces contained therein, and consequent severe losses among the civilian population.
- 3483** This special protection, which applies under the same conditions for military objectives located at or in the vicinity of such works, can only cease in strictly prescribed circumstances (paragraph 2). In that case the civilian population continues to enjoy the general protection to which it is entitled, including precautionary measures, and the attack must be conducted with special precautions (paragraph 3).²¹
- 3484** The expressions “in the knowledge” and “excessive”, as well as the reference to objects, have the same significance here as in sub-paragraph (b). Like sub-paragraph (b), this sub-paragraph represses attacks directed against military

¹⁹ On the principles which determine the lawfulness of incidental civilian loss, and in particular the principle of proportionality, see commentary on Art. 51, *supra*, pp. 625-626; introduction to this Section, *supra*, p. 976, note 11; commentary on Art. 89, *infra*, p. 1033 (on the meaning of the phrase “serious violations”); see also J. Verhaegen, “Une interprétation inacceptable du principe de proportionnalité”, XXI-1-2-3-4 *RDPM DG*, 1982, p. 329.

²⁰ The list in Article 56 is exhaustive.

²¹ Paragraph 6 of that article urges Contracting Parties and Parties to the conflict to conclude further agreements to provide additional protection for such objects. Paragraph 7, which refers to Article 16 of Annex I, lays down a special sign for such works and installations.

objectives, but with incidental effects on the civilian population which are incompatible with the principle of proportionality. Consequently we are concerned here either with attacks against works or installations which are themselves military objectives or with attacks against military objectives located at or in the vicinity of such works, whether or not the special protection has ceased.

3485 On the other hand, the principle of proportionality can not be invoked to justify incidental effects on the civilian population of an attack intentionally directed against a work or installation which does not constitute a military objective: such an attack would fall under sub-paragraph (a).

3486 Under this sub-paragraph, it is a grave breach to wilfully launch an attack against the works or installations concerned, if these constitute a military objective, or against a military objective located at or in the vicinity of such works or installations, in the knowledge that this will have the above-mentioned excessive consequences, if the attack produces the effects described in the opening sentence to such an extent as to be in violation of the principle of proportionality.²²

Sub-paragraph (d)

3487 Non-defended localities and demilitarized zones are defined in and governed by Articles 59 (*Non-defended localities*) and 60 (*Demilitarized zones*), respectively. We only recall that the former may be established by a unilateral declaration or by agreement, while the latter can only be established by an agreement between the Parties to the conflict.²³

3488 As long as it retains its status, a non-defended locality shall not be made the object of attack. As long as it retains its status, the Parties to the conflict cannot extend their military operations to a demilitarized zone if that is contrary to the provisions of the agreement by which it was established; however, the military operations which may be permitted by the agreement cannot in any case include attacks. If they lose their status pursuant to Article 59 (*Non-defended localities*) or 60 (*Demilitarized zones*), or pursuant to the agreements, the non-defended localities and demilitarized zones nevertheless continue to have the benefit of the other provisions of the Protocol and other relevant rules of international law (*cf.* paragraph 7 of both articles).

3489 This sub-paragraph deals with zones which enjoy a special status; if they lose it, the rules of Part IV, Section I, and those of this Section relating to the distinction between combatants and military objectives, on the one hand, and the civilian population and civilian objects on the other hand, continue to apply.

3490 Thus a grave breach as laid down in this sub-paragraph is an attack wilfully directed against a non-defended locality or demilitarized zone, if the attacker is aware of their status and if it produces the effects defined in the opening sentence.

²² The references contained in note 19 *supra* also apply to this sub-paragraph.

²³ The Party in control of a non-defended locality or demilitarized zone must mark it, as far as possible, by such signs as may be agreed upon with the other Party (Art. 59, para. 6; Art. 60, para. 5).

Sub-paragraph (e)

- 3491** Paragraph 1 of Article 41 (*Safeguard of an enemy hors de combat*) provides that “a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack”; paragraph 2 defines the concept “*hors de combat*”. There is a breach of this rule not only when the attacker knows, but also when, in the circumstances, he should know that the person he is attacking is *hors de combat*.
- 3492** On the other hand, the sub-paragraph under consideration here requires that the attacker should actually know that the person is *hors de combat*, for there to be a grave breach. The words “in the knowledge”, which exclude cases of negligence, are superfluous since the opening sentence lays down the criterion of intent, i.e., wilful act.²⁴ These words have a different meaning in sub-paragraphs (b) and (c), where they relate to knowledge of the material effects of the breach.
- 3493** Thus a grave breach within the meaning of this sub-paragraph is committed when someone wilfully attacks a person he knows to be *hors de combat*, causing his death or serious injury to his body or health.

Sub-paragraph (f)

- 3494** Articles 53 and 54 of the First Convention prohibit abuse of the red cross, red crescent and red lion and sun²⁵ emblems and require that such abuse should be prevented and repressed. Nevertheless, the Conventions did not qualify their perfidious use as a grave breach. This omission is henceforth rectified.
- 3495** The protective emblems and signs recognized by the Conventions and the Protocol are first of all those which they have established or provided themselves:
- red cross, red crescent (First Convention, Article 38; Protocol I, Annex I, Article 3 – *Shape and nature*);
 - oblique red bands on a white ground (Fourth Convention, Annex I, Article 6);
 - blue triangle on an orange ground (Protocol I, Article 66 – *Identification*, paragraph 4; Annex I, Article 15 – *International distinctive sign*);
 - three bright orange circles (Protocol I, Article 56 – *Protection of works and installations containing dangerous forces*, paragraph 7; Annex I, Article 16 – *International special sign*);
 - signs agreed upon between Parties to the conflict (Protocol I, Article 59 – *Non-defended localities*, paragraph 6; Article 60 – *Demilitarized zones*, paragraph 5).
- 3496** As Article 18 (*Identification*) places distinctive signals on the same footing as distinctive emblems as regards the repression of misuse, the distinctive signals laid down by the Protocol and used in accordance with the relevant provisions, should be added to this list (Article 18 – *Identification*, paragraph 5; Annex I,

²⁴ In the same sense, E.J. Roucounas, *op. cit.*, p. 107.

²⁵ On this latter emblem, *cf.* Editors' note, *supra*.

Article 6 – *Light signal*, Article 7 – *Radio signal*, Article 8 – *Electronic identification*).

- 3497 Next, Article 37 (*Prohibition of perfidy*) explicitly mentions the protected status of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict²⁶ (paragraph 1(d)).
- 3498 Finally, paragraph 1 of Article 38 (*Recognized emblems*) prohibits the improper use of any emblems, signs or signals provided for by the Conventions or the Protocol, or of other internationally recognized protective emblems, signs or signals, including the flag of truce and the protective emblem of cultural property.
- 3499 To summarize therefore, the perfidious use of emblems, signs or signals provided for by the Conventions or the Protocol, or of emblems, signs, signals or uniforms referred to in Articles 37 (*Prohibition of perfidy*) and 38 (*Recognized emblems*) of the Protocol, for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under this sub-paragraph if it leads to the results defined in the opening sentence.²⁷

Paragraph 4

- 3500 Paragraph 3 deals with grave breaches “on the battlefield”. Paragraph 4 defines a grave breach of this nature in its sub-paragraph (d); apart from this, it is concerned with acts prejudicial to the rights of persons in the power of the enemy, as is the case in the Conventions. Some of the breaches described, which incontestably involve the individual responsibility of those who have committed the acts, follow almost inevitably from policy decisions taken by a Party to the conflict, rather than from purely individual initiatives (sub-paragraphs (a), (b) and (c)).

Opening sentence

- 3501 In contrast with paragraph 3, this paragraph does not lay down particular consequences as constitutive elements which the grave breaches it defines have in common. The opening phrase only states that the breaches must be committed wilfully and in violation of the Conventions or the Protocol, as the case may be.

²⁶ On the expression “neutral and other States not Parties to the conflict”, cf. commentary Art. 2, sub-para. (c), *supra*, p. 61.

²⁷ However, cf. commentary Arts. 37 and 38, *supra*, pp. 439 and 459 respectively, for the case where the United Nations may be engaged in hostilities and its emblem is therefore no longer a protective emblem within the meaning of Article 37 and of this sub-paragraph.

Sub-paragraph (a)

- 3502** Article 49 of the Fourth Convention prohibits all forcible transfers, as well as deportations of protected persons from occupied territory (paragraph 1).²⁸ Only the security of the population of the occupied territory or imperative military reasons can justify total or partial evacuation of an occupied area; such evacuations may only take place within the bounds of the occupied territory, except when for material reasons this is impossible, and protected persons shall be transferred back to their homes as soon as hostilities in the area in question have ceased (paragraph 2). The Occupying Power may not deport or transfer parts of its own civilian population into the occupied territory (paragraph 6). The unlawful deportation or transfer of protected persons are among the grave breaches listed in Article 147.
- 3503** The part of the sub-paragraph dealing with the transfer or deportation of the population of the occupied territory is merely a repetition of Article 147 of the Fourth Convention, and Article 49 of that Convention, to which reference is made, continues to apply unchanged.
- 3504** Thus the new element in this sub-paragraph concerns the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies: this practice, which was a breach, is now a grave breach because of the possible consequences for the population of the territory concerned from a humanitarian point of view.

Sub-paragraph (b)

- 3505** Two articles of the Third Convention lay down an obligation to repatriate prisoners of war. First, Article 109: during hostilities the seriously wounded and seriously sick, unless it is against their will (*cf.* also Article 110, paragraph 1). Secondly, Article 118: all prisoners of war, without delay, after the cessation of active hostilities.²⁹
- 3506** As regards civilians, all protected persons under the Fourth Convention who find themselves in the territory of a Party to the conflict are entitled, in accordance with Article 35 of that Convention, to leave the territory at the outset of or during the conflict, unless their departure is contrary to the national interests of

²⁸ In fact, by using the word “nevertheless”, paragraph 2, which is dealt with later, clearly shows that paragraph 1 also prohibits forcible transfers within occupied territory. On the basis of *Commentary IV*, pp. 278-280 and 599 it may be concluded that such a forcible transfer was already a grave breach within the meaning of Article 147; W.A. Solf and E.R. Cummings, *op. cit.*, pp. 232-233, hold this view; E.J. Roucouas, *op. cit.*, p. 116, holds the opposite view.

²⁹ Subject, however, to Article 119, paragraph 5 (prisoners detained until the end of criminal proceedings or until the completion of punishment for an offence under criminal law). On the problems related to the application of Article 118 of the Third Convention, *cf. inter alia*, in addition to *Commentary III*, pp. 540-553, Ch. Shields-Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities*, Zurich, 1977; E.J. Roucouas, *op. cit.*, pp. 117-119 (and other works referred to there); W.A. Solf and E.R. Cummings, *op. cit.*, pp. 233-234 (and references there).

the State. Only reasons of that nature can justify a Party to the conflict retaining a protected person who wants to leave the territory and possibly placing him in assigned residence or interning him – except in case of criminal proceedings or a sentence depriving him of his liberty. Restrictive measures will cease as soon as possible after the end of hostilities, though again an exception is made in case of criminal proceedings or sentences depriving those concerned of their liberty.³⁰

3507 Thus there is an essential difference between prisoners of war and civilians; prisoners of war must be repatriated, except for special cases;³¹ civilians are entitled to leave enemy territory subject to certain restrictions, but neither they nor the State in whose territory they are, have an obligation in this respect.

3508 The grave breach within the meaning of sub-paragraph 4(b) consists, in the case of prisoners of war, in failure to comply with Articles 109 or 118 of the Third Convention without valid and lawful reasons justifying the delay.³²

3509 With regard to civilians, the grave breach consists in delaying the departure of a foreign national who wants to leave the territory, in violation of Articles 35 or 134 of the Fourth Convention, without valid and lawful reasons justifying such delay.

Sub-paragraph (c)

3510 The policies and practices of *apartheid* have been referred to in a series of resolutions of the United Nations General Assembly. In particular, it adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid*³³ in its Resolution 3068 (XXVIII) of 30 November 1973. This declares that *apartheid* is a crime against humanity (Article I);³⁴ the same article declares that inhuman acts resulting from the policies and practices of *apartheid* and other similar policies and practices of racial segregation and discrimination, as defined in Article II, are crimes violating the principles of international law and constituting a serious threat to international peace and security.

³⁰ Cf. in particular Fourth Convention, Arts. 35-37, 41-43, 46, 132-134. The last article is concerned with facilitating the return of internees to their last place of residence or with their repatriation after the end of hostilities or occupation.

³¹ During hostilities, all seriously sick and wounded prisoners who are opposed to being repatriated (Third Convention, Article 109); after the end of active hostilities, prisoners who do not wish to be repatriated (each individual case requiring a thorough examination) (Third Convention, Art. 118); cf. *supra*, note 29. When ratifying the Protocol the Republic of Korea declared that the failure of a Detaining Power to repatriate prisoners if this accords with their clearly and freely expressed will is not a breach within the meaning of this paragraph.

³² Only material reasons such as circumstances making transportation impossible or dangerous are acceptable. The intention to use prisoners of war or civilians in one's power as a means of applying pressure on the adversary, for example, is not acceptable.

³³ As of 31 December 1984 there were 79 States Parties to this Convention.

³⁴ This qualification was already contained in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. On that Convention, cf. introduction to this Section, *supra*, pp. 977 and 980.

- 3511** Article II defines inhuman acts covered by the term “crime of *apartheid*” and committed for the purpose of establishing and maintaining domination by one racial group over any other racial group and systematically oppressing the latter. This term also covers similar policies and practices of racial segregation and discrimination.
- 3512** In this sub-paragraph the Protocol only condemns practices, whether the practices of *apartheid* or any other inhuman and degrading practices; as far as the policies are concerned, they will remain exclusively within the domain of crimes against humanity.
- 3513** Although the provisions of the Conventions and the Protocol never mention *apartheid* by name, they contain several articles explicitly prohibiting any adverse distinction founded on whatever criterion, including race.³⁵
- 3514** In addition, inhuman treatment is qualified as a grave breach by the relevant articles of the Conventions, and this concept of inhuman treatment encompasses outrages upon the human dignity of protected persons.
- 3515** Finally, if we take into account that this sub-paragraph applies only in situations covered by Article 1 (*General principles and scope of application*), it must be concluded that the practices concerned were already grave breaches of the Conventions, whatever their motive; this is simply a special mention of reprehensible conduct for which the motive is particularly shocking.

Sub-paragraph (d)

- 3516** Article 53 of the Protocol (*Protection of cultural objects and of places of worship*) deals with the protection of cultural objects and places of worship without prejudice, as it says itself, to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and to other relevant rules of international law. That article prohibits committing any acts of hostility against those objects which constitute the cultural or spiritual heritage of peoples and using them in support of the military effort.
- 3517** To qualify as a grave breach within the meaning of this sub-paragraph, the attack must have been committed wilfully in accordance with the opening sentence of the paragraph;³⁶ the objects must not have been used in support of the military effort (*cf.* Article 53 – *Protection of cultural objects and of places of worship*, sub-paragraph (*b*)); special protection must have been given to the objects in question by special arrangement, for example, within the framework

³⁵ Arts. 12/12/16/13 and 27 of the Conventions; Arts. 9, 10, 69, 70 and 75 of the Protocol.

³⁶ The meaning of the term “clearly recognized” was not elucidated during the Conference and allows for two interpretations. For E.J. Roucounas, *op. cit.*, p. 109, it is a question of identification; for J. de Breucker, *op. cit.*, p. 505, it apparently means recognition of the right to protection. This ambiguity is probably not of great importance: in the first case it duplicates the requirement of intent, which implies that the attacker is aware of the status of what he is attacking; in the second case, the term seems to be just as superfluous, since a special arrangement is required anyway.

of a competent international organization;³⁷ the objects must not have been located in the immediate vicinity of military objectives; and the attack must have caused extensive destruction of the objects.

Sub-paragraph (e)

- 3518** Guarantees for a fair and regular trial are laid down in Articles 99-108 of the Third Convention and 71-75 and 126 of the Fourth Convention. Articles 130 and 147 of these Conventions, respectively, qualify as a grave breach the act of depriving a protected person of the rights of fair and regular trial prescribed in these Conventions.
- 3519** At first sight paragraph 2 should have sufficed to make the above-mentioned penal provisions applicable to those mentioned in that paragraph; however, the object of this sub-paragraph is to ensure that the judicial guarantees laid down in Article 75 (*Fundamental guarantees*) are added to those of the Conventions insofar as they supplement or clarify the latter.
- 3520** It is in this respect that the sub-paragraph under consideration here supplements the penal provisions of the Conventions.

Paragraph 5

- 3521** This paragraph, which was considered indispensable or self-evident by some delegations, seemed out of place or dangerous to others.
- 3522** The former emphasized the need to confirm that there is only one concept of war crimes, whether the specific crimes are defined under the law of Geneva or The Hague and Nuremberg law.³⁸ Without denying that grave breaches of the Conventions and the Protocol are indeed war crimes, the latter preferred those instruments to stick to their own terminology in view of their purely humanitarian objectives.³⁹
- 3523** Finally the paragraph was adopted by consensus, despite some reservations, once a formula had been added which guaranteed the application of the Conventions and the Protocol.⁴⁰ The expression “without prejudice to” means

³⁷ Cf. commentary Art. 53, *supra*, p. 643, for further details on the special protection under the 1954 Convention and on the role of UNESCO in this respect. E.J. Roucounas, *op. cit.*, pp. 113-114, thinks that the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage could also constitute a special arrangement within the meaning of this sub-paragraph (cf. also commentary Art. 53, *supra*, pp. 645-646).

³⁸ Cf. also introduction to this Section, *supra*, pp. 977-979.

³⁹ In favour: in particular, *O.R.* IX, p. 282, CDDH/I/SR.61, para. 85; pp. 313-314, CDDH/I/SR.64, para. 49; p. 317, para. 69; p. 319, para. 84; *O.R.* VI, p. 293, CDDH/SR.44, paras. 81-82; p. 294, para. 90; p. 306, *id.*, Annex (Yugoslavia). Against: in particular, *O.R.* IX, p. 269, CDDH/I/SR.61, para. 4; p. 279, para. 62; p. 280, para. 69; p. 282, para. 84; p. 307, CDDH/I/SR.64, para. 10; p. 310, para. 29; *O.R.* VI, p. 293, CDDH/SR.44, para. 85.

⁴⁰ See *O.R.* IX, p. 280, CDDH/I/SR.61, para. 71.

that the affirmation contained in this paragraph will not affect the application of the Conventions and the Protocol.⁴¹ In the French text the expression used is “sous réserve”.⁴²

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⁴¹ The same affirmation is contained in Art. 75, para. 7.

⁴² The French text of Arts. 3 and 53 uses the term “sans préjudice” and the two terms have been used as equivalent in French. *Cf.* also Art. 16 of Protocol II.

Protocol I

Article 86 – Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Documentary references

Official Records

O.R. I, Part I, pp. 165-166; Part III, p. 25 (Art. 76). *O.R.* III, p. 328. *O.R.* VI, p. 307, CDDH/SR.45, paras. 1-2; p. 334, *id.*, Annex (Indonesia). *O.R.* IX, pp. 22-23, CDDH/I/SR.43, para. 33; p. 34, CDDH/I/SR.44, para. 39; p. 44, CDDH/I/SR.45, para. 4; p. 45, para. 9; pp. 113-119, CDDH/I/SR.50, paras. 25-63; p. 278, CDDH/I/SR.61, paras. 52-59; pp. 315-316, CDDH/I/SR.64, paras. 60-63; p. 320, para. 88; pp. 411-412, CDDH/I/SR.71, paras. 59-60; p. 414, para. 75. *O.R.* X, p. 119, CDDH/234/Rev.1, paras. 23-24; p. 123, para. 48; pp. 129-130, paras. 81-83; p. 153, CDDH/I/321/Rev.1; pp. 163-164, CDDH/I/324.

Other references

CE 1971, Report, p. 110, para. 568. *CE 1972, Report*, vol. I, p. 188-189, paras. 4.122-4.127 (Art. 75 A); vol. II, pp. 117-118, CE/COM IV/46. *Commentary Drafts*, pp. 95-96 (Art. 76).

Commentary

3524 A failure to act (omission) consists of failing to do or say something. In a legal sense it consists of failing in a duty to act. Paragraph 1 covers all breaches resulting

from a failure to act, contrary to a duty to act, while paragraph 2 is devoted to the special responsibility of a superior who has not taken measures which he was able to take to prevent or repress a breach committed by a subordinate.

3525 Article 13 of the Third Convention already contains a categorical provision:

“Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention.”

In trials following the Second World War, Allied tribunals had indeed convicted several persons in cases where they had not intervened to prevent a breach or to put a stop to it. However, it was accepted that this rested only on national legislation, either on explicit provisions, or on the application of general principles found in criminal codes. In any case, Article 129 of the Third Convention does not explicitly provide that Contracting Parties must enact penal sanctions for failure to act, but deals with such cases only by prohibiting protected persons being deprived of their right to a fair and proper trial.

3526 From the beginning of the preparatory work to the Diplomatic Conference, numerous experts and even some governments were anxious to introduce a rule of international law on omission.¹ The ICRC took this into account. The draft it presented to the Diplomatic Conference contained Article 76,² which was devoted to omission and which was based on proposals submitted by experts, particularly by experts in criminal law convened by the ICRC for this purpose from 29 January to 2 February 1973, and on those submitted by a restricted meeting of government experts consulted during March of the same year. With one exception³ the ICRC proposal did not meet with opposition on points of substance. It is not for the first time that international treaty law provides for criminal responsibility of those who have failed in their duty to act. In this context we would refer to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968, of which Article 2 explicitly seeks to bring to trial representatives of the State authority who “tolerate” the commission of

“war crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 [...] particularly the “grave

¹ See *CE 1972, Report*, Vol. I, pp. 188-189, para. 4.122, 4.126-4.127; Vol. II, p. 107, *CE/COM IV/45-46*. See also *Government Replies*, pp. 150 and 152.

² This draft article read as follows:

“1. The High contracting Parties undertake to repress breaches of the Conventions or of the present Protocol resulting from a failure to perform a duty to act.

2. The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach.”

³ *O.R. III*, p. 328, *CDDH/I/303*; however, see also, *O.R. IX*, p. 45, *CDDH/I/SR.45*, para. 9.

breaches” enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims.” (Article I)⁴

3527 The articles of the Conventions devoted to penal sanctions apply only to persons “committing, or ordering to be committed”⁵ grave breaches of the Conventions. It was therefore also necessary in the article under consideration here to harmonize “the law of Geneva” with the above-mentioned Convention and with the latest trends in the field of the codification of international law.⁶ We should, however, point out right from the start that determining the limits of responsibility for acts of omission gives rise to a number of problems of criminal law which have not yet been resolved.⁷

3528 Article 86 was adopted by consensus both in Committee and in plenary.⁸

Paragraph 1 – General obligation to repress or suppress breaches resulting from a failure to act

3529 The importance of this provision cannot be doubted. The fact that a breach of the rules of applicable international law may consist of an omission, i.e., a failure to act, just as well as an act by a State organ, is uncontested nowadays and follows both from State practice and from case-law and legal literature. It may even be said that international responsibility of States (and this was not a matter of responsibility of individuals) has perhaps been invoked more often for omissions than for acts.⁹

3530 As regards breaches of the law of armed conflict, the responsibility of those who have refrained from taking the requisite measures to prevent or repress them, has been dealt with explicitly only since the end of the First World War.¹⁰

⁴ In the same sense we may refer to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly at the 93rd plenary meeting on 10 December 1984. Article 1 of this Convention condemns acts of torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

⁵ Cf. First and Second Conventions, Art. 50; Third Convention, Art. 129; Fourth Convention, Art. 146. However, it should be noted that at least one of the grave breaches included in Articles 130 of the Third Convention and 147 of the Fourth Convention may well result literally from a failure to act, namely, the grave breach which consists of depriving a protected person of his right to a fair and regular trial.

⁶ See introduction to this Section, *supra*, p. 973.

⁷ On this subject, see “Le projet de code pénal international, commentaires”, *Revue internationale de droit pénal*, 1981, pp. 553-556. A distinction is made in particular between “infractions d’omission proprement dites”, “les infractions de commission par omission” and “la conduite omissive et participation”.

⁸ O.R. IX, p. 278, CDDH/1/SR.61, para. 59, and O.R. VI, p. 307, CDDH/SR.45. Only one delegation expressed some reservation in his explanations (*ibid.*, pp. 308-309).

⁹ See “State responsibility”, *Yearbook of the International Law Commission*, 1973, Vol. I, pp. 19 and 21-22.

¹⁰ See the Report of the “Commission on the responsibility of the authors of the [first World] War and on enforcement of penalties” of 29 March 1919, which provided for the prosecution of all those who had given orders for action in violation of the laws and customs of war or those who knowingly and while they had the power to intervene, abstained from preventing or taking measures to prevent, terminate or repress such acts, *International Law Studies*, Vol. 60, “Documents on prisoners of war”, Newport, Rhode Island, 1979, pp. 158 ff.

- 3531** The London Agreement of 8 August 1945, which was designed to serve as a basis for the prosecutions instituted after the Second World War, particularly for breaches of the law of armed conflict, does not refer to breaches consisting of omissions. Nevertheless, as we said above, people were convicted for omissions,¹¹ in particular on the basis of Article 1 of the 1907 Hague Regulations which provides that members of the armed forces must “be commanded by a person responsible for his subordinates”.¹² And Article 43 of the Protocol (*Armed forces*) is indeed just as unequivocal, since it provides that armed forces must be placed “under a command responsible [...] for the conduct of its subordinates”.
- 3532** Specific provisions of the 1907 Regulations relating to occupation and the duties of the occupying forces were also invoked.¹³
- 3533** Under the Conventions there are far more situations which may give rise to breaches consisting of failure to act.¹⁴
- 3534** It may also be emphasized that the paramount breach, which encompasses all others, consists of refraining from allowing the implementation of the Conventions when the conditions for their application are met.

¹¹ This was especially the case in the western theatre of operations in “The German High Command Trial” (*cf. 12 Law Reports*), and in the Far East in the “Trial of General Tomoyuki Yamashita” (*cf. 4 Law Reports*).

¹² “The German High Command Trial”, *op. cit.*, p. 108.

¹³ *Ibid.*; these include in particular Article 42, which states that “territory is considered occupied when it is actually placed under the authority of the hostile army”, and Article 43, which urges the occupant to take “all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.

¹⁴ By way of example, we refer to the obligation to respect and ensure respect for the Conventions in all circumstances (Art. 1), to use the services of a Protecting Power (Art. 8/8/8/9), and failing that, of a substitute (Art. 10/10/10/11), in particular to make various notifications through their intermediary, to ensure that the wounded and sick are cared for (First Convention, Art. 12), and that the shipwrecked are cared for (Second Convention, Art. 12), to ensure compliance with provisions relating to the dead (First Convention, Arts. 16-17, Second Convention, Arts. 19-20), to permit repatriation of neutral medical personnel (First Convention, Art. 30), to provide free of charge for the maintenance of prisoners of war (Third Convention, Art. 15) and to ensure their safety (*ibid.*, Art. 13), to undertake an enquiry in the case of the death of prisoners in special circumstances (*ibid.*, Art. 121), to take all sanitary measures necessary to ensure their health (*ibid.*, Art. 29), to grant them a monthly advance of pay (*ibid.*, Art. 60), to establish an information bureau (*ibid.*, Art. 122), to ensure that prisoners are able to contact the outside world (*ibid.*, Arts. 69-77), to release and repatriate them after the cessation of hostilities (*ibid.*, Art. 118), while any unjustified delay in this is qualified by the Protocol as a grave breach (Art. 85, para. 4(b)). The Fourth Convention lays down requirements in favour of civilian internees similar to those provided for prisoners of war, and urges the Occupying Power to ensure and maintain public health and hygiene in occupied territory (Art. 56) and to ensure food and medical supplies for the population (Art. 55). In all these circumstances, and in many others covered in particular by the Protocol (for example, Art. 11, para. 4, which expressly provides that any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends, is a grave breach of the Protocol) which extends the protection of the Conventions to the civilian wounded and sick, civilian health services and new categories of prisoners of war, failure to take the necessary measures for fulfilling the obligations of the Conventions is tantamount to committing a breach of such obligations.

- 3535 Article 85 (*Repression of breaches of this Protocol*) of the Protocol, paragraph 4(e), is a confirmation of the Conventions; it qualifies as a grave breach the act of depriving a person protected by the Conventions or by Articles 44 (*Combatants and prisoners of war*), 45 (*Protection of persons who have taken part in hostilities*) or 73 (*Refugees and stateless persons*) of the Protocol of the rights of fair and regular trial, in accordance with the provisions thereof and with Article 75 of the Protocol (*Fundamental guarantees*). As we have said, this breach can easily result from a failure to act.
- 3536 However, the Protocol also imposes on Contracting Parties and on Parties to the conflict, and consequently, as the case may be, on members of their armed forces, “obligations to act”, i.e. to adopt a particular positive conduct.¹⁵ This is the case with regard to new weapons (Article 36 – *New weapons*), the liberation of prisoners of war captured under unusual conditions of combat (Article 41 – *Safeguard of an enemy hors de combat*, paragraph 3), the obligation for combatants to distinguish themselves from the civilian population, either by means of their uniform, a distinguishing sign or by carrying arms openly (Article 44 – *Combatants and prisoners of war*, paragraphs 3 and 7), the obligation to make a distinction in the conduct of military operations, on the one hand, between combatants and civilians, and on the other, between civilian objects and military objectives (Articles 48 – *Basic rule*, and 52 – *General protection of civilian objects*) and to always ensure in the conduct of such operations that the natural environment is protected against widespread, long-term and severe damage (Articles 35 – *Basic rules*, and 55 – *Protection of the natural environment*) and to spare the civilian population, civilians and civilian objects (Article 57 – *Precautions in attack*) by taking a series of measures: ensuring that the objectives to be attacked are actually military objectives, choosing methods of attack likely to avoid or minimize incidental damage to the civilian population, and when appropriate, warning the population of attacks which may affect it, taking certain precautions against the effects of attacks (Article 58 – *Precautions against the effects of attacks*). We should also point to the duties of the Occupying Power vis-à-vis occupied territories (Article 69 – *Basic needs in occupied territories*), those of Parties to the conflict and of High Contracting Parties vis-à-vis relief actions (Article 70 – *Relief actions*), the provisions relating to the special protection of certain categories of persons, for example, women and children (Articles 76 – *Protection of women*, and 77 – *Protection of children*), the obligation to disseminate the Conventions and the Protocol in such a way that these instruments are known to the armed forces and the civilian population (Article 83 – *Dissemination*), the obligation to create posts for legal advisers (Article 82 – *Legal advisers in armed forces*) and to take all necessary measures for the proper application of the rules which have been adopted (Article 80 – *Measures for execution*). This list gives some idea of the many breaches which may be committed in international humanitarian law simply by a failure to act.

¹⁵ On this point see Ph. Bretton, “Le problème des ‘méthodes et moyens de guerre et de combat’ dans les Protocoles...”, *op. cit.*, pp. 31-38.

3537 Yet, responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so. The text of this paragraph should certainly be understood in this way since it prescribes Contracting Parties or Parties to the conflict to deal with any “failure to act when under a duty to do so”. This concept includes lack of due diligence having regard to the circumstances and amounting to a violation of the requirements indicated above. This concept of a “duty to act” raises the complex problem of the attribution of powers and duties which is not a matter of international law but is governed by the national law of the Parties to the Protocol. However, once national law has attributed powers and duties, the duty resulting therefrom with regard to international humanitarian law has to be interpreted in the light of treaty instruments. In other words, the national law of a State establishes the powers and duties of civilian or military representatives of that State,¹⁶ but international law lays down the way in which they may be exercised within the area governed by it. In the provision under consideration here the Contracting Parties and the Parties to the conflict undertake to ensure that this will indeed occur and that the powers and duties that have been attributed will actually be exercised in accordance with the requirements imposed by treaty rules.

3538 As regards the measures of application to be taken to prevent or repress breaches resulting from a failure to act when there is a duty to do so, the Protocol adopts a solution similar to that laid down by the Conventions in cases where a breach is caused by an act committed or ordered to be committed.¹⁷ It distinguishes breaches from grave breaches. Grave breaches must be repressed, which implies the obligation to enact legislation laying down effective penal sanctions for perpetrators of such breaches. According to Article 85 (*Repression of breaches of this Protocol*), paragraph 1, the provisions of the Conventions also apply to grave breaches of the Protocol.¹⁸ On the other hand, the text of the present paragraph is silent on the other requirements of the Conventions, the application of which ensues from the same Article 85 (*Repression of breaches of this Protocol*), i.e., the search for the perpetrators, regardless of their nationality, and the obligation either to bring them before the courts of the Detaining Power or to hand them over to another contracting Party concerned in order that it may try them.¹⁹ It is self-evident, when a Detaining Power tries a prisoner belonging to the adverse Party, that the “duty to act” of the accused must be interpreted in the light of the powers and duties attributed to him under his own national legislation.²⁰

¹⁶ Unfortunately history is full of examples of civilian authorities which have been guilty of war crimes; thus not only military authorities are concerned (*cf. O.R. IX*, p. 131, CDDH/ISR.51, para. 40).

¹⁷ First Convention, Art. 49; Second Convention, Art. 50; Third Convention, Art. 129; Fourth Convention, Art. 146.

¹⁸ In this respect see also introduction to this Section, *supra*, p. 973, and commentary Art. 85, para. 1, *supra*, p. 992.

¹⁹ On extradition, see commentary Art. 88, *infra*, p. 1025.

²⁰ We refer also to Art. 88, which provides for the broadest possible mutual assistance in criminal matters in any proceedings brought in respect of grave breaches.

3539 For breaches of the Protocols other than grave breaches the terms are the same as those used by the Conventions for breaches of the Conventions other than grave breaches: the Parties to the Protocol undertake to *suppress* them, which means that any “repression” that might be undertaken ultimately by penal or disciplinary sanctions are the responsibility of the authority on which those committing such breaches depend or the Power to which they belong. However, this does not detract from the right of States under customary law, as reaffirmed in the writings of a number of publicists, to punish serious violations of the laws of war under the principle of universal jurisdiction. With regard to other measures, administrative sanctions or change of assignment, they can, by the nature of things, only be taken by their own authorities. Finally, it should be added that this provision supplements (*cf.* Article 85 – *Repression of breaches of this Protocol*, paragraph 1) the provisions of the Conventions relating to the repression of breaches, and is consequently without prejudice to the application thereof as and when the case arises.

Paragraph 2 – Responsibility of superiors

3540 Taking up one of the conditions laid down in Article 1 of the 1907 Hague Regulations,²¹ Article 43 (*Armed forces*), paragraph 1, of the Protocol provides, as we have seen, that armed forces must be placed “under a command responsible [...] for the conduct of its subordinates”. Article 39 of the Third Convention even makes this a specific obligation for the administration of prisoner-of-war camps.²² The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law. However, this principle was not specifically governed by provisions imposing penal sanctions.²³

3541 This provision, which should be read in conjunction with paragraph 1 and Article 87 (*Duty of commanders*), which lays down the duties of commanders, raises a number of difficult questions. The strongest objection which could be raised against this provision perhaps consists in the difficulty of establishing intent (*mens rea*)²⁴ in case of a failure to act, particularly in the case of negligence. For

²¹ Taken up in Art. 4A(2) of the Third Convention.

²² This provides that every prisoner-of-war camp will be placed under the immediate authority of a responsible commissioned officer who will ensure that the provisions of the Conventions are known to the camp staff under his orders and will be responsible for its application, under the direction of his government. A similar rule is contained in Article 99 of the Fourth Convention.

²³ A proposal was submitted on this subject during the second session of the Conference of Government Experts (*CE 1972, Report*, Vol. II, p. 107, CE/COM IV/45), and the ICRC inserted a provision to this end in the draft presented to the Diplomatic Conference (Art. 76, para. 2, *cf. supra*, note 2, p. 1006). This text was the object of various amendments (*cf. O.R. III*, p. 328, CDDH/I/74, CDDH/I/303, CDDH/I/306, and for the discussions, *O.R. IX*, pp. 113-119, CDDH/I/SR.50), before being adopted by consensus both in Committee and in plenary meeting (*see supra*, note 8, p. 1007).

²⁴ On this subject in general, see B.V.A. Röling, “Criminal Responsibility for Violations of the Law of War”, 12 *RBDI*, 1976/1, and, by the same author, “Aspects of the Criminal Responsibility...”, *op. cit.*, pp. 213-220.

that matter, this last point gave rise to some controversy during the discussions in the Diplomatic Conference, particularly due to the fact that the Conventions do not contain any provision qualifying negligent conduct as criminal.²⁵ However, one delegate, referring to the concept expressly reflected in the English version (which was not included in the French text, curiously enough, see *infra*, p. 1013), namely, information which “should have” enabled them to conclude that a subordinate was committing or was going to commit a breach, remarked that this was undoubtedly a case of responsibility incurred by negligence, and that it was important to make this clear.²⁶ However, this does not mean that every case of negligence may be criminal. For this to be so, the negligence must be so serious that it is tantamount to malicious intent,²⁷ apart from any link between the conduct in question and the damage that took place.²⁸ This element in criminal law is far from being clarified, but it is essential, since it is precisely on the question of intent that the system of penal sanctions in the Conventions is based. This applies both in the field of breaches resulting from a failure to act in general and with regard to breaches resulting from negligence. However, since the post-war tribunals succeeded in satisfying the requirement of justice in these very difficult situations, the Conference probably thought that there was no reason to believe the same would not happen again in the future.

3542 It should be clearly noted that this paragraph condemns failure to act of superiors in case of breaches which are not grave breaches as well as in case of grave breaches. In the first case the sanction can be disciplinary or penal, while universal jurisdiction understood as *aut dedere aut judicare* applies in the second case, i.e., in case of a grave breach.

3543 Under the terms of this provision three conditions must be fulfilled if a superior is to be responsible for an omission relating to an offence committed or about to be committed by a subordinate:

a) the superior concerned must be the superior of that subordinate (“his superiors”);

²⁵ See *O.R.* IX, p. 161, CDDH/I/SR.50, para. 41.

²⁶ *Ibid.*, p. 118, paras. 59-60. This is an important point; cf. for example, Article 16 of the Swiss Military Penal Code which provides that “Celui qui pouvait éviter l’erreur (sur les faits) en usant des précautions voulues est punissable par négligence si la loi réprime son acte comme délit de négligence” (anyone who could have avoided the fault (as to the facts) by using the necessary precautions, is punishable for negligence if the law qualified his act as an offence (translated by the ICRC)).

²⁷ In a 1952 trial (*USA v. Schultz*) the United States Court of Military Appeals decided that mere negligence did not constitute a universally recognized basis for criminal responsibility (cf. B.M. Carnahan, “The Law of War in the United States Court of Military Appeals”, XX 3-4, *RDPM DG* 1981, pp. 343-344). Article 15 of the Swiss Military Penal Code provides that “commet un crime ou un délit par négligence celui qui, par une imprévoyance coupable, agit sans se rendre compte ou sans tenir compte des conséquences de son acte. L’imprévoyance est coupable quand l’auteur de l’acte n’a pas usé des précautions commandées par les circonstances et par sa situation personnelle” (anyone who, as a result of criminal negligence, acts without realizing or taking into account the consequences of his act is committing an offence. Such lack of foresight is criminal when the perpetrator of the act has not used precautions required by the circumstances and by his personal situation (translated by the ICRC)). For examples relating to the airforce, see J.M. Spaight, *op. cit.*, p. 58.

²⁸ See in particular, M.C. Bassouni, *International Criminal Law, a Draft Criminal Code*, Leyden, 1980, pp. 58, 149, 155.

- b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it.

a) *The qualification of superior*

3544 This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control.²⁹ The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach.³⁰ However, it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (*Duty of commanders*). The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.

b) *Knowledge, or information from which knowledge can be derived*

3545 There is no problem if the superior knew that a breach had been committed or was going to be committed and if this can be proved (Article 75 – *Fundamental guarantees*, paragraph 4(d)). This could be the case, for example, if the superior knew of preparatory actions or of previous breaches. On the other hand, the clause by which penal or disciplinary responsibility of superiors will arise if they “had information which should have enabled them to conclude in the circumstances at the time” that a breach had been committed or was going to be committed, raises problems of judgment.³¹ In the first place, it should be noted that there is a significant discrepancy between the English version, “information which should have enabled them to conclude”, and the French version, “des informations leur permettant de conclure”, which means “information enabling them to conclude”.³² In such a case the rule is to adopt the meaning which best

²⁹ See, in this sense, “The German High Command Trial”, *op. cit.*, p. 76, and “Trial of General Tomoyuki Yamashita”, *op. cit.*, pp. 35, 87.

³⁰ In this sense, *O.R.* IX, p. 117, CDDH/I/SR.50, para. 48.

³¹ This clause underwent considerable changes during the *travaux préparatoires*. The proposal submitted to the Conference of Government Experts mentioned “breaches of the laws of war which were, or ought to have been, within their [civil and military authorities] knowledge”. (*CE 1972, Report*, Vol. II, p. 107, CE/COM IV/45). Article 76 of the ICRC draft contains the expression “he should have known”. The amendment proposed by the United States contained the following wording: “If they knew or should reasonably have known in the circumstances at the time” (*O.R.* III, p. 328, CDDH/I/306).

³² On this point see the remarks by K.J. Partsch, in M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 525, and *O.R.* IX, p. 278, CDDH/I/SR.61, paras. 53-59.

reconciles the divergent texts, having regard to the object and purpose of the treaty,³³ and therefore the French version should be given priority since it covers both cases.³⁴ It seems to be established that a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him,³⁵ or by invoking temporary absence as an excuse.³⁶ According to post-war judicial decisions, the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits are also pieces of information of which the superior cannot claim to be ignorant.³⁷ Such information available to a superior may enable him to conclude either that breaches have been committed or that they are going to be committed (examples would be information on lack of any instruction for the troops on the Geneva Conventions and the Protocol, on the means of attack allocated or available in an area densely populated by civilians, on lack of medical services and absence of instructions relating to prisoners of war). Every case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time that the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc.³⁸

3546 What is the position if the superior concerned persists in maintaining that he was not aware of the breaches committed or of information enabling him to conclude that they had been committed or were going to be committed, and if no proof can be furnished to the contrary? It is not possible to answer this question in the abstract; something that is true may, depending on circumstances, seem unlikely. It is not impossible for a superior actually to be ignorant of breaches committed by his subordinates because he deliberately wishes to remain ignorant. The fact is that in several flagrant cases the tribunals which were established to try war crimes after the Second World War did not accept that a superior could wash his hands of an affair in this way, and found that, taking into account the circumstances, a knowledge of breaches committed by subordinates could be presumed.³⁹

³³ Cf. Art. 33, para. 4, of the Vienna Convention on the Law of Treaties.

³⁴ In this sense, see *supra*, note 32.

³⁵ See "The Hostages' Trial", 8 *Law Reports*, p. 89.

³⁶ *Ibid.*

³⁷ See the Yamashita case, 4 *Law Reports*, p. 35, and in this respect, the observations made by M.C. Bassiouni in "Repression of Breaches...", *op. cit.*, pp. 207-208.

³⁸ In this sense, O.R. IX, pp. 131-132, CDDH/I/SR.51, para. 43.

³⁹ In the case of the "High Command Trial" the Tribunal found that the responsibility of a superior was involved "where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence." (12 *Law Reports*, p. 76). In the Yamashita case, the Tribunal declared: "Where murder and rape and vicious, revengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them" (4 *Law Reports*, p. 35). In another case the Tribunal clearly based its verdict on the fact that "it was inconceivable that he [the commander] should not have been aware of the acts of atrocity committed by his subordinates [...]" (*ibid.*, p. 88). In other
(continued on next page)

c) *The obligation to take measures to prevent or repress breaches*

3547 This last clause deals with the central purpose of this paragraph: the superior who is responsible and who is aware of the facts must act to prevent or repress the breach. This rule concerns both the immediate commander and his superiors. However, the specific duties of commanders are further dealt with in the detailed provisions which will be examined under Article 87 (*Duties of commanders*). The present provision merely poses the principle of the indictment of superiors who have tolerated breaches of the law of armed conflict. This rule is not without precedent in national law.⁴⁰

3548 Using relatively broad language, the clause requires both preventive and repressive action. However, it reasonably restricts the obligation upon superiors to “feasible” measures, since it is not always possible to prevent a breach or punish the perpetrators. In addition, it is a matter of common sense that the measures concerned are described as those “within their power” and only those. These requirements correspond exactly to the judgments in post-war cases. An illustration can be found in the judgment given by the International Military Tribunal of Tokyo regarding the treatment of prisoners of war and civilian internees and the reasons given in that judgment may serve as a corroboration. The Tribunal stated that it was the duty of those responsible to ensure that prisoners were well treated, that ill-treatment was avoided, and to establish and guarantee an effective and permanent system for this purpose. If they refrain from taking the requisite measures, or if, having taken them, they do not ensure their constant and effective application, they fail in their duties and incur responsibility. Such responsibility continues if, while knowing that breaches are committed, they refrain from taking the appropriate measures that are in their power to prevent further breaches in the future. Ignorance does not absolve them from responsibility if it can be attributed to a fault on their part. The fact that the

circumstances the Tribunals seemed to have found that at least some proof must be furnished before accepting that a superior was aware of the acts of his subordinates (*ibid.*, p. 89). When depositing its instrument of ratification on 13 August 1982, Austria made the following reservation: “Pour juger toute décision prise par un commandant militaire, les articles 85 et 86 du Protocole I seront appliqués pour autant que les impératifs militaires, la possibilité raisonnable de les reconnaître et les informations effectivement disponibles au moment de la décision soient déterminants.” (“In order to judge any decision taken by military commanders, Articles 85 and 86 of Protocol I will be applied with military imperatives, the reasonable possibility of recognizing them and information actually available at the time of the decision, being decisive.” (Translated by the ICRC)).

⁴⁰ Cf. for example, Article 4 of the French Decree on repression of war crimes of 8 August 1944: “Lorsqu’un subordonné est poursuivi comme auteur principal d’un crime de guerre et que ses supérieurs hiérarchiques ne peuvent être recherchés comme coauteurs, ils sont considérés comme complices dans la mesure où ils ont organisé ou toléré les agissements criminels de leurs subordonnés.” (“When a subordinate is prosecuted as the person primarily responsible for a war crime and it is not possible to look upon his superiors in the hierarchy as jointly responsible, they will be treated as accomplices insofar as they organized or tolerated the criminal activities of their subordinates.” (translated by the ICRC)). For other examples, see 4 *Law Reports*, pp. 87-88.

breaches have widespread public notoriety, are numerous and occur over a long period and in many places, should be taken into consideration in reaching a presumption that the persons responsible could not be ignorant of them.⁴¹

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⁴¹ For the complete text, see M. Greenspan, *op. cit.*, p. 483.

Protocol I

Article 87 – Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Documentary references

Official Records

O.R. I, Part I, p. 166. *O.R.* III, pp. 329-330 (Art. 76*bis*). *O.R.* VI, p. 307, CDDH/SR.45, para. 2; p. 329, *id.*, Annex (Argentina); p. 330 (Canada); pp. 334-335 (Indonesia). *O.R.* IX, pp. 119-121, CDDH/I/SR.50, paras. 64-75; pp. 123-127, CDDH/I/SR.51, paras. 2-19; p. 385, CDDH/I/SR.69, para. 26; pp. 392-393, CDDH/I/SR.70, paras. 19-30; p. 399, CDDH/I/SR.71, para. 2; pp. 400-401, paras. 10-11 and 14; p. 402, para. 17; p. 406, para. 37; p. 408, para. 45; p. 411, para. 59; p. 413, para. 65; p. 414, para. 75. *O.R.* X, p. 212, CDDH/405/Rev.1, Annex I, paras. 5-6.

Commentary

- 3549 The first duty of a military commander, whatever his rank, is to exercise command. For this purpose the relationship between ranks and responsibilities

are, as a general rule, exactly determined within the armed forces, and the authority of each of the different levels of the hierarchy is precisely defined. It is under these conditions that the armed forces can be submitted to a régime of internal discipline; and the way the system is applied is the sole responsibility of the Contracting Parties and the Parties to the conflict. This régime is inseparable from the status of armed forces (Article 43 – *Armed forces*). According to this article, the disciplinary system must ensure, in particular, compliance with the rules of international law applicable in armed conflict. In the provision under consideration here, the Protocol enjoins the High Contracting Parties and the Parties to the conflict to ensure that military commanders carry out this task.

3550 We are concerned here with the very essence of the problem of enforcement of treaty rules in the field. This is why the authors of the Protocol considered it necessary to define more precisely on this point the scope of Article 80 (*Measures for execution*), relating to the general measures for the execution of their obligations that the Parties to the Protocol are bound to take. In fact the role of commanders is decisive. Whether they are concerned with the theatre of military operations, occupied territories or places of internment, the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by Parties to the conflict and the conduct of individuals is avoided.¹ At this level, everything depends on commanders, and without their conscientious supervision, general legal requirements are unlikely to be effective.² Undoubtedly the development of a battle may not permit a commander to exercise control over his troops all the time; but in this case he must impose discipline to a sufficient degree (*cf.* Article 43 – *Armed forces*, paragraph 1), to enforce compliance with the rules of the Conventions and the Protocol, even when he may momentarily lose sight of his troops.³

3551 There was no provision of this type in the Conventions or in the draft presented by the ICRC to the Diplomatic Conference. The present Article 87 owes its inclusion to an amendment presented during the third session,⁴ and was adopted in Committee I with 72 votes in favour, 0 against, and 3 abstentions,⁵ before being adopted by consensus in plenary meeting.⁶

¹ O.R. IX, p. 414, CDDH/I/SR.71, para. 75.

² *Ibid.*, p. 120, CDDH/I/SR.50, para. 68.

³ See, in this sense, “Trial of General Tomoyuki Yamashita”, in 4 *Law Reports*, p. 94.

⁴ O.R. III, pp. 329-330, CDDH/I/307, and 307/Rev.1.

⁵ O.R. IX, p. 393, CDDH/I/SR.70, para. 30. The voting on the article as a whole was preceded by a vote by paragraph (*ibid.*, pp. 390-399). The reasons behind the request for voting by paragraph are examined below. For the explanations of vote, see *ibid.*, pp. 399 ff., CDDH/I/SR.71. For the discussions, see *ibid.*, pp. 119-121, CDDH/I/SR.50, and p. 385, CDDH/I/SR.69.

⁶ O.R. VI, p. 307, CDDH/SR.45.

Paragraph 1 – Responsibility of commanders

3552 This paragraph obliges the Contracting Parties and the Parties to the conflict to make the control of the application of the Conventions and the Protocol part of the duties of military commanders. For this purpose the text lists a series of measures which commanders are obliged to take, namely, to prevent breaches from being committed, to suppress them when they have been committed, and to report them to the competent authorities. These measures also form the object of paragraphs 2 and 3 of Article 87, and it is appropriate first of all to try and focus on the concept of “military commanders”.

3553 According to the sponsors of the proposal which was behind the rule under consideration here: “in its reference to ‘commanders’, the amendment was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command”.⁷ This is quite clear. There is no member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol. As there is no part of the army which is not subordinated to a military commander at whatever level, this responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task.

3554 This responsibility primarily applies with respect to “members of the armed forces under their command”. This term should be understood very specifically, if full practical meaning is to be given to the provision. A commander may, for a particular operation and for a limited period of time, be supplied with reinforcements consisting of troops who are not normally under his command. He must ensure that these members of the armed forces comply with the Conventions and the Protocol as long as they remain under his command. In addition, it is self-evident that the obligation applies in the context of the responsibilities as they have devolved over different levels of the hierarchy, and that the duties of a non-commissioned officer are not identical to those of a battalion commander,⁸ and the duties of the latter are not identical to those of a divisional commander. Within the confines of these areas of competence, the responsibility of each of these applies with respect to all the members of the armed forces under his command.

⁷ O.R. IX, p. 120, CDDH/I/SR.50, para. 70. This statement was not contested. Some delegations would even have wished this clarification to have been included in the text of the Protocol in order to avoid any ambiguity, as the word “commander” is not always understood in the same way in the armies of different countries (for the discussions, see *ibid.*, pp. 119-127).

⁸ See, for example, the reservation made by Switzerland with regard to Art. 57, para. 2. According to this reservation, “these provisions only create obligations for commanders at the level of battalions or groups, and at higher levels. The information available to the commanders at the moment of their decision is the determining factor.” (translated by the ICRC; original text: “ces dispositions ne créent des obligations que pour les commandants au niveau du bataillon ou du groupe et aux échelons plus élevés. Sont déterminantes les informations dont les commandants disposent au moment de leur décision.”).

- 3555** However, the text does not limit the obligation of commanders to apply only with respect to members of the armed forces under their command; it is further extended to apply with respect to “other persons under their control”. It is particularly, though not exclusively,⁹ in occupied territory that this concept of indirect subordination may arise, in contrast with the link of direct subordination which relates the tactical commander to his troops. Territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.¹⁰ Consequently the commander on the spot must consider that the local population entrusted to him is subject to his authority in the sense of Article 87, for example, in the case where some of the inhabitants were to undertake some sort of pogrom¹¹ against minority groups. He is responsible for restoring and ensuring public order and safety as far as possible,¹² and shall take all measures in his power to achieve this,¹³ even with regard to troops which are not directly subordinate to him, if these are operating in his sector.¹⁴ *A fortiori* he must consider them to be under his authority if they commit, or threaten to commit, any breaches of the rules of the Conventions against persons for whom he is responsible. As regards the commander who, without being invested with responsibility in the sector concerned, discovers that breaches have been committed or are about to be committed, he is obliged to do everything in his power to deal with this, particularly by informing the responsible commander.
- 3556** As regards the measures mentioned above, which military commanders must take in the case of a breach or threatened breach of the Geneva Conventions and the Protocol (i.e., to prevent, suppress, and where necessary, report such breaches), these are indicated again in paragraph 3 with a slightly different wording, though without any substantial modification as regards the basic meaning. This will therefore be examined below.

Paragraph 2 – Dissemination amongst the armed forces

- 3557** Article 82 (*Legal advisers in armed forces*) provides that legal advisers must be available when necessary to advise military commanders at the appropriate level on the instruction to be given to the armed forces on the subject of the application

⁹ If the civilian population in its own territory is hostile to prisoners of war and threatens them with ill-treatment, the military commander who is responsible for these prisoners has an obligation to intervene and to take the necessary measures, even though this population is not officially under his authority. He is also bound to intervene if prisoners of war threaten their own comrades. The same applies when civilian elements are engaged in his operational sector without being officially subordinated to the military commander.

¹⁰ Hague Regulations, Art. 42.

¹¹ Pogrom: ill-treatment to which a defenceless civilian population is subjected.

¹² Hague Regulations, Art. 43.

¹³ *Ibid.*

¹⁴ On the problem in general, see “Trial of Wilhelm List and Others”, 8 *Law Reports*, in particular, pp. 69-71.

of the Conventions and of the Protocol. Moreover, such a provision is included in the context of the general obligation upon the Contracting Parties to disseminate the rules as widely as possible, particularly by including the study thereof in programmes of military instruction (Article 83 – *Dissemination*). However, legal advisers will never be available at all levels of command. Moreover, they are there to “advise the military commanders” in this field and not to replace them. Under the terms of Article 87, paragraph 2, it is the commanders themselves who must ensure that members of the armed forces under their command are aware of their obligations under the Conventions and the Protocol.

3558 Such authority will be exercised, taking into account the responsibilities ensuing from the provisions of Articles 82 (*Legal advisers in armed forces*) and 83 (*Dissemination*) mentioned above, by the commanders “commensurate with their level of responsibility”, i.e., in accordance with the same criteria as those applicable to the instruction of the troops. If, as in many armies, the commander of a unit is responsible for the instruction of his men, it will be up to him to ensure, primarily through the commissioned and non-commissioned officers under his command, that his unit gets proper training. He will ensure that this is done either periodically or expressly before an engagement by drawing particular attention, where necessary, to the sort of action to be avoided, taking into account the situation or the morale of the troops¹⁵ (the probable presence of civilians in the neighbourhood of the military objective and the conduct to be observed towards them, the attitude towards an adversary wishing to surrender or with regard to recognized signs etc.). It is in fact “in order to prevent and suppress breaches” that military commanders are responsible for such instruction and with the duty to supervise it. This implies that problems are broached in a specific manner. As regards commanders of levels higher than that of company commander, they will have corresponding obligations within the confines of the area of their competence. This may consist, for example, for battalion commanders, of instructing subordinate commanders and the officers of their own headquarters in this field, or for a regimental commander, of ensuring the uniformity and regularity of instruction within the regiment, if necessary calling in the legal adviser who may be permanently attached at a higher level etc.¹⁶

Paragraph 3 – Practical steps

3559 Paragraph 1 of Article 87 lays down the principle that military commanders are obliged to prevent breaches of the Conventions and the Protocol, and if

¹⁵ Interesting remarks on these facts can be found in J. Goldstein, B. Marshall and J. Schwartz in “The MyLay Massacre and its Cover-up: Beyond the Reach of Law?”, in *The Peers Commission Report*, particularly chapter 8: “Significant factors which contributed to the Son My Tragedy” (New York-London, 1976).

¹⁶ With a view to facilitating such instruction and control, the ICRC has undertaken to give courses on the law of armed conflicts at the International Institute of Humanitarian Law in San Remo.

necessary, to suppress them and report them to the competent authorities. Paragraph 3 lays down similar requirements as regards its purport, though referring to the case where a commander “is aware that subordinates or other persons under his control are going to commit or have committed a breach”. Thus these two paragraphs complement each other.

3560 In adopting these texts, the drafters of the Protocol justifiably considered that military commanders are not without the means for ensuring respect for the rules of the Conventions. In the first place, they are on the spot and able to exercise control over the troops and the weapons which they use. They have the authority, and more than anyone else they can prevent breaches by creating the appropriate frame of mind, ensuring the rational use of the means of combat and by maintaining discipline. Their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose. Finally, they are in a position to establish or ensure the establishment of the facts, which would be the starting point for any action to suppress or punish a breach.

3561 Every commander at every level has a duty to react by initiating “such steps as are necessary to prevent such violations”. By way of example, a non-commissioned officer must intervene to restrain a soldier who is about to kill a wounded adversary or a civilian, a lieutenant must mark a protected place which he discovers in the course of his advance, a company commander is to have prisoners of war sheltered from gunfire, a battalion commander must ensure that an attack is interrupted when he finds that the objective under attack is no longer a military objective, and a regimental commander must select objectives in such a way as to avoid indiscriminate attacks.

3562 The text of paragraph 3 also requires that any commander “where appropriate”, will “initiate disciplinary or penal action against violators”. Paragraph 1 lays down the obligation for military commanders to prevent breaches “and, where necessary, to suppress and to report [them] to competent authorities”. Thus these two texts again are complementary. During the course of the discussions some delegations expressed the fear that these provisions would result in an unjustified transfer of responsibilities from the level of the government to that of commanders in zones where military operations are taking place.¹⁷ They also feared that inappropriate prosecutions could take place, and that military commanders might encroach on the judgment of the judicial authorities.¹⁸ These fears, which were the reason for the requests for voting by paragraph on this article,¹⁹ do not seem to be justified. It is not a matter of transferring to military commanders the competence and responsibilities which are those of the judicial authorities, even if this is a military court, whether or not it is represented by a military commission constituted in accordance with the law. The object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provisions of the Conventions and the Protocol, and with regard to other rules of the army to which

¹⁷ See *O.R.* IX, p. 402, CDDH/I/SR.71, para. 17.

¹⁸ *Ibid.*

¹⁹ See *supra*, p. 1018, note 5.

they belong. Such powers exist in all armies. They may concern, at any level, informing superior officers of what is taking place in the sector, drawing up a report in the case of a breach, or intervening with a view to preventing a breach from being committed, proposing a sanction to a superior who has disciplinary power, or – in the case of someone who holds such power himself – exercising it, within the limits of his competence, and finally, remitting the case to the judicial authority where necessary with such factual evidence as it was possible to find. In this way, for example, a commander of a unit would act like an investigating magistrate.²⁰ Indeed, some delegations remarked that Article 87 contains provisions which are already found in the military codes of all countries.²¹ In Article 87 it is merely a question of ensuring that they are explicitly applicable with respect to the provisions of the Conventions and the Protocol.²² In fact, all this does not prevent commanders from trying to identify any possible gaps in the law of armed conflict or to put forward consistent interpretations on points which have not been clearly regulated.

3563 One last question deserves to be raised. The objection is sometimes made that to require that a military commander devote all his attention to the respect for the Conventions and the Protocol is not realistic, for he should primarily devote himself to the conduct of combat with nothing distracting him from this essential task.²³ One can reply to this as follows: first, the preventive stage, which consists of instructing members of the armed forces and inculcating habits and reflexes which are reconcilable with the requirements of the Conventions, does not take place during combat, but before – even before war has broken out.²⁴ Secondly it is appropriate to point out that orders are not only given during combat, but mostly beforehand. All orders given before combat should always and at every level include a reminder of the provisions of the Conventions that are relevant in the particular situation. Finally there is a problem which relates to the very essence of the organization of the armed forces. Although it is true that every military commander is responsible for everything that takes place in his sector, this does not mean that he must do everything himself: for example, members of the military police, medical officers, and specialists in the treatment of prisoners of war should be available at the appropriate levels, in addition to legal advisers, to assume, at the request of the commanders concerned, such tasks as may be assigned them in advance, for which they should be specially prepared, with a view to guaranteeing the best possible application of the Conventions and the Protocol when the time arrives, as well as setting in motion procedures for the suppression of breaches when necessary.

J. de P.

²⁰ On the fundamental role which the corps of officers is called upon to play to ensure respect for the rules of international law applicable in armed conflicts, see, for example, W. Williams, "The Law of War and 'Personnel Infrastructure'", XV-1-2 *RDPM DG*, 1976, pp. 19-35.

²¹ In this sense, see *O.R.* IX, p. 399, CDDH/1/SR.71, para. 2.

²² *Ibid.*, pp. 400-401, para. 11.

²³ See W.H. Parks, *op. cit.*, p. 19.

²⁴ *Cf.* Art. 83.

Protocol I

Article 88 – Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.
2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1, of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Documentary references

Official Records

O.R. I, Part I, p. 166; Part III, p. 25 (Arts. 78-79). *O.R.* III, pp. 333-335 and 337. *O.R.* VI, p. 309, CDDH/SR.45, paras. 13-14; pp. 332-337, *id.*, Annex (France, Indonesia, Poland). *O.R.* VII, p. 211, CDDH/SR.56, para. 85. *O.R.* IX, pp. 15-18, CDDH/I/SR.43, paras. 1-2, 11-13 and 15; pp. 19-24, paras. 18, 20-22, 27, 30, 33 and 41; pp. 25-26, paras. 48-52; p. 27, CDDH/I/SR.44, paras. 1-3; pp. 29-37, paras. 14-16, 20, 23-24, 30, 33-34, 40-42, 47 and 53-55; pp. 39-41, paras. 63-64, 66, 68, 70, 72 and 78; pp. 43-45, CDDH/I/SR.45, paras. 1, 4-5, 7-8 and 10; p. 47, para. 14; pp. 147-154, CDDH/I/SR.53, paras. 1-20, 23 and 25-26; p. 155, paras. 29-30; pp. 156-160, paras. 32-38, 40-42 and 44-57; pp. 161-162, CDDH/I/SR.54, paras. 1-7; pp. 164-167, paras. 9-13 and 15-25; pp. 168-169, paras. 30-34; pp. 170-172, paras. 40-42 and 44-50; pp. 173-177, paras. 52-66 and 68-76; pp. 179-183, CDDH/I/SR.55, paras. 1-25; p. 189, CDDH/I/SR.56, para. 1; pp. 393-397, CDDH/I/SR.70, paras. 31-54; p. 399, CDDH/I/SR.71, paras. 3-4; pp. 400-401, paras. 10-11 and 13-14; pp. 402-403, paras. 18-19; pp. 406-407, paras. 35 and 38; p. 409, paras. 46-47; pp. 411-414, paras. 57, 59, 62-63, 66-67 and 70; p. 415, paras. 76-77 and 80-81; p. 416, para. 86. *O.R.* X, pp. 115-116, CDDH/234/Rev.1, paras. 2-4 and 7-8; p. 120, paras. 28-29; p. 121, paras. 32-33; pp. 136-137, para. 115; p. 159, CDDH/I/324, para. 1; p. 164, para. 12; pp. 181-182, CDDH/405/

Rev.1, paras. 2-8; pp. 188-189, paras. 39-45; p. 211, *id.*, Annex I (CDDH/I/338/Rev.1), para. 1; pp. 213-214, paras. 7-11.

Other references

CE 1972, Report, vol. I, p. 189, para. 4.124; vol. II, pp. 117-118, CE/COM IV/46. *Commentary Drafts*, pp. 97-99 (Arts. 78-79).

Commentary

General remarks

3564 The provisions of the Conventions relating to repression supplemented by this Section apply to the repression of breaches both of the Conventions and the Protocol;¹ thus grave breaches of the Conventions and the Protocol fall under universal jurisdiction. To ensure that no grave breach remains unpunished, each Contracting Party² has the right and duty to search for persons alleged to have committed, or to have given orders to commit,³ a grave breach. According to the relevant provision of the Conventions,⁴ each Contracting Party may, however, also

“if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”.

3565 The possibility of handing over the accused to be tried by another Contracting Party willing to prosecute him is an option open to the Contracting Party in whose territory the accused is or in whose hands he has fallen. In addition, handing over such people is subject to the conditions laid down in the legislation of the requested Party and the other Contracting Party (i.e., the requesting Party) must have made out a *prima facie* case against the accused.⁵

3566 National legislation may pose conditions, e.g., it may require that there is an extradition treaty or that reciprocal rights are given by the requesting State. It may impose restrictions such as the quite common prohibition of extraditing its own nationals or a prohibition of extradition if the accused is punishable in the

¹ Cf. introduction to this Section, *supra*, pp. 973-977, and commentary Art. 85, para. 1, *supra*, p. 992.

² On this point, cf. the above-mentioned introduction, *supra*, p. 975 and note 8.

³ Cf. *ibid.*, pp. 974 and 979-980.

⁴ Para. 2 *in fine* of common Article 49/50/129/146.

⁵ This does not exclude the possibility of handing over a suspect to an international criminal tribunal established and competent to deal with such breaches (cf. introduction to this Section, *supra*, p. 975, note 10).

requesting State in a way that is not accepted by the law of the requested State; this last obstacle may be overcome by a guarantee by the requesting State that the punishment in question will not be imposed in that particular case. Moreover, it should be noted that handing over of an accused to another State is often subject to the specialty principle, i.e., the accused may only be tried for the offence for which he is being extradited.

3567 The requirement of a *prima facie* case being made against the defendant by the requesting country is not only to protect individuals against excessive or unjustified requests, but also to ensure that penal proceedings as envisaged will not be frustrated or reduced in scope as a result of the transfer to another Contracting Party.

3568 This article is in accordance with the system outlined above. The Conference was presented with two draft articles (78 and 79) dealing separately with mutual assistance and extradition, respectively. In the end it combined the two articles to form one. It abandoned provisions on various special aspects of extradition, keeping only the provisions of paragraph 2, as to be read in conjunction with paragraph 3. Paragraph 1, which is also to be read in conjunction with paragraph 3, confirms the duty to afford such mutual assistance as is necessary for the prosecution of any grave breaches wherever they have been committed and wherever those guilty of them may be.⁶

3569 If its legal system so requires, each Contracting Party must, in accordance with Article 80 (*Measures for execution*), take all necessary legislative or other measures for the application of the present article.⁷

3570 This article was adopted in Committee I after a vote, and in plenary by consensus.⁸

Paragraph 1

3571 This paragraph is concerned with mutual assistance in criminal matters in a narrow sense.⁹ The Parties to the Protocol undertake to afford one another the greatest possible measure of assistance in any proceedings relating to a grave breach. Such mutual assistance involves the compilation and exchange of

⁶ On this article and related problems, we refer to the following works quoted in the introduction to this Section (*supra*, p. 973, note 2): M.C. Bassiouni, *op. cit.*, pp. 196, 211-217; E.J. Roucouas, *op. cit.*, pp. 63-64, 67, 136-138; B.V.A. Röling, "Aspects of the Criminal Responsibility...", *op. cit.*, pp. 200, 202-203; Ph. Bretton, "La mise en œuvre...", *op. cit.*, pp. 412-413; G.I.A.D. Draper, "The Implementation...", *op. cit.*, pp. 37-42; "Incidences...", *op. cit.*, p. 426; H.-H. Jescheck, "War Crimes", *op. cit.*, p. 297; G.I.A.D. Draper, "War...", *op. cit.*, p. 324; M. Aubert, *op. cit.*, pp. 372-374.

⁷ Cf., for example, the conclusions in this regard in "Incidences...", *op. cit.*, p. 426.

⁸ Cf., respectively, O.R. IX, p. 394, CDDH/I/SR.70, para. 43 (vote: 70-0-3); O.R. VI, p. 309, CDDH/SR.45, para. 13.

⁹ In the broad sense, as used in the heading of the article and in the second sentence of paragraph 3, the expression also covers questions relating to extradition.

information, and in general, any assistance with a view to the tracing, arrest and trial of suspects.¹⁰

- 3572** This may concern mutual assistance for criminal proceedings conducted in another country, such as the notification of documents, tracing evidence, handing over files and documents, conducting searches etc. It may also concern handing over the prosecution or the execution of foreign criminal judgments.¹¹
- 3573** The principle of mutual assistance is certainly implied in the common article of the Conventions which makes grave breaches subject to universal jurisdiction, even though the conditions and modalities of such mutual assistance are determined by the law of the Contracting Party to whom the request is made (in accordance with paragraph 3 of the present article).

Paragraph 2

- 3574** As indicated in the general remarks, the question of the legal basis necessary for extradition is dealt with in very different ways in different countries: some countries make any extradition of a person in their custody subject to the existence of a bilateral or multilateral extradition treaty between themselves and the requesting State.¹² Others do not require a treaty and can proceed to extradition on the basis of national law.¹³ Finally, among those which require a treaty for extradition to take place, some consider that Article 49/50/129/146 common to the Conventions constitutes a sufficient legal basis in this respect.¹⁴
- 3575** The Conference was not able to agree on a text which would have established that the Conventions or the Protocol would constitute the legal basis necessary for those States which require a treaty as a basis for any extradition.
- 3576** Some States wanted to adopt as a general rule that there should, in general, be extradition to the country where the alleged grave breach had been committed.¹⁵

¹⁰ Cf. for example, Resolution 3074 (XXVIII) of the United Nations General Assembly, which was often cited in the discussions, on the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.

¹¹ Examples taken from the Swiss federal law on international mutual assistance in criminal matters of 20 March 1981 (RS 351.1) which applies to grave breaches of humanitarian law; on this point, cf. M. Aubert, *op. cit.*, pp. 372-374.

¹² Cf. *O.R.* IX, p. 158, CDDH/I/SR.53, para. 45; p. 153, para. 52.

¹³ Cf. *ibid.*, p. 25, CDDH/I/SR.43, paras. 48-49.

¹⁴ Cf. *ibid.*, pp. 412-413, CDDH/I/SR.71, para. 63.

¹⁵ Based on the above-mentioned Resolution 3074 (XXVIII) (*supra*, note 10) these countries had submitted amendment CDDH/I/310 and Corr.1, and Add.1 and 2 (*O.R.* III, p. 334) to this effect. This rule was contained in the Moscow Declaration of 30 October 1943 on German atrocities, adopted by the Soviet Union, the United Kingdom and the United States; the rule was said to be “without prejudice to the case of the major criminals whose offences have no particular geographical localization”. On these points this Declaration was confirmed by the London Agreement of 8 August 1945. The 1948 Convention on genocide recognizes the competence of the State where the crime was committed; the 1968 Convention on non-applicability of statutory limitations requires making possible “the extradition, in accordance with international law”; the above-mentioned Resolution 3074 (XXVIII) provides, in addition to the rule that was indicated,

(continued on next page)

This proposal was only retained in part, namely in the form of an obligation to consider such a request in accordance with the second sentence of this paragraph, because of the opposition of other States to extradition being given special priority, or in general, to give this any systematic preference.¹⁶

- 3577** According to the final wording of this paragraph, it is subject to the rights and obligations arising from the Conventions and from Article 85 (*Repression of breaches of this Protocol*), paragraph 1, of the Protocol. As long as the penal repression of grave breaches is ensured, the right of each Contracting Party to choose between prosecuting a person in its power or to hand him over to another Party interested in prosecuting him therefore remains absolute, subject to the legislation of the Party to which the request is addressed, and to any other treaties applicable in the case in question.
- 3578** On the other hand, there is a duty to co-operate in the matter of extradition when circumstances permit: taking into account the provisions of paragraph 3, this involves giving favourable consideration to a request for extradition from a country justifying its legal interest in the prosecution, if the conditions imposed by the law of the State to which the request is made are satisfied. The interest of another Contracting Party in the prosecution may be founded on the fact that the grave breach was committed in its territory, or that it was committed against its nationals.¹⁷
- 3579** Thus a State presented with a request for extradition not only has to choose between prosecuting the accused itself and extraditing him, but also, as the case may be, between the respective merits of two or more concurrent requests for extradition.
- 3580** The Conference did not adopt a phrase in the draft which was designed to prevent grave breaches from being treated as political offences for the purpose of extradition. The intention of this phrase had been to preclude the requested Party refusing extradition – assuming that all the other conditions of extradition were satisfied – on the basis of the argument that the motive or purpose of the breach had been political. Several recent universal or regional treaties, including the Convention on genocide (Article VII), contain explicit provisions on this subject. This question, too, has to be resolved in each case on the basis of the national legislation and the relevant treaties;¹⁸ once again, without having to settle the question whether the political nature of grave breaches may be invoked, we

that every State has the right to try its own nationals for war crimes; the formulation of 1950 of the Principles of Nuremberg and the Draft Code so far do not deal with this question (on these various texts, *cf.* introduction to this Section, *supra*, pp. 977-979. *Cf.* also commentary Art. 75, para. 7, *supra*, p. 887.

¹⁶ *Cf.* O.R. IX, p. 149, CDDH/I/SR.53, para. 9; p. 151, para. 16; p. 156, para. 36; p. 158, para. 42; p. 176, CDDH/I/SR.54, paras. 74-75.

¹⁷ The sponsors of amendment CDDH/I/310 and Corr.I and Add.1 and 2 (*cf. supra*, note 15) recognized the legitimacy of such a request: *cf.* O.R. IX, p. 172, CDDH/I/SR.54, para. 49.

¹⁸ On the question as a whole, *cf.* C. van den Wijngaert and B. de Schutter, "Terrorisme individuel et terrorisme d'Etat: une différence d'analyse", *Revue internationale de criminologie et de police technique*, 1982, p. 263; see also L. Oppenheim, *op. cit.*, pp. 588-589 (note 4); M.C. Bassiouni, *op. cit.*, pp. 199-200; B.V.A. Röling, "Aspects of the Criminal Responsibility...", *op. cit.*, p. 202; G.I.A.D. Draper, "The Implementation...", *op. cit.*, p. 40; M. Aubert, *op. cit.*, p. 372.

should stress the absolute need to punish those guilty of grave breaches, with or without extradition.

- 3581** It should be noted that the right of asylum may not be invoked by persons suspected of acts contrary to the purposes and principles of the United Nations, or of war crimes.¹⁹ Those suspected of war crimes are also excluded from instruments protecting refugees and stateless persons.²⁰

Paragraph 3

- 3582** This paragraph, which covers matters dealt with in the two preceding paragraphs, makes every request, whether it concerns mutual assistance in a narrow sense or extradition, subject to the law of the Party requested: for both aspects it confirms the provisions of the above-mentioned common article of the Conventions regarding handing over accused persons to another Contracting Party.
- 3583** In all those cases where national law incorporates bilateral or multilateral treaties binding the requested State, or where the legislation accords with such treaties, the second sentence of the paragraph could have been omitted without changing the substance.
- 3584** Therefore States remain free to draft such legislation and to conclude such treaties as they wish, within the limits imposed by the obligation to repress by penal measures grave breaches of the Conventions and of the Protocol.

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¹⁹ See, respectively, the Universal Declaration of Human Rights of 1948, Art. 14; and the 1967 Declaration on Territorial Asylum (Resolution 2312 (XXII) of the United Nations General Assembly), Art. 1.

²⁰ Convention of 1951 Relating to the Status of Refugees, Art. 1, Section F, sub-para. (a); Convention of 1954 Relating to the Status of Stateless Persons, Art. 1, para. 2(iii)(a); 1950 Statute of the Office of the United Nations High Commissioner for Refugees, para. 7(d).

Protocol I

Article 89 – Co-operation

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Documentary references

Official Records

O.R. I, Part I, p. 166. *O.R.* III, pp. 304-306 (new Art. to be inserted before Art. 70); p. 313 (Art. 70 *bis* (b)); pp. 323-324 (Art. 74 *bis*); p. 334, CCDH/I/310 and Corr.1 and Add.1 and 2. *O.R.* VI, p. 80, CDDH/SR.37, Annex (Spain)¹; pp. 345-349, CDDH/SR.46, paras. 31-60; p. 368, *id.*, Annex (Ecuador); pp. 370-371 (France); pp. 374-375 (India, Indonesia); pp. 376-377 (Italy); p. 382 (Peru); p. 384 (Syria). *O.R.* VII, p. 237, CDDH/SR.56, Annex (German Democratic Republic); p. 247 (Tunisia). *O.R.* IX, pp. 58-66, CDDH/I/SR.46, paras. 15-55; pp. 70-81, CDDH/I/SR.47, paras. 20-62; pp. 83-95, CDDH/I/SR.48, paras. 1-57; p. 109, CDDH/I/SR.50, para. 2; p. 349, CDDH/I/SR.66, paras. 3-4; pp. 417-418, CDDH/I/SR.72, paras. 2-11; p. 433, CDDH/I/SR.73, para. 49; p. 443, *id.*, Annex (France); p. 447 (Indonesia); pp. 449-450 (Mexico); p. 452 (Poland); pp. 454-455 (Cameroon); pp. 456-458 (Yugoslavia). *O.R.* X, p. 16, CDDH/48/Rev.1, Annex; p. 44, CDDH/219/Rev.1, para. 117; p. 62, *id.*, Annex; pp. 115-116, CDDH/234/Rev.1, para. 4; p. 118, paras. 16-17; pp. 136-137, para. 115; pp. 181-182, CDDH/405/Rev.1, paras. 4-5 and 9-10; pp. 184-185, paras. 20-30; pp. 217-219, *id.*, Annex II (CDDH/I/349/Rev.1), paras. 1-12; p. 258, *id.*, Annex IV.

Other references

CE/2b, p. 52. CRCE 1971, Report, p. 32. CE 1971, Report, p. 111, paras. 573-577. CE 1972, Commentaries, Part I, pp. 151-153 (Art. 74). CRCE 1972, Report, p. 50. CE 1972, Report, vol. I, pp. 190-191, paras. 4.134-4.142 (Art. 74).

¹ This written statement from Spain was mistakenly reported under Art. 7: in fact it concerns the draft article that was to be placed before or after draft Art. 70 (and which is now Art. 89); cf. moreover *O.R.* VI, pp. 348-349, CDDH/SR.46, paras. 53 and 60, and the Annex to the same record, which does not contain the statement announced by Spain.

Commentary

General remarks

- 3585** This article resulted from a discussion which was essentially concerned with reprisals,² but it does not deal with that subject either explicitly or implicitly. Nevertheless, together with other articles of the Conventions and of the Protocol, it should help to make reprisals unnecessary, even in situations where they are not explicitly prohibited. Like provisions concerned with the individual and collective responsibility of the Contracting Parties, the mechanisms for execution and supervision, fact-finding and repression, this article actually has as its purpose the ensuring of respect for the law, and more especially, the prevention of breaches being answered by further breaches.³
- 3586** Despite the very general wording of its heading, this article refers only to co-operation with the United Nations. This is in addition to other forms of co-operation between Contracting Parties, such as Article 1 (*General principles and scope of application*),⁴ in which the Contracting Parties undertake to respect and to ensure respect for the Protocol in all circumstances; Article 7 (*Meetings*), which provides for meetings of the Contracting Parties to consider general problems concerning the application of the Conventions and of the Protocol; the provisions concerning the repression of breaches, in particular those calling for the greatest measure of mutual assistance in criminal matters.⁵
- 3587** This provision results from a proposal which was considered at the same time as two other proposals explicitly relating to reprisals.⁶ As the Working Group was unable to agree on a single text, the present wording was returned to the Committee together with other proposals;⁷ when these were withdrawn, it was adopted in Committee after a vote.⁸ The plenary Conference also adopted it after a vote.⁹ Both in Committee and in the plenary Conference several delegations regretted that this provision was not considered and discussed in greater detail.¹⁰

² On reprisals in general and for a summary of this debate, *cf.* introduction to this Section, *supra*, pp. 982-987.

³ Further information on this article may be found in the following works referred to in the introduction to this Section (*supra*, p. 973, note 2): E.J. Roucouñas, *op. cit.*, p. 138; B.V.A. Röling, "Aspects of the Criminal Responsibility...", *op. cit.*, p. 213. Also see L. Condorelli and L. Boisson de Chazournes, *op. cit.*, pp. 31 and 34.

⁴ Art. 1, para. 1, Protocol I; Art. 1 common to the Conventions.

⁵ Conventions, Art. 49, 50/50, 51/129, 130/146, 147; Protocol, Art. 85, para. 1, and Art. 88.

⁶ O.R. III, p. 304, CDDH/I/74; p. 313, CDDH/III/103; p. 323, CDDH/I/221.

⁷ *Ibid.*, p. 304, note *ad* CDDH/I/74; pp. 305-306, CDDH/I/348; p. 324, CDHD/I/221/Rev.1. O.R. X, pp. 217-219, CDDH/405/Rev.1, Annex II (CDDH/I/349/Rev.1), paras. 3-12.

⁸ O.R. IX, pp. 417-418, CDDH/I/SR.72, paras. 2-7; vote: 41-18-17.

⁹ O.R. VI, p. 348, CDDH/SR.46, para. 53; vote: 50-3-40.

¹⁰ Thus O.R. IX, p. 447, CDDH/I/SR.73, Annex (Indonesia); p. 458 (Yugoslavia); O.R. VI, pp. 348-349, CDDH/SR.46, paras. 54 and 56; pp. 370-377, *id.*, Annex (France, India, Indonesia, Italy); p. 382 (Peru).

Situations envisaged

- 3588** The meaning of the words “in situations of serious violations of the Conventions or of this Protocol” was not elucidated during the Conference. The expression “serious violations” is only used in one other place in the Protocol, viz., in Article 90 (*International Fact-Finding Commission*), paragraph 2(c)(i).¹¹
- 3589** The system of the Conventions and the Protocol requires that the Contracting Parties suppress any act or omission contrary to the provisions of these instruments; furthermore they must impose penal sanctions on conduct defined by these same instruments as “grave breaches”.¹²
- 3590** The terms “violation” and “breach” may be considered to be synonymous, and both cover any conduct – both acts and omissions – contrary to the Conventions or the Protocol. Does this mean that the expressions “grave breaches” and “serious violations” are also synonymous?
- 3591** The principal elements of the answer can be found in Article 90 (*International Fact-Finding Commission*), of which the above-mentioned paragraph 2(c)(i) distinguishes grave breaches *as defined* in the Conventions and the Protocol, and other serious violations *of* the Conventions or *of* the Protocol. The latter term therefore refers to conduct contrary to these instruments which is of a serious nature but which is not included as such in the list of “grave breaches”.
- 3592** We do not need to have in mind exactly what conduct could fall under this definition, to be able nevertheless to distinguish three categories that qualify:
- isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;¹³
 - conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
 - “global” violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.
- 3593** In this article, as in the above-mentioned Article 90 (*International Fact-Finding Commission*), the situations envisaged are undeniably those of grave breaches or

¹¹ The word “violation”, which is also found in the Conventions (Art. 52/53/132/149) appears several times in the Protocol, for example, in Art. 51 (para. 8), 85 (para. 4), 87 (para. 3, which uses “breach” and “violation” synonymously) and 90 (para. 2). The expression “material breach” is used in Article 60 (para. 7) and the verb “violates” in Article 91. Finally, the expression “in violation of” is used four times in Article 85 (paras. 3 and 4).

¹² Conventions, articles mentioned *supra*, note 5; Protocol, Arts. 85-86. On the repression of breaches in general, cf. introduction to this Section, *supra*, pp. 973-977.

¹³ Cf. for example introduction to this Section, *supra*, p. 976, note 11, and commentary Art. 85, *supra*, p. 991 and note 4.

other serious violations. Nevertheless, it is not concerned with situations where the wrongful conduct remains rare and isolated, so that other mechanisms expressly established for prevention, supervision and repression are to be adequate.

Addressees

- 3594** The article prescribes for all Contracting Parties, and not only those who are Members of the United Nations, that they should act in those situations in co-operation with the Organization and in conformity with its Charter.¹⁴ Thus there will be States bound by the Protocol and this article who are not Members of the United Nations.¹⁵ It should be noted that the United Nations, by virtue of the Charter, must ensure that States which are not Members act in accordance with the principles laid down in Article 2 of the United Nations Charter “so far as may be necessary for the maintenance of international peace and security”.¹⁶ Furthermore, without referring to the observer status they may enjoy, States which are not Members may still bring certain questions before the United Nations or participate in certain discussions.¹⁷

Prescribed action

- 3595** The wording of this article follows *mutatis mutandis* Article 56 of the United Nations Charter which is aimed at co-operation for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all with a view to ensuring peaceful and friendly relations among nations. The scope of application of such co-operation is obviously more restricted here, since it is concerned with situations covered by the Conventions and the Protocol, but it is no less justified.
- 3596** Acting for the protection of man, also in time of armed conflict,¹⁸ accords with the aims of the United Nations no less than does the maintenance of international peace and security.¹⁹ The Organization showed its concern in two main ways: first, by its participation in the process of reaffirming and developing international humanitarian law;²⁰ secondly, by its resolutions on the applicability of humanitarian law and requiring its application to given situations or categories of persons, and also by issuing reports evaluating the application and respect of that law.

¹⁴ For a complete list of references in the Protocol to the United Nations, its Charter and its signs, emblems and uniforms, *cf.* commentary Preamble, *supra*, p. 26, note 8.

¹⁵ As of 31 December 1984 these were the Republic of Korea and Switzerland; these States did not make reservations or declarations on this article.

¹⁶ Charter of the United Nations, Art. 2, para. 6.

¹⁷ *Ibid.*, Art. 11, para. 2, and Arts. 32, 35 and 50.

¹⁸ *Cf.* the resolutions of the General Assembly and reports of the Secretary-General entitled “Respect for human rights in armed conflict” (*cf. infra*, pp. 1573-1576).

¹⁹ United Nations Charter, Preamble and Art. 1.

²⁰ *Cf.* references given *supra*, note 18.

- 3597** The United Nations actions to which Article 89 refers may therefore consist of issuing an appeal to respect humanitarian law, just as well as, for example, setting up enquiries on compliance with the Conventions and the Protocol and even, where appropriate, of coercive actions which may include the use of armed force.²¹ United Nations actions may also take the form of assistance in terms of material or personnel, given to Protecting Powers, their substitutes or to humanitarian organizations.
- 3598** This article is without prejudice to any of the provisions of the United Nations Charter to which reference is made. The Protocol, as stated in its Preamble, does not authorize any threat or use of force inconsistent with the United Nations Charter.²² Consequently the Protocol does not impair the right of individual or collective self-defence as recognized under Article 51 of the United Nations Charter until such time as the Security Council may have taken the necessary measures to maintain peace. Any use of force, individual or collective, even when consistent with the Charter, is subject to the rules of international law applicable in armed conflict, in particular those codified in the Conventions and the Protocol.²³
- 3599** Except for States bound by the Protocol which are not Members of the United Nations, this article does not create new law. It leaves intact the right of States to individual or collective self-defence as laid down in Article 51 of the United Nations Charter while respecting international humanitarian law. It is a reminder that, in addition to maintaining international peace and security, the United Nations is concerned with respect for human rights, also in time of armed conflict.

B.Z.

²¹ Relevant articles of the Charter: (a) General Assembly: 10, 11 (paras. 2 and 3), 12, 14 and 15; (b) Security Council: 24, 39-51. In addition, the General Assembly, in its Resolution 377 (V) of 1950 ("Uniting for Peace"), confirmed its competence to recommend collective measures, including the use of armed force when necessary, if the Security Council because of lack of unanimity fails to act where there appears to be a threat to the peace, breach of the peace, or act of aggression.

²² In any case this would be inconceivable in view of Art. 103 of the United Nations Charter: obligations of Members under the Charter prevail over those under any other international agreement. We refer also to the Vienna Convention on the Law of Treaties of 23 May 1969, Arts. 30 (para. 1) and 31 (para. 3(c)).

²³ On the applicability of the law of armed conflict to United Nations forces, *cf.* F. Seyersted, *op. cit.*; Y. Sandoz, "The Application of Humanitarian Law by the Armed Forces of the United Nations Organization", *IRRC*, Sept.-Oct. 1978, p. 274; D. Schindler, "United Nations Forces and International Humanitarian Law", *op. cit.*, p. 521.

Protocol I

Article 90 – International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as “the Commission”) consisting of fifteen members of high moral standing and acknowledged impartiality shall be established.
- (b) When not less than twenty High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person.
- (c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting.
- (d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.
- (e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs.
- (f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.
2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorized by this Article.
- (b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties.
- (c) The Commission shall be competent to:
 - (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
 - (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

- (d) In other situations, the Commission shall institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.
 - (e) Subject to the foregoing provisions of this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 of the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of this Protocol.
3. (a) Unless otherwise agreed by the Parties concerned, all enquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:
- (i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;
 - (ii) two *ad hoc* members, not nationals of any Party to the conflict, one to be appointed by each side.
- (b) Upon receipt of the request for an enquiry, the President of the Commission shall specify an appropriate time limit for setting up a Chamber. If any *ad hoc* member has not been appointed within the time limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.
4. (a) The Chamber set up under paragraph 3 to undertake an enquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation *in loco*.
- (b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.
- (c) Each Party shall have the right to challenge such evidence.
5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate.
- (b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability.
- (c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.
6. The Commission shall establish its own rules, including rules for the presidency of the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an enquiry, they are exercised by a person who is not a national of a Party to the conflict.
7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an enquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of fifty per cent

of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance fifty per cent of the necessary funds.

Documentary references

Official Records

O.R. I, Part I, pp. 166-168. *O.R. III*, pp. 338-345 (Art. 79 *bis*). *O.R. VI*, pp. 309-328, CDDH/SR.45, paras. 15-99; p. 331, *id.*, Annex (Czechoslovakia); p. 332 (Egypt); pp. 335-336 (Indonesia); p. 337 (Romania); p. 340 (Yemen); pp. 341-343, CDDH/SR.46, paras. 1-21; p. 361, *id.*, Annex (Australia); pp. 364-366 (Canada, Chile, Colombia); p. 367 (Denmark); pp. 368-369 (Finland); pp. 376-378 (Israel, Italy, Japan); p. 382 (Peru); p. 384 (Syrian Arab Republic); p. 386 (Turkey). *O.R. VII*, p. 311, CDDH/SR.58, para. 155. *O.R. VIII*, p. 190, CDDH/I/SR.20, para. 29; p. 283, CDDH/I/SR.28, para. 69; pp. 400-401, CDDH/I/SR.37, paras. 97-100. *O.R. IX*, p. 21, CDDH/I/SR.43, para. 25; p. 47, CDDH/I/SR.45, para. 15; p. 65, CDDH/I/SR.46, para. 53; pp. 189-206, CDDH/I/SR.56, paras. 2-78; pp. 207-221, CDDH/I/SR.57, paras. 1-80; pp. 223-232, CDDH/I/SR.58, paras. 1-48; p. 237, CDDH/I/SR.59, para. 5; p. 349, CDDH/I/SR.66, paras. 3-4; pp. 418-426, CDDH/I/SR.72, paras. 12-64; pp. 435-459, CDDH/I/SR.73, Annex (Austria, Belgium, Canada, Cyprus, Democratic People's Republic of Korea, Denmark, Egypt, France, Greece, Holy See, Indonesia, Ivory Coast, Japan, Mexico, New Zealand, Republic of Korea, Syrian Arab Republic, United Republic of Cameroon, Yugoslavia, Zaire). *O.R. X*, pp. 121-122, CDDH/234/Rev.1, paras. 34-35; pp. 190-191, CDDH/405/Rev.1, paras. 47-56; pp. 222-228, *id.*, Annex II; pp. 264-268, *id.*, Annex IV.

Other references

CE/2b, pp. 22-23. *CRCE 1971, Report*, pp. 29-30. *CE 1971, Report*, pp. 108-109, paras. 540, 542-544 and 546-550. *CE 1972, Basic Texts*, p. 8 (Art. 10). *CE 1972, Commentaries*, Part I, pp. 24-26 (Art. 10). *CE 1972, Report*, vol. I, p. 179, paras. 4.56-4.58; p. 180, para. 4.71.

Commentary

3600 Proposals had already been put forward in 1949 aimed at automatically setting into motion a procedure of enquiry in the case of a breach of the Conventions. However, after lengthy discussion,¹ it had finally been necessary to abandon

¹ See *Commentary I*, pp. 374-379.

these efforts and settle for the brief provision contained in the four Conventions of 1949.² This provision never achieved a tangible result. Despite the efforts of the ICRC, States never succeeded in actually setting up an enquiry because the consent of the Parties concerned was lacking.³

- 3601 From the beginning of the *travaux préparatoires* to the Diplomatic Conference of 1974-1977, the necessity for some form of check on compliance with the rules applicable in case of armed conflict was emphasized by the experts. The development of Article 5 (*Appointment of Protecting Powers and of their substitute*), and the provision relating to the training of qualified personnel (Article 6 – *Qualified persons*) reflect this concern. However, some wished for an additional mechanism,⁴ a sort of “fall back” institution.⁵
- 3602 The ICRC, for its part, was not at all opposed to this. It has always considered that it was not itself an investigative body, publishing findings and reporting on breaches.⁶ However, because there was no specific proposal from the experts, it did not include in the draft a provision relating to commissions of enquiry. Thus the main foundations for the present article were two amendments,⁷ presented during the course of the Conference. One of these proposals was even more ambitious than the present Article 90, since it was entitled “Permanent Commission for the Enforcement of Humanitarian Law”, while the other proposal bore the title “International Enquiry Commission”. In one of the drafts the members of the commission were to be appointed by the ICRC, while the other draft recommended the establishment of regional lists for this purpose. These texts gave rise to new amendments⁸ and proposals. Long and difficult discussions took place in the Committee.⁹ Voting took place almost paragraph by paragraph, and the text was finally adopted as a whole with 40 votes in favour, 18 against, and 17 abstentions.¹⁰ More or less the same happened in the plenary meeting which finally adopted the text of the article with 49 votes in favour, 21 against, and 15 abstentions.¹¹

² First Convention, Art. 52; Second Convention, Art. 53; Third Convention, Art. 132; Fourth Convention, Art. 149. This procedure of enquiry should not be confused with that provided for in Arts. 121, Third Convention, and 131, Fourth Convention, concerning prisoners or internees killed in special circumstances.

³ For examples, see J. Pictet, *Le droit humanitaire et la protection des victimes de la guerre*, op. cit., pp. 80-81.

⁴ See CE 1971, Report, pp. 108-109, paras. 536-550; Government replies, pp. 74-90.

⁵ CE 1972, Report, vol. I, p. 181, para. 4.72.

⁶ Ibid. For the ICRC position on this subject, see “Action by the ICRC in the Event of Breaches of International Humanitarian Law”, IRRC, March-April 1981, pp. 76-83.

⁷ O.R. III, pp. 388-389, CDDH/I/241 and Add.1, and pp. 340-342, CDDH/I/267; for their introduction, O.R. IX, pp. 189-194, CDDH/I/SR.56.

⁸ O.R. III, pp. 342-343, CDDH/I/316; p. 343, CDDH/415; pp. 344-345, CDDH/416.

⁹ See O.R. IX, pp. 189-232, CDDH/I/SR.56-58.

¹⁰ See *ibid.*, pp. 420-426, CDDH/I/SR.72; for the different versions presented, see O.R. X, pp. 220-228, CDDH/405/Rev.1, and for the draft presented in plenary meeting, *ibid.*, pp. 264-268.

¹¹ See O.R. VI, p. 341, CDDH/SR.46, and for the debate, pp. 309-328, CDDH/SR.45.

Paragraph 1 – Establishment of the Commission and election of its members*Sub-paragraph (a)*

- 3603** The Commission in question is an International Fact-Finding Commission¹² consisting of fifteen members. This title actually indicates the scope of the Commission's competence. In principle it is only concerned with facts, and essentially has no competence to proceed to a legal assessment of the facts that have been established. However, the analysis of paragraph 2(c) of this article, which defines the Commission's area of competence more precisely, will show that the Commission may be called upon to provide a legal evaluation of the extent of its mandate. Similarly, paragraph 5 shows that the Commission's conclusions may go beyond simply reporting the facts.
- 3604** The composition of fifteen members corresponds to the proposals of some of the initiators of the article,¹³ and seems appropriate when one refers to paragraph 3 which provides that the enquiry shall be undertaken by a Chamber of seven members, of whom only five have to be members of the Commission. Thus it is possible to constitute simultaneously two, or even three Chambers, depending on the requirements of the situation.
- 3605** The members of the Commission must have a high moral standing and their impartiality must be "acknowledged". This phrase is also found with regard to the supervisory bodies set up under some of the human rights conventions.¹⁴
- 3606** Thus the criterion of impartiality is opposed to the election of persons who are too closely linked by their function or their profession to the politics of the State from which they come.¹⁵
- 3607** Similarly a person who is known for his uncompromising public position with regard to States which are or could be involved in an armed conflict, would not be eligible. Furthermore, it is self-evident that once they have been elected, members of the Commission should abstain from making any public comment on current armed conflicts.¹⁶

¹² For the efforts made in this field by the United Nations, see the two reports of the Secretary-General "Questions of methods on fact-finding" (General Assembly, 21st session, Resolution 2182 of 12 December 1966, Official Documents, supplement No. 16 (A/6316)), and Resolution 2329 of 18 December 1967 (*ibid.*, 22nd session, supplement No. 16 (A/6716)), and B.G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights, International Studies in Human Rights*, The Hague, 1982. See also *SIM Conference on Human Rights Fact-Finding, Utrecht 1983, Final Report*, The Netherlands Institute of Human Rights.

¹³ O.R. III, p. 338, CDDH/I/241, and Add.1. Another proposal envisaged a Commission of five members (*ibid.*, p. 340, CDDH/I/267). By way of comparison, the International Convention on the Elimination of all Forms of Racial Discrimination (Art. 8) provides for the establishment of a Committee consisting of eighteen experts. This Committee has the task of examining the reports submitted by the States Parties to the Convention on the measures they have taken to give effect to this Convention.

¹⁴ For example, see Art. 8 of the above-mentioned Convention.

¹⁵ In this respect, see the remarks of K.J. Partsch, in M. Bothe, K.J. Partsch and W.A. Solf, *op. cit.*, p. 542.

¹⁶ In this sense, see Ph. Bretton, "La mise en œuvre des Protocoles de Genève de 1977", *op. cit.*, p. 398, note 51.

- 3608** It should also be noted that once the conditions laid down in sub-paragraph (b) have been fulfilled, the obligation to establish the Commission is not related to the existence of an armed conflict. It is therefore a permanent, impartial and non-political body.

Sub-paragraph (b)

- 3609** This provision is closely related to the “optional clause on recognition of compulsory competence”, which is contained in paragraph 2(a).¹⁷ This means that the Commission will not be set up until twenty Contracting Parties have agreed to recognize *ipso facto* and in advance the Commission’s competence.¹⁸ Then, it must be constituted, and the depositary is bound to convene, at a constitutive meeting, the representatives of these twenty countries for the purpose of electing the members of the Commission. Thus it is primarily a body not of all the Parties to the Protocol, but of the Parties which in advance agree to accept its competence. Nevertheless, it is not excluded that other Parties to the Protocol may have recourse to the Commission in a particular case, as shown in paragraph 2(d).
- 3610** The members are elected for five years; at the end of this period the depositary convenes another meeting of all the Parties concerned, for the purpose of holding another election.
- 3611** The text contains only some brief ideas on the procedure to be followed during these meetings. However the depositary may seek guidance, for example, from the provisions contained in certain conventions on human rights, to resolve problems that have not been regulated: quorum, required majority, possibility of re-election etc.¹⁹ The States participating in the meeting may obviously choose candidates from their own nationals. However, in view of the increased competence given the Commission in case of application of paragraph 2(d), it would seem desirable that the Commission is not exclusively composed of representatives of the electing countries.

Sub-paragraph (c)

- 3612** The Commission is independent from the States which establish it. This independence is clearly indicated in sub-paragraph (c) by the words which state that the members serve “in their personal capacity”, i.e., in complete freedom. They do not receive instructions. In this context it may be recalled that the members of the Human Rights Committee take an oath or make a solemn

¹⁷ The final wording is due to a last minute amendment (O.R. III, p. 344, CDDH/416, and O.R. VI, pp. 322-325, CDDH/SR.45).

¹⁸ For States which accepted *ipso facto* the competence of the Commission, see *infra*, para. 2 (a), p. 1044.

¹⁹ See, for example, Art. 30 of the International Covenant on Civil and Political Rights, which relates to the procedure for the election of the Human Rights Committee.

declaration, partly inspired by the one taken by judges of the International Court of Justice, to perform their duties and exercise their powers “honourably, faithfully, impartially and conscientiously”.²⁰

Sub-paragraph (d)

- 3613** Candidates must have “the qualifications required”. One suggestion presented during the discussions was aimed at nominating experts who should “not only be of great personal integrity but should be acquainted with, and have interdisciplinary experience of, the various aspects of the Geneva Conventions and the Protocols”.²¹ It should be recalled in this respect that the members of the Commission could not leave any legal problem wholly out of consideration.
- 3614** As regards the clause which requires an equitable geographical representation, this is common for bodies with supervisory functions under the human rights conventions which combine it with the requirement of “representation of the different forms of civilization and of the principal legal systems”.²² The last point may be important for the assessment of evidence (paragraph 4).²³ The criterion of geographical distribution should, if possible, be considered in relation to all the Parties to the Protocol and the Conventions, and not only the countries which recognize *ipso facto* the Commission’s competence.²⁴

Sub-paragraph (e)

- 3615** In the case of a vacancy, the Commission proceeds by co-option, based on the original list of candidates presented at the constitutive meeting or the last meeting convened for an election. The candidate who obtained most votes from the reserve list will not necessarily be elected, since the criteria of qualification and geographical distribution must be respected.²⁵

Sub-paragraph (f)

- 3616** This clause seems to cover only the availability of the necessary locations and secretarial facilities,²⁶ independently of the expenses provided for under paragraph 7.

²⁰ M. Schreiber, “La pratique récente des Nations Unies dans le domaine de la protection des droits de l’homme”, 145 *Hague Recueil*, 1975/II, p. 334.

²¹ O.R. IX, pp. 209-210, CDDH/I/SR.57, para. 16.

²² International Covenant on Civil and Political Rights, Art. 31.

²³ Cf. O.R. IX, p. 218, CDDH/I/SR.57, para. 63.

²⁴ In this sense, see M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, pp. 542-543. Cf. also para. 2 (a) of Article 90.

²⁵ M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 543.

²⁶ Cf. *ibid.*

Paragraph 2 – The Commission’s area of competence

Sub-paragraph (a)

3617 By analogy with Article 36, paragraph 2, of the Statute of the International Court of Justice, this provision contains an optional clause on recognition of compulsory competence²⁷ for States which at the time of signing, ratifying or acceding to the Protocol, or at any subsequent time, declare that they recognize this competence *ipso facto* (*de plein droit* in the French version) with respect to any other State making the same declaration. Thus only those States which choose to, and which commit themselves in advance, are bound by the obligation to accept the enquiry. This formulation²⁸ established a compromise between two positions which created a serious rift between the participants of the Conference, one side insisting on a system of compulsory enquiry, while the other was irreversibly opposed to what they regarded as an intolerable encroachment on the sovereignty of States.²⁹ A final attempt to make the enquiry compulsory “in the case of a violation of the rules in occupied territory” also failed in plenary meeting of the Conference,³⁰ even with a restriction limiting this clause to territory occupied as a result of aggression.³¹

3618 There is no doubt that only States are competent to submit a request for an enquiry to the Commission, to the exclusion of private individuals, representative bodies acting on behalf of the population, or organizations of any nature. On the other hand, there is no reason why a Protecting Power, duly entrusted in protecting the interests of a Party to the conflict which had recognized the Commission’s competence, could not submit a request to the latter in the context of its general mandate. Moreover, it is not necessarily the Party which is the victim of the alleged violation which requests the enquiry. Any Contracting Party in the sense of paragraph 1 (b) can do so, provided that the request applies to another Contracting Party in the sense of the same provision. As regards the Commission, it is absolutely not permitted to act on its own initiative.³²

Sub-paragraph (b)

3619 This provision obliges the depositary to notify all Parties to the Protocol, and even all Parties to the Conventions in accordance with Article 100 (*Notifications*),

²⁷ Cf. Ph. Bretton, “La mise en œuvre des Protocoles de Genève de 1977”, *op. cit.*, p. 398.

²⁸ Accepted in plenary meeting with 43 votes in favour, 13 against, and 33 abstentions (see *O.R.* VI, p. 325, CDDH/SR.45, para. 79).

²⁹ On this controversy, see E. Kussbach, “Commission internationale d’établissement des faits”, XX-1-2 *RDPM DG*, 1981, p. 78, at pp. 96-101.

³⁰ *O.R.* VI, pp. 313 and 317, CDDH/SR.45, paras. 29 and 48; for the discussion, see *ibid.*, pp. 311-318.

³¹ *Ibid.*, p. 324, para. 78.

³² Such a proposal was contained in the initial amendment CDDH/I/241 (*O.R.* III, p. 338), but was later abandoned. See also *O.R.* IX, p. 205, CDDH/I/SR.56, para. 73.

sub-paragraph (c), and not only the Contracting Parties who made a declaration on compulsory competence in accordance with sub-paragraph (a) of this paragraph.

Sub-paragraph (c)

(i) – Enquiry

- 3620** The Commission is competent to enquire into facts and not to judge. If a submission regarding certain facts alleged to have taken place is made in due form, i.e., in accordance with sub-paragraph (a) above, the Commission is competent to try and establish whether these facts took place.
- 3621** Moreover, this does not apply to all facts. The allegation which is submitted to the Commission must relate to a “grave breach” or “serious violation” of the Conventions or the Protocol. Thus the Commission must pass judgment on the admissibility of the request. Breaches and violations which are not serious are excluded, which in itself implies first of all a legal appraisal, which may not always be easy. Minor violations may become serious if they are repeated, and it is then up to the Commission to determine this,³³ in order to establish its competence. Virtually no distinction is made between grave breaches and serious violations in the text of the Conventions or the Protocol, which almost always refers to “grave breaches”. A serious violation may be found which is not covered by the list of grave breaches.³⁴
- 3622** As we saw above, only grave breaches and serious violations of the Conventions and the Protocol fall under the competence of the Commission, and not those of other rules of the law of armed conflict, whether these are rules of customary law or not. Thus it is up to the Commission to interpret the provisions of the Conventions and of the Protocol, where necessary, to determine its competence on this point.
- 3623** Some delegates at the Conference expressed the fear that in this way the Commission would come up against some thorny problems regarding its own competence, which could become a source of possible controversy.³⁵ This is yet another reason why the Commission should include amongst its members highly qualified lawyers. If the Commission had to spend a great deal of time on lengthy discussions regarding its own competence, its efficacy would be compromised.

³³ See *O.R.* IX, p. 53, CDDH/I/SR.45, para. 45. However, it is perfectly possible to imagine resort to the Commission to ensure the supervision of hospital zones and localities from time to time (First Convention, Art. 23 and Annex I, Arts. 8-10) and of hospital and safety zones and localities (Fourth Convention, Art. 14 and Annex I, Arts. 8-10) or non-defended localities or demilitarized zones (Arts. 59 and 60, Protocol I).

³⁴ E. Kussbach expresses the view that a serious violation (unlike a grave breach) engages the responsibility of the Party to the conflict without engaging, at an international level, the responsibility of the individual (“Commission internationale d’établissement des faits”, *op. cit.*, p. 101. In addition see introduction to this Section, *supra*, p. 976, note 11, and commentary Art. 89, *supra*, pp. 1033-1034.

³⁵ See *O.R.* VI, pp. 341-342, CDDH/SR.46.

(ii) – Good offices

- 3624** When it has taken note of facts which seem to it to constitute grave breaches or serious violations, the Commission is invited to facilitate, through its good offices,³⁶ the restoration of an attitude of respect for the provisions concerned. This clause is confirmed and even extended in paragraph 5(a) below, in the sense that, in providing such good offices, the Commission has to submit to the Parties concerned such recommendations as it deems appropriate. Once again it is difficult to imagine that the Commission can invite the restoration of an attitude of respect for certain provisions without having first formed an opinion regarding their non-respect. However, as the Commission must not pronounce on questions of law, it must be careful not to include such elements of legal evaluation in its report. Thus they would only have internal value,³⁷ and the Commission should only express in the report a *prima facie* appraisal.³⁸
- 3625** The term “good offices” can be understood to mean the communication of conclusions on the points of fact, comments on the possibilities of a friendly settlement, written and oral observations by States concerned, etc.³⁹

Sub-paragraph (d)

- 3626** This sub-paragraph creates the possibility of resorting to the Commission for States which have not declared in advance that they recognize the competence of this Commission, in accordance with sub-paragraph (a) of this paragraph. This means that any Party to an international armed conflict, even if it is not a Party to the Protocol, may approach the Commission regarding an allegation of a grave breach or serious violation of the Conventions, which adds to the significance of the creation of the Commission. If such a Party to the conflict is a Party to the Protocol, it can do the same in the context of the Protocol. However, the Commission will consider itself to be competent only when the Party or Parties concerned give their consent. The question may arise whether such consent should be deemed to have been obtained in advance when the Party which is the subject of these allegations is one of those that recognized the Commission's competence *a priori* (sub-paragraph(a) above). This interpretation would undeniably introduce an element of inequality: the Parties to the conflict which have not recognized the compulsory competence of the Commission could force a Party which has recognized this competence to accept the enquiry, but not the

³⁶ Cf. Art. 41 (e) of the Covenant.

³⁷ In this sense, cf. M. Bothe, K.J. Partsch, W.A. Solf, *op. cit.*, p. 544.

³⁸ In this sense, cf. E. Kussbach, “Commission internationale d'établissement des faits”, *op. cit.*, p. 102.

³⁹ Cf. M. Schreiber, *op. cit.*, p. 365. See also B. Graefrath, “Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Abkommen vom 12.8.1949”, *Wissenschaftliche Zeitschrift der Humboldt Universität zu Berlin*, Ges.-Sprachw. R.XXX (1981) 1, p. 13.

other way round.⁴⁰ This does not seem to correspond to the wording of sub-paragraph (a) of this paragraph. In fact the “other situations” referred to here are situations in which the conditions set out in sub-paragraph (a) have not been fulfilled and in which the clause on recognition of compulsory competence therefore does not apply. Only States which recognize the competence of the Commission *a priori* may impose an enquiry on a State which has done the same. This provision has the advantage of allowing all Parties to an armed conflict, including national liberation movements, to resort to the Commission on a case by case basis, but at any time, though obviously subject to the condition that the challenged Party gives its consent.

Sub-paragraph (e)

3627 The article which is common to the four Conventions and is referred to in this sub-paragraph, reads as follows:

“At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.”

3628 This obligation, which applies to all alleged violations, and not solely to grave breaches and serious violations, is not only confirmed, but is extended to all alleged violations of the Protocol. All Parties to the Protocol which do not recognize the Commission’s competence, as provided in this article, remain subject to the obligation to institute an enquiry at the request of a Party to the conflict, pursuant to the common article quoted above of the four Conventions. Similarly, all Parties to the Conventions and the Protocol which recognize the competence of the Commission as laid down in this article, remain subject, by reason of the same common article, to the obligation to institute an enquiry at the request of a Party to the conflict for all violations which do not fall under the Commission’s competence, i.e., for all violations which are not serious.

3629 Thus there is no change as far as basic obligations are concerned. However, this article common to the four Conventions has never in fact been applied. The wording is so succinct that the proceedings can be paralyzed at a procedural level at any time. It is precisely on this point that the present provision has achieved what is perhaps a decisive step forward with respect to allegations of grave breaches or serious violations.

⁴⁰ See *O.R.* VI, pp. 342 and 365, CDDH/SR.46. Moreover, Ch. Rousseau, *op. cit.*, p. 273, specifies that clauses of this type, because they are by way of an exception and subject to a restrictive interpretation when they are included in a treaty.

Paragraph 3 – The constitution of the Chamber of Enquiry*Sub-paragraph (a)*

- 3630** On some points the terms of this sub-paragraph are similar to those of Article 42 of the International Covenant on Civil and Political Rights which relate to the appointment of an *ad hoc* Conciliation Commission. However, it will be noted that the Protocol, by leaving open the possibility of any other solution which the Parties concerned may choose in common agreement, remains flexible and susceptible to any other formulation.
- 3631** The role of the President of the Commission is decisive for the constitution of the Chamber responsible for conducting the enquiry. Paragraph 6 of Article 90 contains provisions relating directly to him. The President is called upon to appoint five members of the Commission to form part of the Chamber “after consultation with the Parties to the conflict”. This expression differs from that used in the above-mentioned Article 42 of the Covenant, which requires “the prior consent of the States Parties concerned”. Thus it may be concluded that the President is not formally bound by the opinion of the Parties that have been consulted.⁴¹ In fact, it would seem desirable not only that the members of the Chamber are not nationals of a Party to the conflict, as stated in the text, but that they belong to neutral countries.⁴²
- 3632** The two *ad hoc* members, not nationals of any Party to the conflict, but appointed by these Parties, need not necessarily be chosen from the members of the Commission. They “represent” the Party which has appointed them and should contribute to creating an atmosphere of trust within the Chamber itself.⁴³

Sub-paragraph (b)

- 3633** In time of armed conflict, the time taken by the body responsible for supervising compliance with the applicable rules may be crucial, not only for the fate of possible victims but also with regard to the risk of counter-measures being taken by the Party which considers itself wronged.⁴⁴ On this latter point, the procedure provided for in Article 90 is intended to have a dissuasive effect,

⁴¹ In this respect, Ph. Bretton remarks that one might think that this is not just an opinion, since it would be very difficult for the president, who might be jeopardizing the success of the enquiry, to appoint someone who did not have the agreement of the Parties involved in the enquiry, and this obligation of consultation could well be transformed into a procedure of a binding opinion, even though, according to the text, the Parties do not have a power of veto here (“La mise en œuvre des Protocoles de Genève de 1977”, *op. cit.*, p. 401).

⁴² In this sense, see *O.R.* IX, pp. 208-209, CDDH/I/SR.57, para. 11, and p. 423, CDDH/I/SR.72, para. 47; see also *O.R.* VI, p. 376, CDDH/SR.46.

⁴³ In this sense, *cf.* E. Kussbach, “Commission internationale d’établissement des faits”, *op. cit.*, p. 103.

⁴⁴ With regard to reprisals, see introduction to this Section, *supra*, p. 981.

and from the time that a request for an enquiry is presented to the Commission, there is some degree of urgency.⁴⁵ Moreover, the longer matters drag on, the more difficult it may become to establish the facts precisely. Thus the President must react immediately to a request presented to him, and will himself appoint the two *ad hoc* members in case the Parties fail to do so,⁴⁶ perhaps after attempting a final consultation with the Parties.

Paragraph 4 – Conduct of the enquiry

Sub-paragraph (a)

3634 Once the Chamber has been constituted, it invites the Parties to the conflict concerned to assist it and to present evidence. The above-mentioned Convention on the Elimination of all Forms of Racial Discrimination provides in Article 11 that a State receiving a communication is to submit written explanations or statements clarifying the matter to the supervisory body, indicating, where appropriate, what measures have been taken to remedy the situation. It is also bound to furnish any relevant supplementary information when it is requested to do so. It may be admitted that the assistance of the Protecting Power can be called in a similar manner, if there is occasion to do so. If the Chamber carries out the investigation *in loco*, it is obvious that it should be provided with all the facilities necessary for this. Ideally it would be assisted by qualified personnel, in the sense of Article 6 of the Protocol (*Qualified persons*). Furthermore, model procedures have been established for this purpose for the organs of the United Nations which have to deal with violations of human rights.⁴⁷ Protocol II annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons⁴⁸ provides, in Article 8, that the head of an observation mission of the United Nations must be informed of the location of minefields in the area where an enquiry is being held.

⁴⁵ See *O.R.* IX, p. 65, CDDH/I/SR/46, para. 53; p. 86, CDDH/I/SR.48, para. 12; p. 194, CDDH/I/SR.56, para. 20.

⁴⁶ In this respect, see the interesting remarks by Ph. Bretton, "La mise en œuvre des Protocoles de Genève de 1977", *op. cit.*, pp. 401-402.

⁴⁷ Resolution 1870 (LVI) of the Economic and Social Council, which brought them to the attention of all organs and agencies of the United Nations concerned with human rights (*cf.* M. Schreiber, *op. cit.*, pp. 367 and 377, note 3); for the text, see B.G. Ramcharan, *op. cit.*, Annex I and II, pp. 231-248, and "Belgrade minimal rules of procedure for international human rights fact-finding missions", *ibid.*, pp. 250-252, and 75 *AJIL* I, 1981, pp. 163-165 (ILA).

⁴⁸ See *supra*, commentary Art. 35, para. 2, p. 402.

Sub-paragraphs (b) and (c)

- 3635** The rules of evidence laid down in these sub-paragraphs tend to confer to the Chamber's activity a quasi-judicial character.⁴⁹ Furthermore it should be noted that all "the Parties", which means the Parties *concerned* (see the French text which states "Parties concernées"), are covered by this provision, while the preceding sub-paragraph refers only to the Parties to the conflict. The evidence may implicate either a Party to the conflict which was not the object of the allegations made, whether or not it accepted the compulsory competence of the Commission, or a State which is not Party to the conflict (for example, in the case of internment in a neutral country).

Paragraph 5 – Report of the Commission*Sub-paragraph (a)*

- 3636** As regards its wording, this sub-paragraph is similar to Article 13, paragraph 1, of the above-mentioned International Convention on the Elimination of all Forms of Racial Discrimination. Under the terms of that article the States concerned receive a report containing the findings of the Commission "on all questions of fact relevant to the issue between the parties, and containing such recommendations as it may think proper for the amicable solution of the dispute". The similarity to the present sub-paragraph is striking, and it is therefore no longer merely a question of good offices, as in paragraph 2(c)(ii). This may be interpreted as a first step towards mediation.

Sub-paragraph (b)

- 3637** Unlike the corresponding provisions of the conventions on human rights,⁵⁰ this sub-paragraph does not determine the period within which the State accused of violation has to reply to the Chamber's requests. This question of the period of time is of great importance as it determines the moment when the Commission will have to expose publicly the responsibility of the Parties concerned, by publicly reporting on their shortcomings, if any. Thus the question must be resolved in the Commission's own rules, as required under paragraph 6. Depending on the situation, particularly when there is a danger of a violent reaction from the Party which considers itself wronged, the enquiry has to be conducted as rapidly as possible. The reproach of being far too slow could indeed be made of the analogous procedures instituted in the context of the human rights conventions.

⁴⁹ In this sense, see Ph. Bretton, "La mise en œuvre des Protocoles de Genève de 1977", *op. cit.*, p. 402.

⁵⁰ Covenant, Art. 41, para. 1(a), and Convention on the Elimination of all Forms of Racial Discrimination, Art. 11, para. 1, which provide for a period of three months.

Sub-paragraph (c)

3638 The wording of this sub-paragraph has given rise to controversy. For some, “the conclusions reached by a highly qualified international commission of inquiry would have the same effect as a sanction, and the incriminated Party would not be able to disregard them” for fear of public opinion.⁵¹ In fact, there may be a need for publicity even when no violation has been noted, to remove all suspicion from the incriminated Party. Other delegations contrasted the advantages of “discreet diplomacy”⁵² to these arguments. Such discretion could well be considered to be the prerogative of organs of conciliation. It was clearly this position which finally won the day, and indeed in the most restrictive form. A proposal aimed at prohibiting public disclosure, “unless the Parties consent thereto”, was rejected by the Conference.⁵³ Thus for the Commission to report its findings publicly there should be a request from all the Parties to the conflict, not the Parties to which paragraph 4(b) and (c) and paragraph 5(a) refer. The findings must be understood to mean the report as a whole, as well as its constitutive elements.

Paragraph 6 – The Commission’s own rules

3639 The Commission can refer, for the purpose of establishing its own rules and before adopting these rules, to models, such as the rules of supervisory organs under the human rights conventions, provided that it respects the conditions laid down in the present paragraph and by the article as a whole, and takes into account the requirements inherent in situations of armed conflict. The depositary can also use these rules as an example at the constitutive meeting of the High Contracting Parties provided for in paragraph 1(a), as long as this meeting has not adopted its own rules.⁵⁴

3640 Because of the central role of the President (see paragraph 3) the continuity of his function is explicitly referred to, on the one hand, and the necessity of providing for his replacement when need be, on the other hand, to ensure that this function is never exercised by a person who is a national of a Party to the conflict. In any case, like all members of the Commission, the President should be a person of the highest calibre and in every respect above suspicion.

Paragraph 7 – The Commission’s expenses

3641 The original proposals anticipated that the cost of the Commission would be met only by voluntary contributions channelled through the International

⁵¹ *O.R.* IX, p. 40, CDDH/I/SR.44, para. 69, and *O.R.* VI, p. 384, CDDH/SR.46.

⁵² *O.R.* IX, p. 205, CDDH/I/SR.56, para. 74.

⁵³ *Ibid.*, p. 425, CDDH/I/SR.72, para. 58.

⁵⁴ See *supra*, p. 1041.

Committee of the Red Cross or through the depositary.⁵⁵ As this solution did not really appear to be satisfactory, it was amended⁵⁶ to the formulation of the present paragraph, which puts forward a clearly improved solution, although it is still subject to criticism.⁵⁷

3642 In the first place, it is to be hoped that the obligation that every State which makes a declaration of acceptance of the compulsory competence of the Commission must share in its administrative expenses will not be such as to discourage it from making this declaration.

3643 By obliging the Party or Parties to the conflict which request an enquiry, to advance the necessary funds for expenses incurred by a Chamber, it was hoped to discourage rash demands for enquiries. However, the obligation for the Party or Parties against which the allegations have been made to reimburse fifty per cent of the expenses incurred, is perhaps not very likely either to favour recognition of the Commission's compulsory competence. In fact, such reimbursement is due, regardless of whether the allegations and counter-allegations are proved. It is sufficient that they have been made against one or more States which recognize the compulsory competence for the reimbursement to be payable. At the very least, this solution must be said to be defective. However, it is true that compared with the costs States are willing to incur for armaments and military expenses in time of armed conflict, these expenses are only a drop in the ocean.

Conclusion

3644 Article 90 is closely related to Article 1 common to the Conventions and Article 1 of the Protocol (*General principles and scope of application*), which enjoin the Contracting Parties to respect and to ensure respect for the Conventions and the Protocol in all circumstances. This article may prove to be useful, despite its faults. It institutes for the first time in the law of armed conflict – and this must be underlined, as all previous efforts failed – a permanent non-political and impartial international commission of enquiry to which the Parties to the conflict can resort at any time. With regard to the Commission's competence, the text allows the Contracting Parties to choose between recognizing its compulsory competence *a priori* and an optional acceptance in each case. In this way it achieves a balance between the two conflicting points of view which arose during the Conference. It is to be hoped that the quorum of twenty Parties to the Protocol recognizing the compulsory competence of the Commission, an essential quorum for it to be established, will soon be achieved.

J. de P.

⁵⁵ O.R. III, p. 339, CDDH/I/241 and Add.I; p. 342, CDDH/I/267.

⁵⁶ *Ibid.*, p. 345, CDDH/I/416.

⁵⁷ See M. Bothe, K.J. Partsch and W.A. Solf, *op. cit.*, p. 546, and Ph. Bretton, "La mise en œuvre des Protocoles de Genève de 1977", *op. cit.*, p. 403. For the debate, see O.R. VI, pp. 325-328, CDDH/SR.45.

Article 91 – Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Documentary references

Official Records

O.R. I, Part I, p. 168. *O.R.* III, p. 347 (new Art. before Art. 80). *O.R.* VI, pp. 343-345, CDDH/SR.46, paras. 22-30. *O.R.* IX, pp. 355-356, CDDH/I/SR.67, paras. 2-6; p. 397, CDDH/I/SR.70, paras. 55-56; p. 400, CDDH/I/SR.71, paras. 8-9. *O.R.* X, p. 192, CDDH/405/Rev.1, paras. 58-61; p. 269, *id.*, Annex.

Commentary

- 3645 Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations. It was the result of a proposal presented at the fourth session of the Conference,¹ and was accepted by consensus both in the Committee and in plenary meeting.²
- 3646 When this article was adopted in The Hague it was presented there as constituting a necessary sanction to the Regulations Concerning the Laws and Customs of War on Land. It was felt that governments would undoubtedly give their armed forces the necessary instructions, as they are obliged to, but that this would not be sufficient to avoid all violations. Such a provision, which is indeed justified, corresponded to the general principles of law on international

¹ See *O.R.* III, p. 347, CDDH/I/335, and Add. 1. The original text contained two paragraphs, the second of which was devoted to reproducing the article common to the four Conventions concerning the liability of Contracting Parties (First Convention, Art. 51; Second Convention, Art. 52; Third Convention, Art. 131; Fourth Convention, Art. 148). In the end such repetition was considered superfluous.

² See *O.R.* IX, p. 397, CDDH/I/SR.70, and *O.R.* VI, pp. 344-345, CDDH/SR.46, para. 22.

responsibility. Moreover, any recourse by wronged persons to the law was considered illusory if this could not be exercised against the government of the perpetrators of these violations, through their own government.³

3647 The practice of States has fallen far short of these laudable intentions. In fact, there has always been a tendency for the victors to demand compensation from the vanquished, without reciprocity and without making any distinction between the damages and losses resulting from lawful or unlawful acts of war.⁴

3648 It was undoubtedly for this reason that the Diplomatic Conference of 1949 inserted an article common to the four Conventions (First Convention, Article 51; Second Convention, Article 52; Third Convention, Article 131; Fourth Convention, Article 148) entitled “Responsibilities of the Contracting Parties”, which reads as follows:

“No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.”

3649 In fact this is the same principle as that contained in the present Article 91 and in Article 3 of Hague Convention IV of 1907. The purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.⁵

3650 However, it is true that these days the problem of the responsibility of States for acts of war does not only arise on the basis of respect for *jus in bello*. It also arises on the basis of *jus ad bellum*, which was not yet the case in practical terms at the time of the First World War. A State which resorts to war in violation of the principle of Article 2, paragraph 4, of the United Nations Charter may be held responsible for all damages caused by such a war,⁶ and not only for those resulting from unlawful acts committed in the sense of *jus in bello*. The International Law Commission has stated that “every internationally wrong act of a State entails that State’s international responsibility”.⁷ In this context it is therefore not the

³ See A. Mechelynck, *op. cit.*, p. 99.

⁴ For the First World War, see in this respect, F. Berber, *op. cit.*, pp. 238-240, and I. Seidl-Hohenveldern, “Reparations”, in Bernhardt (ed.), *op. cit.*, Instalment 4, 1982, pp. 178-180 and, for the Second World War, “Reparations after World War II”, by the same author, *ibid.*, pp. 180-184; see also A.A. Steinkamm, “War Damages”, *ibid.*, pp. 298-303.

⁵ See also *Commentary III*, pp. 629-630. Moreover, the obligation to prosecute and provide effective penal sanctions for the perpetrators of grave breaches is absolute under the terms of the corresponding articles of the Conventions (First Convention, Art. 49; Second Convention, Art. 50; Third Convention, Art. 129; Fourth Convention, Art. 146).

⁶ In this respect, see Art. 231 of the Treaty of Versailles, even though at that time resort to force had not yet been declared illegal, and that without prejudice to the right of individual or collective self-defence (Art. 51 of the United Nations Charter). The three situations which are an exception to Art. 2(4) of the United Nations Charter remain legal: individual or collective self-defence, the measures provided for in Art. 42 of the Charter, and the exercise of the right of self-determination (see also *supra*, commentary Preamble, p. 23, and Art. 1, para. 4, p. 41).

⁷ Art. 1 of the Draft Articles on State responsibility, *Yearbook of the International Law Commission*, 1980, vol. II, part 2, p. 30.

vanquished Party which is bound to make reparation for war damage, but the Party which resorted to force unlawfully, to the exclusion of the Party which merely exercised its right of self-defence. However, this aspect of the problem should remain separate from that of violations committed during the course of the conflict itself, which may have been committed by any one of the Parties involved. The main merit of the present Article 91 is to affirm this, as the above-mentioned article common to the four Conventions had also done.

- 3651** On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war, as they see fit.⁸ On the other hand, they are not free to forego the prosecution of war criminals, nor to deny compensation to which the victims of violations of the rules of the Conventions and the Protocol are entitled.

First sentence – The obligation to compensate

- 3652** The obligation applies to all Parties to the conflict, but obviously only if violations have been committed. Thus no distinction is made between the victor and the vanquished, nor between a Party which is presumed to have resorted to force unlawfully and a Party which is believed only to have exercised its right of self-defence. Anyway, the Preamble confirms this interpretation when it affirms that the provisions of the Conventions and the Protocol must be fully applied in all circumstances to all persons who are protected by those instruments (i.e., also to the possible victims of violations) without any adverse distinction based on the nature or origin of the armed conflict, or on the causes espoused by or attributed to the Parties to the conflict. Thus there is an obligation which belongs exclusively to *jus in bello*.
- 3653** What is meant by compensation? The normal usage of the term refers to the award made to make reparation for a wrong. The French version uses the word “indemnité”.⁹ In fact the treaties concluded at the end of the First and Second World Wars used the term “reparations”. These took many different forms, but their purpose was different from that of Article 91, as we have seen.
- 3654** This obligation corresponds to an uncontested principle of international law which has been reaffirmed by the Permanent Court of International Justice many times:

⁸ Cf. Art. 29 of the above-mentioned Draft Articles of the International Law Commission, to the effect that consent precludes the wrongfulness of an act, except when the obligation arises from a peremptory norm of international law. The prohibition of resorting to force certainly falls under this category, but it may be assumed that in many cases responsibility will be difficult to establish with certainty, or the wrongs will be committed by more than one Party. When depositing its instrument of ratification on 15 January 1982, the Republic of Korea made the following declaration: “In relation to Article 91 of Protocol I, a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall take the responsibility for paying compensation to the party damaged from the acts of violation, whether the damaged party is a legal Party to the conflict or not.”

⁹ The French text uses the term “indemnité”. “Indemnity” was probably not used in the English text deliberately, even as early as 1907 in the Hague Convention, as it refers particularly to a sum of money demanded by the victor: “sum exacted by victorious belligerent” (Oxford Dictionary).

“It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation [...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”¹⁰

- 3655** The text declares that such compensation is due only “if the case demands”. It is not sufficient for a violation simply to have been committed. For the obligation to make reparation to exist, there must also be a loss or damage¹¹ which in most cases will be of a material or personal nature. Moreover, compensation will be due only if restitution in kind¹² or the restoration of the situation existing before the violation, are not possible. Such compensation is usually expressed in the form of a sum of money which must correspond either to the value of the object for which restitution is not possible,¹³ or to an indemnification which is proportional to the loss suffered.¹⁴ If the compensation is assessed in terms of material goods and not in money, it may never consist of cultural property.¹⁵ Compensation may also be awarded in the form of services, but it is absolutely clear that retaining prisoners of war after active hostilities have ceased, for the purpose of contributing to reconstruction work in the country of the Detaining Power as war reparations, would violate the Third Convention (Article 118).¹⁶ No agreement between the Parties to the conflict permits any derogation on this point from the right of prisoners of war to be repatriated without delay after the cessation of active hostilities.
- 3656** Those entitled to compensation will normally be Parties to the conflict or their nationals, though in exceptional cases they may also be neutral countries, in the case of violation of the rules on neutrality or of unlawful conduct with respect to neutral nationals in the territory of a Party to the conflict.¹⁷
- 3657** Apart from exceptional cases,¹⁸ persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address

¹⁰ Permanent Court of International Justice, *Chorzow Factory Case*, 13 September 1928, (Series A, No. 17, p. 29).

¹¹ Cf. E. Jiménez de Aréchaga, “International Responsibility”, in M. Sørensen (ed.), *Manual of Public International Law*, New York, 1968, p. 534.

¹² In this respect, see, for example, some of the Peace Treaties concluded after the Second World War with Hungary, Art. 24; Romania, Art. 23; Italy, Art. 75. Nevertheless, *restitutio in integrum* is only possible for damage resulting from armed conflict in exceptional cases.

¹³ Cf. Permanent Court of International Justice (Series A, No. 17, p. 47), quoted by M. Sibert, *Traité de droit international public*, vol. I, Paris, 1951, p. 324.

¹⁴ Cf. *Yearbook of the International Law Commission*, 1980, vol. I, p. 88, para. 17.

¹⁵ See the Protocol of The Hague for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, Part I, para. 3, which states that such property “shall never be retained as war reparations”.

¹⁶ In this respect, see the ICRC protests after the end of the Second World War, *Report of the ICRC on its activities during the Second World War (1 September 1939-30 June 1947)*, vol. I, Geneva, 1948, pp. 394-403.

¹⁷ Such situations will in most cases be subject to the general rules on international responsibility. Acts causing damage and entailing responsibility based on application of Art. 91, actually remain exceptional.

¹⁸ See, for example, “Bundesversorgungsgesetz” of the Federal Republic of Germany, of 12 December 1950, 1 *Bundesgesetzblatt* 791, 1950.

themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation. However, since 1945 a tendency has emerged to recognize the exercise of rights by individuals.

3658 Joint or collective responsibility, for example, in cases of coalition, cannot be excluded.

3659 The scope of this provision is limited to violations of the Conventions and the Protocol, but the principle on which it is based has a general application for any violation of international commitments, as we saw above. This provision is without prejudice to questions which might arise with regard to compensation for damage inflicted when there has not been any violation in the strict sense of the word, for example, caused by an external or unforeseen event, unrelated to the conduct of hostilities (*force majeure* or fortuitous event).¹⁹

Second sentence – Responsibility²⁰

3660 In international law the conduct of any organ of the State, whether military or civilian, constitutes an act of State, provided that it acted in its official capacity, regardless of its position, whether superior or subordinate.²¹ Thus the same applies to any member of the armed forces, without prejudice to the personal responsibility which he may incur, since a member of the armed forces is an agent of the State or of the Party to the conflict to which he belongs.²² Such responsibility even continues to exist when he has exceeded his competence or contravened his instructions.²³ It can be imputed not only for acts committed by a person or persons who form part of the armed forces, as this provision lays down, but also for possible omissions.²⁴ As regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or

¹⁹ Cf. Arts. 31 and 35 of the above-mentioned draft of the International Law Commission.

²⁰ Apart from the above-mentioned article common to the four Conventions (see *supra*, p. 1053, note 1), the responsibility of the State and of its agents is specifically referred to in the Third Convention in Arts. 12, 39, 56, 57 and 66, and in the Fourth Convention in Arts. 29, 45, 60 and 96. See in particular, *Commentary III*, pp. 128-139, and *Commentary IV*, pp. 209-213.

²¹ Cf. Art. 5 of the above-mentioned draft of the International Law Commission.

²² It automatically follows that a person who has no discernment, whether because of his age or for any other reason, should not be enlisted in the armed forces. In addition, see Art. 77, para. 2, Protocol I.

²³ Cf. Art. 10 of the above-mentioned draft of the International Law Commission.

²⁴ Cf. Art. 3 *ibid.*; see also *O.R.* VI, p. 344, CDDH/SR.46, para. 23. In its judgment in the Corfu Channel case, the International Court of Justice confirmed the obligation of providing information on the existence of a minefield in territorial waters and warning ships when they approach. The Court based its judgment on general and well-recognized principles such as elementary considerations of humanity which are even more exacting in time of peace than in time of war ("Corfu Channel Case", *ICJ Reports* 1949, p. 22). The Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons extends the obligation so that it also includes minefields on land (Art. 7, Protocol II). In this respect, see in particular, *The material remains of war*, United Nations Institute for Training and Research (UNITAR), and Libyan Institute for International Relations, UNITAR/CR/26, 1983, in particular, pp. 39-42 and 58-67.

repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.²⁵

- 3661** This responsibility covers “all” acts committed by members of the armed forces of a Party to the conflict, and not only unlawful acts (or omissions conflicting with a duty to act) in the sense of the Conventions and the Protocol. We saw above that only acts which constitute violations (except for any case of *force majeure* or fortuitous event that may occur) can give rise to compensation. However, it cannot be ruled out that the principle known as no-fault or strict liability would be taken into account, i.e., a concept of objective responsibility or liability which enters into play simply on the ground that the act or omission took place in the territory or under the jurisdiction of the State. This principle is recognized today in the field of environmental damage (irrespective even of the question whether there has been a breach of Article 35 – *Basic rules*, paragraph 3), in nuclear matters, and in case of damage caused by spacecraft.²⁶ In this sense it therefore seems possible that a Party to the conflict could be liable to pay compensation even in a case where no particular violation of the rules of the Conventions and the Protocol, or of another rule of the law of armed conflict, can be imputed to it. However, such liability could not be based on the present article.²⁷

J. de P.

²⁵ See M. Sibert, *op. cit.*, p. 317.

²⁶ See C.W. Jenks, “Liability for Ultra-Hazardous Activities in International Law”, 117 *Hague Recueil*, 1966/I, pp. 90-200.

²⁷ Responsibility would then rest on non-compliance with a duty to prevent (see “International liability for injurious consequences arising out of acts not prohibited by international law”, Report of the International Law Commission on the work of its thirty-fourth session, General Assembly Official Records, Supplement No. 10 (A/37/10), pp. 190-192, paras. 122-128).

Part VI – Final provisions

Introduction

- 3662** Basically this Part contains the technical clauses common to all treaties which, in the Protocol, are similar to those of all multilateral treaties. This applies for the procedure of becoming a Party to the treaty and for notifications, registration and the authentic texts. Finally, like many other treaties, the Protocol is silent with regard to reservations; thus these follow the rules of general international law and we will return to this question below.
- 3663** Some special features in this Part follow from the “additional” character of the Protocol: thus signature and accession are open only to Parties to the Conventions,¹ and similarly there is an article devoted to the relations between the Conventions and the Protocol.
- 3664** Another special feature is the existence of an article relating to amendments to the Protocol, and another providing for a simple procedure for revision of Annex I, which has a technical character.
- 3665** Other special features are justified by the humanitarian aim of the Protocol; in this respect the small number of Parties necessary for its entry into force may be given as an example as well as the possibility of bringing it into force by means of a declaration or even by means of *de facto* application, and the restrictions that apply to the effects of denunciation.

Reservations

Definition

- 3666** We are familiar with the fact that, when States sign or ratify a treaty, or when they accede to one,² they frequently make unilateral statements, usually known as “reservations”, “interpretative declarations”, “declarations” or also “communications”. The object of such statements varies, mainly as a function of the kind of treaty concerned, and the rules on reservations in international law

¹ In this sense the Protocol might be considered as a “restricted” treaty, since only specific States may become Parties to it; in fact, it is open-ended since, like the Conventions, it is intended to be universally applicable.

² For further information about such these legal procedures, in particular with respect to the Protocol, cf. articles 92-94 and the commentary thereon, *infra*, p. 1067.

have enshrined considerably during the last thirty years – it could even be said to have occurred between 1951 and 1969.³ We will limit ourselves to outlining the relevant aspects of the rules laid down in the Vienna Convention on the Law of Treaties, without dwelling on the prior divergent views and uncertainties; the reason why the Protocol does not contain provisions on reservations, is precisely because the Conference preferred to rely on the Vienna Convention as a codification of the principles of customary law.⁴

3667 Article 2, paragraph 1(d), of the Vienna Convention contains the following definition:

“‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

3668 Thus a reservation is a unilateral act by one particular State, as opposed to the text of the treaty to which it refers, irrespective of whether that treaty was established or adopted by a special conference (such as the CDDH, for example), or under the auspices of an international organization, or perhaps within such an organization. The unilateral character remains when several States formulate similar or identical reservations to a particular treaty, whether or not they do this after consultation *inter se*.⁵

3669 Any declaration made by a State purporting “to exclude or modify the legal effect of certain provisions of the treaty in their application to that State” is a reservation within the meaning of the definition given above. As the name given to the declaration or its phraseology are not decisive, there may be two types of discrepancies between form and substance. In the first case a declaration which is not phrased or named as a reservation may nevertheless in fact constitute a reservation if it purports to exclude or modify the legal effect of certain provisions of the treaty; in the second case, where it cannot or is not meant to produce such an exclusion or modification of legal effect, a declaration may not be a reservation despite its wording or name.⁶

3670 There is a difference between reservations and interpretative declarations. The former purport to exclude or modify the legal effect of certain provisions in their application to the State making them; the latter lay down the meaning or the scope which a State attributes to a particular provision, without claiming to

³ Advisory Opinion of the International Court of Justice on Reservations to the Convention on Genocide, *ICJ Reports*, 1951, p. 15; Vienna Convention on the Law of Treaties of 23 May 1969, Art. 2, para. 1(d), and Arts. 19-23 (referred to below as “the Vienna Convention”).

⁴ For the work of the CDDH, *cf. infra*, pp. 1063-1065. As regards legal literature, we will limit ourselves to just one reference, to a work which *inter alia* also devotes numerous paragraphs to reservations to the Geneva Conventions: P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, 1979.

⁵ As far as the Geneva Conventions are concerned, *cf.* C. Pilloud, “Reservations to the Geneva Conventions of 1949”, *op. cit.*, pp. 117-120, 164-168, 170-180 and 184-186.

⁶ *Ibid.*, pp. 117-123, 164-168 and 181-184; *Commentary I*, pp. 116-117 (Art. 10), 301-302 (Art. 38); *Commentary III*, pp. 114-115 (Art. 10); *Commentary IV*, pp. 103-104 (Art. 11).

exclude or modify its legal effect.⁷ However, the practical importance or this distinction is rather limited; for, as we have just seen, the real nature of a declaration, beyond its wording or the name given to it, must be established in any case, and in addition, such a finding will have to be made by every other State concerned.

3671 Finally, we refer to three types of declaration which may accompany signature, ratification or accession, though they differ in character from reservations and interpretative declarations:

- a) declarations of acceptance under optional clauses, for example, relating to recognition of competence or jurisdiction;⁸
- b) declarations by which States specify that their participation in a treaty must not be taken to imply recognition of another State which they do not recognize, or to entail treaty relations with it, irrespective of whether or not that other State is Party to the treaty at the time of the declaration.⁹
- c) declarations which do not relate to the treaty subject to signature, ratification or accession.¹⁰

*The rules on reservations*¹¹

1. Principle

3672 The Vienna Convention provides that when a State signs, ratifies or accedes to a treaty, it may formulate a reservation unless “the reservation is incompatible with the object and purpose of the treaty” (Article 19).

3673 Reservations must be formulated in writing and communicated to the Contracting States¹² and other States entitled to become Parties to the treaty¹³ (Article 23, paragraph 1). A reservation formulated at the time a treaty is signed subject to ratification,¹⁴ must, in order to be valid, be formally confirmed when

⁷ This is different from the interpretation known as the “authentic” interpretation, i.e., the common interpretation on which States Parties to a treaty have agreed, whether in a formal treaty or otherwise. Cf. P. Reuter, *Introduction au droit des traités*, op. cit., pp. 101-102 (para. 136).

⁸ For example, Art. 90, para. 2(a) of the Protocol; the classic example is Article 36, paragraphs 2-3, of the Statute of the International Court of Justice.

⁹ It is to be hoped that declarations of this type relating to instruments of humanitarian law will never preclude their actual application; Art. 4 and Art. 5, para. 5, of the Protocol were adopted for this purpose and in order to remove any fear of unintended indirect effects.

¹⁰ Cf., for example, the communication made by France on Protocol I at the time of its accession to Protocol II.

¹¹ Hereafter we only take treaties without provisions on reservations into account – which is the case for the Protocol.

¹² I.e., according to Art. 2, para. 1(f), “a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”.

¹³ Below we will use the expression “States concerned” to designate these two categories of States collectively. According to Arts. 92 and 94, only Parties to the Conventions are entitled to become Parties to the Protocol. The various communications relating to the Protocol are made, in accordance with Art. 100, through the depositary.

¹⁴ Procedure laid down in Arts. 92 and 93 of the Protocol.

the treaty is ratified by the State which formulated the reservation (Article 23, paragraph 2).

- 3674 Just as it is the responsibility of every other State concerned to determine whether any particular declaration does or does not constitute a reservation, so every State determines individually whether a reservation formulated by another State is or is not compatible with the object and purpose of the treaty.¹⁵

2. Acceptance and objection

- 3675 A State may *accept* the reservation formulated by another State either explicitly or tacitly.¹⁶ Acceptance of the reservation by a Contracting State allows the treaty to enter into force between that State and the State which had made the reservation. The treaty applies between these two States as modified by the reservation (Article 20, paragraph 4(a) and (c), and paragraph 5; Article 21, paragraph 1(a) and (b); Article 23, paragraphs 1 and 3).
- 3676 A State may make an *objection* to a reservation made by another State. Unless the State which formulated the objection clearly expressed its intention to the contrary, an objection by a Contracting State does not prevent the treaty from entering into force, as soon as at least one other Contracting State has accepted the reservation, between the State formulating the objection and the State which made the reservation; however, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation” (Article 20, paragraph 4(b) and (c); Article 21, paragraph 3; Article 23, paragraphs 1 and 3).
- 3677 Thus, it is necessary for the objecting State clearly to express its intention for the treaty not to enter into force, as modified by the reservation, between itself and the State which had made the reservation once at least one other Contracting State has accepted a reservation. Otherwise, the State accepting a reservation and that objecting to it may find themselves in the same situation, depending on the specific object of the reservation.¹⁷
- 3678 It should be emphasized that a reservation only applies as between the State making it and other States bound by the treaty. The reservation does not modify the provisions of the treaty for the other Parties to the treaty *inter se* (Article 21, paragraph 2).
- 3679 As we saw with regard to objections, the Vienna Convention provides that a ratification or accession containing a reservation is effective only if at least one other Contracting State has accepted the reservation. The twelve month period

¹⁵ This does not preclude collective steps, in particular to obtain clarification of the meaning of a reservation. For an example of such a step through the intermediary of the depositary, cf. C. Pilloud, “Reservations to the Geneva Conventions of 1949”, *op. cit.*, pp. 171-173; *Commentary III*, pp. 423-425 (Art. 85).

¹⁶ A State is deemed to have accepted a reservation if it has not raised an objection to that reservation within twelve months from receiving notification of it, or by the date on which it ratified or acceded to the treaty, if this is later (Art. 20, para. 5).

¹⁷ For views on the effect that such situations are identical or that there is a possible difference, cf. P.-H. Imbert, *op. cit.*, pp. 260-268.

laid down for tacit acceptance by States which had previously consented to be bound by the treaty may be longer than the periods laid down by certain treaties for their entry into force for a State after depositing its instrument of ratification or accession.¹⁸ This requires two comments. Although, as we have seen, the Vienna Convention codified customary law, this period of twelve months may, on the other hand, be seen as a new norm, strictly applicable only between States bound by the Vienna Convention at the time of concluding a particular treaty.¹⁹ In any event, the uncertainty which may exist, as to whether a State making a reservation has the status of a Contracting State, is relative in view of the fact that the risk is slight that a reservation will not be accepted by any other Contracting State, either explicitly or tacitly, whether the expression of that State's consent to be bound by the treaty is given either before or after that of the State making the reservation.

3. *Withdrawal of reservations and objections*

- 3680** A reservation or an objection to a reservation may be withdrawn at any time, in writing. The withdrawal of a reservation becomes operative in relation to all other Contracting States when they have received notice thereof; the withdrawal of an objection becomes operative when notice thereof has been received by the State which formulated the reservation (Article 22 and Article 23, paragraph 4).

The work of the CDDH²⁰

- 3681** On the question of reservations the draft Protocol contained an article consisting of two paragraphs: the first listed the articles to which no reservation

¹⁸ The Protocol lays down a period of six months for this purpose (Art. 95, para. 2).

¹⁹ On this subject, cf. P.-H. Imbert, *op. cit.*, pp. 103-108. Art. 4 of the Vienna Convention reads as follows: "*Non-retroactivity of the present Convention*: Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

²⁰ *References*:

Draft Article 85. *Commentary Drafts*, pp. 103-106 (Art. 85). *O.R.* III, pp. 357-358, CDDH/I/74, CDDH/I/87, CDDH/I/87/Rev.1, CDDH/421. *O.R.* VI, pp. 355-359, CDDH/SR.46, paras. 82-101; pp. 362-364, *id.*, Annex (Australia, Austria, Belgium); pp. 366-367 (Democratic Yemen); p. 368 (Ecuador); p. 370 (Finland); pp. 371-372 (France); pp. 373-374 (Holy See, Honduras, Hungary); pp. 380-381 (Mozambique); p. 383 (Republic of Korea); p. 385 (Syria); p. 387 (Uruguay). *O.R.* VII, pp. 15-16, CDDH/SR.47, paras. 1-5; p. 39, *id.*, Annex (Chile); pp. 234-235, CDDH/SR.56, Annex (Democratic Yemen); p. 238 (German Democratic Republic); pp. 247-250 (Tunisia, Turkey); pp. 295-296, CDDH/SR.58, para. 86. *O.R.* IX, pp. 359-360, CDDH/I/SR.67, paras. 30-32; p. 363, paras. 49-50, 52-53; p. 473, CDDH/I/SR.76, paras. 1-2; p. 479, para. 39; pp. 498-499, CDDH/I/SR.77, Annex (Egypt); pp. 501-502 (Indonesia, Japan); pp. 504-505 (Poland, Republic of Korea); p. 509 (Syria); p. 511 (Cameroon); p. 512 (Zaire). *O.R.* X, p. 3, CDDH/48/Rev.1, para. 2; p. 4, paras. 5C, 6; p. 64, CDDH/219/Rev.1, Annex; p. 140, CDDH/234/Rev.1, Annex; p. 181, CDDH/405/Rev.1, para. 4; p. 182, paras. 11-12; pp. 195-196, paras. 81-86; pp. 237-239, *id.*, Annex III, paras. 1-3; pp. 251-252, paras. 39-46.

could be made,²¹ and the second provided that any reservation would lose effect five years after it had been formulated, failing renewal by means of a declaration addressed to the depositary.

- 3682** When introducing this draft, the ICRC specified that it should be checked whether the content of the articles listed were still the same as in the original draft and, above all, whether there were other basic provisions contained in the draft or added by the Conference that were not included in the list. Such a list was proposed to take into account the new trends in international law and the difficulty of prohibiting any reservation at all – a prohibition which might have seemed to be the only solution for a multilateral instrument with a humanitarian aim. If it proved too difficult to reach agreement with regard to the list of articles to which no reservation could be made, the ICRC was ready, in order to complete the work, to support the views in favour of deleting any provision relating to reservations, and consequently to leave this matter to be governed by general international law.²²
- 3683** The Working Group deleted paragraph 2 of the draft article by consensus and also proposed the deletion of paragraph 1 or, failing that, a new formula drafted by a small informal group.²³ The proposal for deletion was adopted after a vote in Committee.²⁴ A new proposal was presented in the plenary Conference,²⁵ but this did not get the required two-thirds majority.²⁶
- 3684** The delegations which spoke against the various lists proposed, did so according to their statements, because these lists were incomplete and because, as no agreement was likely within a reasonable period, it was best to leave the question to be governed by the rules of general international law. Several of these delegations emphasized the fact that they did not intend to make reservations to the articles listed or that they had in mind making few, if any, reservations.
- 3685** As the Protocol does not contain an article relating to reservations, this question is subject to the rules of international law as codified in the Vienna Convention. The following may be hoped for:
- a) that the possibility of making reservations will facilitate the universal acceptance of the Protocol without adversely affecting its object and purpose, which is to improve the protection provided by the Conventions to the victims of international armed conflicts;²⁷

²¹ Articles of the draft corresponding to the following Articles of the final text: 5, 10, 20, 35, 37 (para. 1, first sentence), 41 (para. 1, first sentence), 43, 48, 51 and 52.

²² *O.R.* IX, pp. 359-360, CDDH/I/SR.67, paras. 30-32.

²³ *O.R.* X, pp. 251-252, CDDH/405/Rev.1, Annex III (CDDH/I/350/Rev.1), paras. 39-47. Reservations which were “incompatible with the humanitarian object and purpose of this Protocol, and in particular” those to Articles 1, 3, 5, 10, 20, 35, 43-45, 47, 51-56, 75, 85, 89, 91 and 96, para. 3 of the final text, were prohibited.

²⁴ *O.R.* IX, p. 479, CDDH/I/SR.76, para. 39. Vote: 47-34-4.

²⁵ *O.R.* III, p. 358, CDDH/421. Reservations “incompatible with the humanitarian aim and purpose of this Protocol, and in particular” those to Articles 1, 43, 44, 47 and 96, para. 3 of the final text, were prohibited.

²⁶ *O.R.* VI, p. 359, CDDH/SR.46, para. 101. Vote by roll call: 42-36-17.

²⁷ *Cf. infra*, p. 1549, the list of Parties to the Protocol which indicates whether any reservations or declarations have been made. The text of reservations and declarations relating to the Conventions and the Protocols are available in reports which are regularly updated by the ICRC.

- b) that any objections that may be raised to a reservation should not involve a refusal to enter into treaty relations with the State making the reservation;
- c) that States will not only study with the greatest caution the need to make a reservation but will regularly re-examine the need to maintain that reservation.²⁸

B.Z.

²⁸ On withdrawal of reservations to the Conventions, *cf.* C. Pilloud, "Reservations to the Geneva Conventions of 1949", *op. cit.*, p. 184; several other cases of withdrawal have occurred since then.

Protocol I

Article 92 – Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Documentary references

Official Records

O.R. I, Part I, pp. 4-7, Final Act, paras. 2-3; pp. 15-113, signatures; p. 169; Part III, p. 26 (Art. 80). *O.R.* III, p. 348. *O.R.* VI, p. 31, CDDH/SR.35, para. 22; pp. 350-351, CDDH/SR.46, paras. 62-67; p. 385, *id.*, Annex (Syrian Arab Republic). *O.R.* VII, p. 194, CDDH/SR.56, para. 4; p. 317, CDDH/SR.58, paras. 185-186; pp. 336-337, CDDH/SR.59, para. 5. *O.R.* IX, pp. 356-357, CDDH/I/SR.67, paras. 7-8 and 12-15; p. 363, para. 49; p. 473, CDDH/I/SR.76, paras. 1-3; p. 497, CDDH/I/SR.77, Annex (Cyprus); pp. 508-509 (Syrian Arab Republic). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; p. 192, paras. 62-63; pp. 237-240, *id.*, Annex III, paras. 1-6.

Other references

CE 1972, Basic Texts, p. 26 (Art. 79). *CE 1972, Report*, vol. I, p. 195, para. 4.179 (Art. 79). *Commentary Drafts*, p. 101 (Art. 80).

Commentary

General remarks

- 3686** In view of the wording of the subsequent article (“This Protocol shall be ratified”), Article 92 deals with “signature subject to ratification”, as in fact did the corresponding article common to the four Conventions (56/55/136/151).

- 3687** Signature does not definitively bind States to the Protocol; this is achieved by ratification and accession¹ dealt with in Articles 93 (*Ratification*) and 94 (*Accession*).² By signing the Protocol, States undertake to seriously consider the possibility of ratifying it; they are not obliged to proceed to ratification if they come across major obstacles in the interim.³
- 3688** As regards the signature of the Final Act of the Conference, this merely amounted to authentication of the instruments drawn up by the Conference.⁴
- 3689** Article 92 was adopted by consensus both in Committee I and in a plenary meeting.⁵

Analysis of the article

States entitled to sign

- 3690** The Diplomatic Conference allowed all States Parties to the Conventions of 1949, and Members of the United Nations to participate on an equal basis. It also admitted national liberation movements as observers, insofar as they were recognized by the regional intergovernmental organizations concerned. The same States and liberation movements were entitled to sign the Final Act in two separate groups.⁶
- 3691** On the other hand, States not Parties to the Conventions, and liberation movements, are not permitted to sign and ratify the Protocol or to accede to it. In fact:
- a) as the Protocol is additional to the Conventions, it is not possible to be bound by the Protocol without being bound by the Conventions;⁷
 - b) the fact that liberation movements do not have the status of States explains the drafting of Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, which provides for a special procedure for them to accept the Conventions and the Protocol.

¹ In this respect, refer to Articles 14 and 15 of the Vienna Convention on the Law of Treaties of 23 May 1969.

² For the concepts of ratification, accession and succession, *cf.* the commentary on these articles, *infra*, pp. 1071-1072 and 1077.

³ According to Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), sub-para. (a), of the above-mentioned Vienna Convention, a signatory State must refrain from acts which would defeat the object and purpose of a treaty until it shall have made its intention clear not to become a party to the treaty.

⁴ *Cf.*, in this respect, Article 10 (Authentication of the text), sub-para. (b), of the said Vienna Convention.

⁵ *O.R.* IX, p. 473, CDDH/I/SR.76, para. 3; *O.R.* VI, p. 350, CDDH/SR.46, para. 62.

⁶ For the list of States and liberation movements participating in the CDDH, *cf.* *O.R.* I, Part I, pp. 4-7 and 15-113, Final Act, paras. 2-3, and appended signatures (the signatures of the Final Act also appear in *O.R.* VII, pp. 336-337, CDDH/SR.59, para. 5).

⁷ On the additional character of the Protocol, *cf.* also the commentary on its title, *supra*, pp. 20-21 and commentary Article 1, para. 3, *supra*, p. 39, and Art. 96, para. 1, *infra*, pp. 1085-1086.

- 3692** This does not in any way alter the fact that the Protocol is a treaty open to universal membership, as are the Conventions which it supplements; it should be noted that in fact the Conventions are at this time the multilateral treaties which have the largest participation (161 States as of 31 December 1984).
- 3693** The Protocol can only be signed by Parties to the Conventions. In view of the period of time which precedes their entry into force for a State, this means that States must have ratified the Conventions or have acceded to them at least six months previously.⁸ Since 13 February 1950 it has no longer been possible to sign the Conventions, and all signatories ratified them a long time ago. On the other hand, despite the strict interpretation mentioned above, it may be conceded that a State not Party to the Conventions could have simultaneously acceded to the Conventions and signed the Protocol:⁹ the Vienna Convention on the Law of Treaties¹⁰, common sense and humanitarian considerations justify this interpretation.

Period of deferment

- 3694** The six month waiting period before the Protocol is open for signature is a rather exceptional feature:¹¹ in general a treaty is open for signature from the moment it is adopted. Some delegations explained how long it would take to complete the domestic procedures to consider the acceptability of such a complex treaty, even at the stage of signature, and the other delegations agreed.¹²
- 3695** Thus the idea of such a deferment was accepted to ensure a greater number of signatories as soon as the Protocol would be open to signature. However, one delegation expressed the fear that such deferral could have the opposite effect as Protocol I would be forgotten by the ministries concerned.¹³

Opening the Protocol for signature

- 3696** The adoption of an instrument produced at a Conference and the signature of its Final Act often take place on the same day. In the case of the Protocol it was

⁸ Art. 58, 61/57, 60/138, 140/153, 156 of the Conventions.

⁹ We will see below that the period during which the Protocol was open for signature has also terminated. The possibility envisaged here has not arisen during this period; however, an analogous case did arise, namely the simultaneous accession to the Conventions and the Protocol (cf. commentary Art. 94, *infra.*, p. 1076).

¹⁰ Art. 40 (Amendment of multilateral treaties), para. 3.

¹¹ The Convention of 10 October 1980 on the use of certain conventional weapons laid down the same deferment period in Art. 3.

¹² O.R. X, p. 240, CDDH/405/Rev.1, Annex III (CDDH/I/350/Rev.1), paras. 5-6.

¹³ O.R. IX, p. 508, CDDH/I/SR.77, Annex (Syria); O.R. VI, p. 385, CDDH/SR.46, Annex (Syria).

adopted on 8 June 1977,¹⁴ which is regarded as the date of the Protocol, while the Final Act was signed on 10 June 1977.¹⁵

3697 The Protocol was opened for signature from 12 December 1977 to 12 December 1978; during this time 62 States signed it.¹⁶

Reservations and declarations

3698 At the time of signature of the Protocol, reservations or declarations could be made and some have actually been made.¹⁷ If they affect the undertaking of a State to be bound by the Protocol or the interpretation which it intends to give to it, such reservations and declarations must be confirmed at the time of ratification, if they are to have effect.¹⁸ However, this is not the case with regard to the declarations under Article 90 (*International Fact-Finding Commission*), paragraph 2, sub-paragraph (a), which can be validly made upon signature,¹⁹ ratification or accession, or at any time thereafter.

Notification by the depositary

3699 The signatures, as well as the reservations and declarations made at the time of signature, were notified by the depositary designated in Article 93 (*Ratification*) in accordance with Article 100 (*Notifications*), sub-paragraphs (a) and (c).²⁰

B.Z.

¹⁴ By consensus, cf. *O.R.* VII, p. 194, CDDH/SR.56, para. 4.

¹⁵ *Ibid.*, pp. 336-337, CDDH/SR.59, para. 5.

¹⁶ For the list of signatories, cf. *infra*, p. 1549.

¹⁷ Seven of the ten countries which made reservations or declarations only actually reserved the right to formulate reservations or declarations on ratification.

¹⁸ For the question of reservations and declarations as a whole, cf. the introduction to this Part, *supra*, pp. 1059-1065.

¹⁹ This possibility was not used.

²⁰ For the functions of the depositary in their entirety, refer to the commentary on this article, *infra*, p. 1114.

Protocol I

Article 93 – Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Documentary references

Official Records

O.R. I, Part I, p. 169; Part III, p. 26 (Art. 81). *O.R.* III, p. 349. *O.R.* VI, p. 351, CDDH/SR.46, paras. 67-68; p. 375, *id.*, Annex (Indonesia). *O.R.* IX p. 356, CDDH/I/SR.67, paras. 7-8; p. 358, para. 16; p. 363, para. 49; p. 473, CDDH/I/SR.76, paras. 1-3; p. 497, CDDH/I/SR.77, Annex (Cyprus). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; p. 193, paras. 64-65; pp. 237-239, *id.*, Annex III, paras. 1-3; p. 240, para. 7.

Other references

CE 1972, *Basic Texts*, p. 26 (Art. 80). *CE* 1972, *Report*, vol. I, p. 195, paras. 4.180-4.181 (Art. 80). *Commentary Drafts*, p. 101 (Art. 81).

Commentary

General remarks

3700 Article 93 is the natural and indispensable complement to the preceding article relating to signature. Ratification is the act by which a State Party to the Conventions, which is a signatory to the Protocol, binds itself definitively to this instrument so that it applies to its relations with the other Contracting Parties. If the State concerned wishes to do so, these two steps can be replaced by the single act of accession.

3701 Moreover, there is the possibility of “notification of succession”; by means of such notification a newly independent State continues its participation to a

treaty established on his behalf, before it became independent, by the former administering power. This possibility exists even though it has not been laid down in the Protocol;¹ it was used for the Conventions in a large number of cases.² However, it does not seem very probable that a case of succession will arise for the Protocol.

- 3702** The definitive undertaking in the form of ratification, accession or succession, should be distinguished, on the one hand, from the contingencies laid down in Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraphs 2 and 3, and, on the other, from notice of the provisional application of treaties by a newly independent State.³
- 3703** The Swiss Federal Council was the depositary of the Conventions of 1949 and of all their preceding Conventions, and it was obvious that its role should be extended to the Protocol aimed at supplementing them.⁴
- 3704** This article was adopted by consensus, both in Committee I and in plenary.⁵

Analysis of the article

The nature of ratification

- 3705** The Conference chose for signature to be followed by ratification, and for accession, out of the various ways in which consent to be bound by a treaty can be expressed.⁶
- 3706** As signature does not bind a State definitively, it can be appended fairly easily. On the other hand, ratification commits the State, which must henceforth comply with the obligations contained in the treaty; it therefore requires a thorough examination on the merits, and means that a number of domestic procedures laid down in the constitution of every State must be followed.
- 3707** Preparing for ratification can in fact be accompanied by the development of measures for the execution of the obligations such as those envisaged in Article 80 (*Measures for execution*); at least a preliminary study of such measures is indispensable in the examination of ratification. On the other hand, their final drafting and implementation do not become legal obligations until the Protocol has been ratified or even not until it has entered into force with regard to the State concerned.⁷

¹ The question is dealt with in the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978.

² Cf. B. Zimmermann, "La succession d'Etats et les Conventions de Genève", in *Studies and Essays in honour of Jean Pictet*, *op. cit.*, p. 113.

³ *Ibid.* Cf. also the above-mentioned Convention, *supra* note 1, Arts. 27-29.

⁴ For an overall picture of the functions of the depositary, cf. commentary Art. 100, *infra*, p. 1114.

⁵ O.R. IX, p. 473, CDDH/1/SR.76, para. 3; O.R. VI, p. 351, CDDH/SR.46, para. 67.

⁶ Cf. Vienna Convention on the Law of Treaties of 23 May 1969, Arts. 11-16.

⁷ Cf. Art. 95.

- 3708 The minimum obligation of every State between depositing its ratification and the entry into force of the treaty for it, is to refrain from acts which would defeat the object and purpose of the treaty.⁸
- 3709 The expression “as soon as possible” is not very common. It has been taken from the corresponding article of the Conventions (57/56/137/152) and represents an exhortation without laying down a precise period.⁹

The form of the ratification

- 3710 The instrument of ratification must be deposited by the diplomatic representatives of the country concerned with the Swiss Federal Council, or transmitted in the form of a written communication.

Reservations and declarations

- 3711 The instrument of ratification must also mention any reservations and declarations that may be made and, if the question arises, confirm declarations of any nature made at the time of the signature, if the State wishes to maintain these.¹⁰ However, a declaration in accordance with Article 90 (*International Fact-Finding Commission*), paragraph 2(a), made at the time of signature,¹¹ does not need to be confirmed upon ratification in order to be maintained. Moreover, it can be made at any time after the ratification.

Notification by the depositary

- 3712 The depositary will notify the deposit of every instrument of ratification, as well as any declarations and reservations, in accordance with Article 100 (*Notifications*), sub-paragraphs (a) and (c). As of 31 December 1984, 18 of the 62 signatory States had ratified the Protocol, of which six did so with a declaration in accordance with Article 90 (*International Fact-Finding Commission*), paragraph 2(a), and seven with reservations or declarations.¹²

B.Z.

⁸ Cf. Convention mentioned above, *supra*, note 6, Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), sub-para. (b).

⁹ One delegation would have liked to delete this clause: *O.R.* X, p. 240, CDDH/405/Rev.1, Annex III (CDDH/I/350/Rev.1), para. 7; *O.R.* VI, p. 351, CDDH/SR.46, para. 68; p. 375, *id.*, Annex (Indonesia).

¹⁰ On the general question of reservations to the Protocol, cf. introduction to this Part, *supra*, pp. 1059-1065.

¹¹ This possibility was not used.

¹² For the list of ratifications, with references to all reservations or declarations, cf. *infra*, p. 1549.

Protocol I

Article 94 – Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Documentary references

Official Records

O.R. I, Part I, p. 169; Part III, p. 26 (Art. 82). *O.R.* III, p. 350. *O.R.* VI, p. 351, CDDH/SR.46, paras. 68-69; p. 361, *id.*, Annex (Australia); pp. 378-379 (Japan). *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; p. 358, paras. 17-18; p. 363, para. 49; p. 473, CDDH/I/SR.76, paras. 1-3; p. 497, CDDH/I/SR.77, Annex (Cyprus). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; p. 193, paras. 66-67; pp. 237-239, *id.*, Annex III, paras. 1-3; pp. 240-241, paras. 8-10.

Other references

CE 1972, Basic Texts, p. 27 (Art. 81). *CE 1972, Commentaries*, Part I, p. 161 (Art. 81). *CE 1972, Report*, vol. I, p. 195, para. 4.182. *Commentary Drafts*, p. 102 (Art. 82).

Commentary

General remarks

- 3713** Accession gives the Parties to the Conventions the possibility to bind themselves in a single act instead of doing so by the two-stage process of signature followed by ratification, as laid down in Articles 92 (*Signature*) and 93 (*Ratification*). It remains the only possible way for States which are not

signatories, as the Protocol has no longer been open for signature since 13 December 1978.¹

3714 This article was adopted by consensus both in Committee I and in plenary.²

Analysis of the article

States entitled to accede

3715 Only Parties to the Conventions are entitled to accede; by means of a reasonable and not unduly strict interpretation of this requirement of prior adherence to the Conventions,³ there were three accessions to the Conventions and the Protocol simultaneously.⁴

3716 In view of the differences between accession, on the one hand, and signature followed by ratification, on the other hand, it is also self-evident that only a State which is not a signatory to the Protocol can accede to it.

Opening the Protocol for accession

3717 Traditionally treaties were opened for accession only at the end of the period that they were open for signature, or sometimes only after the treaty had entered into force. For example, the Conventions had adopted the latter solution.⁵ In accordance with the current trend in treaty law, the Protocol provided some latitude in allowing accession even while it was still possible to sign.

3718 Contemporary multilateral treaties frequently require the participation of a fairly large number of States in order to enter into force.⁶ In view of the relative brevity of the period when signature was possible, States which were not signatories would run the risk of being prevented from acceding for a long time if they could only do so after the entry into force, which itself would then depend on achieving the given number of ratifications alone.

3719 So as not to stand in the way of States wishing to bind themselves at an early date, the Protocol therefore provided the possibility of accession, not only before it entered into force, but from the time it was open for signature. Article 94 does not explicitly mention the deferment period, as does Article 92 (*Signature*).

¹ Cf. commentary Art. 93, *supra*, pp. 1071-1072, for the other ways in which the Protocol can be made applicable in a definitive manner, *ad hoc*, or provisionally.

² *O.R.* IX, p. 473, CDDH/I/SR.76, para. 3; *O.R.* VI, p. 351, CDDH/SR.46, para. 68.

³ On this point, cf. commentary Art. 92, *supra*, pp. 1068-1069.

⁴ As of 31 December 1984. One State simultaneously succeeded to the Conventions and acceded to the Protocol, but this is even less debatable.

⁵ Art. 60/59/139/155 common to the Conventions.

⁶ Thus, for example, the Vienna Convention on the Law of Treaties of 23 May 1969 itself requires 35, in accordance with Art. 84 (Entry into force), para. 1.

However, it was understood by the Conference that the Protocol would not be open for accession before being open for signature.⁷

- 3720 As it happens, the arguments given above for such flexible arrangements in treaties in general do not necessarily explain why this facility exists here, as the participation of only two States was sufficient for the Protocol to enter into force in accordance with Article 95 (*Entry into force*), paragraph 1. On the other hand, the deferment period of six months before opening the Protocol for signature constituted an argument in favour of opening it at the same time for accession: during this period States could evaluate the consequences of participating in the Protocol to their own satisfaction and decide to accede to it. One may recall that one instrument of accession was indeed deposited during the period that the Protocol was open for signature.⁸

The nature of accession

- 3721 Accession is the single act definitively expressing the consent of a State to be bound by the Protocol and making it applicable to that State's relations with the other Contracting Parties. Thus, like ratification, it requires a thorough examination on the merits, and a number of internal procedures laid down by the constitution of every State must be carried out.
- 3722 Moreover, the preparations for accession can already be accompanied by the development of measures for the execution of obligations such as those envisaged in Article 80 (*Measures for execution*); at least a preliminary study of such measures is indispensable in the examination of accession. On the other hand, their final preparation and implementation do not become legal obligations until the Protocol has been acceded to or even until it has entered into force for the State concerned.⁹

The form of accession

- 3723 The instrument of accession must be deposited by the diplomatic representatives of the country concerned with the Swiss Federal Council, or transmitted in the form of a written communication.¹⁰

⁷ O.R. VI, p. 351, CDDH/SR.46. para. 69; pp. 361 and 378-379, *id.*, Annex (Australia and Japan).

⁸ Libya, 7 June 1978.

⁹ Cf. Art. 95.

¹⁰ For an overall picture of the functions of the depositary, cf. commentary Art. 100, *infra*, p. 1113.

Reservations and declarations

3724 The instrument of accession must also mention any reservations and declarations that may be made.¹¹ A declaration in accordance with Article 90 (*International Fact-Finding Commission*), paragraph 2 (a), can be made at the time of accession, or at any time thereafter.

Notification by the depositary

3725 The depositary will notify the deposit of every instrument of accession, as well as any reservations and declarations made on accession in accordance with Article 100 (*Notifications*), sub-paragraphs (a) and (c). As of 31 December 1984, there were 30 accessions to the Protocol, without any declarations in accordance with Article 90 (*International Fact-Finding Commission*), paragraph 2 (a), and five were with reservations or declarations.¹²

B.Z.

¹¹ On the general question of reservations to the Protocol, *cf.* introduction to this Part, *supra*, pp. 1059-1065.

¹² For the list of accessions, with references to all reservations or declarations made, *cf. infra*, p. 1549.

Protocol I

Article 95 – Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Documentary references

Official Records

O.R. I, Part I, p. 169; Part III, p. 26 (Art. 83). *O.R.* III, p. 351. *O.R.* VI, pp. 351-352, CDDH/SR.46, paras. 69-71; p. 375, *id.*, Annex (Indonesia); p. 382 (Netherlands). *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; pp. 358-359, paras. 20-24; p. 363, para. 49; p. 473, CDDH/I/SR.76, paras. 1-3; p. 497, CDDH/I/SR.77, Annex (Cyprus). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; p. 193, paras 68 and 70; pp. 237-239, *id.*, Annex III, paras. 1-3; p. 241, para. 11.

Other references

CE 1972, Basic Texts, p. 6 (Art. 4); p. 27 (Art. 83). *CE 1972, Commentaries*, Part I, pp. 11-13 (Art. 4); p. 167 (Art. 83). *CE 1972, Report*, vol. I, p. 197, paras. 4.188-4.195 (Art. 83). *Commentary Drafts*, p. 102 (Art. 83).

Commentary

General remarks

- 3726** The principal object of paragraph 1 is to determine the decisive moment at which, by its entry into force, the Protocol becomes really part of international law. This moment is also that at which the Protocol enters into force for the first two Parties, i.e., its legal effects can be applied with respect to these Parties.

- 3727** Paragraph 2 determines the moment of the Protocol's entry into force for States ratifying or acceding to it after the deposit of the second instrument of ratification or accession.
- 3728** Article 95 was adopted by consensus, both in Committee I and in plenary.¹

Analysis of the article

Paragraph 1

- 3729** Even when it has been adopted by the competent body, a treaty really only commences to exist as an instrument of international law when a specific number of States accept being bound by it in accordance with the agreed conditions.
- 3730** The number of two ratifications had been adopted for this purpose by the Conventions.² The Conference welcomed the ICRC proposal to keep to this minimum number of two for the Protocol:³ this meant that it would quickly become applicable, at least between the Contracting States. Moreover, it could accelerate the rate of ratifications and accessions. Following this point of view in a consistent fashion, the Conference also decided to permit one or two instruments of accession to determine the entry into force of the Protocol, or to contribute to this. In fact, the Protocol entered into force on 7 December 1978 while it was still open for signature, after one ratification and one accession.⁴ On this date it became an integral part of international law.
- 3731** There is an interval of six months between the deposit of the second instrument of ratification or accession and the Protocol's entry into force for the first two Contracting Parties. This period serves to allow the States involved to prepare any legislative or administrative measures for implementing their new obligations.⁵ It also serves to permit the depositary to make the notifications required by Article 100 (*Notifications*), sub-paragraphs (a), (b) and (c) (accessions, ratifications, entry into force of the Protocol, and any declarations in accordance with Article 90 – *International Fact-Finding Commission*, paragraph 2(a)).

Paragraph 2

- 3732** This applies to States other than the first two Contracting Parties. There is an interval of six months identical to that laid down in paragraph 1, for the same reasons, between the deposit by a State of its instrument of ratification or

¹ *O.R.* IX, p. 473, CDDH/I/SR.76, para. 3; *O.R.* VI, p. 351, CDDH/SR.46, para. 69.

² Art. 58/57/138/153 common to the Conventions.

³ Nevertheless one State would have preferred that the entry into force of the Protocol had required half of the Parties to the Conventions, plus one, to be bound by it; *cf.* *O.R.* VI, p. 375, CDDH/SR.46, Annex (Indonesia).

⁴ Ratification by Ghana on 28 February 1978, and accession by Libya on 7 June 1978.

⁵ *Cf.* commentary Art. 80, *supra*, p. 929.

accession and the entry into force of the Protocol between that State and the other Contracting Parties.

Entry into force and application

- 3733** This article deals with the moment from which the legal effects of the Protocol will be applicable to the Contracting Parties, but this requires three clarifications.
- 3734** First, the provisions relating to the entry into force of the Protocol and to certain functions of the depositary are obviously applicable from the outset.
- 3735** Secondly, the respective points in time at which the other provisions become effectively applicable may vary: in this respect, one may refer to the commentary on Article 3 (*Beginning and end of application*).⁶
- 3736** Finally, only Contracting Parties, i.e., States, are taken into consideration in this context, and not the authorities covered by Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3: sub-paragraph (a) of this paragraph provides for a special solution for the situations it covers.

Immediate effect

- 3737** The Conventions contain a common article⁷ by virtue of which the situations covered in their Article 2 will give immediate effect to ratifications and accessions deposited by the Parties to the conflict before or after the beginning of such situations. Thus, for obvious humanitarian reasons, the six month interval which normally separates the ratification or accession by a State from the entry into force of the Conventions for that State, is dispensed with if the conditions for their application are fulfilled.
- 3738** Because the Protocol is an instrument additional to the Conventions,⁸ the ICRC had considered that the clause concerned would apply to the Protocol and that it would not even be necessary to repeat it. However, upon reflection it was considered useful to ask Committee I whether there might be any doubt on this point.⁹
- 3739** As no organ of the Conference requested a debate on this question, it may be concluded that, by virtue of Article 62/61/141/157 common to the Conventions, the existence of a situation covered by Article 1 of the Protocol (*General principles and scope of application*) will give immediate effect to the ratifications and accessions of the Parties to the conflict. If this has not already been done, the depositary will give notification of such ratifications and accessions by the quickest means available.

B.Z.

⁶ *Supra*, pp. 66-67.

⁷ Art. 62/61/141/157.

⁸ On this subject, *cf.* commentary on the title of the Protocol, *supra*, pp. 20-21, and on Art. 1, para. 3, *supra*, p. 39, and on Art. 96, para. 1, *infra*, pp. 1085-1086.

⁹ O.R. IX, p. 359, CDDH/I/SR.67, para. 24.

Protocol I

Article 96 – Treaty relations upon entry into force of this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.
3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
 - (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
 - (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
 - (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Documentary references

Official Records

O.R. I, Part I, p. 169; Part III, p. 26 (Art. 84). *O.R.* III, pp. 352-355. *O.R.* VI, pp. 352-355, CDDH/SR.46, paras. 72-81; pp. 364-365, *id.*, Annex (Canada); p. 372 (Federal Republic of Germany); pp. 378-380 (Jamaica, Japan, Mauritania); p. 383 (Spain); pp. 386-387 (Turkey, United Kingdom). *O.R.* VII, p. 49, CDDH/SR.47, Annex (Syria); pp. 312-313, CDDH/SR.58, para. 164; p. 314, para. 173; p. 324, *id.*, Annex (Mauritania). *O.R.* IX, pp. 356-357, CDDH/I/SR.67, paras. 7-10; p. 359, paras. 26-28; pp. 363-367, paras. 50-51 and 53-85; pp. 369-376, CDDH/I/SR.68, paras. 1-33; pp. 473-474, CDDH/I/SR.76, paras. 1-5; p. 497, CDDH/I/SR.77, Annex (Cyprus); pp. 508-509 (Syria). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; pp. 193-195, paras. 71-79; pp. 237-239, *id.*, Annex III (CDDH/I/350/Rev.1), paras. 1-3; pp. 241-242, paras. 12-16.

Other references

CE/Ib, pp. 39-40. CE 1971, *Report*, p. 18, para. 11. CE 1972, *Basic Texts*, p. 27 (Art. 84). CE 1972, *Commentaries*, Part I, pp. 165-167 (Art. 84). CE 1972, *Report*, vol. I, pp. 197-198, paras. 4.196-4.200; vol. II, p. 108, CE/COM IV/6; p. 122, CE/COM IV/70. *Commentary Drafts*, p. 103 (Art. 84).

Commentary**General remarks**

- 3740** The three paragraphs of this article deal with related, though separate, questions. Paragraph 1 is applicable, as indicated by the heading of the article itself, upon entry into force of the Protocol with respect to each Party to this instrument; the questions dealt with in paragraphs 2 and 3, although they are of the same order, apply only in cases of conflict.
- 3741** Paragraph 1 and the first sentence of paragraph 2 deal with treaty relations in the full sense of the term, i.e., the relations between Parties which have followed the prescribed procedures of signature followed by ratification or of accession, and are therefore fully and permanently bound by the Conventions and the Protocol.¹ The rest of the article provides for special ways in which the Protocol can enter into force in relation to a particular conflict.
- 3742** It is appropriate to recall with regard to the three paragraphs that in relations between Parties to a conflict not governed by the Protocol (or even not governed by the Conventions), the customary law of international armed conflict is fully applicable from the outset.
- 3743** Paragraphs 1 and 2 correspond to the draft submitted to the Conference (Article 84). Paragraph 3 is the result of a proposal presented during the Conference after the adoption of Article 1 (*General principles and scope of application*), paragraph 4, in Committee I.
- 3744** Paragraph 3 was adopted immediately in Committee without being examined by the Working Group, which several delegations regretted.² After being examined by the Working Group paragraphs 1 and 2 were adopted in Committee I by consensus, as was the article as a whole.³ The plenary Conference adopted the article in its entirety by roll-call.⁴

¹ For the Protocol, *cf.* Arts. 92-94. *Cf.* also the comments on the expression “the High Contracting Parties” in commentary Preamble, *supra*, p. 25.

² O.R. IX, pp. 364-367, CDDH/I/SR.67, paras. 56-85; pp. 369-376, CDDH/I/SR.68, paras. 1-33; the vote was 50-0-14 (*ibid.*, p. 365, CDDH/I/SR.67, para. 71).

³ *Ibid.*, pp. 473-474, CDDH/I/SR.76, paras. 3-4.

⁴ O.R. VI, p. 354, CDDH/SR.46, para. 76 (vote: 93-1-2).

Paragraph 1

- 3745 The Conference's title indicated its purpose, namely to reaffirm and develop international humanitarian law applicable in armed conflicts, and the Protocol expresses the same idea in the third paragraph of the Preamble. The title of the Protocol proclaims that it is "Additional to the Geneva Conventions of 12 August 1949" and Article 1 (*General principles and scope of application*), paragraph 3, provides that it "supplements" these Conventions.⁵
- 3746 The addition of a supplement to the Conventions entails the appearance of two separate, though basically overlapping treaty communities once the Protocol enters into force.⁶ On the one hand, the virtually universal already existing community of Parties to the Conventions; on the other hand, that which came into existence on 7 December 1978⁷ of Parties bound by the Conventions and by the Protocol.⁸
- 3747 Only this new treaty community is covered by the paragraph under consideration here. It lays down a rule that applies at all times, and not only in time of armed conflict within the meaning of Article 1 (*General principles and scope of application*), paragraphs 3 and 4.⁹
- 3748 Basically the Protocol supplements the Conventions by extending the scope of their application, the categories of protected persons and objects and the protection conferred. Thus the Conventions remain and the Protocol adds to them without in principle removing anything.¹⁰ When the recognized rules of interpretation reveal an incompatibility on a particular point between the provisions of the Conventions and those of the Protocol, the latter take precedence. In this respect this paragraph merely repeats, succinctly, the relevant rule of the law of treaties.¹¹
- 3749 The Protocol explains its relation to the Geneva Conventions of 1949; the latter do the same with regard to the conventions preceding them, which they replace,¹²

⁵ See also the commentary on the title (*supra*, pp. 20-21); on the third paragraph of the Preamble (p. 27) and on Art. 1, para. 3 (p. 39).

⁶ We do not consider here the community of States Parties to Protocol II which has its own particular features.

⁷ I.e., the date of entry into force of Protocol I, in accordance with Art. 95, para. 1 thereof.

⁸ It is impossible to be bound by the Protocol without being bound by the Conventions (*cf.* commentary Arts. 92 and 94, *supra*, pp. 1068-1069 and 1076). *Cf. infra*, p. 1549 for a list of the Parties to the Conventions and the Parties to the Protocol.

⁹ *Cf.* commentary Art. 3, *supra*, pp. 66-67, on the different points in time when the provisions of the Protocol become applicable or may become applicable.

¹⁰ *Cf.*, however, the case of mercenaries, who are dealt with specifically in Art. 47 of the Protocol; they are now entitled only to a limited degree of protection, while under the Third Convention they were not dealt with as a separate category.

¹¹ The Vienna Convention on the Law of Treaties of 23 May 1969, Art. 30, paras. 3-4; the rule in question is the general rule *lex posterior derogat priori*, i.e., the later law prevails over the earlier law.

¹² *Cf.* Art. 59/58/134 of the First, Second and Third Conventions, respectively. We note that only one country, Burma, is still bound by the two Geneva Conventions of 1929 (on the wounded and sick; and on prisoners of war, respectively) without being bound by the 1949 Conventions.

and the Hague Regulations respecting the laws and customs of war on land (of 1899 or 1907), which they supplement.¹³

3750 In the area which the Protocol and the law of The Hague have in common, but which is absent from the Conventions, the situation is as follows according to the above-mentioned rule: pre-existing law continues to apply as treaty law or customary law insofar as it is not modified or replaced by the Protocol.

3751 In general the relation between the Protocol and all other relevant instruments is studied in this commentary with regard to each provision or group of provisions for which the question arises.¹⁴

Paragraph 2

3752 This paragraph is taken *mutatis mutandis* from paragraph 3 of Article 2, common to the Conventions, and like the latter, deals with two aspects of the same assumption, namely that the Parties to a given conflict are not all bound by the same rules. Until such time as the Protocol is in force universally like the Conventions, it is necessary to determine what is the status in such a situation of the provisions of the Protocol insofar as they are not customary law.

First sentence

3753 This has been a basic rule of the Geneva Conventions since 1929,¹⁵ while the earlier Conventions of Geneva and The Hague included a *clausula si omnes* or clause of universal participation. According to that clause, it was sufficient for one of the Parties to the conflict not to be bound by a particular convention for all the other Parties to the conflict, even though they were bound by that convention, to be absolved from applying it, even between themselves. This had the effect that formally the conventions of humanitarian law in existence at the time were not applicable at the beginning of the First World War.¹⁶

3754 Under the present sentence a Party to a conflict bound by the Protocol remains bound to apply it vis-à-vis the adverse Parties bound by the same instrument, even if one or several adverse or allied Parties are not bound by the Protocol. If necessary Article 1 (*General principles and scope of application*), paragraph 1, of the Protocol confirms that this applies in all circumstances despite practical difficulties which may arise, for example, in military alliances.¹⁷

¹³ Cf. Art. 135 of the Third Convention and Art. 154 of the Fourth Convention.

¹⁴ Basically these are questions arising from Part III and Part IV, Section I. Among the other instruments we could mention, for instance, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 1954 and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 1976.

¹⁵ The same rule also applies to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (Art. 18, par. 3, first sentence) and to the United Nations Convention on the use of certain conventional weapons of 1980 (Art. 7, para. 1).

¹⁶ Cf. *Commentary I*, pp. 33-34 (Art. 2, para. 3).

¹⁷ Cf. *ibid.*, for treatment in greater depth.

*Second sentence*1. *Conflicts between States*

3755 The procedure by which a State binds itself to the terms of an international treaty is a lengthy one: apart from a thorough examination of the treaty it must carry out at least a preliminary study of the measures for execution which will follow from participation in the treaty in question.¹⁸ Thus it may happen that a State gets involved in an international armed conflict without having completed the internal procedure of examining the Protocol. In that case, if the State concerned so desires, this is a way of making the Protocol legally applicable between itself and the other Parties to the conflict already bound by that instrument.¹⁹ Although the sentence concerned only refers to one Party, the same procedure may of course be used by several Parties to a conflict which are not bound by the Protocol.

3756 The way that is open to achieve this is limited in its effects. In fact, it does not definitively bind the Party concerned to all the obligations as does ratification or accession; acceptance²⁰ is limited to the current conflict and the Party making the declaration of acceptance retains total freedom as regards its formal participation in the Protocol.

3757 This procedure is not unduly legalistic. The question when and precisely under what conditions the Conventions would become applicable according to their relevant provision (identical to the provision under consideration here), was discussed at length in 1949. We summarize below the conclusions of the commentary on the Conventions:

- it is highly desirable to have an official and explicit declaration from the accepting Party. However, this is not expressly required, and if the declaration is lacking or its transmission delayed, actual application implies acceptance (tacit acceptance);²¹
- the Parties bound by the Protocol engaged in a conflict with a non-contracting Party will presume that the latter intends to apply the Protocol and they will apply it themselves pending a possible declaration and above all until they have had the possibility of assessing the conduct of the non-contracting adverse Party;

¹⁸ Cf. *supra*, commentary Arts. 80 (p. 929), 93 (p. 1072) and 94 (p. 1077).

¹⁹ Cf. *Commentary III*, p. 35, note 1 (Art. 2, para. 3, *in fine*), for an example of how the corresponding provision of the Conventions has been applied. In the now highly exceptional case that a State Party to the conflict would not be bound by the Conventions, acceptance of the Protocol within the meaning of the present paragraph must be accompanied by acceptance of the Conventions within the meaning of common Art. 2, para. 3 thereof.

²⁰ Acceptance as meant here is different from acceptance as mentioned in various treaties, in particular the Vienna Convention on the Law of Treaties (Art. 16); in that sense acceptance is one of the methods whereby a State may become Party to a treaty and it has the same legal effect as ratification, approval and accession.

²¹ The Hague Convention of 1954 requires a declaration (Art. 18, para. 3, second sentence); the United Nations Convention of 1980 requires a notification of acceptance addressed to the depositary (Art. 7, para. 2).

- only in case the non-contracting Party manifestly fails to apply the Protocol in practice, may the Parties bound by the Protocol abandon applying it – with regard to that non-contracting Party – irrespective of whether or not there has been a declaration of acceptance.

2. *Armed conflict for self-determination*²²

3758 The following paragraph lays down a special procedure for authorities representing peoples fighting for self-determination. If the authority concerned is fighting against a Party to the Protocol, recourse to paragraph 3 will have the advantage of greater clarity; the possibility laid down in this paragraph does not seem adequate. However, if communication with the depositary is difficult, slow or impossible, such a solution may still be envisaged, in which case the declaration should also relate to the Conventions, based on their common Article 2, paragraph 3.²³

Paragraph 3

3759 As the Protocol states in Article 1 (*General principles and scope of application*), paragraph 4, that armed conflicts for self-determination are international, the Conference considered it necessary to lay down a special procedure of acceptance for authorities representing peoples engaged in such conflicts. We will first examine the declaration laid down in this paragraph, and then study any further cases that may occur if all the conditions required here are not fulfilled.

1. *Conditions of application of the paragraph*

- 3760** – In view of the reference to Article 1 (*General principles and scope of application*), paragraph 4, there must be an armed conflict “in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination [...]”²⁴
- 3761** – The armed conflict must be between a people fighting for self-determination and a Party to the Protocol. If the instrument of ratification or accession of the

²² On this point and on paragraph 3 we refer primarily to the commentary on Art. 1, para. 4, *supra*, p. 41 and to the literature referred to in note 71, especially to: W.T. Mallison and S.V. Mallison, *op. cit.*, pp. 13-14; J.J.A. Salmon, *op. cit.*, pp. 71-73, 82, 102-103; D. Schindler, “The Different Types of Armed Conflict...”, *op. cit.*, pp. 135-137, 140-144; G. Abi-Saab, “Wars of National Liberation...”, *op. cit.*, pp. 400-415, 433-434; E. Kussbach, “Die Rechtsstellung nationaler Befreiungsbewegungen...”, *op. cit.*, pp. 501-516; J.A. Barberis, *op. cit.*, pp. 244, 251-259, 267-268; A. Cassese, “Wars of National Liberation...”, *op. cit.*, pp. 315-316, 320-324.

²³ In this connection, *cf.* point 4, *infra*, p. 1091. E. Kussbach thinks that paragraph 2 is also open to the authorities in question together with an acceptance under common Art. 2, para. 3 (“Die Rechtsstellung nationaler Befreiungsbewegungen...”, *op. cit.*, p. 502, note 5).

²⁴ *Cf.* commentary Art. 1, para. 4, *supra*, p. 43 for further developments on such conflicts.

Party concerned was deposited less than six months before, a declaration by the authority representing the people engaged in the conflict remains possible by virtue of the provision on immediate effect included in the Conventions.²⁵

3762 – There must be a declaration addressed to the depositary.²⁶

3763 – The declaration must come from an authority representing the people engaged in the conflict concerned, which requires two points to be clarified:

- first, it has occurred in some conflicts for self-determination that two or more authorities were deemed to represent the people engaged in the conflict.²⁷ In such a case the present paragraph may be applied without difficulty if there is a common declaration or if there are concordant declarations from those authorities; if, on the other hand, one or other of the authorities does not make the declaration, this paragraph applies only between the Contracting Party and the authority or authorities making the declaration;²⁸
- a proposal to require recognition by the competent regional intergovernmental organization, which was not included in Article 1 (*General principles and scope of application*), paragraph 4, was not adopted either for inclusion in the text of the present paragraph.²⁹

2. Nature of the declaration

3764 – The declaration which the authority concerned must make is unilateral since it produces its effects irrespective of the conduct of the Contracting Party. On the other hand, it does not create merely unilateral obligations; it brings into force rights and duties between the two Parties to the conflict which flow from the Conventions and the Protocol and it does so because of the fact that the Contracting Party against which the fight is directed had previously become a Party to the Protocol.

3765 – The declaration is a condition for sub-paragraphs (a)-(c) becoming applicable: the status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humani-

²⁵ Art. 62/61/141/157; cf. also commentary Art. 95, para. 2, *supra*, p. 1081.

²⁶ The depositary in turn will communicate the declaration by the quickest methods to the Parties to the Conventions, in accordance with Art. 100, sub-para. (d).

²⁷ Cf. D. Schindler, "The Different Types of Armed Conflicts...", *op. cit.*, pp. 143-144 and G. Abi-Saab, "Wars of National Liberation...", *op. cit.*, p. 409, on the existence of more than one movement and the application of the present paragraph.

²⁸ It is difficult to see how any other solution could in fact be compatible with sub-para. (c) or with the rejection of the *clausula si omnes* in para. 2.

²⁹ Cf. commentary Art. 1, para. 4, *supra*, p. 43. On this point, cf. also J.J.A. Salmon, *op. cit.*, pp. 83-84; D. Schindler, "The Different Types of Armed Conflicts...", *op. cit.*, pp. 141-142; G. Abi-Saab, "Wars of National Liberation...", *op. cit.*, pp. 408-409; E. Kussbach, "Die Rechtsstellung nationaler Befreiungsbewegungen...", *op. cit.*, p. 511 (all these authors remark on the value of such recognition but they think it is not required by the present article); see also J.A. Barberis, *op. cit.*, pp. 248-251, 267. We may add that such a requirement was put forward by the United Kingdom in a declaration it made when it signed the Protocol, and by the Republic of Korea in a declaration made when ratifying the Protocol.

tarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict: if the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II, Article 3 common to the Conventions and, as the case may be, Protocol II, will bind all the Parties to that armed conflict straightaway.³⁰

- 3766** – Any reservations the Contracting Party may have made will affect the relations between that Party and the authority making the declaration insofar as they are compatible with the object and purpose of the Conventions and of the Protocol.³¹ The authority, too, could formulate reservations, subject to the general conditions relating thereto, if it considered it necessary to do so;³² however, the greatest prudence is appropriate in order to avoid any controversy which might jeopardize the application of international humanitarian law in the conflict that has broken out.

3. *Effects of the declaration*

- 3767** – The Conventions and the Protocol immediately come into force between the Contracting Party and the authority.
- 3768** – In relation to the conflict taking place the authority making the declaration assumes the same rights and the same obligations as a Party to the Conventions and to the Protocol.³³ On the other hand, Article 7 (*Meetings*) and, with the exception of this article, the whole of Part VI, are not applicable to the authority.³⁴
- 3769** – The Conventions and the Protocol bind all the Parties to the conflict equally: this is a reminder of a basic rule of this law, reaffirmed in the fifth paragraph of the Preamble, and in Article 1 (*General principles and scope of application*), paragraph 1, of the Protocol. “All Parties to the conflict” is to be understood subject to what we said regarding the case that two or more authorities represent the same people engaged in a conflict.

³⁰ Cf. commentary Protocol II, general introduction, *infra*, p. 1325, and introduction to Part I, *infra*, p. 1343. Notwithstanding this description of the legal situation, nobody would support the contention that there could be any conflict which would not be subject to at least common Article 3; and to Protocol II, too, however different the views may be on the nature of the conflict, provided that Protocol II applies to the territory in question and all material conditions are met for that Protocol to apply.

³¹ Cf. introduction to Part VI, *supra*, pp. 1059-1065.

³² In this sense E. Kussbach, “Die Rechtsstellung nationaler Befreiungsbewegungen...”, *op. cit.*, p. 510; he refers to the fact that the Conventions and the Protocol are silent on the question of reservations, and to the equality of rights and obligations of all concerned under the terms of sub-para. (b) of the present paragraph 3.

³³ In order to emphasize the importance of implementing Art. 80 forthwith, the Commission decided after adopting the present paragraph to use the formula “The High Contracting Parties and the Parties to the conflict” in both paras. of Art. 80. However, see commentary Preamble, *supra*, p. 25, on the meaning of the term “High Contracting Parties”.

³⁴ However, cf. commentary Art. 7, *supra*, p. 103, and Art. 97, *infra*, pp. 1094-1096.

4. *Cases when a declaration is impossible*

3770 The declaration laid down in this paragraph is only possible if an armed conflict is conducted against a Party to the Protocol. What is the position if an armed conflict within the meaning of Article 1 (*General principles and scope of application*), paragraph 4, is conducted against a Party not bound by the Protocol?

a) *The State is a Party to the Conventions*

3771 The gradual recognition in international law of the right of self-determination and of the international nature of armed conflicts conducted in the exercise of this right had led to the view, even before the Protocol, that common Article 2, paragraph 3, of the Conventions opened also to national liberation movements a possibility to accept the Conventions.

3772 For the advocates of this solution the fact that the drafters of the 1949 Conventions had not intended to cover national liberation movements did not detract in the least from the need to interpret the term “Powers” in that article in a manner consistent with the whole of the legal system as in force at the time of interpretation.³⁵

3773 In fact the same majority of States had insisted on the international character of armed conflicts in the exercise of self-determination³⁶ already before the adoption of the Protocol, and had then proposed, defended and obtained the inclusion of paragraph 4 of Article 1 (*General principles and scope of application*) and paragraph 3 of the present Article 96 of the Protocol.

3774 These States did not for one moment think of taking away from national liberation movements a right which they had recognized on many occasions as due to these movements and which will now be regulated and clarified in this article once the Protocol is in force for the State concerned. Consequently, for a very large majority of States the route of acceptance of the Conventions in accordance with their common Article 2, paragraph 3, remains open to authorities representing peoples fighting for self-determination against a State which is a Party to only the Conventions.³⁷ In the same case a declaration of acceptance of

³⁵ Cf. commentary Art. 1, para. 4, *supra*, p. 47 (and note 56) and p. 51 (with notes 72 and 73).

³⁶ And thus by implication the interpretation given above which may be considered as a question of procedure.

³⁷ On the interpretation of common Art. 2, cf. J.J.A. Salmon, *op. cit.*, pp. 71-72; D. Schindler, “The Different Types of Armed Conflicts...”, *op. cit.*, pp. 135-136, thinks that it is a question of interpretation rather than a rule of customary law, having regard to the opposition of several States in addition to the States concerned; G. Abi-Saab, “Wars of National Liberation...”, *op. cit.*, pp. 400-403, 433, thinks that this rule applies vis-à-vis all States and that the present paragraph confirms the validity of this rule; A. Cassese, “Wars of National Liberation...”, *op. cit.*, p. 332, is of the opinion that the international character of these conflicts has become a rule of customary law as a result of the decision of the Conference and that this right applies vis-à-vis all States which were represented there, with the exception of the one which consistently opposed the formulation of such a rule. See also E. Kussbach, *supra*, p. 1088, note 23.

the Protocol would only count as a unilateral undertaking of obligations in matters which are not covered by customary law.³⁸

b) *The State is not a Party to the Conventions*

3775 In this situation, which is highly exceptional nowadays, any declaration by a liberation movement could only have the effect of a unilateral commitment in matters not covered by customary law.

B.Z.

³⁸ In this respect, *cf.* the 1980 Convention on the use of certain conventional weapons, Art. 7, para. 4(b).

Protocol I

Article 97 – Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Documentary references

Official Records

O.R. I, Part I, p. 170; Part III, pp. 26-27 (Art. 86). *O.R.* III, p. 39, CDDH/I/16; p. 359. *O.R.* VII, p. 16, CDDH/SR.47, para. 5. *O.R.* VIII, p. 183, CDDH/I/SR.19, para. 70; p. 184, para. 76; p. 186, CDDH/I/SR.20, para. 5; p. 188, para. 21; p. 283, CDDH/I/SR.28, paras. 65-66. *O.R.* IX, p. 360, CDDH/I/SR.67, paras. 34-36; p. 474, CDDH/I/SR.76, para. 6. *O.R.* X, p. 196, CDDH/405/Rev.1, paras. 87-90; p. 238, *id.*, Annex III (CDDH/I/350/Rev.1), para. 1; pp. 243-244, paras. 19-25; p. 275, *id.*, Annex IV.

Other references

CE 1972, Basic Texts, p. 7 (Art. 9, para. 1 *in fine*). *CE 1972, Commentaries*, Part I, pp. 23-24 (Art. 9). *CRCE 1972, Report*, p. 49 (Art. 9). *CE 1972, Report*, vol. I, p. 186, paras. 4.109-4.110 and 4.112; vol. II, p. 109, CE/COM IV/10; p. 111, CE/COM IV/18; p. 117, CE/COM IV/40. *Commentary Drafts*, pp. 105-108 (Art. 86).

Commentary

General remarks

- 3776** The inclusion in the Protocol of an article providing for the possibility of amendment corresponds with a general trend in recent multilateral treaties.¹ Part IV of the Vienna Convention on the Law of Treaties of 23 May 1969 (Amendment and modification of treaties – Articles 39-41) contains some provisions on this subject which are applicable when a treaty does not provide otherwise. We will refer to these provisions below.
- 3777** The draft presented to the Conference (Article 86) did not give rise to any proposed amendment and only underwent one modification. Instead of making every amendment to the Protocol, including Annexes I and II, subject exclusively to this article, the Conference laid down detailed rules separately for revision of Annex I (Article 98 – *Revision of Annex I*). The article under consideration here did not give rise to any discussion in Committee I or in the plenary Conference and was adopted by consensus in both.²

Paragraph 1

- 3778** In accordance with the terminology of the Vienna Convention, this article uses the term “amendment” and not “revision”. In this context “amendment” usually means changes made to individual provisions, while “revision” usually means changes affecting, rather, the whole of a treaty. However, this distinction is not always followed and has no legal significance.³ Like the Vienna Convention, this article covers either case and is applicable to both isolated changes and all-embracing revisions.
- 3779** One distinction made by the Vienna Convention defines the scope of this article. An amendment changes a treaty so as to affect all the Parties; on the other hand, when the change to the treaty is only in the mutual relations of two or more Parties, the Vienna Convention refers to “modification”.⁴
- 3780** It should be noted that this article only deals with amendments to the Protocol. However, a procedure for amending the Conventions could – as they do not contain a provision to this effect – apply this article by analogy and similarly make use of the remarks below.

¹ On amendment, revision or modification of treaties, cf. P. Reuter, *Introduction au droit des traités*, *op. cit.*, pp. 131-135 (paras. 193-201) and 151-152 (Notes 193-201); W.G. Grewe, “Treaties, Revision”, *Encyclopedia of Public International Law*, *op. cit.*, Instalment 7, 1984, p. 499.

² Cf. respectively, O.R. IX, p. 474, CDDH/1/SR.76, para. 5; O.R. VII, p. 16, CDDH/SR.47, para. 5.

³ On this subject, and particularly on the reasons for retaining the word “amendment” rather than “revision” in the Vienna Convention, cf. P. Reuter, *Introduction au droit des traités*, *op. cit.*, p. 151 (note 193); W.G. Grewe, *op. cit.*, p. 501.

⁴ On such “modifications” of the Conventions and the Protocol, cf. commentary Art. 4, *supra*, p. 74.

- 3781** The proposal for amendment may come from any Contracting Party, i.e., any Party to the Protocol, irrespective of the way in which it has become a Party.⁵ This is not so for Parties to which the Protocol applies in relation to a conflict in progress, by virtue of an *ad hoc* acceptance on their part;⁶ but this does not alter the fact that it would be desirable for such Parties to be invited as observers if a conference were to be called.
- 3782** The proposal may contain one or more amendments; it may come from one Contracting Party acting for itself or on behalf of several Parties, or it could come from two or more Contracting Parties acting jointly – for example, following a meeting held in accordance with Article 7 (*Meetings*).
- 3783** The fact that the depositary is designated to proceed to consult the Contracting Parties and the ICRC follows logically from its mandate.⁷ That each Contracting Party has the right to participate in the decision about what is to be done regarding the proposed amendment does not require explanation;⁸ the fact that the ICRC is also consulted is a recognition of its role in the codification and development of humanitarian law. Parties to the Conventions not bound by the Protocol are not consulted, but in accordance with Article 100 (*Notifications*), sub-paragraph (c), the depositary informs them of the proposed amendment and of the consultation relating to it.
- 3784** The consultation will in fact consist of submitting the proposed amendment and asking each of the Contracting Parties to give its opinion, within a given period, on convening a conference to examine the proposal.⁹ If there are several proposed amendments, those consulted are free to give an overall view or to present their view on each proposal individually.¹⁰
- 3785** The article is silent regarding the way in which the depositary should decide, on the basis of the results of the consultation, whether it should convene a conference.¹¹ In the absence of any indications in the Official Records of the Conference it must be considered that the latter deliberately abstained from requiring approval by, for example, a third or by a majority of the Contracting

⁵ Cf. commentary Arts. 93 and 94, *supra*, pp. 1071-1072 and 1075. The answer is less clear for a newly independent State which has made a declaration on provisional application of treaties, but this is rather unlikely in the case of the Protocol; if a meeting were called, such a State should nevertheless be invited in any case.

⁶ Cf. commentary Art. 96, paras. 2 and 3, *supra*, p. 1086.

⁷ For a summary of this mandate, cf. commentary Art. 100, *infra*, p. 1114.

⁸ This is confirmed by Article 40, para. 2(a), of the Vienna Convention.

⁹ Although it does not refer to this, the present article does not exclude the possibility that those consulted are also given a choice between a meeting and a written procedure in the case of minor amendments.

¹⁰ On the possibility of conditional approval of proposals in such cases, cf. commentary Art. 7, *supra*, p. 106.

¹¹ No indication can be found either in the Vienna Convention, nor in the message sent by the Swiss Federal Council to the Swiss Federal Parliament on 18 February 1981, Chapter 211.73. The Convention on the use of certain conventional weapons of 10 October 1980 which required participation by 20 States to enter into force (Art. 5, para.1) requires in this respect a majority consisting of at least 18 Contracting Parties (Art. 8, paras. 1 and 2). On conditional approval, cf. note 10.

Parties.¹² The decision of the depositary will be notified to the Contracting Parties, to the Parties to the Conventions, and to the ICRC.

Paragraph 2

- 3786** In the event of an affirmative decision, the depositary will invite all concerned to the conference, namely, the Parties to the Protocol and the Parties to the Conventions; it would be desirable also to invite Parties to which the Protocol applies by virtue of various types of declarations or acceptance as mentioned above.¹³
- 3787** The question of what rights the various delegations have is not explicitly resolved in this article. It might be thought that, as the Protocol is additional to the Conventions, all Parties to the Conventions should enjoy the right to make proposals, the right to take part in the discussions and the right to vote.¹⁴ This would have the advantage of permitting every Party to the Conventions which is not bound by the Protocol – but called upon to become a Party – to take a decisive part in its evolution; that would undoubtedly help to avoid any development which might make it more difficult for such a Party to accept the Protocol later on.
- 3788** These arguments can be rightly countered with the argument that the Parties to the Protocol must be able to determine how this relatively autonomous treaty should be developed, a treaty by which they, and only they, are bound, and from which they alone derive rights and obligations.
- 3789** Reference to the Vienna Convention, in particular to the concept of amendment as given above, provides two additional arguments in favour of the last-mentioned solution. The first is that an amendment to a treaty is intended to change it with regard to the relations between all the Parties to that treaty; thus it relates only to Parties bound by the Protocol. The second argument is that the Vienna Convention grants Parties to a treaty the right to decide on the action to be taken with regard to a proposed amendment and to participate in any negotiations that may be held on that proposal;¹⁵ with regard to the Protocol it must be deduced from this that the group of Parties which have a voice in the matter must be the same in both paragraphs of this article, and therefore it concerns only the Parties to the Protocol.¹⁶
- 3790** This solution leaves open what right, if any, other participants in the conference will have to put forward proposals and to take part in deliberations. This must be decided by the Parties to the Protocol, at the latest at the beginning of the conference; the same is true for the question of the majority needed for adopting

¹² Solutions adopted respectively by Art. 98, para. 2 (which gives the same right to the ICRC), and by Art. 7.

¹³ Cf. *supra*, pp. 1094-1095, and notes 5 and 6.

¹⁴ It may be recalled that in the Diplomatic Conference these rights were also granted States which, while not being Parties to the Conventions, were Members of the United Nations.

¹⁵ Vienna Convention, Art. 40, para. 2.

¹⁶ In the same sense, reference should be made to the Convention on conventional weapons, Art. 8, paras. 1-2.

any proposed amendment. On this point, unless the Parties to the Protocol decide otherwise, the required majority will be two-thirds of the Parties to the Protocol present and voting, i.e., without taking into account abstentions.¹⁷ The amending agreement will decide on the question of the entry into force of the amendments with respect to Parties already bound by the Protocol and with respect to those which may become bound in due course.¹⁸

B.Z.

¹⁷ Cf. Vienna Convention, Arts. 39 and 9, para. 2. Similarly, the above-mentioned message from the Swiss Federal Council, chapter 211.73.

¹⁸ See the rules of the Vienna Convention which are applicable unless a different intention is expressed, Art. 40, para. 5.

Protocol I

Article 98 – Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.
2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.
3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.
4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.
5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.
6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Documentary references

Official Records

O.R. I, Part I, p. 170; Part III, p. 32 (Art. 16). *O.R.* III, p. 378 (Art. 16); pp. 90-93 (Art. 18 *bis*). *O.R.* VII; p. 55, CDDH/SR.48. *O.R.* XI, pp. 570-571, CDDH/II/SR.50, paras. 34-35, 38 and 43; p. 572, paras. 48 and 50; p. 573, paras. 53 and 59; p. 574, para. 62. *O.R.* XII, p. 163, CDDH/II/SR.69, para. 16; p. 165, CDDH/II/SR.70, para. 5; pp. 202-205, CDDH/II/SR.73, paras. 26-43; pp. 207-215, CDDH/II/SR.74, paras. 1-54; pp. 241-247, CDDH/II/SR.77, paras. 28-71; pp. 257-258, CDDH/II/SR.79, paras. 3-10. *O.R.* XIII, p. 34, CDDH/49/Rev.1, paras. 69-71; pp. 47-48 (Art. 16); p. 61, CDDH/221/Rev.1, para. 8; pp. 266-267, CDDH/235/Rev.1, paras. 54-56; p. 264, paras. 63-65; pp. 281-282 (Art. 18 *bis*), paras. 1-6; p. 294, footnote; p. 322, para. 7; pp. 343-344 (Art. 18 *bis*); pp. 354-355, para. 7.

Other references

CE 1972, Report, vol. I, p. 44, para. 1.76; p. 53, paras. 1.1-1.4; p. 55, para. 14. *Commentary Drafts*, pp. 107-108 (Art. 86, al. 1 *in fine*); pp. 127-128 (Art. 16).

Commentary

General remarks

- 3791** This article sets out the procedure to be followed for the periodic revision of Annex I to this Protocol, which is entitled “Regulations concerning identification”, hereafter referred to as Annex I. The procedure is sub-divided into six consecutive steps with which the six paragraphs of this article successively deal. Paragraphs 1 and 2 mention the role of the ICRC.¹
- 3792** Originally the report of the experts of the Technical Sub-Commission of Committee I of the Conference of Government Experts recommended in 1972 that “an international group of technical experts should review [...] to revise and update the identification and signalling standards, practices and procedures” proposed in the report for medical aircraft “in the light of technological advances”.²
- 3793** To this end Article 16 (Chapter V) of the draft Regulations concerning identification annexed to the 1973 draft of Protocol I provided for periodical revision.

¹ Cf. introduction to Annex I, *infra*, p. 1137.

² *CE 1972, Report*, Vol. I, p. 55, Annex III, para. 14.

- 3794** This procedure applies to all the provisions of Annex I and not only those concerning medical aircraft. In fact technical development and progress have an effect not only on the identification and signalling of medical units and transports in the air, but also on those at sea and on land, as military developments in the field of radio communications, detection, localization and identification cover all these: land, sea, air and even space.
- 3795** All these technological advances have civilian uses, sometimes before being used for military purposes, which required the creation of specialized international organizations for regulating their use:
- the International Telecommunication Union (ITU) for the management of the electromagnetic frequencies spectrum, which is a natural resource;
 - the International Maritime Organization (IMO) for maritime navigation (before 1 July 1982 the IMO was called the Inter-Governmental Maritime Consultative Organization (IMCO));
 - The International Civil Aviation Organization (ICAO) for air navigation.
- 3796** These three intergovernmental organizations each have a special procedure for the adoption and revision of rules which makes it possible for them to keep up with technological progress. For this purpose these organizations convene conferences of government experts of the member States. Furthermore, various other international conventions provide in advance for the possibility of amendment.
- 3797** The recommendation of the experts of the Technical Sub-Commission for periodic revision and updating of the Regulations concerning identification annexed to Protocol I is therefore in accordance with established custom for technical rules. The usefulness of the regulations depends on their adaptation to technological development; this is what justifies the periodic meetings of technical experts and a special procedure for revision separate from that for amendment of the Protocol.³
- 3798** When the 1973 draft had been considered at the first session, the Technical Sub-Commission thought that it was a legal matter within the terms of reference of Committee II which was sent the text of Chapter V (Article 16) together with the proposed amendments for consideration.⁴
- 3799** In the course of the work of Committee II during the third session, Article 16 of the draft Annex became Article 18 *bis* of the Protocol; it was adopted by consensus and transferred to Part VI of the Protocol. The Conference also adopted it by consensus and it became Article 98 in the final version of the Protocol.⁵
- 3800** Article 98 provides for revision of Annex I, after the ICRC has consulted the High Contracting Parties, four years after the entry into force of Protocol I and thereafter at intervals of not less than four years. As Protocol I entered into force on 7 December 1978, the ICRC consulted the Contracting Parties on 7 December

³ Cf. commentary Art. 97, *supra*, p. 1093.

⁴ O.R. XIII, p. 34, CDDH/49/Rev.1, paras. 69-72. O.R. III, pp. 91-92, CDDH/II/68; pp. 92-93, CDDH/II/357 and 359; p. 378, Chapter V, Art. 16; p. 401, note.

⁵ O.R. XII, pp. 246-247, CDDH/II/SR.77, para. 69; O.R. VII, p. 55, CDDH/II/SR.48.

1982, in accordance with Article 98, with regard to the question whether a meeting of technical experts should be convened in order to review the Regulations concerning identification.

- 3801** For its part the ICRC did not propose such a meeting of experts as it considered that the number of States Parties to the Protocol was still too small in 1982 and that it was preferable to postpone the procedure for revision until later. Moreover, the international organizations to which the Diplomatic Conference had addressed its Resolutions 17, 18 and 19 in 1977, viz., respectively, ICAO, IMO and ITU, were still working on many important points.
- 3802** As of June 1985 the results of the work undertaken by these organizations in response to these Resolutions had yielded already certain indispensable technical additions for the practical application of Annex I.
- 3803** If henceforth the revision procedure, in accordance with Article 98, modifies the existing rules, this commentary will also have to be updated.

Heading of the article

- 3804** Annex I of the 1973 draft contained a Chapter V entitled “Periodical revision”. That Chapter only contained one article, Article 16, entitled “Procedure”.
- 3805** Committee II transferred the amended Article 16 to Protocol I as Article 18*bis* entitled “Revision of the Annex” and deleted Chapter V of the draft. Article 18*bis* became the present Article 98, of which the heading reads “Revision of Annex I”. In fact it is concerned with the periodical revision and updating of the Regulations concerning identification annexed to Protocol I.

Paragraph 1

- 3806** Paragraph 1 lays down the intervals at which the revision should take place, and the role of the Contracting Parties and the ICRC in this process.
- 3807** According to the sponsors of the amendment which the Technical Sub-Commission communicated to Committee II together with draft Article 16 of Annex I, an interval of four years would enable any meetings of technical experts to coincide with the sessions of the International Conference of the Red Cross.⁶
- 3808** As we have seen, the ICRC carried out its task of consulting the High Contracting Parties regarding the revision of Annex I for the first time in 1982.
- 3809** The proposal made by the ICRC to postpone the first revision of the Regulations did not meet with opposition. Thus the ICRC must again consult the Parties to the Protocol about revision of the Regulations at the next date due for revision, viz., not less than four years after 7 December 1982, i.e., after 7 December 1986; and similarly thereafter at intervals of not less than four years. The interval may be longer if the ICRC considers that technological developments justify this.

⁶ Cf. *O.R.* XII, p. 208, CDDH/II/SR.74, para. 5.

- 3810** When consulting the Contracting Parties regarding the need to convene a meeting of technical experts for the purpose of revising the Regulations, the ICRC may propose such a meeting or suggest that it be postponed to the next due date four years later. If the ICRC proposes that the meeting should take place, it may at the same time propose the amendments it deems desirable. On the other hand, if it proposes postponing the meeting, the ICRC must give reasons therefore. The purpose of Article 98 is the periodic revision of Annex I in order to maintain its effectiveness and thus it is this criterion of efficacy which must guide the ICRC's decision whether to convene or postpone a meeting of experts.
- 3811** Paragraph 1 gives the ICRC the role of ensuring that the technical provisions of Annex I will always remain up to date. Therefore the ICRC undertakes to remain at all times informed of the views held by the experts of the Parties to the Protocol on technological developments in the fields covered by the Regulations. With the support of these experts it also undertakes to prepare the necessary amendments and to anticipate the needs in the light of technological progress.
- 3812** Finally, the ICRC is to convene a meeting of technical experts six months after it has proposed such a meeting to the Contracting Parties. This interval gives those who may be opposed to the meeting the opportunity of expressing their view. The meeting of experts proposed by the ICRC will not be convened if one third of the Contracting Parties objects.
- 3813** The “appropriate international organizations” must be invited by the ICRC in order that they may be represented by observers at the planned meeting. These are in particular the ITU, ICAO and IMO, the International Electro-Technical Commission (IEC), the International Commission on Illumination (CIE), as well as other organizations interested in future developments, such as the International Maritime Satellite Organization (INMARSAT).
- 3814** The ICRC may be called upon to convene a meeting of technical experts at any time at the request of one third of the Contracting Parties. It is highly desirable that these Parties should add to their request the necessary explanations and the amendments they wish to make to Annex I, in order that the ICRC may advise the technical experts thereof in good time. The technical experts concerned in this paragraph are government experts to be appointed by the Contracting Parties.

Paragraph 2

- 3815** The second step in the revision procedure is the calling of a conference of the Parties to the Protocol and the Parties to the Conventions to consider the amendments proposed by the meeting of technical experts. For this purpose, at the end of the meeting of experts, the ICRC or one third of the Parties to the Protocol may request the Federal Council (the Swiss government), the depositary of the Protocol, to convene the conference.⁷
- 3816** The text of this paragraph, which provides that the Contracting Parties, as well as the Parties to the Conventions, must be invited to conferences convened to

⁷ For a summary of the depositary's functions, *cf.* commentary Art. 100, *infra*, p. 1113.

consider amendments proposed by the meeting of technical experts, is on the same lines as paragraph 2 of Article 97 (*Amendment*) of the Protocol. In addition, Article 7 (*Meetings*) of the Protocol provides for meetings of Parties to the Protocol. It may be thought that for all such meetings and conferences the arrangements regarding financing, rules of procedure, place and date of meeting etc. will be similar. According to this paragraph, the deliberations in the conference can only be about amendments proposed by the technical experts. Thus the participating States may only propose additions, deletions or modifications of the agenda if they are related to these amendments. Neither this Article nor Article 97 (*Amendment*) of the Protocol says anything about the question whether Parties to the Conventions which are not Parties to the Protocol are entitled to make proposals and to take part in the discussions.⁸ However, for amendments to Annex I this right ought to be granted to all participants of the conference concerned. A decision on granting it should be taken by the Parties to the Protocol.

3817 Paragraph 2 does not say whether the depositary State should also invite the above-mentioned international organizations as observers. This seems useful, and even indispensable, since the conference is called to consider technical provisions which sometimes involve the competence of one or other of these specialized organizations. The Swiss Federal Council in its message to the Federal Parliament on the additional Protocols did not express a view on this point.

3818 After the adoption of Article 18*bis* in Committee, the representatives of four States at the diplomatic Conference made statements reserving the position of their governments on this article. These reservations regarding the article as a whole were prompted by their views on granting powers to the ICRC to convene meetings of technical experts and conferences of Contracting Parties in accordance with the provisions of paragraphs 1 and 2 of the article. They said that this did not belong to the authority of the ICRC in its capacity as an impartial international organization, and that the provisions of Article 18*bis* impinged upon the sovereignty of States.⁹

3819 During the discussions in Committee II the ICRC representative emphasized that the sovereignty of States was not at issue.¹⁰ The procedures laid down in paragraphs 4, 5 and 6 of Article 98 prove this: the sovereignty of States is respected.

⁸ Cf. commentary Art. 97, *supra*, p. 1093.

⁹ Cf. O.R. XII, p. 258, CDDH/II/SR.79, paras. 8-10; O.R. XIII, p. 269, CDDH/235/Rev.1, paras. 64-65.

¹⁰ Cf. O.R. XII, p. 209, CDDH/II/SR.74, para. 13; p. 211, paras. 26, 30; p. 241, CDDH/II/SR.77, para. 30; p. 242, para. 38.

Paragraph 3

- 3820** The majority of two-thirds of the High Contracting Parties present and voting as specified in this paragraph corresponds to the rule of the Diplomatic Conference on voting on questions of substance.¹¹
- 3821** The voting procedure to be used by the Parties to the Protocol on amendment to Annex I might logically be the same as that provided for in the Rules of procedure of the Diplomatic Conference.¹²

Paragraph 4

- 3822** The provisions of this paragraph leave intact the sovereign right of States to accept or reject an amendment to Annex I. In its message on the Protocols, the Swiss Federal Council stated, with regard to this article, that every Contracting Party has the option of declaring within twelve months that it does not wish to be bound by the amendment (the so-called “opting-out system”).
- 3823** The number of Contracting Parties may change in the course of the one year period laid down for the acceptance or rejection of an amendment. On this point paragraph 2 of Article 95 (*Entry into force*) of the Protocol establishes the date when a State becomes Party to the Protocol, namely, six months after the deposit of its instrument of ratification or accession. On the other hand, the date when a Party denouncing the Protocol ceases to be a Party is laid down in Article 99 (*Denunciation*) of the Protocol.
- 3824** In the case of new accessions or ratifications the number of Contracting Parties to take into account to calculate one third as laid down in this paragraph should be taken as six months prior to the end of the above-mentioned period of one year.
- 3825** In fact for Parties ratifying or acceding to the Protocol during the last half of this year, the period of one year laid down in paragraph 4 lapses on the date when the Protocol enters into force for them. Thus such Parties are not taken into account in calculating the one third rejecting an amendment.

Paragraph 5

- 3826** There is a three month period following the date of acceptance, before an amendment enters into force for all Contracting Parties which have not made a declaration of non-acceptance. This three month period should permit States to issue national rules for the implementation of the amendment concerned. This period should also permit the depositary to make the notifications laid down in paragraph 6.

¹¹ Rule 36 of the Rules of procedure clarifies the meaning of the expression “representatives present and voting”; the expression “High Contracting Parties present and voting” has the same meaning. Cf. *O.R.* II, p. 10, CDDH/2/Rev.3, Rule 36.

¹² Cf. *ibid.*, pp. 9-11, Rules 34-40.

3827 During or after the one year period, a State which has made a declaration of non-acceptance may revoke its decision and accept the amendment. It will then enter into force for that State at the same time as for the other Contracting Parties if the non-acceptance is withdrawn before the expiry of the one-year period. If the withdrawal of the non-acceptance is communicated to the depositary State after the expiry of the one year period laid down in paragraph 4, the amendment enters into force three months after the notification of the withdrawal.

3828 During the discussion of the provision laid down in paragraph 5, the Chairman of Committee II noted that in accordance with Article 32 of the Vienna Convention on the Law of Treaties the records of the Conference may, in general, be used as a means of interpreting the text when there is doubt about its precise meaning. Furthermore, the representative of the United Kingdom, explaining paragraph 5 on behalf of the sponsors of amendment CDDH/II/359, said that

“they had taken as their model some recent international instruments with technical annexes, in particular the IMCO Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil (1973). In order to speed up the entry into force of amendments to such technical annexes, [...] the traditional principle was merely reversed, a State being deemed to accept an amendment unless it rejected it.”¹³

Paragraph 6

3829 The efficacy of Annex I depends on the provisions to be adopted by specialized international organizations following Resolutions 17, 18 and 19 addressed to those organizations by the Diplomatic Conference.

3830 Annex I may therefore have to align itself with the rules and regulations of the competent international organizations, in particular as regards light signals, radio communications, identification by radar and electronic identification.

3831 Thus it will be useful for such specialized international organization also receive the information provided by the depositary in accordance with paragraph 6.

3832 This article does not deal explicitly with States which become Parties to the Protocol after the entry into force of an amendment to Annex I. However, Article 40, paragraph 5, of the above-mentioned Vienna Convention lays down a rule, applicable if there is no specific rule in the treaty in question, similar to that of paragraph 5 above. According to that article, such States become Parties to the Protocol with Annex I as amended unless they express an intention to the contrary.

Ph.E.

¹³ Cf. *O.R.* XII, pp. 213-214, CDDH/II/SR.74, paras. 42-45. See also the 1969 IMO International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (INTERVENTION 1969) and the 1973 Protocol relating to Intervention on the High Seas in Case of Marine Pollution by Substances other than Oil (INTERVENTION PROT 1973).

Protocol I

Article 99 – Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Conventions or this Protocol have been terminated.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.
3. The denunciation shall have effect only in respect of the denouncing Party.
4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Documentary references

Official Records

O.R. I, Part I, pp. 170-171; Part III, p. 27 (Art. 87). *O.R.* III, p. 361. *O.R.* VII, p. 35, CDDH/SR.47, paras. 105-106. *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; p. 361, paras. 38-39; p. 363, para. 49; pp. 473-474, CDDH/I/SR.76, paras. 1-2 and 7; p. 509; CDDH/I/SR.77, Annex (Syria). *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; pp. 198-199, paras. 97-103; pp. 237-239, *id.*, Annex III, paras. 1-3; pp. 243-244, paras. 20-25.

Other references

CE 1972, Basic Texts, pp. 27-28 (Art. 85). *CE 1972, Commentaries*, Part I, pp. 167-168 (Art. 85). *CE 1972, Report*, vol. I, pp. 198-199, paras. 4.201-4.206 (Art. 85). *Commentary Drafts*, pp. 108-109 (Art. 87).

Commentary

General remarks

- 3833** The idea that a State could free itself from the obligations imposed upon it by humanitarian law by means of a denunciation might seem to be incompatible with the very nature of that law.¹
- 3834** In view of the uncertainty of customary law and legal writings on the possibilities of denouncing a treaty when it does not have a specific clause for this purpose, it seemed preferable, already in the case of the Conventions² to provide for the right to denounce them, at the same time making this right subject to certain restrictions and adding a reminder that some obligations continue to exist in all circumstances.³ The provisions adopted here reiterate the relevant clause of the Conventions, with some useful clarifications.
- 3835** Finally, we should mention that no State has ever denounced the Conventions, and it is to be hoped that this article will also remain theoretical.
- 3836** This article was adopted by consensus, both in Committee I and in plenary.⁴

Paragraph 1

- 3837** The period of one year from the date when the depositary received the written notification required by paragraph 2, in order for the denunciation to have effect, is taken from paragraph 3 of the above-mentioned article of the Conventions.
- 3838** Nevertheless, the first part of the second sentence of this paragraph provides that the effect of a denunciation will be deferred if, on the expiry of that one year period, the denouncing Party is engaged in one of the situations referred to in Article 1 (*General principles and scope of application*).⁵ This is an exception which is also made in the same paragraph of the Conventions. Unfortunately the wording of that paragraph is rather ambiguous.
- 3839** Taken literally, that paragraph means that the effect of the denunciation will be deferred if the denouncing Power is involved in a conflict covered by the Conventions at the time when it notifies its denunciation.
- 3840** This literal interpretation was not followed by the ICRC in its commentary on the Conventions,⁶ since the spirit of the article means that it has to be applied in a broader sense: if denunciation is notified less than one year before an event which entails the application of the Conventions, its effect will again be deferred

¹ Cf. O.R. VII, p. 35, CDDH/SR.47, para. 106.

² Art. 63/62/142/158 common to the Conventions. We should add that Protocol II, too, has a denunciation clause (Art. 25), although it was not included in the draft.

³ On the question of denunciation of treaties, cf. Art. 56 of the Vienna Convention on the Law of Treaties of 23 May 1969. See also, among others, M. Akehurst, "Treaties, Termination", in *Encyclopedia of Public International Law*, op. cit., Instalment 7 (1984), p. 507.

⁴ O.R. IX, p. 474, CDDH/I/SR.76, para. 7; O.R. VII, p. 35, CDDH/SR.47, para. 105.

⁵ Cf. paras. 3 and 4 of that article on scope of application.

⁶ Cf., e.g., *Commentary I*, p. 412 (Art. 63, para. 3).

until the situation so started has come to an end and in any event until the release, repatriation and re-establishment operations referred to have been completed.

3841 This interpretation, in accordance with the spirit of the article, was not contested. Even though there may have been some doubt in the past, there can be none now. In fact, it is difficult to imagine that the Protocol would continue to apply when the Conventions which it supplements had ceased to do so, as a result of allegedly divergent denunciation clauses.⁷

3842 The effect of the denunciation will be deferred until the end of the armed conflict or occupation, and in any case, until operations connected with the final release, repatriation or re-establishment of the persons protected by the Conventions or the Protocol have been terminated: on these various concepts, we refer to the commentary on Article 3 (*Beginning and end of application*), sub-paragraph (b) (*supra*, p. 67).

3843 The phrase used in the Protocol is not “until peace has been concluded”, as in the common Article of the Conventions, but “not [...] before the end of the armed conflict or occupation”. This takes into account the long period which may elapse between “the general close of military operations and [...] termination of the occupation” (Article 3 – *Beginning and end of application*, sub-paragraph (b)) and the official conclusion of a peace treaty which even in some cases never happens. Yet when the period of one year has effectively elapsed, there is no need to further defer the effects of denunciation beyond the date when the Conventions and the Protocol cease to be applicable, i.e., the general close of military operations or the termination of occupation, without prejudice however to any subsequent operations for the final release, repatriation or re-establishment of protected persons.

3844 One other problem arises with regard to the relation between postponement of the effect of denunciation in accordance with the relevant article of the Conventions and in accordance with this paragraph. For the Conventions the postponement takes place in situations provided for in their common Articles 2 and 3 (the latter relating to conflicts not of an international character): thus the Conventions as a whole remain on force even if the denouncing Party is only engaged in a non-international armed conflict. Should the postponement in that case apply to the Protocol? As the Protocol may be denounced without a denunciation of the Conventions, and as this paragraph refers to Article 1 of the Protocol (*General principles and scope of application*), this question must be answered in the negative.

Conclusions on paragraph 1

3845 – It is theoretically possible to denounce the Conventions and the Protocol.

⁷ To apply the Protocol on its own in this way is anyway conceivable only for some of its provisions, e.g. of Parts III and IV.

- 3846** – A State Party to the Conventions and to the Protocol may denounce the Protocol without denouncing the Conventions; the converse is not possible.
- 3847** – Denunciation of the Protocol alone, or of both the Conventions and the Protocol, is kept in abeyance if, at the time the denunciation is made, or during a period of one year thereafter, the denouncing Party is engaged in a situation referred to in Article 1 (*General principles and scope of application*), paragraphs 3 and 4, of the Protocol. Denunciation of only the Conventions is postponed if, during the same period, the denouncing Party is involved in a situation referred to by common Article 3.
- 3848** – The denunciation will remain in abeyance until the end of the situation referred to, and in any case until the operations for the final release, repatriation or re-establishment of protected persons have been terminated.

Paragraph 2

- 3849** Any denunciation must, like ratification and accession, be notified in writing to the depositary which will transmit it to all the High Contracting Parties.
- 3850** According to Article 100 (*Notifications*), sub-paragraph (e), and Article 101 (*Registration*), paragraph 2, the depositary must also inform the Parties to the Conventions whether or not they are signatories of the Protocol, as well as the Secretariat of the United Nations.⁸

Paragraph 3

- 3851** “The denunciation shall have effect only in respect of the denouncing Party”, that is to say, in its relations with other States bound by the Protocol; relations between the latter are not affected by it.
- 3852** This provision is taken from paragraph 4 of the relevant article of the Conventions and follows from the fact that universal participation is not a requirement: regardless of whether one Party to the conflict is not, or is no longer bound by the Protocol, Parties to that instrument nevertheless remain bound by it in their mutual relations.
- 3853** This concept is the same as that underlying the first sentence of paragraph 2 of Article 2 common to the Conventions, as well as the first sentence of paragraph 2 of Article 96 of the Protocol (*Treaty relations upon entry into force of this Protocol*).

⁸ We refer to the commentary on Art. 100, *infra*, p. 1114, for a summary of the depositary's functions.

Paragraph 4

- 3854 This paragraph restates a rule of customary law codified in the Vienna Convention on the Law of Treaties of 23 May 1969.⁹ The period referred to, i.e., the period after denunciation has taken effect in accordance with paragraph 1, and the expression “any act committed”, clearly show that this paragraph refers to the obligation to prosecute breaches (Article 85 – *Repression of breaches of this Protocol*, Article 86 – *Failure to act*, Article 88 – *Mutual assistance in criminal matters*, Article 89 – *Co-operation* and Article 90 – *International Fact-Finding Commission*) and to pay compensation (Article 91 – *Responsibility*).
- 3855 As this rule applies even without explicit confirmation, and as the Protocol is additional to the Conventions, the relevant articles of the Conventions¹⁰ should also be taken into account, whether or not the Conventions have been denounced.

Other residual obligations

- 3856 Apart from the obligations examined above, there are other duties which remain to be discharged by the denouncing Party, irrespective of whether it has denounced only the Protocol, or both the Protocol and the Conventions. The corresponding article of the Conventions provides for this in a formula based on a clause known as the “Martens clause”, which is in turn adopted in Article 1 (*General principles and scope of application*), paragraph 2 of the Protocol. Even in the absence of any treaty clause, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.¹¹
- 3857 Even after the denunciation has taken effect, the denouncing Party remains bound therefore by the obligations referred to in paragraph 4, by other treaties in force with respect to it, by the whole of the relevant customary law, including the clauses of the Conventions and the Protocol which represent a codification of customary law, and in particular by *jus cogens*.¹²

B.Z.

⁹ Art. 70 (Consequences of the termination of a treaty): denunciation of a multilateral treaty by a State “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty” prior to the date when the denunciation takes effect.

¹⁰ Arts. 49-52/50-53/129-132/146-149.

¹¹ Cf. also Art. 43 (Obligations imposed by international law independently of a treaty) of the above-mentioned Vienna Convention.

¹² *Jus cogens* means peremptory norms of general international law, which are defined as follows by Art. 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)) of the above-mentioned Vienna Convention: “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Cf. for example, L.A. Alexidze, “Legal Nature of Jus Cogens in Contemporary International Law”, 172 *Hague Recueil*, 1981/III, pp. 219-270.

Article 100 – Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;
- (b) the date of entry into force of this Protocol under Article 95;
- (c) communications and declarations received under Articles 84, 90 and 97;
- (d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
- (e) denunciations under Article 99.

Documentary references

Official Records

O.R., Part I, p. 171; Part III, p. 27 (Art. 88). *O.R.* III, p. 362, *O.R.* VII, p. 35, CDDH/SR.47, para. 106; p. 43, *id.*, Annex (Israel). *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; p. 361, para. 41; p. 363, para. 49; p. 364, paras. 56-57 and 60; p. 369, para. 71; p. 373, CDDH/I/SR.68, para. 21; pp. 473-474, CDDH/I/SR.76, paras. 1-2 and 7. *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; pp. 199-200, paras. 104-108; pp. 237-239, *id.*, Annex III, paras. 1-3; pp. 244-245, para. 26.

Other references

CE 1972, Basic Texts, p. 28 (Art. 86). *CE 1972, Commentaries*, Part I, p. 168 (Art. 86). *CE 1972, Report*, vol. I, p. 199, paras. 4.207-4.208 (Art. 86); vol. II, p. 111, CE/COM IV/65. *Commentary Drafts*, pp. 109-110 (Art. 88).

Commentary

3858 The designation of a depositary is a common characteristic of plurilateral or multilateral treaties. The depositary may be one or more States, an international

organization, or the chief administrative officer of such an organization.¹ The institution and the functions of the depositary are codified in Articles 76-80 of the Vienna Convention on the Law of Treaties of 23 May 1969.²

- 3859** The depositary of the Conventions of 1949 and the Conventions preceding these was the Swiss Federal Council (federal government) and therefore it was logical to designate it as the depositary for the Protocol.
- 3860** Apart from the functions described in this article and the articles to which it refers (84 – *Rules of application*, 90 – *International Fact-Finding Commission*, 92 – *Signature*, 93 – *Ratification*, 94 – *Accession*, 95 – *Entry into force*, 96 – *Treaty relations upon entry into force of this Protocol*, 97 – *Amendment*, 99 – *Denunciation*), other functions are attributed to the depositary by Articles 7 (*Meetings*), 98 (*Revision of Annex I*), 101 (*Registration*) and 102 (*Authentic texts*).
- 3861** Finally, in executing a customary function of the depositary codified by the Vienna Convention, on two occasions the depositary addressed proposals to correct the original text of the Protocol to the States Parties to the Conventions. In the absence of any objection on the part of the States concerned within the time-limit determined, the depositary finally proceeded to correct the errors as proposed.
- 3862** The expression “High Contracting Parties” covers States which have become Parties to the Protocol by ratification, accession or succession.³ In accordance with Articles 92 (*Signature*), 93 (*Ratification*) and 94 (*Accession*), these States are

¹ On this subject, *cf.*, for example, J. Stoll, “Depositary”, in *Encyclopedia of Public International Law*, *op. cit.*, Instalment 7 (1984), p. 68.

² The essence can be found in Article 77 (Functions of depositaries):

“1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the Contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.”

³ On the expression “the High Contracting Parties”, *cf.* commentary Preamble, *supra*, p. 25. On ratification, accession and succession, *cf.* commentary Arts. 93, *supra*, pp. 1071-1072, and 94, *supra*, p. 1075.

all Parties to the Conventions. Basically it would therefore have been sufficient to mention only these in the introductory sentence.

- 3863** Communications by the depositary are made in the form of written notifications; only the provision of sub-paragraph (d) requires that they are made “by the quickest methods”.

Sub-paragraph (a)

- 3864** During the period that the Protocol was open for signature, the depositary notified the various signatures affixed to the Protocol. It did the same with regard to the deposit of the instruments of ratification and accession. The same should also take place in the case of succession. The notifications contained the text of declarations and reservations accompanying certain signatures, ratifications or accessions.⁴

Sub-paragraph (b)

- 3865** The entry into force of the Protocol on 7 December 1978 in accordance with the terms of Article 95 (*Entry into force*), paragraph 1, was duly notified by the depositary.

Sub-paragraph (c)

- 3866** In accordance with Article 84 (*Rules of application*), the Contracting Parties must communicate to one another their official translations of the Protocol, as well as any laws and regulations which they may adopt to ensure its application.
- 3867** In accordance with Article 90 (*International Fact-Finding Commission*), paragraph 2(a), the Contracting Parties may declare that they recognize *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission to enquire into allegations by such other Party. By 31 December 1984 six States had made such a declaration at the time of ratification.⁵ None did so upon signature, accession, or, as allowed by Article 90 (*International Fact-Finding Commission*), “at any other subsequent time”.
- 3868** Finally, Article 97 (*Amendment*) deals with amendments which might be proposed to this Protocol. No amendment had been proposed under the terms of the said article as of 31 December 1984.

⁴ On the question of reservations and declarations, *cf.* the introduction to this Part, *supra*, pp. 1059-1065.

⁵ For the list of these States, *cf. infra*, p. 1549.

Sub-paragraph (d)

- 3869** This deals with the communication of declarations made by an authority representing a people engaged in a conflict of the character mentioned in Article 1 (*General principles and scope of application*), paragraph 4, against a High Contracting Party. Such a communication must be made by the quickest methods. This concern is understandable, since it involves the application of the Protocol in an actual conflict and human lives could be at stake.
- 3870** According to its own terms, the depositary will not pass judgment on the representative character of the authority by which the declaration has been made. On the other hand, it will only proceed to make a notification under this sub-paragraph if the State against which this authority is fighting is a Party to the Protocol.⁶

Sub-paragraph (e)

- 3871** Any denunciation of the Protocol should be notified by the depositary in the same forms as the other acts covered by this article – with the exception of sub-paragraph (d). However, the effect of such a denunciation might be deferred under the conditions and for the period defined by Article 99 (*Denunciation*), paragraph 1.

B.Z.

⁶ *Message du Conseil fédéral suisse aux Chambres fédérales* of 18 February 1981, chapter 211.72.

Article 101 – Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Documentary references

Official Records

O.R. I, Part I, p. 171; Part III, p. 27 (Art. 89). *O.R.* III, p. 363. *O.R.* VII, p. 35, CDDH/SR.47, para. 106. *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; pp. 361-362, para. 43; p. 363, para. 49; pp. 473-474, CDDH/I/SR.76, paras. 1-2 and 7. *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5 and 11-12; p. 200, paras. 109-111; pp. 237-239, *id.*, Annex III, paras. 1-3; p. 245, para. 27.

Other references

CE 1972, Basic Texts, p. 28 (Art. 87). *CE 1972, Commentaries*, Part I, p. 168 (Art. 87). *CE 1972, Report*, vol. I, p. 199, para. 4.209 (Art. 87). *Commentary Drafts*, p. 110 (Art. 89).

Commentary

- 3872** As we saw with respect to Article 95 (*Entry into force*) the Protocol entered into force on 7 September 1978 after ratification by Ghana and accession by Libya. It was duly transmitted by the depositary to the Secretariat of the United Nations for registration and publication. In accordance with Article 102, paragraph 1, of the United Nations Charter, every treaty and every international agreement entered into by any Member of the United Nations must be

transmitted to the Secretariat as soon as possible for registration and publication.¹

3873 The said Article 102 of the Charter provides in paragraph 2 that the States Parties to a treaty may not invoke it before any organ of the United Nations unless it has been duly registered by the Secretariat.²

3874 The publication in the *United Nations Treaty Series* is made in the authentic languages of the treaty and in any case in English and French. The growing volume of treaties due for publication has resulted in a serious backlog in the publication of the *United Nations Treaty Series*, greatly exceeding the period of one year between registration and publication considered normal. The General Assembly considered what measures should be taken during its thirty-third session (1978)³ and subsequent sessions.

3875 In fact, although the Protocol was registered in 1979, it was not yet published on 31 December 1984.

3876 Paragraph 2 of this article only requires the notification to the Secretariat of the United Nations of ratifications, accessions and denunciations. Obviously successions should also be notified.⁴ The same applies for any amendments adopted in accordance with Article 97 (*Amendment*) and Article 98 (*Revision of Annex I*) once such amendments have entered into force. It would be desirable that declarations under Article 90 (*International Fact-Finding Commission*), paragraph 2(a), and Article 96 (*Treaty relations upon entry into force of this Protocol*), paragraph 3, be also notified.

B.Z.

¹ On this article of the Charter, cf. L.M. Goodrich, E. Hambro, A.P. Simons, *Charter of the United Nations, Commentary and Documents* (3rd ed.), New York and London, 1969, pp. 610-614.

² For the role of the United Nations for the benefit of international humanitarian law and its application, cf. commentary Art. 89, *supra*, pp. 1034-1035.

³ On the basis of a report of the Secretary-General of 2 October 1978, A/33/258, item 119 of the agenda, "Registration and publication of treaties and international agreements pursuant to Article 102 of the Charter of the United Nations".

⁴ For the concepts of ratification, accession and succession, cf. commentary Arts. 93 and 94, *supra*, pp. 1071-1072 and 1075.

Article 102 – Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

Documentary references

Official Records

O.R. I, Part I, p. 171; Part III, p. 27 (Art. 90). *O.R.* III, pp. 364-365. *O.R.* VII, p. 35, CDDH/SR.47, para. 106. *O.R.* IX, p. 356, CDDH/I/SR.67, paras. 7-8; pp. 361-363, paras. 43-49; pp. 383-384, CDDH/I/SR.69, paras. 13-24; pp. 473-474, CDDH/I/SR.76, paras. 1-2 and 6-7. *O.R.* X, pp. 181-182, CDDH/405/Rev.1, paras. 3-5; p. 182, para. 11; pp. 200-201, paras. 112-115; pp. 237-239, *id.*, Annex III, paras. 1-3; p. 245, paras. 28-29; p. 281, Annex IV (Art. 90).

Other references

CE 1972, Basic Texts, p. 28 (Art. 88). *CE 1972, Commentaries*, Part I, pp. 168-169 (Art. 88). *CE 1972, Report*, vol. I, p. 199, para. 4.211. *Commentary Drafts*, pp. 110-111 (Art. 90).

Commentary

General remarks

3877 First of all, this article provides that the original of the Protocol will be deposited with the depositary the primary function of which is by definition to keep custody of this document.¹ The depositary will transmit certified true copies

¹ For a summary of the depositary's functions, cf. commentary Art. 100, *supra*, p. 1114.

thereof to the Parties to the Conventions; only they can become Parties to the Protocol.²

3878 In the past, most multilateral treaties were written in only one or two languages, but nowadays most are written in several languages and universal treaties are usually written in the six official languages of the United Nations – viz., Arabic, Chinese, English, French, Russian and Spanish.

3879 Until 1929 the Geneva Conventions were written in French only. The 1949 Conventions were drafted simultaneously in English and French; their common Article 55/54/153/150 declared the two languages to be equally authentic and instructed the depositary to arrange for official translations in the Russian and Spanish languages.

3880 The ICRC draft proposed keeping the same formula while leaving open the list of languages in which an official translation would be made. The present wording omits all mention of official translations and retains as authentic texts the versions in the six official languages of the United Nations. It was adopted by consensus in the Working Group, in Committee I and in the plenary Conference.³

The differences in status of versions in different languages

Authentic texts

3881 A treaty may be authenticated, i.e., recognized as a true original, in one or several languages, depending on the decision of the body in which the treaty is adopted. In general, these will be the languages in which the body concerned conducted its work or, at least, in which it adopted the treaty. However, there are two possible exceptions.

3882 The treaty may provide that one of the authenticated texts (in principle, authentication takes place by signature of the Final Act) will prevail in case of divergence; this possibility is provided for in Article 33 (*Interpretation of treaties authenticated in two or more languages*) of the Vienna Convention on the Law of Treaties of 23 May 1969. The Protocol did not adopt such priority for any particular text, as shown by the expression “are equally authentic”.

3883 On the other hand, the CDDH did in fact resort to the second exception envisaged by the same article in the above-mentioned Vienna Convention. In fact, although the six official languages of the United Nations did become at different times⁴ official languages and working languages for the CDDH,⁵ the Chinese language was not used in the documentation of the Conference. However, the delegation of the host country informed the relevant Working Group that provisions had been taken to prepare a Chinese version of the

² Cf. commentary Arts. 92 and 94, *supra*, pp. 1068-1069 and 1076.

³ Cf. O.R. X, p. 245, CDDH/405/Rev.1, Annex III (CDDH/I/350/Rev.1), paras. 28-29; O.R. IX, p. 474, CDDH/I/SR.76, para. 7; O.R. VII, p. 35, CDDH/SR.47, para. 106.

⁴ For further details, cf. the second paragraph of the introductory note in each volume of the Official Records.

⁵ Cf. O.R. II, p. 13, CDDH/2/Rev.3 (Rules of procedure), Rule 51.

Protocol within a reasonable period of time, in collaboration with the Chinese authorities; therefore the Working Group adopted this article by consensus. The Chinese version was communicated by the depositary to States Parties to the Conventions on 12 October 1977.

3884 Thus the six languages listed are equally authentic – or, according to another traditional formula, bear equal authority. This means that all these versions have exactly the same meaning and that each of them faithfully represents the provisions as adopted by the Diplomatic Conference.

3885 It must be recognized, however, that the two statements made in the previous sentence are too categorical and that they have rather the character of a presumption: according to Article 33 of the Vienna Convention to which we referred, “The terms of the treaty are presumed to have the same meaning in each authentic text”. If a comparison of the authentic texts discloses a difference in meaning and, as is the case with the Protocol, there is no particular text that prevails in case of divergence, Article 33 provides the following rule:

- a) apply the two foregoing articles of the same Convention: Article 31 (General rule of interpretation) and Article 32 (Supplementary means of interpretation);
- b) if the difference in meaning cannot be removed thereby, the meaning must be adopted which best reconciles the texts, having regard to the object and purpose of the treaty.

3886 Having several authentic texts may therefore create problems in case of divergence or contradiction; on the other hand, it may help to make interpretation easier by comparing the different versions, and this will rather more often be the case. Apart from the need to resolve any differences that may arise between authentic texts in accordance with the rules and means of interpretation as referred to above, such differences may also give rise to a correction procedure when there is occasion to do so.⁶

Official translations

3887 A treaty may provide that, in addition to the authentic texts, official translations will be made; as we saw, it was so provided in the Conventions. The main purpose of such official translations is to avoid different versions being made in the same language.

3888 They are official in that they are issued by the same body which adopted the treaty, or by a body designated for that purpose, e.g., the depositary. If there are discrepancies, the authentic texts prevail over the official translations. And these should not be confused with official *national* translations which we will deal with below under the heading “Other translations”.

⁶ Cf. the above-mentioned Vienna Convention, Art. 79 – Correction of errors in texts or in certified copies of treaties. See also commentary Art. 100, *supra*, p. 1114.

- 3889** This brief note is prompted by the singular linguistic situation of the Conventions and the Protocol: two of the versions (English and French) are authentic texts both for the Conventions and for the Protocol; another two versions (Russian and Spanish) are official translations in the case of the Conventions but authentic texts for the Protocol; yet another two versions (Arabic and Chinese) have no special status in the case of the Conventions, but are authentic texts for the Protocol. In interpreting the Conventions and the Protocol these differences in status of the various versions have to be taken into account.

Other translations

- 3890** The domestic law of each Party to the Protocol will determine in which languages that Party will have to have the Protocol translated.⁷ Such translations are official in so far as they are established or recognized by a State; they should not be confused with official translations produced in accordance with the provisions of the treaty itself, as defined above.
- 3891** Only the authentic texts are authoritative and they prevail over all translations. The Protocol provides, however, that the Parties should exchange their official translations as soon as possible, so as to keep each other informed.⁸
- 3892** We should also point out the case of languages which two or more countries have in common; it would be useful if, for each of these languages, the countries concerned would try to co-operate as far as possible and adopt a common official translation.

B.Z.

⁷ Such a translation may be based on any one of the six authentic texts; however, a more reliable translation will undoubtedly result if two or more of the authentic texts are compared.

⁸ The same applies to other laws and regulations adopted to ensure the application of the Protocol; *cf.* commentary Arts. 80 and 84, *supra*, pp. 929 and 969.

Commentary on Annex I to Protocol I

Reading Committee

Chairman : Jean PICTET

Philippe EBERLIN

Annex I to Protocol I Regulations concerning identification

Annex I to the Protocol Additional
to the Geneva Conventions
of 12 August 1949, and relating to the Protection of Victims
of International Armed Conflicts (Protocol I)

Editors

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International Committee of the Red Cross

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Table of contents of Commentary on Annex I to Protocol I

Abbreviations	1129
General introduction to the Commentary on Annex I	1137
Chapter I – <i>Identity cards</i>	1151
Article 1 – <i>Identity card for permanent civilian medical and religious personnel</i>	1153
Article 2 – <i>Identity card for temporary civilian medical and religious personnel</i>	1161
Chapter II – <i>The distinctive emblem</i>	1167
Article 3 – <i>Shape and nature</i>	1173
Article 4 – <i>Use</i>	1179
Chapter III – <i>Distinctive signals</i>	1185
Article 5 – <i>Optional use</i>	1199
Article 6 – <i>Light signal</i>	1205
Article 7 – <i>Radio signal</i>	1215
Article 8 – <i>Electronic identification</i>	1247
Chapter IV – <i>Communications</i>	1257
Article 9 – <i>Radiocommunications</i>	1261
Article 10 – <i>Use of international codes</i>	1265
Article 11 – <i>Other means of communication</i>	1269
Article 12 – <i>Flight plans</i>	1273
Article 13 – <i>Signals and procedures for the interception of medical aircraft</i>	1279
Chapter V – <i>Civil defence</i>	1283
Article 14 – <i>Identity card</i>	1285
Article 15 – <i>International distinctive sign</i>	1289
Chapter VI – <i>Works and installations containing dangerous forces</i>	1295
Article 16 – <i>International special sign</i>	1295

Abbreviations

<i>AFDI</i>	<i>Annuaire français de droit international</i>
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>Annuaire IDI</i>	<i>Annuaire de l'Institut de droit international</i>
<i>ASDI</i>	<i>Annuaire suisse de droit international</i>
ATS	Air Traffic Services
<i>BYIL</i>	<i>British Year Book of International Law</i>
CCD	Conference of the Committee on Disarmament
CCIR	International Radio Consultative Committee (Comité consultatif international des radiocommunications)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés), 1974-1977
CE	Conference of Government Experts
<i>CE/1b</i>	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, I, Introduction, Submitted by the ICRC, Geneva, January 1971</i>
<i>CE/2b</i>	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, II, Measures intended to reinforce the implementation of the existing law, Submitted by the ICRC, Geneva, January 1971</i>
<i>CE/3b</i>	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, III, Protection of the civilian population against dangers of hostilities, Submitted by the ICRC, Geneva, January 1971</i>

- CE/4b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, IV, Rules relative to behaviour of combatants, Submitted by the ICRC, Geneva, January 1971*
- CE/5b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, V, Protection of victims of non-international armed conflicts, Submitted by the ICRC, Geneva, January 1971*
- CE/6b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VI, Rules applicable in guerrilla warfare, Submitted by the ICRC, Geneva, January 1971*
- CE/7b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VII, Protection of the wounded and sick, Submitted by the ICRC, Geneva, January 1971*
- CE/8b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VIII, Annexes, Submitted by the ICRC, Geneva, January 1971*
- CE 1972,
Basic Texts** *Conference of Government Experts on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May-3 June 1972 (second session), I, Texts, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1972,
Commentaries** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), II, Commentaries, part one and part two, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1971,
Report** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, Report on the work of the Conference, ICRC, Geneva, August 1971*

CE 1972, Report	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Report on the work of the Conference, volume I and volume II (Annexes), Geneva, July 1972</i>
CE 1972, Technical Memorandum	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Technical memorandum (Questionnaire and Commentary) on Medical Marking and Identification, Documentary material submitted by the ICRC, Geneva, January 1972</i>
CIE	International Commission on Illumination (Commission internationale de l'éclairage)
Commentary I	<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952</i>
Commentary II	<i>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary III	<i>Geneva Convention relative to the Treatment of Prisoners of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary IV	<i>Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1958</i>
Commentary Drafts	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentaries, ICRC, Geneva, October 1973</i>
COSPAS/SARSAT	Cosmos Spacecraft / Search and Rescue Satellite Aided Tracking
CRCE 1971, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, 1-6 March 1971), Report on the Works of the Conference, Geneva, April 1971</i>

CRCE 1972, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vienna, 20 March-24 March 1972, second session), Report on the Works of the Conference, Geneva, April 1972</i>
CTA	Central Tracing Agency
Draft(s)	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, June 1973</i>
Draft Rules	<i>Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956 (first ed.), 1958 (second ed.)</i>
Government Replies	<i>Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments, ICRC, Geneva, April 1972 (first ed.), 1973 (second ed.)</i>
GYIL	<i>German Yearbook of International Law</i>
Hague Recueil	<i>Recueil des cours de l'Académie de droit international</i>
ICAO	International Civil Aviation Organization
ICDO	International Civil Defence Organization
ICRC	International Committee of the Red Cross
ICRC Memorandum	<i>Memorandum, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, to the Governments Parties to the 1949 Geneva Conventions for the Protection of War Victims and to the IVth Hague Convention of 1907 concerning the Laws and Customs of War on Land, ICRC, Geneva, May 1967</i>
IEC	International Electrotechnical Commission
IFALPA	International Federation of Air Line Pilots Associations
IFF	Identification Friend or Foe
IFRB	International Frequency Registration Board
ILC	International Lifeboat Conference
IMCO	Inter-Governmental Maritime Consultative Organization

IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
IRRC	<i>International Review of the Red Cross</i>
ISO	International Organization for Standardization
ITU	International Telecommunication Union
<i>Law Reports</i>	<i>Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, 15 vols., London, HMSO, 1948-1949</i>
<i>Lucerne Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons, (Lucerne, 24.9-18.10.1974), Report, ICRC, Geneva, 1975</i>
<i>Lugano Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons (second session – Lugano, 28.1-26.2.1976), Report, ICRC, Geneva, 1976</i>
<i>O.R.</i>	<i>Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977</i>
<i>RBDI</i>	<i>Revue Belge de Droit International</i>
<i>RDPMDG</i>	<i>Revue de droit pénal militaire et de droit de la guerre</i>
<i>Reaffirmation</i>	<i>XXIst International Conference of the Red Cross, Istanbul, 1969, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report submitted by the ICRC, Geneva, May 1969</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RICR</i>	<i>Revue internationale de la Croix-Rouge</i>
<i>XXIst Int. Conf. RC, Report</i>	<i>XXIst International Conference of the Red Cross, Istanbul, September 1969, The Protection of Civilian Medical and Nursing Personnel in Time of Conflict (Item 4 d of the Draft Agenda of the Commission on International Humanitarian Law and Assistance to Civilian Population in the event of Armed Conflict), Report submitted by the ICRC, Geneva, February 1969 (D.S. 4d/1)</i>

<i>XXIInd Int. Conf. RC, Report</i>	<i>Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, January 1974</i>
SIF	Selective Identification Features
SSR	Secondary Surveillance Radar
<i>Studies and Essays in Honour of Jean Pictet</i>	<i>Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, Ch. Swinarski (ed.), ICRC-Nijhoff, Geneva-The Hague, 1984</i>
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WARC 79	World Administrative Radio Conference, 1979
WARC Mob-83	World Administrative Radio Conference for the Mobile Services, 1983
WHO	World Health Organization
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

Annex I – General introduction

Introduction

3893 Annex I to Protocol I, entitled “Regulations concerning identification”, contains technical regulations relating to the marking and identification of:

- medical personnel, units and transports,
- civil defence personnel and transports,
- works and installations containing dangerous forces,

identifiable visually by distinctive signs set aside for their exclusive use as well as by distinctive signals and other technical devices contemplated in Annex I.

3894 These technical regulations are required for the implementation of the provisions of Articles 18 (*Identification*), 56 (*Protection of works and installations containing dangerous forces*) and 66 (*Identification*) of Protocol I. Annex I comprises sixteen articles grouped in six chapters. Some of its provisions relate to Resolutions 17, 18 and 19 adopted, together with Annex I, at the fourth session of the Diplomatic Conference in 1977.

Title of Annex I to the Protocol

3895 Draft Annex I submitted by the ICRC to the first session of the Diplomatic Conference in 1974 bore the title: “Regulations concerning the identification and marking of medical personnel, units and means of transport, and civil defence personnel, equipment and means of transport”.¹

3896 In order to examine the draft, Committee II of the Diplomatic Conference set up a Technical Sub-Committee which met during the first and third sessions. In its reports to Committee II, the Technical Sub-Committee adopted the title of the ICRC’s draft Annex I without change.²

¹ *O.R.* I, Part III, p. 28.

² *O.R.* XI, p. 5, CDDH/II/SR.1, para. 4; pp. 83-91, CDDH/II/SR.11, paras. 2, 5, 53-66; pp. 93-95, CDDH/II/SR.12, paras. 1-18. *O.R.* XIII, pp. 23-51, CDDH/49/Rev.1, Annex II, Appendices I-III; p. 159; CDDH/221/Rev.1, para. 260. Approval by Committee II, at the second session in 1975, of the report prepared by the Technical Sub-Committee at the first session of the Conference: *O.R.* V, p. 226, CDDH/SR.22, para. 5. *O.R.* XII, pp. 165-174, CDDH/II/SR.70, paras. 1-62, report of the Technical Sub-Committee, third session; pp. 175-185, CDDH/II/SR.71, paras. 1-87.

- 3897** In May 1976 at the third session, however, Committee II, during its consideration of the Technical Sub-Committee's report, accepted a proposal by the United Kingdom requesting the insertion of the word "recognition" in the title of the English-language version only of the Annex.³ After the adoption of the report, probably as a result of differences in interpretation, the word "recognition" was inserted in the French and Spanish versions also, but not in the Russian and Arabic versions. The title then read: "Regulations concerning the identification, recognition and marking of medical personnel, units and means of transport, and civil defence personnel, equipment and means of transport".⁴
- 3898** This title and the text of the Annex were given further consideration between the third and fourth sessions of the Diplomatic Conference by the Group of Experts appointed by the Conference Secretariat and the ICRC as well as by the technical advisers of the Conference, who met in November 1976 and January 1977 to prepare the work of the Drafting Committee of the Conference.⁵ The word "recognition" was allowed to stand in the above-mentioned language versions; however, the unintentional discrepancy between these and other versions existed only momentarily between the third and the fourth sessions, disappearing when the title was revised by the Drafting Committee.
- 3899** The title, which was long, stood to benefit from being made simpler. The Drafting Committee of the Conference considered that the term "identification", as used in Protocol I and its Annex I, had the same meaning in all the languages concerned and adequately covered the full substance of the Annex, including the new provisions adopted at the fourth session in respect of:
- the international distinctive sign of civil defence;⁶
 - the international special sign for works and installations containing dangerous forces.⁷
- 3900** After the final adoption by Committees II and III of the articles of Protocol I relating to these two new signs, the title was reviewed by the Drafting Committee, which proposed to the Conference the short title "Regulations concerning identification", adopted by consensus at a plenary meeting of the Conference as the definitive title of Annex I. The titles of the articles as they appear in the successive versions of Annex I, together with a list of the amendments relating to the text, are given at the end of Volume III of the Official Records of the Conference.⁸

³ *O.R.* XII, pp. 178-179, CDDH/II/SR.71, paras. 21, 27-30.

⁴ *O.R.* XIII, pp. 266-269, CDDH/235/Rev.1, paras. 50-66.

⁵ *O.R.* II, p. 466, CDDH/SEC/INF.1, Vol.1 (31 January 1977, p. 135); p. 656, CDDH/404/Rev.1, para. 6.

⁶ *O.R.* XIII, pp. 373-375, CDDH/406/Rev.1, paras. 59-62.

⁷ *O.R.* XV, p. 456, CDDH/407/Rev.1, para. 31; pp. 471-473, Annex I.

⁸ *O.R.* VII, pp. 52-57, CDDH/SR.48, paras. 11-19 and Annex. *O.R.* III, pp. 369-402, amendments to the draft Annex, comparative table.

The terms “identification”, “signals”, “recognition”

- 3901** These terms are used in the Geneva Conventions of 12 August 1949 and their Additional Protocols, as well as in Annex I and various texts concerning the safety of medical personnel, units and means of transport.⁹
- 3902** In Article 8 (*Terminology*), sub-paragraph (*m*), of Protocol I, the expression “signal or message” means the distinctive signs or signals intended exclusively for the identification of persons or objects entitled to use those signs or signals under the Conventions and the Additional Protocols.
- 3903** “Identification”, as contemplated in Article 18 (*Identification*) of the Protocol, means recognizing or making it possible to recognize the persons and objects entitled to protection under the Conventions and the Additional Protocols.
- 3904** The term “recognition”, which appeared momentarily in the intermediate draft title of Annex I, is used in Article 5 (*Optional use*), paragraph 2, of the Annex; the word “recognizable” is used in Articles 15 (*International distinctive sign*), paragraph 3, and 16 (*International special sign*), paragraph 4. In the Protocol, the phrase “should be recognizable” is used in Article 18 (*Identification*), paragraph 3. Within the meaning of the Protocol and its Annex I, all these terms are synonymous with identification. In that connection, the delegate of the USSR stated in Committee II that in Russian the idea of recognition was included in that of identification. Similarly, the delegates of France and Spain considered it unnecessary to insert “recognition” after “identification”.¹⁰

Field of application

- 3905** The scope of the Regulations concerning identification is governed by the articles of the Protocol listed below. The corresponding articles of the Regulations are mentioned, together with the resolutions of the Diplomatic Conference having a bearing on the texts concerned.
- 1) Article 18 (*Identification*), relating to the identification of medical and religious personnel and of civilian and military medical units and transports, particularly medical aircraft (Chapters I to IV, Articles 1 to 13; Resolutions 17, 18 and 19).
 - 2) Article 56 (*Protection of works and installations containing dangerous forces*) (Chapter VI, Article 16).
 - 3) Article 66 (*Identification*), relating to the identification of civil defence personnel, buildings and *matériel* (Chapter V, Articles 14 and 15).

⁹ First Convention, Art. 36; Second Convention, Art. 43; Protocol I, Art. 8, sub-para. (*m*), and Art. 18, paras. 5-6; Annex I, Art. 5, para. 2; *CE/7b*, Part II, pp. 39-77, particularly pp. 39, 40, 43, 44; *CE 1971, Report*, p. 36, Annex IV; *CE 1972, Technical Memorandum*.

¹⁰ *O.R. XII*, pp. 178-179, CDDH/II/SR.71, paras. 21-30; pp. 167-168, CDDH/II/SR.70, paras. 14-16, on the meaning of “identification” and “recognition”.

Revision

- 3906 Article 98 (*Revision of Annex I*) of the Protocol provides for Annex I to be revised from time to time in the light of technical developments. In order to remain effective, the methods and means of protective identification and marking must keep abreast of technical advances in the army, navy and air force.
- 3907 It was therefore considered advisable to set out the technical regulations in an Annex to Protocol I, both to simplify the text containing the legal provisions and to allow for the special periodic revision procedure contemplated in Article 98 (*Revision of Annex I*) of the Protocol.

Historical background

- 3908 The task of the Diplomatic Conference which met in Geneva in 1949 was to revise the two international conventions providing for the identification and marking of medical personnel, units and means of transport, namely, the Geneva Convention of 27 July 1929 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the Hague Convention of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906 (Hague Convention X of 1907).
- 3909 The progress of work on the marking and identification of air and sea medical transports can be traced by chronological reference to the meetings and other preparatory activities which took place prior to the revision of the two above-mentioned international conventions.

1930 – XIVth International Conference of the Red Cross, Brussels

- 3910 Resolution XVII – Medical aviation in peacetime: development of civil and military medical aviation in peacetime: crossing of frontiers; priority in transmission; simplification of formalities; participation of merchant air fleets.
- 3911 Resolution XXII – Activities of the Red Cross at sea: plan for a meeting of experts to consider various issues, in particular the amendment of Hague Convention X of 1907.
- 3912 Resolution XXIII – Medical aviation in wartime: draft Convention supplementary to the 1929 Geneva Convention. Medical aviation was included in the 1929 Convention (Article 18) and Recommendation III of the 1929 Diplomatic Conference called for more comprehensive regulations governing the use of aircraft for medical purposes. Resolution XXIII goes some way towards fulfilling that recommendation.¹¹

¹¹ Resolution XXII: see *RICR*, October 1930, p. 862 (in French only). Resolution XXIII: see *RICR*, November 1934, p. 896 (in French only).

1934 – XVth International Conference of the Red Cross, Tokyo

- 3913** Resolution XXXIII – Activities of the Red Cross at sea: renewal of the mandate given to the ICRC in 1930 under Resolution XXII; revision of Hague Convention X relating to maritime warfare.¹²

1934 – International Legal Committee on Aviation, Paris

- 3914** New draft Convention additional to the Geneva Convention of 27 July 1929, relating to the use of medical aircraft in time of war.
- 3915** Draft prepared by Mr. Julliot and Mr. Schickelé together with an annex containing an international code of visual and radio signals for medical aircraft.¹³

1936 – ICRC, Red Cross emblem visibility tests

- 3916** Visibility of the protective emblem from the air: results of the tests published in the “Revue internationale de la Croix-Rouge”.¹⁴

1936 – ICRC, Circular No. 328 of 31 July

- 3917** Invitation to National Red Cross Societies to send representatives to attend a meeting of experts with a view to revising the Geneva Convention. The meeting was held from 19 to 23 October 1937.
- 3918** Military aviation played an important part in the Spanish Civil War, which broke out in July 1936.

1937 – ICRC, Circular No. 337 of 5 April

- 3919** Revision of Hague Convention X of 1907: despatch of a questionnaire and a draft revised text of Convention X to National Red Cross Societies.
- 3920** The questionnaire referred to the identification of hospital ships (use of small signal guns) as well as to search and rescue at sea, by both aircraft and vessels. The draft revised Convention mentions the use of wireless telegraphy by hospital ships.¹⁵

¹² Resolution XXXIII: see *RICR*, April 1937, p. 409 (in French only).

¹³ *RICR*, February 1935, pp. 77-79; *ibid.*, March 1936, pp. 177-203 (in French only).

¹⁴ *RICR*, March 1936, pp. 204-207: Tests by the Dutch Air Force. *RICR*, May 1936, pp. 408-412: Tests by the Swiss Air Force (in French only).

¹⁵ *RICR*, April 1937, pp. 409-448 (in French only).

1937 – ICRC, Meeting of experts held from 19 to 23 October to study the revision of the Geneva Convention of 1929

- 3921** A Sub-Committee was asked to examine technical issues relating to the marking and camouflage of medical formations, establishments and aircraft.¹⁶

1937 – ICRC, Conference of naval experts held from 15 to 18 June to study the revision of Hague Convention X of 1907

- 3922** The experts adopted a draft “Maritime Convention” based on the draft submitted by the ICRC, containing the following provisions in respect of hospital ships:

- standardization of the white-painted hull with a horizontal band of red for both categories of hospital ships;
- prohibition of the use of secret codes, either by wireless telegraphy or by visual signals.¹⁷

1946 – ICRC, Preliminary Conference of National Red Cross Societies, Geneva, 26 July – 3 August

- 3923** Technical proposals submitted by the French Red Cross for the future “Maritime Convention”:

- use of the radio by hospital ships to indicate their position every six hours on the wavelength 600 metres (wavelength adopted for the safety of human life);
- signalling by radio of the route followed by the hospital ship, for relay by the maritime authorities on land;
- identification of hospital ships by radar.

- 3924** The prohibition of use of secret codes with the aid of either signals or radio was spelt out by the First Commission, which proposed the following text: “All their communications by signal or by wireless must be in clear”.

- 3925** Doubts were cast on the effectiveness of painting a horizontal band of red or green on the white hull. In 1937 the naval experts had already drawn attention in their report to the inadequacy of purely visual signalling, having regard to the development of modern armaments such as long-range aircraft and artillery.¹⁸

¹⁶ ICRC 1938, Document No. 11 a, XVIth International Conference of the Red Cross, London, June 1938, pp. 1, 2, 22, 23, 25, 26, 27, 56-79.

¹⁷ ICRC, Report submitted to the XVIth International Conference of the Red Cross (London, 1938) (text of the Draft Revised Maritime Convention adopted by the Commission of Naval Experts which met at Geneva on June 15th, 1937), Document No. 2 a, Annex, pp. 65-75 (Articles 15 and 24).

¹⁸ ICRC, January 1947, Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various Problems relative to the Red Cross, Geneva, July 26 – August 3, 1946, pp. 57-64.

1947 – ICRC, Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14 – 26 April

- 3926** Marking of medical aircraft: the experts who met in 1947 did not consider that any change should be made to Article 18 of the 1929 Convention. They thought that “the technical progress made in the field of aerial warfare and anti-aircraft guns rendered illusory any attempt to develop the use of medical aircraft”.¹⁹
- 3927** Marking of hospital ships: a proposal reading “As soon as technically possible, all hospital ships shall be provided with radar apparatus, to allow their identification by the detecting apparatus of belligerents and neutrals” was rejected.²⁰
- 3928** Thus the new detection, identification and radiocommunication techniques used during the Second World War – infrared light, radar transponders, underwater acoustic systems – were not applied at all in 1947 to enhance the safety of medical transports on land, at sea or in the air.
- 3929** However, these modern signalling and identification methods were discussed once again the following year at the XVIIth International Conference of the Red Cross in Stockholm.

1948 – XVIIth International Conference of the Red Cross, Stockholm, 20 – 30 August

- 3930** After considering the draft texts prepared by the ICRC on the basis of the 1947 experts’ report, the XVIIth Conference proposed the following text for the identification and marking of medical aircraft:

“They shall be provided with any other marking or means of identification that may agreed upon between the belligerents upon the outbreak or during the course of hostilities. To facilitate their identification, they shall endeavour to inform the enemy of their route, altitude and time of flight.”

- 3931** No change was made to the requirement that medical aircraft be painted white and bear the distinctive emblem.²¹
- 3932** With regard to hospital ships, Article 40 adopted at Stockholm as part of the revision of Hague Convention X of 1907, supplemented and replaced Article 24 of 1947 by providing for a distinctive light signal and for radar and underwater acoustic identification:

“[...] A luminous red cross of maximum practicable size to be placed as high as possible above the superstructure, in such a manner as to ensure maximum

¹⁹ ICRC, 1947, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14 – 26, 1947), pp. 1-11, 44-47.

²⁰ *Ibid.*, pp. 97-99.

²¹ ICRC, Archives. Files of the XVIIth International Conference of the Red Cross, Stockholm, August 1948, summary of the debates of the Legal Commission’s Sub-Commissions, pp. 12-19, 23 (in French only).

visibility from all points of the horizon, both on the surface and from the air. This cross shall consist of three luminous members, of which one is vertical and two horizontal. Of the horizontal members, one shall be placed lengthwise to the ship and the other at right angles. The cross may have an automatic switching mechanism to provide flashing and alternating illumination of the two horizontal members.”

“[...] As soon as technically possible, all hospital ships shall be provided with radar and underwater sound apparatus, to permit their identification by the detecting apparatus of belligerents and neutrals [...]”²²

1949 – Diplomatic Conference, Geneva, 21 April – 12 August

3933 The draft revised Conventions prepared by the ICRC and approved by the XVIIth International Conference of the Red Cross in 1948 were submitted to the Diplomatic Conference of 1949. They were referred to Committee I of the Conference which used them as the basis for its revision of the “Wounded and Sick” and “Maritime” Conventions. Protective marking was discussed at considerable length by Committee I and the Working Group on the conditions of naval warfare. The report of Committee I to the plenary meeting of the 1949 Conference states, in particular:

“As regards marking, the Committee dealt mainly with those on medical aircraft and hospital ships.

There was general agreement that in the present conditions of aerial warfare, the red cross on a white ground no longer constituted an easily recognizable emblem and therefore no longer afforded effective protection. Aircraft at present speeds can be recognized only by their general shape; moreover, the most distinctive signs are quite unrecognizable at night and *a fortiori* by wireless controlled projectiles.

A new conception was therefore embodied in the Conventions; belligerents are required to agree between themselves on the routes to be followed by military aircraft, and also the altitude and times of flight. Aircraft will only be entitled to respect in so far as there has been previous agreement on these points.

The Committee was unable to agree to a condition of a similar kind applicable to hospital ships, as it feared that in notifying the enemy of the course they were to follow, this would give valuable information regarding the safety of navigation in certain maritime zones. Be this as it may, there was unanimous agreement that the best means of ensuring protection is to inform the enemy of the exact position of the formation requiring protection. There is no question, therefore, of camouflage; on the contrary everything will be done to facilitate recognition. Further, the recommendation, in the Maritime Convention, that belligerents shall only employ vessels of over

²² *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. I, draft Conventions approved by the XVIIth International Conference of the Red Cross, pp. 53, 68.

2 000 tons gross as hospital ships on the high seas is to be interpreted in this sense, since the greater visibility of vessels of that size tends to increase security.”²³

3934 In 1949 the experts’ study of technical methods for marking and identifying medical aircraft and hospital ships produced only suggestions regarding prior agreements to be concluded between the Parties to the conflict, without actually identifying the technical methods to be used.

3935 With regard to the use of radiocommunications, the 1949 Conference adopted Resolutions 6 and 7 annexed to the Geneva Conventions of 12 August 1949.²⁴ The preamble of Resolution 6 explains the limited scope of the Conference’s work in respect of technical matters:

“[...] Whereas the present Conference has not been able to raise the question of the technical study of means of communication between hospital ships, on the one hand, and warships and military aircraft, on the other, since that study went beyond its terms of reference [...]”

3936 The problem of underwater acoustic identification of hospital ships was not solved. It had been raised as early as 1917, in the report on the activities of the Netherlands Red Cross during the First World War submitted to the Xth International Conference of the Red Cross (Geneva, 1921). The report contains the following passage:

“However, on 2 July 1917, thanks to the intervention of the Netherlands Government, an agreement was concluded whereby the British and German Governments gave a reciprocal undertaking to intern a certain number of prisoners of war with us; in addition to the transport of these prisoners, both civilian and military, disabled persons and medical personnel would henceforth be exchanged. As a safeguard against torpedo attacks, the German Government requested that at least two paddle boats should sail in convoy, because only the sound of paddle wheels can be identified at great distances by submarines. The *Zélande* Company’s *Zélande* and *Koningin Regentes* and Rotterdamsche Lloyd’s *Sindoro* were assigned to serve as hospital ships. They were provided with the distinctive marking prescribed for hospital ships under the 1907 Convention and fitted out to transport the sick, the mutilated and the mentally ill. The number of berths was increased to 900. Boston was the English port used, so the crossing could be made in 19 hours, but because of the danger it took longer.” (author’s translation)

Some gaps subsisted after 1949, particularly in respect of the identification of hospital ships and medical aircraft by radar. That method of identification had been used during the Second World War, but only for “friendly” military aircraft and ships equipped with radar transponders. Furthermore, the distinctive light signal for hospital ships which had been mentioned, together with radar and

²³ *Ibid.*, Vol. II, Section A, pp. 187-188.

²⁴ *Ibid.*, Vol. I, p. 362.

underwater sound apparatus, in the draft produced by the XVIIth International Conference of the Red Cross at Stockholm, was omitted from the text adopted in 1949.

3937 The use of the technical marking and identification methods proposed in 1949 in Article 40 of the draft “Maritime” Convention was first discussed at length by Committee I of the Diplomatic Conference and again proved to be a highly controversial issue when it was taken up in the plenary meetings of the Conference.²⁵

3938 Having failed to draw up regulations governing radiocommunication between hospital ships on the one hand and warships and military aircraft on the other, the Conference adopted Resolution 6 on the subject. Similarly, Resolution 7 relating to the notification by hospital ships of their position by wireless was adopted in a plenary meeting.²⁶

1949-1970

3939 After the Diplomatic Conference, as a follow-up to Resolutions 6 and 7, draft radio procedures were drawn up in 1950 by a group of government experts and transmitted to the Swiss Government as the depositary of the 1949 Geneva Conventions. They were revised by experts at ICRC headquarters in 1959 and submitted to the Plenipotentiary Conference of the International Telecommunications Union (ITU) held the same year in Geneva. The draft procedures were found to comply with ITU requirements, after modification of the distress radio frequencies they contained.

3940 In 1961 the Swiss Federal Council transmitted the drafts to the States Parties to the Geneva Conventions, some of which accepted them for unilateral application as internal regulations. Others stated that they would rather apply international rules drawn up under the aegis of specialized international organizations (ITU, IMCO, ICAO).²⁷

3941 While these endeavours were being made to codify radiocommunications intended to facilitate the identification of hospital ships, the effectiveness of the helicopter as a means of medical transport was being demonstrated in the wars which broke out in Asia from 1950 to 1953 and 1961 to 1975. That type of aircraft, which was new at the time, enabled thousands of wounded to be evacuated directly from the battlefield to field hospitals or hospital ships. In addition, large cargo aircraft converted into “flying hospitals” and operating on an inter-continental basis repatriated the wounded more rapidly than had ever been the case before.

3942 The development of such medical transports, which did not always display the protective sign, prompted organizations in a number of countries to call for

²⁵ *Ibid.*, Vol. II, Section A, pp. 163-164; Vol. II, Section B, pp. 262-265.

²⁶ *Ibid.*, Vol. II, Section A, p. 162; Vol. II, Section B, pp. 489-492; Vol. III, p. 178, draft resolution 390.

²⁷ *CE/7b*, pp. 66-73. *RICR*, August 1959, pp. 375-391 and 426-423 (in French only). *IRRC*, May 1961, p. 103.

enhanced protection for such aircraft in periods of armed conflict, so that they could be put to the fullest possible use. In fact, Article 36 of the First Convention of 1949, and its equivalent in the Second Convention, Article 39, grant immunity to medical aircraft in conditions which are more restrictive than those of Article 18 of the 1929 Convention which they replace. Article 18 laid down three requirements for medical aircraft, namely:

- they must be exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment;
- they must bear the distinctive emblem, paintwork and prescribed markings;
- they must not fly over the firing line, the front zone or enemy-occupied territory “in the absence of special and express permission”.

3943 Articles 36 and 39 of 1949 lay down a fourth requirement in addition to the above three: immunity is only granted to medical aircraft “while flying at heights, times and on routes specifically agreed upon between the belligerents concerned”. Furthermore, prior agreement between the belligerents is required to provide medical aircraft with “any other markings or means of identification”.²⁸

3944 The inadequacy of purely visual marking for medical aircraft, together with technological developments in aerial warfare, are briefly mentioned early in 1952 in an article of the “*Revue internationale de la Croix-Rouge*”.²⁹

3945 Moreover, Articles 36 and 39 of 1949 were already regarded in 1954 as somewhat outdated.³⁰

3946 These texts, published shortly after the commentary on Article 36, paragraph 2, suggesting that technical marking and identification methods be studied, show that the absence of supplementary means of identification, for which no specific provision has been made in 1949, continued to cause serious concern. More and more attention started to be paid to this shortcoming, which was contrasted with the unremitting development of detection, location and identification techniques for civil or military application. It should be borne in mind that a radar identification system for military aircraft and ships was used from the very beginning of the Second World War.

3947 A large number of specialists from different countries attended the IIIrd International Congress on Vertical Flight at San Remo from 24 to 26 April 1954 and adopted a resolution requesting the ICRC to study the bases for regulations which would afford better wartime protection to helicopters used for medical purposes.³¹

3948 The International Bulletin of the Army, Navy and Air Force Medical Services (Liège, April 1957) published a communication dated April 1956 and announcing

²⁸ *Commentary I*, pp. 288-290 (Art. 36). G. Schwarzenberger, “The Law of Air Warfare and the Trend toward Total War”, in *Mélanges Gilbert Gidel*, Paris, 1969, pp. 537-538.

²⁹ R.J. Wilhelm, “Les Conventions de Genève et la guerre aérienne”, *RICR*, January 1952, p. 10, particularly p. 31, note 1.

³⁰ M. Le Goff, *Manuel de Droit Aérien*, Paris, 1954. *Id.*, “La guerre aérienne”, *Revue générale de l’Air*, No. 2, Paris, 1955.

³¹ *RICR*, June 1954, p. 511 (in French only).

³² *RICR*, August 1957, p. 464 (in French only).

the destruction of a medical helicopter during the fighting in the Far East. The authors called for the revision of the First Convention, pointing out that Article 36 did not take into account the technical conditions of helicopter use and emphasizing that a new text was needed.³²

- 3949** In 1965 General E. Evrard, Head of the Medical Service of the Belgian Air Force, published a study on the protection of medical aircraft which mentions a number of societies, legal bodies and specialists involved in studying the question since 1949. He too advocates the use of additional means of identification, such as luminous signals, radio and radar transponders.³³
- 3950** In 1965 the Commission médico-juridique de Monaco drew up draft regulations relating to medical transport by air in time of armed conflict. Article 4 contemplated a continuous system of light signals or instantaneous electrical and radio identification, or possibly both, over and above the distinctive emblem on a white ground. These additional means of identification are described in an annex to the draft regulations.³⁴
- 3951** The draft of the Commission médico-juridique de Monaco and General Evrard's study were published in the International Review of the Red Cross in October and July 1966.
- 3952** Turning to the maritime aspect, hospital ships – which were still in service during the Asian conflicts following the Second World War – seemed destined to be superseded sooner or later by medical aircraft.³⁵ After 1949 their protection did not give rise to any serious problems; nevertheless, the ICRC consulted the meeting of experts it convened in Geneva in 1970 about the use of additional means of identification for such ships.³⁶
- 3953** Since the Oslo Conference in 1947, the protection of rescue craft in periods of armed conflict has been receiving attention from the International Life-Boat Conference (ILC), which meets every four years. The problem was described in detail by Professor Gilbert Gidel, President of the French Central Society for Rescue of the Shipwrecked, after the VIIth International Life-Boat Conference (ILC) held at Estoril (Portugal) on 16 June 1955, which adopted an important resolution relating to Article 27 of the Second Convention and lifeboat crews.³⁷
- 3954** The ILC has continued its work in this area since the Diplomatic Conference of 1974-1977, to which it was not invited because matters relating to naval warfare did not come within the purview of the Conference.
- 3955** Because of their specific nature, the rules of humanitarian law relating to maritime warfare were not included among the subjects to be studied with a view to the reaffirmation and development of the laws and customs applicable in armed conflicts, which had been placed on the agenda of the XXIst International

³² E. Evrard, "Legal Protection of Aero-Medical Evacuation in War-Time", in *12 Annales de droit international médical*, Monaco, 1965, and *IRRC*, July 1966, p. 343.

³⁴ Commission médico-juridique de Monaco, 1965, resolutions (4 June 1966), and *IRRC*, October 1966, p. 534; *CE/7b*, pp. 50, 56.

³⁵ J.H. Plumridge, *Hospital Ships and Ambulance Trains*, London, 1975, p. 159.

³⁶ The consultation proved extremely valuable, and the experience of the six hospital ships operated by the belligerents in the south Atlantic in 1982 showed that additional methods of identification and marking are essential.

³⁷ G. Gidel, "La protection des embarcations de sauvetage", *RICR*, September 1955, p. 549.

Conference of the Red Cross (Istanbul, 1969). One of the experts consulted by the ICRC in February 1969 nevertheless pointed out that humanitarian law applicable to naval warfare also needed to be reviewed as a matter of some urgency.³⁸

The Diplomatic Conference of 1974-1977

- 3956** The XXist International Conference of the Red Cross adopted Resolution XIII entitled “Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts” requesting the ICRC to propose rules which would supplement the existing humanitarian law and to invite governmental experts to meet for consultations with the ICRC on those proposals.
- 3957** With regard to marking and identification, the ICRC deemed it necessary first and foremost to hold consultations on an individual and private basis with qualified experts in technical methods of detection, identification and communication.
- 3958** The outcome of these consultations, which took place in 1970, will be discussed, together with the preparatory work for the Diplomatic Conference and the work of the Technical Sub-Committee, in the introduction to Chapter III (*Distinctive signals*) of Annex I. The study of distinctive signals on the basis of the draft Annex accounted for a very substantial share of the work performed by Committee II’s Sub-Committee at the Diplomatic Conference.
- 3959** The international distinctive sign of civil defence given in Chapter V of the draft Annex – an equilateral blue triangle on an orange ground – was finally adopted at the eighty-ninth meeting of Committee II on 6 May 1977. Chapter V of the draft Annex was finalized when Committee II adopted Article 59 of draft Protocol I.³⁹
- 3960** In Article 49, paragraph 3, of draft Protocol I, the ICRC provided for works and installations containing dangerous forces to be marked by means of a visual sign. At the fourth session of the Conference, Committee III, which was responsible for studying draft Article 49, set up a Sub-Working Group on the international special sign for works and installations containing dangerous forces. The sign proposed by the Sub-Working Group – three bright orange circles placed in a line – was adopted, together with Article 49, by Committee III at its fifty-ninth meeting on 10 May 1977. The Drafting Committee decided to include that article in Annex I to Protocol I.⁴⁰
- 3961** Draft Annex I and the three resolutions, as revised by Committee II at the fourth session, were finally adopted by consensus at the last meeting of Committee II on 20 May 1977.⁴¹

³⁸ ICRC, D.S. 4 a, b, e, XXist International Conference of the Red Cross, Istanbul, September 1969, report submitted by the ICRC, pp. 31, 33.

³⁹ O.R. XIII, pp. 374-375, CDDH/406/Rev.1, paras. 60-62.

⁴⁰ O.R. XV, p. 456, CDDH/407/Rev.1, para. 31; p. 471, Annex; p. 486 (Art. 49); pp. 505-506, Protocol II (Art. 28).

⁴¹ O.R. XII, pp. 489-490, CDDH/II/SR.101, paras. 26-33.

3962 The Diplomatic Conference adopted Annex I by consensus at its forty-eight plenary meeting on 1 June 1977, together with Article 18*bis* of draft Protocol I which became Article 98 (*Revision of Annex I*) in the final version of Protocol I. The three draft resolutions drawn up by the Technical Sub-Committee were adopted by consensus at the fifty-fourth plenary meeting of the Conference on 7 June 1977.⁴²

Resolutions

3963 The follow-up to Resolutions 17, 18 and 19 in the period following the Diplomatic Conference up until the end of 1985 will be discussed in the commentary on the articles concerned.

Ph.E.

⁴² *O.R.* VII, pp. 52-54, CDDH/SR.48, paras. 11-19; p. 171, CDDH/SR.54, paras. 44-45.

Annex I, Chapter I – Identity cards

Introduction

- 3964** The identity cards described in this Chapter are provided for in Article 18 (*Identification*), paragraph 3, of the Protocol. They are intended for the civilian medical and religious personnel defined in sub-paragraphs (c), (d) and (k) of Article 8 (*Terminology*) of the Protocol. Such personnel may be either permanent or temporary, and provision is made for issuing the latter category with a less detailed identity card.¹
- 3965** To this end, Chapter I is divided into two articles relating, respectively, to the identity cards for permanent and temporary personnel. The relevant provisions of Article 1 (*Identity card for permanent civilian medical and religious personnel*) also apply to the identity card for civil defence personnel referred to in Article 14 (*Identity card*) of Chapter V (*Civil defence*) of the Annex.
- 3966** The identity card, issued by the competent authority enables the holder to prove that he forms part of the civilian medical and religious personnel entitled to respect and protection. For these categories of civilian personnel, particularly in occupied territories and combat areas, the identity card is evidence of the right to wear the distinctive emblem.
- 3967** In the 1974 draft, Chapter I was entitled “Documents” and consisted of four articles. Only the first two of these, relating to identity cards, were retained in the final version of the Chapter. Article 4 of the draft became Article 12 (*Flight plans*), whereas Article 3² was deleted. At the first session, the Technical Sub-Committee considered that draft Article 3 created an administrative burden which did not have the effect of strengthening the protection granted. Furthermore, the last paragraph of Article 20 of the Fourth Convention makes provision for a list of the personnel working in civilian hospitals.

Ph.E.

¹ Cf. commentary Arts. 8 and 18 of the Protocol, *supra*, p. 113 and p. 221.

² Entitled “Lists of personnel”.

Protocol I

Annex I, Article 1 – Identity card for permanent civilian medical and religious personnel

1. The identity card for permanent civilian medical and religious personnel referred to in Article 18, paragraph 3, of the Protocol should:
 - (a) bear the distinctive emblem and be of such size that it can be carried in the pocket;
 - (b) be as durable as practicable;
 - (c) be worded in the national or official language (and may in addition be worded in other languages);
 - (d) mention the name, the date of birth (or, if that date is not available, the age at the time of issue) and the identity number, if any, of the holder;
 - (e) state in what capacity the holder is entitled to the protection of the Conventions and of the Protocol;
 - (f) bear the photograph of the holder as well as his signature or his thumbprint, or both;
 - (g) bear the stamp and signature of the competent authority;
 - (h) state the date of issue and date of expiry of the card.
2. The identity card shall be uniform throughout the territory of each High Contracting Party and, as far as possible, of the same type for all Parties to the conflict. The Parties to the conflict may be guided by the single-language model shown in Figure 1. At the outbreak of hostilities, they shall transmit to each other a specimen of the model they are using, if such model differs from that shown in Figure 1. The identity card shall be made out, if possible, in duplicate, one copy being kept by the issuing authority, which should maintain control of the cards which it has issued.
3. In no circumstances may permanent civilian medical and religious personnel be deprived of their identity cards. In the event of the loss of a card, they shall be entitled to obtain a duplicate copy.

Documentary references

Official Records

O.R. I, Part I, p. 173; Part III, p. 28. *O.R.* III, pp. 369-371, 380-382. *O.R.* VII, pp. 52-53, CDDH/SR.48, paras. 11-12. *O.R.* XI, p. 93, CDDH/II/SR.12, para. 2; pp. 565-576, CDDH/II/SR.50. *O.R.* XII, p. 163, CDDH/II/SR.69, para. 16; p. 165, CDDH/II/SR.70, paras. 2-5; pp. 175-185, CDDH/II/SR.71; pp. 187-194, CDDH/II/SR.72, paras. 1-60; p. 257, CDDH/II/SR.79, paras. 1-2. *O.R.* XIII, p.

24', CDDH/49/Rev.1, paras. 12-15; pp. 35-41, *id.*, Annex; p. 159, CDDH/221/Rev.1, para. 260; pp. 266-267, CDDH/235/Rev.1, paras. 54-56; p. 269, paras. 64-66; pp. 294-297, *id.*, Annex; p.321, *id.*, Annex III, paras. 2-5.

Other references

CE/7b, p. 6 (Art. 7); pp. 15-21. *CE 1971, Report*, p. 25, paras. 57-59. *CE 1972, Basic Texts*, p. 10 (Art. 18, para. 2). *CE 1972, Commentary*, Part I, pp. 38-39. *CRCE 1972, Report*, p. 24, Art. 18. *CE 1972, Report*, Vol. I, p. 38, paras. 1.44-1.45; p. 53, Annex I. *Commentary Drafts*, pp. 112-116. *XXIst Int. Conf. RC, Report*, p. 5, para. 8; p. 14; pp. 15-16 (Art. 8).

Commentary

General remarks

- 3968** The characteristics of this identity card are similar to those of the card for military medical and religious personnel governed by Article 40 of the First Convention but, following Committee II's discussion of Article 18 (*Identification*) of the Protocol, they are not compulsory.¹ It was considered advisable to avoid any rigid standardization of the items to be included in this document intended for civilians, since each country has its own population registration methods and its own procedures for keeping files on civilians and their identity documents. At present there are no international standards in this sphere. The International Standardization Organization (ISO) would be the competent body to study international standards for identity documents. Some of its Technical Committees have drawn up codes for the representation of country names, as well as systems or documents relating to the romanization of Arabic, Chinese, Cyrillic and Hebrew characters.²
- 3969** Whatever national standards exist for identity documents, the characteristics of the identity card proposed in paragraph 1 enable the civilian and military authorities of the Parties to the conflict to check the holder's identity and entitlement to wear the distinctive emblem. The colour of the identity card is not specified; the Technical Sub-Committee of Committee II suggested that it should be white, this making it easier to represent the red distinctive emblem on a white ground.
- 3970** Current developments in computer information processing systems make it possible to produce very small identity cards for military use ("electronic dog tags"). Neither this type of identity card, nor the type used for bank cards or to

¹ *O.R. XI*, p. 166, CDDH/II/SR.18, para. 8.

² Standards ISO R9-68, ISO 233-1984, ISO 259-1984, ISO R843-1968, ISO 7098-1982, ISO 3166, ISO 216-1975.

restrict access to high-security areas, nor again the type of identity card which is based on biometric techniques, can replace the identity card provided for in the Conventions and the Protocol,³ which can be manufactured without recourse to sophisticated techniques and contains information comprehensible to everybody, everywhere.

- 3971** Article 1 does not provide for an identity disc to be worn by permanent civilian medical and religious personnel. However, it would be advisable to provide such personnel with a disc similar to that intended for military personnel and referred to in Articles 16 and 40 of the First Convention. This precaution should be taken, at least in the areas mentioned in Article 18 (*Identification*), paragraph 3, of the Protocol.

Paragraph 1

- 3972** The manufacture of identity cards and discs should be studied and, if possible, prepared in peacetime; the production of these documents should on no account be improvised once a conflict has started.⁴

Sub-paragraph (a)

- 3973** The distinctive emblem which should appear on the identity card is the red cross or red crescent, models for which are given in Figure 2 of Annex I; the red lion and sun which also appears in Figure 2 is no longer used and has been replaced in Iran since 1980 by the red crescent.⁵
- 3974** The two red crosses appearing at the top of the model identity card in Figure 1 are not compulsory. A single red cross or red crescent would suffice and it could be placed anywhere on the card. The national emblem may also be represented, together with the name of the country. If the identity card is white, the distinctive emblem may be stamped or printed on it in red: the emblem must be red on a white ground.
- 3975** So that the identity card may easily be carried in the pocket, the Technical Sub-Committee suggested that the A7 format be used, so as to produce a rectangular 74 × 105 mm card printed recto-verso. Under ISO international

³ Biometry: “biology from a statistical point of view, especially with reference to problems of variation” (Funk & Wagnalls Dictionary). It enables fingerprint patterns and the shape of faces and hands, etc. to be identified.

⁴ The Conventions and their Additional Protocols do not propose a model identity disc. Some are oval in shape, measuring about 6 cm lengthwise and 4 cm across and are made of 1 mm stainless steel. They are partially perforated along the short axis so that they can be broken into two, each half being engraved with the particulars stipulated in Article 16 of the First Convention. Two holes are pierced at each end of the long axis; the disc may then be hung round the neck on a 60 cm stainless steel chain.

⁵ The delegate of Israel recalled that in his country the red shield of David (six-branched star) was used as a distinctive emblem. Patterns of the emblems may be found in: Ph. Eberlin, *Protective Signs*, Geneva, 1983.

standards, the A7 format is equal to one-eighth of the 297 × 210 mm A4 format; A4 paper is commonly used for writing and typing.⁶

- 3976** The A7 format identity card may be printed either upright or sideways and is designed to receive a photograph measuring at least 55 × 40 mm.

Sub-paragraph (b)

- 3977** By the term “as durable as practicable”, the Technical Sub-Committee meant that the card should be crease-resistant, water-resistant and dirt-resistant. These criteria are met by plastified paper or paperboard and by the stiff plastic materials used to make badges and bank credit cards. Finally, the identity card may be placed in a transparent, hermetically sealed holder or, failing that, in any type of protective covering.

Sub-paragraph (c)

- 3978** In some countries the identity cards issued to civilians are bilingual or trilingual, but in many other countries they are monolingual. The model in Figure 1 provides enough space to print the various items in two languages; in that case, care should be taken to ensure that the text concerning protection is prominently displayed.
- 3979** To facilitate the translation of the information on the identity card into a language other than the national language, the items could be numbered, starting with 1 for the name of the country and issuing authority.⁷ The list of items numbered from 1 to 16 could then be translated into other languages and exchanged for the corresponding list of the other Party to the conflict, which could be reproduced and distributed as appropriate.
- 3980** The official language referred to in this sub-paragraph is that recognized as official State language. This official or national language may therefore not be

⁶ For comparison, the model identity cards annexed to the Conventions have the following sizes: First and Second Conventions, 75 × 100 mm model; Third Convention, 130 × 100 mm actual size.

⁷ The items of the model in Figure 1 could be numbered as follows:

- 1 – Name of the country and authority issuing this card
- 2 – Identity card for permanent/temporary civilian medical/religious personnel
- 3 – Name
- 4 – Date of birth (or age)
- 5 – Identity No. (if any)
- 6 – The holder of this card... (text in full)
- 7 – Date of issue
- 8 – No. of card... Signature of issuing authority
- 9 – Date of expiry
- 10 – Height; 11 – Eyes; 12 – Hair;
- 13 – Other distinguishing marks or information
- 14 – Photo of holder
- 15 – Stamp
- 16 – Signature of holder or thumbprint or both.

among those used for the authentic texts referred to in Article 102 of the Protocol (*Authentic texts*). Furthermore, there may be more than one national or official language in a given country.

- 3981** It is advisable for the other languages spoken in the national territory to be used, together with the official language, for drawing up the identity card.⁸ When it is possible to do so, there may be some advantage in also using an international language for the identity card.

Sub-paragraph (d)

- 3982** Usage regarding family and first names or other constituent parts of the name varies from country to country and sometimes even inside the same country. Consequently, after lengthy discussions, Committee II decided that the first name should not appear on the identity card as a separate item. Thus the competent authorities can give the name customarily used in the country to identify a person, together with the first name(s) if appropriate. That customary name should be entered first and perhaps even underlined in order to make it clear that it identifies the person. The habitual first name should be entered immediately after the name.⁹
- 3983** The date of birth, which is an important means of identification, may in some countries not be known for a large number of people. In such cases, the person's age may be established by a medical commission which issues a certificate stating the presumed age, from which the year of birth may be deduced. If the exact date of birth is unknown, the person's age, at least in approximate terms, should be entered on the identity card.
- 3984** One of the delegates in the Technical Sub-Committee observed that complications might arise from the fact that not all countries have the same calendar. In fact, the differences between the various calendars in use are known and, if necessary, the competent services could publish any information required for the conversion of dates.
- 3985** As a general rule, civilians are not given an identity number in peacetime; however, if such a number is assigned to permanent civilian medical and religious personnel in time of armed conflict, it could usefully be entered on the card in order to facilitate identification. In that case, the same number should also appear on the identity disc, if any, issued to such civilian personnel.

Sub-paragraph (e)

- 3986** The card must indicate the holder's medical or religious status. Both categories of personnel are mentioned in the specimen card reproduced in Figure 1, and all that has to be done is to strike out the term which does not apply.

⁸ *O.R.* XII, p. 189, CDDH/II/SR.72, paras. 18-20.

⁹ *Ibid.*, p. 180, CDDH/II/SR.71, paras. 34-36; pp. 183-184, paras. 64-80.

- 3987 It would also be desirable to give a precise indication of the holder's capacity by mentioning his profession: surgeon, anaesthetist, doctor, nurse, ambulance driver etc.
- 3988 In the case of a minister of religion, additional information such as denomination, capacity – for example, hospital chaplain – or possible attachment to a relief organization could be helpful for purposes of identification.
- 3989 In certifying clearly the holder's status, the identity card complies with the provision of Article 18 (*Identification*), paragraph 3, of the Protocol.

Sub-paragraph (f)

- 3990 In the case of permanent civilian personnel, there should be no difficulty in affixing the holder's photograph to the identity card. The photograph is an essential feature of all identity documents and is used in all countries.
- 3991 The holder's signature must appear on the identity card, as evidence that he recognizes the accuracy of the description given therein of his status. The signature is also an aid to identification, as is the thumbprint which may either replace or accompany the signature. In order to avoid confusion, it may be advisable for the holder to sign the back of the photograph as well.

Sub-paragraph (g)

- 3992 The stamp and signature of the competent authority are essential as evidence of the identity card's validity. In the model in Figure 1, the place for "signature of issuing authority" is on the front side whereas the space for the stamp is on the back. This arrangement is not compulsory; the authority's signature and stamp could equally well be in the same place.
- 3993 Article 1 does not state whether the identity card should bear a number; nevertheless, the specimen in Figure 1 has a space for "No. of card". This is a suggestion in keeping with the provisions of Article 40 of the First Convention (Identification of medical and religious personnel) and the specimen military identity card annexed to that Convention.

Sub-paragraph (h)

- 3994 The requirement that the identity card for permanent civilian medical and religious personnel should state the date of issue and expiry is consistent with the widespread practice of making civilian identity documents renewable periodically. Compulsory renewal enable changes in the holder's physical appearance, duties etc. to be taken into account.
- 3995 If necessary, the extension of the card's validity may be certified and signed by the competent authority on the card itself, in the space which the specimen in Figure 1 provides for "Other distinguishing marks or information".

Paragraph 2

- 3996** The provisions of this paragraph, like those of the second paragraph of Article 40 of the First Convention, are compulsory. The requirement that the identity card for permanent civilian medical and religious personnel must be uniform throughout the national territory is an essential one, since the card is not necessarily issued in the place where the protected person usually pursues his professional activities in peacetime. Since communications may break down, identity cards which may have been issued anywhere on the national territory can only be controlled effectively if they all follow a standard pattern.
- 3997** The issuing authority which maintains control of the cards issued to protected civilian personnel will be in touch with the professional bodies concerned, the personnel services of medical establishments, civilian and religious administrative bodies and National Red Cross or Red Crescent Societies. Each country, taking into account its special situation, will designate the authority which is to be in charge of keeping the files and duplicate copies of cards issued, replacing lost cards, extending or updating cards etc.¹⁰
- 3998** When the Parties to the Conflict transmit specimen identity cards to each other, they should attach a translation into the adverse Party's national language of the card's particulars.

Paragraph 3

- 3999** The stipulation that permanent civilian medical and religious personnel may in no circumstances be deprived of their identity cards is designed to protect such personnel against arbitrary decisions which might jeopardize their humanitarian activity. This is how the prohibition should be interpreted. Obviously, if the holder of such an identity card were to be found guilty of violating his humanitarian mission or flouting medical ethics, he would lose his entitlement to the card. Nevertheless, he should not be completely deprived of an identity document.
- 4000** Paragraph 3 bears a resemblance to the fourth paragraph of Article 40 of the First Convention, which states that protected personnel may not be deprived of the right to wear the distinctive emblems (armlet). The same applies to civilian personnel issued with identity cards entitling them to respect and protection.

Ph. E.

¹⁰ Cf. *Commentary I*, Art. 40.

Protocol I

Annex I, Article 2 – Identity card for temporary civilian medical and religious personnel

1. The identity card for temporary civilian medical and religious personnel should, whenever possible, be similar to that provided for in Article 1 of these Regulations. The Parties to the conflict may be guided by the model shown in Figure 1.
2. When circumstances preclude the provision to temporary civilian medical and religious personnel of identity card similar to those described in Article 1 of these Regulations, the said personnel may be provided with a certificate signed by the competent authority certifying that the person to whom it is issued is assigned to duty as temporary personnel and stating, if possible, the duration of such assignment and his right to wear the distinctive emblem. The certificate should mention the holder's name and date of birth (or if that date is not available, his age at the time when the certificate was issued), his function and identity number, if any. It shall bear his signature or his thumbprint, or both.

Documentary references

Official Records

O.R. I, Part I, p. 173; Part III, p. 28 (Art. 2). *O.R.* III, pp. 369-371, 380-382. *O.R.* VII, pp. 52-53, CDDH/SR.48, paras. 11-12. *O.R.* XII, pp. 175-178, CDDH/II/SR.71, paras. 1-20; p. 182, paras. 52-53; pp. 187-188, CDDH/II/SR.72, paras. 6, 8, 12; p. 189, para. 18; p. 257, CDDH/II/SR.79, paras. 1-3. *O.R.* XIII, p. 24, CDDH/49/Rev.1, para. 15; p. 35, paras. 1-3; p. 39 (model); p. 41 (Art. 3); pp. 266-267, CDDH/235/Rev.1, paras. 54-56; p. 269, para. 66; pp. 294-297, *id.* (Chapter I); p. 321, *id.*, Annex III, paras. 2, 5; p. 414, CDDH/406/Rev.1 (Art. 2).

Other references

CE/7b, p. 8, Art. 11; pp. 25-29. *CE 1971, Report*, p. 25, paras. 57-59. *CE 1972, Basic Texts*, p. 10 (Art. 18, para. 2). *CE 1972, Commentary*, Part I, pp. 38-40. *CRCE 1972, Report*, p. 27 (Art. 18 a); p. 61, Annex I (section 02). *CE 1972, Report*, Vol. I, pp. 38-39 (draft Art. 18); p. 53, Annex I. *Commentary Drafts*, p. 113 (Art. 2); p. 114 (model of identity card). *XXIst Int. Conf. RC, Report*, pp. 15-16.

Commentary**General remarks**

- 4001** The temporary civilian medical and religious personnel referred to in this article are defined in sub-paragraphs (c), (d) and (k) of Article 8 (*Terminology*) of the Protocol; since they are entitled to respect and protection they should be able, if the need arises, to prove their right to wear the protective distinctive emblem by showing the identity card provided for in Article 18 (*Identification*), paragraph 3, of the Protocol. Since the Protocol does not distinguish between “permanent” and “temporary” status for civilian medical and religious personnel, the identity cards intended respectively for these two categories of personnel are based on one and the same provision.
- 4002** As we have seen, only the first of the two articles of the Annex devoted to these identity cards refers to paragraph 3 of Article 18 (*Identification*) of the Protocol, in which the terms “permanent” and “temporary” do not appear.
- 4003** In cases of emergency, when an identity card based on the national model or on the model in Figure 1 cannot be drawn up for temporary personnel, the competent authority may issue a similar document, namely, the certificate referred to in paragraph 2 of this article. Like the identity card provided for in Article 18 (*Identification*), paragraph 3, of the Protocol, the certificate issued to temporary civilian medical and religious personnel states their right to wear the distinctive emblem as well as their right to respect and protection.

Paragraph 1

- 4004** The model identity card proposed in Figure 1 was designed by the Technical Sub-Committee so that it could also be issued to temporary civilian medical and religious personnel. All that is required is to strike out the word “permanent” which appears in the model. The essential features which serve to identify an individual are the same, irrespective of whether permanent or temporary personnel are involved.
- 4005** Temporary personnel, who are required to meet the conditions laid down in Article 8 (*Terminology*), sub-paragraphs (c), (d) and (k), of the Protocol, may be called upon at short notice.¹ Their mission should not be delayed by the administrative formalities involved in issuing the identity card certifying their right to wear the distinctive emblem. A single model of identity card which can be used for both permanent and temporary personnel facilitates both control and issuance procedures throughout the national territory and at any time; the forms may be printed, left blank and distributed in advance to the authorities responsible for issuing and controlling the identity cards.

¹ Cf. commentary Art. 8 of the Protocol, sub-paras. (c), (d), (k), *supra*, pp. 124, 127 and 132.

Paragraph 2

- 4006** Where circumstances preclude the provision of identity cards based on the national model or the model in Figure 1 to temporary civilian medical and religious personnel in occupied territories or in the areas referred to in paragraph 3 of Article 18 (*Identification*) of the Protocol, the competent authority may issue a certificate as proof of the status of the person to whom it is issued.
- 4007** The certificate should contain the following particulars:

*Certificate for temporary civilian medical and religious personnel**Name:**Date of birth:*

(or age when the certificate was issued).

*Holder's function:**Identity No. (if any):*

The holder has the right to wear the distinctive emblem conferring protection.

His assignment to duty as temporary medical/religious personnel

begins on:

ends on:

(date of issue)

Signature of holder
or thumbprint or both

Signature of the competent
authority issuing the
certificate

- 4008** In exceptional circumstances or emergencies, it is not compulsory for the certificate to bear the distinctive emblem and the competent authority's stamp. Neither do certificates of this kind need to bear the holder's photograph. By analogy with the provisions governing the identity card, temporary personnel provided with this certificate should not have it removed from them and may in no circumstances be deprived of it during their assignment. In the event of loss, they should be provided with a duplicate copy. The issuing authority should, if possible, keep a control of the certificates it issues, for example by keeping a list of names. The material to be used is not specified and could, for example, be ordinary typing paper without an official letterhead.

- 4009** If the holder does not know his date of birth, paragraph 2 recommends that his age at the time of issue should be mentioned. Consequently, the certificate should bear a date of issue.

Model of identity card for Articles 1 and 2



FRONT		REVERSE SIDE		
<div><div></div><div>(space reserved for the name of the country and authority issuing this card)</div><div></div></div>	<div>IDENTITY CARD</div> <div>for PERMANENT medical personnel</div> <div>for TEMPORARY civilian religious personnel</div>	<div>Height</div>	<div>Eyes</div>	<div>Hair</div>
<div>Name</div> <div>Date of birth (or age)</div> <div>Identity No. (if any)</div> <div>The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as</div> <div>.</div> <div>.</div> <div>Date of issue</div> <div>No. of card</div> <div>Signature of issuing authority</div> <div>Date of expiry</div>		<div>Other distinguishing marks or information:</div> <div>.</div> <div>.</div> <div>.</div> <div>.</div> <div>.</div> <div>PHOTO OF HOLDER</div>		
		<div>Stamp</div>	<div>Signature of holder or thumbprint or both</div>	

Fig. 1: Model of identity card (format: 74 mm × 105 mm)

- 4010 The particulars referred to in Article 1 (*Identity card for permanent civilian medical and religious personnel*), paragraph 1, sub-paragraphs (a) to (h), appear on either the front or the reverse side of the model. Enough space was left to include additional particulars as an aid to precise identification of the holder, namely, height, eyes and hair.
- 4011 A person may be described as short, of average height or tall, but it is certainly preferable for the height to be expressed in metric terms. Eyes and hair are characterized by their colour; a bald person may be so described. It is not compulsory for these particulars to be given; they are not mentioned in Article 1 (*Identity card for permanent civilian medical and religious personnel*), paragraph 1, sub-paragraphs (a) to (h).
- 4012 The item “Other distinguishing marks or information” could be used, for example, to list any distinguishing physical marks or provide information about the holder’s profession.
- 4013 The Technical Sub-Committee considered that it was not necessary for the holder’s blood group to be entered on the identity card because, if the need arises, it is preferable to check the blood group rather than to rely on previous information from a source which may be unverifiable.

Ph.E.

Annex I, Chapter II – The distinctive emblem

Introduction

- 4014 The expression “distinctive emblem” is defined, for the purposes of the Conventions and their Protocols, in Article 8 (*Terminology*), sub-paragraph (*l*), of the Protocol. The use of the distinctive emblem for marking and identifying medical personnel, units and transports is governed by Article 18 (*Identification*) of the Protocol.¹
- 4015 The essential rules for the most effective possible implementation of the provisions concerning the use of the distinctive emblem are summed up in Articles 3 (*Shape and nature*) and 4 (*Use*) which make up Chapter II.
- 4016 If it is to be effective, the distinctive emblem – like any visual sign – must be fully visible and identifiable within the visual range for which it is designed. Accordingly, it should make medical personnel, units and transports identifiable to the naked eye in daylight and in clear weather (absence of fog, snow, rain etc.), at the distance which separates combatants when they shoot on sight.
- 4017 This distance will obviously vary significantly according to the nature of the armaments concerned (infantry, armoured tanks, artillery, naval or air weaponry etc.).
- 4018 The visibility of the distinctive emblem from the air was tested in 1936 by the Dutch and Swiss Air Forces. According to the experts, these tests are still valid today notwithstanding the speed of modern aircraft. The detailed results were published by the ICRC in the “Revue internationale de la Croix-Rouge”.²

Dutch tests

- 4019 Size of the red cross: 6 m in diameter with arms 0.80 m wide. White ground: square with sides measuring 6 m. The tests produced the following results:
- from 1,500 m altitude, the red cross is visible to an observer knowing where it is;

¹ Cf. commentary Arts. 8, sub-para. (*l*), and 18 of the Protocol, *supra*, p. 134 and p. 221. Cf. also Arts. 38 and 85, para. 3 (*f*), of the Protocol and the related commentary, *supra*, p. 445 and p. 998.

² Tests by the Dutch Air Force, *RICR*, March 1936, p. 204 (in French only). Test by the Swiss Air Force, *RICR*, May 1936, p. 408 (in French only).

- from 2,500 m, the red cross is scarcely visible even to an observer knowing where it is;
- from 3,500 m, the red cross is not visible.

4020 In poor weather and limited visibility, huge emblems (50 m cross with arms 10 m wide) are essential and should be floodlit.

4021 The distinctive emblem also needs to be this size in order to be visible from an altitude of 4,000 m in clear weather.

4022 At the altitudes from which the above-mentioned observations were made, a 3 m red cross is not visible.

Swiss tests

4023 Size of the red cross: 5 m in diameter, width of arms not specified but – judging by the proportions of the Swiss cross – probably 1.5 m wide and 1.75 m long (length exceeding width by 1/6).³ White ground: 5 × 5 m. The following results were produced:

- from a low-flying (200 to 300 m) aircraft, a cross of this size astride the ridge of a hospital roof is only recognizable from a very short distance because the cross appears distorted by the slope of the roof. Consequently, the red cross must not be placed straddling the top angle of a roof but, rather, on the flat surface of each slope;
- from 1,000 m, seen perpendicularly from above, the cross is visible to an observer knowing its position;
- from 2,000 m, seen perpendicularly from above, the cross appears distorted but it is identifiable if its position is already known;
- from 2,500 to 3,000 m, the distinctive emblem is no longer visible.

4024 It will be noted that the Dutch and Swiss tests on the visibility of the protective emblem from the air produced concordant results.

4025 On land, the visibility tests carried out by the ICRC on two occasions in 1972 and repeated in 1976 for the experts of the Technical Sub-Committee, showed that the distinctive emblem is no longer identifiable at the following distances:

- 60 m for a red cross 10 cm in diameter on a white armlet;
- 300 m for a red cross 40 cm in diameter on a white ground, on an ambulance;
- 500 to 600 m for a red cross 80 cm in diameter on a white ground, on an ambulance or flag.

4026 At sea, studies have also been carried out on the visibility of the distinctive emblems on the hull and superstructure of ships chartered by the ICRC for its operations, as well as on a number of hospital ships. The results are practically identical to those of the above-mentioned aerial observations. From a distance of

³ Cf. First Convention, Art. 38, first para. Cf. also Ph. Eberlin, *Protective Signs*, *op. cit.*, pp. 23-26.

two nautical miles, a red cross 3 m high on a white ground painted on the hull of a ship is barely visible and is not identifiable to the naked eye.⁴

- 4027** The use of the distinctive emblem by hospital ships and coastal rescue craft is the subject of Resolution 18 addressed by the Diplomatic Conference to the International Maritime Organization in 1977. The resolution requests that the use of the distinctive emblem be recognized in the appropriate IMO documents such as the International Code of Signals.
- 4028** The visual identification issues raised in Resolution 18 were referred by IMO to its Maritime Safety Committee and its Sub-Committee on Safety of Navigation. As a result of their work, a new Chapter XIV called “Identification of Medical Transports in Armed Conflict and Permanent Identification of Rescue Craft” was added to the International Code of Signals. The new text, which is annexed to this commentary came into force on 1 January 1986.⁵
- 4029** The visibility of the distinctive emblem to infrared observation was also tested by the ICRC, using both the red cross and the red crescent.
- 4030** The Spanish Red Cross transmitted to the ICRC photographs of ambulances which demonstrated that the red distinctive emblem was invisible to infrared film. As a result of these tests, the Technical Sub-Committee recommended that the necessary steps be taken to ensure that the distinctive emblem could be detected by technical means.

Ph.E.

⁴ Ph. Eberlin, “Identification of Hospital Ships”, *IRRC*, November-December 1982, p. 315.

⁵ *International Code of Signals*, IMO, London, 1985, p. 27; *cf. infra*, p. 1170. French and Spanish language editions are available.

Document annexed (*Cf. supra*, p. 1169, footnote 5)

INTERNATIONAL CODE OF SIGNALS

(extract)

CHAPTER XIV

Identification of Medical Transports in Armed Conflict and Permanent Identification of Rescue Craft*

1. Shape, colour and positioning of emblems for medical transports

- 1.1 The following emblems can be used separately or together to show that a vessel is protected as a medical transport under the Geneva Convention.



- 1.2 The emblem, positioned on the vessel's sides, bow, stern and deck, shall be painted dark red on a white background.
- 1.3 The emblem shall be as large as possible.
- 1.3.1 On the vessels's sides the emblem shall extend from the waterline to the top of the ship's hull.
- 1.3.2 The emblems on the vessel's bow and stern must, if necessary, be painted on a wooden structure so as to be clearly visible to other vessels ahead or astern.
- 1.3.3 The deck emblem must be as clear of the vessel's equipment as possible to be clearly visible from aircraft.
- 1.4 In order to provide the desired contrast for infrared film or instruments, the red emblem must be painted on top of a black primer paint.
- 1.5 Emblems may also be made of materials which make them recognizable by technical means of detecting.

2. Illumination

- 2.1 At night and in restricted visibility the emblems shall be illuminated or lit.

* In accordance with Article 27 of the Second Geneva Convention of 12 August 1949, this chapter also applies to coastal rescue craft. The expression "rescue craft" was adopted in 1984 by the International Life-Boat Conference to designate the coastal craft referred to in Article 27.

- 2.2 At night and in restricted visibility all deck and overside lights must be fully lit to indicate that the vessel is engaged in medical operations.

3. *Personal equipment*

- 3.1 Subject to the instructions of the competent authority, medical and religious personnel carrying out their duties in the battle area shall, as far as possible, wear headgear and clothing bearing the distinctive emblem.

4. *Flashing blue light for medical transports*

- 4.1 A vessel engaged in medical operations shall exhibit one or more all-round flashing blue lights of the colour prescribed in paragraph 4.4.
- 4.2 The visibility of the lights shall be as high as possible and not less than 3 nautical miles in accordance with Annex 1 to the International Regulations for Preventing Collisions at Sea, 1972.
- 4.3 The light or lights shall be exhibited as high above the hull as practical and in such a way that at least one light shall be visible from any direction.
- 4.4 The recommended blue colour is obtained by using, as trichromatic co-ordinates:
- | | |
|-----------------|-----------------------|
| green boundary | $y = 0.065 + 0.805 x$ |
| white boundary | $y = 0.400 - x$ |
| purple boundary | $x = 0.133 + 0.600 y$ |
- 4.5 The frequency of the flashing light shall be between 60 and 100 flashes per minute.

5. *Radar transponders*

- 5.1 It should be possible for medical transports to be identified by other vessels equipped with radar by signals from a radar transponder fitted on the medical transport.
- 5.2 The signal from the medical transport transponder shall consist of the group YYY, in accordance with article 40 of the Radio Regulations followed by the call sign or other recognized means of identification.

6. *Underwater acoustic signals*

- 6.1 It should be possible for medical transports to be identified by submarines by appropriate underwater signals transmitted by the medical transports.
- 6.2 The underwater signal shall consist of the call sign of the ship preceded by the single group YYY transmitted in morse on an appropriate acoustic frequency, e.g. 5 kHz.

7. *Rescue craft carried by medical transports*

- 7.1 Every rescue craft should be equipped with a mast on which a red cross flag measuring about 2×2 metres can be hoisted.

8. *Flashing blue light for medical aircraft*

- 8.1 The light signal, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.
- 8.2 Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible.

Protocol I

Annex I, Article 3 – Shape and nature

1. The distinctive emblem (red on a white ground) shall be as large as appropriate under the circumstances. For the shapes of the cross, the crescent or the lion and sun, the High Contracting Parties may be guided by the models shown in Figure 2.
2. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.

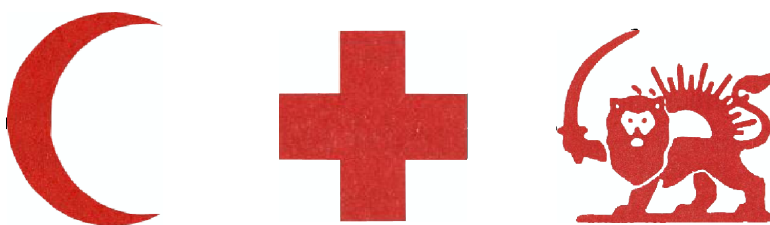


Fig. 2: Distinctive emblems in red on a white ground

Documentary references

Official Records

O.R. I, Part I, p. 175; Part III, p. 29 (Art. 5). *O.R.* III, pp. 372-373, 383. *O.R.* VII, p. 52, CDDH/SR.48, para. 11. *O.R.* XI, p. 93, CDDH/II/SR.12, para. 5; p. 566, CDDH/II/SR.50, para. 6. *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 166, CDDH/II/SR.70, paras. 6-7; p. 190, CDDH/II/SR.72, para. 30. *O.R.* XIII, p. 25, CDDH/49/Rev.1, para. 19; p. 41 (Art. 4); p. 268, CDDH/235/Rev.1, para. 59; p. 298 (Art. 3); p. 321; *id.*, Annex III.

Other references

CE/7b, p. 5 (Art. 4). *CE 1972, Technical Memorandum*, pp. 8, 16-17. *CE 1972, Report*, Vol. I, p. 54, para. 6(a); p. 56, Annex III C, paras. 1-3; p. 58, para. 2.1. *Commentary Drafts*, pp. 116-117 (Art. 5).

Commentary**General remarks**

- 4031** The distinctive emblems reproduced in Figure 2 are those of the 1949 Conventions. As pointed out earlier, the red lion and sun has not been used since 1980.
- 4032** However, this emblem could only be deleted from the Protocol if the amendment procedure were followed.
- 4033** The red cross and the red crescent should always stand out on a white ground. There are no provisions governing the shape and size of the white ground, which may be the hull of a hospital ship, the fuselage of a medical aircraft, or a white wall. It is not mandatory for medical aircraft or ambulances to be painted white. They often are, however, for the colour white is a thermal insulant.
- 4034** There are no mandatory provisions regarding the size or proportions of the distinctive emblem. It is thus possible, in an emergency, to fashion the emblem using whatever materials are available. For the same reasons, the red and white colours are not standardized and may therefore be produced by improvisation if necessary.
- 4035** Article 43 of the Second Convention refers to the colour dark red in respect of the distinctive emblems placed on hospital ships and coastal rescue craft. This is only a recommendation intended to secure a good red and white colour contrast.¹ Under Article 48 of the First Convention, the heraldic emblem of the red cross on a white ground is formed, as a compliment to Switzerland, by reversing the Federal colours. The red colour of the Swiss emblem has been regulated and is quite dark; however, Article 38 contains no stipulations regarding either the shape or the colour of the distinctive sign, which retains its full protective value whatever the shade of the red and the white colours, as explained in a technical note published in the International Review of the Red Cross.²
- 4036** When references are made to the size of the distinctive emblem, what is meant is its height and its width together with the area delimited by its contours. The distance at which it is visible depends on all these factors, or, in other words, on its red area. Comparative observations made during visibility tests by night and by day showed quite clearly that both a sign consisting only of lines and the surface of a crescent are less visible than an outspread cross of the same size.

Paragraph 1

- 4037** The expression “shall be as large as appropriate under the circumstances” represents a compromise between the need to ensure that the distinctive emblem is as effective as possible thanks to its size, and military requirements which, in some situations, call for the emblem to be camouflaged or made smaller.

¹ Cf. *Commentary II*, pp. 241-243 (Art. 43, para 1).

² Ph. Eberlin, “Technical Note on the Colours of the Red Cross and Red Crescent Emblem”, *IRRC*, March-April 1983, p. 77.

- 4038 The visibility tests carried out on the distinctive emblem showed that the outline of a vehicle approaching from a distance can be seen before its colours are visible to the naked eye. If the red emblem on a white ground is supposed to be “as large as possible”, it should be displayed over the vehicle’s full height so that it can be identified on the outline as soon as the red and white colour contrast revealing it starts to appear. The same applies for aircraft, ships and small craft marked with the distinctive emblem.
- 4039 Figure 2 gives an idea of the shape and proportions of the distinctive emblems and could be used as the basis for improvising one. More detailed information on the manufacture of distinctive emblems has been published by the ICRC in a trilingual booklet, which describes a method proposed by a National Red Crescent Society for the geometrical construction of the crescent. The Conventions lay down no rules for either the positioning of the red crescent on the white ground or its proportions.³

Paragraph 2

- 4040 The decision to light or illuminate the distinctive emblem is for the competent authority to take if it deems that the emblem should be identifiable at night or when visibility is poor.
- 4041 The emblem is “lighted” by a projector or a lamp; the white light projected onto it brings out its shape and colours.
- 4042 The emblem is “illuminated” when red and white lights are placed on it in order to pick out the red emblem against the white ground. This may be done by placing strings of red electric bulbs along the contour of the emblem and white bulbs round the edge of the white ground.
- 4043 Furthermore, there is no reason why the emblem itself should not be luminous, giving off a red light surrounded by a white halo or glow.⁴ This type of device, which could be based on those used for road signs and neon advertising signs, should be subjected to visibility tests.
- 4044 The technical means of detection referred to in paragraph 2 are essentially those involving infrared (IR) observations, which may be divided into three categories;
- active electro-optic infrared observation, involving the emission of infrared light and the reception of reflected images;
 - infrared photography;
 - passive electro-optic infrared observation, involving the detection of infrared radiation from sources of heat.

³ Ph. Eberlin, *Protective Signs*, *op. cit.* The crescent is obtained by making the circumferences of two eccentric circles intersect; their centres are two units of measurement apart and their radius measures 6 and 5 units respectively. The crescent may be pointed in various directions in relation to the centre of the circles.

⁴ Cf. *supra*, general introduction to the commentary on Annex I, p. 1144.

At the time of the Conference of Government Experts (1971-1972) such infrared observation methods were in general use in the armed forces, having been introduced during the Second World War. Other technical means of detection which were then starting to become known to the public at large, such as seismic or chemical “sensors” released by aircraft over vast areas and transmitting information by means of automatic radio signals, did not enable medical personnel, units and transports to be identified. The shortage of detailed documentation on this new “generation” of technical means of detection has prevented an accurate assessment from being made of their implications for the respect and protection to which medical services are entitled.

- 4045 The ICRC tests carried out in 1972 and 1976 on the use of infrared observation to detect the distinctive emblem by night were confined to active electro-optic infrared observation using a projector and an image enlarger with screen. The wavelengths used for the infrared radiations ranged from 0.8 to 2.0 μm .⁵ The observational distance was fairly short since it did not exceed 800 metres.
- 4046 Following the communication to the ICRC by the Spanish Red Cross of photographs of ambulances taken with infrared sensitive film, on which the red cross could not be seen at all, infrared photographic tests prepared by the ICRC were also carried out. It will be recalled that infrared photography, both in black and white and in colour, is used under a variety of techniques for the day-time observation and aerial monitoring of combat and supply zones. The wavelength used for these tests ranged from 0.7 to 0.85 μm .
- 4047 The ICRC did not test the visibility of the distinctive emblem by means of calorimetric electro-optic passive sensors, which may be used by both day and night for infrared passive observation of the differences in temperature caused by hot engines, chimneys, human beings, animals etc., in combat and supply zones. This type of passive electro-optical infrared observation using wavelengths from 3 to 5 and from 10 to 14 μm may be carried out from the air at altitudes of up to 3,000 metres.
- 4048 The ICRC tests showed that the distinctive emblem is visible to active electro-optic infrared observation only through the colour contrast produced by the dark against a pale ground. The white ground reflects more than 80% of infrared light whereas the colour red reflects only 0 to 10%. If the colour red itself is placed on a pale ground, the contrast disappears. This holds good for photography too. When black and white infrared film is used with an orange filter, the emblem appears as a dark shape on a pale gray ground, if ordinary paint is used for the red and white colours. The contrast is improved if reflectorized material is used for the white ground and glossy paint for the red emblem.
- 4049 Using a colour infrared film and a yellow filter, the emblem is seen as yellow on a reddish-gray ground.

⁵ μ = Greek letter (mu); under the International System of Units (SI), μ = micron or micrometre, also abbreviated μm . One μm = 10^{-6}m = 0.000001 m. Infrared wavelengths may sometimes be expressed in millimicrons ($\text{m}\mu$), nanometres (nm), or angstroms (\AA); $1\mu = 10^3\text{m}\mu = 10^3\text{ nm} = 10^4\text{ \AA}$.

4050 Various methods of improving the contrast were tested:

- a black band round the perimeter of the sign;
- a strip of reflectorized plastic material round the perimeter of the sign;
- red reflectorized hatching across the sign;
- addition of black pigment to the red paint;
- a black coating beneath the red.

The last method was found to be the most effective in improving the dark-on-pale contrast, whereas the others made the shape of the cross stand out more clearly on its pale ground.

4051 The ICRC was informed that the distinctive emblem's colour contrast was not visible to passive calorimetric infrared detection. In order to be identified by means of this type of sensor, which is used for diurnal and nocturnal aerial observation, the temperature of the emblem needs to be from 10 to 100°C higher than that of its background.

4052 The materials which may be used to make the emblem visible to the above means of infrared detection are therefore those which improve the dark-on-pale contrast or, in other words, enhance the reflective properties of the white ground and diminish the reflected radiation from the red sign. Industry produces reflectorized materials which have been described in the International Review of the Red Cross and have proved most effective in improving the distinctive emblem's contrast under infrared observation.⁶

Ph. E.

⁶ Ph. Eberlin, "Modernization of Protective Markings and Signalling", *IRRC*, March-April 1979, p. 59.

Annex I, Article 4 – Use

1. The distinctive emblem shall, whenever possible, be displayed on a flat surface or on flags visible from as many directions and from as far away as possible.
2. Subject to the instructions of the competent authority, medical and religious personnel carrying out their duties in the battle area shall, as far as possible, wear headgear and clothing bearing the distinctive emblem.

Documentary references

Official Records

O.R. I, Part I, p. 175; Part III, p. 29 (Art. 6). *O.R.* III, pp. 372-373, 384. *O.R.* VII, p. 52, CDDH/SR.48, para. 11. *O.R.* XI, p. 93, CDDH/II/SR.12, para. 5; p. 566, CDDH/II/SR.50, para 6. *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 166, CDDH/II/SR.70, paras. 6-7; p. 191, CDDH/II/SR.72, paras. 31-35. *O.R.* XIII, p. 25, CDDH/49/Rev.1, para. 20; p. 41 (Art. 5); p. 268, CDDH/235/Rev.1, para. 59; p. 298 (Art. 4); p. 321, *id.*, Annex III; p. 415, CDDH/406/Rev.1 (Art. 4).

Other references

CE 1972, Technical Memorandum, pp. 8, 16-21. *CE 1972, Report*, Vol. I, p. 53, para. 2.1.1; p. 56, paras. III-IV; p. 58, para. 2.1.3. *Commentary Drafts*, pp. 117-118 (Art. 6).

Commentary

General remarks

- 4053 The whole of the distinctive emblem must be visible from all directions if it is to be identified at a glance, without hesitation. This was demonstrated by the ICRC visibility tests carried out in 1972 and 1976 as well as by the tests of the

emblem's visibility from the air conducted in March and May 1936 by the Dutch and Swiss Air Forces.¹

- 4054 The ICRC's report on its own tests (D.1291) was communicated to the specialists attending the 1972 Conference of Government Experts. The report gives the size of the emblems and the distances, ranging from 100 to 1,000 m, at which they were observed, together with the type of material used to make them. The red cross measured 80 × 80 cm and was displayed on a white 100 × 100 cm panel. The red crescent was 80 cm high. Different types of panel (wood, cardboard and metal), all with plane surfaces, were used. Ordinary paint was used for some of the signs, while others were made out of ordinary or fluorescent self-adhesive coloured plastic. Phosphorescent colours were tested as well as red and white retro-reflective materials, and experiments were carried out with various combinations of the above-mentioned materials.
- 4055 Further details will be given later of these tests, which also included the observation, from distances of less than 80 m, of the small distinctive emblem on flags, armlets, tabards, helmets, stretchers, tents and medical vehicles. The observations, which were made during the day, at twilight and at night (moon in the first quarter), in clear weather, showed that these small signs were inadequate, particularly on the armlet.
- 4056 At night, visible light projectors and pencil beams (pocket torches) were used to view the signs; infrared detection of the sign was tested by means of active electro-optic observation. Under infrared radiation, as in the case of visible light, the judicious use of reflectorized materials may considerably improve colour contrast and visibility range. Retro-reflective material consists of microscopic spherical glass balls embedded in sheets or strips of self-adhesive cloth or plastic and secured by a film of special transparent material. It should be borne in mind that the reflected light ceases to be visible if the observer moves outside the cone of about 4 degrees formed by the angles of incidence. The eyes of a cat, which are natural retro-reflectors, have optical characteristics on which the invention of retro-reflective material was based.² Retro-reflective materials are widely used, particularly for road signs.

Paragraph 1

- 4057 The flag has always been – and still is – an excellent signal since, taken together with its holder and pole, and provided it is large enough (about 100 × 100 cm), its height makes it an ideal stimulus for the naked eye.
- 4058 Flying the white flag struck with the red distinctive emblem is tantamount to sending a visual signal which will be seen more clearly from below by a distant observer than a less conspicuous sign. Thus ICRC vehicles operating in combat areas are not only marked with distinctive signs that are as large as possible and

¹ Cf. general introduction to the commentary on Annex I; *supra*, p. 1141, and introduction to Chapter II, *supra*, p. 1167.

² Cf. Ph. Eberlin, "Modernization of Protective Markings and Signalling", *op. cit.*, pp. 72-73.

are visible from the front, the back and both sides; they also fly a 100 × 100 cm red cross flag from a vertical mast mounted at the rear.

- 4059** If the distinctive emblem is not displayed on a flat surface, it will not be seen in full at a glance, for part of it will be concealed by ridges or broken angles. One example is the sign displayed astride the summit of a roof which, because it is broken, is not identifiable by an approaching aircraft. It has to be seen from directly above in order to be identified. The same applies to a sign straddling the ridge of a medical tent, which is not fully visible to an observer at ground level and therefore cannot be identified beyond any doubt, even at the relatively small distance of about 200 m.
- 4060** In order to be visible from every possible direction, the distinctive emblem should therefore be displayed on flat surfaces facing these directions, such as the side walls and yard of a building, each slope of a roof, the walls of a medical tent, as well as on angled panels placed near the buildings. Such surfaces can generally receive large markings which are visible from afar. The ICRC uses 5 × 5 m and 10 × 10 m red cross flags with no mast for this purpose.
- 4061** The tests conducted by the ICRC on the visibility of the distinctive emblem displayed on moving vehicles showed that emblems measuring 50 × 50 cm or less were quite inadequate when seen from constantly changing angles. Such emblems become difficult to distinguish at about 250 m. Medical vehicles should display red cross emblems which are as large as possible, depending on the type of vehicle; in other words, they should cover the full height of the bodywork, even if a small part of the sign is distorted or broken by the line of the vehicle.
- 4062** White panels measuring 100 × 100 cm with an 80 × 80 cm distinctive emblem, displayed on the front, rear, sides and roof of a medical vehicle, provide an easy means of identification up to 300 m. On a moving vehicle in clear weather, the visibility of the sign becomes fair to poor at more than 300 m and nil at about 500 m.
- 4063** Various colouring matters were tested in order to assess their effect on the visual range of the emblem; the results of these tests are discussed in the articles published in the *International Review of the Red Cross* on the modernization of protective markings and signalling and the colours of the distinctive emblem.³
- 4064** Phosphorescent paint, which accumulates light falling on it, emits only a small quantity of light in obscurity and is therefore not a great deal of use. Fluorescent paint, which is activated by ultra-violet rays, is very effective, especially at dawn or twilight when ultra-violet radiation in the atmosphere increases for a short time and makes fluorescent colours very bright. A fluorescent red cross on a 100 × 100 cm panel remains visible and identifiable at 200 m until night has completely fallen; it is still visible, although not necessarily identifiable, at 500 m.
- 4065** Like retro-reflective material, fluorescent paint must be used judiciously so as to preserve the contrast between the red sign and its white ground. The same applies to cat's eyes, which are used for marking roads because of their reflective properties. Studies and research still need to be conducted in order to identify the red and white substances which best meet all the requirements of the distinctive

³ Cf. *supra*, Art. 3, footnotes 6 and 2, pp. 1177 and 1174.

sign, namely, visibility from as far away as possible, by day and by night, in bad weather, under infrared observation, or using light amplification glasses and increasingly sophisticated military electro-optic systems.

Paragraph 2

4066 Like military medical and religious personnel, permanent or temporary civilian medical and religious personnel are entitled to wear the distinctive emblem. It is worth mentioning in passing that the ICRC tests demonstrated the ineffectiveness of the armlet at a distance:

- the armlet which medical personnel are required to wear on the left arm (First Convention, Article 40) cannot be identified at less than 80 m, if the person wearing it is either squatting or seen from the right, the front or behind;
- the prescribed armlet, marked with a red cross or crescent about 8 cm in diameter, worn on the left arm and seen from the left, is not identifiable at a distance of more than about 80 m;
- if the protected personnel wear an armlet on each arm, they are easier to identify, seen in profile, at a distance of less than 80 m; they are far more difficult to identify from the front and the rear and cannot be distinguished at all at more than 80 m.

4067 Paragraph 2 seeks to remedy the shortcomings of the armlet as a means of identification by proposing, subject to the authorization of the competent authority, that military and civilian medical and religious personnel should be provided with additional means of identification restricted to personnel carrying out their humanitarian duties in the combat zone.

4068 As far as possible, therefore, protected personnel are to be supplied with headgear and clothing bearing the distinctive emblem, thus according official status to the practice which had already become common during the Second World War of using white-painted helmets with the distinctive emblem marked on the back, front, sides and top.

4069 Tabards, coats and other white clothing bearing the distinctive sign are also authorized under the above-mentioned conditions.

4070 The necessarily small size of the distinctive emblem on headgear, tabards and other items of clothing limits the distance at which personnel are identifiable. According to the ICRC's tests, these distances are as follows:

- 1) For a tabard made of ordinary material and bearing the sign back and front: at 80 m, identification easy from the front and the rear, difficult from the side; from 80 to 150 m, visibility is only fair, becoming poor at more than 150 m because the red cross is too small.
- 2) The above comments apply to white outer clothing marked back and front with red crosses.
- 3) The comments made in connection with the armlet apply also to white helmets marked with red crosses; the latter, which measure about 8 cm, become invisible at 80 m. The white helmet is identifiable by its light colour (immaculate surface) up to about 150 m.

- 4071 The tests showed that a red crescent of the same height as the cross is more difficult to identify because it has a smaller red area.
- 4072 The personnel carrying out their humanitarian duties in the combat zone are best protected by the conclusion of truce agreements enabling the Parties to the conflict to care for the wounded and evacuate them together with the dead. Even in these conditions, medical and religious personnel must be provided with the equipment proposed in paragraph 2, in order to avoid any misapprehension.

Ph.E.

Annex I, Chapter III – Distinctive signals

Introduction

4073 For the purposes of the Protocol, the distinctive signals are defined in subparagraph (*m*) of its Article 8 (*Terminology*), as follows:

“‘distinctive signals’ means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.”

4074 It is therefore in this Chapter, which contains Articles 5 to 8, that the distinctive signals are specified. Provision is made for three categories, namely, the light signal, the radio signal and electronic identification.

4075 Article 5 (*Optional use*) supplements the rules relating to the use of distinctive signals set out in paragraphs 2, 5, 6 and 8 of Article 18 (*Identification*) of the Protocol.¹

4076 The problem of the distinctive signals as defined in this Chapter is far from new. With regard to the Geneva Conventions, it arose before and during the Diplomatic Conference of 1949, even though the expression “distinctive signals” was not actually used at that time. Technical signalling and identification systems similar to those recommended in this Chapter were proposed and discussed in 1949, but no specific provisions were produced.

4077 In the military environment which existed at that time, purely visual marking and identification were already proving inadequate in relation to the existing technical means of detecting and locating targets outside the visual range.

Preparations for the Diplomatic Conference

1970-1972

4078 As mentioned earlier, the ICRC called a meeting of experts in 1970 in order to investigate the possibilities of using additional means of identification.²

¹ Cf. commentary Art. 8, sub-para. (*m*), and Art. 18, paras. 2, 5, 6, 8, of the Protocol, *supra*, p. 135 and pp. 226, 230, 232, 234.

² Cf. general introduction to the commentary on Annex I, historical background, *supra*, p. 1149.

- 4079 These consultations were held at ICRC headquarters from 28 to 30 October 1970. Consideration was given to the possibilities of adapting existing technical signalling and identification systems for use by medical aircraft, hospital ships, rescue craft and medical vehicles. The discussions centred round the use of radio, radiocommunications, secondary radar, submarine acoustic signals, light signals and the flashing blue light. It was proposed that the word “Medical” should be used as an international call sign by medical transports as part of their distinctive radio signal and radiocommunications.
- 4080 The views of the experts were submitted to the Conference of Government Experts convened by the ICRC in 1971.³
- 4081 During the general debate held at the beginning of the Conference, several experts stressed how important it was to provide better protection for the wounded, the sick and medical personnel. One expert stated that the Conference should not overlook sea warfare. He advocated regulations for the behaviour of combatants at sea.⁴
- 4082 Participants in the Conference were provided with a detailed list of the issues to be considered, one of which related to protection of the wounded and sick, including matters concerned with the marking and identification of medical transports.⁵ These are set out in Document VII, entitled “Protection of the Wounded and Sick”, of the collection prepared by the ICRC. Document II of the same collection, entitled “Measures Intended to Reinforce the Implementation of the Existing Law”, sets out in Annex XVIII (pp. 040 to 044) a number of measures advocated by the ICRC in connection with the signalling and identification of medical personnel, units and transports, including medical aircraft, hospital ships and rescue craft.
- 4083 As anticipated in the foreword to Document VII, the experts consulted did not draw up any draft rules on signalling and identification:
- “[...] In Part Two, under the heading ‘Safety of Medical Transports’, a field of a highly technical nature, the International Committee of the Red Cross, while not yet prepared to formulate any concrete proposals, presents to the experts the results of its studies to date and the documents it has gathered thanks to the kind co-operation of a number of qualified institutions and persons.”
- 4084 At the close of the Conference, the report of Commission I, set up to examine the protection of wounded and sick, states, in Chapter III and Annex IV, that rules in the field of medical air and sea transport could not yet be formulated. The Commission recommended that a second conference of government experts, which should include qualified technical experts, should cover the whole problem of medical transport and should try to ensure that such transport was equipped with modern means of marking, pinpointing and identification.⁶

³ CE/1b, p. 10; pp. 18-19, para. b). CE/7b, pp. 39-55.

⁴ CE 1971, Report, pp. 22, 26, 28.

⁵ CE/1b, pp. 1, 10, 19 (first para.).

⁶ CE 1971, Report, pp. 28, 32.

- 4085 On that basis, the ICRC prepared a technical memorandum containing a questionnaire and commentary on medical marking and identification, which was submitted in January 1972 to the invited governments and international organizations as part of the documentation prepared by the ICRC for the second session of the Conference of Government Experts. The documentation included the draft Additional Protocol to the four Geneva Conventions of 12 August 1949; Article 27, paragraph 2, contained the following reference to Annex I: “2. Apart from the distinctive emblem, medical aircraft may be fitted with a system of signals and identification, in accordance with the Rules attached as an annex to the present Protocol.” Annex I bore the title “Regulations on the Marking and Identification of Medical Aircraft”. It contained no draft rules.
- 4086 A note indicated that the matter would be studied on the basis of the documentation submitted by the ICRC on the one hand⁷ and a special technical memorandum drawn up by the ICRC on the other.
- 4087 The leading role played by helicopters in medical evacuation during the conflicts which were taking place while the draft Protocols were being prepared explains the priority accorded to provisions which would provide these new “flying ambulances” with better protection. But other means of medical transport were not neglected either: in its Technical Memorandum, the ICRC considered that the supplementary means of signalling and identification

“should be available for use by all means of medical transport by air, land and water, as well as by medical personnel and units protected according to the terms of the Conventions”.⁸

- 4088 The Technical Memorandum was used by Commission I as a basis for its work at the second session of the Conference of Government Experts. The Commission set up a Technical Sub-Commission on the marking and identification of medical transports.⁹ The International Telecommunication Union (ITU), the International Maritime Organization (IMO) and the International Electrotechnical Commission (IEC) were represented at the Conference; they had already taken part in the consultation of experts at ICRC headquarters in 1970. The IEC submitted two studies on the following issues:

- *Radar identification*: airborne equipment for generating identification echoes. This study was discussed at the meeting of experts in 1970. Its author, Mr. Karl Emanuelson, engineer at the Research Institute of Swedish National Defence and the Swedish Board of Civil Aviation, and IEC expert, proposed an original solution involving an automatic air-to-ground and air-to-air radar device which did not interfere with anti-aircraft radar surveillance.¹⁰
- *Specific light signals*: after the meeting of experts in 1970, the IEC submitted the questions relating to light signals to both the International Commission on Illumination (CIE) and its own Technical Committee on Lamps, to find out

⁷ CE 1972, *Basic Texts*, pp. I, III, 12, 29; CE 1972, *Commentary*, Part I, pp. I, III, 54-55, 170.

⁸ CE 1972, *Technical Memorandum*, p. 6, second para.

⁹ CE 1972, *Report*, Vol. I, p. 31, paras. 1.2-1.3; p. 55, Annex III A: composition of the Technical Sub-Commission.

¹⁰ International Electrotechnical Commission, IEC, *Bulletin*, No. 17, July 1971; CE 1972, *Technical Memorandum*, p. 44, Annex II.

whether those bodies had any comments to make. The commentary prepared by IEC Committee E-1.7, “Fundamentals of Visual Signalling”, was submitted to the Technical Sub-Commission in Annex I to the Technical Memorandum.¹¹

- 4089** In order to assess the visual range of the protective red cross and red crescent sign, the ICRC held tests on the Bière (Switzerland) exercise ground on 25 March 1972. In view of the results obtained, the tests were repeated at Versoix (Geneva) on 6 May 1972 for the experts of the Technical Sub-Commission. The demonstration brought out the limited visual range of the distinctive sign and also showed that it was invisible to infrared observation. This point has already been discussed in connection with Articles 3 (*Shape and nature*) and 4 (*Use*) of this Annex.
- 4090** At the meetings of the Technical Sub-Commission, the replies received by the ICRC to the questionnaire in the Technical Memorandum were transmitted to the experts so that they could be taken into account in the discussions. A number of replies did not reach the ICRC until after the end of the Conference.¹²
- 4091** In its report to Commission I, the Technical Sub-Commission pointed out that it had been asked to concentrate on recommending practical means of improving the signalling and identification of medical aircraft. It had also been required to consider the problem of medical transport on land and at sea. It had no specific proposal to make on the latter two aspects but suggested that additional studies be undertaken, on the one hand by a group having expertise in marine and naval matters and, on the other, by specialists in medical transport on land.¹³
- 4092** An example of the type of additional study to be undertaken is given in Annex III E to the Technical Sub-Commission’s report, which proposes international telecommunication requirements for hospital ships and medical aircraft, and also refers to rescue craft.¹⁴

1973

- 4093** Acting on the Technical Sub-Commission’s suggestion, the ICRC invited thirteen maritime States to send specialists to the meeting of experts on the signalling of sea and land medical transports which it proposed to hold at its headquarters from 5 to 9 February 1973.
- 4094** At both sessions of the Conference, several government experts had recommended that a more thorough study be made of the broad issues involved in expanding the Second Convention so as to improve the situation of the wounded, sick and shipwrecked and provide better protection for medical transports, particularly hospital ships.¹⁵ Accordingly, the ICRC suggested that these matters too should be considered at the proposed meeting, together with

¹¹ CE 1972, *Technical Memorandum*, pp. 9, 21-24, 41-43 (Annex I).

¹² CE 1972, *Report*, Vol. I, pp. 56-58, paras. 1-22.

¹³ CE 1972, *Report*, Vol. I, pp. 41-43, paras. 1.66-1.68; p. 53, Annexes I and II; p. 54, para. 2; p. 55, paras. 8-12; pp. 56-60.

¹⁴ CE 1972, *Report*, Vol. I, pp. 59-60, Annex III E.

¹⁵ See CE 1971, *Report*, p. 22, paras. 31-32; p. 28, para. 90. CE 1972, *Report*, Vol. I, p. 32, para. 1.11; p. 209, para. 5.48.

the possible repercussions of the application of new signalling and identification methods on some of the provisions of the Second Convention.¹⁶

4095 This suggestion was well received, but the view was expressed that the vast subject of signalling for sea and land medical transports could not be covered in one week. Nevertheless, the meeting was held as scheduled. The ICRC observed that the experts' views on these matters was required in order to prepare the Additional Protocols and that they would be asked to comment on the broad principles involved, rather than enter into details. Finally, the ICRC suggested that States might wish to send more than one expert to the meeting, so that several groups could work in parallel.

4096 Accordingly, the thirty experts present at the opening of the meeting split up into a technical group and a legal-military group. The latter proposed several amendments, most of them editorial, to the texts prepared at the second session of the Conference of Government Experts. The technical group studied draft Annex I to the Protocol and recommended that the States Parties to the Geneva Conventions should conduct the appropriate studies on the use by hospital ships of the following technical methods of identification:

- submarine acoustic signal;
- light signal (blue light);
- secondary radar signal;
- radio signal with call sign "Medical".

4097 With regard to land medical transports, the experts recommended:

- that the distinctive emblem should be as large as possible and visible from all directions;
- that the clothing and headgear worn by medical personnel responsible for evacuations from the combat zone should be marked with the largest possible distinctive emblem;
- that the light signal (blue light) should be used by medical vehicles;
- that the radio signal with the call sign "Medical" should be used to indicate the position of medical transports as well as for their radiocommunications.

4098 The technical details of these recommendations (proposed frequencies, radio procedures etc.) will be found in the sections of this commentary relating to the articles concerned.

4099 At the Plenipotentiary Conference of the International Telecommunication Union (ITU), held at Malaga-Torremolinos (Spain) from 14 September to 26 October 1973, Switzerland as the depositary of the Geneva Conventions submitted a draft recommendation on radiocommunications for hospital ships and medical aircraft, prepared jointly by the ICRC and the Swiss PTT delegation.

4100 The text was adopted and incorporated in the new International Telecommunication Convention under the title: "Recommendation No. 2 – Use of Radiocommunications for announcing and identifying Hospital Ships and Medical

¹⁶ In this connection, see the comments in *CE 1972, Report*, Vol. I, pp. 59-60, Annexes III D and III E.

Aircraft protected under the Geneva Conventions of 1949”. It reads as follows:

“The Plenipotentiary Conference of the International Telecommunication Union (Malaga-Torremolinos, 1973),

considering

- a) that it is essential to be able to identify and determine the position of hospital ships and medical aircraft during armed conflict so that they may be spared by the armed forces of the parties to the conflict;
- b) that the use of radiocommunications is necessary, along with other established and recognized methods, for identifying and determining the position of hospital ships at sea and medical aircraft in flight during armed conflict;

recommends that the World Administrative Conferences on Maritime and on Aeronautical Radiocommunications consider the technical aspects of the use of certain international frequencies for the radiocommunications and identification of hospital ships and medical aircraft protected under the Geneva Conventions of 1949.”

Work of the Diplomatic Conference

1974

- 4101** In the draft Protocol submitted by the ICRC to the first session of the Diplomatic Conference, Article 18 (*Identification*) refers to the Annex for the rules relating to distinctive signals besides the distinctive emblem. The fact that the consultations held with government experts had failed to produce suitable technical specifications for medical transports at sea prevented the ICRC from including any specific reference to hospital ships and land-based rescue craft in Chapter III of its draft Annex, which nevertheless was not confined to military aircraft, as the 1972 draft had been, since it contained provisions for the use of the light signal (blue light) by both medical aircraft and vehicles. Provision was also made for the use of radio with the call sign “Medical” by medical transports, secondary radar identification of medical aircraft and the use of international codes by medical transports.¹⁷
- 4102** The Technical Sub-Committee set up by Committee II at the first session of the Diplomatic Conference was open-ended and met eight times between 8 and 21 March 1974. Together with its report, it transmitted a new draft Annex to Committee II, which studied and took note of the text, together with the statements made by the ITU and ICAO representatives.¹⁸ The Chairman of Committee II, introducing his Committee’s report in a plenary meeting of the Conference on 29 March 1974, said that it had not been possible to consider the

¹⁷ O.R. I, Part III, pp. 28-32.

¹⁸ O.R. XIII, pp. 23-51, CDDH/49/Rev.1, paras. 1-73 and Appendices I-III.

new version of the Annex due to lack of time and that governments ought to be consulted on the matter. Accordingly, the adoption of the new draft was deferred until the second session of the Diplomatic Conference.¹⁹

- 4103 Pursuant to Recommendation No. 2 of the International Telecommunication Convention referred to above, the ICRC and the Swiss PTT delegation drew up a draft recommendation which was submitted by the Swiss PTT delegation to the World Maritime Administrative Radio Conference held in Geneva from February to June 1974.
- 4104 The text was adopted and inserted in the Radio Regulations under the title “Recommendation No. Mar2-17 relating to the Use of Radiocommunications for Marking, Identifying, Locating, and Communicating with the Means of Transport protected under the Geneva Conventions of 12 August 1949, concerning the Protection of War Victims and any Additional Instruments of those Conventions, as well as for ensuring the Safety of Ships and Aircraft of States not Parties to an Armed Conflict”.
- 4105 The text of the recommendation is annexed to this commentary (*cf. infra*, p. 1197).

1975

- 4106 The ICRC transmitted the texts of Recommendations Nos. 2 and Mar2-17 to the second session of the Diplomatic Conference.²⁰
- 4107 The Technical Sub-Committee did not meet during the second session of the Diplomatic Conference. On 9 April 1975 Committee II approved the Technical Sub-Committee’s report together with the principles embodied in the new version of Annex I.²¹
- 4108 The Sub-Committee was invited to meet again in 1976, at the third session of the Diplomatic Conference, in order to study the text in detail having regard to the comments made by Committee II at the second session.
- 4109 The statement made by the observer for the ITU at the first session of the Conference, which was annexed to the Technical Sub-Committee’s report and included with it in the report of Committee II, Appendix III, drew attention to the fact that:

“The appropriate means for adopting provisions such as those foreseen in the annex to draft Protocol I concerning a ‘MEDICAL’ call and international designation of frequencies, is by decision of an ITU World Administrative Radio Conference competent to deal with the radio services concerned”.²²

¹⁹ O.R. V, p. 226, CDDH/SR.22, para. 5; see *supra*, footnote 2. O.R. XIII, pp. 49-51, CDDH/49/Rev.1, Appendices II and III.

²⁰ O.R. XI, p. 567, CDDH/II/SR.50, para. 12.

²¹ O.R. XIII, pp. 1, 23-51, CDDH/49/Rev.1, Annex II, Appendices I and III. O.R. XIII, pp. 159-163, CDDH/221/Rev.1, paras. 260-265.

²² O.R. XIII, p. 51, CDDH/49/Rev.1, Appendix III, fourth para.

- 4110 With a view to the resumption of the Technical Sub-Committee's work at the third session in 1976, it was a matter of some urgency that all the delegations to the second session of the Diplomatic Conference be made aware of the competency problem and informed about the applicable rules.
- 4111 Accordingly, in order to avoid any confusion that might be caused by the adoption and implementation of texts that were inconsistent with existing international regulations, the Chairman of the International Frequency Registration Board (IFRB), a permanent organ of the International Telecommunication Union, sent a memorandum to the Diplomatic Conference on 3 April 1975, explaining and justifying the need for national co-ordination of the questions concerning radiocommunications referred to in draft Annex I to Protocol I.²³
- 4112 At the second session of the Diplomatic Conference, the Swiss delegation submitted to Committee II a draft resolution prepared as a follow-up to the IFRB's memorandum. Several delegations co-sponsored the draft, which was adopted by Committee II subject to a few amendments.²⁴
- 4113 In the resolution, Committee II requested the Chairman of the Diplomatic Conference to bring to the attention of the invited governments:
- the need for national co-ordination of the questions concerning radiocommunications raised in Annex I;
 - the need for delegations to include radiocommunication experts, so that the representatives of national telecommunication administrations could participate in the Technical Sub-Committee's work at the third session of the Conference.

In fact, the Technical Sub-Committee was chaired for the entire duration of the Conference by the Swiss PTT representative of the Swiss delegation to the Conference.

1976

- 4114 The Technical Sub-Committee held ten meetings at the third session of the Diplomatic Conference. Its programme of work included:
- revision of the draft Annex it had prepared at the first session of the Conference;²⁵
 - consideration of the new amendments submitted to the Technical Sub-Committee;

²³ *O.R.* XI, pp. 567-568, CDDH/II/SR.50, paras. 13-16; p. 601, CDDH/II/SR.53, paras. 25-28. *O.R.* XIII, pp. 159-162, CDDH/221/Rev.1, paras. 260-265.

²⁴ *O.R.* XIII, pp. 160-161, CDDH/221/Rev.1, paras. 262-263; pp. 161-162, para. 264; pp. 162-163. *O.R.* XI, pp. 598-601, CDDH/II/SR.53, paras. 8-28; pp. 614-617, CDDH/II/SR.54, paras. 69-85; pp. 619-620, CDDH/II/SR.55, paras. 1-12. *O.R.* V, p. 382, CDDH/SR.33, para. 13.

²⁵ *O.R.* XIII, pp. 23-51, CDDH/49/Rev.1, Annex II and Appendices I to III.

- follow-up of the resolution adopted at the second session by Committee II, concerning national co-ordination of the questions relating to radiocommunications raised in the Annex;
- preparation of draft resolutions relating to Chapter III of the Annex, with a view to the forthcoming World Administrative Radio Conference (WARC) to be held in Geneva in 1979. The agenda of WARC-79 was to be adopted by the Administrative Council of the ITU sometime between 14 June and 2 July 1976, and steps had to be taken to ensure that the radiocommunication questions raised in Annex I were not omitted from it. Accordingly, the resolution adopted by the Diplomatic Conference would have to reach both governments and the ITU in good time.

- 4115 On 11 May 1976, therefore, the Technical Sub-Committee requested the Chairman of Committee II to request the Chairman of the Conference to forward Resolution CDDH/II/363 to the Secretary-General of the ITU for information as soon as it had been adopted by Committee II but before its adoption by the Conference.²⁶ The resolution, entitled “Draft resolution concerning the use of radiocommunications for announcing and identifying medical transports protected by the Geneva Conventions of 1949 or any additional instrument”, was adopted by Committee II by consensus.²⁷
- 4116 On 16 June the Secretary-General of the Diplomatic Conference communicated to governments, the ITU and participants in the Conference the text of the above-mentioned resolution together with Articles 7, 8 and 9 of the Regulations concerning identification approved by Committee II (see Document CDDH/II/389).
- 4117 The Swiss PTT Directorate-General had transmitted the resolution to the IFRB on 28 May, with the request that the text be communicated by circular-letter to all national administrations members of the ITU. This was done on 8 June 1976. Thus, the resolution reached those concerned in time for the ITU discussions concerning the agenda of the 1979 World Administrative Radio Conference (WARC-79).
- 4118 The previous WARC had been held in 1959, the year in which the draft regulations prepared in response to Resolutions 6 and 7 of the Diplomatic Conference of 1949 had been submitted to the ITU.²⁸ In view of the time which had elapsed – ten years from 1949 to 1959 and twenty years from 1959 to 1979 – there was every reason for the Technical Sub-Committee’s impatience to submit the question of medical radiocommunications to the ITU.
- 4119 In his letter of 23 September 1976 to ICAO and IMCO (IMO), the Secretary-General of the Diplomatic Conference explained that the resolutions in question (CDDH/II/392 for ICAO and CDDH/II/390 for IMCO) had been forwarded to those organizations in advance, on 16 June 1976, for study and comment prior to

²⁶ *O.R.* XII, pp. 166-174, CDDH/II/SR.70, paras. 8-62. *O.R.* V, p. 382, CDDH/SR.33, para. 13. *O.R.* XIII, p. 268, CDDH/235/Rev.1, para. 57 (titles of draft Resolutions).

²⁷ *O.R.* XII, pp. 166-167, CDDH/II/SR.70, paras. 8-13. *O.R.* XIII, p. 268, CDDH/235/Rev.1, paras. 57-58; p. 322, Annex III, para. 8.

²⁸ See *supra*, p. 1146.

the last session of the Conference in 1977. The two organizations were informed that the resolutions would be communicated to them officially as soon as they had been adopted by the plenary meeting of the Diplomatic Conference, at the fourth session.

4120 The titles of the two draft resolutions were:

- CDDH/II/392 (CDDH/II/364/Rev.1): “Draft resolution concerning the use of certain electronic and visual means of identification by medical aircraft protected by the Geneva Conventions of 1949 or any additional instrument”;
- CDDH/II/390 (CDDH/II/366/Rev.1): “Draft resolution concerning the use of visual signalling for identification of medical transport protected by the Geneva Conventions of 1949 or any additional instrument”.

4121 The new draft Annex, prepared in 1976 on the basis of the 1974 draft and the amendments submitted, did not yet contain the final version of the regulations concerning the identification and marking of medical personnel, units and transports and of civil defence personnel, *matériel* and transports. In its report to Committee II of 14 May 1976, the Technical Sub-Committee observed that the final adoption of Chapter V (*Civil defence*) would depend on the decisions taken in respect of Article 59 of the draft Protocol. Chapter VI entitled “Periodical revision”, was also being submitted subject to consideration at a later date, since it would have been to be brought in line with other related articles of Protocol I. Together with the new draft Annex, the Technical Sub-Committee submitted the three draft resolutions referred to above and dealing, respectively, with radiocommunications (intended for the ITU), electronic and visual means of identification (intended for ICAO) and visual signals (intended for IMCO (IMO)).²⁹

4122 In the latest version of the Annex, as in its previous versions, the provisions designed to improve signalling and identification of medical aircraft were not accompanied by similar provisions for either medical transports at sea (hospital ships and rescue craft) or medical vehicles. Nevertheless, paragraph 3 of Article 6 (*Light signal*) mentioned the use of the flashing blue light by medical ships and craft, subject to agreement between the Parties to the conflict. The same applied to identification by radar as governed by Article 8 (*Electronic identification*).

4123 Towards the close of the Technical Sub-Committee’s work at the first session of the Conference and during the second session in 1975, several experts had suggested that improvements could be made in the structure of the Annex, for example by dividing Chapter III into three parts relating, respectively, to land, air and sea. The ICRC had rearranged the text along those lines, without making any changes in the substance of the articles discussed at the first session. The “maritime signalling” section contemplated a submarine acoustic identification signal.³⁰

²⁹ O.R. XIII, pp. 245, 247, 266-269, 281, 294-301, 321, CDDH/235/Rev.2, paras. 50-66, Annexes I and III.

³⁰ O.R. XI, p. 569, CDDH/II/SR.50, para. 27.

- 4124 This draft new layout of the Annex was not accepted by the Technical Sub-Committee when the subject was raised early in the 1976 session, for its study would have been time-consuming and subject to deadlines, a course that would have been incompatible with the task assigned to the Technical Sub-Committee.
- 4125 However, medical transports at sea were not excluded from the discussions, particularly in respect of Articles 21 to 25 of the draft Protocol, which were considered at the second session.³¹
- 4126 Attention was drawn to the importance of submarine acoustic signalling and identification when the report of the Technical Sub-Committee was considered.³²
- 4127 It had been suggested by delegates at the second session that further tests should be made during the third session concerning the visibility of the distinctive emblem and the blue light, through observation and infrared photography.³³
- 4128 These tests took place on the evening of 29 April 1976 at Versoix (Geneva), where the ICRC had positioned boards marked with the distinctive emblem and ambulances equipped with their usual blue light. More than 40 experts thus had an opportunity to make observations either with the naked eye or using an infrared device. The results of the tests are commented on under Chapter II (*The distinctive emblem*), Articles 3 (*Shape and nature*) and 4 (*Use*), of Annex I.

1977

- 4129 The Technical Sub-Committee was not scheduled to meet during the fourth and last session of the Diplomatic Conference. As a result of the discussions held by Committee II and its Drafting Committee at that session, some editorial amendments were made to the text of the draft Annex as well as to the resolution addressed to the ITU. Since the latter organization had decided to place the matter on the agenda of WARC-79, an appropriate reference had to be included in the final text of the resolution to be submitted to the plenary meeting of the Diplomatic Conference, together with the texts of the resolutions addressed to ICAO and IMCO (IMO), for adoption and official communication to those organizations.³⁴
- 4130 Through its observer at the fourth session of the Diplomatic Conference, IMCO (IMO) informed Committee II that the resolution on the use of visual signalling had been informally submitted for information to the Sub-Committee on Safety of Navigation of the Maritime Safety Committee of IMCO (IMO). The Secretary-General of IMCO looked forward to formally receiving the resolution upon its adoption by the Diplomatic Conference, so that member States could be invited to take appropriate action.³⁵

³¹ *Ibid.*, pp. 551-561, CDDH/II/SR.49, paras. 2-68.

³² *Ibid.*, p. 569, CDDH/II/SR.50, para. 26; p. 602, CDDH/II/SR.53, paras. 29, 30-32.

³³ *Ibid.*, p. 602, CDDH/II/SR.53, para. 33.

³⁴ O.R. XIII, pp. 354-381, CDDH/406/Rev.1, paras. 6, 7, 8, 13, 20, 60, 67, 81, 83, 85; p. 387, Annex, note; p. 406 (Art. 59, para. 6); pp. 414-417 (Technical Annex); p. 431, CDDH/II/439/Rev.1 (Art. 59, paras. 2, 6); p. 433 (Art. 59); pp. 431-440.

³⁵ O.R. XII, p. 489, CDDH/II/SR.101, para. 30.

- 4131** The follow-up action taken by IMO in respect of Resolution 18 resulted in the adoption of a new Chapter XIV of the International Code of Signals, which came into effect on 1 January 1986.

Ph.E.

Document annexed (*cf. supra*, p. 1191)

RADIO REGULATIONS

Edition of 1976
Volume 2
(extracts)

RECOMMENDATION No. Mar2 – 17

Relating to the Use of Radiocommunications for Marking, Identifying, Locating, and Communicating with the Means of Transport protected under the Geneva Conventions of 12 August 1949, concerning the Protection of War Victims and any Additional Instruments of those Conventions, as well as for ensuring the Safety of Ships and Aircraft of States not Parties to an Armed Conflict

The World Maritime Administrative Radio Conference, Geneva, 1974,

considering

- a)* that it is desirable for the safety of human life to be able to identify and determine the position of the means of transport protected under the Geneva Conventions of 12 August 1949 and any additional instrument of those Conventions;
- b)* that several international Conferences have adopted resolutions on this question, notably the 1949 Geneva Diplomatic Conference for the elaboration of international Conventions for the protection of war victims (Resolution 6) and the International Red Cross Conferences of 1930 (Resolution XVII), 1934 (Resolution XXXII), 1965 (Resolution XXX), 1969 (Resolution XXVII) and 1973 (Resolution XIII);
- c)* that it is desirable to be able to identify and determine the position of neutral ships and aircraft in times of armed conflict;
- d)* that it is for the I.T.U. to fix basic radio regulatory provisions;
- e)* that the Administrative Radio Conference, Geneva, 1959, adopted Recommendation No. 34 relating to the use of radiotelegraph and radiotelephone links by Red Cross organizations;
- f)* that the Plenipotentiary Conference of the International Telecommunication Union, Malaga-Torremolinos, 1973, adopted Recommendation No. 2 relating to the use of radiocommunications for announcing and identifying hospital ships and medical aircraft protected under the Geneva Conventions of 1949, referring technical questions to the competent Administrative Conferences;
- g)* that, to ensure the necessary close coordination, it is desirable to refer the study of problems affecting several services simultaneously to a general World Administrative Radio Conference;

recommends

that the next general World Administrative Radio Conference, planned for 1979, study the technical and administrative aspects of the use of radiocommunications for marking, identifying, locating and communicating with the means of transport protected under the 1949 Geneva Conventions and any additional instruments of those Conventions, and for ensuring the safety of the ships and aircraft of States not parties to an armed conflict.

Protocol I

Annex I, Article 5 – Optional use

1. Subject to the provisions of Article 6 of these Regulations, the signals specified in this Chapter for exclusive use by medical units and transports shall not be used for any other purpose. The use of all signals referred to in this Chapter is optional.
2. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem, may use the distinctive signals authorized in this Chapter. The best method of effective identification and recognition of medical aircraft is, however, the use of a visual signal, either the distinctive emblem or the light signal specified in Article 6, or both, supplemented by the other signals referred to in articles 7 and 8 of these Regulations.

Documentary references

Official Records

O.R. I, Part I, P. 175; Part III, p. 29 (Art. 7). *O.R.* III, p. 372 (Art. 6), p. 373 (Art. 5); p. 374; pp. 385-386. *O.R.* VII, p. 52, CDDH/SR.48, Art. 5. *O.R.* XI, p. 95, CDDH/II/SR.12, para. 15; p. 566, CDDH/II/SR.50, para. 6. *O.R.* XII, p. 168, CDDH/II/SR.70, paras. 17-19. *O.R.* XIII, p. 25, CDDH/49/Rev.1, para. 21 (Chapter III *in fine*); p. 26, para. 24; p. 27, para. 28; p. 42 (Art. 6); pp. 266-267, CDDH/235/Rev.1, para. 54; p. 268, para. 59; p. 299 (Art. 5); p. 321, *id.*, Annex III, paras. 2-3.

Other references

CE 1972, *Report*, Vol. I, pp. 41-42, para. 1.66; p. 54, para. 5. *Commentary Drafts*, p. 119 (Art. 7).

Commentary**General remarks**

- 4132** The optional use of the distinctive signals described in Articles 6 (*Light signal*), 7 (*Radio signal*) and 8 (*Electronic identification*) of Annex I is established in paragraph 5 of Article 18 (*Identification*) of the Protocol, according to which the Parties to the conflict may authorize the use of such signals, while remaining equally free not to grant such authorization.¹ Furthermore, neither paragraph 5 of Article 18 (*Identification*) of the Protocol nor the present Article 5 calls for reciprocity in the use of distinctive signals. However, paragraphs 1 and 2 of Article 18 (*Identification*) referred to above calls upon the Parties to the conflict to endeavour to ensure that medical units and transports are identifiable by means of the distinctive emblem and distinctive signals.
- 4133** Several hypothetical situations are to be envisaged for the use of the distinctive signals, depending on military requirements, the equipment available to the adversary and other factors:
- 1) The use of distinctive signals is authorized by all the Parties to the conflict. Such authorization may be based on the availability to all the Parties of compatible means of identification for the use of radiocommunications, radar and the flashing blue light. Furthermore, the desire to apply the provisions of the Protocol and the Conventions contributes to the protection of medical units and transports and is therefore a decisive factor.
 - 2) None of the Parties to the conflict authorizes the distinctive signals. Such prohibition may be permanent, temporary, general or confined to a specific region. It will probably be based on military necessity. A permanent or temporary absence or shortage of certain items of radio, radar or light equipment may be one of the reasons for the prohibition; there may be other reasons too.
 - 3) Distinctive signals are authorized by one of the Parties to the conflict whereas the other Party, while recognizing and accepting that fact, decides not to use them itself. The difference in approach may be a question of tactics or expediency.
 - 4) Distinctive signals are authorized by one of the Parties but are not accepted by the other Party as it cannot use or intercept them. There may be different reasons for such opposition, for instance, one of the Parties may not have compatible equipment for receiving or sending distinctive signals.
- 4134** These four hypotheses concerning the optional use of distinctive signals apply to civilian or military, permanent or temporary medical units and transports entitled to use the distinctive emblem and signals. The principal means of transport concerned are medical aircraft, in particular medical helicopters, as well as hospital ships and land-based rescue craft.

¹ Cf. commentary Art. 18 of the Protocol, *supra*, p. 221.

- 4135 Both the Conventions and the Protocol make provision for the notification of flights by medical aircraft,² the use of distinctive signals must be communicated to the adversary at the very latest when such notification is made. Nevertheless, it is highly recommendable that the intention to use such signals be communicated as early as possible to the adverse Party, which should acknowledge such communication and confirm its own intentions with regard to their use. Chapter IV (*Communications*) of the Regulations concerning identification meets communication requirements regarding implementation of the provisions relating to the notification of flights by medical aircraft.
- 4136 The same holds good for the use of distinctive signals by hospital ships and rescue craft. Over and above the related provisions of Articles 6 (*Light signal*) and 8 (*Electronic identification*) of Annex I, the eighth paragraph of Article 43 of the Second Convention authorizes such ships and craft, subject to agreement between the Parties, to use the most modern methods available to facilitate their identification. Such agreements should be concluded at the time of notification under Articles 22 and 27 of the Second Convention.
- 4137 The use of distinctive signals should also be notified to neutral or other States not Parties to the conflict³ whose territory might be overflowed by medical aircraft, in accordance with Article 31 (*Neutral or other States not Parties to the conflict*) of the Protocol.
- 4138 All the above comments apply also to medical helicopters based on board hospital ships, notifications of their flights being transmitted by the latter.
- 4139 The Parties to the conflict may delegate their power to authorize the use of distinctive signals – flashing blue light, radio, radar – to commanding officers on land or at sea, so that these signals may be used by the officers concerned and their personnel to identify medical aircraft, including helicopters, as well as hospital ships and rescue craft. Accordingly, commanding officers should have the means of instructing military personnel affected by distinctive signals and the safety of medical units and transports in the various hypotheses contemplated, so that medical transports enjoy respect and protection in all cases, as required by the Conventions and the Protocol. To this end, Chapter IV (*Communications*) of Annex I contains provisions regarding the communications of medical units and transports – use of international codes, other means of communication, flight plans – which may be particularly valuable in cases where there has not been unanimous consent with regard to the use of distinctive signals.

Paragraph 1

- 4140 The rule in this paragraph which states that, subject to the provisions of Article 6 (*Light signal*), paragraph 3, of Annex I, the distinctive signals are for exclusive

² Cf. commentary Arts. 25, 26, 27 and 29 of the Protocol, *supra*, respectively p. 283, p. 287, p. 293 and p. 307; First Convention, Art. 36, first para.; Second Convention, Art. 39, first para.; introduction to Chapter IV, *infra*, p. 1257.

³ Hereinafter “neutral States”; on the expression “neutral or other States not Parties to the conflict” cf. commentary Art. 2, sub-para. (c), of the Protocol, *supra*, p. 61.

use by medical units and transports, is also set out in Article 18 (*Identification*), paragraph 6, of the Protocol.⁴

- 4141** Since the distinctive signals are means of identification which supplement the visual distinctive emblem, like the latter they are set aside for the exclusive use of medical units and transports. Under Article 38 (*Recognized emblems*) of the Protocol, it is prohibited to make improper use of the distinctive emblem or of distinctive signals.
- 4142** It seems unlikely that improper use would be made of the distinctive signals, for they make it easier to locate and follow the movements of the transports by which they are used. Radiocommunications enable contact to be established with transports transmitting distinctive signals; Article 11 (*Other means of communication*) of Annex I makes provision for other means of communication and Article 13 (*Signals and procedures for the interception of medical aircraft*) sets out the procedure to be followed for intercepting medical aircraft. By removing all incentive to use the distinctive signals improperly, these measures should be conducive to ensuring that they are used exclusively by medical units and transports.
- 4143** The exception constituted by Article 6 (*Light signal*) of Annex I relates only to the use of the flashing blue light. This provision takes into account the widespread use of this light signal as a priority road traffic signal which existed before the adoption of the Protocol, in particular as a means of securing right of way for civilian or military ambulances in peacetime. This point will be further discussed in the commentary on Article 6 (*Light signal*) of Annex I.
- 4144** In making the use of distinctive signals optional, account has been taken of the related material requirements, such as the availability of the technical equipment and skilled operators required for radio and radar systems as well as for the electrical installation of the flashing blue light. The Parties to the conflict may not possess the required material resources or skilled personnel and may therefore be in one of the hypothetical situations described above under the heading “General remarks”.
- 4145** It was in order to cater for such situations that the “standards, practices and procedures” recommended for the signalling and identification of medical aircraft in the report of the Technical Sub-Commission of the 1972 Conference of Government Experts take the form of recommendations rather than compulsory rules.⁵

Paragraph 2

- 4146** Temporary medical aircraft are defined in sub-paragraphs (g), (j) and (k) of Article 8 (*Terminology*) of the Protocol.⁶ Generally speaking, the number of permanent medical aircraft in the armed forces is very small, since they can be

⁴ Cf. commentary Art. 18 of the Protocol, *supra*, p. 232.

⁵ CE 1972, Report, Vol. I, pp. 41-42, para. 1.66; pp. 53-54, Annex II; p. 54, para. 5.

⁶ Cf. commentary Art. 8, sub-paras. (g), (j), (k) of the Protocol, *supra*, pp. 130-133.

used for no other purpose and would therefore be grounded for much of the time. When the need arises, therefore, armed or unarmed fighter helicopters may be used to evacuate the wounded, who may also be transported in non-medical aircraft from first-aid centres to hospitals in the rear.⁷ Thus, certain military aircraft used to transport military equipment or parachutists are also fitted out to receive stretchers and to transport wounded in the seated or supine position.

4147 Such aircraft are entitled to the protection afforded to medical transports and may therefore display the distinctive emblem and use distinctive signals for the duration of such transport when they transport only wounded and carry no arms other than those allowed under Article 28 (*Restrictions on operations of medical aircraft*), paragraph 3, of the Protocol.

4148 Both supplies – paint or self-adhesive materials – and time are required to mark a helicopter or other aircraft with the distinctive emblem.⁸ Some of the members of the Technical Sub-Committee considered that it would be simpler and quicker to replace the red covers of the aircraft's anti-collision lights with blue covers, thus fitting temporary medical aircraft with the distinctive light signal. In the view of these experts, the flashing blue light would entitle the aircraft to use the other distinctive signals, namely, the radar identification code and the radio signal.⁹ We shall revert to this matter under Articles 6 to 8 of Annex I.

4149 Paragraph 5 of Article 18 (*Identification*) of the Protocol contains the same rule as the paragraph now under consideration, which authorizes temporary medical aircraft to use only the distinctive signals if, either for lack of time or because of the condition of their fuselage or wing areas, they cannot be marked with the distinctive emblem. There seems to be no reason why the aircraft could not be at least rapidly marked with the emblem, using red and white chalk covered, if necessary, with a waterproof transparent spray, while the anti-collision light covers are being changed or the radar identification code displayed. Red and white spray paint would also make for rapid marking but would be difficult to remove once the temporary medical aircraft had completed its humanitarian mission.

4150 The easiest and quickest distinctive signal for a temporary medical aircraft to use is without doubt the radar identification code, in so far as such a code has been allocated to the aeronautical region affected by the conflict; this will probably have been done if permanent medical aircraft are operating in the region concerned. This issue is discussed in the commentary on Article 8 (*Electronic identification*). In addition to the display of a radar identification code, the use of radiocommunications by temporary medical aircraft in accordance with Article 7 (*Radio signal*) of Annex I does not in principle require any special equipment, since all aircraft carrying radio equipment can use one or other of the "urgency" frequencies contemplated in Section II (Medical Transports) of Article 40 of the ITU Radio Regulations. That section was added to the Regulations as a result of Resolution 19 addressed by the Diplomatic Conference to the ITU.

⁷ O.R. XI, p. 168, CDDH/II/SR.18, para. 19.

⁸ Ph. Eberlin, "The Identification of Medical Aircraft in Periods of Armed Conflict", *IRRC*, July-August 1982, p. 202.

⁹ O.R. III, p. 386, CDDH/II/329, para. 2.

- 4151 Medical aircraft are most effectively marked by means of a visual signal within the meaning of this paragraph. However, modern air warfare or anti-aircraft defence methods enable a fighter plane to open fire on another aircraft long before such signs can be distinguished.
- 4152 Accordingly, the practical aspects of using distinctive signals should be studied in advance and the necessary arrangements made in good time, so that all these signals may be brought into use promptly in the event of recourse to temporary medical aircraft.

Ph. E.

Protocol I

Annex I, Article 6 – Light signal

1. The light signal, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended blue colour is obtained by using, as trichromatic co-ordinates:

green boundary	$y = 0.065 + 0.805x$
white boundary	$y = 0.400 - x$
purple boundary	$x = 0.133 + 0.600y$

The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.

2. Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible.
3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles and ships and craft, the use of such signals for other vehicles or ships is not prohibited.

Documentary references

Official Records

O.R. I, Part I, p. 176, p. 205 (Res. 18); Part II, p. 22, CDDH/243 (Res. 13 (III)); p. 40, CDDH/446 (Res. 18). Part III, p. 29 (Art. 8). *O.R.* III, pp. 373-374, 387. *O.R.* VII, p. 52, CDDH/SR.48 (Art. 6); p. 171, CDDH/SR.54, para. 44. *O.R.* XI, p. 90, CDDH/II/SR.11, para. 61; p. 569, CDDH/II/SR.50, paras. 24-25; p. 569, para. 27; p. 571, para. 42. *O.R.* XII, p. 168, CDDH/II/SR.70, paras. 17-18; p. 169, para. 28. *O.R.* XIII, p. 23, CDDH/49/Rev.1, para. 4; p. 25, para. 21; p. 26, para. 24; pp. 27-28, paras. 28-33; p. 34, paras. 67-68; p. 42 (Art. 7); p. 49, Appendix II and proposal; p. 159, CDDH/221/Rev.1, para. 260; p. 266, CDDH/235/Rev.1, para. 53; p. 268, paras. 57 (Resolution CDDH/II/364/Rev.1), 59; p. 299 (Art. 6); pp. 321-322, *id.*, Annex III.

Other references

CE/7b, p. 46, para. 3; pp. 50-52; p. 60 (Art. 4); pp. 63-64. *CE 1972, Report*, Vol. I, p. 41, para. 1.66; p. 53, para. 2.1.2; p. 54, para. 6(b), p. 55, para. 8; p. 58,

paras. 2.1.6, 3.1; p. 59, Annex III D. *CE 1972, Technical Memorandum*, pp. 21-24, pp. 41-43 (Annex I). *Commentary Drafts*, pp. 119-120 (Art. 8).

Commentary

General remarks

- 4153** Under Article 4, paragraph 2, of the draft regulations relating to medical transport by air in time of armed conflict drawn up in 1965 by the Commission médico-juridique de Monaco, medical aircraft were to be provided “both by day and by night [...] with a fixed system of luminous visual signals”.¹ In this connection, the technical experts consulted by the ICRC late in October 1970 proposed a flashing blue light as the distinctive light signal for medical aircraft. The signal was to be used both by day and by night.
- 4154** As the colour white, red and green were used for navigation lights by all aircraft and vessels, in accordance with international air traffic and maritime navigation regulations, only the colour blue was still available for the distinctive light signal to be used by medical aircraft and other medical transports.
- 4155** The chromatic limits of the blue light, which are set out in a publication of the International Commission on Illumination (CIE)² were communicated to the ICRC in January 1971 by the experts of the International Electrotechnical Commission (IEC) who took part in the 1970 consultation, in a commentary by the competent IEC Committee co-ordinated with the CIE Airborne Lighting Committee.³
- 4156** Flashing or winking light signals are easier to see than fixed lights of equal intensity, as day-to-day experience with road traffic shows. The flashing blue light is a recognized priority signal, set aside under national legislation in many countries as well as in international regulations⁴ for use by ambulances (this term covers both civilian and military ambulances), police vehicles, fire brigade vehicles and possibly other special vehicles.
- 4157** The blue light has also been used for some time by certain harbour, river or lake police craft. However, under the International Code of Signals which entered into force on 1 January 1986, it is allocated to vessels engaged in medical

¹ *CE/7b*, pp. 60-61, Art. 4; pp. 50-52. Cf. E. Evrard, *op. cit.*

² CIE, publication No. 2.2 (TC-1.6), 1975, “Colours of Light Signals”, pp. 1-28; p. 24, Fig. 1; p. 28, Fig. 5.

³ CIE, Committee E-1.7, Fundamentals of Visual Signalling, in *CE 1972, Technical Memorandum*, p. 41, Annex I.

⁴ United Nations Economic and Social Council, Economic Commission for Europe, Inland Transport Committee, Working Party on Road Transport, consolidated resolution on road traffic (R.E.I.), para. 2.3, Marking of priority vehicles, TRANS/SC 1/294/Rev.3/Amend.1 (1981); *id.*, Group of Experts on the Construction of Vehicles, Regulation “Uniform provisions concerning the approval of warning lamps for motor vehicles”, TRANS/SC 1/WP 29/12, para. 24 and TRANS/SC 1/WP 29/79, para. 82 (entry into force in 1986).

operations, namely, the hospital ships and medical craft protected by the Conventions and the Protocols, as well as rescue craft.⁵

- 4158** These widespread and long-standing uses of the flashing blue light were not overlooked by the members of the Technical Sub-Commission at the Conference of Government Experts in 1972.⁶ Nevertheless, it was proposed that this light should be used as the distinctive signal of medical aircraft, since it was not already being used for air navigation. The colour blue is used to mark airfield taxiways, but the lights in question are fixed luminous beacons. As far as other means of medical transport are concerned, paragraph 3 of this article leaves the possibility open of reserving the use of this light signal for the identification of such transports in time of armed conflict, by day and by night. Thus Article 6 of Annex I is in line with Article 18 (*Identification*) of the Protocol, which is concerned with medical transports in general.

Paragraph 1

- 4159** In draft Annex I, Article 8, paragraph 1, the flashing blue light was defined in terms of the frequency of its flashes, namely, between forty and one hundred per minute. Its exclusive use by medical aircraft was not specified.
- 4160** The ICRC's draft was amended by the Technical Sub-Committee at the first session in 1974; Article 8 became Article 7 and the new text of paragraph 1 referred to the use of the blue light by medical aircraft subject to the provisions of new paragraph 3, which was concerned with the special agreement that might be concluded between the Parties to the conflict regarding the use of the same blue light by other types of medical transport.
- 4161** Paragraph 1 was recast in its final form by the Technical Sub-Committee at the second session in 1976, when the flashing rate of the blue light was altered and the reference to paragraph 3 deleted.
- 4162** Under Article 18 (*Identification*), paragraph 8, of the Protocol, the use of distinctive signals is subject to the same supervision as that of the distinctive emblem. Therefore, Article 44 of the First Convention is applicable to distinctive signals, including the flashing blue light used by ambulances or medical helicopters. If authorized by the competent authority, therefore, the flashing blue light could be used by aircraft in peacetime in accordance with Article 44, subject to the relevant ICAO regulations.⁷
- 4163** The trichromatic co-ordinates given in this paragraph define the boundaries of the blue colour. These boundaries are straight lines separating the blue zone from the other colour zones on the CIE's chromatic diagram, which represents a triangular surface showing the recommended boundaries of the colours used for light signals – red, orange, yellow, green, blue, violet – arranged in contiguous

⁵ IMO, *International Code of Signals*, London, 1985, Chapter XIV.

⁶ CE 1972, *Report*, Vol. I, p. 55, para. 11; p. 57, Section VI.

⁷ Cf. commentary Art. 18, para. 7, Protocol, *supra*, p. 233, and ICAO, Doc. 9051-AN/896, *Airworthiness Technical Manual*, Part III, Section 8.

zones round a white centre (*cf.* document annexed No. 1, p. 1212);⁸ document annexed No. 2 shows the recommended boundaries for the blue and violet signals. For technical reasons, the boundaries on the colour diagram reproduced below as an illustration are only approximate (*cf.* documents annexed Nos. 2 and 3, p. 1213 and p. 1214).

4164 The recommended flashing rate – between sixty and one hundred flashes per minute – is the same as that laid down by ICAO for the anti-collision lights of civilian aircraft. Consequently, luminous signalling by means of the flashing blue light looks very simple in theory. A medical aircraft could seemingly be marked very quickly with a blue light by replacing the red glass covers of the anti-collision lights by blue glass or plastic covers. In practice, however, the operation is more complex, as has been demonstrated by tests conducted using ICRC aircraft. The main difficulties encountered are as follows:

- a) The rotating anti-collision light fittings in civilian and military aircraft are not standardized, varying in size from one plane to another depending on the manufacturer.
- b) The specially manufactured heat-resistant blue glass or plastic domes are not universally available; they have to be ordered and checked for heat-resistance, in view of the large amount of heat energy retained by the colour blue.
- c) The installation on a medical aircraft of blue lights of the same type as those used by road vehicles raises problems of electricity supply and compliance with aeronautical standards. A light of this type fitted under the fuselage of a Piper Cherokee Six aircraft protruded too much and was smashed by stones and lumps of earth when taking off from an improvised runway.
- d) The ICRC has also tested blue lights of the “strobe” type, that is, lights in which electricity is discharged in a gas. Lights of this type fitted to ICRC aircraft were shown to have the following disadvantages:
 - the intensity of the flashes produced may interfere with the piloting of the aircraft or helicopter (reflection on the rotor blades); electromagnetic interference makes it necessary to shield navigational and communication equipment;
 - beyond a few hundred metres, the strobe light loses its blue colour and is seen from the ground as white. Seen from the front, a medical aircraft emitting rapid flashes of blue-white light may look like a military aircraft machine-gunning the ground, the flashing light resembling gunfire. An ICRC Piper Cherokee actually experienced this difficulty; it was fired on by guerrilla fighters who explained later that they had been misled by the flashing strobe light.

4165 A solution therefore has to be worked out with the manufacturers of aeronautical equipment, one of whom has expressed misgivings about the intensity required to distinguish the flashing blue light used by medical aircraft from the flashing blue-white strobe lights more and more commonly used as

⁸ CIE publication No. 2.2 (TC-1.6), 1975, “Colours of Light Signals”, is trilingual (English, French and German); the colours themselves are not reproduced in it, *cf.* documents annexed.

anti-collision lights in addition to the red rotating lights. He claimed that rather more than 1000 watts would be required to produce effective intensity of 100 candelas on a quasi-horizontal plane. Such highly-powered electric flashes raise problems for the aircraft's power supply system.

4166 The ICRC has established regular contacts with both ICAO and manufacturers regarding the technical problems caused by the flashing blue light. ICAO has requested that the following parameters be specified:

- the required intensity of the flashing blue light;
- the required visual range, weather conditions, background;
- the required beamwidth and intensity in the angles of vision above and below the horizontal plane.

4167 The flashing blue light should be tested again using special blue glass covers, and the results communicated to ICAO.

4168 Medical helicopters based on board hospital ships at sea have to be identifiable from greater distances than on land. Experiments at sea have demonstrated that an airborne medical helicopter showing all its navigation and landing lights is visible from a long way off. Here too, studies should continue to be conducted, particularly by the maritime States concerned.⁹ The visual or luminous range of the light, expressed in nautical miles as a function of its intensity in terms of candelas, may be calculated using the formula in Annex I to the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 1972).¹⁰

Paragraph 2

4169 According to the type of medical aircraft used, one or more blue lights should be fitted so that the light signal is visible in every direction. If placed on the top of the tail fin, the signal may be omnidirectional but it will not be easily accessible on a large aircraft. In the case of a small aircraft or helicopter, a flashing blue light should be placed both underneath and atop the fuselage. These lights must not interfere with the piloting of the aircraft, either by day or by night.

4170 Additional lights can only be installed on aircraft by firms specializing in aeronautical maintenance (supplies, positioning, power supply, aircraft structure, light casing, wiring, switches).

4171 In the case of permanent military medical aircraft, this operation should be carried out in peacetime unless it is possible to replace the red cover by a blue one in the event of an emergency. In all cases, steps must be taken to ensure that the blue light can be seen at maximum intensity in all directions, a requirement which does not apply to ordinary anti-collision lights meeting ICAO specifi-

⁹ Cf. Ph. Eberlin, "The Identification of Medical Aircraft...", *op. cit.*; *id.*, "Identification of Hospital Ships...", *op. cit.*, pp. 321-323.

¹⁰ IMO, *International Conference on Revision of the International Regulations for Preventing Collisions at Sea, 1972*, London, 1974 ed., reprinted in 1983. In this connection, see also the IEC communication in Annex I to CE 1972, *Technical Memorandum*, p. 41.

cations. Anti-collision lights have to be visible in all directions but their intensity must be variable in relation to the horizontal plane, whereas the intensity of the flashing blue light should be at its highest when seen from all angles, both above and below the horizontal plane.

- 4172 No international regulations concerning the flashing blue light used by civilian medical aircraft have yet been published. When ICAO is in possession of the necessary information on the flashing blue light, it will be able to make proposals to the Air Navigation Commission for the amendment of Annexes 2, 6 and 8 and of the Airworthiness Technical Manual.¹¹ Satisfactory follow-up action will then have been taken in respect of Resolution 17 addressed to ICAO by the Diplomatic Conference.

Paragraph 3

- 4173 The established practice of using the flashing blue light as a priority signal in road traffic and on board certain types of craft prevented the Diplomatic Conference from reserving it for the exclusive use of medical vehicles, hospital ships and coastal rescue craft. For this reason, paragraph 3 provides for a special agreement to be concluded between the Parties to the conflict regarding the use of the flashing blue light by medical vehicles and hospital ships. However, new Chapter XIV of the International Code of Signals which entered into force on 1 January 1986 provides for the use of the flashing blue light by hospital ships, coastal rescue craft and medical aircraft. This provision meets the request addressed by the Diplomatic Conference to the International Maritime Organization in Resolution 18.
- 4174 Paragraph 4.2 of the above-mentioned Chapter XIV stipulates that the visual range of the flashing blue light shall be as high as possible and not less than three nautical miles, in accordance with Annex I to the International Regulations for Preventing Collisions at Sea, 1972.¹² Tests carried out at sea have shown that, ideally, a hospital ship's flashing blue light should be identifiable at a distance of about ten nautical miles. Further research is still required in this connection.¹³
- 4175 The International Life-Boat Conference (ILC) is justifiably concerned about the safety of coastal rescue craft in time of armed conflict. It would like such craft – together with their crews, land-based installations and personnel – to enjoy the same protection as that afforded to hospital ships and their crews. This claim for

¹¹ ICAO, Annex 2, *Rules of the Air*, seventh ed., Montreal, July 1981. ICAO, Annex 6, *Operation of Aircraft*, Part I, fourth ed., Montreal, July 1983; Part II, third ed., Montreal, September 1983. ICAO, Annex 8, *Airworthiness of Aircraft*, sixth ed., Montreal, July 1973. ICAO, Doc. 9051-AN/896, *Airworthiness Technical Manual*, first ed., Montreal, 1974. ICAO, Doc. 9110, *ICAO Lexicon*, Vol. I, *Vocabulary*; Vol. II, *Definitions*, fourth ed., Montreal, 1974.

¹² Cf. IMO, *International Code of Signals*, Chapter XIV, annexed, *supra*, p. 1170. Cf. footnote 9, *supra*.

¹³ Cf. Ph. Eberlin, "Identification of Hospital Ships...", *op. cit.*, visibility of the blue light at sea, p. 322; blue light similar to those used on police cars, identifiable to the naked eye at a distance of 3 miles and with binoculars at a distance of 7 miles.

protection has been approved by official or officially recognized private maritime rescue organizations; the rescue organizations of the major maritime States belong to the ILC. As far as marking and identification are concerned, new Chapter XIV meets the requirements of the maritime rescue organizations. The flashing blue light is to be used by rescue craft as a distinctive light signal in time of armed conflict; it is also to be used in peacetime so that the shipwrecked and those in distress at sea can see it from afar and know that rescue is at hand.¹⁴

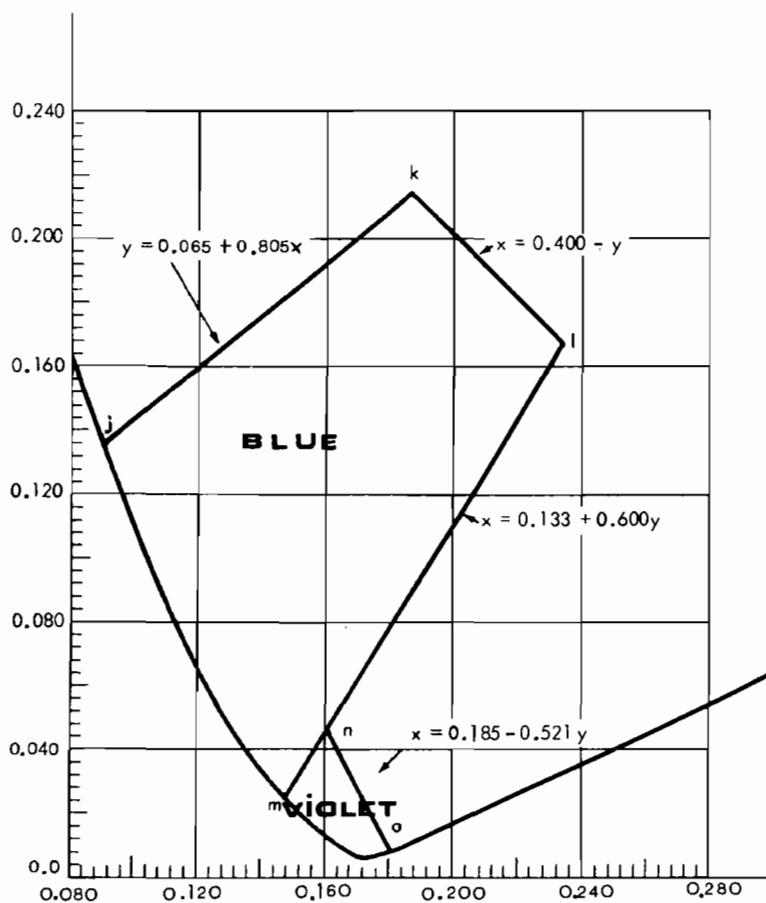
4176 The agreement between the Parties to the conflict reserving the use of the flashing blue light for the identification of medical vehicles, namely, permanent or temporary civilian and military ambulances, should not give rise to any difficulty, since this light signal is already used in peacetime by civilian or military ambulances in many countries.

4177 In periods of armed conflict it is not really in the interest of vehicles which are not protected by the Conventions and their Protocols to attract attention by using any type of coloured light signal at all. Accordingly, any such vehicle using a blue light in peacetime could probably refrain from doing so, in favour of the ambulances.

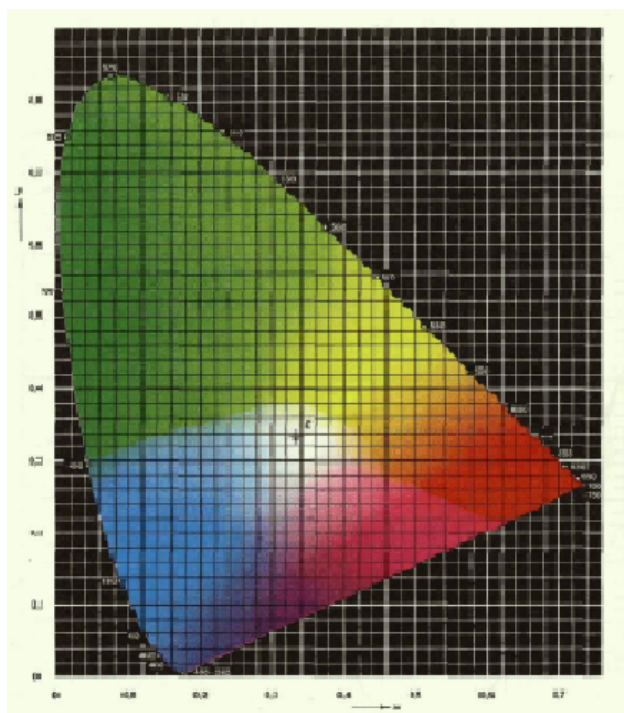
Ph.E.

¹⁴ Cf. G. Gidel, *op. cit.*; Ph. Eberlin, "The Protection of Rescue Craft in Periods of Armed Conflict", *IRRC*, May-June 1985, p. 140.

Document No. 2. Recommended boundaries for blue and violet light signals



Document No. 3



Standardized colour table, based on the chromaticity diagram (colour triangle) of the International Commission on Illumination (CIE) and DIN Standard 5033

The colours of luminous sources and surfaces (i.e. paints, colour filters, etc) are arranged clearly on this diagram according to their chromaticity. This arrangement of the colours presupposes a previous measurement of the chromaticity coordinates x and y ; these coordinates in fact determine the colour point of a certain chromaticity. The luminance of light sources or the luminance factor of surface colours are not represented on this diagram. Each point of the chromaticity diagram represents a chromaticity; colours of the same chromaticity differ from each other only through their luminosity.

In the centre of the triangle (exactly at the point $x = 0.333$ and $y = 0.333$) is the achromatic area (white, grey down to black depending on the luminosity). The border is composed of the *spectrum locus* and of the so-called purple boundary; a few wave lengths are indicated along the spectrum locus (in nm). All other colours are situated between the achromatic point and the border line, and all the straight lines originating from the achromatic point have the same hue, with increasing saturation. The chromaticity of an additive mixture of colour stimuli of two components is located, on the colour triangle, always on the straight line connecting the chromaticity of the components; the chromaticity diagram rests on this principle.

Note: This representation of the chromaticity diagram shows only approximately the distribution of the chromaticities. A perfect concordance of the colours of the diagram with the exact chromaticity of definite points cannot be attained because of technical printing reasons (translation from German by M. Dutruit).

Protocol I

Annex I, Article 7 – Radio signal

1. The radio signal shall consist of a radiotelephonic or radiotelegraphic message preceded by a distinctive priority signal to be designated and approved by a World Administrative Radio Conference of the International Telecommunication Union. It shall be transmitted three times before the call sign of the medical transport involved. This message shall be transmitted in English at appropriate intervals on a frequency or frequencies specified pursuant to paragraph 3. The use of the priority signal shall be restricted exclusively to medical units and transports.
2. The radio message preceded by the distinctive priority signal mentioned in paragraph 1 shall convey the following data:
 - (a) call sign of the medical transport;
 - (b) position of the medical transport;
 - (c) number and type of medical transports;
 - (d) intended route;
 - (e) estimated time en route and of departure and arrival, as appropriate;
 - (f) any other information such as flight altitude, radio frequencies guarded, languages and secondary surveillance radar modes and codes.
3. In order to facilitate the communications referred to in paragraphs 1 and 2, as well as the communications referred to in Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol, the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, may designate, in accordance with the Table of Frequency Allocations in the Radio Regulations annexed to the International Telecommunication Convention, and publish selected national frequencies to be used by them for such communications. These frequencies shall be notified to the International Telecommunication Union in accordance with procedures to be approved by a World Administrative Radio Conference.

Documentary references

Official Records

O.R. I, Part I, p. 176; p. 209 (Res. 19); Part II, p. 26, CDDH/243 (Res. 14); p. 44, CDDH/466 (Res. 19); Part III, p. 30 (Arts. 9-10). *O.R.* III, pp. 374-375; pp. 388-389. *O.R.* V, p. 382, CDDH/SR.33, para. 13. *O.R.* VII, p. 52, CDDH/SR.48 (Art. 7); p. 171, CDDH/SR.54, para. 44. *O.R.* XI, p. 90, CDDH/II/SR.11, para.

58; p. 93, CDDH/II/SR.12, para. 5; p. 94, para. 8; p. 95, paras. 16-18; pp. 566-568, CDDH/II/SR.50, paras. 8-19; pp. 569-570, paras. 27-33; p. 571, paras. 36-38; p. 572, para. 49; p. 573, para. 60; pp. 574-575, paras. 69-74; pp. 575-576, paras. 78-83; pp. 598-601, CDDH/II/SR.53, paras. 7-28; p. 606, CDDH/II/SR.54, paras. 10-12; pp. 614-616, paras. 68-76; pp. 616-617, paras. 77-85; pp. 619-620, CDDH/II/SR.55, paras. 1-12. *O.R. XII*, p. 163, CDDH/II/SR.69, paras. 18-20; p. 165, CDDH/II/SR.70, para. 3; pp. 166-170, paras. 8-32, p. 171, paras. 36-39; pp. 171-174, paras. 40-62; p. 203, CDDH/II/SR.73, paras. 35-36; p. 292, CDDH/II/SR.82, para. 26; pp. 489-490, CDDH/II/SR.101, paras. 26-33. *O.R. XIII*, p. 23, CDDH/49/Rev.1, para. 4; p. 25, para. 21; p. 26, para. 24; pp. 28-30, paras. 33-46; pp. 42-43 (Art. 8); p. 51, Appendix III; p. 61, CDDH/221/Rev.1, para. 8; pp. 159-163, paras. 260-265; pp. 266-267, CDDH/235/Rev.1, para. 54; p. 268, paras. 57-60 (Resolution CDDH/II/SR.363/Rev.1); pp. 299-300 (Art. 7); pp. 321-322, *id.*, Annex III, p. 358, CDDH/406/Rev.1 (Resolutions); p. 381, para. 85.

Other references

Diplomatic Conference of 1949, *Final Record*, Vol. I, p. 362, Resolutions 6 and 7. *CE/7b*, p. 47, para. III; pp. 54-55, Section III; pp. 57-58 (Art. 4); pp. 60-61 (Art. 4); pp. 63-77. *CE 1972, Report*, Vol I, p. 41, para. 1.66; p. 53, paras. 2.2.1-2.2.1.2; p. 54, para. 7(b); p. 57, paras. VIII-XI; p. 58, paras. 2.3-2.3.3; pp. 59-60, Annex III D, Annex III E. *CE 1972, Technical Memorandum*, pp. 10-11, 26-35. *Commentary Drafts*, pp. 120-123 (Arts. 9-10).

Commentary

General remarks

- 4178** The radio signal provided for in this article is a distinctive signal within the meaning of paragraph (m) of Article 8 (*Terminology*) of the Protocol, and its use is governed by Article 18 (*Identification*) of the Protocol. Furthermore, since the use of radiocommunications is governed by the Radio Regulations of the International Telecommunication Union (ITU), the Diplomatic Conference addressed to the latter organization Resolution 19 requesting that the World Administrative Radio Conference, to be held in Geneva in 1979 (WARC-79), adopt provisions designed to ensure that the vital requirements of communications for protected medical units and transports were adequately provided for in the Radio Regulations.
- 4179** In that connection, it was observed at the third session of the Diplomatic Conference that the text of Chapters III and IV of Annex I were purely tentative and that the ITU, ICAO and IMO had been asked to provide some new practices and procedures for signalling and communications.¹

¹ *O.R. XII*, p. 203, CDDH/II/SR.73, para. 35.

4180 The issue brought to the attention of WARC-79 in Resolution 19 appeared on the agenda of the Conference as item 2.6:

“2.6. to study the technical aspects of the use of radiocommunications for marking, identifying, locating and communicating with the means of medical transport protected under the 1949 Geneva Conventions and any additional instruments of these Conventions.”²

4181 WARC-79 accorded the radiocommunications of medical units and transports the same degree of priority as the urgency and safety transmissions governed by Article 40 of the Radio Regulations. Consideration of item 2.6 of the agenda resulted in the adoption of a new Section II for Article 40, entitled “Medical Transports”, and these transports were also mentioned specifically in the title of the article.

4182 Article 40 as amended was submitted to the World Administrative Radio Conference for the Mobile Services (maritime and aeronautical) convened by the ITU in Geneva in 1983 (WARC Mob-83), which decided to supplement some of the provisions adopted in 1979 in order to facilitate the identification of all the medical transports defined in Section II. The following additions were made:

- *No. 3209, paragraph 7 (Mob-83)*. At the end of the sentence, after “an armed conflict”: “[...] when these ships, craft and aircraft assist the wounded, the sick and the shipwrecked”.
- *No. 3219A, paragraph 11A (Mob-83)*. The identification and location of medical transports at sea may be effected by means of appropriate standard maritime radar transponders.
- *No. 3219B, paragraph 11B (Mob-83)*. The identification and location of aircraft medical transports may be effected by the use of the secondary surveillance radar (SSR) system specified in Annex 10 to the Convention on International Civil Aviation.

4183 Article 40 of the Radio Regulations now comprises three sections, the first two of which meet the essential requirements of the distinctive radio signal set out in this article. It is reproduced in full *infra*, p. 1237.

4184 The optional use of radiocommunications for announcing and identifying medical transports is referred to in No. 3220 of Article 40, which states that, if such radiocommunications are used, the provisions of the Radio Regulations and particularly of Article 40, Section II, and Articles 37 and 38 shall apply. Article 37 contains general provisions relating to distress, safety and urgency communications for stations on board ships or aircraft and for the satellite service. Article 38 contains the rules for using the frequencies available for distress and safety purposes. Both articles are reproduced *infra*, p. 1220 and p. 1223.

4185 In respect of medical aircraft, provisions similar to those of Article 40, Section II, of the Radio Regulations were incorporated by ICAO in Chapter 5,

² *O.R. I*, Part I, pp. 209-210, Res. 19, para. 1. *Cf.* Res. 19, *infra*, p. 1519. Prior to its adoption by the Diplomatic Conference in 1977, the text of Resolution 19 had been communicated to the ITU for information at the third session in 1976. See the introduction to Chapter III, “1976”, *supra*, p. 1192.

“Aeronautical Mobile Service”, of Annex 10, Volume II, “Aeronautical Telecommunications”.³ These provisions relating to aeronautical telecommunications are reproduced *infra*, p. 1241.

- 4186** The need to use radiocommunications for announcing and identifying medical transports became apparent during the Second World War. At sea, more than 45 hospital ships and 4 ships chartered by the ICRC were sunk or damaged by acts of war; the absence of effective means of identification was responsible for most of the attacks, both above and under the water. In 1943 a hospital ship attacked by aircraft endeavoured to identify itself by radio. The Malta coast station retransmitted the ship’s message as a general call to all stations (CQ), but the attacking aircraft were unable to receive it. From 1944 onwards, neutral vessels in the Mediterranean signalled their position by transmitting a message every four hours on the distress frequency 500 kHz. In the Atlantic, this message was transmitted once a day. These messages announcing the ship’s position and transmitted on the frequency 500 kHz were prescribed by the belligerents.⁴
- 4187** Section II of Article 40 gives effect to Resolution 19 of the Diplomatic Conference as well as to ITU Recommendations Nos. 2 and Mar2-17.⁵
- 4188** There are other ITU recommendations or resolutions which relate to situations of armed conflict or have a bearing on the work of the International Red Cross, such as:

- *Resolution No. 11*, relating to the use of radiocommunications for ensuring the safety of ships and aircraft of States not parties to an armed conflict – WARC-1979 (this resolution replaces Recommendation No. Mar2-17 of 1974).
- *Resolution No. 18*, relating to the procedure for identifying and announcing the position of ships and aircraft of States not parties to an armed conflict – WARC Mob-83 (this resolution replaces Resolution No. 11 of 1979).
- *Resolution No. 10*, relating to the use of radiotelegraph and radiotelephone links by the Red Cross, Red Crescent and Red Lion and Sun Organizations⁶ – WARC 1979 (this resolution replaces Recommendation No. 34 of 1959).

Resolutions Nos. 10 and 18 are found in Volume 2 of the Radio Regulations; they are annexed to this commentary, *infra*, p. 1243 and p. 1244.

Paragraph 1

- 4189** When the Regulations are brought up to date, all the provisions of this paragraph should be brought into line with Article 40 of the Radio Regulations.

³ ICAO, Annex 10, Vol. II, pp. 66-67, section 5.3.3.4, “Action by an aircraft used for medical transports”.

⁴ Cf. Ph. Eberlin, *Rapport de mer. Navires et marins au service de la Suisse et de la Croix-Rouge pendant la guerre de 1939-1945*, Berne, 1970; *id.*, “La modernisation de la signalisation protectrice et les communications des unités et moyens de transport sanitaires”, in *Studies and Essays in Honour of Jean Pictet, op. cit.*, p. 47, particularly p. 69.

⁵ Cf. introduction to Chapter III, *supra*, p. 1185.

⁶ The red lion and sun emblem has not been used since 1980, cf. commentary Annex I, Art. 1 (a), *supra*, p. 1155.

- 4190** The radiotelephone or radiotelegraph message is described in Nos. 3212 to 3218 of Section II of Article 40; the priority signal is defined in Nos. 3196 and 3197 of Section I and No. 3210 of Section II. Thus, in radiotelephony, the radio signal transmitted by a medical unit or transport starts with:

PAN PAN PAN PAN PAN PAN MEDICAL

This distinctive priority signal is followed by the message defined in Nos. 3212 to 3218 referred to above.

Paragraph 2

- 4191** Sub-paragraph (a), which here refers only to the call sign, was supplemented by WARC-79 as follows: “[...] or other recognized means of identification of the medical transport”.
- 4192** Technological progress in the field of radiocommunications makes it possible to allocate selective call numbers to radio stations on board ships and aircraft. The allocation of individual call numbers is being contemplated, and the radio-telex equipment at some stations already has its own number. Accordingly, the call sign may not be the only internationally recognized distinctive sign of a medical transport.
- 4193** The text of this paragraph will also have to be brought into line with Article 40 of the Radio Regulations.

Paragraph 3

- 4194** The frequencies referred to in Section I of this Article 40 are to be used exclusively for urgency and safety transmissions and medical transports. The procedure laid down in Article 40 must be followed for transmission of the radio signal set aside for medical units and transports. Consequently, the entire operative part of this paragraph should be replaced by the procedure set out in Sections I and II of Article 40.

Ph.E.

Documents annexed

Document No. 1 (*cf. supra*, p. 1217)

INTERNATIONAL TELECOMMUNICATION UNION

RADIO REGULATIONS

Edition of 1982

Revised in 1985

(Extract)

CHAPTER IX

Mob-83

Distress and Safety Communications¹**ARTICLE 37****General Provisions**

- 2930** § 1. The procedure specified in this Chapter is obligatory in the maritime mobile service and for communications between aircraft stations and stations of the maritime mobile service. The provisions of this Chapter are also applicable to the aeronautical mobile service except in the case of special arrangements between the governments concerned.
- 2931** § 2. The procedure specified in this Chapter is obligatory in the maritime mobile-satellite service and for communications between stations on board aircraft and stations of the maritime mobile-satellite service, where this service or stations of this service are specifically mentioned. Nos. **3086, 3090, 3095, 3096, 3097, 3098, 3200, 3203** and **3223** are also applicable.

C.IX
Mob-83

¹ For the purposes of this Chapter, distress and safety communications include distress, urgency and safety calls and messages.

- 2932** § 3. (1) No provision of these Regulations prevents the use by a mobile
Mob-83 station or mobile earth station in distress of any means at its disposal to attract attention, make known its position, and obtain help.
- 2933** (2) No provision of these Regulations prevents the use by stations on
Mob-83 board aircraft or ships engaged in search and rescue operations, in exceptional circumstances, of any means at their disposal to assist a mobile station or mobile earth station in distress.
- 2934** (3) No provision of these Regulations prevents the use by a land
Mob-83 station or coast earth station, in exceptional circumstances, of any means at its disposal to assist a mobile station or mobile earth station in distress (see also No. 959).
- 2934A** § 3A. When special circumstances make it indispensable to do so, an
Mob-83 administration may, as an exception to the methods of working provided for by these Regulations, authorize ship earth stations located at Rescue Coordination Centres² to communicate with other stations of the same category using bands allocated to the maritime mobile-satellite service, for distress and safety purposes only.
- 2935** § 4. In cases of distress, urgency or safety, transmissions;
- 2936** a) by telegraphy, when using Morse, shall not in general exceed
Mob-83 a speed of sixteen words a minute;
- 2937** b) by radiotelephony, shall be made slowly and distinctly, each
word being clearly pronounced to facilitate transcription.
- 2937A** § 4A. Distress, urgency and safety transmissions may also be made,
Mob-83 taking into account Nos. 2944 to 2949, using digital selective calling and satellite techniques in accordance with relevant CCIR Recommendations, and/or direct-printing telegraphy.
- 2938** § 5. The abbreviations and signals of Appendix 14 and the Phonetic
Alphabet and Figure Code in Appendix 24 should be used where applicable and, where language difficulties exist, the use of the International Code of Signals also is recommended.
- 2939** § 6. (1) The International Convention for the Safety of Life at Sea
prescribes which ships and which of their survival craft shall be fitted with radio equipment and which ships shall carry portable radio equipment for use in survival craft. It also prescribes the requirements which shall be complied with by such installations.

2934A.1 ² The term “Rescue Coordination Centre” refers to a facility designated by
Mob-83 a competent national authority to perform rescue coordination functions consistent with the International Convention on Maritime Search and Rescue (1979).

2940 (2) The Annexes to the Convention on International Civil Aviation
Mob-83 state which aircraft should be fitted with radio equipment and which aircraft should carry portable survival radio equipment. They state also the requirements which should be complied with by such installations.

2941 § 7. The applicable provisions of the present Regulations shall,
 however, be observed in the use of all such installations.

2942 § 8. Mobile stations³ of the maritime mobile service may communicate,
Mob-83 for safety purposes, with stations of the aeronautical mobile service. Such communications shall be made on the frequencies authorized, and under the conditions specified, in Section I of Article **38** (see also No. **2932**).

2942A § 8A. Mobile stations of the aeronautical mobile service may
Mob-83 communicate, for safety purposes, with stations of the maritime mobile service.

2943 § 9. Any aircraft required by national or international regulations to
Mob-83 communicate for distress, urgency or safety purposes with stations of the maritime mobile service shall be capable of transmitting preferably class A2A or H2A and receiving preferably class A2A and H2A emissions on the carrier frequency 500 kHz or, on the carrier frequency 2 182 kHz, transmitting class J3E or H3E and receiving class A3E, J3E and H3E emissions⁴, or on the carrier frequency 4 125 kHz, transmitting class J3E and receiving class J3E emissions, or on the frequency 156.8 MHz transmitting and receiving class G3E emissions.

2944 § 10. The frequency provisions made in Section I of Article **38** for the
Mob-83 future global maritime distress and safety system (FGMDSS) shall be used in connection with the testing and introduction of this system (see Resolution **321 (Mob-83)** and Recommendation **201 (Rev.Mob-83)**), and be subject to the provisions of Nos. **2945** to **2949**.

2945 § 11. Until a future world administrative radio conference has made full
Mob-83 provision for the normal operational use of the future global maritime distress and safety system (FGMDSS):

2946 a) all provisions of the Radio Regulations pertaining to the
Mob-83 present distress, urgency and safety communications shall be maintained in force;

2942.1 ³ Mobile stations communicating with the stations of the aeronautical
Mob-83 mobile (R) service in bands allocated to the aeronautical mobile (R) service shall conform to the provisions of the Regulations which relate to that service and, as appropriate, any special arrangements between the governments concerned by which the aeronautical mobile (R) service is regulated.

2943.1 ⁴ As an exception, the requirement to receive class A3E emissions on the
Mob-83 carrier frequency 2 182 kHz may be made optional when permitted by national regulations.

- 2947**
Mob-83 b) particular care shall be taken to ensure that harmful interference is not caused to distress, urgency and safety communications on the established international distress frequencies 500 kHz, 2 182 kHz and 156,8 MHz and on the supplementary distress frequencies 4 125 kHz and 6 215,5 kHz;
- 2948**
Mob-83 c) operators of stations participating in the future global maritime distress and safety system (FGMDSS) for distress, urgency or safety purposes, should recognize that it may be necessary to revert to the other distress, urgency and safety arrangements provided for in these Regulations (see Recommendation **201 (Rev.Mob-83)**);
- 2949**
Mob-83 d) the frequencies identified in Section I of Article **38** for exclusive use for distress and safety calls by digital selective calling may additionally be used for test transmissions only to the extent necessary to facilitate the testing and progressive introduction of that system.
- 2950** NOT allocated.
to
2966

* * *

Document No. 2 (*cf. supra*, p. 1217)

ARTICLE 38

Frequencies for Distress and Safety

Section I. Availability of Frequencies

2967
Mob-83

A. 490 kHz

2968 § 0. The frequency 490 kHz is used exclusively for distress and safety
Mob-83 calls in the shore-to-ship direction by digital selective calling techniques (see No. **2944**). Additional conditions concerning the use of this frequency are given in Resolution **206 (Mob-83)**.

2969
Mob-83

B. 500 kHz

2970 § 1. (1) The frequency 500 kHz is the international distress frequency for
Mob-83 Morse telegraphy (see also No. **472**); it shall be used for this purpose by ship, aircraft and survival craft stations employing frequencies in the bands between 415 kHz and 535 kHz when requesting assistance from the maritime

services. It shall be used for the distress call and distress traffic, for the urgency signal and urgency messages, for the safety signal and, outside regions of heavy traffic, for short safety messages. When practicable, safety messages shall be transmitted on the working frequency after a preliminary announcement on 500 kHz (see also No. **4236**). For distress and safety purposes, the classes of emission to be used on 500 kHz shall be A2A, A2B, H2A or H2B (see also No. **3042**).

2971 (2) However, ship and aircraft stations which cannot transmit on 500 kHz should use any other available frequency on which attention might be attracted.

2971A
Mob-83

C. 518 kHz

2971B
Mob-83

§ 1A. In the maritime mobile service, the frequency 518 kHz is used exclusively for the transmission by coast stations of meteorological and navigational warnings and urgent information to ships, by means of narrow-band direct-printing telegraphy (see No. **2944** and Resolution **318 (Mob-83)**).

2971C
Mob-83

D. 2 174.5 kHz

2971D
Mob-83

§ 1B. The frequency 2 174,5 kHz is used exclusively for distress and safety traffic by narrow-band direct-printing telegraphy (see No. **2944**).

2972
Mob-83

E. 2 182 kHz

2973
Mob-83

§ 2. (1) The carrier frequency 2 182 kHz¹ is an international distress frequency for radiotelephony (see also Nos. **500** and **501**); it shall be used for this purpose by ship, aircraft and survival craft stations and by emergency position-indicating radiobeacons using frequencies in the authorized bands between 1 605 kHz and 4 000 kHz when requesting assistance from the maritime services. It is used for the distress call and distress traffic, for signals of emergency position-indicating radiobeacons, for the urgency signal and urgency messages and for the safety signal. Safety messages shall be transmitted, where practicable, on a working frequency after a preliminary announcement on 2 182 kHz (see No. **2944**). The class of emission to be used for radiotelephony on the frequency 2 182 kHz shall be H3E. Class A3E emission may continue to be used by apparatus provided solely for distress, urgency and safety purposes (see No. **4127**). The class of emission to be used by emergency position-indicating radiobeacons shall be as specified in Appendix **37** (see also No. **3265**). The class of emission J3E may be used for the exchange of distress call using digital selective calling techniques on 2 187.5 kHz taking into account that other shipping in the vicinity may not be able to receive this traffic.

2973.1
Mob-83

¹ Where administrations provide at their coast stations a watch on 2 182 kHz for receiving class J3E emissions as well as class A3E and H3E emissions, ship stations may communicate with them using class J3E emissions.

2974 (2) If a distress message on the carrier frequency 2 182 kHz has not
Mob-83 been acknowledged, the radiotelephone alarm signal, whenever possible followed by the distress call and message, may be transmitted again on a carrier frequency of 4 125 kHz or 6 215.5 kHz, as appropriate (see Nos. **2982**, **2986** and **3054**).

2975 (3) However, ship and aircraft stations which cannot transmit on the carrier frequency 2 182 kHz or, in accordance with No. **2974**, on the carrier frequencies 4 125 kHz or 6 215.5 kHz, should use any other available frequency on which attention might be attracted.

2976 SUP
Mob-83

2977 (5) Any coast station using the carrier frequency 2 182 kHz for distress purposes shall be able to transmit the radiotelephone alarm signal described in No. **3270** (see also Nos. **3277**, **3278** and **3279**).

2978 (6) Any coast station authorized to send navigational warnings should be able to transmit the navigational warning signal described in Nos. **3284**, **3285** and **3286**.

2978A *F. 2 187.5 kHz*
Mob-83

2978B § 2A. The frequency 2 187.5 kHz is used exclusively for distress and
Mob-83 safety calls by digital selective calling techniques (see No. **2944**). It may also be used for emergency position-indicating radiobeacons using digital selective calling.

2979 *G. 3 023 kHz*
Mob-83

2980 § 3. The aeronautical carrier (reference) frequency 3 023 kHz may be
Mob-83 used for intercommunication between mobile stations when they are engaged in coordinated search and rescue operations, and for communication between these stations and participating land stations, in accordance with the provisions of Appendix **27 Aer2** (see Nos. **501** and **505**).

2981 *H. 4 125 kHz*
Mob-83

2982 § 4. (1) The carrier frequency 4 125 kHz is used to supplement the carrier
Mob-83 frequency 2 182 kHz for distress and safety purposes and for call and reply (see also No. **520**). This frequency is also used for distress and safety traffic by radiotelephony (see No. **2944**).

2982A (2) The carrier frequency 4 125 kHz may be used by aircraft stations
Mob-83 to communicate with stations of the maritime mobile service for distress and safety purposes (see No. **2943**).

2982B
Mob-83

I. 4 177.5 kHz

2982C § 4A. The frequency 4 177.5 kHz is used exclusively for distress and
Mob-83 safety traffic using narrow-band direct-printing telegraphy (see No. **2944**).

2982D
Mob-83

J. 4 188 kHz

2982E § 4B. The frequency 4 188 kHz is used exclusively for distress and safety
Mob-83 calls using digital selective calling techniques (see No. **2944**).

2983
Mob-83

K. 5 680 kHz

2984 § 5. The aeronautical carrier (reference) frequency 5 680 kHz may be
Mob-83 used for intercommunication between mobile stations when they are engaged in coordinated search and rescue operations, and for communication between these stations and participating land stations, in accordance with the provisions of Appendix **27 Aer2** (see also Nos. **501** and **505**).

2985
Mob-83

L. 6 215.5 kHz

2986 § 6. The carrier frequency 6 215.5 kHz is used to supplement the carrier
Mob-83 frequency 2 182 kHz for distress and safety purposes and for call and reply (see also No. **520**). This frequency is also used for distress and safety traffic by radiotelephony (see No. **2944**).

2986A
Mob-83

M. 6 268 kHz

2986B § 6A. The frequency 6 268 kHz is used exclusively for distress and safety
Mob-83 traffic using narrow-band direct-printing telegraphy (see No. **2944**).

2986C
Mob-83

N. 6 282 kHz

2986D § 6B. The frequency 6 282 kHz is used exclusively for distress and safety
Mob-83 calls by digital selective calling techniques (see No. **2944**).

2986E
Mob-83

O. 8 257 kHz

2986F § 6C. The carrier frequency 8 257 kHz is used for distress and safety
Mob-83 traffic by radiotelephony (see No. **2944**).

2986G
Mob-83

P. 8 357.5 kHz

2986H § 6D. The frequency 8 357.5 kHz is used exclusively for distress and
Mob-83 safety traffic using narrow-band direct-printing telegraphy (see No. **2944**).

2987
Mob-83

Q. 8 364 kHz

2988 § 7. The frequency 8 364 kHz is designated for use by survival craft
stations if they are equipped to transmit on frequencies in the bands between
4 000 khz and 27 500 kHz and if they desire to establish communications
relating to search and rescue operations with stations of the maritime and
aeronautical mobile services (see also No. **501**).

2988A
Mob-83

R. 8 375 kHz

2988B § 7A. The frequency 8 375 kHz is used exclusively for distress and safety
Mob-83 calls using digital selective calling techniques (see No. **2944**).

2988C
Mob-83

S. 12 392 kHz

2988D § 7B. The carrier frequency 12 392 kHz is used for distress and safety
Mob-83 traffic by radiotelephony (see No. **2944**).

2988E
Mob-83

T. 12 520 kHz

2988F § 7C. The frequency 12 520 kHz is used exclusively for distress and safety
Mob-83 traffic using narrow-band direct-printing telegraphy (see No. **2944**).

2988G
Mob-83

U. 12 563 kHz

2988H § 7D. The frequency 12 563 kHz is used exclusively for distress and
Mob-83 safety calls using digital selective calling techniques (see No. **2944**).

2988I
Mob-83

V. 16 522 kHz

2988J § 7E. The carrier frequency 16 522 kHz is used for distress and safety
Mob-83 traffic by radiotelephony (see No. **2944**).

2988K *W. 16 695 kHz*
Mob-83

2988L § 7F. The frequency 16 695 kHz is used exclusively for distress and safety
Mob-83 traffic using narrow-band direct-printing telegraphy (see No. **2944**).

2988M *X. 16 750 kHz*
Mob-83

2988N § 7G. The frequency 16 750 kHz is used exclusively for distress and safety
Mob-83 calls using digital selective calling techniques (see No. **2944**).

2989 *Y. 121.5 MHz and 123.1 MHz*
Mob-83

2990 SUP
Mob-83

2990A § 8. (1A) The aeronautical emergency frequency 121.5 MHz² is used for
Mob-83 the purposes of distress and urgency for radiotelephony by stations of the aeronautical mobile service using frequencies in the band between 117.975 MHz and 136 MHz (137 MHz after 1 January 1990). This frequency may also be used for these purposes in survival craft stations and emergency position-indicating radiobeacons.

2990B (1B) The aeronautical auxiliary frequency 123.1 MHz, which is
Mob-83 auxiliary to the aeronautical emergency 121.5 MHz, is for use by stations of the aeronautical mobile service and by other mobile and land stations engaged in coordinated search and rescue operations (see also No. **593**).

2991 (2) Mobile stations of the maritime mobile service may communicate
Mob-83 with stations of the aeronautical mobile service on the aeronautical emergency frequency 121.5 MHz for the purposes of distress and urgency only, and on the aeronautical auxiliary frequency 123.1 MHz for coordinated search and rescue operations, using class A3E emissions for both frequencies (see also Nos. **501** and **593**). They shall then comply with any special arrangements between the governments concerned by which the aeronautical mobile service is regulated.

2992 *Z. 156.3 MHz*
Mob-83

2993 § 9. The frequency 156.3 MHz may be used for communication
Mob-83 between ship stations and aircraft stations, using G3E emission, engaged in coordinated search and rescue operations. It may also be used by aircraft stations to communicate with ship stations for other safety purposes (see also note g) of Appendix **18**).

2990A.1 ² Normally aircraft stations transmit distress and urgency messages on the
Mob-83 working frequency in use at the time of the distress or urgency incident.

2993A
Mob-83

AA. 156.525 MHz

2993B § 9A. The frequency 156.525 MHz is used exclusively in the maritime
Mob-83 mobile service for distress and safety calls by digital selective calling techniques (see Nos. **613A** and **2944** and Resolution **317 (Mob-83)**).

2993C
Mob-83

AB. 156.650 MHz

2993D § 9B. The frequency 156.650 MHz is used for ship-to-ship communi-
Mob-83 cations related to the safety of navigation in accordance with note *n*) of Appendix **18** (see No. **2944**).

2993E
Mob-83

AC. 156.8 MHz

2994 § 10. (1) The frequency 156.8 MHz is the international distress, safety and
Mob-83 calling frequency for radiotelephony for stations of the maritime mobile service when they use frequencies in the authorized bands between 156 MHz and 174 MHz (see also Nos. **501** and **613**). It is used for the distress signal, the distress call and distress traffic, as well as for the urgency signal, urgency traffic and the safety signal (see also No. **2995A**). Safety messages shall be transmitted where practicable on a working frequency after a preliminary announcement on 156.8 MHz. The class of emission to be used for radiotelephony on the frequency 156.8 MHz shall be G3E (see No. **2944** and Appendix **19**).

2995 (2) However, ship stations which cannot transmit on 156.8 MHz should use any other available frequency on which attention might be attracted.

2995A (3) The frequency 156.8 MHz may be used by aircraft stations for
Mob-83 safety purposes only.

2995B
Mob-83

AD. 156.825 MHz

2995C § 10A. The frequency 156.825 MHz is used exclusively in the maritime
Mob-83 mobile service for distress and safety traffic by direct-printing telegraphy (see Nos. **2944**, **3033** and **4393** and note *k*) of Appendix **18**).

2996
Mob-83

AE. 243 MHz

(See Nos. **501** and **642**)

2997 *AF. 406 - 406.1 MHz Band*
Mob-83

2997A § 10B. The frequency band 406 - 406.1 MHz is used exclusively by satellite
Mob-83 emergency position-indicating radiobeacons in the Earth-to-space direction
(see No. **649**).

2998 *AG. 1 544 - 1 545 MHz Band*
Mob-83

2998A § 10C. Use of the band 1 544 - 1 545 MHz (space-to-Earth) is limited to
Mob-83 distress and safety operations (see No. **728**) including:

2998B a) feeder links of satellites needed to relay the emissions of
Mob-83 satellite emergency position-indicating radiobeacons to earth
stations;

2998C b) narrow-band (space-to-Earth) links from space stations to
Mob-83 mobile stations.

2998D *AH. 1 645.5 - 1 646.5 MHz Band*
Mob-83

2998E § 10D. Use of the band 1 645.5 - 1 646.5 MHz (Earth-to-space) is limited
Mob-83 to distress and safety operations (see No. **728**).

2999 *AI. Aircraft in Distress*
Mob-83

3000 § 11. Any aircraft in distress shall transmit the distress call on the
frequency on which watch is kept by the land or mobile stations capable of
helping it. When the call is intended for stations in the maritime mobile
service, the provisions of Nos. **2970** and **2971** or **2973** and **2975** or **2994** and
2995 shall be complied with.

3001 *AJ. Survival Craft Stations*
Mob-83

3002 § 12. Equipment provided for use in survival craft stations shall, if
capable of operating on any frequency:

3003 a) *in the authorized bands between 415 kHz and 526.5 kHz*, be
Mob-83 able to transmit with a carrier frequency of 500 kHz using either
class A2A and A2B* or H2A and H2B* emissions. If a receiver
is provided for any of these bands, it shall be able to receive
class A2A and H2A emissions on a carrier frequency of
500 kHz;

* This is to cater for the automatic reception of the radiotelegraph alarm
signal.

- 3004** *b) in the bands between 1 605 kHz and 2 850 kHz*, be able to transmit with a carrier frequency of 2 182 kHz using class A3E or H3E emissions. If a receiver is provided for any of these bands, it shall be able to receive class A3E and H3E emissions on a carrier frequency of 2 182 kHz;
- 3005** *c) in the bands between 4 000 kHz and 27 500 kHz*, be able to transmit with a carrier frequency of 8 364 kHz using class A2A or H2A emissions. If a receiver is provided for any of these bands, it shall be able to receive class A1A, A2A and H2A emissions throughout the band 8 341.75 - 8 728.5 kHz;
- 3006** *d) in the bands between 117.975 MHz and 136 MHz* (137 MHz after 1 January 1990), be able to transmit on 121.5 MHz, using amplitude modulated emissions. If a receiver is provided for any of these band, it shall be able to receive class A3E emissions on 121.5 MHz;
- Mob-83**
- 3007** *e) in the bands between 156 MHz and 174 MHz*, be able to transmit on 156.8 MHz using class G3E emissions. If a receiver is provided for any of these bands it shall be able to receive class G3E emissions on 156.8 MHz;
- 3008** *f) in the bands between 235 MHz and 328.6 MHz*, be able to transmit on the frequency 243 MHz.
- 3008A** § 12A. Equipment with digital selective calling facilities provided for use
Mob-83 in survival craft shall, if capable of operating:
- 3008B** *a) in the bands between 1 605 kHz and 2 850 kHz*, be able to
Mob-83 transmit on 2 187.5 kHz;
- 3008C** *b) in the bands between 4 000 kHz and 27 500 kHz*, be able to
Mob-83 transmit on 8 375 kHz;
- 3008D** *c) in the bands between 156 MHz and 174 MHz*, be able to transmit
Mob-83 on 156.525 MHz.

Mob-83

Section II. Protection of Distress and Safety Frequencies

3009

A. General

- 3010** § 13. Except as provided for in Nos. **2944**, **2949** and **3011**, any emission
Mob-83 capable of causing harmful interference to distress, alarm, urgency or safety communications on the international distress frequencies 500 kHz, 2 182 kHz or 156.8 MHz, or on the distress and safety calling frequencies 490 kHz, 2 187.5 KHz, 4 125 kHz, 4 188 kHz, 6 215.5 kHz, 6 282 kHz, 8 375 kHz, 12 563 kHz, 16 750 kHz or 156.525 MHz is prohibited. Any emission causing harmful interference to distress and safety communications on any of the other frequencies identified in Section I of this Article is prohibited.

3011 § 14. (1) Test transmissions shall be kept to a minimum on the frequencies
Mob-83 identified in Section I of this Article and should, wherever practicable, be carried out on artificial antennas or with reduced power.

3012 to 3015 SUP
Mob-83

3016 (2) It is not permitted to transmit complete alarm signals for testing
Mob-83 purposes on any frequency except for essential tests coordinated with component authorities. As an exception such tests are permitted for radiotelephone equipment which can operate only on the international distress frequency 2 182 kHz, in which case a suitable artificial antenna shall be employed.

3016A § 14A.(1) Before transmitting on any of the frequencies identified in Section
Mob-83 I for distress and safety, a station shall listen on the frequency concerned to make sure that no distress transmission is being sent (see No. **4915**).

3016B (2) The provisions of No. **3016A** do not apply to stations in distress.
Mob-83

3017 *B. 500 kHz*

3018 § 15. (1) Apart from the transmissions authorized on 490 kHz and 500 kHz,
Mob-83 and taking account of No. **4226**, all transmissions on the frequencies included between 490 kHz and 510 kHz are forbidden (see No. **471** and Resolution **206 (Mob-83)**).

3019 (2) In order to facilitate the reception of distress calls, other
transmissions on the frequency 500 kHz shall be reduced to a minimum, and in any case shall not exceed one minute.

3020 and 3021 SUP
Mob-83

3022 *C. 2 182 kHz*

3023 § 16. (1) Except for transmissions authorized on the carrier frequency
Mob-83 2 182 kHz and on the frequencies 2 174.5 kHz and 2 187.5 kHz, all transmissions on the frequencies between 2 173.5 kHz and 2 190.5 kHz are forbidden.

3024 and 3025 SUP
Mob-83

3026 (4) To facilitate the reception of distress calls, all transmissions on
2 182 kHz shall be kept to a minimum.

3027 (5) At sea it is not permitted to radiate test transmissions of the
Mob-83 radiotelephone alarm signal on the carrier frequency 2 182 kHz. The function of the generator of the radiotelephone alarm signal shall be checked by aural monitoring without operating a transmitter. The transmitter shall be checked independently. During tests of the radio installation carried out by an administration or on behalf of an administration the radiotelephone

alarm signal device should be checked with a suitable artificial antenna on frequencies other than 2 182 kHz. If the installation is capable of operating only on the frequency 2 182 kHz a suitable artificial antenna should be employed (see No. **3016**).

3028 (6) Before and after the tests performed using an artificial antenna in
Mob-83 accordance with No. **3027**, a suitable announcement should be made on the test frequency that the signals are or were for testing purposes only. The identification of the station should be included in the announcement.

3029 to 3031 SUP
Mob-83

3031A *DA. 121.5 MHz, 123.1 MHz and 243 MHz*
Mob-83

3031B § 17A. On the frequencies 121.5 MHz, 123.1 MHz and 243 MHz
Mob-83 transmissions other than those authorized are forbidden (see Nos. **501**, **593**, **642**, **2990A** and **2990B**).

3032 *E. 156.8 MHz*

3033 § 18. (1) All emissions in the band 156.7625 - 156.8375 MHz capable of
Mob-83 causing harmful interference to the authorized transmissions of stations of the maritime mobile service on 156.8 MHz are forbidden. The frequency 156.825 MHz may, however, be used for the purposes described in No. **2995C** subject to not causing harmful interference to authorized transmissions on 156.8 MHz (see also note *k*) of Appendix **18**).

3034 and 3035 SUP
Mob-83

3036 (4) To facilitate the reception of distress calls all transmissions on 156.8 MHz shall be kept to a minimum and shall not exceed one minute.

Section III. Watch on Distress Frequencies

3037 *A. 500 kHz*

3038 § 19. (1) In order to increase the safety of life at sea and over the sea, all
Mob-83 stations of the maritime mobile service normally keeping watch on frequencies in the authorized bands between 415 kHz and 526.5 kHz shall, during their hours of service, take the necessary measures to ensure watch on the international distress frequency 500 kHz for three minutes twice an hour beginning at *x* h 15 and *x* h 45, Coordinated Universal Time (UTC) by an operator using headphones or loudspeaker.

3039 (2) During the periods mentioned above, except for the emissions
Mob-83 provided for in this Chapter on the frequency 500 kHz:

- 3040**
Mob-83 a) transmissions shall cease in the bands between 485 kHz and 515 kHz (see also Resolution **206 (Mob-83)**);
- 3041** b) outside these bands, transmissions of stations of the mobile service may continue; stations of the maritime mobile service may listen to these transmissions on the express condition that they first ensure watch on the distress frequency as required by No. **3038**.
- 3042**
Mob-83 § 20. (1) Stations of the maritime mobile service open to public correspondence and using frequencies in the authorized bands between 415 kHz and 526.5 kHz shall, during their hours of service, remain on watch on 500 kHz. This watch is obligatory only for class A2A and H2A emissions.
- 3043** (2) These stations, while observing the requirements of No. **3038**, are authorized to relinquish this watch only when they are engaged in communications on other frequencies.
- 3044** (3) When they are engaged in such communications:
- 3045** a) ship stations may maintain this watch on 500 kHz by means of an operator using headphones or a loudspeaker or by some appropriate means such as an automatic alarm receiver:
- 3046** b) coast stations may maintain this watch on 500 kHz by means of an operator using headphones or a loudspeaker; in the latter case an indication may be inserted in the List of Coast Stations.
- 3046A**
Mob-83 (4) Ship stations, while observing the requirements of No. **3038**, are also authorized to relinquish this watch³ when it is impractical to listen by split headphones or by loudspeaker, and by order of the master in order to repair or carry out maintenance required to prevent imminent malfunction of:
- 3946B**
Mob-83 a) equipment for radiocommunication used for safety;
- 3946C**
Mob-83 b) radionavigational equipment;
- 3946D**
Mob-83 c) other electronic navigational equipment.
- 3046E**
Mob-83 (5) Ship stations fitted with an automatic alarm receiver should ensure the equipment is in operation whenever watch is relinquished under the terms of No. **3046A**.

3047*B. 2 182 kHz*

- 3048**
Mob-83 § 21. (1) Coast stations which are open to public correspondence and which form an essential part of the coverage of the area for distress purposes shall, during their hours of service, maintain a watch on 2 182 kHz.

3046A.1
Mob-83 ³ For additional information see the relevant provisions of the International Convention for the Safety of Life at Sea.

3049 (2) These stations shall maintain this watch by means of an operator using some aural method, such as headphones, split headphones or loudspeaker.

3050 (3) In addition, ship stations should keep the maximum watch practicable on the carrier frequency 2 182 kHz for receiving by any appropriate means the radiotelephone alarm signal described in No. **3270** and the navigational warning signal described in Nos. **3284**, **3285** and **3286**, as well as distress, urgency and safety signals.

3051 § 22. Ship stations open to public correspondence should, as far as possible during their hours of service, keep watch on 2 182 kHz.

3052 § 23. In order to increase the safety of life at sea and over the sea, all stations of the maritime mobile service normally keeping watch on frequencies in the authorized bands between 1 605 kHz and 2 850 kHz shall, during their hours of service, and as far as possible, take steps to keep watch on the international distress carrier frequency 2 182 kHz for three minutes twice each hour beginning at x h 00 et x h 30 Coordinated Universal Time (UTC).

3052A § 23A. During the periods referred to in No. **3052** all transmissions, except
Mob-83 those provided for in this Chapter, shall cease in the band 2 173.5 - 2 190.5 kHz.

3053 *C. 4 125 kHz and 6 215.5 kHz*

3054 § 24. (1) In the zone of Region 1 south of latitude 15° N, in Region 2 (except
Mob-83 Greenland) and in the zone of Region 3 south of latitude 25° N, all coast stations which are open to public correspondence and which form an essential part of the coverage of the area for distress purposes may, during their hours of service, maintain a watch on the carrier frequencies 4 125 kHz and/or 6 215.5 kHz (see Nos. **2982** and **2986**). Such watch should be indicated in the List of Coast Stations.

3055 (2) These stations should maintain this watch by means of an operator using some aural method, such as headphones, split headphones or loudspeaker.

3056 *D. 156.8 MHz*

3057 § 25. (1) A coast station providing an international maritime mobile radiotelephone service in the band 156 - 174 MHz and which forms an essential part of the coverage of the area for distress purposes should, during its working hours in that band, maintain an efficient aural watch on 156.8 MHz (see Recommendation **306**).

3058 (2) Ship stations should, where practicable, maintain watch on 156.8 MHz when within the service area of a coast station providing international maritime mobile radiotelephone service in the band 156 - 174 MHz. Ship stations fitted only with VHF radiotelephone equipment operating in the authorized bands between 156 MHz and 174 MHz, should maintain watch on 156.8 MHz when at sea.

3059 (3) Ship stations, when in communication with a port station, may, on an exceptional basis and subject to the agreement of the administration concerned, continue to maintain watch, on the appropriate port operations frequency only, provided that watch on 156.8 MHz is being maintained by the port station.

3060 (4) Ship stations, when in communication with a coast station in the ship movement service and subject to the agreement of the administrations concerned, may continue to maintain watch on the appropriate ship movement service frequency only, provided the watch on 156.8 MHz is being maintained by that coast station.

3061
to
3085 NOT allocated.

Document No. 3 (*cf. supra*, p. 1217)

ARTICLE 40

Urgency and Safety Transmissions, and Medical Transports

Section I. Urgency Signal and Messages

3196 § 1. (1) In radiotelegraphy, the urgency signal consists of three repetitions of the group XXX, sent with the letters of each group and the successive groups clearly separated from each other. It shall be transmitted before the call.

3197 (2) In radiotelephony, the urgency signal consists of three repetitions of the group PAN PAN, each word of the group pronounced as the French word “panne”. The urgency signal shall be transmitted before the call.

3198 § 2. (1) The urgency signal shall be sent only on the authority of the master or the person responsible for the ship, aircraft or other vehicle carrying the mobile station or mobile earth station in the maritime mobile-satellite service.

3199 (2) The urgency signal may be transmitted by a land station or an earth station in the maritime mobile-satellite service at specified fixed points only with the approval of the responsible authority.

3200 § 3. (1) The urgency signal indicates that the calling station has a very urgent message to transmit concerning the safety of a ship, aircraft or other vehicle, or the safety of a person.

3201 (2) The urgency signal and message following it shall be sent on one or more of the international distress frequencies 500 kHz, 2 182 kHz, 156.8 MHz, the supplementary distress frequencies 4 125 kHz and 6 215.5 kHz, the aeronautical emergency frequency 121.5 MHz, the frequency 243 MHz or on any other frequency which may be used in case of distress.

3202 (3) However, in the maritime mobile service, the message shall be transmitted on a working frequency:

a) in the case of a long message or a medical call; or

b) in areas of heavy traffic in the case of the repetition of a message transmitted in accordance with the provisions laid down in No. 3201.

An indication to this effect shall be given at the end of the call.

3203 (4) The urgency signal shall have priority over all other communications, except distress. All stations which hear it shall take care not to interfere with the transmission of the message which follows the urgency signal.

3204 (5) In the maritime mobile service, urgency messages may be addressed either to all stations or to a particular station.

- 3205** § 4. Messages preceded by the urgency signal shall, as a general rule, be drawn up in plain language.
- 3206** § 5. (1) Mobile stations which hear the urgency signal shall continue to listen for at least three minutes. At the end of this period, if no urgency message has been heard, a land station should, if possible, be notified of the receipt of the urgency signal. Thereafter, normal working may be resumed.
- 3207** (2) However, land and mobile stations which are in communication on frequencies other than those used for the transmission of the urgency signal and of the call which follows it may continue their normal work without interruption provided the urgency message is not addressed “to all stations” (CQ).
- 3208** § 6. When the urgency signal has been sent before transmitting a message “to all stations” (CQ) which calls for action by the stations receiving the message, the station responsible for its transmission shall cancel it as soon as it knows that action is no longer necessary. This message of cancellation shall likewise be addressed “to all stations” (CQ).

Section II. Medical Transports

- 3209** § 7. The term “medical transports”, as defined in the 1949 Geneva
Mob-83 Conventions and Additional Protocols, refers to any means of transportation by land, water or air, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to a conflict or of neutral States and of other States not parties to an armed conflict, when these ships, craft and aircraft assist the wounded, the sick and the shipwrecked.
- 3210** § 8. For the purpose of announcing and identifying medical transports which are protected under the above-mentioned Conventions, a complete transmission of the urgency signals described in Nos. **3196** and **3197** shall be followed by the addition of the single group YYY in radiotelegraphy and by the addition of the single word MAY-DEE-CAL, pronounced as in French “médical”, in radiotelephony.
- 3211** § 9. The frequencies specified in No. **3201** may be used by medical transports for the purpose of self-identification and to establish communications. As soon as practicable, communications shall be transferred to an appropriate working frequency.
- 3212** § 10. The use of the signals described in No. **3210** indicates that the message which follows concerns a protected medical transport. The message shall convey the following data:
- 3213** a) the call sign or other recognized means of identification of the medical transport;
- 3214** b) position of the medical transport;
- 3215** c) number and type of medical transports;

- 3216** *d)* intended route;
- 3217** *e)* estimated time en route and of departure and arrival, as appropriate;
- 3218** *f)* any other information, such as flight altitude, radio frequencies guarded, languages used and secondary surveillance radar modes and codes.
- 3219** § 11. The provisions of Section I of this Article shall apply as appropriate to the use of the urgency signal by medical transports.
- 3219A** § 11A. The identification and location of medical transports at sea may be
Mob-83 effected by means of appropriate standard maritime radar transponders.
- 3219B** § 11B. The identification and location of aircraft medical transports may
Mob-83 be effected by the use of the secondary surveillance radar (SSR) system specified in Annex 10 to the Convention on International Civil Aviation.
- 3220** §12. The use of radiocommunications for announcing and identifying medical transports is optional; however, if they are used, the provisions of these Regulations and particularly of this Section and of Articles **37** and **38** shall apply.

Section III. Safety Signal and Messages

- 3221** § 13. (1) In radiotelegraphy, the safety signal consists of three repetitions of the group TTT, the individual letters of each group and the successive groups being clearly separated from each other. It shall be sent before the call.
- 3222** (2) In radiotelephony, the safety signal consists of the word SÉCURITÉ pronounced clearly as in French, spoken three times and transmitted before the call.
- 3223** § 14. (1) The safety signal indicates that the station is about to transmit a message containing an important navigational or an important meteorological warning.
- 3224** (2) The safety signal and call shall be sent on one or more of the international distress frequencies (500 kHz, 2 182 kHz, 156.8 MHz) or on any other frequency which may be used in case of distress.
- 3225** (3) The safety message which follows the call should be sent on a working frequency. A suitable announcement to this effect shall be made at the end of the call.
- 3226** (4) In the maritime mobile service, safety messages shall generally be addressed to all stations. In some cases, however, they may be addressed to a particular station.

- 3227** § 15. (1) With the exception of messages transmitted at fixed times, the safety signal, when used in the maritime mobile service, shall be transmitted towards the end of the first available period of silence (see No. **3038** for radiotelegraphy and No. **3052** for radiotelephony); the message shall be transmitted immediately after the period of silence.
- 3228** (2) In the cases prescribed in Nos. **3328**, **3331** and **3335**, the safety signal and the message which follows it shall be transmitted as soon as possible, and shall be repeated at the end of the first period of silence which follows.
- 3229** § 16. All stations hearing the safety signal shall listen to the safety message until they are satisfied that the message is of no concern to them. They shall not make any transmission likely to interfere with the message.
- 3230**
to
3254 NOT attributed.

Document No. 4 (*cf. supra*, p. 1217)

INTERNATIONAL CIVIL AVIATION ORGANIZATION

**INTERNATIONAL STANDARDS,
RECOMMENDED PRACTICES AND
PROCEDURES FOR AIR NAVIGATION SERVICES**

AERONAUTICAL TELECOMMUNICATIONS

ANNEX 10

**TO THE CONVENTION ON
INTERNATIONAL CIVIL AVIATION**

VOLUME II

**(COMMUNICATION PROCEDURES
including those with PANS status)**

FOURTH EDITION OF VOLUME II – APRIL 1985

CHAPTER 5 – Aeronautical Mobile Service (extract)

5.3.3. – Radiotelephony urgency communications

5.3.3.1 *Action by the aircraft reporting an urgency condition except as indicated in 5.3.3.4).*

5.3.3.1.1. In addition to being preceded by the radiotelephony urgency PAN, PAN (*see* 5.3.1.2), preferably spoken three times and each word of the group pronounced as the French word “panne”, the urgency message to be sent by an aircraft reporting an urgency condition shall:

- a) be on the air-ground frequency in use at the time;
- b) consist of as many as required of the following elements spoken distinctly and, if possible, in the following order:
 - 1) the name of the station addressed;
 - 2) the identification of the aircraft;
 - 3) the nature of the urgency condition;
 - 4) the intention of the person in command;
 - 5) present position, level (i.e. flight level, altitude, etc., as appropriate) and heading;
 - 6) any other useful information.

Note 1. – The foregoing provisions of 5.3.1.1 are not intended to prevent an aircraft broadcasting an urgency message, if time and circumstances make this course preferable.

Note 2. – The station addressed will normally be that station communicating with the aircraft or in whose area of responsibility the aircraft is operating.

5.3.3.2 Action by the station addressed or first station acknowledging the urgency message

5.3.3.2.1 The station addressed by an aircraft reporting an urgency condition, or first station acknowledging the urgency message, shall:

- a) acknowledge the urgency message;
- b) take immediate action to ensure that all necessary information is made available, as soon as possible, to:
 - 1) the ATS unit concerned;
 - 2) the aircraft operating agency concerned, or its representative, in accordance with pre-established arrangements;

Note. – The requirement to inform the aircraft operating agency concerned does not have priority over any other action which involves the safety of the flight in distress, or of any other flight in the area, or which might affect the progress of expected flights in the area.

- c) if necessary, exercise control of communications.

5.3.3.3 Action by all other stations

5.3.3.3.1 The urgency communications have priority over all other communications, except distress, and all stations shall take care not to interfere with the transmission of urgency traffic.

5.3.3.4 Action by an aircraft used for medical transports

5.3.3.4.1 The use of the signal described in 5.3.3.4.2 shall indicate that the message which follows concerns a protected medical transport pursuant to the 1949 Geneva Conventions and Additional Protocols.

5.3.3.4.2 For the purpose of announcing and identifying aircraft used for medical transports, a transmission of the radiotelephony urgency signal PAN, PAN preferably spoken three times, and each word of the group pronounced as the French word “panne”, shall be followed by the radiotelephony signal for medical transports MAY-DEE-CAL, pronounced as in the French “médical”. The use of the signals described above indicates that the message which follows concerns a protected medical transport. The message shall convey the following data:

- a) the call sign or other recognized means of identification of the medical transports;
- b) position of the medical transports;
- c) number and type of medical transports;

- d) intended route;
- e) estimated time en route and of departure and arrival, as appropriate; and
- f) any other information such as flight altitude, radio frequencies guarded, languages used, and secondary surveillance radar modes and codes.

5.3.3.5 Action by the station addressed or by other stations receiving a medical transports message.

5.3.3.5.1 The provisions of 5.3.3.2 and 5.3.3.3 shall apply as appropriate to stations receiving a medical transports message.

* * *

Document No. 5 (*cf. supra*, p. 1218)

INTERNATIONAL TELECOMMUNICATIONS UNION

RADIO REGULATIONS

Edition of 1982
Revised in 1985

(Extract)

RESOLUTION No. 10

**Relating to the Use of Radiotelegraph and Radiotelephone
Links by the Red Cross, Red Crescent,
and Red Lion and Sun Organizations**

The World Administrative Radio Conference, Geneva, 1979,

considering

- a)* that the worldwide relief work of the Red Cross, Red Crescent, and Red Lion and Sun Organizations is of increasing importance and often indispensable;
- b)* that in such circumstances normal communication facilities are frequently overloaded, damaged, completely interrupted or not available;
- c)* that it is necessary to facilitate by all possible measures the reliable intervention of these national and international organizations;

d) that rapid and independent contact is essential to the intervention of these organizations;

e) that for international relief work of the Red Cross, it is necessary that the national Red Cross, Red Crescent, and Red Lion and Sun Organizations be able to communicate with each other as well as with the International Committee of the Red Cross and the League of Red Cross Societies;

decides to urge administrations

1. to take account of the possible needs of the Red Cross, Red Crescent, and Red Lion and Sun Organizations for communication by radio when normal communication facilities are interrupted or not available;

2. to assign to these organizations the minimum number of necessary working frequencies in accordance with the Table of Frequency Allocations; in the case of fixed circuits between 3 MHz and 30 MHz, the frequencies shall be selected, as far as possible, adjacent to the amateur bands;

3. to take all practicable steps to protect such links from harmful interference.

* * *

Document No. 6 (*cf. supra*, p. 1218)

RESOLUTION No. 18 (Mob-83)

Relating to the Procedure for Identifying and Announcing the Position of Ships and Aircraft of States Not Parties to an Armed Conflict

The World Administrative Radio Conference for the Mobile Services, Geneva, 1983,

considering

a) that ships and aircraft encounter considerable risk in the vicinity of an area of armed conflict;

b) that for the safety of life and property it is desirable for ships and aircraft of States not parties to an armed conflict to be able to identify themselves and announce their position in such circumstances;

c) that radiocommunications offers such ships and aircraft a rapid means of self-identification and providing location information prior to their entering areas of armed conflict and during their passage through the areas;

d) that it is considered desirable to provide a supplementary signal and procedure for use, in accordance with customary practice, in the area of armed conflict by ships and aircraft of States representing themselves as not parties to an armed conflict;

resolves

1. that the frequencies specified in No. **3201** of the Radio Regulations may be used by ships and aircraft of States not parties to an armed conflict for self-identification and establishing communications. The transmission will consist of the urgency or safety signals, as appropriate, described in Article **40** followed by the addition of the single group “NNN” in radiotelegraphy and by the addition of the single word “NEUTRAL” pronounced as in French “neutral” in radiotelephony. As soon as practicable, communications shall be transferred to an appropriate working frequency;
2. that the use of the signal as described in the preceding paragraph indicates that the message which follows concerns a ship or aircraft of a State not party to an armed conflict. The message shall convey at least the following data:
 - a) call sign or other recognized means of identification of such ship or aircraft;
 - b) position of such ship or aircraft;
 - c) number and type of such ships or aircraft;
 - d) intended route;
 - e) estimated time en route and of departure and arrival, as appropriate;
 - f) any other information, such as flight altitude, radio frequencies guarded, languages and secondary surveillance radar modes and codes;
3. that the provisions of Sections I and III of Article **40** shall apply as appropriate to the use of the urgency and safety signals, respectively, by such ship or aircraft;
4. that the identification and location of ships of a State not party to an armed conflict may be effected by means of appropriate standard maritime radar transponders. The identification and location of aircraft of a State not party to an armed conflict may be effected by the use of the secondary surveillance radar (SSR) system in accordance with procedures to be recommended by the International Civil Aviation Organization (ICAO);
5. that the use of the signals described above would not confer or imply recognition of any rights or duties of a State not party to an armed conflict or a party to the conflict, except as may be recognized by common agreement between the parties to the conflict and a non-party;
6. to encourage parties to a conflict to enter into such agreements;

request the Secretary-General

to communicate the contents of this Resolution to the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO) for such action as they may consider appropriate;

requests the CCIR

to recommend an appropriate signal in the digital selective calling system for use in the maritime mobile service and other appropriate information as necessary.

Protocol I

Annex I, Article 8 – Electronic identification

1. The Secondary Surveillance Radar (SSR) system, as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used to identify and to follow the course of medical aircraft. The SSR mode and code to be reserved for the exclusive use of medical aircraft shall be established by the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, in accordance with procedures to be recommended by the International Civil Aviation Organization.
2. Parties to a conflict may, by special agreement between them, establish for their use a similar electronic system for the identification of medical vehicles, and medical ships and craft.

Documentary references

Official Records

O.R. I, Part I, p. 177; pp. 203-204 (Res. 17); Part II, p. 31, CDDH/243 (Res. 15); p. 37, CDDH/446 (Res. 17); Part III, p. 30 (Art. 11). *O.R.* III, p. 374 (Art. 9); p. 375 (Art. 8), p. 376 (Art. 11); pp. 390-391. *O.R.* V, p. 382, CDDH/SR.33, para. 13. *O.R.* VII, p. 52, CDDH/SR.48, para. 11 (Art. 8); p. 171, CDDH/SR.54, para. 44 (CDDH/424). *O.R.* XI, p. 90, CDDH/II/SR.11, paras. 56-60; p. 566, CDDH/II/SR.50, paras. 6-7; p. 568, paras. 17-21; p. 569, paras. 27-29; p. 574, para. 64. *O.R.* XII, pp. 171-174, CDDH/II/SR.70, paras. 40-62; p. 203, CDDH/II/SR.73, para. 35; p. 292, CDDH/II/SR.82, para. 26. *O.R.* XIII, p. 23, CDDH/49/Rev.1, para. 4; p. 25, para. 21; p. 26, para. 24; p. 29, paras. 36 (3) and 38; p. 31, para. 50; p. 32, para. 56; p. 33, paras. 59-66; p. 43 (Art. 9); p. 49, *id.*, Appendix II; p. 61, CDDH/221/Rev.1, para. 8; pp. 159-160, paras. 260-261; p. 266, CDDH/235/Rev.1, paras. 50-53; p. 267, para. 54 (Art. 9); p. 268, paras. 57 (Resolution CDDH/II/364/Rev.1) and 59-61; p. 300 (Art. 8); p. 321, *id.*, Annex III, paras. 3-4; p. 358, CDDH/406/Rev.1 (resolutions).

Other references

CE/7b, p. 46, Section II; p. 47, para. 2; p. 48, Section A, sixth para.; p. 50, para. b); pp. 52-54, Section II; pp. 57-58 (Art. 4); pp. 60-61 (Art. 4); p. 63, para. 3);

p. 65, Section III; *CE 1972, Technical Memorandum*, pp. 12-13, Section III; pp. 36-40, Section III; pp. 44-52, Annex II. *CE 1972, Report*, Vol. I, p. 41, para. 1.66; pp. 53-54, paras. 2.2.2-2.2.2.2; p. 55, paras. 7(c) and 12-14; pp. 57-58, Sections XI-XIII; p. 58, para. 2.3.4; p. 59, Annex III D, paras. 1-4. *Commentary Drafts*, pp. 123-124 (Art. 11).

Commentary

General remarks

4195 The use of radar to identify medical aircraft was discussed at the meeting of technical experts held at the ICRC in 1970. Two identification systems were studied:

- the secondary surveillance radar (SSR) system used by international civil aviation;
- the radar identification echo transmission system put forward by the International Electrotechnical Commission (IEC).

4196 The experts recommended the secondary radar system, which is more and more commonly used worldwide and is less costly than the identification echo transmission system, although the latter has a number of other advantages.

4197 The Technical Sub-Commission of the 1972 Conference of Government Experts also proposed the use of the secondary surveillance radar (SSR) system; Annex I, Article 11, of the 1973 ICRC draft is entitled “Secondary surveillance radar (SSR) system signal”.¹

4198 At the first session of the Diplomatic Conference, Article 11 was replaced by Article 9, “Secondary radar identification such as IFF/SIF”, as a result of the work of the Technical Sub-Committee which added the initials IFF/SIF to the title of Article 9 in order to make it more specific. The meaning is:

IFF = Identification Friend or Foe

SIF = Selective Identification Features.

4199 The ICAO representative pointed out that these initials were military and could not be applied to civil aviation.²

4200 After revision by the Technical Sub-Committee in 1976, Article 9 became Article 8, “Electronic identification”, with its present text. Article 9 called for codes set aside for the exclusive use of medical aircraft, a requirement which could not be met in either 1974 or 1976 under the secondary surveillance radar (SSR) system. At the third session of the Conference, the Technical Sub-Committee avoided further lengthy discussion on the matter by dropping the

¹ *CE/7b*, pp. 46, 52-54; *CE 1972, Technical Memorandum*, pp. 12-13, 36-39, 44-52 (Annex II); *CE 1972, Report*, Vol. I, p. 53, para. 2.2.2; *Commentary Drafts*, pp. 123-124 (Art. 11).

² *O.R. XIII*, p. 29, CDDH/49/Rev.1, paras. 36, 38.

requirement for exclusive radar codes, replacing the reference to secondary radar in the title by the word “electronic” and deleting the military initials IFF/SIF.

4201 Nonetheless, it is with the SSR system and its modes and codes that Article 8 is concerned stipulating that the procedures for obtaining modes and codes for the exclusive use of medical aircraft are to be recommended by ICAO.

4202 To this end, Resolution 17 addressed by the Diplomatic Conference to ICAO invites the latter to “establish appropriate procedures for the designation, in case of an international armed conflict, of an exclusive SSR mode and code to be employed by medical aircraft concerned”.³

4203 Secondary surveillance radar was developed from the IFF military system used during the Second World War to locate aircraft and ships. The IFF system consists of a primary, interrogator or surveillance radar and a transponder installed on board the aircraft or ship, enabling the latter to be identified when detected by the primary radar. The transponder is the system’s secondary radar.

4204 The primary radar, installed on land or on board ship, sweeps the horizon with an electromagnetic pulse stream. When the pulses encounter a “target” – aircraft or ship – an echo is sent back, producing a luminous dot on the primary radar’s display screen and enabling the detected target to be located. At the same time the primary radar’s pulses trigger the target’s transponder, which automatically starts to transmit the allocated identification code at which it has been set. A decoding device connected to the primary radar display reproduces the identification code alongside the luminous dot representing the target.

4205 The mode of an IFF or secondary radar system gives the characteristics of the interrogation pulses: amplitude, duration, interval etc. The identification code consists of four digits. Aircraft are identified by means of military SSR modes numbered from 1 to 4 and civilian modes A, B, C and D defined by ICAO.⁴

4206 Modes A and 3 are common to civilian and military operations, as is mode C which is used to determine aircraft altitude. Modes A, 3 and C are used for air traffic control.

4207 Like the modes, the identification codes are limited in number, so that a code cannot be set aside for the exclusive use of medical aircraft, of which there are relatively few; nevertheless, the matter is still under study by ICAO, which holds the view that the chances of being able to select an exclusive radar code for medical aircraft probably depend on the development of secondary radar modes with greater data processing capacity than the above-mentioned existing ones. At the present time, ICAO is in charge of the procedure for allocating secondary radar codes (Annex 10, Aeronautical Telecommunications, Vol. I, Part I, para. 2.5.4.1).

4208 National administrations responsible for air navigation control, in particular air traffic services (ATS), are invited to draw up procedures for the allocation of

³ Cf. Resolution 17 annexed, together with Resolutions 18 and 19, to this commentary, *infra*, p. 1513.

⁴ Cf. Annex 10 to the Convention on International Civil Aviation (Chicago, 7 December 1944), hereinafter referred to as ICAO, Annex 10, Aeronautical Telecommunications, Vol. I, Sections 2.5 and 3.8, Attachment B.

radar codes on a regional basis, in accordance with ICAO. In allocating the codes, account should be taken of regional air navigation arrangements.

- 4209** Radar codes have on occasion been allocated to medical aircraft by arrangement between the Parties to a conflict. In one case, the codes 5000 and 5100 were allocated, respectively, by each of the Parties to the conflict to its own medical aircraft.
- 4210** Under Chapter XIV of the International Code of Signals, the group YYY is used as the distinctive signal for transponders on board hospital ships. In radiotelegraphy, this group is also used as a prefix in the radiocommunications of medical units and transports, pursuant to Article 40, Section II, of the Radio Regulations.

Paragraph 1

- 4211** In international civil aviation the same frequencies are used worldwide for secondary radar pulses:
- 1030 MHz for interrogation transmissions;
 - 1090 MHz for the reply transmission from the transponder.⁵
- 4212** These frequencies are used by civilian aircraft all over the world and to a large extent by military aircraft as well. Some air forces are said to use other frequencies, probably in the band between 700 MHz and 1040 MHz. Since the frequencies used are known, compatible equipment allowing the radar identification code to be displayed on the interrogator screen can be defined. Radar identification of a medical aircraft should therefore give rise to no difficulty wherever military or civilian SSR facilities exist.
- 4213** At the 1972 Conference of Government Experts, this principle was accepted by the Technical Sub-Commission which recommended, for the secondary radar mode and code:
- Mode 3/A;
 - Code: to be agreed upon or specified by the Parties.⁶
- 4214** This procedure is geared to the existing possibilities described by ICAO and outlined in the introduction to this Chapter.
- 4215** The Parties to the conflict should endeavour to prevail upon their national air traffic services (ATS) to allocate a secondary radar identification code for use by their own medical aircraft in the aeronautical region affected by the conflict. This code, together with mode 3/A and the stated intention to use the distinctive signals, should immediately be notified to the other Party; the States not Parties to the conflict (hereinafter called “neutral States”) should also be informed.

⁵ *Ibid.*, paras. 3.8.1.1, 3.8.2.1.

⁶ *CE 1972, Report*, Vol. I, p. 54, para. 2.2.2.1.

Paragraph 2

- 4216** IFF (friend or foe) identification systems have been designed to meet all the identification requirements of friendly land vehicles operating on the battlefield. The possibilities they offer include the following:
- ground-to-ground identification of friendly vehicles;
 - compatibility with the existing ground-to-air system, enabling helicopters and aircraft operating above the battlefield to be identified;
 - location of friends;
 - search for a specific vehicle by means of its code.
- 4217** These equipments operate on frequencies between 1030 MHz and 1090 MHz, which have already been mentioned in connection with the transponders on board aircraft in the secondary radar systems.
- 4218** If the Parties to the conflict wish to use such radar identification systems for their medical units and transports on land, they should state their intention of doing so and notify each other of the radar codes and modes concerned. The agreement they conclude in this connection should specifically mention the region covered, in which exclusive use will be made of the radar identification code allocated to medical units and transport or in other words, land vehicles, ambulances and medical aircraft. This information should also be communicated to the neutral States.
- 4219** At sea, only warships use IFF systems at the present time. The use of radar to identify hospital ships and other vessels (for example, rescue craft) protected by the Conventions and the Protocol would mean that appropriate frequencies, modes and codes would have to be established. International standards governing the use of electromagnetic frequencies for radar identification and tracking in the maritime mobile service are being studied by both the ITU and IMO. The use of shipborne transponders in a secondary radar system for the identification and tracking of civilian vessels is intended to enhance the safety of navigation at sea. The use of radar systems to monitor congested or dangerous areas and the entry to some harbours has paved the way for the studies which are currently being conducted on the standardization of civilian shipborne transponders. To this end, WARC-79 adopted Resolution No. 600 and Recommendation No. 605, relating respectively to the use of frequency bands by, and the technical characteristics of, shipborne transponders.
- 4220** Resolution No. 600 and Recommendation No. 605, together with Recommendation No. 713 (Mob-83) relating to the use of radar transponders for facilitating research and rescue operations at sea are reproduced *infra*, pp. 1252-1255. The action taken with regard to these three texts will be of crucial importance for the ships and craft protected by the Geneva Conventions and Protocol. These issues are to be discussed at the WARC for the mobile services to be held in 1987.
- 4221** The conclusion of the special agreement regarding the use of radar to identify medical ships and craft for which provision is made in paragraph 2 of this article will be facilitated once the related standards and international rules currently under study in the ITU and IMO have been adopted; the agreement in question should also cover life-saving appliances occupied by shipwrecked persons.

Documents annexed

Document No. 1 (*cf. supra*, p. 1251)

INTERNATIONAL TELECOMMUNICATION UNION

RADIO REGULATIONS

Edition of 1982
Revised in 1985
(Extract)

RESOLUTION No. 600

**Relating to the Use for the Radionavigation Service
of the Frequency Bands 2 900 - 3 100 MHz, 5 470 - 5 650 MHz,
9 200 - 9 300 MHz, 9 300 - 9 500 MHz and 9 500 - 9 800 MHz**

The World Administrative Radio Conference, Geneva, 1979,

considering

- a)* that this Conference has adopted provisions relating to the development of shipborne transponders in the maritime radionavigation service in frequency bands 2 930 - 2 950 MHz, 5 470 - 5 480 MHz and 9 280 - 9 300 MHz;
- b)* the growing demands already being made on the frequency allocations for the radionavigation service in the bands utilized for aeronautical and maritime radionavigation arising from:
 - i)* the increasing number of shipborne radars which is reinforced by the demands being made for compulsory installation on an international basis;
 - ii)* the increasing need for navigational aids and transponders working with primary radars;
 - iii)* the need for the increasing utilization of this band by stations in the aeronautical radionavigation service noting that compulsory installation on board aircraft is also demanded on an international basis;
- c)* the increase in harmful interference occurring in the 9 300 - 9 500 MHz band due to these factors;
- d)* that these radar applications have important safety considerations;

noting

- a)* Recommendation **605**;
- b)* the conclusions of the Special Preparatory Meeting of the CCIR;

c) the need for additional operational and technical information in deciding the most effective frequency utilization;

resolves

1. that the next competent world administrative radio conference shall:

1.1. review footnotes to these radionavigation bands and make such changes as deemed appropriate in the light of additional studies;

1.2 prepare regulatory recommendations as appropriate;

2. that the CCIR shall continue to consider the technical factors and make Recommendations;

invites

1. *the Administrative Council* to ensure that radionavigation matters of concern to the mobile services are included in the agenda of the next competent mobile conference;

2. *administrations* to study the use of these bands by the radionavigation services and to submit proposals for their efficient utilization;

requests the Secretary-General

to refer this Resolution to the IMCO and ICAO inviting their urgent consideration of the operational requirements for the maritime and aeronautical radionavigation services using these frequency bands, and to make appropriate recommendations to assist administrations in their preparation for the conference.

* * *

Document No. 2 (*cf. supra*, p. 1251)

RECOMMENDATION No. 605

Relating to Technical Characteristics and Frequencies for Shipborne Transponders^{1, 2}

The World Administrative Radio Conference, Geneva, 1979,

considering

a) that merchant ships of the world are increasing in size and speed;

b) that every year a significant number of collisions occur involving merchant vessels with resultant loss of life and property and that collisions have a high potential for endangering the natural environment;

¹ A receiver-transmitter which emits a signal automatically when it receives the proper interrogation.

² Replaces Recommendation No. Mar2 – 14 of the World Maritime Administrative Radio Conference, Geneva, 1974.

- c) that there is a need to correlate radar targets with vessels making VHF radiotelephone transmissions;
- d) that studies and experiments have shown that shipborne transponders can enhance and supplement radar target images as compared with normal radar images;
- e) that current studies and experimentation relating to shipborne transponders indicate that development of equipment can be expected in the near future which will offer adequate radar image enhancement and target identification and, possibly, data transfer capabilities;
- f) that such shipborne transponders may require protection from interference;
- g) that the selection of technical characteristics for these transponders should be coordinated with other users of the radio frequency spectrum whose operations might be affected;

request the CCIR

to recommend, after consultation with appropriate international organizations, the most suitable order of frequencies and bandwidth required for this purpose, and the technical parameters to be met by such devices taking into account electromagnetic compatibility with other services having allocations in the same frequency band;

invites administrations and the Inter-Governmental Maritime Consultative Organization (IMCO)

to continue to evaluate the operational benefits which could result from the widespread use of transponders on ships and to consider whether there would be advantage in adopting an internationally approved system for future implementation;

recommends

that, pending further technical and operational developments and evaluation, administrations be prepared at the next competent world administrative radio conference to make the necessary provisions for the use of such devices.

* * *

Document No. 3 (*cf. supra*, p. 1251)

RECOMMENDATION No. 713 (Mob-83)

**Relating to the Use of Radar Transponders for Facilitating
Search and Rescue Operations at Sea**

The World Administrative Radio Conference for the Mobile Services, Geneva, 1983,

considering

- a) that a search and rescue system, composed of shipborne radars operating in the 9 GHz band in combination with radar transponders which respond to radio signals transmitted by the shipborne radar, could be a practicable means of position-finding for a unit in distress at sea;
- b) that this system would make use of radars operating in the 9 GHz band already installed on board ships and aircraft engaged in search and rescue operations and could contribute greatly to search and rescue operations at sea;
- c) that this system would be more effective, if the small-size, light-weight and low-cost radar transponders were in conformity with internationally agreed technical and operating characteristics;
- d) CCIR Questions 28/8 and 45/8, and in particular the studies on homing on emergency position-indicating radiobeacons;

requests the CCIR

to include in its studies on the future global maritime distress and safety system (FGMDSS) the technical and operating characteristics of radar transponders for facilitating search and rescue operations at sea.

recommends administrations

to study this matter and submit contributions to CCIR,

invites the Secretary-General

to bring this Recommendation to the attention of the International Maritime Organization (IMO), the International Association of Lighthouse Authorities (IALA) and the International Civil Aviation Organization (ICAO).

Annex I, Chapter IV – Communications

Introduction

4222 The communications to be exchanged between the Parties to the conflict with regard to medical units and transports are based in particular on the following provisions of the Protocol:

- Article 12 (*Protection of medical units*), paragraph 3: notification of the location of fixed medical units.
 - Article 18 (*Identification*), paragraphs 1 and 2: notification of the use of distinctive signals.
 - Article 22 (*Hospitals ships and coastal rescue craft*), paragraph 3, second sentence: exchange of information regarding the identification of medical craft.
 - Article 23 (*Other medical ships and craft*), paragraph 2, second sentence: hailing; paragraph 4, first sentence: notification of the characteristics and course of a medical ship.
 - Article 25 (*Medical aircraft in areas not controlled by an adverse Party*), second sentence: notification of medical aircraft to the adverse Party.
 - Article 26 (*Medical aircraft in contact or similar zones*), first sentence: prior agreement regarding the operation of medical aircraft.
 - Article 27 (*Medical aircraft in areas controlled by an adverse Party*), paragraph 2, first sentence: requirement for a medical aircraft carrying out a flight to identify itself and inform the adverse Party of any navigational error or emergency.
 - Article 28 (*Restriction on operations of medical aircraft*), paragraph 4: prior agreement concerning the use of medical aircraft to search for the wounded.
 - Article 29 (*Notifications and agreements concerning medical aircraft*), paragraphs 1-5: notification, prior agreement, immediate acknowledgement of receipt, transmission to the units concerned of information concerning the flight plans of medical aircraft.
 - Article 30 (*Landing and inspection of medical aircraft*), paragraphs 1 and 2: order to a medical aircraft to land, acknowledgement of receipt of such an order by the medical aircraft concerned.
 - Article 31 (*Neutral or other States not Parties to the conflict*), paragraphs 1-3: prior agreement regarding the overflight of neutral territory by medical aircraft belonging to a Party to the conflict; requirement for a medical aircraft to give notification of navigational errors and to identify itself if flying over neutral territory without prior agreement; reception and acknowledgement of receipt of an order to land on neutral territory.
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- 4223 As stated in the preambular part of Resolution 19¹ addressed by the Diplomatic Conference to the ITU, these provisions of the Protocol call for “distinctive” and reliable means of communication. The ITU met the basic radiocommunication requirements of medical units and transports by incorporating new Section II, “Medical Transports”, in Article 40 of the Radio Regulations, which are drawn up by the ITU so as to enable radio operators all over the world to set up efficient communications.
- 4224 The above list of communications affecting medical units and transports is not comprehensive. The fact that Resolution 19 refers to marking, identifying, locating and communicating suggests that a wide range of communications may be involved, in circumstances which are impossible to predict.
- 4225 Satellite radiocommunications should be considered for use by medical units and transports. Two complementary systems are in operation in this area.
- 4226 Since 1982, the International Maritime Satellite Organization (INMARSAT) has been operating a worldwide satellite radiocommunication system, with satellites positioned over the Atlantic, Pacific and Indian Oceans providing almost total world coverage. These satellites are placed on the geostationary orbit some 36,000 kilometres above the equator and their spin rate is equal to the Earth rate, making them stationary in relation to the Earth, of which they always cover the same area. The INMARSAT system enables ships and drilling platforms at sea to benefit from all the communication services: telephone, telex, facsimile, low-, medium-, high- and very high-speed (up to 1 megabit per second)² data transmission, colour television. It is a co-operative, commercial, non-profit-making operation with 50 member countries, including the world’s major maritime nations. Each country takes part in the organization’s decision-making process and contributes to its financing. The system provides an instantaneous, high-standard mobile communication service which will no doubt be extended in the future to other mobile applications such as satellite telecommunications for aeronautical purposes.
- 4227 The COSPAS/SARSAT system³ is designed for the rapid detection of signals transmitted by ships and aircraft in distress. It is a joint international satellite search and rescue project in which Canada, the United States, France and the Soviet Union have been participating since 1982. It is based on the principle of placing several satellites in low (800 to 1,000 km) quasi-polar orbits to monitor distress signals emitted by the emergency position-indicating radiobeacons installed in ships and aircraft; the satellites serve as relays for the retransmission of these distress signals to terrestrial stations which are thus able to determine the exact position of the ship or aircraft and make the necessary rescue arrangements.

¹ Cf. Resolution 19, *infra*, p. 1519.

² bit = either of the two digits 0 or 1 used in binary notation; a unit of information equivalent to the result of a choice between two equally probable alternatives (Webster). Contracted form of “binary digit” (1 octet = 8 bits, 1 megabit = 10⁶ bits).

³ COSPAS = Cosmos Spacecraft (USSR); SARSAT = Search and Rescue Satellite Aided Tracking (USA).

4228 An integrated system of polar (COSPAS/SARSAT type) and geostationary (INMARSAT) satellites would enable all rescue communication and service requirements on land, at sea and in the air to be met worldwide, even in time of armed conflict, since the satellites concerned do not constitute a military objective.

Ph.E.

Protocol I

Annex I, Article 9 – Radiocommunications

The priority signal provided for in Article 7 of these Regulations may precede appropriate radiocommunications by medical units and transports in the application of the procedures carried out under Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol.

Documentary references

Official Records

O.R. I, Part I, p. 177; Part II, p. 26, CDDH/243, Resolution 14; p. 44, CDDH/446, Resolution 19; Part III, p. 30 (Art. 10). *O.R.* III, pp. 375-376 (Chapter IV – Art. 10); p. 392. *O.R.* VII, p. 53, CDDH/SR.48 (Art. 9); p. 171, CDDH/SR.54, para. 44. *O.R.* XI, p. 95, CDDH/II/SR.12, para 16; pp. 566-568, CDDH/II/SR.50, paras. 8-21; p. 570, para. 32; pp. 575-576, paras. 78-83; pp. 598-601, CDDH/II/SR.53, paras. 7-28; pp. 614-617, CDDH/II/SR.54, paras. 68-85; pp. 619-620, CDDH/II/SR.55, paras. 1-12. *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 18-20; p. 165, CDDH/II/SR.70, para. 3; pp. 166-170, paras. 8-32; pp. 170-171, paras. 33, 36-39; p. 203, CDDH/II/SR.73, paras. 35-36; p. 292, CDDH/II/SR.82, para. 26; pp. 489-490, CDDH/II/SR.101, paras. 26-33. *O.R.* XIII, p. 25, CDDH/49/Rev.1, para. 22; p. 28, para. 35; pp. 30-31, para. 47; pp. 32-33, paras. 55-59; p. 44 (Art. 10); p. 51, *id.*, Appendix III; pp. 159-163, CDDH/221/Rev.1, paras. 260-265; p. 165, *id.*, Annex I (CDDH/221); p. 267, CDDH/235/Rev.1, para. 54 (Art. 10); p. 268, paras. 57-60 (Resolution CDDH/II/SR.363/Rev.1); p. 301 (Chapter IV); p. 321, *id.*, Annex III, para. 4; p. 358, CDDH/406/Rev.1 (resolutions); p. 381, para. 85.

Other references

1949 Conference, Resolutions 6 and 7. *CE/7b*, pp. 54-55. Section III, *CE 1972, Technical Memorandum*, pp. 10-11, Section II; pp. 26-35, Section II. *CE 1972, Report*, Vol I, p. 41, para. 1.66; p. 54, para. 2.2.1.2; pp. 54-55, para. 7 (b); p. 57, paras. XIII-X; p. 58, paras. 2.3-2.3.3; pp. 59-60, Annexes III D and III E. *Commentary Drafts*, p. 123 (Art. 10).

Commentary

- 4229** This article corresponds to Article 10 of the ICRC's draft of Annex I.
- 4230** The use of radiocommunications within the meaning of this article is governed by Article 40, Section II, No. 3220, of the Radio Regulations. Accordingly, its provisions should be brought into line with those of Article 40 when Annex I is revised.¹
- 4231** No. 3220 of Article 40 of the Radio Regulations makes the use of radiocommunications optional, as is the case for all the distinctive signals. Clearly, a hospital ship sailing behind a fleet of warships will not break radio silence by transmitting any of the radio signals provided for in Section II of Article 40, thus revealing the fleet's course. The radiocommunications contemplated in this article will only be used when necessary, at the order of the competent authority.
- 4232** Satellite links in the frequency bands listed in Article 38 of the Radio Regulations may be used for the radiocommunications referred to in Section II of Article 40. The text of Article 38 is annexed to the commentary on Article 7 (*Radio signal*) above.² In cases where high-speed radio-telex or radiotelephony transmissions in clear are used, this fact should be mentioned when the characteristics of the medical transports are notified, particularly where hospital ships are involved.
- 4233** This transmission mode does not use a secret code; in addition, the satellite radiocommunication earth stations installed on board merchant ships are notified to, and recorded by, the ITU. This procedure should enable a certain degree of supervision to be exercised and should remove any ambiguity as to the requirement for a ship fitted with such equipment to communicate in clear if it is converted into a hospital ship. The same would apply to a rescue craft using satellite links.
- 4234** It has been observed that, under Article 34 of the Second Convention, hospital ships may not possess or use a secret code for their wireless or other means of communication. The words "émissions" and "emisiones" are used in the French and Spanish texts respectively. Can it be deduced that hospital ships must not *transmit*, but may *receive*, messages in secret code? Such an interpretation would enable them to receive secret instructions concerning their movements, course and victualling without revealing the intentions, order of battle and victualling or refuelling points and sources of the war fleet at sea.
- 4235** In all likelihood, the drafters of the 1949 Conventions intended to prohibit only the transmission – and not the reception – of secret codes. During the discussions relating to the revision of Hague Convention X and its replacement by the Second Geneva Convention of 1949, the reception of secret codes was not questioned in the proposals which formed the basis for Article 34. Those proposals sought to prohibit the transmission of messages in secret code in order

¹ Cf. commentary Art. 7, Annex I, general remarks, second paragraph and footnote 1, *supra*, p. 1216.

² Cf. commentary Art. 7, Annex I, *supra*, p. 1223.

to avoid a repetition of incidents which had occurred during the First World War.³ This opinion is shared by a number of naval experts.

4236 With regard to the communications of coastal rescue craft, the International Life-Boat Conference (ILC) intends to prepare a handbook for the commanding officers of rescue craft which would deal with the question of radiocommunications in time of armed conflict. The ILC holds the view that this use of radiocommunications should also be covered in Article 40 and that the issue should therefore be submitted to the forthcoming World Administrative Radio Conference for the mobile services in 1987. It is to be proposed that the prefix “rescue craft” be set aside for the exclusive use of rescue craft both in peacetime and during armed conflicts.

4237 The communications contemplated in this article have already proved to be useful both on land and at sea for the conclusion of agreements concerning the establishment of temporary neutralized zones used to exchange the wounded and arrange for the transport of medical equipment in a situation of armed conflict.⁴

Ph.E.

³ Cf. Second Convention, Art. 58; Ph. Eberlin, “Modernization of Protective Markings and Signalling”, *op. cit.*, p. 59. On the “Ophelia” affair, cf. *RICR*, July 1915, pp. 296, 306; October 1915, p. 453; April 1916, p. 165; July 1917, p. 263 (in French only).

⁴ Cf. Ph. Eberlin, “Identification of Hospital Ships...”, *op. cit.*, p. 324; Communications.

Annex I, Article 10 – Use of international codes

Medical units and transports may also use the codes and signals laid down by the International Telecommunication Union, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization. These codes and signals shall be used in accordance with the standards, practices and procedures established by these Organizations.

Documentary references

Official Records

O.R. I, Part I, p. 177; Part III, p. 31 (Art. 13). *O.R.* III, pp. 376-377; p. 396. *O.R.* VII, p. 53, CDDH/SR/48, Art. 10. *O.R.* XI, p. 569, CDDH/II/SR.50, para. 27. *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 170, CDDH/II/SR.70, paras. 33-34; p. 203, CDDH/II/SR.73, paras. 35-36. *O.R.* XIII, pp. 31-33, CDDH/49/Rev.1, paras. 54-59; p. 44 (Art. 10); p. 268, CDDH/235/Rev.1, para. 59; p. 301 (Chapter IV); pp. 321-322, Annex III.

Other references

CE/7b, p. 68, second para.; pp. 69-72, Annex I; p. 74, Annex III, para. 2; p. 73, para. b), Section III; pp. 76-77, codes. *CE 1972, Technical Memorandum*, pp. 28-34. *CE 1972, Report*, Vol. I, pp. 56-57, Section V; p. 59, para. 6. *Commentary Drafts*, p. 125 (Art. 13).

Commentary

- 4238** Provision was made for the use of international codes in Article 13 of the ICRC's draft of Annex I, which was adopted by the Conference subject to editorial amendments. The text does not place the Parties to the conflict under any obligation; they may unilaterally authorize the use of such codes or not, as they wish.

- 4239** The international codes published by the ITU, IMO and ICAO are designed to facilitate the communications in respect of which these three organizations issue international regulations. Their purpose is to provide ways and means of communicating when language difficulties exist, in order to enhance the safety of sea and air navigation as well as of life.
- 4240** The ITU Radio Regulations contain a number of codes, abbreviations and signals for use in radiocommunications alongside the compulsory procedures applied in the maritime and aeronautical mobile services. These provisions apply to sea and air medical transports in peacetime and it is advisable that they should be used also in time of armed conflict, subject to the agreement of the competent authority.¹
- 4241** The Q code, which is used by all three organizations for radiocommunications, consists of groups of three letters, the first of which is always Q. The groups are arranged in series, as follows:
- QAA to QNZ = for use in the aeronautical service,
 - QOA to QQZ = for use in the maritime service,
 - QRA to QUZ = for use in all services.
- 4242** The series QAA to QNZ, allocated to the aeronautical radiocommunication service, are not part of the ITU Radio Regulations; they are found in ICAO document 8400/3 under the heading “The Q Code”.²
- 4243** The series QOA to QQZ to be used for radiocommunications in the maritime mobile service are set out, together with their meaning and procedures, in the ITU Radio Regulations, Vol. II, Appendix 14; they are followed by the abbreviations and signals to be used with the Q code.
- 4244** The series QRA to QUZ, which may be used by all services, are found in the Radio Regulations, Vol. II, Appendix 13, followed by the abbreviations and signals to be used with the Q code.
- 4245** Each of the three parts of the Q code comprises series of groups set aside for urgency, distress and search and rescue radiocommunications.
- 4246** It would be advisable to select Q code groups for use by medical units and transports on land and at sea in time of armed conflict, in order to facilitate their communications with the adverse Party in notifying the information required to ensure the safety of their missions.
- 4247** ICAO document 8400/3 referred to above contains all the abbreviations and codes for use in aircraft operation, with the exception of certain abbreviations published in other documents and listed in the foreword to document 8400/3.
- 4248** There would be some advantage in extracting from document 8400/3 all the material that might facilitate the task of medical aircraft in time of armed conflict, in particular as regards co-ordination with medical units and transports on land and at sea.

¹ ITU, *Radio Regulations*, Vol. I, Arts. 52, 53, 63-65; Vol. II, Appendices 13-14, Q code; Appendix 24, Phonetic alphabet.

² ICAO, Document 8400/3, *Procedures for Air Navigation Services, ICAO Abbreviations and Codes*, Montreal.

- 4249** The IMO International Code of Signals may be used by all existing communication media for the transmission of messages: flags, signalling lamps using the Morse code, sound signalling, signalling by arms (semaphore) and radiocommunications. The document comprises fourteen chapters describing the methods and procedures for the transmission of the groups of letters and digits listed in the General Section, the Medical Section and the Appendices. Chapter XIV is entitled “Identification of Medical Transport in Armed Conflict and Permanent Identification of Rescue Craft”.³
- 4250** The General Section of the Code comprises groups of letters and digits for use in distress and emergency situations as well as in search and rescue operations. Appendices 1 and 3 contain distress signals and signals for use during rescue operations.
- 4251** In principle, the International Code of Signals is carried on board all ships. However, it would be useful for the information and provisions meeting the specific needs of hospital ships, coastal rescue craft and other vessels protected by the Convention and Protocol in time of armed conflict to be extracted from the Code and collated for their use.
- 4252** Any extract from an international code must contain a reminder to the effect that the compulsory transmission procedure is to be observed in all circumstances. The increasingly widespread use of radiotelephony does not make the Q code any less valuable, since its groups may be transmitted in spoken form using the spelling table in the Radio Regulations. This facility enables language difficulties to be overcome.

Ph.E.

³ French and Spanish language editions are available. *Cf. supra*, p. 1169, note 5 and p. 1170.

Annex I, Article 11 – Other means of communication

When two-way radiocommunication is not possible, the signals provided for in the International Code of Signals adopted by the Inter-Governmental Maritime Consultative Organization or in the appropriate Annex to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used.

Documentary references

Official Records

O.R. I, Part I, p. 177; Part III, p. 30 (Art. 12). *O.R.* III, pp. 376-377, p. 394. *O.R.* VII, p. 53, CDDH/SR.48 (Art. 11). *O.R.* XI, p. 569, CDDH/II/SR.50, para. 27. *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 170, CDDH/II/SR.70, paras. 33-34; p. 203, CDDH/II/SR.73, paras. 35-36. *O.R.* XIII, p. 31, CDDH/49/Rev.1, paras. 50-53; p. 44 (Art. 11); p. 268, CDDH/235/Rev.1, para. 59; p. 301 (Chapter IV); pp. 321-322, Annex III.

Other references

CE 1972, *Technical Memorandum*, p. 8, question 6; pp. 20-21, question 6. *CE* 1972, *Report*, Vol. I, pp. 56-57, Section V; p. 58, para. 2.1.5. *Commentary Drafts*, pp. 124-125 (Art. 12).

Commentary

- 4253 The draft text on other means of communication submitted by the ICRC – Article 12 of draft Annex I – referred to Annex 12 to the Chicago Convention on International Civil Aviation of 7 December 1944. This Annex is entitled “Search and rescue” and it is applicable to the search and rescue services in the territories of Contracting States and on the high seas, and to the co-ordination of such services between States. Chapter 5.10 and Appendix A of Annex 12 provide for aircraft and ships to exchange visual signals for search and rescue purposes and

also refers to two ground-to-air visual signal codes for use by survivors and search parties.

4254 Other visual and light signals for search and rescue are given in the ICAO Search and Rescue Manual, Part 2, Chapter 2, “Communications”. They include paulin signals and body signals in the ground-to-air visual signal codes for use by ground search parties and survivors.¹

4255 It may be assumed that crews of medical aircraft are familiar with these visual means of communication, which are described in international search and rescue procedures. However, it would be advisable for the personnel of other medical units and transports to receive some training in this area as well, so that, if necessary, visual signals may be used in time of armed conflict, subject to the approval of the competent authority.

4256 In order to avoid any differences of interpretation when these visual signals are used in medical evacuation or search and rescue operations, the Parties to the conflict could notify one another of their intention to use such signals, under the agreements concluded in respect of such operations.

4257 The methods to be used for sending the visual signals concerned are described in the Search and Rescue Manual, Part 2, Chapter 2, Section 2.3.3:

“2.3.3. Ground-Air Visual Signal Code for Use by Land Parties

2.3.3.1. When a land party wishes to inform an aircraft of the progress of the search and/or rescue, it should use the appropriate symbols described in Figures 2-1 and 2-2.

2.3.3.2. The symbols shown in Figures 2-1 and 2-2A may be made of any available material, e.g., strips of fabric or parachute material, pieces of wood, stones, snow blocks, etc., or by digging shadow-throwing trenches. The symbols should be at least 8 ft (2.5 m) long and provide as much colour contrast as possible with the background. The symbols shown in Figure 2-2B are the so-called paulin or panel signals and are made by folding a paulin, a type of rubber poncho, provided in a life-raft. They are neon-red on one side and non-specular blue on the other (other models are yellow-orange and sea-blue).”

4258 Chapter 4 and Appendix A of ICAO Annex 2, “Rules of the Air”, refer to other visual signals used for giving aircraft clearance to approach, land and taxi on aerodromes.

4259 Section 3 of Appendix A describes the visual signals used to warn an unauthorized aircraft flying in, or about to enter a restricted, prohibited or danger area. They consist of a series of projectiles discharged from the ground at intervals of ten seconds, each showing, on bursting, red and green lights or stars. They indicate that the aircraft is to take such action as may be necessary to leave the area. These are not the interception signals referred to in Article 13 (*Signals and procedures for the interception of medical aircraft*) below.

¹ ICAO, Doc. 7333-AN/859, *Search and Rescue Manual*, Parts 1 and 2, ICAO, Montreal, 3rd edition, 1970.

4260 The IMO International Code of Signals contains detailed instructions on visual transmission methods:

- *Flag signalling*: the International Code's set of signal flags consists of 26 alphabetical flags, 10 numeral pendants, 3 substitutes and the answering pendant. Messages are always coded using the Code's letter groups.
- *Flashing light and sound signalling*: international Morse symbols are used; they represent letters and numerals and are expressed by dots (short) and dashes (long). Theoretically, a dash is equivalent to three dots. Luminous Morse signals are sent by showing and covering a light. Sound Morse signals consist of long and short blasts produced by a siren, a whistle, a foghorn or any other sound-producing device.
- *Morse signalling by arms*: this method is described in Chapter IX of the Code by means of a table showing how the arms are lifted or stretched to form a dot or a dash. A flag may be held in each hand. Signals may be sent without a flag or using one arm only; this Morse signalling method has replaced the former system of semaphore signalling by arms. If a time count is kept, the message will necessarily conform to the Code's groups. The use of international codes calls for familiarity with the compulsory procedure to be used for each method of transmission. Practice is also necessary in order to achieve a satisfactory visual signalling rate. For example, the standard rate of Morse signalling by flashing light is eight words per minute.

4261 Visual signalling using international codes is the last means of communication left in situations where there are no wire or radio links and a messenger cannot be sent.

Ph.E.

Annex I, Article 12 – Flight plans

The agreements and notifications relating to flight plans provided for in Article 29 of the Protocol shall as far as possible be formulated in accordance with procedures laid down by the International Civil Aviation Organization.

Documentary references

Official Records

O.R. I, Part I, p. 177; Part III, p. 28 (Art. 4). *O.R.* III, pp. 376-377; p. 395. *O.R.* VII, p. 53, CDDH/SR.48 (Art. 12). *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 170, CDDH/II/SR.70, paras. 33-34; p. 203, CDDH/II/SR.73, paras. 35-36. *O.R.* XIII, p. 33, CDDH/49/Rev.1, paras. 63-64; p. 44 (Art. 12); p. 268, CDDH/235/Rev.1, para. 59; p. 301 (Chapter IV); pp. 321-322, Annex III.

Other references

CE 1972, Technical Memorandum, pp. 29-34. *Commentary Drafts*, p. 116 (Art. 4).

Commentary

- 4262** The main advantage of medical helicopters is that they enable the wounded to be evacuated promptly to medical centres which may be situated some distance away. If that advantage is not to be forfeited, the time required for the notification, prior agreement or flight authorization procedure for medical aircraft must be reduced to a minimum. Article 29 (*Notifications and agreements concerning medical aircraft*), paragraph 4, of the Protocol stipulates that the necessary measures shall be taken to ensure that such notifications and agreements can be made rapidly.
- 4263** The flight plan is in itself a flight notification, acknowledgement of which is tantamount to agreement that the flight may take place. This article proposes that existing international procedures should be followed with a view to ensuring that

flight plans submitted by medical aircraft in time of armed conflict are notified and accepted as promptly as possible.

4264 The flight plans of medical aircraft referred to in paragraph 1 of Article 29 (*Notifications and agreements concerning medical aircraft*) of the Protocol contain detailed information enabling the course, time and, in general, operation of flights by medical aircraft to be monitored in accordance with Article 28 (*Restrictions on operations of medical aircraft*) of the Protocol. It was for this reason that Article 4 (Flight plan) was included in Chapter I (Documents) of the ICRC's draft Annex I.¹

4265 It is because the members of the Technical Sub-Committee considered that, for the purposes of Annex I, the article relating to flight plans should be part of the chapter on communications that Article 4 of the draft text became the present Article 12.

4266 The term "flight plan" as it relates to international civil aviation is defined in ICAO Annex 2 (Rules of the Air), Chapter I (Definitions), as follows: "*Flight plan*. Specified information provided to air traffic services units, relative to an intended flight or portion of a flight of an aircraft". Sub-section 3.3.1, "Flight plans", of Chapter III (General Rules) of the same Annex contains the following note:

"The term *flight plan* is used to mean variously, full information on all items comprised in the flight plan description, covering the whole route of a flight, or limited information required when the purpose is to obtain a clearance for a minor portion of a flight such as to cross an airway, to take off from, or to land at a controlled aerodrome."²

4267 The contents of the flight plan are set out in sub-section 3.3.1.2 with the following note: "Note 3. – The term *aerodrome* where used in the flight plan is intended to cover also sites other than aerodromes which may be used by certain types of aircraft, e.g. helicopters or balloons."

4268 With regards to the aerodrome of departure, Note 1 reads as follows: "For flight plans submitted during flight, the information provided in respect of this item will be an indication of the location from which supplementary information concerning the flight may be obtained, if required."

4269 Many of the provisions in ICAO Annex 2 and ICAO document 4444-RAC/501/12 concerning flight information and flight plan procedures for civil aircraft also meet the requirements of medical aircraft in time of armed conflict. In order to comply with the notification and prior agreement provisions of the above-mentioned Article 29 (*Notifications and agreements concerning medical aircraft*) of the Protocol,³ the authorities responsible for military air traffic control should, as far as possible, make use of these international flight information procedures.

¹ *Commentary Drafts*, p. 116 (Art. 4).

² ICAO, Annex 2, "Rules of the Air", Seventh Edition, Amendments Nos. 1-26 (No. 26 effective 21 November 1985), ICAO, Montreal; ICAO Doc. 9110, Vol. II – ICAO Lexicon, p. 46, F.23; Doc. 4444-RAC/501/12, Rules of the Air and Air Traffic Services, pp. 2-6 to 2-16, Appendix 2 and Attachment B.

³ Cf. commentary Arts. 25-30 and 31, *supra*, p. 283 and p. 325.

Thus flight plan and prior agreement instructions and forms could be drawn up in peacetime for use by medical aircraft operating in time of armed conflict.

4270 The contents of the radio signal referred to in Article 7 (*Radio Signal*), paragraph 2, of Annex I correspond to the information contained in a simplified international flight plan for use by medical aircraft. The use of Q code groups could be contemplated for some of the items.

4271 ICRC aircraft carrying out medical missions in areas of armed conflict have used the ICAO flight plan to notify their flights to Parties to the conflict. In some cases, the acknowledgement received at the aerodrome of departure has laid down a time and a course, called the “cease fire channel” and valid for 15 minutes at certain points of the route. This channel could be maintained or modified every 15 minutes by the control tower in communication with the aircraft. The simplified flight plan for medical helicopters based on hospital ships should be submitted by the latter unless other arrangements have been made by the competent naval authorities.

4272 A specimen simplified flight plan is given below for information (*cf. infra*, p. 1276).

4273 All means of radiocommunication referred to above under Articles 7 to 11 may be used to transmit flight plans to the adverse Party’s medical units and transports or to a station designated by the Parties to the conflict. Satellite links may also be used for radiocommunication with hospital ships or other vessels equipped with earth stations.

4274 The INMARSAT and COSPAS/SARSAT satellite systems offer reliable and fast long-distance radio links, not only for search and rescue operations which might involve medical aircraft but also for the transmission of other data relating to flights by medical aircraft. Both these international organizations will be affected by the outcome of the work under way in IMO, the ITU and ICAO concerning the future global maritime distress and safety system (FGMDSS),⁴ which will provide enhanced opportunities for search and rescue as well as for the provision of more effective assistance to the shipwrecked.

Ph.E.

⁴ *Cf.* ITU Regulations, Res. No. 203 (Mob-83).

Document annexed (*cf. supra*, p. 1275)

Model of simplified flight plan form for mission of medical aircraft in armed conflict

Modèle de plan de vol simplifié pour mission d'aéronef sanitaire en période de conflit armé

FLIGHT PLAN AND NOTIFICATION OF FLIGHT FOR MEDICAL AIRCRAFT*

PLAN DE VOL ET NOTIFICATION DE VOL POUR LES AÉRONEFS SANITAIRES*

1. Notification sent from :
Notification émise par :
 - a) Hospital ship
Navire-hôpital
 - b) Other
Autre

2. Notification addressed to :
Notification destinée à :
 - a) Hospital ship
Navire-hôpital
 - b) General call (CQ)
Appel à tous (CQ)
 - c) Other(s)
Autre(s)

3. Type of mission :
Genre de mission :
 - a) Evacuation(s)
Evacuation(s)
 - b) Rescue operation(s)
Opération(s) de sauvetage
 - c) Other(s)
Autre(s)

4. Estimated duration of operation(s) : (h, min)
Durée estimée d'opération(s)

* « Medical aircraft » means any medical transports by air, whether based on land or on hospital ship.

« Aéronef sanitaire » s'entend de tout moyen de transport sanitaire par air, basé à terre ou sur un navire-hôpital.

5. Number and type of aircraft:
Nombre et type d'aéronef(s):
 - a) Airplane
Avion
 - b) Helicopter
Hélicoptère
6. Departure point:
Point de départ:
 - a) Hospital ship at (h, min)
Navire hôpital à
 - b) Other at (h, min)
Autre à
7. Area of flight/altitude/intended route/destination:
Région survolée/altitude/route prévue/destination:
8. Alternate point of arrival:
Point de dégagement:
9. Means of visual identification:
Moyens d'identification visuelle:
 - a) Red cross / Red crescent
Croix rouge / Croissant rouge
 - b) Flashing blue light(s)
Feu(x) bleu(s) à éclats
 - c) Navigation lights
Feux de navigation
 - d) Landing light(s)
Phare(s) d'atterrissage
 - e) Other(s)
Autre(s)
10. Continuous radio watch and language used on:
Veille radio permanente, langue utilisée sur:
 - a) 121.5 MHz in
121,5 MHz en
 - b) 243.0 MHz in
243,0 MHz en
 - c) MHz in
..... MHz en
11. Radar identification (SSR mode and code); mode A/3, code:
Identification radar (mode et code SSR); mode A/3, code:
12. Aircrew and medical staff (number):
Equipe navigant et personnel sanitaire (nombre):

13. Acknowledgement:

Accusé de réception:

Flight authorized by

Vol autorisé par

14. Date:

Date:

Time:

Heure:

(h, min)

Annex I, Article 13 – Signals and procedures for the interception of medical aircraft

If an intercepting aircraft is used to verify the identity of a medical aircraft in flight or to require it to land in accordance with Articles 30 and 31 of the Protocol, the standard visual and radio interception procedures prescribed by Annex 2 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, should be used by the intercepting and the medical aircraft.

Documentary references

Official Records

O.R. I, Part I, p. 178. *O.R.* III, pp. 377, 396. *O.R.* VII, p. 53, CDDH/SR.48 (Art. 13). *O.R.* XII, p. 163, CDDH/II/SR.69, paras. 16-20; p. 165, CDDH/II/SR.70, paras. 2, 3, 5; p. 170, paras. 33-34; p. 203, CDDH/II/SR.73, paras. 35-36. *O.R.* XIII, pp. 31-32, CDDH/49/Rev.1, paras. 52-54; p. 44 (Art. 13); p. 268, CDDH/235/Rev.1, para. 59; p. 301 (Chapter IV); pp. 321-322, Annex III.

Other references

Article 13 is a new article which was proposed by the ICRC to the Technical Sub-Committee at the third session of the Conference.

Commentary

- 4275** Following serious incidents in the air involving civil and military aircraft, the International Federation of Air Line Pilots Associations (IFALPA) at its March 1973 meeting in Tokyo noted that the visual signals for the interception of civil aircraft laid down by ICAO in Annex 2, "Rules of the Air", Section 3.4 and Appendix A, were inadequate.
- 4276** The view held by IFALPA was that pilots, who were constantly flying over national frontiers, were not able to keep themselves fully informed about the visual signals and procedures for interception described by ICAO and the modifications which might be adopted by some States in that respect. Those

purely visual interception procedures disregarded the main method of communicating with an aircraft, namely, radiotelephony.

4277 The Federation requested ICAO and national aeronautical authorities to study ways and means of standardizing visual signals and also to consider procedures involving the use of radiotelephony in cases where civil aircraft had to be identified or intercepted. In particular, it proposed the following:

- that flight plans informing the authorities about the operations of aircraft should be closely co-ordinated between military aeronautical units and civil air traffic control;
- that, given the hazardous nature of the operation, civil aircraft should only be intercepted in case of absolute necessity and when other means have failed;
- that a civil aircraft which has to be identified in spite of the information provided in the flight plan should first be contacted by radio. Only if the radio connection cannot be set up should physical air-to-air or ground-to-air interception involving visual methods be attempted;
- that interception should under no circumstances entail opening fire on a civil aircraft.

4278 In June 1973, together with its proposals, the Federation transmitted to ICAO a draft set of interception procedures which were supplemented and improved in October. At that juncture the ICRC approached the Federation with a view to investigating the possibility of using the proposed procedures for the interception of medical aircraft in time of armed conflict. However, it was too late at that stage to include any provisions on that matter in draft Annex I to the Protocol.

4279 The issue was nevertheless discussed at the first session of the Diplomatic Conference by the Technical Sub-Committee, which was given information about the ICRC's contacts with IFALPA and ICAO.¹ The text of Article 13 was adopted by the Technical Sub-Committee and Committee II at the third session of the Diplomatic Conference in 1976.

4280 All the ICAO provisions and special recommendations relating to the interception of civil aircraft were consolidated in a single document, the Manual concerning Interception of Civil Aircraft, published by ICAO in 1984,² the contents of which are drawn from a number of ICAO annexes and procedures. The foreword contains the following request:

“[...] Contracting States are requested to ensure that the material in this manual is brought to the attention of all civil and military administrative or operational personnel who may be concerned with the development and/or application of national practices and procedures relating to the identification and interception of civil aircraft.”

¹ O.R. XIII, p. 31, CDDH/49/Rev.1, para. 52.

² ICAO, Doc. 9433-AN/926, *Manual concerning Interception of Civil Aircraft*, ICAO, Montreal (with Amendment No. 1 of 19.3.1985).

- 4281 The manual is an excellent source of information for military authorities required to monitor medical aircraft operations in time of armed conflict. The provisions proposed for the interception of civil aircraft should therefore be studied with a view to making advance arrangements for their application in a situation of armed conflict. Full particulars are given about the radio frequencies to be used, radar code display, message transmission, etc. The table of contents of the manual, reproduced *infra*, p. 1282, gives some indication of the scope of the provisions required should it prove essential to intercept medical aircraft.
- 4282 Chapter 2, “Elimination or reduction of the need for interception”, to mention only one example, would need to be studied specifically from the standpoint of medical aircraft missions in time of armed conflict, in the cases contemplated in Articles 25 to 29 and 31 of the Protocol.
- 4283 The recommendations and instructions contained in the manual should also be adapted for use in the case of flights by medical aircraft based on hospital ships. The aircraft concerned are medical helicopters used for medical missions in naval, air and sea or amphibious operations. The bases for co-ordination between the navy and the air traffic services military authorities should be established in peacetime.
- 4284 This article contemplates action by an intercepting aircraft pursuant to Articles 30 (*Landing and inspection of medical aircraft*) and 31 (*Neutral or other States not Parties to the conflict*) of the Protocol. Those two articles, while recognizing that medical aircraft may be ordered to land, give no indication as to how this order should be given. It may be issued either from the ground or by a warship.
- 4285 In such cases too, the interception procedures described in the manual should be used in order to avoid hazardous undertakings such as opening fire in the direction of medical aircraft, which are entitled to respect and protection and should therefore not be threatened by fire when ordered to land.³
- 4286 If for any reason the Parties to the conflict are not able to comply with the procedures set out in the ICAO manual for the elimination or reduction of the need for interception and for application of the ICAO radio and visual interception procedures, they should notify one another of the situation and provide information on the substitute procedures they intend to use.
- 4287 The present Article 13 might usefully be brought up to date when the Annex is revised, by including a reference to both the ICAO manual and ground-to-air interception. The question whether the safety of medical aircraft over both land and sea would be enhanced by more detailed provisions concerning interception during armed conflicts would have to be given very careful thought.

Ph.E.

³ On 10 May 1984 the ICAO Assembly decided unanimously to supplement the Convention by an Article 3*bis* which embodies the principle, already recognized in international law, of non-recourse to the use of arms against civil aircraft.

Document annexed (*cf. supra*, p. 1280, note 2, and p. 1281)

Manuel concerning Interception of Civil Aircraft

(Consolidation of Current ICAO Provisions and Special Recommendations)

(Doc 9433-AN/926)

FIRST EDITION – APRIL 1984

(extract)

TABLE OF CONTENTS

1. – General principles	1
2. – Elimination or reduction of the need for interception	2
2.1. – Identification of civil aircraft	2
2.1.1. – Submission of flight plans	2
2.1.2. – Air-ground communications and position reporting	2
2.1.3. – Co-ordination between ATS units	3
2.1.4. – Transmission of flight plan messages	5
2.1.5. – Transmission of departure messages	7
2.1.6. – Facilities for communications between ATS units	7
2.1.7. – Co-ordination between military and ATS authorities/units	9
2.1.8. – Facilities for communications between ATS units and military units	9
2.1.9. – Action by ATS units in respect of unidentified aircraft	10
2.1.10. – Identification by means of radar	10
2.2. – Navigation aspects	14
2.2.1. – Airborne navigation equipment	14
2.2.2. – Adherence to flight plan	15
2.2.3. – Prohibited and restricted areas	15
2.2.4. – Navigational assistance by ATS units	16
2.2.5. – Navigational assistance by military units	17
2.3. – Availability of information	17
2.3.1. – Promulgation in aeronautical information publications (AIP)	17
2.3.2. – Depiction on aeronautical charts	18
3. – Elimination or reduction of hazards in the event of interception	19
3.1. – Interception	19
3.1.1. – Action by States	19
3.1.2. – Action by intercepting aircraft	20
3.1.3. – Action by intercepted aircraft	22
3.1.4. – Air-to-air visual signals	23
3.1.5. – Air-ground communications	24
3.1.6. – Action by intercept control units	26
3.1.7. – Action by ATS units in the event of interception	26
3.2. – Availability of information	27
3.2.1. – Promulgation of information in aeronautical information publications (AIP)	27
3.2.2. – Carriage of information on board aircraft	27

Annex I, Chapter V – Civil defence

Introduction

- 4288 Paragraph 1 of each of the two articles in the present Chapter mentions Article 66 (*Identification*) of the Protocol, which refers to an identity card for civilian civil defence personnel (paragraph 3) and an international distinctive sign of civil defence (paragraph 4) for the protection of civil defence organizations, their personnel, buildings and *matériel* and for civilian shelters.
- 4289 The same civil defence identity card and international distinctive sign are also to be used for the identification of military personnel assigned to civil defence units, pursuant to paragraph 1(c) of Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*) of the Protocol.
- 4290 The civil defence identity card and distinctive sign appear in the documents submitted by the ICRC to the 1971 Conference of Government Experts, as part of the proposals for strengthening the guarantees afforded by international humanitarian law to non-military civil defence organizations.¹
- 4291 Those proposals were considered by the Conference's Commission III, which recommended in its report that uniform markings be internationally adopted, laid down in the regulations and used as a protective distinctive sign² reserved for permanent or temporary civil defence personnel.
- 4292 No conclusion was reached concerning the nature of the international sign of civil defence at the second session of the Conference of Government Experts, during which an *ad hoc* working group studied the matter and issued general guidelines.³ The ICRC was requested to carry out the necessary studies with a view to proposing an appropriate distinctive sign for civil defence.⁴ As to the identity card, it was proposed that the permanent personnel of civil defence organizations should be recognizable by an identity card attesting to the capacity of the holder, bearing his photograph, and embossed with the stamp of the responsible authority.⁵ A model identity card was not proposed. In response to the wish expressed at the second session of the Conference of Government Experts, the ICRC arranged for a small group of experts to meet in January 1973

¹ CE/3b, pp. 155-156.

² CE 1972, *Report*, p. 89, paras. 503, 505, 506.

³ CE 1972, *Report*, Vol. II, p. 95, CE/COM III/OPC 16.

⁴ *Ibid.*, Vol. I, p. 169, paras. 3.334-3.336; p. 172, Annex, draft Art. 71.

⁵ *Ibid.*, Vol. I, p. 172, para. 1.

to discuss the distinctive sign of civil defence. The experts recommended that an article on the civil defence sign should be included in Annex I to the draft Protocol and suggested the alternative design reproduced in the ICRC's draft together with the model identity card for permanent civil defence personnel.⁶

4293 At the Diplomatic Conference, the Technical Sub-Committee recommended the blue triangle on an orange ground, which was adopted by Committee II at the fourth session together with the model identity card.

4294 The introduction to Part IV, Section I, Chapter VI (*Civil defence*) of the Protocol and, in particular, the commentary on Articles 66 (*Identification*) and 67 (*Members of the armed forces and military units assigned to civil defence organizations*)⁷ provide the necessary information on the use of the international distinctive sign of civil defence by civil defence personnel and organizations, as well as on the right to carry the civil defence identity card.

Ph.E.

⁶ *Commentary Drafts*, pp. 125-127.

⁷ *Supra*, pp. 713 and 779.

Protocol I

Annex I, Article 14 – Identity card

1. The identity card of the civil defence personnel provided for in Article 66, paragraph 3, of the Protocol is governed by the relevant provisions of Article 1 of these Regulations.
2. The identity card for civil defence personnel may follow the model shown in Figure 3.
3. If civil defence personnel are permitted to carry light individual weapons, an entry to that effect should be made on the card mentioned.

Documentary references

Official Records

O.R. I, Part I, pp. 178-179; Part III, p. 31 (Art. 14). *O.R.* III, pp. 378-379, pp. 397-399, CDDH/II/328, CDDH/422. *O.R.* VII, p. 53, CDDH/SR.48, paras. 12-13. *O.R.* XI, p. 566, CDDH/II/SR.50, para. 6; p. 574, para. 64. *O.R.* XII, p. 163, CDDH/II/SR.69, para. 16; p. 165, CDDH/II/SR.70, para. 5; p. 191, CDDH/II/SR.72, paras. 36-37, pp. 355-362, CDDH/II/SR.89, paras. 1-40; p. 364, paras. 50-51; pp. 391-392, CDDH/II/SR.92, paras. 55-67; p. 437, CDDH/II/SR.96, paras. 61-64; pp. 452-453, CDDH/II/SR.97, paras. 77-85. *O.R.* XIII, p. 25, CDDH/49/Rev.1, para. 22; pp. 44-45 (Art. 14); p. 267, CDDH/235/Rev.1, para. 54 (Art. 14, CDDH/II/SR.328), para. 56 (note 4, Chapter V); p. 269, para. 62; p. 294 (Chapter V, footnote); p. 321, *id.*, Annex III, paras. 2, 6; pp. 354, 355, CDDH/406/Rev.1, paras. 6, 8; p. 357, para. 20 (Art. 14); pp. 361-362, paras. 33-38; pp. 376-377, para. 67; pp. 380-381, paras. 81-82; p. 414 (Art. 2, note 3); p. 416 (Art. 14); p. 431, CDDH/II/439/Rev.1 (Art. 59, para. 3); pp. 439-440, CDDH/II/439/Add.1 (Chapter V, Art. 14).

Other references

XXIst Int. Conf. RC, Report, p. 17. *CE/3b*, pp. 155-156. *CE 1971, Report*, p. 89, paras. 503-506. *CE 1972, Report*, Vol. I, p. 169, paras. 3.333-3.340; p. 172, Annex, draft Art. 71, para. 1. *Commentary Drafts*, pp. 125-127 (Art. 14).

Commentary

General remarks

4295 The identity card for civilian and military civil defence personnel is similar to that for civilian medical personnel described in Article 1 (*Identity card for permanent civilian medical and religious personnel*) of the present Annex I,¹ from which it differs in three respects only:

- the distinctive sign is the equilateral blue triangle on a orange ground;
- the words “permanent/temporary” do not appear in the heading of the identity card for civil defence personnel;
- on the reverse side, beneath the heading “other distinguishing marks or information”, there is an item relating to weapons.

4296 Consequently, the commentary on Article 1 (*Identity card for permanent civilian medical and religious personnel*) of Annex I applies, *mutatis mutandis*, to the present article. Neither the Protocol nor Annex I provides for an identity disc to be worn by civil defence personnel; the remark concerning the disc in the commentary on Article 1 (*Identity card for permanent civilian medical and religious personnel*) of Annex I also applies here.

Paragraph 1

4297 The personnel mentioned in paragraph 3 of Article 66 (*Identification*) of the Protocol, to which reference is made in this paragraph, are civilian civil defence personnel. The personnel referred to in paragraph 1(c) of Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*) of the Protocol are not mentioned, even though that paragraph states that such personnel should be “provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status”.

4298 It would therefore seem that Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*), paragraph 1(c), should be mentioned in this paragraph together with Article 66 (*Identification*), paragraph 3.

4299 The same omission was made in draft Article 14 of Annex I set out in the supplement to the report of Committee II’s Working Group A, which was instructed at the fourth session of the Conference to consider the provisions relating to civil defence.²

¹ Cf. commentary Art. 66, paras. 2-3 and Art. 67, para. 1(c) of the Protocol, *supra*, p. 782 and p. 797, and commentary Article 1, Annex I, *supra*, p. 1153.

² O.R. XII, p. 437, CDDH/II/SR.96, para. 61. O.R. XIII, pp. 355-356, CDDH/406/Rev.1, paras. 8, 9, 13, 14, 20; p. 357 (Arts. 59, 59bis and Annex); pp. 406-408 (Arts. 59, 59bis); p. 431, CDDH/II/439/Rev.1 (Art. 59, para. 3); p. 439, CDDH/II/439/Add.1 (Chapter V, Art. 14, para. 1).

- 4300** The provisions in the three paragraphs of Article 1 (*Identity card for permanent civilian medical and religious personnel*) of Annex I, as they apply to the identity card for civil defence, are not difficult to interpret.

Paragraph 2

- 4301** The comments on the model identity card referred to in Articles 1 (*Identity card for permanent civilian medical and religious personnel*) and 2 (*Identity card for temporary civilian medical and religious personnel*) of Annex I apply also to the model identity card for civil defence. The holder's function or rank and his posting to a civil defence unit should indicate whether he has civilian or military status. Information about the holder's profession could be given under "Other distinguishing marks or information", by reference to the civil defence tasks described in Article 61 (*Definitions and scope*) of the Protocol.

Paragraph 3

- 4302** Civilian civil defence personnel are entitled under Article 65 (*Cessation of protection*), paragraph 3, of the Protocol to bear light individual weapons. The same applies to military personnel, under Article 67 (*Members of the armed forces and military units assigned to civil defence organizations*), paragraph 1(d), of the Protocol.
- 4303** The right to bear arms should be indicated, together with the type of weapon (pistol, revolver or other light individual weapon) and its number, if any.

Ph.E.

Document annexed

Model of identity card for civil defence personnel



FRONT		REVERSE SIDE	
	(space reserved for the name of the country and authority issuing this card) IDENTITY CARD for civil defence personnel		
Name		Height Eyes Hair	
Date of birth (or age)		Other distinguishing marks or information:	
Identity No. (if any)		Weapons	
The holder of this card is protected by the Geneva Conventions of 12 August 1949 and by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) in his capacity as		PHOTO OF HOLDER	
Date of issue No. of card		Stamp	
Signature of issuing authority		Signature of holder or thumbprint or both	
Date of expiry			

Fig. 3: Model of identity card for civil defence personnel
(format: 74 mm × 105 mm)

Protocol I

Annex I, Article 15 – International distinctive sign

1. The international distinctive sign of civil defence provided for in Article 66, paragraph 4, of the Protocol is an equilateral blue triangle on an orange ground. A model is shown in Figure 4.

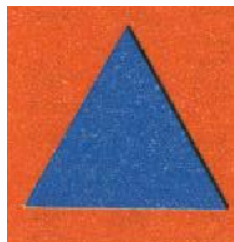


Fig. 4: Blue triangle on an orange ground

2. It is recommended that:
 - (a) if the blue triangle is on a flag or armlet or tabard, the ground to the triangle be the orange flag, armlet or tabard;
 - (b) one of the angles of the triangle be pointed vertically upwards;
 - (c) no angle of the triangle touch the edge of the orange ground.
3. The international distinctive sign shall be as large as appropriate under the circumstances. The distinctive sign shall, whenever possible, be displayed on flat surfaces or on flags visible from as many directions and from as far away as possible. Subject to the instructions of the competent authority, civil defence personnel shall, as far as possible, wear headgear and clothing bearing the international distinctive sign. At night or when visibility is reduced, the sign may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.

Documentary references

Official records

O.R. I, Part I, p. 180; Part III, p. 31 (Art. 15). *O.R.* III, pp. 378-379; p. 400, CDDH/422. *O.R.* VII, p. 54, CDDH/SR.48, paras. 14-16. *O.R.* XI, p. 91, CDDH/II/SR.11, para. 65; p. 94, CDDH/II/SR.12, para. 6; p. 566, CDDH/II/SR.50, para. 6; p. 574, para. 64. *O.R.* XII, p. 62, CDDH/II/SR.60, para. 46; p. 64, para. 56; p. 163, CDDH/II/SR.69, para. 16; p. 165, CDDH/II/SR.70, para. 5; pp. 191-194, CDDH/II/SR.72, paras. 37-60; pp. 355-362, CDDH/II/SR.89, paras. 1-40; p. 364, paras. 50-51; p. 365, CDDH/II/SR.90, paras. 1-2; p. 390, CDDH/II/SR.92, para. 54; pp. 391-392, paras. 55-67; p. 432, CDDH/II/SR.96, para. 26; p. 437, paras. 61-64. *O.R.* XIII, pp. 25-26, CDDH/49/Rev.1, paras. 22-23, 26, 27; p. 47 (Art. 15); p. 267, CDDH/235/Rev.1, para. 56 (Chapter V); p. 269, para. 62; p. 294, CDDH/235/Rev.1 (Chapter V, footnote); p. 321, paras. 2, 6; pp. 354-355, CDDH/406/Rev.1, paras. 6, 8; pp. 356-357, para. 20 (Art. 15); pp. 361-362, paras. 33-38; p. 374, para. 60; p. 381, para. 83; p. 417 (Art. 15); p. 440 (Art. 15).

Other references

XXIst Int. Conf. RC, Report, p. 17. *CE/3b*, pp. 155-156. *CE 1971, Report*, p. 89, paras. 503-506. *CE 1972, Report*, Vol. I, p. 169, paras. 3.334-3.336; p. 171, Annex, draft Art. 71, para. 1; *id.*, Vol. II, p. 95, CE/COM III/OPC 16. *Commentary Drafts*, p. 127 (Art. 15).

Commentary

General remarks

4304 The expert meeting convened by the ICRC in January 1973 to study the question of the distinctive sign of civil defence considered the following aspects:

- existing international signs;
- national civil defence emblems existing in various countries;
- signs used in the member countries of the International Civil Defence Organization (ICDO);
- proposals by ICDO;
- visibility tests carried out by the ICRC on the red cross sign;
- choice of colours and a simple geometric design.

4305 After considering the documentation made available to the group, it was decided that the sign selected should be easily distinguishable from existing signs. Furthermore;

- the sign should be easily recognizable from a fair distance;
- the national and international signs should not be combined or associated;
- the design should be simple and limited to two colours.

4306 On the basis of the above considerations, some fifty suggested designs were examined by the specialists, who selected two proposals for submission to the Diplomatic Conference:

- a light blue equilateral triangle on a light orange ground;
- two or more light blue vertical and parallel stripes on a light orange ground.

4307 The group recommended that:

- no specifications should be laid down concerning the nature of the background, which could be an armlet or tabard, the wall of a building etc.;
- one of the angles of the triangle should be pointed vertically upwards;
- no angle of the triangle should touch the edge of the background.

4308 Both the signs proposed by the group of experts are reproduced in Article 15 of the ICRC's draft Annex I. At the first session of the Conference, the Technical Sub-Committee expressed its preference for the triangle. Commenting on the two designs under consideration, the representative of the International Association of Lighthouse Authorities suggested the deletion of the adjective "light" before the words "orange" and "blue".¹

4309 At the third session of the Conference, the observer for ICDO expressed the view that a sign consisting of two red stripes on a yellow ground would be more effective than a blue triangle on a orange ground. After discussion, the Sub-Committee nevertheless decided to adopt the blue triangle on an orange ground, the final adoption of Chapter V (*Civil defence*) of Annex I being dependent upon the conclusions reached by Committee II concerning the civil defence provisions.

4310 As shown in the supplement to its report, Working Group A of Committee II considered the provisions relating to civil defence at the fourth session and also expressed its preference for the blue triangle on an orange ground.²

4311 In addition to the distinctive sign, Article 66 (*Identification*), paragraph 5, authorizes the use of distinctive signals for civil defence identification purposes, subject to agreement between the Parties to the conflict.

4312 The commentary on Article 66 (*Identification*) explains why Annex I contains no rules in respect of such distinctive signals. If the civil defence organization runs a medical service for evacuating the wounded, the sick or the shipwrecked, its medical transports are entitled to the same protection as other medical services; in other words, they can use the distinctive signals set aside for the exclusive use of medical services.³ These signals are described in Chapter III of Annex I.

4313 The other means of transport used by civil defence services may be marked with the visual international distinctive sign, namely, the blue equilateral triangle

¹ O.R. XIII, p. 26, CDDH/49/Rev.1, para. 26; p. 47 (Chapter V, Art. 15).

² *Ibid.*, pp. 439-440, CDDH/II/439/Add.1.

³ Cf. commentary Art. 66, para. 5, *supra*, p. 784.

on an orange ground. Furthermore, there is nothing to prevent such means of transport – aircraft or ships, for example – from resorting to the recognized international procedures used by civil vessels and aircraft in peacetime to identify themselves by radio and radar. The maritime and aeronautical radiocommunications governed by the Radio Regulations on the one hand and Volumes I and II of Annex 10 to the Convention on International Civil Aviation (Chicago Convention of 7 December 1944) on the other⁴ may be used by the Parties to the conflict for establishing contact with a view to concluding the agreement referred to in paragraph 5 of Article 66 (*Identification*).

4314 Such agreements in respect of any aircraft or ships used by civil defence services, for example to evacuate civilians from a threatened area, could be based on the following texts:

- IMO, International Code of Signals, Chapter XIV;
- ITU, Radio Regulations; Article 40, Section II; Resolution No. 18 of the Radio Regulations;
- ICAO, Annex 10, Volume II, Chapter 5, sections 5.3, 5.3.3.4-5.3.3.5.1.

4315 These provisions contain standard instructions for the use of technical identification and signalling methods which may be adapted to meet the requirements of civil defence services with a view to concluding the required agreement without delay.

4316 Quite apart from evacuation of the civilian population, civil defence organizations may need to use various means of transport for the performance of the tasks listed in Article 61 (*Definitions and scope*):

- ships and other craft for use in the event of floods, tidal waves or rescue at sea;
- aircraft to fight forest fires;
- intervention in the event of natural disaster, all types of pollution, nuclear accidents etc.

4317 Even in time of armed conflict, steps should be taken to ensure a minimum of safety for such operations. Distinctive signals may prove essential for ships and aircraft used by civil defence services for such purposes.

Paragraph 1

4318 Articles 3 (*Shape and nature*) and 4 (*Use*) of Annex I, together with their commentary, apply *mutatis mutandis* to this article. As to the blue and orange colours, the ICRC visibility tests demonstrated that dark colours make the sign easier to identify from a distance. The trichromatic co-ordinates of the blue and orange colours have yet to be specified and this should be done, for information only, when Annex I is revised.

⁴ ITU, Radio Regulations, revised edition of 1985. ICAO, International Standards, Recommended Practices and Procedures for Air Navigation Services: Aeronautical Telecommunications, Annex 10 to the Convention on International Civil Aviation, Volumes I and II.

Paragraph 2

4319 The purpose of the recommendations in sub-paragraphs (b) and (c) is to standardize the sign's aspect. The government experts recommended that, if the orange background is a square or rectangle, the side of the triangle opposite the angle pointing vertically upwards should be parallel to one of the sides of the background.

Paragraph 3

4320 The commentary on Articles 3 (*Shape and nature*) and 4 (*Use*)⁵ of Annex I applies also to the international distinctive sign of civil defence. Infrared visibility tests of the blue sign on an orange ground have shown that these two colours provide the dark-on-pale contrast required to distinguish the form of the sign.

Ph.E.

⁵ *Supra*, p. 1173.

Protocol I

Annex I, Chapter VI – Works and installations containing dangerous forces

Annex I, Article 16 – International special sign

1. The international special sign for works and installations containing dangerous forces, as provided for in Article 56, paragraph 7, of the Protocol, shall be a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, in accordance with Figure 5 illustrated below.
2. The sign shall be as large as appropriate under the circumstances. When displayed over an extended surface it may be repeated as often as appropriate under the circumstances. It shall, whenever possible, be displayed on flat surfaces or on flags so as to be visible from as many directions and from as far away as possible.
3. On a flag, the distance between the outer limits of the sign and the adjacent sides of the flag shall be one radius of a circle. The flag shall be rectangular and shall have a white ground.
4. At night or when visibility is reduced, the sign may be lighted or illuminated. It may also be made of materials rendering it recognizable by technical means of detection.

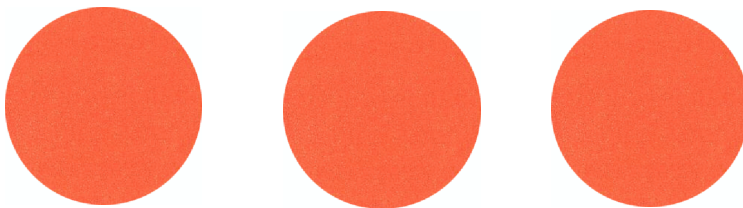


Fig. 5: International special sign for works and installations containing dangerous forces

Documentary references

Official Records

O.R. I, Part I, pp. 180-181. *O.R.* III, p. 379, pp. 401-402, CDDH/III/378. *O.R.* VII, p. 54, CDDH/SR.48, para. 17. *O.R.* XIV, p. 301, CDDH/III/SR.31, para.

13. *O.R.* XV, p. 456, CDDH/407/Rev.1, para. 31; pp. 471-473, *id.*, Annex I; p. 486 (Art. 49, para. 7); p. 497 (Annex); pp. 505-506 (Protocol II, Art. 28).

Other references

CE 1972, Report, Vol. I, p. 146, para. 3.137, sub-para. 3. *Commentary Drafts*, pp. 62-63, para. 3.

Commentary

General remarks

- 4321 The works and installations containing dangerous forces described in Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 1, of the Protocol may be marked with the international special sign in order to facilitate their identification.¹
- 4322 The special sign is defined in paragraph 7 of the above-mentioned article. The expression “special sign” is used in that article, whereas Article 16 of Annex I refers to the “international special sign”.
- 4323 At the second session Committee III, which was responsible for studying the ICRC draft text relating to the protection of works and installations containing dangerous forces (Article 49 of the draft), adopted a text which did not describe the special sign. At the fourth session a Sub-Working Group was established by the Working Group of Committee III to make recommendations concerning this sign.²
- 4324 Committee III adopted by consensus the sign proposed in the Sub-Working Group’s report, leaving the Drafting Committee to decide where the article relating to the sign should be placed in Annex I. The final text of the existing Article 16 was prepared by the Drafting Committee, which retained the title proposed by the Sub-Working Group, namely, “International special sign”.³

Paragraph 1

- 4325 In some countries, national signs and notices in the national language are used to mark works and installations containing dangerous forces of all types. International signs have also been devised to mark certain works from which dangerous forces such as, for example, radioactive matter might be released. The International Atomic Energy Agency has established international sign enabling radioactive matter to be identified.

¹ Cf. commentary Art. 56 of the Protocol, *supra*, p. 665.

² *O.R.* XV, p. 456, CDDH/407/Rev.1, para. 31.

³ *Ibid.*, pp. 471-473, CDDH/407/Rev.1, Annex I; p. 486 (Art. 49); p. 497, Annex.

- 4326 It was therefore necessary to have a specific international sign which could be used to mark the works and installations described in Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 1, of the Protocol, since such works and installations enjoy special protection.
- 4327 Geometrically, the sign described in this paragraph is easy to make and calls for no particular comment. It is perhaps less easy to make advance arrangement for adequate supplies of the materials required to mark a nuclear power station or the walls of a dyke or hydroelectric dam with three large circles. The amount of bright orange paint or self-adhesive material required to block out circles several metres in diameter raises a problem of supplies and stocks which will have to be solved at the same time as the difficulties involved in affixing the sign to a rough concrete surface or the causeway of a dyke. It would be simpler to use sheets of bright orange fabric or plastic. In any event, many problems in respect of resistance to bad weather, heat, cold, wind and air pollution will have to be overcome in order to ensure the sign's durability.
- 4328 The trichromatic co-ordinates of the bright orange colour were not defined by the Working Group. Nevertheless, it would be useful for such a definition to be worked out and inserted for information in Annex I when the latter is revised.

Paragraph 2

- 4329 The sign must be clearly visible from an aircraft flying either towards the ground or horizontally. The visibility tests carried out on the red cross as seen from the air and described earlier in the introduction to Chapter II (*The distinctive emblem*) of Annex I provide useful comparative data.⁴ As to the sign's visibility, the commentary on Articles 3 (*Shape and nature*) and 4 (*Use*)⁵ of Annex I also holds good for the international special sign.

Paragraph 3

- 4330 If necessary, flags of different shapes or sizes may be prepared in advance with a view to marking dykes, dams or nuclear power plants. Masts, cables or panels may also be installed in advance so that the flags may be displayed rapidly as and when required. They may be lighted at night or when visibility is poor. It is important to check that a flag is clearly visible against the backdrop of the countryside.
- 4331 As a comparison, the ICRC in some areas of armed conflict uses 10 × 10 m white flags bearing a red cross, displayed either vertically against the wall of a building or horizontally on the roof.

⁴ Cf. introduction to Chapter II, Annex I, *supra*, p. 1167

⁵ *Supra*, pp. 1173 and 1179.

Paragraph 4

- 4332** The remarks made in respect of the lighting or illumination of the distinctive emblem in the commentary on Article 3 (*Shape and nature*), paragraph 2,⁶ of Annex I apply also to the international special sign. The colour contrast of the three bright orange circles under infrared observation could not be checked.
- 4333** Since bright orange and white have very similar rates of reflection under infrared observation, very little colour contrast would be produced by placing the three circles on a pale ground such as, for example, concrete walls.
- 4334** Data obtained by the ICRC on sets of measurements of radiation in the near infrared region (frequency 1,200 nm) showed that the reflectivity of both white and bright orange is about 65%. Steps should therefore be taken to ensure that the reflectivity of the ground against which the three bright orange circles are placed, or at least the area round their circumference, is as low as possible, so that the geometric design of the international special sign stands out by contrast.
- 4335** Further studies and tests should be conducted on the colour contrast produced by bright orange on different grounds under infrared observation, in order to provide the additional data required for the sign to be made visible to infrared detection, particularly in aerial photography.

Ph. E.

⁶ *Supra*, p. 1173

Commentary on Annex II to Protocol I

Annex II to Protocol I

Annex II to the Protocol Additional
to the Geneva Conventions
of 12 August 1949, and relating to the Protection of Victims
of International Armed Conflicts (Protocol I)

Annex II – Identity card for journalists on dangerous professional missions

Front

<p>NOTICE</p> <p>This identity card is issued to journalists on dangerous professional missions in areas of armed conflicts. The holder is entitled to be treated as a civilian under the Geneva Conventions of 12 August 1949, and their Additional Protocol I. The card must be carried with him at all times by the bearer. If he is detained, he shall at once hand it to the Detaining Authorities, to assist in his identification.</p> <p>ملحوظة</p> <p>تصرف هذه البطاقة المصحين الكلتين بعمليات خطيرة في مناطق النزاعات المسلحة ويجب لحائنها أن يتعامل معاملة المدنيين الذين وثقوا اتفاقيات جنيف الأربعة ١٢ آب / أغسطس ١٩٤٩ ولحائنها (بروتوكولها) الإضافي الأول . ويجب أن يحتفظ صاحب البطاقة بها دائما ولا يفترق ويجب أن يسلمها فوراً إلى سلطة الاعتقال لتساعد على تحديد هويته</p>	<p>(Name of country issuing this card) (اسم القطر الصادر لهذه البطاقة)</p> <p>(Nombre del país que expide esta tarjeta) (Nom du pays qui a délivré cette carte)</p> <p>(Название страны, выдавшей настоящее удостоверение)</p>
<p>NOTA</p> <p>La presente tarjeta de identidad se expide a los periodistas en misión profesional peligrosa en zonas de conflictos armados. Su titular tiene derecho a ser tratado como persona civil conforme a los Convenios de Ginebra del 12 de agosto de 1949 y su Protocolo adicional I. La tarjeta debe llevar la tarjeta consigo, en todo momento. En caso de ser detenido, la entregará inmediatamente a las autoridades que lo detengan a fin de facilitar su identificación</p>	<p>IDENTITY CARD FOR JOURNALISTS ON DANGEROUS PROFESSIONAL MISSIONS بطاقة الهوية الخاصة بالصحفيين الكلتين بعمليات خطيرة</p>
<p>AVIS</p> <p>La présente carte d'identité est délivrée aux journalistes en mission professionnelle périlleuse dans des zones de conflit armé. Le porteur a le droit d'être traité comme une personne civile aux termes des Conventions de Genève du 12 août 1949 et de leur Protocole additionnel I. La carte doit être portée en tout temps par son titulaire. Si celui-ci est arrêté, la remettre immédiatement aux autorités qui le retiennent afin qu'elles puissent l'identifier.</p>	<p>TARJETA DE IDENTIDAD DE PERIODISTA EN MISION PELIGROSA</p> <p>CARTE D'IDENTITÉ DE JOURNALISTE EN MISSION PÉRILLEUSE</p>
<p>ПРИМЕЧАНИЕ</p> <p>Настоящее удостоверение выдается журналистам, находящимся в опасных профессиональных миссиях в районах вооруженного конфликта. Его обладатель имеет право на обращение с ним как с гражданским лицом согласно с Женевскими Конвенциями от 12 августа 1949 г. и Дополнительным Протоколом I к ним. Владелец удостоверения должен постоянно иметь его при себе. В случае задержания он немедленно должен вручить его задерживающим властям для содействия установлению его личности.</p>	<p>УДОСТОВЕРЕНИЕ ЖУРНАЛИСТА, НАХОДЯЩЕГОСЯ В ОПАСНОЙ КОМАНДИРОВКЕ</p>

Reverse side

<p>Issued by (competent authority) Emisat per (autoritat competent) Emission par (autoritat competent) Emission par (autoritat competent)</p> <p>Place Lloc Lugar Место Date Data Fecha Date Дата</p> <p>Photograph Fotografia Fotografia Фотография Фотография</p> <p>Signature Signatura Signatura Подпись Подпись</p> <p>(Official seal/imprint) (Sello oficial) (Timbre de l'autorité délivrant la carte) (Официальная печать)</p> <p>(Signature of bearer) (Firma del titular) (Signature du porteur) (Подпись владельца)</p>	<p>Height Alçada Taille Рост</p> <p>Weight Pes Poids Вес</p> <p>Blood type Grup sanguini Groupe sanguin Группа крови</p> <p>Religion (optional) Religió (opcional) Religion (optional) Религия (по желанию)</p> <p>Fingerprints (optional) Huella dactilars (opcional) Empreintes digitales (facultatif) Отпечатки пальцев (по желанию)</p> <p>(Left forefinger) Dedo index esquerdo (Left index finger) (Левый указательный палец)</p> <p>(Right forefinger) Dedo index dextro (Right index finger) (Правый указательный палец)</p> <p>Special marks of identification Marques d'identificació Marques d'identificació Особые примечания</p>
<p>Name Nom Nom Имя, Отчество Place & date of birth Lloc i data de naixement Lieu & date de naissance Дата и место рождения Correspondent of Correspondent de Correspondant de Specific occupation Ocupació específica Catégorie professionnelle Catégorie professionnelle Pos. vinteler Valid for Valido por Duree de validité Действительно</p>	<p>Religion (optional) Religió (opcional) Religion (optional) Религия (по желанию)</p> <p>Fingerprints (optional) Huella dactilars (opcional) Empreintes digitales (facultatif) Отпечатки пальцев (по желанию)</p> <p>(Left forefinger) Dedo index esquerdo (Left index finger) (Левый указательный палец)</p> <p>(Right forefinger) Dedo index dextro (Right index finger) (Правый указательный палец)</p> <p>Special marks of identification Marques d'identificació Marques d'identificació Особые примечания</p>

Commentary on Protocol II

Reading Committee

Chairman: Jean PICTET

Hans-Peter GASSER · Sylvie-S. JUNOD ·
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Yves SANDOZ · Christophe SWINARSKI ·
Claude F. WENGER · Bruno ZIMMERMANN

Sylvie-Stoyanka JUNOD

Commentary
on the Protocol Additional
to the Geneva Conventions
of 12 August 1949,
and relating to the Protection of Victims
of Non-International Armed Conflicts
(Protocol II)

Editors

Yves SANDOZ · Christophe SWINARSKI ·
Bruno ZIMMERMANN

International Committee of the Red Cross

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Table of contents of Commentary on Protocol II

Abbreviations	1311
General introduction to the Commentary on Protocol II	1319
Preamble	1337
Part I	
– <i>Scope of this Protocol</i>	1343
Article 1	
– <i>Material field of application</i>	1347
Article 2	
– <i>Personal field of application</i>	1357
Article 3	
– <i>Non-intervention</i>	1361
Part II	
– <i>Humane treatment</i>	1365
Article 4	
– <i>Fundamental guarantees</i>	1367
Article 5	
– <i>Persons whose liberty has been restricted</i>	1383
Article 6	
– <i>Penal prosecutions</i>	1395
Part III	
– <i>Wounded, sick and shipwrecked</i>	1403
Article 7	
– <i>Protection and care</i>	1407
Article 8	
– <i>Search</i>	1413
Article 9	
– <i>Protection of medical and religious personnel</i>	1417
Article 10	
– <i>General protection of medical duties</i>	1423
Article 11	
– <i>Protection of medical units and transports</i>	1431
Article 12	
– <i>The distinctive emblem</i>	1437
Part IV	
– <i>Civilian population</i>	1443
Article 13	
– <i>Protection of the civilian population</i>	1447
Article 14	
– <i>Protection of objects indispensable to the survival of the civilian population</i>	1455
Article 15	
– <i>Protection of works and installations containing dangerous forces</i>	1461

Article 16	– <i>Protection of cultural objects and of places of worship</i>	1465
Article 17	– <i>Prohibition of forced movement of civilians</i>	1471
Article 18	– <i>Relief societies and relief actions</i>	1475
 Part V	 – <i>Final provisions</i>	 1483
Article 19	– <i>Dissemination</i>	1487
Article 20	– <i>Signature</i>	1491
Article 21	– <i>Ratification</i>	1493
Article 22	– <i>Accession</i>	1495
Article 23	– <i>Entry into force</i>	1497
Article 24	– <i>Amendment</i>	1499
Article 25	– <i>Denunciation</i>	1501
Article 26	– <i>Notifications</i>	1505
Article 27	– <i>Registration</i>	1507
Article 28	– <i>Authentic texts</i>	1509

Abbreviations

AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
Annuaire IDI	<i>Annuaire de l'Institut de droit international</i>
ASDI	<i>Annuaire suisse de droit international</i>
ATS	Air Traffic Services
BYIL	<i>British Year Book of International Law</i>
CCD	Conference of the Committee on Disarmament
CCIR	International Radio Consultative Committee (Comité consultatif international des radiocommunications)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés), 1974-1977
CE	Conference of Government Experts
CE/1b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, I, Introduction, Submitted by the ICRC, Geneva, January 1971</i>
CE/2b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, II, Measures intended to reinforce the implementation of the existing law, Submitted by the ICRC, Geneva, January 1971</i>
CE/3b	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, III, Protection of the civilian population against dangers of hostilities, Submitted by the ICRC, Geneva, January 1971</i>

- CE/4b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, IV, Rules relative to behaviour of combatants, Submitted by the ICRC, Geneva, January 1971*
- CE/5b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, V, Protection of victims of non-international armed conflicts, Submitted by the ICRC, Geneva, January 1971*
- CE/6b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VI, Rules applicable in guerrilla warfare, Submitted by the ICRC, Geneva, January 1971*
- CE/7b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VII, Protection of the wounded and sick, Submitted by the ICRC, Geneva, January 1971*
- CE/8b** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, VIII, Annexes, Submitted by the ICRC, Geneva, January 1971*
- CE 1972,
Basic Texts** *Conference of Government Experts on the Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May-3 June 1972 (second session), I, Texts, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1972,
Commentaries** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), II, Commentaries, part one and part two, Documentary material submitted by the ICRC, Geneva, January 1972*
- CE 1971,
Report** *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, Report on the work of the Conference, ICRC, Geneva, August 1971*

CE 1972, Report	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Report on the work of the Conference, volume I and volume II (Annexes), Geneva, July 1972</i>
CE 1972, Technical Memorandum	<i>Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972 (second session), Technical memorandum (Questionnaire and Commentary) on Medical Marking and Identification, Documentary material submitted by the ICRC, Geneva, January 1972</i>
CIE	International Commission on Illumination (Commission internationale de l'éclairage)
Commentary I	<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1952</i>
Commentary II	<i>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary III	<i>Geneva Convention relative to the Treatment of Prisoners of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1960</i>
Commentary IV	<i>Geneva Convention relative to the Protection of Civilian Persons in Time of War, Commentary published under the general editorship of Jean S. Pictet, ICRC, Geneva, 1958</i>
Commentary Drafts	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentaries, ICRC, Geneva, October 1973</i>
COSPAS/SARSAT	Cosmos Spacecraft / Search and Rescue Satellite Aided Tracking
CRCE 1971, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, 1-6 March 1971), Report on the Works of the Conference, Geneva, April 1971</i>

CRCE 1972, Report	<i>Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vienna, 20 March-24 March 1972, second session), Report on the Works of the Conference, Geneva, April 1972</i>
CTA	Central Tracing Agency
Draft(s)	<i>Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, June 1973</i>
Draft Rules	<i>Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956 (first ed.), 1958 (second ed.)</i>
Government Replies	<i>Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by Governments, ICRC, Geneva, April 1972 (first ed.), 1973 (second ed.)</i>
GYIL	<i>German Yearbook of International Law</i>
Hague Recueil	<i>Recueil des cours de l'Académie de droit international</i>
ICAO	International Civil Aviation Organization
ICDO	International Civil Defence Organization
ICRC	International Committee of the Red Cross
ICRC Memorandum	<i>Memorandum, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, to the Governments Parties to the 1949 Geneva Conventions for the Protection of War Victims and to the IVth Hague Convention of 1907 concerning the Laws and Customs of War on Land, ICRC, Geneva, May 1967</i>
IEC	International Electrotechnical Commission
IFALPA	International Federation of Air Line Pilots Associations
IFF	Identification Friend or Foe
IFRB	International Frequency Registration Board
ILC	International Lifeboat Conference
IMCO	Inter-Governmental Maritime Consultative Organization

IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
IRRC	<i>International Review of the Red Cross</i>
ISO	International Organization for Standardization
ITU	International Telecommunication Union
<i>Law Reports</i>	<i>Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, 15 vols., London, HMSO, 1948-1949</i>
<i>Lucerne Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons, (Lucerne, 24.9-18.10.1974), Report, ICRC, Geneva, 1975</i>
<i>Lugano Report</i>	<i>Conference of Government Experts on the Use of Certain Conventional Weapons (second session – Lugano, 28.1-26.2.1976), Report, ICRC, Geneva, 1976</i>
<i>O.R.</i>	<i>Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977</i>
<i>RBDI</i>	<i>Revue Belge de Droit International</i>
<i>RDPMDG</i>	<i>Revue de droit pénal militaire et de droit de la guerre</i>
<i>Reaffirmation</i>	<i>XXIst International Conference of the Red Cross, Istanbul, 1969, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report submitted by the ICRC, Geneva, May 1969</i>
<i>RGDIP</i>	<i>Revue générale de droit international public</i>
<i>RICR</i>	<i>Revue internationale de la Croix-Rouge</i>
<i>XXIst Int. Conf. RC, Report</i>	<i>XXIst International Conference of the Red Cross, Istanbul, September 1969, The Protection of Civilian Medical and Nursing Personnel in Time of Conflict (Item 4 d of the Draft Agenda of the Commission on International Humanitarian Law and Assistance to Civilian Population in the event of Armed Conflict), Report submitted by the ICRC, Geneva, February 1969 (D.S. 4d/1)</i>

<i>XXIInd Int. Conf. RC, Report</i>	<i>Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC, Geneva, January 1974</i>
SIF	Selective Identification Features
SSR	Secondary Surveillance Radar
<i>Studies and Essays in Honour of Jean Pictet</i>	<i>Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, Ch. Swinarski (ed.), ICRC-Nijhoff, Geneva-The Hague, 1984</i>
UNHCR	United Nations High Commissioner for Refugees
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WARC 79	World Administrative Radio Conference, 1979
WARC Mob-83	World Administrative Radio Conference for the Mobile Services, 1983
WHO	World Health Organization
<i>ZaöRV</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

General introduction to the Commentary on Protocol II

4337 Except for Article 3 common to the Geneva Conventions of 1949, which is often rightly called a “mini-convention”, Protocol II constitutes the first real legal instrument for the protection of victims of non-international armed conflicts. Why did it take until 1977 for this instrument to be adopted? On the one hand, this introduction is aimed at briefly recalling the nature of this particular type of conflict; on the other hand, it attempts to trace in broad lines the development of the law which resulted in the drawing up of these still rather modest rules.

The concept of non-international armed conflict

4338 In the absence of a general definition of non-international armed conflict, which may take very different forms, an attempt should be made to describe situations of this type in relation to the objective facts characterizing them.

4339 First, a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States,¹ but the government of a single State in conflict with one or more armed factions within its territory.²

4340 It is therefore appropriate to raise the question whether all forms of violent opposition to a government, from simple localized rioting to a general confrontation with all the characteristics of a war, can be considered as non-international armed conflicts.

4341 The expression “armed conflict” gives an important indication in this respect since it introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions,³ characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflict in a legal sense, even if the government

¹ We should mention the exception created by armed conflicts in which peoples fight against colonial domination and alien occupation, and against racist régimes, as these are considered as international armed conflicts. See Art. 1, para. 4, Protocol I, and Art. 1, para. 1, Protocol II, as well as the commentary thereon, *supra*, p. 41 and *infra*, p. 1347.

² A situation of armed conflict may also exist in which armed factions fight against each other without intervention by the armed forces of the established government. See commentary Art. 1, *infra*, p. 1351.

³ See commentary Art. 1, para. 2, *infra*, p. 1354.

is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State.⁴ Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new State.

The legal situation before 1949

4342 Positive law has very largely abstained from laying down rules governing non-international armed conflict. According to traditional doctrine, States were the only sovereign entities considered to be subjects of international law; thus the laws of war, which were conceived to govern international relations, were not applicable in internal conflicts.

4343 Emmer de Vattel was a pioneer in this field. In fact, for the first time he raised the question whether the Sovereign must observe the ordinary laws of war towards rebellious subjects who openly take up arms against him,⁵ and attempted to answer this affirmatively. However, it was only during the nineteenth century that the first attempts were made to make the laws of war applicable to the relations between the established government of a State and insurgents fighting against it. For this purpose, insurgents were put on a par with belligerents, i.e., with a party to an inter-State war, and this was done by means of a legal construction: the recognition of belligerency.

Recognition of belligerency

4344 This concept appears under two aspects:

1. Recognition of belligerency by the legitimate government of the State

4345 This is a juridical act which is both unilateral and discretionary and may take either an explicit⁶ or a tacit form. Tacit recognition of belligerency, which covers

⁴ On this point, see CE/5b, pp 36-37.

⁵ E. de Vattel, *Le droit des gens ou principes du droit naturel*, Neuchâtel, 1758, Edition Carnegie, 1916, book III, chapter XVIII, p. 238.

⁶ See J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non international*, Paris, 1958. According to that author the only examples of express recognition that can be given took place:

a) on the occasion of the American Civil War when a decision of Congress intervened (pp. 78-90);
b) during the American War of Independence, when the British parliament adopted a law governing trade with the insurgent colonies (p. 56);

c) during the Colombian War of Independence when a treaty was signed by Simon Bolivar and the Spanish General Murillo, to legalize the war (p. 68).

the majority of cases, can be deduced from government measures or attitudes towards an internal situation of conflict (for example, a blockade). Such an act creates a new legal situation. The relationship between the established government and the insurgents follows from the state of war which makes the law of armed conflict as a whole applicable between them. Recognition is a manifestation of the competence of a State to wage war, which keeps its national sovereignty.⁷ It grants insurgents merely a sort of legal personality as subjects of rights and duties within the confines of the laws of war.

2. *Recognition of belligerency by a third State*

4346 A third State may also be induced to recognize a situation of belligerency. Such recognition cannot be given tacitly. It has legal consequences only for the relations of that State with the parties to the non-international armed conflict. It prohibits the recognizing State from unilaterally aiding either the government party or the insurgent party to the conflict.⁸ Does not such a declaration constitute interference in the internal affairs of the State in whose territory the conflict is taking place? This would certainly be the case if a third State recognized a situation of belligerency which did not objectively exist. The search for objective criteria led to the legal concept of civil war; thus certain *de facto* elements must all be present for third States to be able to recognize a situation of belligerency without committing the inadmissible act of interfering with the internal affairs of the other State.

The concept of civil war

4347 The Institute of International Law studied this question at length and in 1900 finally established Regulations for civil war; Article 8 of these Regulations lays down three conditions which make it possible to that whether there is a genuine civil war and therefore that it is possible for a third State to recognize the belligerency of the insurgents. This article provides that:

“Third States may not give recognition to the belligerency of the insurgent party:

1. if it has not won for itself a territorial existence by taking possession of a given part of the national territory;
2. it does not fulfil the conditions which must be met to constitute a regular government *de facto* exercising in that part of the territory the ostensible rights belonging to sovereignty; and;

⁷ On this point reference may be made to Ch. Zorgbibe, *La guerre civile*, Paris, 1958, pp. 45-51.

⁸ Such an act of recognition is equivalent to a declaration of neutrality and creates the same obligations for the third State as if it were a neutral State in an international conflict.

3. if the struggle waged in its name is not conducted by organized forces subject to military discipline and complying with the laws and customs of war.”⁹

4348 The work of the Institute is considered as having legal weight in its capacity as representing the meetings of highly qualified publicists. Moreover, according to the article itself, third States are not obliged to recognize belligerency when the conditions listed above are fulfilled. The States remain completely free to act as they see fit in this respect and even to withdraw recognition later if they consider it appropriate to do so.¹⁰

4349 The institution of recognition of belligerency has proved to be extremely difficult to apply in practice and has given rise to many controversies. We will not go into these here.¹¹ Nevertheless, this brief historical summary seems necessary, on the one hand, because recognition of belligerency constituted the first step in the regulation of non-international armed conflicts, and on the other hand, because it is often, though incorrectly, invoked as a consequence of the application of common Article 3 and of Protocol II. Furthermore, confusion also often arises between the legal effects of recognition by an established government and those resulting from recognition by third States.

Role of the Red Cross – A review of Resolutions

4350 The Red Cross Movement as a whole, and the ICRC in particular, were concerned with the fate of victims of non-international armed conflicts well before 1949. In 1912, during the IXth International Conference of the Red Cross (Washington), a first attempt was made to specify its role in civil wars. This was unsuccessful.

4351 It was only in 1921 that the Xth International Conference of the Red Cross (Geneva) adopted a first resolution relating to civil war¹² which established the right of all victims of civil wars, social or revolutionary disturbances to receive aid in accordance with the general principles of the Red Cross, and gave the ICRC a mandate to intervene in a supporting role in relief matters. This Resolution represented an important step forward as it reflected a consciousness of the humanitarian needs engendered in situations of internal conflict. It is relevant to

⁹ Translated by the ICRC. Original French:

“Les tierces puissances ne peuvent reconnaître au parti révolté la qualité de belligérant:

1. s’il n’a pas acquis une existence territoriale distincte par la possession d’une partie déterminée du territoire national;
2. s’il n’a pas réuni les éléments d’un gouvernement régulier exerçant en fait, sur cette partie du territoire, les droits apparents de la souveraineté;
3. si la lutte n’est pas conduite, en son nom, par des troupes organisées, soumises à la discipline militaire et se conformant aux lois et coutumes de la guerre.”

Annuaire IDI, 1897-1904, p. 639.

¹⁰ See Ch. Zorgbibe, *op. cit.*, pp. 71-97.

¹¹ J. Siotis, *op. cit.*, pp. 116-117, details the reasons for these controversies.

¹² Resolution XIV, “Civil War”, *International Red Cross Handbook*, 12th ed., Geneva, 1984, pp. 641-642.

note that it covers both civil wars and internal strife. In particular it served as a basis for ICRC activities during the Spanish Civil War. For that matter, that conflict had a decisive impact on the development of rules for non-international armed conflicts.

4352 In 1938 the XVIth International Conference of the Red Cross (London) supplemented the 1921 Resolution on civil war with a new resolution¹³ relating to the role and the activities of the Red Cross in time of civil war. For the first time this provided for the, if not of the Conventions themselves, at least of implementation the principles underlying them.

4353 With this encouragement, the ICRC had studied since 1945, how to include provisions relating to non-international armed conflicts in the Conventions in preparation.

Non-international armed conflict and the Charter of the United Nations

4354 The United Nations Charter is basically aimed at ensuring the maintenance of international peace and security; therefore resorting to the threat or the use of force is expressly condemned in the international relations of Member States (Article 2, paragraph 4). This does not mean that States are any less sovereign within their own territory and, to put it differently, civil war is not prohibited as such.

4355 In addition, the same Article 2 which lays down the principle of the sovereign equality of Member States in paragraph 1, lays down the following provisions in paragraph 7:

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter [...]”

4356 Thus a State may resort to the use of force in order to restore public order in its own territory without incurring the risk of being condemned by the United Nations. The principle of respect for the sovereignty of Member States and of non-interference in their internal affairs is, however, subject to an exception when international peace and security are threatened. In fact, if armed action undertaken by a State in its own territory endangers international peace, it is no longer only an internal matter. That is why the same Article 2, paragraph 7, specifies *in fine* that recognition of national jurisdiction “shall not prejudice the application of enforcement measures under Chapter VII”.

4357 Wars known as “wars of national liberation” form an exception in this respect. Initially they were considered as internal armed conflicts, but it has gradually been accepted that they have an international character. The Charter is based on the principle of the self-determination of peoples (Article 1, paragraph 2). On the basis of this principle the United Nations has been induced to adopt

¹³ Resolution XIV, “Role and Activity of the Red Cross in Time of Civil War”, *International Red Cross Handbook*, *op. cit.*, pp. 642-643.

a supportive position towards peoples fighting in the exercise of their right of self-determination. This point of view, which has repeatedly been confirmed in resolutions and declarations,¹⁴ is now universally recognized.

4358 Recent developments in international humanitarian law have followed this evolution; therefore, armed conflicts in which peoples are fighting in the exercise of their right of self-determination have been included amongst international armed conflicts.¹⁵

Article 3 common to the four Conventions

4359 Common Article 3 of the Conventions constitutes the keystone of humanitarian law applicable in non-international armed conflicts. It is the first major achievement with regard to this law which is still to be developed (we refer the reader to the commentary on the Conventions).¹⁶ Protocol II supplements and develops amplifies Article 3 without changing the conditions of its application,¹⁷ and in this sense the two instruments are indissociable.¹⁸ As the commentary on the Protocol repeatedly refers to common Article 3, it is appropriate to include the text in this general introduction. It reads as follows:

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

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

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

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

¹⁴ Resolution 1514 (XV) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States (Resolution 2625 (XXV)) are the most important of these.

¹⁵ See commentary Arts. 1, para. 4, and 96, para. 3, of Protocol I, *supra*, p. 41 and p. 1088, which deal with this question in detail. Mentioning it in this introduction has the sole object of broadly outlining the development of the rules governing non-international armed conflicts.

¹⁶ *Commentaries I, II, III and IV*, respectively, pp. 37-61, 31-39, 27-43 and 25-44.

¹⁷ See commentary Art. 1, para. 1, Protocol II, *infra*, p. 1350.

¹⁸ The characteristic features of common Article 3 and of Protocol II are referred to in the introduction to Part I, Protocol II, *infra*, p. 1343.

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

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

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

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

Historical background to Protocol II

The reasons for the development of the law applicable in non-international armed conflicts

- 4360** Since the Second World War the majority of armed conflicts – of which there have unfortunately been a deplorably large number – have had a non-international character. Such fratricidal conflicts have caused great suffering and have resulted in numerous victims.
- 4361** Although common Article 3 lays down the fundamental principles of protection, difficulties of application have emerged in practice, and this brief set of rules has not always made it possible to deal adequately with urgent humanitarian needs.
- 4362** It has sometimes been said – quite incorrectly – that this article has never been applied. In fact, it often has, even if its application has been delayed to when hostilities between the parties to the conflict had reached a certain state of equilibrium. Despite the fact that Article 3 is based on the principle that the rules apply automatically whenever a situation is objectively characterized as an armed conflict, the fact remains that the High Contracting Party concerned still has a wide area of discretion and has in some cases abused it.
- 4363** Article 3 merely expresses a minimum of basic rules. The concise wording lays down the principles without developing them, which has sometimes given rise to restrictive interpretations. This particularly applies to the scope of judicial guarantees (paragraph 1(1)(d)) which does not go into details. The precarious position in which insurgent combatants find themselves requires that such guarantees should be clarified and reinforced for their benefit, particularly with regard to matters of judicial procedure. In fact, an insurgent combatant does not enjoy immunity when charged with having taken up arms, as do members of the armed forces in a conflict between States; on the contrary, he may be punished for having violated the national law.
- 4364** The obligation to collect and care for the wounded and sick also remains a very general one; the text of Article 3 is silent on the protection to be given doctors and other members of medical personnel, as well as to medical units and

transports. The protection of the emblem is not provided for. Already in 1957 the XIXth International Conference of the Red Cross (New Delhi) had expressed the wish, in a resolution relating to medical care,¹⁹ that Article 3 should be supplemented on this point, and made an urgent appeal to governments to take all necessary measures to guarantee effective care for the wounded, and to prevent doctors from being hindered in the performance of their task.

4365 The rules of Article 3 therefore needed to be confirmed and clarified. Furthermore, this provision contains gaps. Although it expresses the principle that persons who do not or no longer participate in hostilities should be protected, there are, on the other hand, no rules on the conduct of hostilities aimed at sparing the civilian population as such. And yet the civilian population is particularly exposed in such conflicts. Often civilians are even the main victims, particularly because they may be used as a shelter by insurgents.²⁰

4366 There is another important point on which Article 3 is silent: namely, relief actions. Great difficulties involved in setting up relief actions have often been experienced in practice, and the question has been raised whether it would not be useful to specify the modalities for such actions in order to ensure that relief will reach its destination without meeting obstacles.

4367 Concerned with the need to ensure the efficacy of relief actions as far as possible, the above-mentioned XIXth International Conference of the Red Cross as early as 1957 adopted a resolution establishing some fundamental principles.²¹

4368 The preceding considerations may illustrate that the need for developing rules relating to situations of non-international armed conflict did not arise from one day to the next. More than twenty years of practical experience have gradually made it clear that the position gained in 1949 in the form of common Article 3 has, together with its positive points, its imperfections and shortcomings.

Travaux préparatoires

4369 This work was spread out over almost ten years.

4370 The XXth International Conference of the Red Cross (Vienna) noted in 1965 the inadequacy of the protection of victims of non-international armed conflicts, and adopted two Resolutions which constitute the beginning of the development of rules in this area.²²

4371 In 1968 the International Conference on Human Rights, which convened in Teheran under the auspices of the United Nations, marked an important turning

¹⁹ Resolution XIX, "Relief in the Event of Internal Disturbances".

²⁰ Aware of this important omission, in its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, the ICRC had provided for those Rules to apply in all armed conflicts, both international and internal (Art. 2, para. (b)). See also introduction to Part IV, Protocol II, *infra*, p. 1443.

²¹ Resolution XIX, "Relief in the Event of Internal Disturbances".

²² Resolution XVIII, "Protection of Civilian Population against the Dangers of Indiscriminate Warfare"; Resolution XXXI, "Protection of Victims of Non-International Conflicts", *International Red Cross Handbook*, *op. cit.*, pp. 626-627 and 643-645.

point by establishing the relationship between human rights and international humanitarian law. By adopting a resolution on human rights in armed conflicts,²³ which encouraged the development of new rules, the Conference qualified humanitarian law as an extension of human rights and included it amongst the matters of concern the United Nations. Henceforth, the rules of international law on human rights, and in particular the International Covenant on Civil and Political Rights, would be used as a point of reference to bring into focus the fundamental guarantees given in Protocol II for the way in which human beings should be treated.²⁴

- 4372 In 1969 the ICRC privately invited a group of experts to examine the development of humanitarian law in the context of non-international armed conflict; their conclusions were to serve as a basis for the drawing up of the first documentation for the benefit of the XXIst International Conference of the Red Cross (Istanbul, 1969).²⁵ That Conference requested the ICRC to devote special attention to the problem, and broadly recognized the necessity for supplementing and clarifying common Article 3.²⁶ The question of the specific protection of combatants of an armed opposition was raised for the first time and a resolution was put forward proposing, under certain conditions, to grant them prisoner-of-war treatment.²⁷
- 4373 In 1970 the ICRC arranged further meetings of experts²⁸ in order to draw up, on the basis of the views obtained, concrete proposals to be presented to the Conference of Government Experts which was to take place the following year.²⁹
- 4374 The first session of the Conference of Government Experts took place in 1971. The ICRC did not present the experts with an actual draft, but with a list of the most important problems forming the key to any subsequent development of the law.³⁰
- 4375 We will indicate the main results of this meeting here, which show the evolution of ideas and controversies which arose with regard to the subject of non-international armed conflicts.

²³ This was followed in the same year by Resolution 2444 (XXIII) with the same title, adopted by the United Nations General Assembly. See also *supra*, general introduction to the Commentary on the Protocols.

²⁴ See commentary Preamble and introduction to Part II, *infra*, p. 1337 and 1365.

²⁵ See the XXIst International Conference of the Red Cross, 1969, "Reaffirmation and development of the laws and customs applicable in armed conflict" (Doc. D.S.4), pp. 97 ff. and "Protection of victims of non-international conflicts" (Doc. D.S.5).

²⁶ Resolution XVII, "Protection of Victims of Non-International Armed Conflicts".

²⁷ Resolution XVIII, "Status of Combatants in Non-International Armed Conflicts": "Combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war."

²⁸ Cf. ICRC, *Preliminary Report on the Consultation of Experts concerning Non-International Conflict and Guerrilla Warfare*, Geneva, 1970 (D 1153b).

²⁹ CE/5b, 1971.

³⁰ CE 1971, *Report*, pp. 33-65, paras. 93-356 and Annexes.

4376 The actual principle that common Article 3 should be developed was almost unanimously agreed. The debates showed that such a development could be envisaged in various ways, and different approaches were put forward, such as:

- an overall approach to the development of humanitarian law which would no longer distinguish international armed conflicts from non-international armed conflicts and which would be characterized by the drafting of a single international instrument. This concept was based on purely humanitarian ideas, i.e., that victims in all situations of armed conflict, whatever their nature, are subject to the same suffering and should be helped in the same way;³¹
- the preparation of model agreements (in the sense of common Article 3) with a view to the application of all or some of the 1949 Conventions, so that the parties to the conflict could implement in any particular case the appropriate agreement, given a situation of large-scale non-international armed conflict;³²
- development of the law based on a clear definition of the concept of non-international armed conflict, drawn up by means of objective criteria.

4377 This last point found favour with the majority of experts, who recommended, on the one hand, a separate régime for non-international armed conflict and, on the other, establishing a definition. In order to reduce States' discretionary power of judgment, the ICRC proposed that the definition should not be exhaustive, but a flexible formula illustrated by examples of situations in which the régime would be applicable.³³ In general this proposal was considered to be a good working basis.

4378 At this stage no conclusion was reached, except on one point, which was supported by a majority, namely, to leave out situations of internal disturbances, as these were considered to be covered by the instruments dealing with human rights.

4379 In the end a number of experts expressed the view that wars of national liberation should be considered as international conflicts, in particular on the basis of the principle of self-determination enshrined in the United Nations Charter, while others, on the contrary, considered that only the existence of objective facts and not the reasons underlying the conflict, could be used to qualify the conflict as international or as non-international.

4380 In 1971 it was not yet clear precisely what form the envisaged development of the law would take; therefore the possibility of supplementing Article 3 by adopting some additional chapters (such as, for example, on the wounded and sick) was not excluded in the event that a comprehensive instrument could not be successfully drafted.

4381 It should be noted that a first draft for a Protocol was submitted during these consultations by the Canadian delegation.³⁴ The proposals contained in this draft provided a valuable basis, particularly concerning the field of application *ratione personae*, as it covered anyone affected by the armed conflict and was present in

³¹ *Ibid.*, p. 61, CE/COM II/1. Norway, which put forward this proposal, maintained this position throughout the work of the Diplomatic Conference.

³² *Ibid.*, p. 62, CE/COM II/5.

³³ CE/5b, p. 43.

³⁴ CE 1971, Report, p. 57, CE/Plen/2 bis.

the territory of the Contracting Party, whether or not he was a combatant. In this way there was no need to assign any particular status to the insurgent party. This solution was subsequently to be maintained in substance.

4382 The second element of this draft to be highlighted is the suggestion to treat all persons deprived of their liberty for reasons related to the conflict in the same way. This was again to avoid having to grant a particular status to an armed opponent when he would be taken prisoner. This solution, too, would prevail.

4383 The second session of the Conference of Government Experts met in 1972. The ICRC submitted to it a draft Protocol additional to common Article 3, taking into account the different opinions expressed in 1971. 1972 was characterized by a change in the way in which Protocol II was conceived, and we comment on this below.

The main points of the 1972 draft³⁵

Material field of application

4384 The draft followed the line of common Article 3, i.e., the Protocol would apply in all situations of non-international armed conflict in the sense of Article 3. Thus the ICRC's proposal³⁶ had the same tenor as that which it had put forward in 1971.

Personal field of application

4385 The ICRC largely followed the Canadian draft presented to the Conference of Experts in 1971.³⁷

Proposals relating to members of the armed forces or armed groups who have fallen into the power of the adverse party

4386 In order to guarantee such persons humane treatment in case of capture the ICRC made a proposal in two parts:³⁸

- a) Members of regular armed forces or of insurgent armed groups fulfilling the conditions stipulated in Article 4A(2) of the Third Convention, who fall into the power of the adversary, should receive a treatment similar to that provided for prisoners of war in the same Convention.³⁹ It should be noted that such treatment only applies for the duration of captivity, without necessarily conferring immunity for the fact of having taken up arms.

³⁵ CE 1972, *Basic texts*, pp. 35-45.

³⁶ *Ibid.*, p. 33.

³⁷ See *infra*, p. 1359. CE 1971, *Report*, p. 57, CE/Plen/2 bis.

³⁸ CE 1972, *Basic Texts*, pp. 40-42 (Chapters VI and VII); CE 1972, *Commentaries*, Part II, pp. 48-62.

³⁹ This proposal reiterates that of Resolution XVIII of the XX1st International Conference of the Red Cross, quoted *supra*, p. 1327 and note 27.

Those who fulfil the conditions of Article 4 of the Third Convention, or who have at least distinguished themselves from the civilian population and have respected the rules of the Protocol in their operations, should no longer be liable to the death penalty for the sole fact of having taken part in hostilities or of having formed part of armed forces.

- b) Those who do not fulfil these conditions, and in general all persons deprived of their freedom for reasons related to the armed conflict, should be guaranteed decent conditions of detention.

*Protection of the civilian population*⁴⁰

4387 In 1971 the possibility of creating a single protocol relating to the protection of the civilian population in all types of conflict was still envisaged. As the majority of experts expressed a preference for maintaining the distinction between international armed conflict and non-international armed conflict because of the characteristic features of each of these cases, the ICRC abandoned the idea of a single protocol on this point and introduced into the draft of Protocol II a part on the protection of the civilian population, following the example of draft Protocol I. A definition of the civilian population was proposed, together with the general principle of protection and rules of conduct to be applied during hostilities. Finally, it was provided that objects indispensable to survival should be protected and safeguarded.

*Relief*⁴¹

4388 The draft laid down the principle that supplies should be provided for the population, even in case of blockade, and the principle that the ICRC and National Societies of other countries should act for the benefit of the population.

*Special cases*⁴²

4389 In addition, the ICRC proposed regulations to be annexed to the Protocol for special situations which, in its opinion, would justify the application of the entire body of Geneva law in the interests of the victims (conflicts on a large scale; outside aid by another State).⁴³

⁴⁰ CE 1972, *Basic Texts*, pp. 38-39 (Chapter IV); CE 1972, *Commentaries*, Part II, pp. 31-44.

⁴¹ CE 1972, *Basic Texts*, pp. 42-43 (Chapter VIII); CE 1972, *Commentaries*, Part II, pp. 63-73.

⁴² CE 1972, *Basic Texts*, p. 46.

⁴³ *Ibid.*

*Work of the experts*⁴⁴

4390 Without meaning in any way to underrate the importance of other matters, it should be noted that the experts were particularly concerned with two questions, viz., the scope of application and the problem of the treatment of captured combatants.

4391 As regards the scope of application, two broad trends emerged from thirteen different proposals:⁴⁵

- to provide for clauses whereby the scope of application would be clearly defined and for substantive rules in great detail; or
- to opt for a general definition and to provide only some general rules.

4392 Objective and subjective criteria (territory, duration, intensity) were advanced, and some experts considered that it was up to governments to decide when the instrument would be applicable.⁴⁶ However, this suggestion was dismissed because a majority considered that the State should not have direct powers of discretion with regard to the qualification of a conflict situation, and they adhered to the principle that the Protocol should automatically apply when a particular situation objectively exists.

4293 The experts wanted to establish upper and lower thresholds for conflicts. As regards the upper threshold, the divergent views regarding wars of national liberation, which had been rampant since 1971, were confirmed. Some tended to consider wars of liberation as international armed conflicts, basing their case on the practice of the United Nations, while others rejected the idea of taking the purposes of the struggle into consideration in order to qualify the conflict. As regards the lower threshold, a certain number of experts were in favour of explicitly excluding internal disturbances.

4394 These debates, which were very intense, revealed a tendency to move towards a rather restrictive definition of non-international armed conflict which was in danger of no longer being fully in line with common Article 3. In order to avoid the risk of the scope of Article 3 being reduced by an excessively narrow definition, one delegation proposed a separate definition in order that the Protocol should become complete in itself;⁴⁷ in this way, thanks to the autonomy of the respective instruments, Article 3 would retain an independent existence. This proposal is important, for up to then the scope of application of the instrument in preparation had always been envisaged as derived from common Article 3, i.e., a Protocol applicable in all situations covered by Article 3.

4395 As regards the treatment of persons who have participated in hostilities and have fallen into the power of the adverse party, and the penal prosecutions to which they may be subject, the ICRC proposals were not always well received, because they granted more extensive guarantees to those who complied with the

⁴⁴ *CE 1972, Report*, Vol. I, pp. 53-99, paras. 2.1-2.350.

⁴⁵ *Ibid.*, pp. 70-72, paras. 2.71-2.106.

⁴⁶ *Ibid.*, Vol. II, pp. 35-36, CE/COM II/14.

⁴⁷ *Ibid.*, p. 33, CE/COM II/1 (United States).

rules of the Protocol.⁴⁸ Some experts favoured specific protection for combatants captured in armed conflicts of a particular degree of severity; thus their position was linked with the definition of conflicts (as contained in Article 1 of the draft). The special case of a combatant in a war of liberation was raised on this occasion, with the same stands taken as for the definition of the scope of application.

4396 In the end some would have wished to broaden the range of persons entitled to prisoner-of-war treatment in case of capture by analogy with Article 4 of the Third Convention with appropriately flexible conditions, following the example of those laid down in draft Protocol I (guerrilla combatants).⁴⁹

4397 In general it seems unrealistic to establish combatant status for persons who have participated in hostilities and have been captured in non-international armed conflicts. In fact, such status would be incompatible, first, with respect for the principle of sovereignty of States, and secondly, with national legislation which makes rebellion a crime. On the other hand, a trend emerged among the experts in favour of granting captured insurgents not so much a treatment *sui generis*, but a treatment in accordance with the requirements of humanitarian law, identical for all persons deprived of their liberty for reasons related to the conflict. Such a solution would make it possible to avoid a reference to Article 4 of the Third Convention or to Protocol I. The same idea had already been advanced by the experts from Canada in 1971.⁵⁰

4398 The same difference of opinion regarding the extent to which guarantees should actually be granted those captured, also arose with regard to penal prosecution, and particularly with regard to the death penalty.⁵¹

4399 The ICRC's proposal that members of armed forces or of armed groups who had acted in accordance with the law of armed conflict should no longer be liable to the death penalty for the sole fact of having taken part in hostilities, led to heated debates. That proposal was modest enough as it applied only to that particular case and did not prejudice the prosecution of criminal offences in any way. However, the experts found it difficult to reconcile the elimination of the death penalty with the imperative needs of internal security; therefore some considered that it would be better to deal with the matter by procedural means and by granting a reprieve.

4400 The experts from the United States advanced a proposal to this effect, recommending:⁵²

- a) the granting of fundamental judicial guarantees;
- b) the right of appeal or petition from any sentence;
- c) a death sentence imposed on any person belonging to armed forces or armed groups, whose guilt arises only by reason of his having taken part in the combat, shall not be carried out until the hostilities have ceased;
- d) endeavouring to grant a general amnesty at the conclusion of the hostilities.

⁴⁸ CE 1972, *Basic Texts*, pp. 40-42 (Arts. 25, 26, 28).

⁴⁹ *Ibid.*, p. 14 (draft Protocol I, Art. 38).

⁵⁰ CE 1971, *Report*, p. 57, CE/Plen/2 bis, Art. 19.

⁵¹ CE 1972, *Report*, Vol. I, pp. 84-87, paras. 2.209-2.235.

⁵² *Ibid.* Vol. II, p. 41, CE/COM II/49.

This compromise proposal was subsequently largely adopted.

- 4401** Other important problems, such as the protection of the civilian population or humanitarian assistance⁵³ were studied. These were matters related to the ICRC draft as a whole. It should be underlined in this respect that, as far as the protection of the civilian population is concerned, the discussion was not about the principle itself, which was universally admitted, but about the substance of the rules to be included in Protocol II. The question was up to what point it should be kept on parallel lines with Protocol I in this field. Finally, it should be noted that the exchange of views on relief foreshadowed serious difficulties in reaching an agreement, and raised many problems, for example, on the question of how to ensure that the principle of non-interference would be observed. An expert went so far as to raise the question of the extent to which the duration of a conflict might even be prolonged by providing relief necessary for the survival of the civilian population, and this in turn brought up the problem of blockades.⁵⁴

The Diplomatic Conference

The 1973 draft

- 4402** This draft, which formed the basis for the work of the Diplomatic Conference, was drawn up by the ICRC, and very largely took into account the views expressed by the experts in 1972; it considerably differs therefore from the preceding draft.
- 4403** It contains forty-nine⁵⁵ provisions, divided into eight parts and has four main features:
- the structure is similar to that of draft Protocol I, due to the fact that the subject matter of the two instruments is closely connected;
 - rules are formulated more simply and succinctly from a concern to adapt them to the special context of non-international armed conflict;
 - co-existence with common Article 3, each remaining autonomous. This is a fundamental change in comparison with the 1972 draft. The ICRC accepted the point of view expressed by numerous experts, that it is desirable that common Article 3 and Protocol II should co-exist autonomously: in fact, to link the Protocol to common Article 3 would have resulted in restricting the latter's scope of application. But it is important that, on the contrary, the scope of common Article 3 remains unchanged, since it confers fundamental guarantees upon the victims of all non-international armed conflicts.⁵⁵ According to this point of view, draft Protocol II is no longer additional only to common Article 3, but to the Geneva Conventions as a whole. Article 3, which has a broad scope of application, will continue to apply in all non-international armed conflicts, while Protocol II would apply to situations specified in the definition given in its Article 1;

⁵³ *Ibid.*, Vol. I, pp. 72-73, paras. 2.107-2.113; pp. 84-87, paras. 2.236-2.278.

⁵⁴ See commentary Art. 14, *infra*, p. 1455.

⁵⁵ O.R. VIII, p. 204, CDDH/I/SR.22, para. 16.

- the draft does not specify special categories of protected persons who would be entitled to particular treatment, but lays down a certain number of fundamental guarantees for the benefit of all persons in the power of parties to the conflict.

4404 These few basic features are intended merely “to place” the draft in context. For the rest, the reader should refer to the text itself.⁵⁶

Negotiations during the Diplomatic Conference

4405 The organization of the Conference and the rules of procedure are outlined in the general introduction.⁵⁷ However, we should mention here a decision which, in this field, had important consequences for the *travaux préparatoires* of Protocol II.

4406 The two draft Protocols submitted to the Conference were based on the same structure; for that matter, the interrelation of the subject matter led the Conference to consider the two drafts in parallel on the President’s proposal.

4407 Opting for this procedure had the advantage of avoiding the risk that Protocol II should be treated as a “poor relation”. In fact, there may have been reason to fear that consideration of Protocol II could have been left or postponed until the last minute. On the other hand, the simultaneous consideration of the two drafts entailed the disadvantage of the text becoming rather more ponderous in comparison with the initial draft. In fact, what might be called a “maximalist tendency” – the opinion of delegates who were in favour of a Protocol with the same tenor for both categories of conflicts, i.e., international and non-international conflicts – in some cases resulted in the adoption of rules which were more detailed than they had been initially.

4408 In the first session it was not really possible to deal with the substance of Protocol II (with the exception of Committee III), but the work was divided amongst the various Committees, each of which was given a certain number of articles to consider. Furthermore, this first session marked an important turning point, because wars known as “wars of liberation” were excluded from Protocol II and were henceforth included among international conflicts by the adoption of Article 1 of draft Protocol I.

4409 Negotiations on Protocol II really got underway during the second session of the Conference. The procedure of parallel consideration of the two drafts was followed up to the end of the work of the Conference.

4410 When the Committees had completed their work, approximately two weeks before the end of the Conference, the draft Protocol II resulting therefrom was more complete and detailed than the ICRC draft. By analogy with draft Protocol I, some provisions had been added, such as the protection of cultural objects and places of worship and the general protection of civilian objects; other articles which were contained in the initial draft in a simplified form, had been transposed from draft Protocol I to draft Protocol II in such a way that the wording was no

⁵⁶ The draft is contained in *O.R. I*, Part III, pp. 33-46.

⁵⁷ See *supra*, general introduction to the Commentary.

longer restricted only to basic rules, but also covered the various ways of implementing them.

- 4411 The more comprehensive character of the draft resulting from the work of the Committees is a consequence of the parallel consideration given to the two instruments, and of the interrelation of their subject matter. However, it can also be explained by the scope of application which is clearly defined in Article 1 of the draft, and which could have allowed for the adoption of more detailed rules.
- 4412 A few days before the beginning of the final plenary meetings it became clear that the draft produced by the Committees would not be acceptable to everyone, and in any case would not be adopted by consensus. A number of delegations revealed their reluctance and again expressed the fears which they had shown since the beginning of the undertaking. These fears were related to two aspects: on the one hand, they did not believe that the draft provided sufficient guarantees for respect due to national sovereignty and for non-interference with internal affairs; on the other hand, some of the rules seemed to be too detailed to be realistic or to be able genuinely to be applied in the specific context of internal armed conflicts.
- 4413 After a number of unofficial consultations, the head of the Pakistani delegation took the initiative of producing a simplified draft of Protocol II, which could meet the concerns which had been expressed.⁵⁸
- 4414 What was the tenor of this draft? Reduced by half (24 articles instead of 48), it retained the same structure as the initial draft and did not include any drafting modifications in the articles that were retained. The new proposal did not intend that the formulae which had slowly come to fruition in the Committees should be renegotiated, but consisted of deletions in the text of the draft in order to remove the obstacles to adopting it.
- 4415 Thus all the elements considered to contain any possibility at all of being interpreted in the sense of a recognition of insurgent parties were deleted. This was the case with regard to the provision on the equality of the rights and duties of the parties to the conflict as, according to some, it could have given rise to beginnings of recognition. Such extreme caution also led to the deletion of the term “parties to the conflict” throughout the draft.⁵⁹
- 4416 The strictly humanitarian rules were retained, with simplified wording: for example, as the protection of children, which was dealt with in very detailed provision, seemed unrealistic, it was retained as a principle only and inserted in the article relating to fundamental guarantees. In the end all the rules dealing with the conduct of hostilities, except for the question of quarter, were left out of the draft, but is nevertheless retained the general principle that the civilian population and works and installations containing dangerous forces should be protected. It should be noted that a simplified set of rules of this type had already been recommended by the Canadian delegation during the second session,

⁵⁸ This project was submitted to the Conference under number CDDH/427. It is included in *O.R. IV* in the form of an amendment to each Article of Protocol II.

⁵⁹ See commentary Preamble, *infra*, p. 1337.

though this had not taken the form of an amendment.⁶⁰ There is little doubt that to some extent the Pakistani delegate followed this Canadian draft. As regards the scope of application, the proposal for the simplified Protocol included Article 1 of the draft as adopted by the Committee; the proposal, with its high threshold of application and greatly simplified rules, left common Article 3 intact.

4417 Numerous unofficial negotiations took place during the following days and meetings of regional groups were held. In record time, about four days, the fate of Protocol II was sealed, with an agreement which may not have satisfied everyone, but which did allow it to be adopted by consensus.

4418 One important procedural point remained for the Conference to settle: what was the status of the new draft in relation to that prepared by the Committees? The President of the Conference suggested that the simplified version of the text adopted in Committee should be considered as an amendment to the latter.⁶¹ That proposal was accepted. The draft prepared by the Committees was therefore retained as a working basis, while the simplified draft was submitted as an amendment, article by article, as each article was dealt with. The prior agreements were instrumental in the plenary meeting to resolve the matter. Protocol II, in the form it was adopted, corresponds to the proposal put forward by Pakistan as supplemented on various points. In fact, some rules which the Pakistani draft wanted to be deleted were nevertheless retained, following a vote. In this respect the protection of objects necessary for the survival of the civilian population can be quoted, as well as the protection of cultural objects and places of worship and a much abbreviated provision on relief. After an article by article examination in plenary meetings, Protocol II was adopted as a whole by consensus on 8 June 1977.⁶² Some delegations were rather disappointed, for the result fell short of their hopes, especially because of the high threshold for applying the instrument. Such regrets should not be disregarded, but nevertheless it should not be forgotten that Protocol II constitutes a body of minimum rules developed and accepted by the international community as a whole. Although it was not possible to go as far as one might have wished, the consensus in this particular case, apart from its intrinsic value, indicates an undeniable moral weight.

S.J.

⁶⁰ Draft (CDDH/212) contained in *O.R.* IV with respect to various articles.

⁶¹ *O.R.* VII, pp. 64-65, CDDH/SR.49, paras. 26-36.

⁶² *Ibid.*, p. 205, CDDH/SR.56, para. 62.

Protocol II

Preamble

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Emphasizing the need to ensure a better protection for the victims of those armed conflicts,

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,

Have agreed on the following:

Documentary references

Official Records

O.R. I, Part I, p. 189; Part III, p. 33. *O.R.* IV, p. 3. *O.R.* VII, p. 170, CDDH/SR.54, para. 43. *O.R.* IX, pp. 362-363, CDDH/I/SR.67, paras. 45-46 and 48-49; pp. 476-478, CDDH/I/SR.76, paras. 16-35; pp. 500-501, CDDH/I/SR.77, Annex (Indonesia); pp. 503-504 (Oman); p. 511 (Cameroon). *O.R.* X, pp. 207-208, CDDH/405/Rev.1, paras. 174-181; pp. 249-250, *id.*, Annex III (CDDH/I/350/Rev.1), para. 37.

Other references

CE 1971, Report, p. 44, para. 223. *CE 1972, Basic Texts*, p. 35. *CE 1972, Report*, vol. I, pp. 119-121, paras. 2.522-2.541; vol. II, p. 35, CE/COM II/13; pp. 36-37, CE/COM II/19; pp. 46-47, CE/COM II/69; p. 50, CE/COM II/83 and 87. *Commentary Drafts*, pp. 130-131.

Commentary

General remarks

4419 This very brief preamble expresses several fundamental viewpoints which will serve as guidelines for the interpretation of the rules of the Protocol, explain the reasons which inspired them and help to provide for cases for which there are no provisions.¹ In contrast with the 1949 Conference, which had to abandon the idea of including a preamble for the Conventions because it was unable to come up with a formula which met with agreement,² and contrary to some negative views expressed during the Conference of Government Experts, on the basis of which difficulties in this respect might have been anticipated,³ the ICRC draft was adopted by consensus without any amendment being submitted to the proposed text.⁴

“The High Contracting Parties”

4420 The High Contracting Parties are those States for which the Protocol is in force in the sense of Article 23 (*Entry into force*), either because they have ratified it, because they have acceded to it, or because they have expressed their will to be bound by it by means of a notification of succession.

4421 The term “High Contracting Party” should be understood to mean “Party” in the sense of the Vienna Convention on the Law of Treaties of 23 May 1969, i.e., “a State which has consented to be bound by the treaty and for which the treaty is in force”.⁵

4422 The expression is frequently used throughout the Conventions and the Protocols. It has the same meaning and the same scope whenever used in these various instruments.⁶

4423 The regulation of non-international armed conflicts, i.e., common Article 3 of the Conventions and Protocol II, is based on the existence of two or more parties confronting each other. However, only the legal government, or the government in power, of the State Party to common Article 3, or to Protocol II, is a “High Contracting Party”; in fact, even if the *de facto* authority leading the struggle against the government exercises the same rights and undertakes the same humanitarian obligations⁷ in the context of those instruments, it is not a High Contracting Party in the eyes of the law. Following common Article 3 on

¹ See the Vienna Convention on the Law of Treaties, Art. 31, para. 2.

² Official Records of the 1949 Diplomatic Conference of Geneva, Vol. II, Section A, pp. 777-782; Vol. III, Annexes, pp. 95-99 and *Commentary I*, pp. 18-23.

³ *CE 1972, Report*, Vol. I, p. 120, para. 2.535.

⁴ *O.R.* VII, p. 170, CDDH/SR.54, para. 43.

⁵ Vienna Convention, Art. 2 (Use of terms), para. 1(g).

⁶ See the more detailed commentary on the Preamble of Protocol I, *supra*, p. 25.

⁷ See the introduction to Part I of Protocol II, *infra*, p. 1343.

this point,⁸ the ICRC draft used the expression “parties to the conflict” to describe the entities involved in the conflict.⁹ Every mention of parties to the conflict was subsequently deleted from the text from a concern that it might be interpreted as a recognition of the insurgent party.¹⁰ As the Official Records of the Conference refer to “parties to the conflict” with a lower case “p”,¹¹ the Commentary follows the same course if only for the purpose of giving the necessary explanations for a better comprehension of the text.

First paragraph

- 4424 This paragraph reaffirms the great importance of common Article 3, the “parent provision”, thus presenting Protocol II as an extension of it.
- 4425 The humanitarian principles enshrined in that article are recognized as the foundation of the protection of the human person in cases of non-international armed conflict. What are these principles?
- 4426 They can be summarized by stating that they are fundamental guarantees of humane treatment (physical and mental integrity) for all those who do not, or who no longer participate in hostilities, and of the right to a fair trial. Respect for such humanitarian principles implies in particular protection of the civilian population, respect for the enemy *hors de combat*, assistance for the wounded and sick, and humane treatment for those deprived of their liberty. Protocol II reaffirms or develops these principles on the basis of these fundamental tenets which remain unchanged. The conditions under which they are to be applied are laid down in Article 1 (*Material field of application*).

Second paragraph

- 4427 This paragraph establishes the link between Protocol II and the international instruments on human rights. The paragraph is based on a proposal made by the experts which was then included in the ICRC draft.¹²
- 4428 The term “international instruments relating to human rights” means the instruments adopted by the United Nations, i.e., on the one hand, the Universal Declaration of Human Rights and the Covenants derived from it,¹³ in particular the Covenant on Civil and Political Rights, and on the other, the instruments concerning specific aspects of the protection of human rights, such as the

⁸ Common Art. 3, para. 4.

⁹ See in particular draft Art. 5.

¹⁰ O.R. IV, p. 16, CDDH//427; O.R. VII, p. 61, CDDH/SR.49, para. 11.

¹¹ At the suggestion of one delegation; see O.R. VIII, pp. 213-214, CDDH/I/SR.22, paras. 62-64.

¹² CE 1972, Report, Vol. I, p. 120, paras. 2.536-2.537 and 2.539.

¹³ The Universal Declaration was adopted by the United Nations in 1948; the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, were both adopted on 16 December 1966 and entered into force on 3 January 1976 and 23 March 1976, respectively.

Convention on genocide¹⁴ and the Convention on the elimination of racial discrimination,¹⁵ which are often invoked in situations of non-international armed conflict, and also the recent Convention on torture,¹⁶ to mention only a few of the most important ones. Regional instruments relating to human rights also fall under this term.¹⁷ It is the first time that the term is explicitly used in a treaty on humanitarian law.

4429 The Conventions and their additional Protocols have the same purpose as international instruments relating to human rights, i.e., the protection of the human person. However, these are two distinct legal systems, each with its own foundations and mechanisms, and international humanitarian law applies in situations of armed conflict. Human rights continue to apply concurrently in time of armed conflict.¹⁸ The human rights treaties provide that some rights may be suspended “in time of public emergency which threatens the life of the nation”,¹⁹ i.e., when there is serious strife or conflict, and then only insofar as is strictly required by the exigencies of the situation. However, the provisions made in this respect do not allow for derogation from so-called fundamental rights protecting the human person, which guarantee respect for the physical and mental integrity of the person.

4430 This irreducible core of human rights, also known as “non-derogable rights”, corresponds to the lowest level of protection which can be claimed by anyone at any time. Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights,²⁰ which constitute the basic protection mentioned in the paragraph under consideration here. These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part. It may be accepted that they form part of *jus cogens*.²¹ This view may be controversial for some of these rights, but there is no doubt whatsoever as regards, for example, the prohibition of

¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948.

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965.

¹⁶ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984.

¹⁷ The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950; American Convention on Human Rights, adopted on 22 November 1969; African Charter on Human and People's Rights, adopted on 26 June 1981; Arab Charter on human rights being prepared.

¹⁸ See Resolution 2675 (XXV) of the United Nations General Assembly.

¹⁹ See Art. 4 of the Covenant on Civil and Political Rights.

²⁰ See Part II, Protocol II and the introduction thereto, *infra*, p. 1365.

²¹ Vienna Convention on the Law of Treaties, Art. 53 – Treaties conflicting with a peremptory norm of general international law (*jus cogens*): “[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

slavery and torture, even without entering into a discussion whether *jus cogens* exists at all.²²

Third paragraph

- 4431 This paragraph underlines the *raison d'être* of the Protocol, i.e., the need to ensure a better protection for victims of non-international armed conflict.²³

Fourth paragraph

- 4432 This is inspired by the so-called Martens clause, named after its author, which is contained in the Preambles of the 1899 and 1907 Conventions respecting the laws and customs of war on land.

- 4433 In the absence of a preamble, this clause had already been included in the Conventions in the article on denunciation.²⁴ Article 1 (*General principles and scope of application*), paragraph 2, of Protocol I uses a similar formula.²⁵ The wording of the paragraph under consideration here is shorter and takes into account the specific nature of non-international armed conflicts.

- 4434 If a case is “not covered by the law in force”, whether this is because of a gap in the law or because the parties do not consider themselves to be bound by common Article 3, or are not bound by Protocol II, this does not mean that anything is permitted. “The human person remains under the protection of the principles of humanity and the dictates of the public conscience”: this clarification prevents an *a contrario* interpretation. Since they reflect public conscience, the principles of humanity actually constitute a universal reference point and apply independently of the Protocol.

- 4435 It should be noted that in contrast to Article 1 (*General principles and scope of application*), paragraph 2, of Protocol I, there is no mention of established custom. This should not be interpreted as a rejection on the part of the Conference, as the ICRC had not made a proposal to that effect in its initial draft. It was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field. In our opinion this cautious point of view requires some clarification as there is more to it than that. Even though customary practices are traditionally only recognized as playing a role in international relations, the existence of customary norms in internal armed conflicts should not be totally denied. An example that might be given is the respect for and protection of the wounded. Irrespective of

²² Reference may be made in particular to: E. Suy, “The Concept of *Jus Cogens* in Public International Law”, *Carnegie Endowment for International Peace*, 1967, “Convenance of International Law”, Lagonissi, Greece, 3-8 April 1966; K. Marek, “Contribution à l’étude du *jus cogens* en droit international”, *Recueil d’études de droit international en hommage à P. Guggenheim*, Geneva, 1968, p. 426; G. Perrin, “La nécessité et les dangers du *jus cogens*”, in *Studies and Essays in Honour of Jean Pictet*, *op. cit.*, p. 751.

²³ See the general introduction to Protocol II, *supra*, p. 1325.

²⁴ Art. 63/62/142/158. See *Commentary I*, p. 464 (Art. 63).

²⁵ See the commentary thereon, *supra*, p. 38.

the qualification of the conflict as an internal or international conflict, the codes of conduct are not fundamentally different.²⁶ This is shown by the Lieber Code,²⁷ as it was developed for a civil war, based on the existing principles of the laws of war. In their turn the negotiators of the 1899 and 1907 Conventions did not hesitate to seek inspiration from it.

S.J.

²⁶ See F. Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts" in A. Cassese (ed.), *Current Problems of International Law*, Milan, 1975, p. 268.

²⁷ F. Lieber, *op. cit.*

Part I – Scope of this Protocol

Commentary

- 4436 At the basis of the Protocol, Part I lays down the conditions of its application (Article 1 – *Material field of application*) and defines the beneficiaries of the rules it contains and those for whom they are intended (Article 2 – *Field of personal application*). As the Protocol is the result of a compromise between humanitarian requirements and those of State security, the negotiators also considered it necessary to include a clause safeguarding the inviolability of the national sovereignty of States (Article 3 – *Non-intervention*).
- 4437 The content and scope of all of these articles will be analysed in the respective comments on them. Before doing this it seems useful to have a closer look at the basic pattern of Part I, which reveals the similarity of the ideas which inspired Protocol II and common Article 3. To understand the scope of the Protocol one should indeed always bear in mind the fact that this instrument supplements and develops common Article 3; it is an extension of it, and is based on the same structure.¹ Their common characteristics find expression, explicitly or implicitly, in Part I. These can be summarized as follows:

1. Protocol II and common Article 3 apply automatically once there is a *de facto* situation of armed conflict²

- 4438 The threshold where Protocol II becomes applicable is determined by the criteria expressed in Article 1 (*Material field of application*),³ which means that it is intended to apply only to conflicts of a certain degree of intensity. The principle that it will automatically apply is based on humanitarian requirements, for the implementation of rules for the protection of victims should not be dependent on the subjective judgment of the parties.⁴ Good faith in the application of these instruments remains a basic element.

¹ Several delegations stressed what one delegate referred to as the “essential identity” between common Article 3 and Protocol II. See, in particular, O.R. VIII, p. 234, CDDH/I/SR.24, para. 27.

² On the concept of armed conflict, cf. *Commentary I*, pp. 51-52 (common Art. 3) and the general introduction to the Commentary on Protocol II, *supra*, p. 1319.

³ See Art. 1 of Protocol II and the commentary thereon, *infra*, p. 1347.

⁴ One delegation proposed that the State should determine whether the conditions of application were fulfilled. This proposal was not supported since it would have constituted a step backwards compared to 1949. See O.R. VII, pp. 66-68, CDDH/SR.49, in particular paras. 39, 51-52.

2. The application of Protocol II and common Article 3 does not in any way confer international recognition on the insurgent party⁵

4439 Common Article 3 expressly provides that the application of its provisions will have no effect on the legal status of the parties to the conflict. The ICRC draft contained a reaffirmation of that clause.⁶ As every mention of “parties to the conflict” had been deleted, that article was no longer relevant, and consequently it was dropped. According to some delegations, the mere mention of parties to the conflict in the text of the Protocol could have implied a semblance of recognition of an insurgent party.⁷

4440 Like common Article 3, Protocol II has a purely humanitarian purpose and is aimed at securing fundamental guarantees for individuals in all circumstances. Thus, its implementation does not constitute recognition of belligerency even implicitly⁸ nor does it change the legal nature of the relations between the parties engaged in the conflict. In this respect it is interesting to note that up to now neither common Article 3, nor Protocol II, has ever been used for the purpose of claiming recognition.

3. Protocol II and common Article 3 do not grant a special status to members of the armed forces or armed groups captured by the adversary

4441 Following the example of common Article 3, Protocol II does not establish any special category of protected persons, nor does it create any special legal status. A member of the armed forces in the power of the adverse party and a civilian deprived of his liberty for a reason related to the conflict enjoy the same legal protection (Article 4 – *Fundamental guarantees*, Article 5 – *Persons whose liberty has been restricted*, and Article 6 – *Penal prosecutions*). National law remains in force, i.e., the authorities retain the right to prosecute and, when necessary, to sentence persons who have been found guilty of offences related to the conflict. In particular the Protocol does not prevent bringing to justice a member of an insurgent armed group for the act of taking up arms. It does not confer upon him either combatant or prisoner-of-war status.⁹

⁵ To describe armed opposition to the government we adopt the term “insurgents”, which will be used throughout the Commentary on Protocol II.

⁶ Draft Art. 3 (Legal status of the parties to the conflict).

⁷ O.R. VII, p. 85, CDDH/SR.50, para. 3. See also *ibid.*, p. 61, CDDH/SR.49, para. 11.

⁸ See the general introduction to Protocol II, *supra*, p. 1320 (recognition of belligerency).

⁹ It should be recalled that: “the death penalty shall not be pronounced on person who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children” (Art. 6, para. 4), and that the authorities in power shall endeavour to grant the broadest possible amnesty at the end of hostilities (*ibid.*, para. 5). In addition, the ICRC has always attempted in practice to recommend measures of clemency both to protect persons and to prevent the escalation of violence.

4. Protocol II and common Article 3 are based on the principle of the equality of the parties to the conflict

4442 The deletion from the text of all mention of “parties to the conflict” only affects the drafting of the instrument, and does not change its structure from a legal point of view. All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.

4443 The ICRC draft clarified this point in an article which reads as follows: “The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.”¹⁰ The Conference decided not to include it during the final stage of the adoption of the Protocol.¹¹

4444 The question is often raised how the insurgent party can be bound by a treaty to which it is not a High Contracting Party.¹² It may therefore be appropriate to recall here the explanation given in 1949: the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.¹³

5. The offer of services by an impartial humanitarian organization, such as the ICRC, cannot be considered as interference in the conflict or in the internal affairs of the State.

4445 Common Article 3 gave the ICRC the right of initiative in situations of non-international armed conflict.¹⁴ Even in the absence of explicit reaffirmation, it continues to apply, since Protocol II has an “additional” character.¹⁵ The parties to the conflict retain complete freedom to refuse or accept such an offer of services, but it may not in itself be considered as a hostile act or as intervention;

¹⁰ Draft Art. 5 (Rights and duties of the parties to the conflict).

¹¹ *O.R.* VII, p. 86, CDDH/SR.50, para. 9. See also *ibid.*, p. 76, CDDH/SR.49, Annex (Belgium). This explanation of vote reaffirms the philosophy of common Article 3, and in particular “the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict”.

¹² For the meaning of “High Contracting Party”, see the commentary on the Preamble to Protocols I and II, *supra*, pp. 25 and 1338.

¹³ See *Commentary I*, pp. 52-53 (common Art. 3). See also *CE 1971, Report*, p. 44, para. 223.

¹⁴ Common Art. 3, para. 4. See Y. Sandoz, “Le droit d’initiative humanitaire”, 22 *GYIL*, 1979, p. 352.

¹⁵ *Cf.* commentary Art. 3, para. 2, *infra*, p. 1363. On the statement by the ICRC: see *O.R.* VII, p. 151, CDDH/SR.53, para. 64.

moreover, the Protocol provides for the possibility of appealing to a humanitarian organization, in particular by mentioning the possibility of undertaking international relief actions.¹⁶

S.J.

¹⁶ See Art. 18, para. 2, Protocol II and the commentary thereon, *infra*, p. 1478.

Protocol II

Article 1 – Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Documentary references

Official Records

O.R. I, Part I, p. 190; Part III, p. 33 (Art. 1). *O.R.* IV, pp. 6-10. *O.R.* VII, pp. 66-73, CDDH/SR.49, paras. 37-83; pp. 75-84, *id.*, Annex (Argentina, Belgium, Brazil, Canada, Colombia, Ecuador, Federal Republic of Germany, Ghana, India, Kenya, Philippines, Cameroon, Tanzania); pp. 100-101, CDDH/SR.50, Annex (Italy). *O.R.* VIII, pp. 201-214, CDDH/I/SR.22; pp. 215-226, CDDH/I/SR.23, paras. 1-65; pp. 229-237, CDDH/I/SR.24, paras. 1-40; pp. 285-294, CDDH/I/SR.29, paras. 1-43; pp. 437-438, CDDH/I/SR.41, paras. 41-53. *O.R.* X, pp. 38-40, CDDH/219/Rev.1, paras. 87-92; pp. 93-94, CDDH/I/238/Rev.1.

Other references

CE/5b, pp. 13-16 and 36-48. *CRCE 1971, Report*, pp. 46-48. *CE 1971, Report*, pp. 33-43; p. 57 (Art. 1); pp. 60-61, *CE/COM II/4-6*, *CE/COM II/8*. *CE 1972, Basic Texts*, p. 35 (Art. 1). *CE 1972, Commentaries*, Part II, pp. 3-8. *CRCE 1972, Report*, pp. 52-53 (Art. 1). *CE 1972, Report*, vol. I, p. 62, para. 2.9; pp. 67-72, paras. 2.45-2.106; vol. II, pp. 33-34, *CE/COM II/1-7*; pp. 35-37, *CE/COM*

II/13-14, CE/COM II/16-19. *Commentary Drafts*, pp. 132-133 (Art. 1). *XXIIInd Int. Conf. RC, Report*, pp. 24-25, paras. 77-78. S. Junod, “Additional Protocol II. History and Scope”, 33 *American University Law Review*, 1983, p. 29.

Commentary

General remarks

- 4446** As the heading indicates, Article 1 defines the material field of application of the Protocol, i.e., it determines the circumstances in which it applies. This provision constitutes the keystone of the instrument. It is the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it until it was finally adopted in the plenary meetings of the Conference.¹
- 4447** At first sight the article seems to be based on complicated concepts. In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict. Why there are these different steps in the applicable legal system can be more easily explained in the light of a brief historical survey.
- 4448** Common Article 3 does not contain a definition of armed conflict.² In the absence of clarity of this concept, it gave rise to a great variety of interpretations and in practice its applicability was often denied. To improve the protection of the victims on non-international armed conflicts it proved necessary not only to develop the rules, but also to find more objective criteria to determine whether they are applicable and to reduce the measure of discretion left to each government.
- 4449** Initially two possibilities had been envisaged: either to establish a procedure for determining objectively whether an armed conflict existed, or to clarify the concept of non-international armed conflict, i.e., to select a number of concrete material elements so that, when these elements are present, the authorities concerned could no longer deny the existence of a conflict.
- 4450** It became apparent during the Conference of Government Experts that the first above-mentioned procedure would be too difficult to achieve.³ Therefore this left the second solution, i.e., to formulate a definition, although everyone was fully aware of the risks incurred by such an undertaking. The applicability of common Article 3 was often not recognized because of the absence of a definition, but too rigid or too restrictive a definition would entail the risk of the Protocol not applying either. The work of the Conference of Government Experts showed

¹ See *O.R. VII*, pp. 66-73, CDDH/SR.49, paras. 37-83. Article 1 was adopted as the result of a vote by roll-call (by 58 votes to 5, with 29 abstentions).

² See *Commentary I*, pp. 49-51, and the introduction to this Part, *supra*, p. 1343.

³ See *CE 1971, Report*, p. 37.

how many divergent views and possible solutions existed. Six variants were formulated, based on thirteen proposals. The first was based on the view that a single Protocol should apply to all types of armed conflict without distinguishing between them; the other five, which only applied to non-international armed conflicts, ranged from the broadest conceivable definition, covering all situations, including those where the level of strife was very low, to the narrowest possible definition, covering only very intense conflicts with all the material characteristics of a war.⁴ Taking the views that were expressed into account, the ICRC attempted in its draft to propose a formula defining the characteristics of non-international armed conflicts, while remaining sufficiently general and flexible to be able to apply to all such situations.⁵

4451 The draft endeavoured to meet three concerns:

- 1) to establish the upper and lower thresholds of non-international armed conflict;
- 2) to provide the elements of a definition;
- 3) to ensure that the achievements of common Article 3 would remain intact.

4452 The upper threshold was defined by reference to armed conflicts within the meaning of common Article 2 of the Conventions. This formula was retained, but updated by referring instead to conflicts as covered by Article 1 of Protocol I (*General principles and scope of application*).

4453 The exclusion of situations of internal disturbances and tensions from the Protocol's field of application determined the lower threshold. This proposal, which corresponded with the views of the majority of the experts consulted previously, was also adopted and is now contained in paragraph 2 of the present text. The ICRC proposed a broad definition based on material criteria: the existence of a confrontation between armed forces or other organized armed groups under responsible command, i.e., with a minimum degree of organization. As its representative submitting the draft article in Committee explained, the intention was "to specify the characteristics of a non-international armed conflict by means of objective criteria so that the Protocol could be applied when those criteria were met and not be made subject to other considerations".⁶ Although the basic idea underlying the proposal was approved, it turned out to be very difficult to achieve a consensus as to what criteria should be used in the definition. Apart from amendments, numerous proposals were put forward in the Working Group and Sub-Group. It was in fact necessary to create a Sub-Group of the Working Group and this had to meet six times before reaching an agreement.⁷ The three criteria that were finally adopted on the side of the insurgents i.e. – a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol – restrict the applicability of the Protocol to conflicts of a certain degree of intensity. This means that not all cases of non-international armed conflict are covered, as is the case in common Article 3.

⁴ See *CE 1972, Report*, Vol. I, p. 71. *O.R.* VIII, p. 203, CDDH/I/SR.22, para. 11.

⁵ Draft Art. 1.

⁶ See *O.R.* VIII, p. 203, CDDH/I/SR.22, para. 12.

⁷ See *O.R.* X, pp. 93-94, CDDH/I/238/Rev.1.

- 4454 Finally, the ICRC draft endeavoured to keep intact the achievements of common Article 3 by providing that the conditions of application of that article would not be modified. Keeping the conditions of application of common Article 3 as they are, and stipulating that the proposed definition will not apply to that article, meant that the Protocol was conceived as a self-contained instrument, additional to the four Conventions and applicable to all armed conflicts which comply with the definition and are not covered by common Article 2. Keeping the Protocol separate from common Article 3 was intended to prevent undercutting the scope of Article 3 itself by laying down precise rules. In this way common Article 3 retains an independent existence.
- 4455 As adopted, Article 1 of the Protocol takes into account most of these proposals, which are explicitly set out in paragraph 1.

Paragraph 1

- 4456 On the one hand, paragraph 1 establishes the link between the Protocol and common Article 3; on the other, it distinguishes international armed conflicts from non-international armed conflicts by means of a negative reference to Article 1 of Protocol I (*General principles and scope of application*). Finally, it lays down the material criteria determining the circumstances in which the Protocol is applicable.

1. *The link with common Article 3*

- 4457 Formally, the Protocol is additional to the four Conventions. In order to reinforce and increase the protection granted to victims of non-international armed conflict – the *raison d'être* of Protocol II – it develops and supplements the brief rules contained in common Article 3 “without modifying its existing conditions of application”. This explicit reference constitutes one of the bases of the compromise which made the adoption of Article 1 possible. In fact, the Conference chose in favour of the solution which makes the scope of protection dependent on intensity of the conflict. Thus, in circumstances where the conditions of application of the Protocol are met, the Protocol and common Article 3 will apply simultaneously, as the Protocol’s field of application is included in the broader one of common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply.⁸ In fact, common Article 3 retains an autonomous existence, i.e., its applicability is neither limited nor affected by the material field of application of the Protocol. This formula, though legally rather complicated, has the advantage of furnishing a guarantee against any reduction of the level of protection long since provided by common Article 3.

⁸ Mention should also be made of the possibility that armed factions confront each other without the armed forces of the government being involved; see *infra*, p. 1351.

2. *The distinction between international and non-international conflicts*

4458 Taking into account the link established with common Article 3, the Protocol applies to all armed conflicts which are not covered by Article 1 of Protocol I (*General principles and scope of application*). By excluding situations covered by Protocol I, this definition creates the distinction between international and non-international armed conflicts. The entities confronting each other differ, depending on which category the conflict falls under; in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power acting in the exercise of the public authority vested in it.⁹ This distinction sets the upper threshold for the applicability of the Protocol.

3. *The objective criteria*

4459 This paragraph lays down a number of objective criteria for determining the field of application of the Protocol. Its application should not depend on the discretionary judgment of the parties. The Protocol applies automatically as soon as the material conditions as defined in the article are fulfilled. The aim of this system is that the protection of the victims of armed conflict should not depend on an arbitrary decision of the authorities concerned – this is one of the cornerstones of international humanitarian law and already applied to Articles 2 and 3 common to the 1949 Conventions.

3.1. *The parties confronting each other*

4460 The Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces, i.e., where there is a rebellion by part of the government army or where the government's armed forces fight against insurgents who are organized in armed groups, which is more often the case. This criterion illustrates the collective character of the confrontation; it can hardly consist of isolated individuals without co-ordination.

4461 In its draft the ICRC had provided that the Protocol would be applicable in the case of several factions confronting each other without involvement of the government's armed forces, for example, if the established government had disappeared or was too weak to intervene.¹⁰ Such a situation, it appeared to the Conference, was merely a theoretical textbook example and the provision was dropped, even though the ICRC had already been confronted with this type of situation. Thus unfortunately the definition does not cover such cases and only common Article 3 will apply to them. Of course, the possibility will always exist

⁹ See *O.R. VIII*, pp. 203-204, CDDH/I/SR.22, paras. 13-14.

¹⁰ *Commentary Drafts*, pp. 132-133.

of putting the Protocol into force by special agreement, as provided by common Article 3.¹¹

- 4462 The term “armed forces” of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, “regular armed forces”, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force).¹²

3.2. *The responsible command*

- 4463 The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.

3.3. *Control over a part of the territory*

- 4464 The article provides that the armed groups of the opposition must be able to exercise “such control over a part of [the High Contracting Party’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.
- 4465 These various criteria are closely related. Control over a part of the territory requires that the insurgent armed groups are organized.¹³ What part of the territory should be controlled is not specified. In fact, several proposals were made with a view to specifying that this should be “a non-negligible part of the territory”¹⁴ or a “substantial part of the territory”,¹⁵ but they were not adopted by the Conference.
- 4466 The word “such” provides the key to the interpretation. The control must be sufficient to allow sustained and concerted military operations to be carried out¹⁶ and for the Protocol to be applied, i.e., for example, caring for the wounded and the sick, or detaining prisoners and treating them decently, as provided in Articles 4 (*Fundamental guarantees*) and 5 (*Persons whose liberty has been restricted*).
- 4467 In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain

¹¹ Common Art. 3, para. 3.

¹² O.R. X, p. 94, CDDH/I/238/Rev.1.

¹³ In this context “control” is synonymous with domination. Cf. Shorter Oxford English Dictionary (1978), pp. 416 and 594.

¹⁴ O.R. IV, p. 8, CDDH/I/79.

¹⁵ *Ibid.*, p. 7, CDDH/I/32.

¹⁶ See *infra*.

in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.

3.4. *The sustained and concerted character of military operations*

4468 In fact, it is the “sustained and concerted military operations” which effectively determine control of a territory. What does this mean exactly?

4469 “Sustained” (in French the reference is to “*opérations continues*”) means that the operations are kept going or kept up continuously.¹⁷ The emphasis is therefore on continuity and persistence. “Concerted” (in French: “*concertées*”) means agreed upon, planned and contrived, done in agreement according to a plan.¹⁸ Thus we are talking about military operations conceived and planned by organized armed groups. The criteria of duration and intensity¹⁹ were not retained as such in the definition because they would have introduced a subjective element. The applicability of the rules of protection of the Protocol must not in fact depend on the subjective judgment of the parties. On the other hand, the criterion whether military operations are sustained and concerted, while implying the element of continuity and intensity, complies with an objective assessment of the situation. At the beginning of a conflict military operations rarely have such a character; thus it is likely that only common Article 3 will apply to the first stage of hostilities.

3.5. *Ability to implement the Protocol*

4470 This is the fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, the insurgents must be in a position to implement the Protocol. The threshold for application therefore seems fairly high. Yet, apart from the fact that it reflects the desire of the Diplomatic Conference, it must be admitted that this threshold has a degree of realism. The conditions laid down in this paragraph 1, as analysed above, correspond with actual circumstances in which the parties may reasonably be expected to apply the rules developed in the Protocol, since they have the minimum infrastructure required therefor.

¹⁷ Shorter Oxford English Dictionary (1978), p. 2205.

¹⁸ *Ibid.*, p. 389.

¹⁹ See O.R. IV, pp. 6-7, CDDH/I/26, CDDH/I/32, amendments which proposed formulae such as “the hostilities are of some intensity and continue for a reasonable period of time” and “over a prolonged period”.

Paragraph 2

- 4471 This paragraph expressly excludes situations of internal disturbances and tensions from the Protocol's field of application, as these are not considered as armed conflicts.²⁰
- 4472 It should be stressed that the criteria laid down in paragraph 1, taken by themselves, are clearly sufficient to exclude internal disturbances and, *a fortiori*, internal tensions.
- 4473 This paragraph was taken from the ICRC draft²¹ and made sense in the context of the original draft article. Its purpose was to define the lower threshold of the concept of armed conflict, assuming that the field of application of common Article 3 and the Protocol would be identical.²² The paragraph was not questioned and was retained and adopted without lengthy debates.²³
- 4474 No real definitions are given. The concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions.²⁴
- 4475 As the ICRC has a legally recognized right of initiative to offer its services with a view to assisting and protecting the victims in such situations,²⁵ it has for a long

²⁰ The English phrase "as not being" is rendered in French as "qui ne sont pas considérés" (which are not considered as). This has no effect on the meaning.

²¹ Draft Art. 1, para. 2.

²² Art. 1, para. 1, of the draft read as follows: "The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command"; see commentary para. 1, *supra*, p. 1350.

²³ In this respect the delegation of the Federal Republic of Germany stated: "This article constitutes a compromise solution which was difficult to reach. An essential element of this compromise is the fact that the existing conditions of application of Article 3 common to the Geneva Conventions are not modified. This is clearly expressed in Article 1, paragraph 1, of Protocol II. It also applies to paragraph 2 of the same article. Consequently, the negative definition of the term 'armed conflict' in paragraph 2 applies only to Protocol II, not to Article 3 common to the Geneva Conventions. This is the understanding of the Federal Republic of Germany as to the interpretation of Article 1 of Protocol II. It does not, however, intend to express any view, be it only by implication, on the meaning of the term 'armed conflict' as used in Article 3 common to the Geneva Conventions." See *O.R.* VII, pp. 79-80, CDDH/SR.49, Annex (FRG).

²⁴ See *Commentary Drafts*, p. 133.

²⁵ The Statutes of the International Red Cross, Art. VI, para. 5: "neutral institution whose humanitarian work is carried out particularly in time of war, civil war, or internal strife, it endeavours at all times to ensure the protection of and assistance to military and civilian victims of such conflicts and of their direct results [...]"; para 6: "It takes any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary and considers any question requiring examination by such an institution."

It should be noted that not only the constituent bodies of the Red Cross Movement (ICRC, League, the National Red Cross and Red Crescent Societies), but also States Parties to the Geneva Conventions are members of the International Conference of the Red Cross, the body which adopted the Statutes and which can modify them. *Cf.* also *supra*, Editors' note.

time been attempting to define them in order to better guide its activities. Originally drawn up for internal use, some definitions were submitted in particular to a group of government experts in 1970.²⁶ On the basis of their comments the ICRC gave the following description of internal disturbances during the first session of the Conference of Government Experts in 1971:²⁷

“This involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.”

4476 As regards *internal tensions*,²⁸ these could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of “political” prisoners;²⁹
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances.

4477 In short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.

4478 These definitions are not contained in a convention but form part of ICRC doctrine (*supra* and note 27). While designed for practical use, they may serve to shed some light on these terms, which appear in an international law instrument for the first time.

²⁶ Cf. *Preliminary Report on the Consultation of Experts Concerning Non-International Conflict and Guerrilla Warfare*, ICRC, Geneva, 1970, p. 2.

²⁷ CE/5b, p. 79, reproduced in *The ICRC, the League and the Report on the Re-Appraisal of the Role of the Red Cross*, ICRC, Geneva, 1979, pp. 24-25 (offprint first published in the *IRRC* of July-August 1978, pp. 210-211).

²⁸ *Ibid.*

²⁹ It should be noted that there is no legal definition of so-called “political” prisoners. They may be referred to in very different ways depending on national legislation, for example, “persons detained for security reasons”, “persons detained by order of the executive”, etc.

4479 Internal disturbances and tensions are not at present within the field of application of international humanitarian law; the ICRC has carried out activities in this field on an *ad hoc* basis.³⁰ However, this does not mean that there is no international legal protection applicable to such situations, as they are covered by universal and regional human rights instruments.³¹ It is not within the scope of this commentary, however, to go into that subject.

S.J.

³⁰ On this point reference may be made to J. Moreillon, *Le Comité international de la Croix-Rouge et la protection des détenus politiques*, Lausanne, 1973, p. 303.

³¹ See commentary Preamble, *supra*, p. 1337.

Protocol II

Article 2 – Personal field of application

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as “adverse distinction”) to all persons affected by an armed conflict as defined in Article 1.
2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Documentary references

Official Records

O.R. I, Part I, p. 190; Part III, pp. 33-34 (Art. 2). *O.R.* IV, pp. 11-15. *O.R.* VII, p. 85, CDDH/SR.50, para. 1. *O.R.* VIII, pp. 210-214, CDDH/I/SR.22, paras. 43-68; pp. 215-226, CDDH/I/SR.23, paras. 1-65; pp. 229-236, CDDH/I/SR.24, paras. 1-35; p. 294, CDDH/I/SR.29, paras. 44-46; p. 439, CDDH/I/SR.41, paras. 54-56. *O.R.* X, pp. 40-41, CDDH/219/Rev.1, paras. 93-98; pp. 95-96, CDDH/238/Rev.1. *O.R.* XI, p. 263, CDDH/II/SR.26, para. 40.

Other references

CE 1971, Report, pp. 36-43, paras. 129-218; p. 57 (Art. 1, para. 2); pp. 59-60. *CE 1972, Basic Texts*, pp. 35-36 (Arts. 2-3). *CE 1972, Commentaries*, Part II, pp. 7-9. *CE 1972, Report*, vol. I, pp. 123-125, paras. 2.542-2.557; vol. II, p. 46, CE/COM II/68; p. 50, CE/COM II/88. *Commentary Drafts*, pp. 133-134 (Art. 2).

Commentary**General remarks**

- 4480 The provision defines the field of application *ratione personae* of the rules of the Protocol by indicating who benefits from them and for whom they are intended and how far they apply in place and time. Paragraph 1 affirms the principle of non-discrimination in the application of the Protocol to “all persons affected by an armed conflict”. The meaning to be given to this term will be indicated in the commentary on paragraph 1.
- 4481 Paragraph 2 specifies *ratione temporis* the legal protection of persons deprived of their liberty, who will continue to enjoy the fundamental guarantees of humane treatment and of judicial guarantees after the end of hostilities, not only if they were already detained, but also if they were arrested after the conflict came to an end. This rule reduces the risk of arbitrary behaviour by the victorious party.

Paragraph 1*Principle of non-discrimination*

- 4482 First, paragraph 1 lays down that persons protected by application of the rules of the Protocol must be treated equally. This concept is based on the principle of non-discrimination which is nowadays universally recognized in international law. The list of the various criteria of discrimination is not exhaustive. It is contained in other provisions of the Conventions and of the Protocols in greater or lesser detail.¹ Its scope is always the same.
- 4483 In Article 2 under consideration here, the list of criteria is very similar to that of the Covenant on Civil and Political Rights.² In this respect, it should be noted that a degree of correspondence in the terminology used in international instruments relating to human rights and those on humanitarian law makes for a certain measure of cohesion of the international rules for the protection of the human person, and is of help for their interpretation.
- 4484 “This Protocol shall be applied without any adverse distinction”: this formula is taken from common Article 3 of the Conventions. The adjective “adverse” is used to make an important point. In fact, favourable distinctions may be made quite lawfully, such as differences of treatment which may be made to take into account the suffering or distress or natural weakness of people (such as a child or an old man, for example), which call for special measures related to the urgency and needs of the case in point.³

¹ In particular, Art. 13, Fourth Convention, common Art. 3, Art. 75, Protocol I, and Art. 4, Protocol II.

² Art. 2 of the Covenant.

³ See *Commentary IV*, pp. 127-128 (Art. 13).

Field of application ratione personae

- 4485 Who are the people “affected by an armed conflict”? On the one hand, these are persons who do not, or no longer take part in hostilities and enjoy the rules of protection laid down by the Protocol for their benefit. On the other, they are those who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population.⁴
- 4486 The ICRC draft was more explicit and clearer. It took up a Canadian proposal submitted during the Conference of Government Experts in 1971,⁵ and read as follows: “The present Protocol shall apply [...] to all persons, whether military or civilian, combatant or non-combatant, affected by an armed conflict.”⁶
- 4487 This proposal was based on two thoughts:
- by providing for a field of application that would cover everybody, combatants as well as non-combatants in the territory of the country where the conflict was taking place, there would be no need for the insurgent party to have a defined status;
 - by extending the field of application of the rules applicable in case of non-international armed conflict to cover combatants, the fact that the Protocol contains provisions on how to behave in combat and on the conduct of hostilities would be properly taken into account.⁷
- 4488 The final version of the article, as it now reads in the Protocol, is also the result of a Canadian amendment.⁸ Although the wording of the text is less explicit, the original approach has been retained and was not contested.
- 4489 The Protocol applies to all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons. It may happen that the authorities take special security measures with regard to aliens, and certain offences committed in connection with the conflict situation may be considered of greater or less severity, depending on whether they were committed by foreigners or nationals. These are administrative or judicial measures which, although based on the nationality criterion, are without prejudice to the guarantees on the treatment of individuals.⁹

Field of application ratione loci

- 4490 Persons affected by the conflict within the meaning of this paragraph are covered by the Protocol wherever they are in the territory of the State engaged in conflict. The situation may only affect a small part of the territory; this is why the Diplomatic Conference did not provide that the Protocol should automatically

⁴ See *O.R. VIII*, p. 210, CDDH/I/SR.22, para. 43.

⁵ *CE 1971, Report*, pp. 57 and 59-60 (Art. 1); *CE 1972, Commentaries*, Part II, p. 7.

⁶ Draft Art. 2, *Commentary Drafts*, p. 134.

⁷ For example, quarter (Art. 4, para. 1 *in fine*), or the protection of the civilian population (Art. 13).

⁸ *O.R. IV*, p. 11, CDDH/I/37; p. 13, CDDH/I/220.

⁹ *O.R. VIII*, p. 210, CDDH/I/SR.22, para. 45.

apply to the territory as a whole. No criterion *ratione loci* was adopted. As we saw above, the applicability of the Protocol follows from a criteria related to persons, and not to places.¹⁰

Field of application ratione temporis

4491 The starting point of the application of the Protocol is determined by Article 1, (*Material field of application*), paragraph 1, and corresponds to the moment when the criteria laid down in that article are objectively fulfilled.

4492 The text does not contain any indication as regards the end of its applicability.¹¹ Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities, while the fundamental guarantees granted persons deprived of their liberty are dealt with in paragraph 2 commented on below.

Paragraph 2

4493 In principle, measures restricting people's liberty, taken for reasons related to the conflict,¹² should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.

4494 That is the *raison d'être* of this paragraph, which provides that at the end of the armed conflict persons deprived of their liberty for reasons related to the conflict, either because they have not been released, or because they were arrested after the end of hostilities, continue to enjoy protection under the rules relating to detention (Article 5 – *Persons whose liberty has been restricted*) and judicial guarantees (article 6 – *Penal prosecutions*).

4495 These fundamental guarantees remain valid at all times and without any restriction in time, until the deprivation or restriction of the liberty of those concerned has come to an end. In fact, this is an essential protection for the individual.

4496 The article uses the terms “deprived of [...] liberty” and “whose liberty has been restricted” to ensure that there is no gap in protection.¹³ In fact, these terms cover all possible situations, from release subject to police supervision (such as house arrest or assigned residence, for example), to imprisonment.

S.J.

¹⁰ *Ibid.*, p. 211, paras. 47-48.

¹¹ An amendment which was not adopted proposed that the application of the Protocol should cease “upon the general cessation of military operations”; cf. *O.R.* IV, p. 12, CDDH/I/79.

¹² On the meaning of the term “for reasons related to the armed conflict”, cf. commentary Art. 5, para. 1, *infra*, p. 1385.

¹³ Concerning the term “interned or detained” persons, cf. also *ibid.*

Protocol II

Article 3 – Non-intervention

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Documentary references

Official Records

O.R. I, Part I, p. 190; Part III, p. 34 (Art. 4). *O.R.* IV, p. 16. *O.R.* VII, p. 86, CDDH/SR.50, paras. 7-9; p. 151, CDDH/SR.53, para. 64. *O.R.* VIII, pp. 215-218, CDDH/I/SR.23, paras. 1-19; pp. 237-239, CDDH/I/SR.24, paras. 41-54; pp. 294-298, CDDH/I/SR.29, paras. 47-70; pp. 299-308, CDDH/I/SR.30, paras. 1-53; pp. 439-441, CDDH/I/SR.41, paras. 59-68. *O.R.* X, pp. 42-43, CDDH/219/Rev.1, paras. 104-111; p. 96, CDDH/I/238/Rev.1.

Other references

CE 1971, Report, pp. 45-46, paras. 240-242. *CRCE 1972, Report*, pp. 52-53. *CE 1972, Report*, vol. I, pp. 65-66, paras. 2.30-2.34; p. 120, paras. 2.534-2.535. *Commentary Drafts*, p. 135 (Art. 4). United Nations, A/Res. 2625 (XXV), relative to Principles of International Law concerning Friendly Relations and Co-operation among States. Ch. Rousseau, *Droit international public*, tome IV, 1980, pp. 37-52.

Commentary

General remarks

- 4497 Article 3 is a response to the fear that Protocol II might be used as a pretext to violate the sovereignty of States and intervene in their internal or external affairs, i.e., that it might serve as a justification for intervention. Such fear became apparent at the Conference of Government Experts. Some of the experts would even have liked to include a clause in the Preamble to the effect that respect for national sovereignty and for the principle of non-interference in internal affairs was a pre-requisite for applying the Protocol.¹
- 4498 In view of this recurring concern, the ICRC had already included such a provision in the draft submitted to the Diplomatic Conference. Although it had the same tenor, the proposed provision was nevertheless more succinct.²
- 4499 This is a savings clause which brings to mind the two complementary principles of international law enshrined in the United Nations Charter:³ the principle of inviolability of the national sovereignty and that of non-intervention in matters which are essentially within the domestic jurisdiction of a State. In fact, the ICRC draft contained yet another savings clause which recalled that the legal status of the parties to the conflict would not be affected by the application of the Protocol.⁴ That article was deleted by consensus during the final stage of the adoption of the Protocol.⁵ On the one hand, its *raison d'être* had disappeared since all mention of parties to the conflict had been deleted from the text, precisely so as not to give any semblance of recognition to any sort of international status of the insurgent party;⁶ on the other hand, such a clause is already contained in common Article 3, and therefore retains its full validity with regard to Protocol II.⁷ Thus it is perfectly clear that the application of international humanitarian law in situations of non-international armed conflict has no effect whatever on the qualification of relations between the parties.

Paragraph 1

- 4500 Paragraph 1 reaffirms the principle of the inviolability of the national sovereignty of States. The Protocol has a purely humanitarian aim. Consequently it does not affect the right of States to take appropriate measures for maintaining or restoring law and order, defending their national unity and territorial integrity. This is the responsibility of governments and is expressly recognized here.

¹ CE 1972, *Report*, Vol. I, p. 120, paras. 2.534 and 2.539.

² Draft Art. 4.

³ United Nations Charter, Art. 2, paras. 1 and 7.

⁴ Draft Art. 3.

⁵ See *O.R.* VII, p. 86, CDDH/SR.50, para. 9.

⁶ See the introduction to this Part, *supra*, p. 1343.

⁷ Common Art. 3, para. 4.

- 4501 If the State's authority had been totally reserved, that would have risked depriving the Protocol of its substance and meaning; for this reason it was of paramount importance to specify that only legitimate means may be used. Thus imperative needs of State security may not be invoked to justify breaches of the rules of the Protocol. In ratifying or acceding to the Protocol, a State accepts its terms by the unfettered exercise of its sovereign powers. Consequently, the obligation to respect the rules contained in it cannot later be considered as an infringement of its sovereignty, as the government's freedom of action is limited by the obligations it has itself freely agreed to.⁸

Paragraph 2

- 4502 Paragraph 2 reserves the principle of non-intervention. The Protocol cannot serve as a pretext or justification for direct or indirect intervention in an armed conflict or in the internal or external affairs of the High Contracting Party concerned.
- 4503 The ICRC draft was concerned only with prohibiting intervention by third States.⁹ In Committee a proposal was submitted orally to include "any other organization" in addition to States. This proposal was based on the allegation that in the past private organizations had been guilty of abuses in the name of humanitarian activities.¹⁰ It did not meet with the agreement of the delegates. Some expressed the fear, which was unfounded,¹¹ that it could result in the competence of the United Nations being called into question, particularly that of the Security Council, to take appropriate measures in the event that international peace and security were endangered.¹² On the other hand, an amendment to the effect that the reference to States in the text should be deleted, was adopted.¹³ The prohibition is therefore addressed not only to States, but also to other bodies, international or non-governmental organizations, which might use the Protocol as a pretext for interfering in the affairs of the State in whose territory the armed conflict is taking place.
- 4504 In view of the fear to which we referred above, it seems appropriate to note that this provision does not call into question previously existing procedures of international organizations and particularly the United Nations.

⁸ On this question, see "The SS Wimbledon case", Reports of the Permanent Court of International Justice, Series A, No. 1, 17 August 1923: "The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any Convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty." See also *O.R.* VIII, pp. 215-218, CDDH/I/SR.23, paras. 1-19.

⁹ Draft Art. 4.

¹⁰ *O.R.* VIII, p. 295, CDDH/I/SR.29, para. 49.

¹¹ See Art. 103 of the Charter.

¹² *O.R.* VIII, p. 295, CDDH/I/SR.29, para. 50.

¹³ *O.R.* IV, p. 16, CDDH/I/239. See also *O.R.* VIII, p. 306, CDDH/I/SR.30, para. 36, and *O.R.* X, p. 43, CDDH/219/Rev.1, para. 108.

- 4505 It should also be recalled here that common Article 3 provides that: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.” Such an offer of services, legitimate under common Article 3, cannot be considered as a hostile act.¹⁴ Even in the absence of explicit reaffirmation, the position achieved in 1949 is not adversely affected by Protocol II, which, as specified in article 1 (*Material field of application*) supplements and develops common Article 3 without modifying its conditions of application.¹⁵ Nor does it prohibit the offer by an impartial humanitarian organization such as the ICRC to provide assistance and protection to the victims of the armed conflict, and to contribute to the implementation of the Protocol. This possibility is expressly provided for with regard to assistance for persons who have been deprived of their liberty¹⁶ and with regard to the organization of relief actions for the benefit of the civilian population.¹⁷ However, there is no obligation to accept assistance from such an organization. Parties remain free to accept or refuse assistance offered them, precisely in order to retain their complete freedom of judgment and so as not be exposed to external interventions.
- 4506 Finally, one delegation pointed out that a distinction is nowadays made between “intervention” and “interference”; “intervention” is applied to subversive or terrorist activities, whereas the word “interference” may be used for ordinary *démarches* or protests.¹⁸

S.J.

¹⁴ See *Commentary I*, pp. 57-59 (Art. 3).

¹⁵ The ICRC recalled this important point in a plenary meeting of the Conference. See *O.R.* VII, p. 151, CDDH/SR.53, para. 64.

¹⁶ See Art. 5, para. 1(c), and the commentary thereon, *infra*, p. 1388.

¹⁷ See Art. 18, para. 2, and the commentary thereon, *infra*, p. 1478.

¹⁸ *O.R.* VIII, p. 300, CDDH/I/SR.30, para. 5. This remark is based on Resolution 2625 (XXV) of the United Nations on Principles of International Law concerning Friendly Relations and Co-operation among States, and Principle VI of the Final Act of Helsinki: *Non-intervention*. See also on this point, R.J. Dupuy and A. Leonetti, “La notion de conflit armé à caractère non international”, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflicts*, *op. cit.*, pp. 272-274.

Part II – Humane treatment

Introduction

- 4507 This Part is aimed at protecting persons who do not, or no longer, participate in hostilities against abuses of power and against inhuman and cruel treatment which may be inflicted upon them by the military or civilian authorities into whose hands they have fallen.¹ As the Protocol does not provide for different categories of persons who enjoy a special status, such as prisoners of war in international armed conflicts, the rules laid down here apply equally to all persons affected² by the armed conflict who are in the power of the enemy (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians.
- 4508 Such rules are already contained, implicitly or explicitly, in common Article 3; they are developed and supplemented in the Protocol. These are inalienable³ and fundamental rights, inherent in the respect due to the human person: guarantees of humane treatment (Article 4 – *Fundamental guarantees*), minimum standards during detention (Article 5 – *Persons whose liberty has been restricted*) and judicial guarantees (Article 6 – *Penal prosecutions*).
- 4509 The above-mentioned articles bear the mark of international human rights law. In fact the ICRC, in drawing up its draft articles, and subsequently the Conference, were inspired by the Covenant on Civil and Political Rights.
- 4510 These fundamental guarantees constitute a minimum standard of protection which anyone can claim at any time, and they underlie the whole system of human rights. As the Protocol has its own field of application, it was important that it should include these guarantees, properly adapted and supplemented to match the circumstances for which the Protocol is intended.
- 4511 This Part contains virtually all the irreducible rights of the Covenant, i.e., those from which there is no possibility of derogation, even in time of public emergency threatening the life of the nation.⁴ It also reiterates the judicial guarantees which are not part of that minimum protection, but which are of particular importance in situations of armed conflict; it was therefore all the more important to include

¹ These may be *de jure* or *de facto* authorities.

² See commentary Art. 2, para. 1, *supra*, p. 1359.

³ The term “inalienable” means not only that the rights cannot be taken away, but also that they cannot be renounced. See *Commentary I*, pp. 77-85 (Art. 7).

⁴ Covenant, Art. 4, para. 1.

these in the Protocol. They include the presumption of innocence, the right of the accused to be present at his trial, and the principle that no one can be compelled to testify against himself (Article 6 – *Penal prosecutions*, paragraph 2(d), (e) and (f)). Thus there is some homogeneity as to both form and substance between these fundamental rules of protection in the Protocol and in the Covenant.

4512 During the debates in the Diplomatic Conference a great many delegates systematically referred to the corresponding rules of the Covenant which they wanted to include in the Protocol as they were. This concern met the desire to establish guarantees at least equivalent to those granted by human rights instruments, so as not to be out of line. It played an important part with regard to the form and substance of Part II. It was responsible for bringing about a degree of uniformity between international rules of protection which impose limitations on national legal systems.

4513 In addition, human rights and humanitarian law, which are separate legal systems each with its own field of application and mechanisms, exist concurrently.⁵ This uniformity and convergence serve to reinforce the protection of the human person.

4514 Finally, it should be noted that the same non-derogable core of rights contained in this Part is also contained in Article 75 of Protocol I (*Fundamental guarantees*). All persons who do not benefit from more favourable treatment under the Conventions or that Protocol enjoy the protection of that article.

S.J.

⁵ See Resolution 2675 (XXV) of the United Nations General Assembly. See also the commentary on the second paragraph of the Preamble, *supra*, p. 1339. Such concurrent application is of course a factor which has to be taken into account to the extent States are bound by the various instruments.

Protocol II

Article 4 – Fundamental guarantees

1. All persons who do not take a direct part of who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
 - (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - (b) collective punishments;
 - (c) taking of hostages;
 - (d) acts of terrorism;
 - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
 - (f) slavery and the slave trade in all their forms;
 - (g) pillage;
 - (h) threats to commit any of the foregoing acts.
3. Children shall be provided with the care and aid they require, and in particular:
 - (a) they shall receive an education, including religious and moral education in keeping with the wishes of their parents or, in the absence of parents, of those responsible for their care;
 - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
 - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
 - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;
 - (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Documentary references

Official Records

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Commentary

General remarks

4515 Article 4, paragraphs 1 and 2, reiterates the essence of common Article 3, in particular paragraph 1, sub-paragraph (1)(a), (b) and (c) thereof. These rules

were supplemented and reinforced by new provisions inspired by the Conventions and the International Covenant on Civil and Political Rights.¹

4516 The rule on quarter is given at the end of paragraph 1. This provision originates in Hague law and is based on Article 23, paragraph 1(d), of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land.

4517 Paragraph 3 is devoted more particularly to the protection of children and reiterates some principles already contained in the Fourth Convention, especially in Articles 17, 24 and 26.

4518 The diversity of the subject matter dealt with in this article can be explained in the light of a review of the history of the negotiations. The fundamental guarantees as provided in Article 6 of the ICRC draft correspond to paragraphs 1 and 2 of the present article, with the exception of the provision on giving quarter. The rule on quarter was contained in Article 22 of the draft, which also proposed some other rules on conduct in combat;² this was an abbreviated version of Part III, Section I, of Protocol I (*Methods and means of warfare*). These articles, which were adopted in Committee, were not retained when the Protocol was adopted in plenary meetings with the exception of the rule on giving quarter, which the Pakistani delegation had retained in its proposal for a simplified Protocol.³ In the absence of any further rules in the Protocol for the conduct of combatants it seemed logical to include the rule on quarter amongst the fundamental guarantees, and this proposal did not encounter any opposition.

4519 Protection of children was also included in a separate provision of the draft (Article 32). The article as such was not retained when the Protocol was adopted, but the most essential elements of its content were included in Article 4 in the form of the present paragraph 3.⁴

Paragraph 1

First two sentences – General principle of humane treatment

4520 The scope of application as defined here applies not only to Article 4, but also to Part II as a whole. *Ratione personae* it covers all persons affected by armed conflict within the meaning of Article 2 of the Protocol (*Personal field of*

¹ Hereafter referred to as “the Covenant”.

² *Draft*, Part IV: Methods and means of combat (Arts. 20-23).

³ See *O.R.* IV, p. 20, CDDH/427 and CDDH/430. *Cf.* also general introduction to the Protocol, *supra*, p. 1333.

⁴ *O.R.* IV, p. 20, CDDH/427.

application) when they do not, or no longer, participate directly in hostilities. *Ratione temporis* combatants are protected as soon as they are *hors de combat*.⁵

4521 The right of protected persons to respect for their honour, convictions and religious practices is an element of humane treatment confirmed in this paragraph. The formula is taken, with slight modification, from Article 27 of the Fourth Convention.

“The right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers.”⁶

4522 It should be noted that Article 27 of the Fourth Convention refers to religious convictions and practices, while Article 4 of Protocol II refers to “convictions and religious practices”. This slight drafting modification is not arbitrary and gave rise to lengthy debate.⁷ It is aimed at making the adjective “religious” qualify only the word “practices”; convictions are not necessarily religious and it is important that philosophical and political convictions, which are not specifically part of a religion, are also ensured respect. This is why it was thought necessary to make this point.⁸

4523 The term “treat humanely” is based on the Hague Regulations.⁹ It was also used in the 1929 and 1949 Conventions. The word “treatment” should be understood in its broadest sense as applying to all the conditions of man’s existence.¹⁰

4524 The words “without any adverse distinction” can be explained in the light of Article 2 (*Personal field of application*), paragraph 1:

“without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth,

⁵ Common Art. 3, para. 1, sub-para. (1), already provides for protection of “those placed *hors de combat* by sickness, wounds, detention, or any other cause”, but the ICRC considered that it was logical and sensible to specify the time from which a combatant who has ceased to participate in hostilities is entitled to the protection of Part II; it had therefore proposed to include in that Part a rule on protection of enemies *hors de combat*. Such a provision, which led to some discussion because of its position in the Protocol, was not finally retained (adopted in Committee as Article 22 *bis* among the rules on methods and means of combat). See *O.R.* IV, p. 68, CDDH/427; *O.R.* VIII, pp. 332-336, CDDH/I/SR.32, paras. 47-67. A similar rule is contained in Article 41 of Protocol I.

⁶ *Commentary IV*, p. 201 (Art. 27).

⁷ *O.R.* X, pp. 186-187, CDDH/405/Rev.1, paras. 35 and 36; *O.R.* XV, p. 461, CDDH/407/Rev.1, para. 43.

⁸ The Covenant, very often called upon as an instrument of reference, contains in Art. 18, para. 3, the words “freedom to manifest one’s religion or beliefs”. It should be noted that this is a provision from which there can be no derogation, even in time of public emergency. The 1949 commentators naturally interpreted the expression “religious convictions and practices” broadly as evidenced by *Commentary IV*, p. 203, *ad* Art. 27, which reads: “This safeguard relates to any system of philosophical or religious beliefs”.

⁹ See Art. 4 of the above-mentioned Hague Regulations.

¹⁰ *Commentary IV*, p. 204 (Art. 27).

birth or other status, or on any other similar criteria (hereinafter referred to as ‘adverse distinction’).”¹¹

Third sentence – The rule on quarter

4525 This is one of the fundamental rules on the conduct of combatants inspired by Hague law.¹² It is aimed at protecting combatants when they fall into the hands of the adversary by prohibiting a refusal to save their lives if they surrender or are captured, or a decision to exterminate them.¹³ The text of the draft was more explicit and read as follows: “It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.”¹⁴ The present wording is briefer, but does not alter the essential content of the rule. Clearly respect for this rule is fundamental. It is a precondition governing the application of all the rules of protection laid down in the Protocol, for any guarantees of humane treatment, any rule on care to be given the wounded and sick, and any judicial guarantees would remain a dead letter if the struggle were conducted on the basis of orders to exterminate the enemy.

4526 The inclusion of this provision amongst the fundamental guarantees laid down in Article 4 is of special importance. In fact, it indirectly indicates the moment from which combatants who are no longer able to fight are protected by Part II, a function originally assigned in the draft to the rule on safeguarding enemies *hors de combat*.¹⁵ Protection of enemies *hors de combat* is in a way the final stage of the present rule on quarter, in the sense that the prohibition against ordering that there will be no survivors affects the concept of military operations even before the enemy is *hors de combat*.¹⁶

Paragraph 2

Opening sentence

4527 The general principle on humane treatment laid down in the preceding paragraph is illustrated with a non-exhaustive list of prohibited acts. The term “without prejudice to the generality of the foregoing” means that none of the specific prohibitions can have the effect of reducing the scope of the general principle.

¹¹ See commentary Art. 2, *supra*, p. 1357.

¹² Article 23, paragraph 1(d), of the above-mentioned Hague Regulations reads as follows: “It is especially forbidden to declare that no quarter will be given.” This is why this prohibition is known as the rule on quarter. Originally a quarter (in French: *quartier*) was a place of shelter and safety.

¹³ See *Commentary Drafts*, p. 154 (Art. 22).

¹⁴ Art. 22 of the draft, which corresponds to Art. 40 of Protocol I. Reference can be made to the commentary thereon, *supra*, p. 473.

¹⁵ Draft Art. 7. See general remarks, *supra*, p. 1368.

¹⁶ See Art. 41, Protocol I, and the commentary thereon, *supra*, p. 479.

- 4528 The prohibitions are explicit and do not allow for any exception; they apply “at any time and in any place whatsoever”. They are absolute obligations.¹⁷
- 4529 For reasons of a legal and political nature,¹⁸ there are no provisions prohibiting “reprisals” in Protocol II.
- 4530 The list of prohibited acts is fuller than that of common Article 3. That being so, and because of the absolute character of these prohibitions, which apply at all times and in all places, there is in fact no room left at all for carrying out “reprisals” against protected persons. Such an interpretation was already given in the commentary on common Article 3. In the absence of an express reference to “reprisals”, the ICRC considered that they were implicitly prohibited.

¹⁷ The absolute character of these obligations is the same as that of a large number of rules in the Protocols and in international humanitarian law in general. On considering the nature of absolute obligations, the International Law Commission stated that: “neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than a reciprocal character.” (Cf. *ILC Yearbook*, 1957, Vol. II, p. 54, paras. 125-126). It also means that no derogation is allowed, in line with the rule on derogations in the Covenant, in particular with regard to arbitrary deprivation of life (Art. 6), torture and cruel, inhuman or degrading treatment or punishment (Art. 7) and slavery (Art. 8).

¹⁸ Aware of the fact that the lack of any mention of reprisals in common Article 3 could give rise to a *contrario* interpretations, the ICRC had proposed in its draft specific prohibitions in the different Parts whenever this seemed necessary for the protection of the persons and objects concerned. This question gave rise to discussions in the three Committees concerned of the Conference. Discussion focused on the scope of such prohibitions, the best place to include one or several references to such prohibitions in the text of the Protocol, and the terminology to be used. Several delegations argued that rules on reprisals concerned only relations between States, as subjects of international law possessing *facultas bellandi*. However, it was recognized that analogous measures, such as acts of retortion (this term, which is incorrect in law, was repeatedly used during the debates) or punitive measures, could be taken by parties to a non-international armed conflict, though such acts would always lack the element of enforcing the law which characterizes reprisals in international armed conflict. For its part, the ICRC based its proposals on the following legal arguments: application of common Article 3 has no legal effect on the status of the parties confronting each other, and consequently does not imply in any way recognition of belligerency. The same applies for application of Protocol II. But that does not take away the fact that the parties to the conflict are still subjects of international law in the limited context of humanitarian rights and obligations resting upon them under these two instruments. Whenever there is a possibility of rules of international law not being respected, there may be reprisals. A Working Group of Committee I worked at length on drawing up a formula which from the humanitarian point of view would be equivalent to a prohibition of reprisals without using the actual word “reprisals”. Its endeavours resulted in the adoption in Committee of an article on unconditional respect in which it was provided that the provisions of Parts II and III and those of Articles 26, 26 *bis*, 27 and 28 should not in any circumstances be contravened, not even in response to a breach of the provisions of the Protocol (Articles 26, 26 *bis*, 27 and 28 dealt with protection of the civilian population, of civilian objects, of objects indispensable to the survival of the civilian population and of works and installations containing dangerous forces). The proposed simplified version of the Protocol recommended deleting this article. The decision to delete it was not carried out by consensus; the article was the object of a vote and was rejected by 41 votes to 20, with 22 abstentions. See, in particular, *O.R.* IV, p. 37, CDDH/I/302 and CDDH/427. *O.R.* X, pp. 107-109, CDDH/I/287/Rev.1 and Annex; pp. 231-235, CDDH/SR.51, paras. 4-16; pp. 119-123, CDDH/SR.51, Annex (*ad Art. 10 bis*). Draft Articles 8, 19 and 26. *Commentary Drafts*, pp. 139, 151 and 157.

4531 The argument for this view was based on both the spirit and the letter of common Article 3:

“The acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the ‘humane treatment’ demanded unconditionally in the first clause of sub-paragraph (1).”¹⁹

The strengthening of fundamental guarantees of humane treatment in Protocol II and, in particular, the inclusion of a prohibition on collective punishments²⁰ confirms this interpretation without calling into question the refusal of the negotiators to introduce the legal concept of reprisals in the context of non-international armed conflict.

Sub-paragraph (a) – Violence to the life, health and physical or mental well-being of persons

4532 This sub-paragraph reiterates paragraph 1, sub-paragraph (1)(a) of common Article 3. The scope of the prohibition was considerably strengthened; “violence to the life, health, and physical or mental well-being” is further-reaching in protection than the sole mention of violence to life and person, as contained in Article 3. The list is of course non-exhaustive, as shown by the words “in particular”. Murder covers not only cases of homicide, but also intentional omissions which may lead to death; the prohibition of torture covers all forms of physical and mental torture.

4533 The practice of torture is prohibited by international law,²¹ and is universally condemned. It is one of the evils which the international community seeks to eradicate. Therefore, for many years torture has been one of the United Nations’ concerns. The General Assembly of the Organization has adopted a number of resolutions which, although they do not create mandatory obligations, do have an important moral force; the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 9 December 1975 (Resolution 3452 (XXX)) deserves particular mention. Finally, the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly on 10 December 1984 (Resolution 39/46). The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; the act of torture is reprehensible

¹⁹ See *Commentary IV*, pp. 39-40 (Art. 3).

²⁰ See commentary para. 2(b), *infra*, p. 1374.

²¹ International Covenant on Civil and Political Rights, Art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3; American Convention on Human Rights, Art. 5; African Charter on Human and People’s Rights, Art. 5; Geneva Conventions, common Art. 12/12/17//32; Protocol I, Art. 75, para. 2(a).

in itself, regardless of its perpetrator, and cannot be justified in any circumstances.²²

- 4534 The mention of corporal punishment is new, as it did not appear in common Article 3;²³ it met the wish of a number of delegations that corporal punishment be explicitly mentioned in the text.²⁴

Sub-paragraph (b) – Collective punishments

- 4535 The ICRC draft prohibited collective penalties in Article 9 relating to the *principles of penal law* as a corollary of individual penal responsibility.²⁵ On this point it was inspired by Article 33 of the Fourth Convention. The ICRC intended to give this prohibition the same significance as the above-mentioned Article 33, i.e., to prohibit “penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed”.²⁶
- 4536 In the Working Group of the Committee some delegates considered that this prohibition should not be included amongst penal provisions since, in that context, it would appear to relate only to penalties imposed by the courts. The concept of collective punishment was discussed at great length. It should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended.²⁷ The prohibition of collective punishments was included in the article relating to fundamental guarantees by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.²⁸ In fact, to include the prohibition on collective punishments amongst the acts unconditionally prohibited by Article 4 is virtually equivalent to prohibiting “reprisals” against protected persons.

²² The Convention refers to torture or other punishments inflicted by a public official or any other person acting on official orders, but Art. 1, which defines its scope of application, also provides that that article is without prejudice to any other international instrument or any national law which contains or might contain provisions with a broader scope.

²³ The terminology is taken from Art. 32 of the Fourth Convention, which mentions corporal punishment. See *Commentary IV*, p. 221.

²⁴ See *O.R. X*, p. 104, CDDH/1/287, Rev.1.

²⁵ Draft Art. 9, para. 1. See commentary Art. 6, para. 2(b), *infra*, p. 1398.

²⁶ *Commentary IV*, p. 225 (Art. 33).

²⁷ The term “collective punishment” (in French “punitions collectives”, in Spanish “castigos colectivos”) was adopted in preference to the original text of the draft, which referred to “collective penalties”. In fact, the word “penalty” is a term used in penal law, and according to some delegates it could have been interpreted restrictively to cover only judicial sentences. See *O.R. VII*, pp. 87-88, CDDH/SR.50, paras. 18-29.

²⁸ See *O.R. X*, p. 130, CDDH/234/Rev.1, para. 86; p. 201, CDDH/405/Rev.1, paras. 118-119.

Sub-paragraph (c) – The taking of hostages

- 4537 This sub-paragraph reaffirms a prohibition which is already contained in common Article 3, paragraph 1, sub-paragraph (1)(b).²⁹ It should be noted that hostages are persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them.³⁰

Sub-paragraph (d) – Acts of terrorism

- 4538 The prohibition of acts of terrorism is based on Article 33 of the Fourth Convention. The ICRC draft prohibited “acts of terrorism in the form of acts of violence committed against those persons” (i.e., against protected persons).³¹ The formula which was finally adopted is simpler and more general and therefore extends the scope of the prohibition. In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect. It should be mentioned that acts or threats of violence which are aimed at terrorizing the civilian population, constitute a special type of terrorism and are the object of a specific prohibition in Article 13 (*Protection of the civilian population*), paragraph 2.

Sub-paragraph (e) – Outrages upon personal dignity

- 4539 This sub-paragraph reaffirms and supplements common Article 3, paragraph 1, sub-paragraph (1)(c). The ICRC draft contained a separate paragraph relating to the protection of women.³² During the discussions it became clear that it was necessary to strengthen not only the protection of women, but in addition that of children and adolescents who may also be the victims of rape, enforced prostitution or indecent assault. Therefore a reference to such acts was added to sub-paragraph (e). Furthermore, a separate article specifically devoted to protection of women and children was adopted in the Working Group.³³

²⁹ See *Commentary IV*, p. 39 (Art. 3).

³⁰ See *Commentary Drafts*, p. 137.

³¹ Draft Art. 6, para. 2(c).

³² Draft Art. 6, para. 3, which read as follows: “Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.”

³³ Art. 6 *bis*: “In addition to the protection conferred by Article 6 [present Art. 4], women and children shall be the object of special respect and shall be protected against rape, enforced prostitution, and any other form of indecent assault.” See *O.R. X*, p. 105, CDDH/I/287/Rev.1; *O.R. VIII*, p. 413, CDDH/I/SR.39, paras. 15-18.

- 4540 When the Protocol was adopted in plenary meetings, that article was deleted by consensus, as the subject matter is already covered by sub-paragraph (e) under consideration here.³⁴ It should be added that this particular aspect of protection gave rise to considerable interest in the Diplomatic Conference.

Sub-paragraph (f) – Slavery and the slave trade

- 4541 This sub-paragraph reiterates the tenor of Article 8, paragraph 1, of the Covenant. It is one of the “hard-core” fundamental guarantees, now reaffirmed in the Protocol. The prohibition of slavery is now universally accepted; therefore the adoption of this sub-paragraph did not give rise to any discussion. However, the question may arise what is meant by the phrase “slavery and the slave trade in all their forms”. It was taken from the Slavery Convention, the first universal instrument on this subject, adopted in 1926 (Article 1). A Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practises Similar to Slavery, was adopted in 1956, and supplements and reinforces the prohibition; certain institutions and practices comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labour are prohibited.³⁵ It may be useful to note these points in order to better understand the scope of the prohibition of slavery in all its forms.

Sub-paragraph (g) – Pillage

- 4542 The prohibition of pillage is based on Article 33, paragraph 2, of the Fourth Convention. It covers both organized pillage and pillage resulting from isolated acts of indiscipline.³⁶ It is prohibited to issue order whereby pillage is authorized. The prohibition has a general tenor and applies to all categories of property, both State-owned and private.

Sub-paragraph (h) – Threats to commit any of the foregoing acts

- 4543 This offence concludes the list of prohibited acts and enlarges its scope. In practice threats may in themselves constitute a formidable means of pressure and undercut the other prohibitions. The use of threats will generally constitute violence to mental well-being within the meaning of sub-paragraph (a).

³⁴ O.R. VII, p. 91, CDDH/SR.50, paras. 45-47.

³⁵ See “The United Nations and Human Rights”, New York, 1973, p. 17.

³⁶ *Commentary Drafts*, p. 137.

Paragraph 3

Opening sentence – The principle of aid and protection for children

- 4544 Children are particularly vulnerable; they require privileged treatment in comparison with the rest of the civilian population. This is why they enjoy specific legal protection.³⁷
- 4545 The general principle of protection laid down at the beginning of the paragraph is illustrated with a list of obligations implied by it (sub-paragraphs (a)-(e)). As indicated by the words “in particular”, this list is illustrative only and does not in any way prejudice other measures which may be taken.
- 4546 In the territory under their control, the authorities, both *de jure* and *de facto*, have the duty to protect children from the consequences of hostilities by providing the care and aid they require, preventing physical injury or mental trauma, and ensuring that they develop as normally as circumstances permit.³⁸
- 4547 This duty is expressed by the use of the word “shall”: “children shall be provided” (the French equivalent is “les enfants recevront”).³⁹
- 4548 The words “they require” were chosen in accordance with a proposal by a delegation. This flexible formula means that all the factors relevant for determining the aid required must be taken into account in each individual case.⁴⁰
- 4549 The Conference intentionally did not give a precise definition of the term “child”.⁴¹ The moment at which a person ceases to be a child and becomes an adult is not judged in the same way everywhere in the world. Depending on the culture, the age may vary between about fifteen and eighteen years. Sub-paragraph (c) determines the lower limit of fifteen years for recruitment into the armed forces. The text refers to “children who have not attained the age of fifteen years”, which suggests that there may be children over fifteen years. This age was chosen as a realistic basis, and because the Conventions had already taken it into account to ensure that children should have the benefit of priority measures.⁴²

³⁷ See in particular the Declaration of the Rights of the Child, United Nations, GA/Res/1386 (XIV), Principle 8: “The child shall in all circumstances be among the first to receive protection and relief”. See also the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, United Nations, GA/Res/3318 (XXIX). Articles relating to the protection of children in Protocol I: Arts. 75, 77 and 78, *supra*, pp. 861, 897, 907.

³⁸ See *O.R.* XV, pp. 63-71, CDDH/III/SR.45, paras. 3-40.

³⁹ It should be noted that in other articles of the Protocols “shall” is sometimes translated in French by the future of the verb “devoir” followed by another verb: “Les enfants devront recevoir”. Example: Art. 12, Protocol I. These are merely questions of drafting and have no effect on the nature of the obligation.

⁴⁰ See *O.R.* IV, p. 101, CDDH/III/28; *O.R.* XV, p. 65, CDDH/III/SR.45, para. 9. In the draft the ICRC proposed “the care and aid their age and situation require” (Art. 32).

⁴¹ See *O.R.* XV, p. 465, CDDH/407/Rev.1, para. 63.

⁴² See Arts. 14, 23, 24, 38 and 50 of the Fourth Convention.

- 4550 However, this is only an indication and should not be seen as a definition.⁴³ Biological and psychological maturity varies, and it is important not to exclude the possibility that aid is required by children over the age of fifteen.
- 4551 Therefore the question immediately arises whether children over the age of fifteen who have been recruited in the armed forces are actually no longer considered as children. The problem rarely arises in concrete terms when they participate in hostilities, but rather when they are deprived of their liberty. The very young may require special attention (such as extra food, for example, because they are growing). It is desirable and normal practice in many countries to hold them in separate quarters.⁴⁴ Thus the fact of having been recruited does not in itself automatically deprive a child of the aid required by his age. As regards judicial proceedings, it must be recalled that the death penalty for an offence related to the conflict cannot be pronounced on a person under the age of eighteen years, in accordance with the provisions of Article 6 (*Penal prosecutions*), paragraph 4, of the Protocol.

Sub-paragraph (a) – Education

- 4552 This sub-paragraph was not contained in the ICRC draft, which was limited to the material aspect of protection,⁴⁵ and it is the result of an amendment.⁴⁶ It answers the concern to ensure continuity of education so that children retain their cultural identity and a link with their roots. This rule is aimed at removing the risk that children separated from their family by the conflict might be uprooted by being initiated into a culture, religion or moral code which may not correspond with the wishes of their parents, and in addition could in this way become political pawns. Religion and morality are an integral part of education, but it was considered preferable to specify “including religious and moral education” so that the word “education” should be understood in its broadest sense, and not be interpreted restrictively.⁴⁷

⁴³ The commentary on Art. 24 of the Fourth Convention gives the following explanations: “An age limit of fifteen was chosen because from that age onwards a child’s faculties have generally reached a stage of development at which there is no longer the same necessity for special measures” (*Commentary IV*, p. 186).

⁴⁴ This measure is stipulated in Art. 77, para. 4, Protocol I. The prohibition on indecent assault laid down in para. 2(e) of the present article should also be called to mind.

⁴⁵ See draft Art. 32.

⁴⁶ *O.R.* IV, p. 162, CDDH/III/309 and Add.1 and 2. This amendment is based in particular on Art. 18, para. 4, of the Covenant on Civil and Political Rights, which provides that: “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions”. This provision is one of the articles from which no derogation can be made within the meaning of Art. 4, para. 2.

⁴⁷ See *O.R.* XV, p. 79, CDDH/III/SR.46, para. 11.

Sub-paragraph (b) – Reunion of families

- 4553 This sub-paragraph is inspired by article 26 of the Fourth Convention.⁴⁸ Parties to the conflict must do their best to restore family ties, i.e., they should not only permit searches undertaken by members of dispersed families, but they should even facilitate them. The ICRC draft prescribed that children should be identified in the conflict zone whenever possible and necessary, and that information bureaux should be established.⁴⁹ Such measures, which are contained in the Conventions,⁵⁰ were not adopted in the text of Protocol II from a fear that it might not be possible to apply them materially; nevertheless, they continue to be a guideline indicating “appropriate measures”. It should be noted that the Central Tracing Agency (CTA) of the ICRC is an excellent example of a humanitarian organization specialized in the field of bringing about the reunion of dispersed families. In practice its services are often called upon in situations of international or internal conflicts. In fact, ICRC delegations usually include an “Agency” section staffed with delegates who are seconded, if necessary, by the National Red Cross or Red Crescent Society. The function of the Agency consists of keeping families together or bringing them together. Its main tasks are: the transmission of messages between families when means of communication have been broken, the communication to families of information regarding the fate of members of the family (notification of where the wounded and sick have been hospitalized and their state of health; information on places of internment or detention of persons deprived of their liberty, and on their transfer or release; notification of death), registration of the civilian population, particularly children, in case of evacuation.
- 4554 The Agency is an active instrument in this field. Depending on the circumstances, other initiatives may be useful, such as, for example, the transmission of family messages by radio. The most important thing is that the right of families to be informed of the fate of their relatives and to be reunited should be fully recognized, and that steps to this end should be facilitated.

Sub-paragraph (c) – The principle that children should not be recruited into the armed forces

- 4555 The prohibition against using children in military operations is a fundamental element of their protection. Unfortunately this happens frequently, and children are all too often ready to follow adults without weighing up the consequences of their acts.
- 4556 The setting of an age-limit gave rise to lengthy discussion; a number of delegations considered that the age of fifteen was too low, and would have

⁴⁸ See *Commentary IV*, pp. 195-198 (Art. 26). This sub-paragraph corresponds to Art. 74 of Protocol I: Reunion of dispersed families, *supra*, p. 857.

⁴⁹ Draft Art. 32, para. 2(d), and Art. 34: Recording and information.

⁵⁰ Arts. 26/19/122/24, 136, 137 and 138.

preferred eighteen. The great divergence of national legislations on this question did not make it possible to arrive at a unanimous decision. The age of fifteen proposed on the basis of realistic considerations in the ICRC draft was ultimately adopted.⁵¹ To enhance the chances of this proposal being accepted the ICRC had followed the age limit laid down in the Fourth Convention to ensure that children enjoy privileged treatment.⁵²

- 4557 The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be “allowed to take part in hostilities”, i.e., to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.⁵³

Sub-paragraph (d) – Continued protection in the case that sub-paragraph (c) is not applied

- 4558 This sub-paragraph is the result of the parallel negotiation of the drafts of both Protocols in Committee, which, in this particular case, ended in an apparent weakening of the text, though this should have no practical consequences. In fact, it should be noted that the preceding sub-paragraph (c) contains an absolute obligation, while Article 77 (*Protection of children*), paragraph 2, of Protocol I, which corresponds to it, is less constraining and reads as follows: “The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities”; the term “all feasible measures” leaves the door open to exceptions which justify the provision that if children under fifteen nevertheless participate in hostilities, they still continue to enjoy the special protection laid down for children.⁵⁴ On the other hand, in Protocol II the text is worded in such a way that there is no escape clause: “Children [...] shall neither be recruited in the armed forces or groups, nor allowed to take part in hostilities.”
- 4559 It should be recalled that the aim of this provision is to guarantee children special protection in the turmoil caused by situations of conflict. For this reason it seemed useful to specify in this sub-paragraph that children will continue to enjoy privileged rights in case the age limit of fifteen years laid down in sub-paragraph (c) is not respected. In this case making provision for the consequences of any possible violation tends to strengthen the protection.

⁵¹ See *Commentary Drafts*, p. 163 (Art. 32, para. 2(e)).

⁵² See Arts. 14, 23, 24 and 38 of the Fourth Convention.

⁵³ See, in particular, *O.R.* XV, pp. 65-69, CDDH/III/SR.45, paras. 11-31.

⁵⁴ This solution is a compromise which the Committee adopted for Protocol I on the basis of the fact that sometimes, especially in occupied territories and in wars of national liberation, it would not be realistic to totally prohibit participation of children aged under fifteen. *O.R.* XV, p. 465, CDDH/407/Rev.1, para. 61.

Sub-paragraph (e) – Temporary evacuation

- 4560** The evacuation of children, as provided in this sub-paragraph, must have an exceptional and temporary character. It should be noted that the possibility of evacuation to a foreign country was not retained; the text refers to “a safer area within the country.”⁵⁵
- 4561** The consent of parents or persons primarily responsible is required “whenever possible”. As one delegation argued, it would be unrealistic to make the consent of parents a mandatory requirement as the parents might have disappeared or it may be impossible to contact them.⁵⁶
- 4562** The question may arise what is meant by persons who “are primarily responsible for their care”. It would seem that this term covers not only cases in which the care of the child has been legally entrusted to a guardian (such as in the case of orphans, or of irresponsible parents), but also cases in which a person materially takes care of a child and is responsible for it, whether related or not to the child.
- 4563** A child may also be entrusted to someone on the basis of the local custom. This is why in addition to the reference to the law there is also a reference to custom as regards the responsibility for the children’s care. Custom was included in the text following a proposal in the Working Group which discussed the draft. In fact, in some countries family structure is governed not only by law but also and especially by custom, and it is important to take this into account.⁵⁷

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⁵⁵ See commentary Art. 78, Protocol I, *supra*, p. 907.

⁵⁶ *O.R.* XV, p. 82, CDDH/II/SR.46, para. 23.

⁵⁷ This proposal was directly integrated in the text submitted by the Rapporteur to the Committee, without an amendment having been submitted. It was accepted by consensus and no special statements were made thereon in the plenary meetings of Committee III.

Protocol II

Article 5 – Persons whose liberty has been restricted

1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained:
 - (a) the wounded and the sick shall be treated in accordance with Article 7;
 - (b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
 - (c) they shall be allowed to receive individual or collective relief;
 - (d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
 - (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.
2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:
 - (a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
 - (b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;
 - (c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
 - (d) they shall have the benefit of medical examinations;
 - (e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.
3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1(a), (c) and (d), and 2(b) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Documentary references

Official Records

O.R. I, Part I, p. 192; Part III, pp. 35-36 (Art. 8). *O.R.* IV, pp. 23-29. *O.R.* VII, pp. 91-92, CDDH/SR.50, paras. 48-54. *O.R.* VIII, p. 210, CDDH/I/SR.22, para. 46; pp. 336-341, CDDH/I/SR.32, paras. 65-90; pp. 343-346, CDDH/I/SR.33, paras. 4-21; pp. 413-419, CDDH/I/SR.39, paras. 18-64; pp. 421-429, CDDH/I/SR.40, paras. 1-39; pp. 443, CDDH/I/SR.41, paras. 78-81. *O.R.* X, pp. 51-54, CDDH/219/Rev.1, paras. 159-175; pp. 105-108, CDDH/I/287/Rev.1.

Other references

CE/5b, pp. 61-65. *CE 1971, Report*, pp. 47-48, paras. 266-267; p. 59 (Arts. 19-21). *CE 1972, Basic Texts*, pp. 40-41 (Arts. 25-26). *CE 1972, Commentaries*, Part II, pp. 49-56 (Arts. 25-26). *CE 1972, Report*, vol. I, pp. 79-85, paras. 2.157-2.197. *Commentary Drafts*, pp. 138-140 (Art. 8). *XXIInd Int. Conf. RC, Report*, p. 25, para. 79.

Commentary

Heading of the article

- 4564 The expression “persons whose liberty has been restricted” was chosen in preference to more specific words such as “prisoners” or “detainees” to take into account the full extent of the article’s scope of application, which covers all detainees and persons whose liberty has been restricted for reasons related to the conflict, without granting them a special status. However, the choice of words in French and Spanish – “personnes privées de liberté” and “personas privadas de libertad”, respectively – is less suitable than the more explicit English version.

General remarks

- 4565 The purpose of this article is to ensure that conditions of detention for persons whose liberty has been restricted for reasons related to the conflict will be reasonable. The obligations laid down are concrete measures which must guarantee them humane treatment in the particular situation they find themselves

in. Thus this provision supplements Article 4 (*Fundamental guarantees*).¹ It should be noted that Article 4 (*Fundamental guarantees*) contains prohibitions, while Article 5 lays down obligations to do certain things, with the exception of paragraph 2(e), which also deals with unjustified omissions. The text largely corresponds to the ICRC draft,² which was drafted on the basis of principles contained in the Third and Fourth Conventions, relating to the conditions of detention for prisoners of war and civilian internees.³ The first two paragraphs of this article have different degrees of force; paragraph 1 lays down absolute obligations, while paragraph 2 lays down rules to be implemented as far as possible. To reconcile realistic considerations and humanitarian ideals, while taking into account the cultural background of different countries in the international community, proved to be a difficult task as regards the classification of obligations, and this gave rise to lengthy discussions. The diversity of views and the complexity of the problem become even clearer when it is recalled that one amendment went so far as to distinguish three categories: minimum obligations, obligations which the parties to the conflict should respect “subject to temporary and exceptional measures” and measures they should take “within the limits of their capabilities”.⁴ The formula which was finally adopted makes a distinction merely between unconditional obligations and those taking into account the available resources.

4566 Paragraphs 3 and 4 were the result of proposals directly put forward in the Working Group of Committee I, charged with considering the draft Article, without first having been submitted as amendments.⁵ Paragraph 3 fills a legal gap by according some guarantees of protection to persons who are not interned or detained in the strict sense of the word, but whose liberty has been restricted in some other way. Finally, paragraph 4 takes into consideration the safety measures for releases.

Paragraph 1

4567 Added to the guarantees laid down in Article 4 (*Fundamental guarantees*), which apply to all persons under the control of one of the parties to the conflict, are the guarantees of Article 5 for persons whose liberty has been restricted. However, only paragraph 1, following the example of Article 4 (*Fundamental guarantees*), contains absolute obligations.⁶ Taken together, these rules – Article 4 (*Fundamental guarantees*) and Article 5, paragraph 1 – express the basic standard to which anyone whose liberty has been restricted for reasons related to

¹ See commentary Art. 4, *supra*, p. 1367.

² Draft Art. 8.

³ See particularly Arts. 22, 26 and 27, Third Convention, and Arts. 82, 85, 89 and 90, Fourth Convention.

⁴ O.R. IV, p. 25, CDDH/I/236.

⁵ O.R. X, pp. 105-106, CDDH/I/287/Rev.1.

⁶ For the definition of an absolute obligation, see commentary Art. 4, *supra*, p. 1372.

the conflict is entitled, i.e., combatants who have fallen into the power of the adverse party as well as civilians.⁷

4568 The term “deprived of their liberty for reasons related to the armed conflict” is taken from Article 2 (*Personal field of application*), paragraph 2, of the Protocol.⁸ At this point it is appropriate to recall its far-reaching scope. It covers both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law.⁹ However, there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision.

4569 Article 5 applies as soon as a person is deprived of his liberty, until he is released, even if hostilities have ceased in the meantime.¹⁰

4570 Protocol II, following the example of common Article 3, does not grant a special status to members of the armed forces or armed groups who have fallen into enemy hands. They are not legally prisoners of war entitled to special protection; this is why it is so important that the rules laid down in this article establish minimum guarantees.

4571 Paragraph 1 deals with persons who have been deprived of their liberty, i.e., who have been interned or detained. Persons whose liberty has merely been restricted are dealt with in paragraph 3.

Sub-paragraph (a)

4572 This is a reminder of the principle that protection and care should be given the wounded and sick. In fact, Article 7 (*Protection and care*) covers all the wounded and sick, including those deprived of their liberty, but it was important to include this fundamental guarantee on how such people should be treated among the rules relating to the conditions of detention.¹¹

Sub-paragraph (b)

4573 The purpose of this sub-paragraph is to make sure that persons deprived of their liberty will be provided with essential minimum requirements: food, drinking water, hygiene and shelter. This is inspired by Articles 22, 26 and 27 of the Third Convention, and by Articles 85, 89 and 90 of the Fourth Convention. The detaining authority is responsible for the detainees or internees. It must provide them with the means necessary for survival. This principle is widely

⁷ *Commentary Drafts*, p. 139 (Art. 8); *O.R.* VIII, pp. 336-337, CDDH/I/SR.32, paras. 65-70.

⁸ See commentary Art. 2, *supra*, p. 1357.

⁹ *O.R.* VIII, pp. 344-345, CDDH/I/SR.33, paras. 10-17.

¹⁰ See Art. 2, para. 2, of Protocol II, *supra*, p. 1360; persons deprived of their liberty at the end of a conflict also have the benefit of these guarantees, throughout the duration of their detention. See also introduction to Part I, *supra*, p. 1343.

¹¹ See commentary Art. 7, *infra*, p. 1407.

recognized but the problem arises from the fact that in situations of internal armed conflict the local population usually lives in very difficult conditions. It would not have been realistic to adopt norms which were too burdensome, and which would turn out to be impossible to apply: “the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water”. The obligation of the detaining authority remains an absolute one, but its content varies, depending on the living conditions prevailing in the area. In fact the country may sometimes be so large that completely different conditions exist in different areas. The type of subsistence of the civilian population constitutes a measure to evaluate how much food and drinking water persons deprived of their liberty must receive.¹²

- 4574** Although food and water seem the most essential elements, hygiene, health and protection against the rigours of the climate are also important factors for human survival; the detaining authority must therefore take care of them. A lack of water, defective drainage and damp may cause sickness and epidemics. Inadequate ventilation, lack of sunlight or of light in general may also make a place unhealthy and affect health. Other factors, such as the absence of anti-parasitic disinfectants may be other decisive elements in the field of health and hygiene. This list given is not exhaustive, but gives some examples of factors to be taken into account to ensure hygiene and healthy conditions in places of detention. Protection against the rigours of the climate suggests clothes for the cold, but the sun and any intemperate conditions (such as floods, sandstorms etc.) may also endanger human life if there is no shelter available.
- 4575** Persons deprived of their liberty must be protected against “the dangers of the armed conflict”. In addition, paragraph 2(c) of this Article 5 provides that places of internment and detention must not be located close to the combat zone, and that evacuation may have to be carried out in case of danger. The obligation laid down in paragraph 1 is an absolute one, while the measures prescribed in paragraph 2 are binding only within the limits of the capabilities of the authorities responsible. How should this difference be interpreted in practice?
- 4576** Paragraph 1 lays down a general obligation. It may prove objectively impossible to take prisoners to places located outside the combat zone or to evacuate them, but the obligation to protect them remains in the sense that it is prohibited to knowingly expose detainees to danger. For example, in the case of bombardment, prisoners must be able to seek refuge in shelters like their guards, and should not be kept in a place where they run much greater risks.

¹² The provision of food etc., according to this paragraph is not, of course, a question of relief, but an obligation resting upon the detaining authority to provide detainees with the necessities of life. If the situation deteriorates to the point where the civilian population requires relief to survive, persons deprived of their liberty should of course also have the benefit of such relief actions. Sub-paragraph (c), which will be discussed below, emphasizes that there is a right to relief. It is not a legal entitlement, but strictly a humanitarian provision. Food available for the guards of the detainees should also be a criterion; although detainees cannot claim privileged treatment, they should nevertheless receive as much food as those guarding them.

Sub-paragraph (c)

4577 This sub-paragraph lays down the right to receive relief, both individually and collectively. The term “individual or collective relief” was taken from the Conventions (Article 72, Third Convention; Article 108, Fourth Convention): “Individual relief consists of parcels sent by a donor to a prisoner of war, the latter being designated by name”; “collective relief is sent to prisoners of war either in standard anonymous parcels, or in the form of bulk shipments”.¹³ This general formula allows for all possible forms of relief action. Permission to receive relief does not in any way diminish the obligation laid down in the preceding sub-paragraph to provide detainees with food, drinking water etc. In addition, detainees must be allowed to benefit from relief actions for the civilian population, as provided in Article 18 (*Relief societies and relief actions*), paragraph 2.¹⁴

Sub-paragraph (d)

4578 This sub-paragraph guarantees persons protected by this article two closely related rights: to practise their religion and to receive spiritual assistance. These two rights follow from the principle that respect is due to convictions and religious practices, as laid down in Article 4 (*Fundamental guarantees*).¹⁵ The freedom to practise one’s own religion is clearly confirmed and does not require any explanation. On the other hand, the right to receive spiritual assistance does need some comment. It is worded as follows: “they shall be allowed [...], if requested and appropriate, to receive spiritual assistance”. The term “appropriate” was translated rather inelegantly into French by the formula “si cela est approprié”, which was adopted to preserve uniformity between the two languages. Spiritual assistance must be provided whenever possible, having regard to the circumstances (for example, the development of hostilities and availability of suitable religious personnel). This provision is the result of a compromise. A number of delegations thought in fact that giving spiritual assistance should not become an absolute obligation and they wanted to include it in paragraph 2. Other delegations, however, pointed out that spiritual assistance is a corollary of the right to practise one’s own religion and is inseparable therefrom.¹⁶ The insertion of the word “appropriate” made it possible to reconcile these two points of view: spiritual assistance is indeed considered as an inalienable aspect of freedom to practise one’s own religion, but this formula reduces the binding force of the obligation somewhat and thereby takes into account the difficulty – sometimes even the impossibility – of finding adequate religious assistance. The obligation is thus somewhat relative, but nevertheless contains an element dependent on an objective judgment of the situation; it should not be interpreted

¹³ *Commentary III*, p. 353.

¹⁴ See commentary Art. 18, para. 2, *infra*, p. 1478.

¹⁵ See commentary Art. 4, para. 1, *supra*, p. 1369.

¹⁶ O.R. VIII, p. 337, CDDH/I/SR.32, para. 72; p. 423, CDDH/I/SR.40, para. 10.

in such a way as to arbitrarily restrict the possibilities of receiving religious assistance. On the proposal of one delegation, the term “persons, such as chaplains, performing religious functions”, was taken from Protocol I, Article 15 (*Protection of civilian medical and religious personnel*), paragraph 5.¹⁷

Sub-paragraph (e)

- 4579 This sub-paragraph seeks to prevent that persons deprived of their liberty should have to work in unacceptable conditions. The ICRC draft did not refer to working conditions. This point was introduced in an amendment.¹⁸ Detainees or internees do not necessarily have to work; in some cases conditions do not lend themselves to this. The rule under consideration here, however, refers to cases in which they are made to work. Working often contributes to improving living conditions, both materially and psychologically, but it should not give rise to ill-treatment. This is why it is provided that persons deprived of their liberty must have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population. Thus it is prohibited to force detainees to carry out unhealthy, humiliating or dangerous work, bearing in mind the conditions in which the local population works.

Paragraph 2

Opening sentence

- 4580 Some measures for improving living conditions in detention cannot always be executed because of lack of material possibilities, but they must be respected within the limits of the means available. Such is the aim of paragraph 2, which gives, by way of example, some rules which, although only compulsory as far as the means are available, are nevertheless important. It should be recalled that the delegations encountered great difficulties during the negotiations, on the one hand, to determine the mandatory minimum standard contained in the preceding paragraph, and, on the other hand, the rules which parties are called upon to respect “within the limits of their capabilities”.
- 4581 Paragraph 2 may be considered as a sort of guideline which may be developed, depending on the circumstances and the goodwill of those responsible; the few rules that are given serve as illustrations and should not be interpreted restrictively or rigidly.
- 4582 The expression “those who are responsible for the internment or the detention” relates to persons who are responsible *de facto* for camps, prisons, or any other places of detention, independently of any recognized legal authority.

¹⁷ O.R. IV, p. 26, CDDH/I/247. See also *supra*, p. 195.

¹⁸ O.R. IV, p. 24, CDDH/I/94.

Sub-paragraph (a)

- 4583** Women shall be held in quarters separate from those of men, under the immediate supervision of women, except in cases where families are accommodated together. In the ICRC draft this principle was included among the mandatory rules of paragraph 1. It is based on Article 82 of the Fourth Convention. This measure of special protection for women is an essential element of what must be done to comply with the prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” laid down in Article 4 (*Fundamental guarantees*), paragraph 2(e); it follows automatically, since Article 4 (*Fundamental guarantees*), paragraph 2, forms part of the body of absolute obligations.
- 4584** In cases where it is not possible to provide separate quarters, provision should in any case be made for separate sleeping quarters and separate washing facilities.

Sub-paragraph (b)

- 4585** This sub-paragraph lays down the right to correspond and provides that persons referred to in paragraph 1 are allowed to send and receive letters and cards, though their number may be limited by the competent authority, if it deems necessary. The exchange of news between persons deprived of their liberty and their families is a fundamental element of their mental health. It is also a way of preparing for a return to peace, since it is a means of limiting the number of families permanently separated by events because they are unable to locate their relatives. However, in a situation of conflict, postal services are often paralysed and forwarding letters may incur problems which are difficult to resolve. Censorship may be considered to be necessary, but this requires personnel. It should be noted that the responsible authorities may appeal to the Central Tracing Agency (CTA), as provided in the Conventions.¹⁹ The CTA’s experience and its neutral position enable a number of practical difficulties to be resolved. The form with a maximum of twenty-five words strictly related to family matters which is used by the CTA has proved very useful in non-international armed conflicts during the last thirty years. The facility to correspond is a legal right; it may not therefore, be used as a disciplinary measure or as a means of exerting pressure, even though it may sometimes prove necessary to limit the number of cards and letters.

Sub-paragraph (c)

- 4586** Places of internment and detention should not be located close to the combat zone. They must be evacuated when they become too exposed, provided that the

¹⁹ See also commentary Art. 4, para. 3(b), on the reunion of dispersed families, *supra*, p. 1379.

evacuation can be carried out under adequate conditions of safety. This provision is based on Article 23 of the Third Convention and Article 83 of the Fourth Convention.²⁰ Persons deprived of their liberty do not participate in hostilities and should consequently enjoy protection against the dangers resulting from the conflict. To locate places of internment close to combat zones would render such protection quite illusory. As regards carrying out an evacuation under adequate conditions of safety, it should be recognized that in this context the concept of safety is relative and difficult to establish. In any event, the evacuation should not be more dangerous than staying in the same place. Of course the relevant criterion is the interest of the persons deprived of their liberty. If the general principle under which prisoners should be treated as well as those detaining them is upheld, the evacuation should not be carried out in conditions worse than those during movements of armed forces or members of the civilian population.

Sub-paragraph (d)

- 4587** This sub-paragraph provides for medical examinations for persons deprived of their liberty. This provision was not contained in the ICRC draft and was adopted on the basis of an amendment.²¹ Its aim is to ensure, generally, good medical attention in places of internment or detention; on the one hand, so that no one remains in a condition of distress without receiving care, and on the other hand, to ensure that contagious diseases are detected in time, in the interests of detainees and guards alike.

Sub-paragraph (e)

- 4588** This sub-paragraph is aimed at protecting the physical and mental health and integrity of persons deprived of their liberty. The general rule is accompanied by some principles specifically governing medical procedures made available to them, in order to prevent any harmful medical treatment or intervention.²² The text reiterates Article 11 (*Protection of persons*), paragraph 1, of Protocol I, which was drafted with great care in Committee II of the Conference. The interpretation of these two purely humanitarian provisions is identical and consequently reference can also be made to the commentary on Article 11 (*Protection of persons*) of Protocol I.²³

²⁰ *Commentary Drafts*, p. 139 (Art. 8, para. 3(d)).

²¹ *O.R. IV*, p. 24, CDDH/I/94.

²² See draft Art. 12, paras. 3 and 4, and *O.R. IV*, p. 28, CDDH/427.

²³ See commentary Art. 11, para. 1, Protocol I, *supra*, p. 152.

First sentence

- 4589** This rule supplements the absolute obligation contained in Article 4 (*Fundamental guarantees*), paragraph 2(a), which prohibits “violence to the life, health and physical and mental well-being of persons”.²⁴ The protection provided here is more complete; it covers not only health, but also physical and mental integrity, which often, though not necessarily, go together. Thus the removal of an organ or amputation of a limb could endanger the integrity of a person without necessarily impairing his health.
- 4590** The term “endanger” refers to the stage before the actual effect takes place: the mental health of a person may be endangered if he is put into isolation which may be expected to lead to psychological problems. Putting a man into isolation may endanger his health, without knowing in fact whether his health will be damaged.
- 4591** “Any unjustified act or omission”; the justification resides in the interest of the person concerned, his well-being, improvement in his health or alleviation of his suffering. The term “unjustified” was considered at length, for a number of delegations wanted it to be deleted. The adjective was finally retained because it sometimes happens that an act or omission is medically justified, even though it endangers the health or integrity of the patient; for example, a surgical operation during which the anaesthetic causes medical problems. The act is justified, although there is no improvement in the patient’s state of health
- 4592** The term “omissions” refers not only to wilful omissions, but also to failure to act without due diligence.

Second sentence

- 4593** The aim of this sentence is to prohibit medical experiments. The term “medical procedure” means “any procedure which has the purpose of influencing the state of health of the person undergoing it”.²⁵ The reason for carrying out such a procedure must be, medically and morally, based on the expectation that it will be for the patient’s benefit. The reference to generally recognized medical standards, i.e., medical ethics, is the essential element in making this judgment; in addition, the criterion of non-discrimination must be taken into account. A person deprived of his liberty must be cared for in the same way as a free man suffering from the same ailment, i.e., he must receive the same treatment.
- 4594** This provision does not mention the patient’s consent. However, even with such consent, no procedure that is not based on medical grounds can be allowed. Reference may be made to the exceptions laid down in Article 11, paragraph 3, of Protocol I, viz:

“donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then

²⁴ See commentary Art. 4, *supra*, p. 1365.

²⁵ See commentary Art. 11, Protocol I, *supra*, p. 149.

only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient”.

These exceptions should apply by analogy to situations of non-international armed conflict even though they are not expressly included in the text. They correspond to the spirit if not to the letter of Protocol II. The negotiators of Protocol II wanted the instrument to be simple and the rules not to be too detailed for fear that they might otherwise be incapable of application as being beyond the capabilities of the authorities responsible. Of course, the humanitarian considerations remain the same.

Paragraph 3

4595 Persons who are neither interned nor detained within the meaning of paragraph 1, but whose liberty is restricted in some way for reasons related to the conflict, have the benefit of the fundamental guarantees laid down in Article 4 (*Fundamental guarantees*), as well as that of the provisions of Article 5 which are not concerned with the material conditions of detention, i.e., paragraphs 1(a), (c) and (d), and 2(b), which deal with the treatment of the wounded and sick, the right to receive individual or collective relief, the right to practise their religion, the right to receive spiritual assistance when appropriate, and the right to send and receive mail. This provision is aimed at ensuring reasonable living conditions to persons under house arrest or who live under surveillance in any other way. For example, permission to send and receive mail is important for a person who is forced to live in a district far away from his usual place of residence.

Paragraph 4

4596 This paragraph provides that if it is decided to release persons deprived of their liberty, necessary measures to ensure their safety must be taken by those who decide to release them. There was some controversy about this rule and it was necessary to choose between the two possibilities proposed by the Sub-Group of the Working Group.²⁶ In fact, a distinction should be made between two elements: on the one hand, the decision to release, and on the other hand, the conditions of safety. For some the prime consideration should be the question of decision-making, while others recommended that no release should be possible in the absence of conditions of safety to do so, i.e., that the element of safety should be foremost. The text as adopted takes into account both aspects of the problem, which are in fact interdependent. Release should not take place if it

²⁶ O.R. X, pp. 106-107, CDDH/I/287/Rev.1.

proves impossible to take the necessary measures to ensure the safety of the persons concerned. It is not indicated for how long such conditions of safety should be envisaged. It seems reasonable to suppose that this should be until the released persons have reached an area where they are no longer considered as enemies, or otherwise until they are back home, as the case may be.

S.J.

Protocol II

Article 6 – Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
 - (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
 - (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
 - (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
 - (d) anyone charged with an offence is presumed innocent until proven guilty according to law;
 - (e) anyone charged with an offence shall have the right to be tried in his presence;
 - (f) no one shall be compelled to testify against himself or to confess guilt.
3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Documentary references

Official Records

O.R. I. Part I, p. 193; Part III, p. 36 (Arts. 9-10). *O.R.* IV, pp. 30-36. *O.R.* VII, pp. 92-97, CDDH/SR.50, paras. 56-102; pp. 99-105, *id.*, Annex (Afghanistan, Holy See, Indonesia, Kenya, Nigeria, Saudi Arabia, Spain, Cameroon, Zaire). *O.R.* VIII, pp. 346-355, CDDH/I/SR.33, paras. 22-71; pp. 357-365, CDDH/I/SR.34; p. 443, CDDH/I.SR.41, para. 81. *O.R.* IX, pp. 297-302, CDDH/I.SR.63, paras. 40-75; p. 308, CDDH/I/SR.64, paras. 19-20; p. 310, para. 31; pp. 312-313, paras. 39-46; p. 314, para. 54; p. 315, para. 59; p. 318, paras. 73 and 79; p. 319, paras. 82 and 85; pp. 321-322, paras. 92 and 100; p. 323, para. 105. *O.R.* X, pp. 55-56, CDDH/219/Rev.1, paras. 176-178; pp. 107-108, CDDH/I/287/Rev.1; pp. 123-124, CDDH/234/Rev.1, paras. 49-52; pp. 130-133, paras. 84-95; pp. 143-151, CDDH/I/317/Rev.2 and CDDH/I/GT/88.

Other references

CE/5b, pp. 56-66. *CE 1971, Report*, pp. 46-47, paras. 253-265; pp. 58-59 (Arts. 14-18). *CE 1972, Basic Texts*, pp. 41-42 (Arts. 27-28). *CE 1972, Commentaries*, Part II, pp. 58-62. *CE 1972, Report*, vol. I, pp. 83-87, paras. 2.198-2.235; vol. II, p. 37, *CE/COM II/24*; p. 38, *CE/COM II/31*; p. 40, *CE/COM II/39*; pp. 41-43, *CE/COM II/45*, 48-50, 52-54 and 56; p. 49, *CE/COM II/78*. *Commentary Drafts*, pp. 140-143 (Arts. 9-10). *XXIInd Int. Conf. RC, Report*, p. 26, para. 80 (Arts. 9-10).

Commentary

General remarks

- 4597 The whole of Part II (*Humane treatment*) is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances;¹ the guarantees defined in this article refer to the two stages of the procedure: preliminary investigation and trial.² Just like common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the

¹ See *O.R.* VIII, pp. 346-355, CDDH/I/SR.33, paras. 22-71; pp. 357-365, CDDH/I/SR.34.

² The execution of penalties is not dealt with in this article – with the exception of the execution of the death penalty on pregnant women and mothers of young children, which is prohibited by para. 4.

armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect.³ It supplements and develops common Article 3, paragraph 1, sub-paragraph (1)(d), which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions,⁴ and for the rest is largely based on the International Covenant on Civil and Political Rights,⁵ particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation. In Protocol I, Article 75 (*Fundamental guarantees*) contains rules with the same tenor.

Historical background

4598 The ICRC draft originally contained two articles: *Principles of penal law* and *Penal prosecutions*.⁶ During the preliminary examination of those articles numerous amendments were submitted; a proposal to combine the two provisions in a single article was put forward,⁷ and adopted as a starting point; this was the origin of the present Article 6.

Analysis of the article

Paragraph 1 – The scope of application

4599 This paragraph lays down the scope of application of the article by confining it to offences related to the armed conflict; these must be criminal offences and not merely administrative or disciplinary offences or procedures. *Ratione personae*, Article 6 is quite open and applies equally to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions.

³ Dissident armed forces and organized armed groups within the meaning of Article 1 of the Protocol, which are opposed to the government in power, must be able to apply the Protocol. See *supra*, p. 1353.

⁴ See Arts. 86, 89-108 of the Third Convention and Arts. 64-78 of the Fourth Convention.

⁵ Hereinafter referred to as the Covenant.

⁶ Draft Arts. 9 and 10. It should be noted that the present heading of the article is incomplete, since it mentions only penal prosecutions, while the provision also lays down principles of penal law.

⁷ O.R. IV, pp. 35-36, CDDH/I/262.

Paragraph 2 – The right to be tried by an independent and impartial court*Opening sentence*

- 4600 The text repeats paragraph 1, sub-paragraph (1)(d) of common Article 3, with a slight modification. The term “regularly constituted court” is replaced by “a court offering the essential guarantees of independence and impartiality”. In fact, some experts argued that it was unlikely that a court could be “regularly constituted” under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention,⁸ which was accepted without opposition.
- 4601 This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgment is given by “a court offering the essential guarantees of independence and impartiality”. Sub-paragraphs (a)-(f) provide a list of such essential guarantees; as indicated by the expression “in particular” at the head of the list, it is illustrative, only enumerating universally recognized standards.

Sub-paragraph (a) – Right to information and defence

- 4602 The ICRC draft simply provided for “a procedure affording the accused the necessary rights and means of defence”.⁹ That formula was clarified and developed following the proposal by a delegation, on which the present text is based.¹⁰ The rules laid down here are very clear and do not give rise to any difficulties of interpretation: the accused must be informed as quickly as possible of the particulars of the offence alleged against him, and of his rights, and he must be in a position to exercise them and be afforded the rights and means of defence “before and during his trial”, i.e., at every stage of the procedure. The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witnesses for the defence and produce evidence; these constitute the essential rights and means of defence.¹¹

Sub-paragraph (b) – The principle of individual responsibility

- 4603 This sub-paragraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in

⁸ See *Commentary III*, pp. 411-412 (Art. 84); pp. 484-492 (Art. 105).

⁹ See draft Art. 10, para. 1.

¹⁰ See *O.R. X*, p. 145, CDDH/I/317/Rev.1. The amendment submitted during these deliberations is mentioned, but the text is not published in the Official Records as it was a working document.

¹¹ See *Commentary Drafts*, p. 142.

Article 33 of the Fourth Convention, where it is more elegantly worded as follows: “No protected person may be punished for an offence he or she has not personally committed”.¹² The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology (“individual penal responsibility”). Article 75, paragraph 4(b), of Protocol I, lays down the same principle.

Sub-paragraph (c) – The principle of non-retroactivity

- 4604** This sub-paragraph sets out two aspects of the principle that penal law¹³ should not be retroactively applied: *nullum crimen sine lege* and *nulla poena sine lege*. The ICRC draft was inspired by Articles 99 of the Third Convention, 67 of the Fourth Convention and 15, paragraph 1, of the Covenant.¹⁴ The proposal to adopt this wording was put forward in an amendment which served as a basis for discussion.¹⁵ There was a long debate, followed by a vote in Committee resulting in a large majority.¹⁶ The wording of the Covenant was retained despite some problems of interpretation owing to the specific context of non-international armed conflict. This solution was adopted out of a concern to establish in Protocol II fundamental guarantees for the protection of human beings, which would be equivalent to those granted by the Covenant in the provisions from which no derogation may be made, even in time of public emergency threatening the life of the nation.¹⁷ Article 15 of the Covenant is one of those articles. In fact, the relevance of including the principle on non-retroactivity was never contested, but the first sentence of the sub-paragraph, and in particular the words “under national or international law”, were not considered by everyone to be very clear.
- 4605** The possible co-existence of two sorts of national legislation, namely, that of the State and that of the insurgents, makes the concept of national law rather complicated in this context.
- 4606** The Conference followed the Covenant, though there was no real explanation given as regards the meaning to be attributed to the term “national law”, which appears in the French text though not in the English text of this sub-paragraph (as the reference to “le droit national ou international” in French has been abbreviated to “the law” in English, the following comments apply more particularly to the French text, although clearly “the law” referred to in the English text does include national law). The interests of the accused and good faith require that this should be interpreted in the light of the initial ICRC proposal, i.e., that no one can be convicted for an act, or for failing to act contrary to a duty to act, when such an act or omission was not an offence at the time when it was committed.

¹² *Commentary IV*, p. 224 (Art. 33).

¹³ The term “law” is used here in a broad sense, as *lex* encompasses custom.

¹⁴ See draft Art. 9, para. 2.

¹⁵ *O.R. IV*, pp. 35-36, CDDH/I/262.

¹⁶ *O.R. X*, p. 130, CDDH/234/Rev.1, para. 87.

¹⁷ Covenant, Art. 4, paras. 1-2.

- 4607 The reference to international law is mainly intended to cover crimes against humanity. A breach of international law should not go unpunished on the basis of the fact that the act or omission (failure to act) concerned was not an offence under the national law at the time it was committed. Some delegations suggested replacing the term “under national or international law” by “under the applicable law” or even by “under applicable domestic or international law”,¹⁸ but the majority finally considered that it was best to retain the wording of the Covenant “in order to avoid being out of line”.

Sub-paragraph (d) - The principle of the presumption of innocence

- 4608 This sub-paragraph sets out the principle of the presumption of innocence, which is implicitly contained in Article 67 of the Fourth Convention. This refers to the “general principles of law”. It is also contained in Article 14, paragraph 2, of the Covenant. In addition, it is laid down in Article 75 (*Fundamental guarantees*), paragraph 4(d), of Protocol I.

Sub-paragraph (e) - The right of the accused to be present at his own trial

- 4609 This sub-paragraph reiterates the principle laid down in Article 14, paragraph 3(d), of the Covenant. It is the result of a proposal in the Working Group which recommended “everyone charged with an offence shall have the right to be tried in his presence”.¹⁹ The proposal was not adopted in this form because a number of delegations argued that sentences *in absentia* are allowed. The right of the accused to be present at his trial, which is established here, should be understood as a right which the accused is free to exercise or not.

Sub-paragraph (f) - The right not to be compelled to testify against oneself or to confess guilt

- 4610 This sub-paragraph repeats Article 14, paragraph 3(g), of the Covenant. It was included as the result of a proposal made by the Working Group.²⁰

Paragraph 3 - The right to be informed of judicial remedies and of the time-limits in which they must be exercised

- 4611 It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right

¹⁸ See *O.R.* X, p. 144, CDDH/I/317/Rev.2.

¹⁹ *Ibid.*

²⁰ *Ibid.*

of appeal against sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft.²¹ However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.²²

- 4612 The term “judicial and other remedies” was originally adopted in English and, in order to maintain uniformity between the languages, was translated into French as “droits de recours judiciaires et autres”. The word “autres” is superfluous in the French text since the words “droit de recours” cover all the possible remedies. However, in English the word “judicial” was not considered sufficient to include all the different types of remedies existing in various legal systems.

Paragraph 4 - The prohibition on pronouncing the death sentence upon persons under eighteen years and on carrying it out on pregnant women and mothers of young children

- 4613 The authorities retain the right to pronounce the death sentence in accordance with national legislation with one exception: adolescents under the age of eighteen years at the time they committed the offence; the death sentence may be pronounced but may not be carried out on pregnant women or mothers of young children. According to the experts who were consulted it would not have been possible to impose a general prohibition on the death sentence as such a decision would not have taken into account all the penal systems in force.²³ Nevertheless, the ICRC expressed the wish that the penalty should not be executed before the end of hostilities.²⁴ This proposal, which was included in the draft, reflected the experience that executions result in an escalation of violence on both sides. Moreover, when hostilities have ceased, passions die down and there is a possibility of amnesty. Unfortunately, however modest the proposal, it did not gain a consensus. On the other hand, the limitation laid down in this paragraph was easily accepted in principle; it was inspired by Article 68, paragraph 4, of the Fourth Convention,²⁵ and by Article 6, paragraph 5, of the Covenant. The discussions were essentially about two points; fixing the age limit, and extending the rule in favour of pregnant women to cover also mothers of young children.
- 4614 The age limit of eighteen years was adopted in order to harmonize with the Conventions and the Covenant, which also contain this age limit. The proposal concerning mothers of young children was put forward by a delegation.²⁶ The concept of “young children” as a legal term remained vague. For this reason a

²¹ Draft Art. 10, para. 2.

²² This clarification was proposed in an amendment. It was not adopted apparently to avoid making the text too complicated. See *O.R.* IV, p. 33, CDDH/I/259.

²³ See *O.R.* VIII, pp. 357-365, CDDH/I/SR.34, paras. 2 ff.

²⁴ Draft Art. 10, para. 3.

²⁵ See *Commentary IV*, pp. 346-347 (Art. 68).

²⁶ *O.R.* IV, p. 33, CDDH/I/259.

vote was requested on this point, and it was adopted by 37 votes to 2, with 9 abstentions.²⁷ In any event, the concept is wider than “new-born babies” in the sense of Article 8 (*Terminology*), sub-paragraph (a), of Protocol I. It is up to the responsible authorities to reach a judgment in good faith on what is meant by “young children”.²⁸

4615 The results of the vote suggest that the concept will be broadly interpreted, and that in such special cases the death penalty will not be pronounced.

4616 In any case, Article 76 (*Protection of women*), paragraph 3, of Protocol I, which has the same tenor, contains the recommendation not to pronounce the death penalty on pregnant women and on mothers having dependent infants and this recommendation should be considered here.

Paragraph 5 – Amnesty

4617 Amnesty is a matter within the competence of the authorities. It is an act by the legislative power which eliminates the consequences of certain punishable offences, stops prosecutions and quashes convictions.²⁹ Legally, a distinction is made between amnesty and a free pardon. The latter is granted by the Head of State and puts an end to the execution of the penalty, though in other respects the effects of the conviction remain in being. This paragraph deals only with amnesty, though this does not mean that free pardon is deliberately excluded. The draft adopted in Committee provided, on the one hand, that anyone convicted should have the right to seek a free pardon or commutation of sentence, and on the other hand, that amnesty, pardon or reprieve of a death sentence may be granted in all cases.³⁰ That paragraph was not adopted in the end, in order to keep the text simple. Some delegations considered that it was unnecessary to include it because national legislation in all countries provides for the possibility of a free pardon.³¹

4618 The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.

S.J.

²⁷ O.R. X, p. 131, CDDH/234/Rev.1, para. 90.

²⁸ The Conventions provide some sort of guide in this respect by mentioning mothers of children under seven years old (Art. 14, para. 1, Fourth Convention).

²⁹ “Amnesty” is described as an act of oblivion, a general pardon of past offences by the ruling authority (*Shorter Oxford English Dictionary*, 1978, p. 60). Its mode of operation and effect may obviously differ from country to country. The French definition (“Amnistie: acte du législateur qui a pour effet d’éteindre l’action publique ou d’effacer une peine prévue pour une infraction et, en conséquence, soit d’empêcher ou d’arrêter les poursuites, soit d’effacer les condamnations.”), as given in the *Grand Dictionnaire encyclopédique Larousse*, Vol. I, 1982, p. 414, indicates that it is an act of the legislative whereby the public prosecution of certain offences is ended and the penalty thereon is cancelled, so that no more prosecutions will be instituted, and those already instituted will be discontinued and any convictions for such offences will be quashed.

³⁰ O.R. X, p. 133, CDDH/234/Rev.1, para. 95.

³¹ O.R. VII, pp. 94 and 96, CDDH/SR.50, para. 79 and 99.

Part III – Wounded, sick and shipwrecked

Introduction

- 4619** This Part is aimed at developing the fundamental principle that the wounded and sick should be respected and protected, as contained, very succinctly, in common Article 3, paragraph 1, sub-paragraph (2), of the Conventions: “The wounded and sick shall be collected and cared for”. It also applies to the shipwrecked, who are put on the same footing as the wounded and sick under the Geneva Conventions.
- 4620** After 1949, the ICRC became concerned with the situation of civilian medical personnel who were only partially protected under the Fourth Convention. As a first step the problem was studied from a general point of view, both for international and non-international conflicts.
- 4621** For this purpose, the ICRC acted together with the two large international associations representing the medical profession, the World Medical Association and the International Committee of Military Medicine and Pharmacy, in which the medical corps of more than eighty countries participate. They jointly formed a working group which held a great many “Entretiens consacrés au droit international médical” in the presence of an observer representing the WHO. Draft Rules for the Protection of the Wounded and Sick and of Civilian Medical and Nursing Personnel in Time of Conflict were presented at the XXth International Conference of the Red Cross (Vienna, 1965).¹
- 4622** The draft was favourably received, but the Conference wanted a thorough study to be carried out on an extension of the use of the red cross and red crescent emblem.
- 4623** The XXIst International Conference of the Red Cross (Istanbul, 1969) required concrete proposals to be put forward this time by the ICRC and by governments. At that time a Protocol additional to the Fourth Convention was envisaged.
- 4624** The Working Group was extended by a number of observers, in particular experts from the League of Red Cross and Red Crescent Societies, the International Law Association, the Commission Médico-juridique de Monaco, and the International Committee for the Neutrality of Medicine. On reflection, it appeared that it would be preferable to provide separate rules for situations of non-international armed conflicts, and two drafts, one for international conflicts and the other for internal conflicts, were submitted to the Conference of

¹ CE/7b, pp. 1-3.

Government Experts in 1971. The draft relating to non-international armed conflicts was aimed at developing common Article 3 by introducing therein some basic concepts concerning not only civilian medical personnel, but also on the protection of the wounded and sick, and of medical personnel, units and materials for their care, irrespective of whether these are military or civilian.²

4625 This 1971 draft forms the basis of this Part.

4626 It should also be recalled that the XIXth International Conference of the Red Cross (New Delhi, 1957) had expressed

“the wish that a new provision be added to the existing Geneva Conventions of 1949, extending the provisions of Article 3 thereof so that:

- a) the wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,
- b) the inviolable principle of medical professional secrecy may be respected,
- c) there may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes.”³

4627 These concerted efforts undertaken more than twenty years previously resulted in the adoption of this Part, whose object and purpose was clearly defined by a delegate of Committee II of the Diplomatic Conference:

“The Committee’s essential task was to make explicit what was implicit in the very simple general statement in Article 3 common to the Geneva Conventions [...] by formulating a number of derivative rules specifying the protection to be given to medical personnel, units and installations, the standard of care, and so forth.”⁴

4628 This Part reiterates the essential substance of Part II (*Wounded, sick and shipwrecked*) of Protocol I, which corresponds to it. The rules were negotiated on parallel lines, taking into account the particular context of each category of conflict.

4629 In the drafts the ICRC proposed that each of these two Parts on the “Wounded, sick and shipwrecked”, one in each Protocol, would open with definitions.⁵ The question of these definitions was discussed at great length.

4630 In fact, from the beginning there was no unanimous view about the whole question of having definitions; some delegations considered that definitions did not belong in an instrument relating to non-international armed conflicts and would merely complicate an understanding of the text. It was even considered to place these definitions in an annex to the Protocol. Despite such initial doubts, definitions were nevertheless scrupulously established and adopted by Committee

² *Ibid.*, pp. 30-38.

³ Resolution XVII of the XIXth International Conference of the Red Cross, New Delhi, 1957.

⁴ *O.R.* XI, p. 209, CDDH/II/SR.21, para. 43.

⁵ See draft Art. 8, Protocol I, and Art. 11, Protocol II.

II and the delegates endeavoured to achieve a degree of uniformity in the terminology used in the two Protocols.⁶

4631 In the end the definitions were omitted from the final version of Protocol II as part of the proposal to simplify the text, put forward by the Pakistani delegation.⁷ This was not because of controversies about matters of substance, but in a genuine attempt to simplify the text. The Part as a whole was not called into question, even though it was negotiated on the basis of definitions which were not adopted. The terminology used is identical to that of Protocol I and the definitions given there in Article 8 (*Terminology*), though of course they have no binding force in Protocol II, nevertheless constitute a guide for the interpretation of the terms. For this reason we will, in our commentary on the articles, often refer to those definitions.

4632 Part III supplements Part II (*Humane treatment*). The right of the wounded, sick and shipwrecked to receive aid is a fundamental guarantee of humane treatment in a specific situation. As is the case in Part II (*Humane treatment*), Part III sets forth individual rights which are directly applicable to those entitled to them, without being dependent on bilateral arrangements being made between the two opposing parties.

S.J.

⁶ This is evidenced by the explanatory notes given by the Rapporteur of Committee II on the report of the Drafting Committee, which read: "A number of the terms defined in draft Protocol II, article 11, were also defined in draft Protocol I, article 8, concerning which he had made a number of interpretative statements; those statements applied equally to the definitions in draft Protocol II, article 11, where the same words were used. The same words had, in fact, been used in the two sets of definitions wherever that was appropriate." *O.R.* XII, p. 260, CDDH/II/SR.79, para. 19.

⁷ *O.R.* IV, p. 43, CDDH/427.

Protocol II

Article 7 – Protection and care

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Documentary references

Official Records

O.R. I, Part I, p. 194; Part III, p. 37 (Art. 12). *O.R.* IV, pp. 44-46. *O.R.* VII, p. 109, CDDH/SR.51, para. 16. *O.R.* XI, pp. 206-211, CDDH/II/SR.21, paras. 35-50; pp. 247-256, CDDH/II/SR.25, paras. 10-63; pp. 262-267, CDDH/II/SR.26, paras. 37-65. *O.R.* XII, pp. 264-265, CDDH/II/SR.79, paras. 45-54. *O.R.* XIII, pp. 119-121, CDDH/221/Rev.1, paras. 130-135; p. 227, CDDH/II/287; p. 275, CDDH/235/Rev.1.

Other references

CE/5b, pp. 53-55. *CE/7b*, pp. 30-32 and 35. *CE 1971, Report*, p. 27, paras. 71-75; pp. 30-31, Annex II (Art. 1); p. 46, paras. 247-250. *CE 1972, Basic Texts*, p. 37 (Art. 7). *CE 1972, Commentaries*, Part II, pp. 20-24. *CRCE 1972, Report*, pp. 27-28. *CE 1972, Report*, vol. I, pp. 100-101, paras. 2.354-2.366; vol. II, p. 38, *CE/COM II/27*; pp. 47-48, *CE/COM II/75. Commentary Drafts*, pp. 145-146 (Art. 12).

Commentary

General remarks

4633 This article corresponds to the ICRC draft, reduced to expressing the fundamental principles of protection and care; it reiterates the four paramount

principles which have defined the inviolability of the wounded ever since 1929: respect, protection, humane treatment and medical care.¹ In addition, the draft contained provisions prohibiting unjustified acts or omissions harmful to health and to the physical and mental integrity of people, in particular, mutilation and medical or scientific experiments. These points were not retained, but Article 4 (*Fundamental guarantees*), paragraph 2(a), Article 5 (*Persons whose liberty has been restricted*), paragraph 2(e), and Article 10 (*General protection of medical duties*), paragraph 2, provide all necessary guarantees in this respect.

- 4634 Article 7 follows the wording of Article 10 of Protocol I (*Protection and care*). Common Article 3 merely provides in paragraph 1, sub-paragraph (2), that “the wounded and sick shall be collected and cared for”. Article 7 reaffirms and develops this fundamental rule and provides the keystone to the whole of this Part. In fact, the rights and obligations laid down in Articles 8-12 follow from the principle that the wounded and the sick are entitled to immunity. They serve in effect to implement that principle.

Paragraph 1

- 4635 This paragraph recalls the principle of the respect and protection due to the wounded, sick and shipwrecked. The concepts of respect and protection are taken from the Conventions, the first concept having been introduced in the 1906 revision and the second concept in 1929. The verb “to respect” means “to spare, not to attack”; it is an obligation to abstain from any hostile act, to which is added the duty to protect. “To protect” means “to come to someone’s defence, to lend help and support”.² This implies taking measures to remove the wounded, sick and shipwrecked, if possible, from the scene of combat and shelter them, and to ensure that they are effectively respected, i.e., that no one takes advantage of their weakness in order to mistreat them, steal their belongings, or harm them in any other way. The duty to respect and protect is incumbent on everyone, both on the members of armed forces or armed groups and on the civilian population.
- 4636 What is meant by the phrase “wounded, sick and shipwrecked”? Protection of the wounded, sick and shipwrecked responds to a fundamental humanitarian requirement and was not cast into doubt in the context of drawing up rules to govern non-international armed conflicts; this is why it is possible to use the same definition of the wounded, sick and shipwrecked as the point of departure in the two Protocols. In the light of the negotiations it can be noted that the basic terminology is uniform.³
- 4637 In the absence of a provision of definitions, which was finally not adopted for Protocol II,⁴ we refer to Article 8 (*Terminology*), sub-paragraph (a), of Protocol I, which defines the wounded and sick as follows:

¹ Cf. *Commentary I*, p. 135 (Art. 12).

² Cf. *ibid.*

³ Cf. introduction to this Part, *supra*, p. 1403.

⁴ *Ibid.*, p. 1403.

“‘Wounded’ and ‘sick’ mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.”⁵

4638 The definition of the wounded and sick protected by this Part is based on two criteria:

- 1) requiring medical care;
- 2) refraining from any act of hostility.

4639 Any person, military or civilian, fulfilling these two conditions is included amongst the wounded or sick; maternity cases, new-born babies, the infirm and expectant mothers are examples thereof, but this is not an exhaustive list. Thus this definition differs from the usual meaning of the terms “wounded” and “sick”.⁶ In fact, a wounded or sick person who continued to fight would not be considered as such under the terms of the Protocol, and would consequently not be entitled to protection under this article.

4640 In the absence of a definition here, Article 8 (*Terminology*), sub-paragraph (b), of Protocol I, provides a guideline also for the interpretation of the concept of “shipwrecked”:

“‘Shipwrecked’ means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them, and who refrain from any act of hostility.”⁷

4641 It is quite logical to consider that, as in the case of the wounded or sick, the shipwrecked in order to be entitled to protection must refrain from any act of hostility. In fact, it is difficult to imagine that a shipwrecked person who continued to fire from a rescue craft would be respected as such. A study of the deliberations of the Committee reveals that the concept of “shipwrecked” covers not only those shipwrecked from a ship in distress, i.e., shipwrecked in the strict sense, but also for example, anyone in distress in the water who has come down from an aircraft or who has accidentally fallen overboard. The situation of danger must be the result of an accident. Persons who have voluntarily placed themselves in such a situation (such as a group of commandos consisting of frogmen, for example) are excluded from the definition. The Conference did not retain a proposal put forward during the deliberations aimed at including among the shipwrecked persons who are lost on land, in particular in deserts, and as a result get into a dangerous situation. The provision covers those shipwrecked at sea and “in other waters”, i.e., lakes or rivers. The shipwrecked person is considered as such until

⁵ Cf. commentary Art. 8, sub-para. (a), Protocol I, *supra*, p. 116, and draft Art. 11, Protocol II, as drafted by the Committees (O.R. XIII, p. 275, CDDH/235/Rev.1).

⁶ See commentary Art. 8, sub-para. (a), Protocol I, *supra*, p. 116.

⁷ Cf. commentary Art. 8, sub-para. (b), Protocol I, *supra*, p. 118, and draft Art. 11, Protocol II, as drafted by the Committees (O.R. XIII, p. 275, CDDH/235/Rev.1).

the end of rescue operations. The Rapporteur of Committee II illustrated the reasons therefor very clearly by stating:

“It must be made clear that a shipwrecked person who was flown by helicopter, for instance, still had shipwrecked status during the flight: otherwise the flight would not be covered by the definition of medical transportation.”⁸

- 4642** In a situation of non-international armed conflict people cannot acquire a different status to the same extent as in an international conflict, since there are not, strictly speaking, different categories of protected persons: “all persons who do not take a direct part or who have ceased to take part in hostilities”⁹ are protected. Nevertheless, after the end of the rescue operation the shipwrecked are no longer considered as such, and, depending on the circumstances, will be protected under one or other of the rules of the Protocol. As the case may be, they will be wounded or sick within the meaning of this article, if their state of health requires care;¹⁰ they will fall in the category of those detained or interned, if they have been captured by the adverse party,¹¹ or they may simply be civilians.¹² Protection is due to all the wounded, sick and shipwrecked, “whether or not they have taken part in the armed conflict”. No distinction is made between members of the armed forces and civilians or according to whether they belong to the one party or the other concerned; the obligation to respect and protect is general and absolute.

Paragraph 2

- 4643** The wounded, sick and shipwrecked shall “in all circumstances [...] be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”.
- 4644** Humane treatment is a general principle which applies at all times and in all places; it follows from respect and protection. This is a reaffirmation in this particular context of the principle already contained in Article 4 (*Fundamental guarantees*), paragraph 1.¹³
- 4645** As regards medical care and attention, the expression “to the fullest extent practicable” was incorporated as a matter of realism, in order to take into account the means and personnel available. It is sometimes materially impossible to immediately provide the care and attention required. The obligation remains to provide it and to do so as well and as quickly as possible, given the circumstances.

⁸ Cf. O.R. XII, p. 264, CDDH/II/SR.79, para. 45.

⁹ Art. 4, para. 1, and the commentary thereon, *supra*, p. 1369.

¹⁰ Protected under the whole of Part III and in particular by the present Article 7.

¹¹ Protected by Arts. 5 and 6; cf. the commentary thereon, *supra*, p. 1383 and p. 1395.

¹² Protected by Arts. 4 and 13. See the commentary thereon, *supra*, p. 1367 and *infra*, p. 1447. In addition, for a detailed analysis of the situation of the shipwrecked in international conflicts, see commentary Art. 8, sub-para. (b), Protocol I, *supra*, p. 118.

¹³ Cf. commentary Art. 4, *supra*, p. 1367.

4646 No distinction founded on any ground other than medical ones may be made between patients, i.e., no distinction founded on:

“race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as ‘adverse distinction’) [...]”¹⁴

4647 The only factors allowed for giving priority in medical care and attention are matters of urgency and medical ethics.

S.J.

¹⁴ Art. 2, para. 1, and the commentary thereon, *supra*, p. 1358.

Article 8 – Search

Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Documentary references

Official Records

O.R. I, Part I, p. 194; Part III, p. 38 (Art. 13). *O.R.* IV, p. 49. *O.R.* VII, p. 110. CDDH/SR.51, para. 21. *O.R.* XI, pp. 267-268, CDDH/II/SR.26, paras. 66-73; pp. 269-271, CDDH/II/SR.27, paras. 5-18; p. 487, CDDH/II/SR.44, paras. 11-12. *O.R.* XII, p. 472, CDDH/II/SR.99, paras. 49-50. *O.R.* XIII, pp. 121-122, CDDH/221/Rev.1, paras. 136-140; p. 228, CDDH/II/287; p. 382, CDDH/406/Rev.1, paras. 87-88.

Other references

CE/5b, pp. 53-55. *CE/7b*, pp. 13 and 35-36 (Art. 2). *CRCE 1971, Report*, pp. 14 and 24-25. *CE 1971, Report*, p. 27, paras. 76-78 (Art. 2); p. 31, Annex II (Art. 2); pp. 57 and 60 (Art. 3). *CE 1972, Basic Texts*, p. 37 (Art. 8). *CE 1972, Commentaries*, Part II, pp. 24-25 (Art. 8). *CE 1972, Report*, vol. I, pp. 101-102, para. 2.367; p. 104, paras. 2.379-2.380. *Commentary Drafts*, pp. 146-147 (Art. 13).

Commentary

General remarks

- 4648** Article 8 develops and reaffirms the obligation to collect for the wounded and sick, which is already contained in common Article 3, paragraph 1, sub-paragraph 2, and which reads as follows: “The wounded and sick shall be collected and cared

for”. There is no corresponding provision in Protocol I, as this question is already dealt with by the Conventions (Article 15, First Convention; Article 18, Second Convention; Article 16, Fourth Convention). The text reflects Article 15 of the First Convention with slight differences in the wording and with the addition of the shipwrecked.

4649 Following the example of the Conventions, the ICRC draft¹ provided for the possibility of concluding local arrangements for the removal of the wounded and sick, elderly persons and children from the combat zone and from besieged or encircled areas. This provision, which was retained by Committee II,² was eliminated in the final version of the Protocol as some considered it to be rather unrealistic in the context of a non-international armed conflict. Nevertheless, this does not detract from the fact that evacuation measures should be encouraged whenever they are feasible.

4650 To search for and collect the wounded, sick and shipwrecked constitutes the implementation of the fundamental principle of protection and care set out in Article 7 (*Protection and care*). There is a duty to do so. All possible measures must be taken to fulfil this duty, “whenever circumstances permit, and particularly after an engagement”. It is particularly after an engagement that it is necessary to search for victims, but the obligation goes further: it applies whenever circumstances permit. Article 15 of the First Convention provides that the Parties to the conflict must take all possible measures “at all times, and particularly after an engagement”; Article 18 of the Second Convention contains the same obligation, though it is limited by the words “after each engagement”.

4651 These words were already contained in the corresponding provision of Hague Convention X of 1907 and in the Geneva Convention of 1906. The 1949 Conference substituted them in the First Convention by the words “at all times”, but left the original expression in the Second Convention unchanged, in accordance with the views expressed by the experts in 1947. They considered that the expression “after each engagement” corresponded more closely to the specific conditions at sea.³

4652 Article 8 of the Protocol covers search for the wounded and sick, as well as the shipwrecked and the formula “whenever circumstances permit”, which was adopted, takes into account the above-mentioned provisions of the First and Second Conventions;⁴ it reflects the concrete possibilities of taking action.

4653 In 1949 the First Convention therefore extended the obligation in time, as the 1929 Convention, of which the formula was retained in the Second Convention, only laid down the duty to search for the wounded and sick “after each engagement”, and only for those on the battlefield. In modern armed conflicts hostilities are more continuous, flaring up in varying degrees and moving from place to place; it would often be difficult to determine where exactly the battlefield is in place and in time. Therefore the obligation to respect the

¹ Cf. *Commentary Drafts*, pp. 146-147 (Art. 13).

² O.R. XIII, p. 228, CDDH/II/287.

³ See *Commentary II*, p. 133 (Art. 18).

⁴ O.R. XI, p. 268, CDDH/II/SR.26, paras. 70-73, and pp. 269-271, CDDH/II/SR.27, paras. 5-18.

wounded and sick has a general scope. It applies to civilians, taking into account Article 18 (*Relief societies and relief actions*), paragraph 1, of the Protocol.⁵ The obligation includes search operations as far as the authorities are concerned, and also for medical and religious personnel and for armed units present in the area of military operations after an engagement.

4654 Victims must be protected against pillage and ill-treatment and they must receive adequate care. Such protection measures are particularly important during the period before the victims are able to be evacuated, when they are especially vulnerable. They reinforce the prohibition on pillage and violence to the life, health and physical or mental well-being which is already contained in Article 4 (*Fundamental guarantees*), paragraph 2(g) and (a), respectively.⁶

4655 “Adequate care” is first aid given on the spot, which may be of the utmost importance to avoid wounded, sick or shipwrecked succumbing during evacuation, which must take place as quickly as possible. Obviously such care includes ensuring the transport of the wounded to a place where they can be adequately cared for.

4656 It is prohibited to despoil the dead. They must be searched for, and they are entitled to be paid their last respects, i.e., they must be decently buried (apart from cases of disposal of the body at sea and cremation) after a religious service, if required.

4657 Protocol I contains a section on missing and dead persons,⁷ which contains, in particular, the obligation to search for persons reported missing by the adverse Party. In addition, the latter must transmit all relevant information in order to facilitate such searches (Article 33 – *Missing persons*, paragraph 1, Protocol I). Article 34 (*Remains of deceased*) provides, in particular, that gravesites must be marked. It would not have been realistic to lay down such detailed rules for the specific circumstances resulting from non-international armed conflicts. However, it is worth noting how important it is for families to be informed of the fate of their missing relatives and, when appropriate, the location of their graves, particularly in an internal fratricidal conflict. It may also be a factor facilitating a return to peace at the end of the confrontation. Experience shows the importance of such information about missing persons; in fact, in countries engaged in conflict where an ICRC delegation is carrying out activities of assistance and protection in accordance with the humanitarian mandate entrusted to it, the number or requests for searches received from families is always extremely high. The responsible authorities should, as far as possible, inform families about the fate of their relatives, or when appropriate facilitate the task of the ICRC in this field, which is a fundamental humanitarian activity for the benefit of the victims of armed conflicts of any kind.

S.J.

⁵ Unfortunately Art. 18, para. 1, merely authorizes the civilian population to *offer* to collect the wounded and sick. Cf. the commentary on this article, *infra*, p. 1477.

⁶ Cf. commentary Art. 4, *supra*, p. 1367.

⁷ Cf. Part II, Section III, Protocol I, and the commentary thereon, *supra*, p. 339.

Protocol II

Article 9 – Protection of medical and religious personnel

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Documentary references

Official Records

O.R. I, Part I, p. 194; Part III, p. 38 (Art. 15). *O.R.* IV, pp. 52-54. *O.R.* VII, p. 112, CDDH/SR.51, paras. 36-38. *O.R.* XI, pp. 273-279, CDDH/II/SR.27, paras. 32-66; pp. 281-282, CDDH/II/SR.28, paras. 1-11; pp. 318-326, CDDH/II/SR.31, paras. 6-67; pp. 430-431, CDDH/II/SR.40, para. 9; pp. 434-436, paras. 29-41; pp. 464-469, CDDH/II/SR.42, paras. 46-82; pp. 471-477, CDDH/II/SR.43, paras. 1-29; p. 493, CDDH/II/SR.44, paras. 43-46. *O.R.* XII, p. 220, CDDH/II/SR.75, para. 20; pp. 260-266, CDDH/II/SR.79, paras. 18-59; pp. 267-272, CDDH/II/SR.80, paras. 1-30; p. 281, CDDH/II/SR.81, paras. 1-2. *O.R.* XIII, pp. 124-126, CDDH/221/Rev.1, paras. 147-154; pp. 217-220, CDDH/II/269; pp. 228-229, CDDH/II/287 (Art. 15); pp. 346-347, CDDH/II/386 (Art. 11, sub-para. f, h).

Other references

CE/5b, pp. 53-55. CE/7b, pp. 30-32; pp. 36-37 (Art. 4). *CRCE 1971, Report*, pp. 24-25; p. 014, Annex (Art. 4). *CE 1971, Report*, pp. 27-28, paras. 80-81; p. 31, Annex II (Art. 4); pp. 57 and 60 (Art. 5). *CE 1972, Basic Texts*, p. 37 (Art. 10). *CE 1972, Commentaries*, Part II, pp. 27-28 (Art. 10). *CE 1972, Report*, vol. I, p. 103, paras. 2.374-2.376; vol. II, p. 45, CE/COM II/64; pp. 47-48, CE/COM II/75; pp. 49-50, CE/COM II/82. *Commentary Drafts*, pp. 147-148 (Art. 15). United Nations, Report of the Secretary-General A/8052, 1970, p. 47, para. 150.

Commentary**General remarks**

- 4658 The Conventions provide for protection of military medical and religious personnel,¹ and some members of civilian medical personnel.² Protocol I extended such protection to all civilian medical and religious personnel.³ On the other hand, common Article 3 is silent on this point and merely lays down the principle that the wounded and sick should be protected. Although the implementation of this principle implied that respect and protection was due to medical personnel, it was necessary to make good this omission in order to strengthen the protection and improve the means of safeguarding the wounded and sick. This is the aim of Article 9.
- 4659 Article 9 reflects the tenor of Article 15 of the ICRC draft.⁴ Like the other provisions of this Part, Article 9 was negotiated and drafted on the basis of definitions developed for the two Protocols together.

Paragraph 1

- 4660 The first sentence lays down the principle that respect and protection is due to religious and medical personnel which shall display the distinctive emblem, as prescribed in article 12 (*The distinctive emblem*). It therefore seems essential to define such personnel who are entitled to display the red cross or red crescent emblem under the authorization and recognition of the authorities in power. If this were not the case, abuses would be inevitable.
- 4661 Who fall under the definition of medical and religious personnel? The Working Group which studied questions relating to Articles 15, 16 and 18,⁵ to be dealt with by Committee II, considered in its report that the term “medical personnel”, as used in Protocol II, should include all the categories of persons listed in Article 8 (*Terminology*), sub-paragraph (d), of Protocol I.⁶
- 4662 As regards religious personnel, the Working Group formally raised the question whether the term “religious personnel” should have a wider scope than it had at that stage of the negotiations in article 15 of Protocol I (*Protection of*

¹ See *Commentary I*, pp. 217-229 (Arts. 24-26). It should be recalled that Article 26 treats, under certain conditions, personnel of Red Cross Societies and of other recognized relief societies in the same way as military medical personnel.

² Art. 20, Fourth Convention: “Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.” See *Commentary IV*, pp. 156 ff.

³ Cf. commentary Art. 15, and Art. 8, sub-paras. (c) and (d) of Protocol I, *supra*, pp. 189 and 124.

⁴ See *Commentary Drafts*, pp. 147-148 (Art. 15).

⁵ See present Arts. 9, 10 and 12.

⁶ O.R. XIII, p. 217, CDDH/II/269.

civilian medical and religious personnel), and wider than was envisaged by Article 24 of the First Convention, and in Articles 36 and 37 of the Second Convention.⁷ On the basis of an analysis of this question it was decided that religious personnel should be defined in the same way in the two Protocols.

4663 We should therefore refer, both for medical personnel and for religious personnel, to the definitions of these terms given in Article 8 (*Terminology*) of Protocol I.

4664 Medical personnel covers “those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (e)”, i.e., “the search for, collection, transportation, diagnosis or treatment – including first-aid treatment –⁸ of the wounded, sick and shipwrecked, or for the prevention of disease”, and

“to the administration of medical units or to the operation or administration of medical transports.⁹ Such assignments may be either permanent or temporary. The term includes:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
- (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies¹⁰ and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
- (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2”.

4665 At this point it is also appropriate to refer to the definition developed for Protocol II, which took into account the specific aspects of internal conflicts. This read as follows:¹¹

“The term [medical personnel] shall include:

- (i) medical personnel of a party to the conflict, whether military or civilian [including those assigned to medical tasks of civil defence];
- (ii) medical personnel of Red Cross (Red Crescent, Red Lion and Sun) organizations recognized and authorized by parties to the conflict;
- (iii) medical personnel of other aid societies recognized and authorized by a party to the conflict and located within the territory the conflict is taking place.”

⁷ O.R. XI, p. 318, CDDH/II/SR.31, para. 6.

⁸ Rehabilitation centres providing medical treatment and dental treatment are explicitly included under medical purposes; cf. O.R. XIII, p. 253, CDDH/235/Rev.1, para. 20. This explanation was given for Art. 8 of Protocol I, but also applies for Protocol II. Cf. statement by the Rapporteur, O.R. XII, p. 260, CDDH/II/SR.79, para. 19.

⁹ See commentary Art. 11, *infra*, p. 1431.

¹⁰ Iran renounced the use of the red lion and sun emblem in favour of the red crescent. Cf. also *supra*, Editors' note.

¹¹ O.R. XIII, p. 304, CDDH/235/Rev.1.

4666 The term “Red Cross organizations” was used in order to cover not only the assistance available on the government side, but also groups or sections of the Red Cross on the other side which already existed, and even improvised organizations which might be set up during the conflict.¹²

4667 Such was the intention of the negotiators, and this interpretation remains in the absence of definitions in the Protocol. It is supported not only by the above-mentioned work of the Conference, but also by Article 18 (*Relief societies and relief actions*), paragraph 1, which uses the term “Red Cross organizations” in this sense.¹³ As regards relief societies, it was considered necessary to specify that relief societies other than Red Cross organizations should be located within the territory of the Contracting Party where the armed conflict was taking place, to avoid private groups from outside the country establishing themselves by claiming the status of a relief society and then being recognized by the insurgents.¹⁴

4668 In the absence of a precise definition, the term “medical personnel” covers both permanent and temporary categories. The term “permanent medical personnel” means medical personnel exclusively assigned to medical purposes for an unspecified length of time, while “temporary medical personnel” are personnel exclusively assigned to medical purposes for limited periods.

4669 In both cases such assignment must be exclusive. It should be noted that such status is based on the functions carried out, and not on qualifications. The Working Group which examined this article shed some light on this point in its report to Committee II, stating that:

“The categories cover all supporting personnel, i.e., medical personnel who have not completed their medical studies together with personnel with no medical qualifications or working as auxiliaries or assistants. This category might have increased significance under the circumstances of an internal conflict.”¹⁵

4670 Article 8 (*Terminology*), sub-paragraph (d), of Protocol I, defines religious personnel as follows:

“‘religious personnel’ means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- (i) to the armed forces of a Party to the conflict;
- (ii) to medical units or medical transports of a Party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organizations of a Party to the conflict.”

¹² O.R. XI, pp. 430-431, CDDH/II/SR.40, para. 9.

¹³ Cf. commentary Art. 18, para. 1, and Art. 12, *infra*, pp. 1477 and 1437.

¹⁴ O.R. XII, p. 270, CDDH/II/SR.80, para. 16.

¹⁵ O.R. XIII, p. 218, CDDH/II/269.

- 4671 The definition formulated for Protocol II mentioned, in addition, religious personnel attached to medical units of relief societies authorized by a party to the conflict.¹⁶
- 4672 The term “religious personnel” is a generic term and covers all religions; the word “chaplain” is used by way of example, but it was specified that this does not mean that only Christian religious personnel are referred to.¹⁷
- 4673 Naturally, respect and protection imply that personnel in enjoyment thereof must refrain from all acts of hostility and will not themselves be made the object of attacks. Article 11 (*Protection of medical units and transports*) specifies that the units and transports in question must be “respected and protected at all times and shall not be the object of attack”.¹⁸ This point is not contained in Article 9, which merely mentions respect and protection, and this omission could give rise to different interpretations.
- 4674 The concept of respect implies a duty not to attack, so that it is not necessary from a legal point of view to mention attacks.¹⁹ However, this term was retained in Article 11 of the Protocol (*Protection of medical units and transports*) because it was taken from Article 19 of the First Convention. The scope of the protection granted by Articles 9 and 11 (*Protection of medical units and transports*) is in fact the same. Thus the reference to attacks in the latter article, and not in the former, is an error of methodology which is regrettable. It would have been better to be consistent.
- 4675 Protection of medical and religious personnel applies throughout the duration of their mission, including times when such personnel do not carry out their duties temporarily. It should be noted that this specific protection of medical and religious personnel, visibly reflected in the emblem of the red cross, does not in any way prejudice any assistance and support that may come from the population when they spontaneously offer their services, as provided in Article 18 (*Relief societies and relief actions*), paragraph 1. Indeed, the authorities may very well incorporate voluntary workers among medical personnel; if this is not done, in particular because voluntary civilians may not devote themselves exclusively to medical tasks, they continue to be protected as civilians. Civilian doctors and paramedical personnel who care for the wounded and sick without being members of medical personnel within the meaning of this article, enjoy the protection of Article 10 (*General protection of medical duties*).
- 4676 The first sentence of paragraph 1 also provides that medical and religious personnel must be granted all available help for the performance of their duties, and the second sentence provides that they may not be compelled to carry out

¹⁶ O.R. XIII, p. 347, CDDH/II/386:

“h) ‘religious personnel’ means persons such as chaplains, whether military or civilian, exclusively engaged in the work of their ministry and attached either to:

(i) the armed forces or other armed groups of a party to the conflict, or to

(ii) medical units of a party to the conflict, or to

(iii) medical units of the aid societies referred to in sub-paragraph (f).”

¹⁷ See O.R. XII, p. 220, CDDH/II/SR.75, para. 20, and commentary Art. 8, sub-para. (d), Protocol I, *supra*, p. 127.

¹⁸ See commentary Art. 11, *infra*, p. 1431.

¹⁹ *Commentary I*, p. 195 (Art. 19).

tasks which are not compatible with their humanitarian mission. In the draft the ICRC had provided that they “shall not be compelled to carry out tasks unrelated to their mission”.²⁰ The Conference considered that it should suffice to provide that medical personnel should not be employed on tasks which are not compatible with their humanitarian mission.²¹ The use of the verb “to compel”, taken from Article 33 of the Third Convention, refers to cases where medical and religious personnel have fallen into the hands of the adversary.²² In addition to being protected by Article 5 (*Persons whose liberty has been restricted*), like any other persons deprived of their liberty for reasons related to the conflict, they are also granted the guarantee of not being compelled to carry out tasks which are incompatible with their mission. This could refer to medical experiments, but also, for example, to camouflaging military operations under cover of medical tasks. The second possibility may materialize not only when medical or religious personnel have fallen into the hands of the adversary: the parties to the conflict may in no case compel the personnel in question to carry out military tasks as these are, by their very nature, incompatible with any humanitarian mission; medical assignment must be exclusive.

Paragraph 2

4677 This paragraph reaffirms the principle that there may be no discrimination between the wounded, sick and shipwrecked, a principle already contained in Article 7 (*Protection and care*), and now expressed by providing that “in the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds”. For example, it would be prohibited to *compel* medical personnel to give priority to lightly wounded soldiers, to the detriment of others who were more seriously injured, regardless of the party to the conflict to which they belong. On the other hand, neither the Conventions nor the Protocols determine what medical criteria should be used. Should a doctor choose to perform a long surgical operation on a seriously wounded person, or should he sacrifice such a case for the benefit of other wounded people whose chances of survival are better?²³ Medical personnel must remain the judges on where to give priority, a matter which should only be decided on medical grounds,²⁴ in accordance with medical ethics and professional conscience. In fact, such a case by definition belongs to medical ethics and to the professional conscience.

S.J.

²⁰ *Commentary Drafts*, p. 147 (Art. 15, para. 2).

²¹ *O.R. XIII*, p. 218, CDDH/II/269. “The Working Group feels that the ICRC text is unnecessarily restrictive on this point, and that it should be sufficient to provide that medical personnel shall not be employed on tasks which are not compatible with their humanitarian role.”

²² See *Commentary III*, pp. 216 ff. (Art. 33).

²³ See commentary Art. 10, para. 2, of Protocol I, *supra*, p. 147.

²⁴ “Urgent medical reasons” is the criterion used in Art. 12, para. 3, of the First Convention.

Article 10 – General protection of medical duties

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.
3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Documentary references

Official Records

O.R. I, Part I, p. 194; Part III, p. 38 (Art. 16). *O.R. IV*, pp. 55-56. *O.R. VII*, p. 112, CDDH/SR.51, paras. 39-42. *O.R. XI*, p. 146, CDDH/II/SR.16, para. 26; pp. 149-150, paras. 43-46; p. 183, CDDH/II/SR.19, para. 59; pp. 206-211, CDDH/II/SR.21, paras. 35-50; p. 237, CDDH/II/SR.24, para. 15; pp. 283-286, CDDH/II/SR.28, paras. 12-36; p. 317, CDDH/II/SR.31, paras. 1-4; pp. 318-324, paras. 8-48; pp. 422-428, CDDH/II/SR.39, paras. 21-56; pp. 441-445, CDDH/II/SR.40, paras. 80-98; pp. 447-469, CDDH/II/SR.41-42; pp. 471-477, CDDH/II/SR.43, paras. 2-28; pp. 493-496, CDDH/II/SR.44, paras. 47-63. *O.R. XIII*, pp. 126-129, CDDH/221/Rev.1, paras. 155-164; pp. 217-220, CDDH/II/269; p. 229, CDDH/II/287 (Art. 16).

Other references

CE/5b, pp. 53-55. *CE/7b*, pp. 30-32, 34 and 36-37; pp. 010-011, Annex II; pp. 012-013, Annex III (particularly point 4). *CRCE 1971, Report*, pp. 24-25 and 48-49. *CE 1971, Report*, pp. 27-28, paras. 81-82; p. 30, Annex II, p. 46, paras. 249-250 (Art. 4). *CE 1972, Basic texts*, p. 37 (Art. 10). *CE 1972, Commentaries*,

Part II, pp. 27-28 (Art. 10). *CE 1972, Report*, vol. I, p. 103, paras. 2.374-2.376; vol. II, p. 45, CE/COM II/64; pp. 47-48, CE/COM II/75; pp. 49-50, CE/COM II/82. *Commentary Drafts*, pp. 148-149 (Art. 16). *XXIIInd Int. Conf. RC, Report*, p. 76 (Art. 16). United Nations, Report of the Secretary-General A/8052, 1970, pp. 47-48, paras. 150-151.

Commentary

Heading of the article: General protection of medical duties

- 4678** It will be recalled that the Diplomatic Conference attached legal significance to the headings of the articles of the Protocols. In most cases the heading of the provision merely indicates the subject matter, without posing particular difficulties of interpretation. In this case the term “medical duties” requires some elucidation, since it does not occur in the text, but only in the heading of the article.
- 4679** Article 10 provides that medical activities in a broad sense may be freely exercised and performed. It thereby protects not only doctors, but also any other persons engaged in such activities professionally. Therefore the term “medical duties” refers to medical activities, i.e., to the tasks which personnel perform in accordance with their professional obligations when they give care or treatment. In the French text this concept is rendered by the expression “la mission médicale”, which is perhaps not quite as precise as “medical duties” in English.

General remarks

- 4680** This provision is aimed at strengthening the basic principle that the wounded and sick shall be protected.¹ To that end it establishes a general protection of medical and paramedical personnel. In particular, it is a matter of ensuring immunity for civilian doctors who care for patients without forming part of medical personnel assigned to medical units within the meaning of Articles 9 (*Protection of medical and religious personnel*) and 11 (*Protection of medical units and transports*), of the Protocol. The problem may arise in different ways, depending on the organization of medical services in each of the countries concerned, but this article was adopted in the spirit of making available all medical assistance, whether civilian or military, to the wounded and sick; it does not cover the case of civilians without medical training who spontaneously lend aid to the wounded and sick. The supportive role of the civilian population is dealt with in Article 18 (*Relief societies and relief actions*), paragraph 1.
- 4681** The Conventions do not provide for such protection specifically. Common Article 3 is, *a fortiori*, silent on this point. However, it should be noted that

¹ General principle of protection laid down in Art. 7 of the Protocol.

protection of medical duties follows from the principle of protecting the wounded and sick and is inspired by Article 18, paragraph 3, of the First Convention, which states that “no one may ever be molested or convicted for having nursed the wounded or sick”.² Paragraphs 1 and 2 establish the neutrality of medical activities and guarantee that they may be freely carried out in accordance with medical ethics. These rules have been taken from the ICRC draft (Article 16)³ and are also contained in Article 16 of Protocol I (*General protection of medical duties*).⁴ The major problem underlying the protection of medical duties lies in the preservation of “professional confidentiality” of medical practitioners, a question which is closely related to the still controversial principle that it is wrong to inform on patients to the authorities.

4682 The ICRC endeavoured to find a flexible solution, leaving the decision to the doctor and placing in him the confidence he deserved.⁵ To this end the draft provided that:

“no person engaged in medical activities may be compelled to give to any authority information concerning the sick and the wounded under his care should such information be likely to prove harmful to the persons concerned or to their families”.

4683 It should be noted that this was a moderate proposal, for medical circles had repeatedly expressed views against reporting patients to the authorities, particularly at the conferences of the International Law Association, on the basis of the idea that the wounded and sick would not seek medical attention if they feared being denounced.⁶

4684 During the Conference the proposal came up against the fear that, if such a rule were introduced in the Protocol, it would prejudice the national sovereignty of States and violate the principle of non-interference with the internal affairs of States, reaffirmed by Article 3 (*Non-Intervention*), paragraph 2, of the same Protocol. The problem proved to be particularly delicate in the context of non-international armed conflict. Committee II discussed this at length; as it was impossible to achieve a solution acceptable to all in a first Working Group, a second had to be called, following the submission of a very large number of oral amendments in plenary meetings of the Committee.⁷ Paragraphs 3 and 4 are the result of all this work, which resulted in a laborious and rather unsatisfactory compromise; they guarantee that the professional obligation of medical personnel to maintain confidentiality will be respected and they prohibit punishing doctors who refuse to give information. In fact, these two paragraphs form a single clause which was separated into two for reasons of brevity and clarity.⁸ These guarantees

² See *Commentary I*, pp. 192-193.

³ Cf. *Commentary Drafts*, pp. 148-149.

⁴ Cf. *commentary Art. 16, Protocol I, supra*, p. 197.

⁵ O.R. XI, p. 146, CDDH/II/SR.16, para. 26.

⁶ Cf. *Commentary Drafts*, pp. 148-149. Cf. also introduction to this Part, *supra*, p. 107.

⁷ Cf. O.R. XIII, pp. 82-87 and 126-129, CDDH/221/Rev.1, and O.R. XI, pp. 447-456, CDDH/II/SR.41, paras. 1-50, and pp. 457-463, CDDH/II/SR.42, paras. 1-45.

⁸ *Ibid.*, p. 494, CDDH/II/SR.44, para. 53.

are useful and even essential, but by making them “subject to national law” their scope could be greatly reduced.

Paragraph 1

- 4685** This paragraph guarantees the principle of the neutrality of medical activities by stating that “under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom”.
- 4686** This rule refers not only to doctors, but also to any other persons professionally carrying out medical activities, such as nurses, midwives, pharmacists and medical students who have not yet qualified.
- 4687** The term “medical activities” should be interpreted very broadly. The concept is broader than that of medical care and treatment. A doctor not only treats patients, he may also be called upon to issue death certificates, vaccinate people, make diagnoses, give advice etc.⁹ Medical assistance should always be neutral; it should not be considered as taking a stand on the conflict because of those benefitting from this assistance. The criterion of when to undertake medical activities is based on purely humanitarian considerations, regardless of any other factors. To perform medical activities for the benefit of any person, including persons belonging to the adverse party, is not only lawful, but even a duty for those who are professionally bound.
- 4688** Ethics (or deontology) means the science of duty or moral obligation.¹⁰ The term is not only used in connection with the medical profession, but reference is usually made to medical ethics, and this is what is meant here. It consists of moral duties incumbent on the medical profession. Such duties are defined by the national and international corps of the medical profession.¹¹
- 4689** Those who have sworn the Hippocratic Oath to protect human life in all circumstances are allowed a wide margin of appreciation under medical ethics. Thus someone carrying out medical activities could not be punished for the mere fact of carrying out the duties incumbent upon him, irrespective of whether he acted spontaneously or whether he was asked to do so.
- 4690** The obligation to refrain from punishment is addressed to all authorities capable of meting out punishment, including both the government in power and the authority controlling part of the territory in accordance with Article 1 of the Protocol (*Material field of application*).
- 4691** The reference to punishing is meant to cover all forms of sanction, including both penal and administrative measures; all these are prohibited.

⁹ Cf. CE/7b, paras. 21-23.

¹⁰ As defined in the Shorter Oxford Dictionary (1978), p. 520.

¹¹ The World Medical Association has adopted a code of ethics, as well as “rules of medical ethics in time of war”. Though they have no binding force under international law, they serve as a point of reference (cf. commentary Art. 16, Protocol I, *supra*, p. 197).

Paragraph 2

- 4692 Paragraph 2 establishes the principle of the free exercise of medical activities, i.e., medical personnel should be able to work without compulsion, guided only by professional ethics. Thus it is specifically prohibited to compel those carrying out medical activities to commit any act or to refrain from acting in a way which would be contrary to “the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol”.
- 4693 It should be noted that in addition to the mention of medical ethics reference is made to “other rules”. This is, in particular, because of the fact that in some countries medical ethics prohibit doctors from co-operating in medical procedures undertaken by personnel which are not officially qualified.¹² This would apply for example to a medical student. The article refers to the rules of medical ethics which protect the wounded and sick, as opposed to those which are concerned only with the interests of the medical profession; it also refers to other rules designed for the same purpose, and applicable in specific cases.¹³
- 4694 The reference to the provisions of the Protocol endorses the rules of protection already contained in it, for instance, the rule prohibiting “cruel treatment such as torture, mutilation or any form of corporal punishment” (Article 4 – *Fundamental guarantees*, paragraph 2(a)). Compelling a doctor to refrain from acting, for example, would be tantamount to prohibiting him from caring for the wounded or sick, and this would in any case constitute a breach of the principle that protection and care are due to the wounded and sick as laid down in Article 7 (*Protection and care*).
- 4695 Amongst the cases of being compelled to perform acts which were most often raised during the discussions in Committee, mention should be made of administering drugs to prisoners in order to modify their behaviour and obtain information; one delegation even wanted this to be explicitly prohibited and submitted an amendment to that effect.¹⁴ Medical experiments are another example.

Paragraph 3

- 4696 Medical ethics impose an obligation of confidentiality on doctors; a doctor is obliged to be discreet regarding the nature of the complaint of his patient, and in general not to divulge any information that might be harmful to his patient or the latter’s relatives. Moreover, the question whether doctors are ever allowed to report on their patients to the authorities, i.e., to denounce them, is added to the principle of medical confidentiality. In the eyes of many representatives of the medical profession, this question is also an integral part of medical ethics.

¹² Cf. O.R. XI, p. 150, CDDH/II/SR.16, para. 46.

¹³ *Ibid.*, p. 183, CDDH/II/SR.19, para. 59 (Statement by the Rapporteur of the Committee).

¹⁴ *Ibid.*, p. 149, CDDH/II/SR.16, para. 43.

- 4697 In ethical terms, the rule against denunciation does not mean that information may never be given; the doctor has a certain measure of freedom of action to follow his own conscience and judgment.
- 4698 The aim of this paragraph is to establish protection and respect for medical activities while preserving the obligation of professional confidentiality. For this purpose it provides that the professional obligations of those engaged in medical activities regarding information, which they may acquire concerning the wounded and sick under their care, must be respected, but always subject to national law. Being subject to national law was the price paid for this rule. This formula was finally retained following lengthy discussions in the Working Group.
- 4699 What is meant by national law? It refers here not only to the law in force at the start of the conflict, but also to any new legislation introduced and brought into force by a State after the start of the conflict.¹⁵ This legal situation, the result of a compromise, has its shortcomings in that it might endanger the special protection to which the wounded and sick should be entitled.
- 4700 In fact, national law, in a situation of conflict fulfilling the criteria of Article 1 of Protocol II (*Material field of application*), will not always be known to the adverse party if it has changed during hostilities. If there is any doubt regarding a doctor's obligations towards the authorities, many of the wounded would risk suffering and dying, rather than risk being denounced. An obligation to systematically reveal the identity of the wounded and sick would divest the principle of the neutrality of medical activities of all meaning.
- 4701 Finally, it is clear that in practice, when hostilities have reached an advanced stage, two separate sets of rules may exist concurrently. It is up to each authority to reach a judgment on what attitude it intends to take with regard to military requirements and with regard to its humanitarian obligations. If humanitarian principles and the aim of the Protocol, i.e., safeguarding the lives of the wounded, are taken into account, the laws should allow medical personnel a sufficient measure of freedom and responsibility to perform their duties.
- 4702 The obligation to give notification of communicable diseases laid down in the ICRC draft and included in Article 16 of Protocol I (*General protection of medical duties*) is not mentioned here, since such a measure is included in the national legislations of virtually all countries.

Paragraph 4

- 4703 Paragraph 4 is the corollary of paragraph 3. As indicated above, they appear as two separate paragraphs for the sake of clarity. Respect for medical activities and professional obligations as implied therein would be of no practical significance if those carrying out such activities could be penalized for respecting the principle of confidentiality, by refusing or failing to give information concerning patients, as such confidentiality is itself a professional obligation.

¹⁵ Cf. *ibid.*, pp. 495-496, CDDH/II/SR.44, paras. 54-63.

- 4704 The conclusion was reached that it would be necessary for the text to provide explicitly that it is prohibited to penalize people engaged in medical activities for no other reason than that they had failed to give information on the wounded and sick in their care. Such conduct should not be considered as a criminal offence.¹⁶
- 4705 The prohibition on such penalization concerns all types of punishment, penal as well as administrative sanctions, such as, for example, closing down a medical practice. Again, making the rule subject to national law reduces the value of the principle that is established and it has the same effect as in the preceding paragraph. Three points deserve mention in this respect:
- This provision lays down that the confidentiality that may be kept by anyone engaged in medical activities regarding the wounded and sick under his care, is legitimate, but subject to national law. Thus, in accordance with the principle of penal law, *nullum crimen sine lege*, if there is no national law on the subject, a doctor cannot be penalized in any way for maintaining silence. This stand cannot be interpreted as taking sides in the conflict.
 - Promulgation of new rules during the conflict implies an obligation for the authorities to inform those to whom those rules are addressed.
 - The principle that the law may not be applied retroactively should be respected in accordance with Article 6 (*Penal prosecutions*), paragraph 2(c).
- 4706 In general it should be noted that if anyone engaged in medical activities were to be prosecuted for failing to comply with the law, he would in any case enjoy the legal guarantees provided in Article 6 of the Protocol (*Penal prosecutions*).

S.J.

¹⁶ This principle was set out in paragraph 5 of the *Rules to ensure and care for the wounded and sick, particularly in time of armed conflict*, as drawn up by the World Medical Association, the International Committee of Military Medicine and Pharmacy and the ICRC and as amended in 1983. Cf. Introduction to this Part, *supra*, p. 1403. The reservation made regarding national legislation therefore concerns the question of denunciation, and not professional confidentiality in accordance with medical ethics within the meaning of paragraph 1 of this article.

Protocol II

Article 11 – Protection of medical units and transports

1. Medical units and transports shall be respected and protected at all times and shall not be the object of attack.
2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Documentary references

Official Records

O.R. I, Part I, pp. 194-195; Part III, p. 38 (Art. 17). *O.R.* IV, pp. 57-58. *O.R.* VII, p. 113, CDDH/SR.51, paras. 43-47. *O.R.* XI, pp. 287-288, CDDH/II/SR.28, paras. 38-46; pp. 496-498, CDDH/II/SR.44, paras. 64-77; p. 501, CDDH/II/SR.45, para. 2; pp. 602-603, CDDH/II/SR.53, paras. 34-37. *O.R.* XII, p. 260, CDDH/II/SR.79, para. 19. *O.R.* XIII, pp. 129-130, CDDH/221/Rev.1, paras. 165-170; p. 229, CDDH/II/287; pp. 253-254, CDDH/235/Rev.1, para. 20; pp. 303-304, *id.*, Annex I (Art. 11); p. 347, CDDH/II/386.

Other references

CE/5b, pp. 53-55. *CE/7b*, pp. 34 and 38. *CRCE 1971, Report*, p. 25. *CE 1971, Report*, p. 28 (Art. 5); pp. 57-58. *CE 1972, Basic Texts*, p. 37 (Art. 11). *CE 1972, Commentaries*, Part II, pp. 28-29 (Art. 11). *CE 1972, Report*, vol. I, pp. 103-104, paras. 2.377-2.378; vol. II, p. 45, *CE/COM II/64*; pp. 47-48, *CE/COM II/75*; p. 49, *CE/COM II/80. Commentary Drafts*, pp. 149-150 (Art. 17).

Commentary**General remarks**

- 4707 To implement the principle that the wounded and sick be protected and respected, as laid down in common Article 3 and reaffirmed in Article 7 (*Protection and care*) of this Protocol, the protection of medical units and transports¹ is just as essential as the protection of medical and religious personnel (Article 9 – *Protection of medical and religious personnel*) and protection of medical duties (Article 10 – *General protection of medical duties*). Article 11 is basically inspired by Articles 19 and 21 of the First Convention, but it is clearly also related to Articles 20, 35 and 36 of the First Convention, Articles 22, 23 and 24 of the Second Convention, and Articles 18, 21 and 22 of the Fourth Convention. In fact, this provision seeks to secure protection and respect for all military or civilian medical transports, on land, in the air, at sea or on lakes or rivers.
- 4708 In situations of international armed conflicts the protection granted by the Conventions in the articles mentioned above is developed in Article 12 (*Protection of medical units*) and 13 (*Discontinuance of protection of civilian medical units*), as well as in Section II (*Medical transportation*) of Part II of Protocol I.
- 4709 As regards Protocol II, the ICRC draft merely laid down the principle that medical units and transports must be protected, without explicitly providing when such protection may cease, i.e., without fixing the limitations of this right.² The parallel negotiation of the two instruments in Committee led the delegates to adopt a paragraph 2 on the discontinuance of protection based on Article 13 of Protocol I (*Discontinuance of protection of civilian medical units*). The text produced by the Committee also included a paragraph 3 regarding acts which should not be considered to be hostile acts, in this respect following the example of Article 13 of Protocol I (*Discontinuance of protection of civilian medical units*).³ This paragraph was not included in the version which was finally adopted.⁴ This simplification means the text is less clear, for it is less explicit, but it does not restrict the scope of the principle, and should not give rise to subjective and far-reaching interpretations of the concept of hostile acts.⁵

Paragraph 1

- 4710 Paragraph 1 lays down the principle that protection and respect are due to medical units and transports.

¹ For the definitions of the terms “medical units”, “medical transports” and “medical transportation”, cf. *infra*, commentary para. 1 and note 7.

² Cf. draft Art. 17.

³ O.R. XIII, p. 229, CDDH/II/287.

⁴ O.R. IV, p. 58, CDDH/427.

⁵ See *infra*, commentary para. 2, p. 1435.

- 4711** The term “medical unit” is a generic term covering both permanent units, which stay where they are (hospitals, laboratories, equipment depots etc.), and mobile medical units, which may be moved as required (field hospitals, first aid posts, ambulances etc.).⁶
- 4712** The term “medical transports” means any land vehicle (cars, trucks, trains etc.), ship, craft or aircraft assigned to transporting the wounded, sick and shipwrecked, medical and religious personnel, and medical equipment. Protection applies for military and civilian medical units and transports, whether they are permanent or temporary, provided that they are exclusively assigned to medical purposes; while they are so assigned, whether or not for an indefinite period, depending on whether they are permanent or temporary, medical units and transports may not be used for any purposes other than medical ones.⁷ The concept “medical purposes” should be understood in a broad sense. It covers not only the care given the wounded, sick and shipwrecked, but also any activities for the prevention of disease, blood transfusion centres, rehabilitation centres for medical treatment and dental treatment.⁸
- 4713** Medical units and transports must at all times:
- 1) be respected,
 - 2) be protected,
 - 3) not be the object of attack.
- 4714** The words “respect and protection” are part of the classical vocabulary of international humanitarian law. They already appear in Articles 7 (*Protection and care*) and 9 (*Protection of medical and religious personnel*) in this Part of the Protocol.⁹ It should be recalled that respect and protection imply not only the obligation to spare the people and objects concerned, but also to actively take measures to ensure that medical units and transports are able to perform their functions and to give them assistance where necessary. “To respect such units means, not to attack them or harm them in any way”, according to the

⁶ See *Commentary I*, pp. 194-195 (Art. 19).

⁷ The definitions given in Art. 11 of the draft produced by Committee II, which was not adopted, read as follows:

“(c) ‘Medical units’ means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first aid treatment – of the wounded, sick and shipwrecked, and for the prevention of disease, which belong to or are recognized and authorized by a party to the conflict. Medical units may be fixed or mobile, permanent or temporary.

(d) ‘Medical transportation’ means the conveyance by land, water or air of the wounded, sick and shipwrecked, medical and religious personnel and medical equipment and supplies protected by this Protocol.

(e) ‘Medical transport’ is a means of transportation, be it military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a party to the conflict.”

Cf. *O.R. XIII*, pp. 303-304, CDDH/235/Rev.1.

⁸ Rehabilitation centres providing medical treatment and dental treatment were explicitly included under medical purposes: cf. *ibid.*, p. 253, para. 20. This clarification was given on Art. 8, Protocol I, but also applies for Protocol II; cf. *O.R. XII*, p. 260, CDDH/II/SR.79, para. 19.

⁹ See commentary Art. 7, *supra*, p. 1407.

commentary on Article 19 of the First Convention. Thus it was not necessary to mention that medical units and transports may not be the object of attack. The formula dates back to 1949; it endorses the expression “respect and protect”. The commentary points out that “this strengthening of the general form of wording may not, however, be superfluous in view of the increasing scale of aerial bombardment”.¹⁰

- 4715 This remark is undoubtedly still just as valid today, but, as we have indicated before, it is unfortunate that the reference to attacks is not also included in Article 9 (*Protection of medical and religious personnel*), even though this omission does not affect the substance of the provision.¹¹
- 4716 The obligation to respect and protect medical units and transports applies “at all times”,¹² i.e., even when they are not used to accommodate any wounded or other patients, or not for the time being, though of course, only provided that they remain assigned exclusively to medical purposes.¹³
- 4717 By making it possible to identify medical units or transports, the distinctive emblem renders that protection visible (Article 12 – *Distinctive emblem*). The use of the distinctive emblem of the red cross or the red crescent, and in general the conditions of use of medical units and transports should be governed by the rules issued by the competent authority to which they belong. Such control is essential to prevent abuse and ensure the application of the rules of protection.
- 4718 Finally, it should be noted that before definitively adopting Article 11 in Committee, the Conference waited for Section II (*Medical transportation*) of Part II of Protocol I to be adopted, so as to make sure that Protocol II would not in any way clash with Protocol I.¹⁴ Article 11 covers indeed all medical transports on land, in the air, and on water, but its succinct wording does not go beyond expressing a general principle, while Protocol I is far more detailed in this respect. In case of specific difficulties, in particular to make sure that a given medical craft or aircraft is properly protected, Protocol I may serve as a very useful guide and provide practical solutions which may be relevant, by analogy, for the implementation of the principle.¹⁵

¹⁰ Cf. *Commentary I*, p. 196.

¹¹ Cf. commentary Art. 9, *supra*, p. 1417. We should call to mind the definition of attacks given in Art. 49, para. 1, of Protocol I: “‘Attacks’ means acts of violence against the adversary, whether in offence or defence.” See *supra*, p. 602.

¹² See commentary Art. 4, para. 2(b), on the prohibition of collective punishments and “reprisals” in Protocol II, *supra*, p. 1374.

¹³ See *supra*, p. 1432.

¹⁴ Cf. O.R. XI, p. 603, CDDH/II/SR.53, para. 37.

¹⁵ Cf. the articles of Part II, Section II, “Medical transportation”, of Protocol I, and the commentary thereon, *supra*, p. 245.

Paragraph 2

First sentence

- 4719** Protection and respect for medical units and transports are permanent obligations: “at all times”. However, there are some exceptional cases in which protection for them may cease, namely, if “they are used to commit hostile acts, outside their humanitarian function”.
- 4720** This paragraph reiterates Article 21 of the First Convention, with slight changes in the wording. In particular, Article 21 does not refer to “hostile acts”, but to “acts harmful to the enemy”. There is no difference of substance between these two terms. The draft article provided by the Committee used the term “acts harmful to the adverse Party”.¹⁶ As all references to “parties to the conflict” had been deleted from the text on the proposal of the Pakistani delegation,¹⁷ in order to eliminate any possibility of an interpretation which would give any sort of recognition to the insurgent party, the term “hostile acts” was finally adopted.
- 4721** The meaning is the same as in Article 21 of the First Convention: the acts concerned are those which are harmful to the adversary. Whether an act is harmful or hostile must be judged objectively.
- 4722** Medical units and transports are under an obligation to remain strictly neutral, that is to say, that they should not in any way interfere in military situations. However, it may happen that a medical unit or transport, while strictly adhering to its duties, unwittingly becomes a hindrance or a tactical obstacle.¹⁸ Its presence might incorrectly be interpreted as a hostile act, but this does not mean that protection should cease. It only ceases if the units or transports are used *outside their humanitarian function*.
- 4723** Such examples can also be found in Article 13 (*Discontinuance of protection of civilian medical units*), paragraph 2, of Protocol I. Although they have no binding force in the context of Protocol II, they may nevertheless help the interpretation thereof:¹⁹

“The following shall not be considered as acts harmful to the enemy:

- (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
- (b) that the unit is guarded by a picket or by sentries or by an escort;
- (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
- (d) that members of the armed forces or other combatants are in the unit for medical reasons.”²⁰

¹⁶ O.R. XIII, p. 229, CDDH/II/287.

¹⁷ An oral proposal in plenary meeting, cf. O.R. VII, p. 113, CDDH/SR.51, paras. 43-46.

¹⁸ Cf. *Commentary I*, pp. 200-201 (Art. 21).

¹⁹ Para. 3, which was deleted during the final stage of the adoption of Protocol II, provided an *contrario* explanation of the nature of hostile acts by giving a list of acts which should not be considered to be hostile. See *supra*, p. 176.

²⁰ See also O.R. XIII, p. 229, CDDH/II/287, *ad* Art. 17, para. 3.

- 4724 As regards terminology, it should also be noted that the term “humanitarian duties”, used in Article 21 of the First Convention, was replaced in this article by the words “humanitarian function”. This change is a matter of drafting. The word “function” was found to be more satisfactory, as this term applies not only to personnel, but also to transports and buildings. Moreover, the term “*tareas humanitarias*”, used in the Spanish version, contains simultaneously the concepts of duty and function.

*Second sentence*²¹

- 4725 When medical units or transports commit a hostile act, they lose their right to protection, but in most cases they are entitled to be given notice first: “Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.”
- 4726 Patients, wounded or sick, are not responsible for unlawful acts committed by personnel caring for them; therefore it is appropriate to accord them guarantees of humane treatment. Moreover, the adverse party may have made an error of judgment and the time-limit provides the opportunity for correcting this; it also allows those responsible to put an end to the acts which are considered as hostile acts, i.e., to correct them, or alternatively to take the wounded and sick to a safe place. The adverse party must therefore order the unit or transport to cease the hostile act and inform them how much time they have before they may be attacked, if the warning has not been heeded.
- 4727 A “reasonable time-limit”, is not defined: it is the time they need, depending on the circumstances, to change their approach, to explain themselves if a mistake has been made, or to evacuate the wounded and sick.
- 4728 The time-limit will be set “whenever appropriate”. Article 21 of the First Convention refers to “all appropriate cases”. In fact, this mainly applies to situations in which there is some doubt regarding the hostile character of a medical unit or transport. In some cases it is not appropriate to allow a time-limit. The commentary on Article 21 of the First Convention illustrates this possibility very clearly by imagining a body of troops approaching a hospital and being met by heavy fire from every window.²²

S.J.

²¹ The commentary on this second sentence is based on the commentary on Art. 21 of the First Convention, *Commentary I*, p. 201.

²² Cf. *ibid.*, p. 202.

Protocol II

Article 12 – The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Documentary references

Official Records

O.R. I, Part I, p. 195; Part III, p. 38 (Art. 18). *O.R.* IV, p. 59. *O.R.* VII, pp. 113-114, CDDH/SR.51, para. 48. *O.R.* XI, pp. 288-290, CDDH/II/SR.28, paras. 47-58; pp. 318-326, CDDH/II/SR.31, paras. 8-67; pp. 429-441, CDDH/II/SR.40, paras. 1-79; pp. 464-469, CDDH/II/SR.42, paras. 46-82; pp. 471-477, CDDH/II/SR.43, paras. 2-29; pp. 498-499, CDDH/II/SR.44, paras. 78-87; p. 501, CDDH/II/SR.45, paras. 1-4. *O.R.* XIII, pp. 217-220, CDDH/II/269; p. 230, CDDH/II/287 (Art. 18); p. 347, CDDH/II/386 (Art. 11, sub-para. i).

Other references

CE/5b, pp. 53-55. *CE/7b*, pp. 34 and 38 (Art. 6). *CRCE 1971, Report*, p. 24; p. 015, Annex II (Art. 6). *CE 1971, Report*, p. 28, para. 87; p. 31, Annex II (Art. 8); p. 58 (Art. 8); p. 60 (Art. 9). *CE 1972, Basic Texts*, p. 38 (Art. 13). *CE 1972, Commentaries*, Part II, pp. 30-31 (Art. 13). *CE 1972, Report*, vol. I, p. 104, paras. 2.381-2.383; vol. II, pp. 47-48, CE/COM II/75. *Commentary Drafts*, p. 150 (Art. 18).

Commentary

General remarks

- 4729 For the protection of the wounded, sick and shipwrecked to be effective, the personnel assisting them, the places sheltering them and the transport used

to transport them, all of which also enjoy protection under the Protocol (Articles 9 – *Protection of medical and religious personnel*, and 11 – *Protection of medical units and transports*), must be identifiable. If they could not be identified, the protection accorded them would be illusory.

- 4730** Such identification is possible by the use of the distinctive emblem of the red cross or red crescent.¹ Such use must be regulated and supervised so as to avoid abuse. This is the aim of the present article, which constitutes the latest stage in the development of the principle that respect and protection are due to the wounded, sick and shipwrecked, a principle already contained in common Article 3 of the Conventions, and reaffirmed in Article 7 of Protocol II (*Protection and care*).
- 4731** This provision is based on the relevant articles of the Conventions, viz., Chapter VII of the First Convention and Chapter VI of the Second Convention, both entitled “The distinctive emblem”, as well as on Articles 18, 20 and 22 of the Fourth Convention: these rules were supplemented in Protocol I by Article 18 (*Identification*) and Annex I to that Protocol (*Regulations concerning identification*).
- 4732** The basic content of the draft presented by the ICRC was retained, although the version that was finally adopted was worded more concisely.²

The distinctive emblem

- 4733** The red cross and red crescent emblems may have two very different functions: a protective function in time of armed conflict, and an indicatory function which applies, even in time of peace, to designate persons or objects attached to a red cross or red crescent institution, without entitling them to protection.
- 4734** The term “distinctive emblem”, as used in both Protocols, refers only to the emblem used for the purpose of protection. Article 8 (*Terminology*), subparagraph (f), of Protocol I reads:

“‘Distinctive emblem’ means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground, when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies.”³

Article 12 was adopted on the basis of almost exactly the same definition, which had been drafted for Protocol II.⁴

- 4735** The distinctive emblem concerned here protects those persons and objects which are mentioned in the provision, to the exclusion of all others, i.e. “medical and religious personnel and medical units, and [...] medical transports”. Therefore the definition is of paramount importance and we should here recall the main elements of the negotiations which took place regarding Article 12.

¹ On the emblem of the red lion and sun, cf. *supra*, commentary Art. 9, note 10, p. 1419.

² Draft Art. 18.

³ See commentary Art. 8, sub-para. (f), of Protocol I, *supra*, p. 134.

⁴ The term “*matériel*” was replaced by the term “medical equipment and supplies”; cf. *O.R. XIII*, p. 347, CDDH/III/386.

The extended use of the distinctive emblem

4736 The ICRC draft proposed enlarging the use of the distinctive emblem by extending it to red cross or red crescent organizations:

“The emblem of the red cross (red crescent, red lion and sun) on a white ground, which is the distinctive emblem of the medical personnel, medical units and means of medical transport of the parties to the conflict and of Red Cross (Red Crescent, Red Lion and Sun) organizations, shall be respected in all circumstances.”⁵

4737 Under the Conventions, the National Red Cross or Red Crescent Societies are only entitled to the indicatory sign, of a somewhat smaller size, and the protective emblem was reserved for military medical services.⁶ To lend force to its proposal, the ICRC stressed the key role played by the Red Cross in situations of non-international armed conflict, particularly for the non-governmental party; in the absence of organized medical services, the services of the National Red Cross Society would have an even greater importance, as it is the only humanitarian organization which would continue to function for both parties.⁷

4738 The Working Group which examined the article studied this proposal thoroughly. It came to the following conclusions:

“When the question of the need for an extended use of the distinctive emblem had been discussed in the Working Group, the Group had heard of a number of cases in non-international armed conflicts in recent times in which the need for local branches of the Red Cross, or even groups authorized to care for the wounded and the sick in such circumstances, to use the distinctive emblem had been clearly brought out.”⁸

“The Working Group had discussed the most appropriate place in draft Protocol II for a rule meeting the requirement for an extended use of the distinctive emblem. Either a specific rule could be inserted in Article 18 [12] or the problem could be solved by a suitable definition of medical personnel in Article 11(f) [Definitions].”⁹

At first the second possibility was favoured. Thus a draft definition of medical personnel had been drawn up which included the following categories: “medical personnel of Red Cross (Red Crescent, Red Lion and Sun) organizations [...] who are recognized and authorized by one of the parties to the conflict”, and “medical personnel of [...] other aid societies located within the territory of the High Contracting Party in whose territory an armed conflict is taking place, who are recognized and authorized by one of the parties to the conflict”.¹⁰

⁵ *Commentary Drafts*, p. 150.

⁶ *Cf.* Arts. 38 and 44, First Convention; *cf.* also Art. 18, Fourth Convention.

⁷ *O.R.* XI, p. 289, CDDH/II/SR.28, para. 50.

⁸ *Ibid.*, p. 430, CDDH/II/SR.40, para. 6.

⁹ *Ibid.*, para. 8.

¹⁰ *Cf.* also *O.R.* XIII, p. 346, CDDH/II/386.

4739 Failing a definition in the Protocol itself, the tenor of the discussions seems to indicate that the Conference pronounced itself in favour of extending the use of the emblem. Retaining the reference to “Red Cross organizations” in Article 18 of Protocol II (*Relief societies and relief actions*), argues in favour of this interpretation. The term “Red Cross organizations” had been used in the definition to:

“cover not only assistance provided on the Government side, but also already existing Red Cross groups or branches on the side opposing the Government and even improvised organizations which had come into existence only during the conflict.”¹¹

4740 Thus it is clear that in such cases the right to use the emblem is extended as regards medical personnel, units or transports for pragmatic reasons, without recognizing as such a new Red Cross or Red Crescent Society.

4741 For the rest, National Red Cross or Red Crescent Societies in time of armed conflict often carry on with their everyday social activities as in peacetime. For activities other than rendering assistance to civilian and military medical services, the indicatory sign may continue to be used; it should be smaller than the protective emblem.¹²

Is the distinctive emblem a compulsory condition for the right to protection?

4742 The use of the emblem is optional; medical personnel and medical units and transports are protected in any event: such protection is expressly granted in Articles 9 (*Protection of medical and religious personnel*) and 11 (*Protection of medical units and transports*). However, it is the direct interest of those enjoying protection to ensure that they can be identified, not only by the adverse party, but also by the armed forces or armed groups of their own side, particularly in a non-international armed conflict where, in most cases, the area of confrontation is not well-defined, or shifts frequently.

4743 Article 18 (*Identification*), paragraph 1, of Protocol I, provides that “each Party to the conflict shall endeavour to ensure that medical and religious personnel, and medical units and transports, are identifiable”.¹³

4744 According to Article 12 of Protocol II, “the distinctive emblem [...] shall be displayed”. In French the future tense is used, rather than the imperative: “le signe distinctif [...] sera arboré”. This formula shall be taken to express a right and invites use to be made thereof.

¹¹ Cf. O.R. XI, p. 430, CDDH/II/SR.40, para. 9.

¹² See *Commentary Drafts*, p. 150.

¹³ Cf. commentary Art. 18, Protocol I, *supra*, p. 221.

The size of the emblem

4745 The distinctive emblem must be as clearly visible as possible: “the need to make the emblem as large as possible was a matter of common sense and logic; it was not necessary for it to be mentioned explicitly [...]”¹⁴ This was the view expressed by the Committee. Annex I to Protocol I deals with the size of the emblem in the same way, by stating in Article 3 (*Shape and nature*), paragraph 1, “The distinctive emblem [...] shall be as large as appropriate under the circumstances.”¹⁵

Direction of the “competent authority concerned”

4746 If the emblem is to be effectively respected, it is essential that its use should be subject to supervision. Otherwise anyone might be tempted to use it. The protection conferred by the distinctive emblem requires that its use be subject to the authorization and supervision of the competent authority concerned. It is up to each responsible authority to take the measures necessary to ensure that such control be effective. The competent authority may be civilian or military. For those who are fighting against the legal government this will be the *de facto* authority in charge. It should be recalled that the threshold for application of the Protocol requires a certain degree of organization in general, and in particular the ability of the insurgents to apply the rules of the Protocol.¹⁶

The distinctive emblem “shall be respected in all circumstances”

4747 The obligation is absolute and applies at all times and in all places, barring such exceptional cases as referred to in Article 11 (*Protection of medical units and transports*), paragraph 2.¹⁷

¹⁴ O.R. XI, p. 437, CDDH/II/SR.40, para. 49.

¹⁵ Cf. commentary Annex I, Protocol I, *supra*, p. 1167.

¹⁶ See Article 1 and the commentary thereon, *supra*, p. 1347.

¹⁷ Cf. commentary Art. 11, para. 2, *supra*, p. 1435.

“It shall not be used improperly”

4748 The emblem may only be used to protect the persons and objects mentioned in this article, i.e., medical and religious personnel and medical units and transports. Any other use constitutes improper use and is consequently prohibited.¹⁸

S.J.

¹⁸ Cf. *Commentary Drafts*, p. 150; *O.R.* XI, pp. 433 and 438, CDDH/II/SR.40, paras. 21, 27 and 57. N.B. also the provisions relating to the use of the emblem and the repression of the misuse thereof (Arts. 44 and 53, First Convention; 44 and 45, Second Convention; Art. 18, para. 4, Arts. 38 and 85, para. 3 (f), of Protocol I). Furthermore, the International Conferences of the Red Cross have repeatedly encouraged States Parties to the Conventions to reinforce their national legislation to repress the misuse of the emblem. See, for example, Resolution XI, adopted by the XXIIIrd International Conference of the Red Cross in Bucharest in 1977.

Part IV – Civilian population

Documentary references of the Part as a whole

Other references

CE/3b. CE/5b, pp. 67-74. *CRCE 1971, Report. CE 1971, Report*, pp. 73-80. *CE 1972, Commentaries*, Part I, pp. 31-44. *CRCE 1972, Report. CE 1972, Report*, vol. I, pp. 111-118, paras. 2.449-2.507. *Commentary Drafts*, pp. 155-161. Hague Convention IV, 1907, Regulations. Hague Convention IX, 1907. Fourth Geneva Convention, 1949. Hague Convention, 1954. ICRC, Draft Rules, 1956. *ICRC Memorandum*. Institute of International Law, Edinburgh Resolution, 1969, in 53 *Annuaire IDI* 2, Sept. 1969, pp. 48-126. United Nations, A/Res.2444 (XXII). United Nations, A/Res. 2675 (XXV). XXth International Conference of the Red Cross, 1965, Resolution XXVIII. United Nations, Report of the Secretary-General A/7720, 1969, paras. 133-155. United Nations, Report of the Secretary-General A/8052, 1970, paras. 30-87. United Nations, Report of the Secretary-General A/8370, 1971, paras. 30-92.

Introduction

- 4749 This Part is aimed at developing the legal protection to which the civilian population is entitled. It is based on the principles of the law of war: in an armed conflict the object is to damage the military potential of the adverse Party in order to obtain a decisive advantage, and civilians who do not participate in hostilities should be spared. In this Part we have a confirmation of treaty and customary law on this subject.
- 4750 The principle of the immunity of those who do not participate directly in hostilities has in fact been recognized for a long time, in situations of both national and international armed conflict. Thus, in 1863, the Lieber Code already provided that “an unarmed citizen is to be spared in person, property, and honor, as much as the exigencies of war will permit”.¹ Although it was subject to reservation on

¹ F. Lieber, *op. cit.*, Art. 22.

military necessity, the fact remains that the principle as such was nevertheless already recognized.²

- 4751** As regards situations of non-international armed conflict, the law of Geneva had only until now provided protection under common Article 3 of the 1949 Conventions, which provides that: “persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely”.
- 4752** Since the Second World War the type of weapons developed and the widespread use of guerrilla warfare as a method of combat have resulted in growing numbers of victims amongst the civilian population, particularly in internal armed conflicts, which are becoming increasingly common.
- 4753** This problem has been a continuous matter of concern to the ICRC, which submitted Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War at the International Conference of the Red Cross in 1957 (New Delhi).³ Based on the idea that the civilian population required the same protection, regardless of the legal qualification of the conflict, the Draft provided a set of rules applicable both to international and non-international armed conflicts.⁴ Although this initiative was generally well-received in Red Cross circles, it was unfortunately not followed up by governments.⁵ The fundamental principles of protection which the draft laid down were subsequently reaffirmed, first in a number of resolutions of the International Conference of the Red Cross, and later by those of the United Nations. To mention the most important in chronological order, these include: Resolution XXVIII of the XXth International Conference of the Red Cross, and Resolutions 2444 (XXIII) and 2675 (XXV) of the United Nations General Assembly, adopted respectively in 1965, 1968 and 1970.
- 4754** Ever since the United Nations began to encourage the development of international humanitarian law from 1968 onwards, it focused attention in particular on the problem of protecting the civilian population. The above-mentioned Resolution 2675 (XXV) reiterates and summarizes the “basic principles for the protection of civilian populations in armed conflicts”.⁶

² For the definition of military necessity, see commentary on Part IV of Protocol I, and in particular, Art. 54, para. 5, *supra*, pp. 583 and 658.

³ Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956.

⁴ *Ibid.*, Art. 2(b): the present rules apply in case of non-international armed conflict.

⁵ See the General introduction to the Protocol, *supra*.

⁶ “The General Assembly [...]”

Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
4. Civilian populations as such should not be the object of military operations.

(continued on next page)

- 4755 Even after the adoption of the Protocols this resolution continues to be an important point of reference. These basic principles were adopted unanimously and can in fact be of help in interpreting the rules summarily expressed in Protocol II.⁷
- 4756 The problem of how to protect the civilian population was dealt with in a general way in both the United Nations and International Red Cross resolutions, without a distinction being made between the various types of conflict.
- 4757 In its first studies on a new development of humanitarian law, the ICRC retained the same approach.⁸ It became clear that unduly detailed rules for non-international armed conflicts would undoubtedly be more difficult for governments to accept and for the parties in such special circumstances to apply; for this reason the principle was adopted in 1972 that two separate régimes were needed.⁹ The proposals put forward for Protocol II, though based on those for Protocol I, were simplified. In its draft the ICRC had taken care to make a distinction between basic rules and rules of application so as not to jeopardize the acceptance of the former.¹⁰
- 4758 A number of acts specifically prohibited by Protocol I are not mentioned in Protocol II; nevertheless, they may not be considered to be legitimate. Despite its brevity, this Part significantly reinforces the protection of the civilian population because of the fundamental nature of the rules it lays down.¹¹

5. Dwellings or other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assault on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application."

⁷ The work of the Institute of International Law may also serve as a source of information on legal writings, since although it has no binding legal force, it constitutes a subsidiary source of guidance that is widely recognized internationally. It is appropriate to refer here to the resolution adopted in Edinburgh entitled "The distinction between military objectives and non-military objects in general, and particularly the problems associated with weapons of mass destruction", which lists a number of rules for the conduct of hostilities applicable in all situations of conflict. 53 *Annuaire IDI* 2, September 1969, pp. 48-126 and pp. 375-377.

⁸ See "Questionnaire aux experts" in 1970 and the 1971 draft.

⁹ Cf. the General introduction to the Protocol, *supra*, p. 1329.

¹⁰ *CE 1971, Report*, para. 146.

¹¹ The negotiation of the articles of the two Protocols was carried out simultaneously on parallel lines. This working method, which was followed by the Committees of the Conference, has made it possible to use identical terminology in the two instruments which should avoid divergent interpretations. During the first stage this simultaneous negotiation led to the adoption in Committee of more detailed rules than those initially envisaged in the draft for Protocol II. The final version adopted in plenary meeting had been simplified, to be even shorter than the initial draft.

- 4759** Article 13 (*Protection of the civilian population*) sets out first of all the general principle of protection, i.e. the immunity to which the population is entitled under the law. This, in particular, implies an absolute prohibition of certain methods of combat: direct attacks against the civilian population and intimidation (Article 13 – *Protection of the civilian population*, paragraph 2), starvation (Article 14 – *Protection of objects indispensable to the survival of the civilian population*) and forced movements (Article 17 – *Prohibition of forced movements of civilians*). Civilian objects do not enjoy a general protection, but some are protected because of their nature and function, in order to ensure that the civilian population will be safeguarded. These are objects indispensable to their survival (Article 14 – *Protection of objects indispensable to the civilian population*), works and installations containing dangerous forces (Article 15 – *Protection of works and installations containing dangerous forces*), and cultural objects and places of worship (Article 16 – *Protection of cultural objects and places of worship*). Finally, Article 18 (*Relief societies and relief actions*) provides for the organization of relief actions nationally, (paragraph 1) and internationally (paragraph 2).
- 4760** This simple text has the advantage of not raising the threshold for application of the Protocol; the ability of the armed opposition to respect these provisions would undoubtedly be more readily contested if unduly elaborate precautionary measures had been prescribed. The disadvantage is that there is a lack of precision on practical points, which leads to a need for interpretation.¹²

S.J.

¹² In this respect the rules of Protocol I serve as a point of reference for those who will have to assume responsibility for military operations. See Arts. 50-58 of Protocol I, and in particular, Art. 51, paras. 4-8, and Arts. 57 and 58, concerning precautions in attack, *supra*, p. 609.

Protocol II

Article 13 – Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilian shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Documentary references

Official Records

O.R. I, Part I, p. 195; Part III, p. 40 (Art. 26). *O.R.* IV, pp. 75-81. *O.R.* VII, p. 134, CDDH/SR.52, paras. 74-78; p. 140, *id.*, Annex (Spain). *O.R.* XIV, p. 37, CDDH/III/SR.5, para. 14; p. 41, paras. 49-51; p. 43, CDDH/III/SR.6, para. 1; p. 44, para. 10; pp. 48-49, para. 41; p. 56, CDDH/III/SR.7, para. 46; p. 57, para. 51; pp. 59-83, CDDH/III/SR.8-10; pp. 197-198, CDDH/III/SR.22, paras. 1-6; pp. 387-394, CDDH/III/SR.37, paras. 1-33. *O.R.* XV, pp. 288-296, CDDH/215/Rev.1, paras. 113-153; pp. 319-321, *id.*, Annex (Arts. 24-26); p. 329, CDDH/III/224; pp. 361-367, CDDH/III/275.

Other references

CE/3b, pp. 29-39. *CE/5b*, pp. 67-72. *CE/6b*, pp. 24-32. *CRCE 1971, Report*, pp. 33-35 and 43-44. *CE 1971, Report*, pp. 69-70, paras. 384-392. *CE 1972, Basic Texts*, p. 38 (Art. 15). *CE 1972, Commentaries*, Part II, pp. 38-40 (Art. 15). *CE 1972, Report*, vol. I, pp. 111-112, paras. 2.449 and 2.451-2.452; pp. 114-115, paras. 2.475-2.486; vol. II, p. 35, *CE/COM II/11*; pp. 38-39, *CE/COM II/32*; pp. 40-41; *C/COM II/43*; p. 48, *CE/COM II/76*; p. 49, *CE/COM II/81*; p. 50, *CE/COM II/84*. *Commentary Drafts*, pp. 157-159 (Art. 26).

Commentary

General remarks

- 4761** Article 13 codifies the general principle that protection is due to the civilian population against the dangers of hostilities, already recognized by customary international law and by the laws of war as a whole. This principle is translated into a specific rule in paragraph 2, with the absolute prohibition of direct attacks and of acts or threats of violence committed with a view to spreading terror. Paragraph 3 defines the field of application of the general principle *ratione personae*: civilians lose their right to protection under the whole of Part IV if they take part in hostilities, and throughout the duration of such participation.
- 4762** Both as regards substance and structure, this article corresponds to the first three paragraphs of Article 51 of Protocol I (*Protection of the civilian population*), and reference may also be made to the commentary thereon.¹ Unlike Protocol I, which contains detailed rules, only the fundamental principles on protection for the civilian population are formulated in Protocol II and it is done in a very rudimentary form in this article, even though it constitutes the basis of Part IV.
- 4763** The draft submitted by the ICRC, and adopted in Committee, had three provisions: Article 24: Basic rules; Article 25: Definitions; Article 26: Protection of the civilian population.² In accordance with the amendment submitted by the Pakistani delegation when the instrument was finally adopted in the plenary meetings, only the first paragraphs of Article 26 of the draft were retained.³ These constitute Article 13 in its present form.
- 4764** This radical simplification does not reduce the degree of protection which was initially envisaged, for despite its brevity, Article 13 reflects the most fundamental rules. How to implement them is the responsibility of the parties, and this means that the safety measures they are obliged to take under the rule on protection will have to be developed so as to best suit each situation, the infrastructure available and the means at their disposal.

Paragraph 1

- 4765** This paragraph lays down the general principle that protection is due to the civilian population, which forms the cornerstone of Part IV.

¹ See commentary Art. 51, Protocol I, *supra*, p. 613.

² ICRC draft Arts. 24, 25 and 26; see also *O.R.* XV, pp. 319-321, CDDH/215/Rev.1.

³ See *O.R.* IV, pp. 72, 74 and 81, CDDH/427.

First sentence

- 4766** The term “civilian population” is the usual term for referring to civilians as a group. The text refers simultaneously to the civilian population and to individual civilians to indicate that the civilian population is protected as a whole in the same way as the individuals which constitute it.
- 4767** The general protection covers all civilians, without any distinction. The term “general protection” is used in contrast to the special protection designed to give additional protection to certain categories of individuals belonging to the civilian population (the wounded and sick, children, medical personnel etc.).⁴ Special protection does not replace the general protection but adds to it.
- 4768** What is meant by the phrase “general protection against the dangers arising from military operations”? In other words, what is the scope of the general principle of protection?
- 4769** “Military operations” refers to movements of attack or defence by the armed forces in action.⁵ They present the civilian population with two types of danger; on the one hand, that of attacks as such and, on the other, the incidental effects of attacks.
- 4770** Protection covers “the dangers arising from military operations”. This means that the obligation does not consist only in abstaining from attacks, but also in avoiding, or in any case reducing to a minimum, incidental losses, and in taking safety measures.
- 4771** To ensure general protection for the civilian population consequently implies:
- 1) an absolute prohibition of direct attack against the civilian population as such, or against civilians; this prohibition is specifically mentioned in paragraph 2 discussed below;
 - 2) reducing the effects of military operations which could affect protected persons.
- 4772** The implementation of such protection requires that precautions are taken both by the party launching the attack during the planning, decision and action stages of the attack, and by the party that is attacked. For example; military installations should not be intentionally placed in the midst of a concentration of civilians with a view to using the latter as a shield or for the purpose of making the adverse party abandon an attack, without forgetting any other safety measures which are not explicitly laid down in Protocol II.⁶ Each party should, in good faith, design such measures and adapt them to the specific circumstances, bearing in mind the means available to it, and based on the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or an internal one. It is appropriate to recall here the most important of these principles, i.e., the principle to use the minimum force

⁴ CE 1971, Report, pp. 77-78, paras. 441-445.

⁵ O.R. XIV, p. 14, CDDH/III/SR.2, para. 8.

⁶ On the other hand, in Protocol I conditions of attack and precautionary measures are dealt with in specific rules which develop the general principle of protection (see Arts. 48-58 of Protocol I and the commentary thereon, *supra*, pp. 597-695).

required to harm the enemy, the principle of distinction and the principle of proportionality which only intervenes when it is not possible to ensure the total immunity of the population:

- parties engaged in a conflict do not have an unlimited right as regards the means of injuring the enemy;⁷
- a distinction should be made at all times between persons participating in hostilities and the civilian population, so that the latter may be spared as far as possible;⁸
- the relation between the direct advantage anticipated from an attack and the harmful effects which could result on the persons and objects protected⁹ should be considered in advance.

Second sentence

4773 “To give effect to this protection”: the use of this phrase does not imply that protection is only considered in case of military operations.¹⁰ In fact, the Protocol contains other rules to be observed in all circumstances by armed forces or armed groups, and these also help to make the protection of the civilian population effective.¹¹

4774 This paragraph is worded in the same way as Article 51 (*Protection of the civilian population*), paragraph 1, of Protocol I, though without including a reference to other applicable rules of international law.¹²

4775 Applicable international law includes customary international law, whether or not it has been codified, in addition to treaty law.¹³ That follows from the general theory of international law and from the very nature of customary international law. The question may well be asked whether the reference to international law was intentionally omitted in order to suggest that customary law is deemed not to apply to situations of non-international armed conflict.

⁷ This principle was formulated in Art. 22 of the Hague Regulations Respecting the Laws and Customs of War on Land and reaffirmed in the resolutions of the Red Cross, particularly Resolution XXVIII of the XXth International Conference, Vienna, 1965.

⁸ This principle was expressed in particular in Resolution XXVIII of the XXth International Conference of the Red Cross and Resolution 2575 (XXV) of the United Nations General Assembly.

⁹ The principle of proportionality is expressly set out in Art. 57, para. 2(b), of Protocol I, which reads as follows: “an attack shall be cancelled or suspended if it becomes apparent [...] that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”; see *supra*, p. 686. It should be noted that civilian objects do not enjoy general protection under Protocol II. Only those objects which must be protected as being essential for the needs of the civilian population are taken into consideration.

¹⁰ See *O.R.* XV, p. 329, CDDH/III/224.

¹¹ For example, Art. 4, para. 2(b), (c) and (d).

¹² Art. 51, para. 1, of Protocol I: “To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances”; see *supra*, p. 617.

¹³ This view also emerged from the discussions in Committee; see *O.R.* XIV, p. 15, CDDH/III/SR.2, para. 13, for example.

- 4776 It would seem that this is not the case. The discussions in the Conference do not indicate that any doubt was cast on the applicability of customary law. The reference to other rules of international law was probably omitted because it was not considered necessary, given that the only rule explicitly laid down for non-international armed conflicts is common Article 3 of the 1949 Conventions, which does not contain provisions relating to the protection of the civilian population as such.¹⁴

Paragraph 2

First sentence

- 4777 This sentence lays down an absolute obligation applicable at all times: “The civilian population as such, as well as individual civilians, shall not be the object of attack.”

Scope of the rule

- 4778 Civilians, whether in groups or individually, may not be made the object of an attack.
- 4779 This rule prohibits launching direct attacks against the civilian population. On the other hand, secondary effects of military operations directed against military objectives,¹⁵ which might incidentally affect the civilian population, are not specifically referred to here.¹⁶
- 4780 The prohibition of direct attack is further corroborated by the use of the expression “the civilian population as such”, taken from the United Nations resolutions on this question.¹⁷

Individuals within the civilian population

- 4781 Article 25, paragraph 3, of the draft adopted in Committee provided that: “The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian

¹⁴ See *O.R.* XV, p. 363, CDDH/III/275.

¹⁵ As regards military objectives, these are defined as follows in Art. 52, para. 2, of Protocol I: “objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. See the commentary on this provision, *supra*, p. 635.

¹⁶ Secondary effects are taken into consideration in the concept of “general protection against the dangers arising from military operations”; see, *supra*, p. 1449.

¹⁷ See Resolution 2444 (XXIII), para. 1(b), and Resolution 2675 (XXV), para. 4; see also *Commentary Drafts*, p. 56 (Art. 26).

character.”¹⁸ This rule, which is contained in Article 50 (*Definition of civilians and civilian population*), paragraph 3, of Protocol I, was not included in Protocol II.

- 4782 It cannot be denied that in situations of non-international armed conflict in particular, the civilian population sometimes shelters certain combatants, and it may be difficult to ascertain the status of individuals making up the population. However, we must point out that if the mere presence of some individuals not protected under paragraph 3 of this article were to permit an attack against a whole group of civilians, the protection enjoyed by the civilian population would become totally illusory. Thus the fact that the Protocol is silent on this point, as on other points, should not be considered to be a licence to attack.

Definition of attack

- 4783 Protocol I defines attacks. This term has the same meaning in Protocol II.¹⁹ Article 49 (*Definitions of attacks and scope of application*), paragraph 1, of Protocol I, reads as follows: ‘Attacks’ means acts of violence against the adversary, whether in offence or defence.” The fact that both attacks in offence or in defence are covered is because the term “attacks” does not cover only acts by those who have initiated the offensive; it is a technical term relating to a specific military operation limited in time and place.²⁰
- 4784 It should be noted that the prohibition of attacks against the civilian population as such, and against individual civilians, remains valid, even if the adversary has committed breaches.²¹ Acts of terrorism, collective punishment and pillage are expressly forbidden in Article 4 (*Fundamental guarantees*) of the Protocol.²² Even unlawful acts on the part of the adverse party cannot justify such measures. Furthermore, a denunciation of the Protocol would not take effect until the end of the armed conflict and could not serve as a justification for failing to fulfil obligations incurred under it.²³

¹⁸ O.R. XV, p. 320, CDDH/215/Rev.1.

¹⁹ From the beginning of the work of the Conference it was agreed that the same meaning should be given this term in both Protocols. See *Commentary Drafts*, p. 157; this definition is based on Art. 3 of the Draft Rules of 1956. See also, *supra*, p. 602.

²⁰ It is important not to confuse the concept of attack in the sense of the Protocol, with that of aggression; see *Commentary Drafts*, pp. 54-55.

²¹ Humanitarian law applies without conditions of reciprocity. Cf. on this point, J. de Preux, “The Geneva Conventions and Reciprocity”, *op. cit.*, pp. 25-29.

²² Art. 4, para. 2(b), (d) and (g): it was thought that “reprisals” were a precise legal concept applicable only to situations of international armed conflict. This problem was discussed at length during the Conference. See commentary Art. 4, para. 2(b), for more detailed discussion, *supra*, p. 1372, note 18, and p. 1374.

²³ Art. 25 of the Protocol (Denunciation) and the commentary thereon, *infra*, p. 1501.

Second sentence

- 4785** “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population. Thus the Draft Rules of Aerial Warfare, prepared in The Hague in 1922, already prohibited such attacks.²⁴ Air raids have often been used as a means of terrorizing the population, but these are not the only methods. For this reason the text contains a much broader expression, namely “acts or threats of violence” so as to cover all possible circumstances.
- 4786** Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror, as one delegate stated during the debates at the Conference.²⁵

Paragraph 3

- 4787** This paragraph defines when civilians are protected: civilians lose their right to protection under this Part if they take a direct part in hostilities and throughout the duration of such participation. The term “direct part in hostilities” is taken from common Article 3, where it was used for the first time. It implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.
- 4788** Hostilities have been defined as “acts of war that by their nature or purpose struck at the personnel and *matériel* of enemy armed forces”.²⁶ However, several delegations considered that the term “hostilities” also covers preparations for combat and returning from combat.²⁷
- 4789** Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian. Anyone suspected of having taken part in hostilities and deprived of his liberty for this reason will have the benefit of the provisions laid down in Articles 4 (*Fundamental guarantees*), 5 (*Persons whose liberty has been restricted*), and 6 (*Penal prosecutions*).²⁸

S.J.

²⁴ Rules Relating to Aerial Warfare and Rules Concerning the Use of Radio in Time of War, drawn up by the Commission of Jurists which was given the task of examining and reporting on the revision of the laws of war, Article 22.

²⁵ O.R. XIV, p. 65, CDDH/III/SR.8, para. 54.

²⁶ *Ibid.*, p. 14, CDDH/III/SR.2, para. 8.

²⁷ O.R. XV, p. 330, CDDH/III/224.

²⁸ See commentary Arts. 4, 5 and 6, *supra*, pp. 1367-1402.

Article 14 – Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Documentary references

Official Records

O.R. I, Part I, p. 195; Part III, p. 40 (Art. 27). *O.R.* IV, pp. 84-87. *O.R.* VII, pp. 135-138, CDDH/SR.52, paras. 79-94. *O.R.* XIV, pp. 135-140, CDDH/III/SR.16, paras. 38-60; pp. 141-150, CDDH/III/SR.17; pp. 151-154, CDDH/III/SR.18, paras. 1-15; p. 176, CDDH/III/SR.20, para. 33; p. 177, para. 44. *O.R.* XV, p. 109, CDDH/III/SR.49, paras. 9-10; p. 267, CDDH/215/Rev.1, para. 20; pp. 279-281, paras. 72-77 and 81-82; p. 394, CDDH/236/Rev.1, para. 57; pp. 399-400, paras. 77-82; p. 422 (Art. 27); p. 443, CDDH/III/353.

Other references

CE/3b, pp. 71-72 and 118-120. *CE 1971, Report*, p. 80, para. 456; p. 81, para. 458; pp. 84-85, paras. 478-480. *CE 1972, Basic Texts*, pp. 38-39 (Art. 16). *CE 1972, Commentaries*, Part II, pp. 41-43 (Art. 16). *CE 1972, Report*, vol. I, pp. 115-117, paras. 2.487-2.496; vol. II, pp. 38-39, *CE/COM II/32-33. Commentary Drafts*, p. 160 (Art. 27). United Nations, A/Res. 2675 (XXV), principles 5-6. United Nations, Report of the Secretary-General A/8052, 1970, para. 42, letters *i, j, f*.

Commentary

General remarks

- 4790** Article 14 implements the general principle of protection laid down in Article 13 (*Protection of the civilian population*).

- 4791 The term “starvation” means the action of subjecting people to famine, i.e., extreme and general scarcity of food.¹ The object of this provision is to prohibit the deliberate provocation of such a situation and to preserve the means of subsistence of the civilian population, in order to give effect to the protection to which it is entitled. It is suitable to interpret the aim of this article in the light of Article 17 (*Prohibition of forced movement of civilians*) and Article 18 (*Relief societies and relief actions*), which may facilitate the determination of its scope as they, too, are a means of applying the general principle.
- 4792 This article is a simplified version of Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 1, and the first half of paragraph 2, of Protocol I, worded in similar terms.
- 4793 The prohibition on using starvation against civilians, and the specific protection given to objects indispensable to the survival of the population, are new rules supplementing and developing existing law. Nevertheless, the problem had already been broached in the Conventions. In fact, Article 23 of the Fourth Convention already provided for assistance to be given to the most vulnerable categories of the civilian population, particularly in the form of foodstuffs.² Mention should also be made of Article 53 of the same Convention, which is aimed at safeguarding property necessary for the existence of civilians under occupation.³
- 4794 As regards the law applicable to non-international armed conflicts, this is a new rule, though it is really only a specific application of common Article 3, which imposes on parties to the conflict the obligation to guarantee humane treatment for all persons not participating in hostilities, and in particular prohibits violence to life.⁴ Such specific legal protection for objects indispensable to the survival of the civilian population is all the more important as Protocol II,⁵ unlike Protocol I,⁶ does not protect civilian objects in general.

First sentence

- 4795 The prohibition on using starvation against civilians is a rule from which no derogation may be made. A form of words whereby it would have been possible to make an exception in case of imperative military necessity was not adopted.⁷

¹ The Shorter Oxford English Dictionary (1978), pp. 724 and 2111.

² Supplemented by Art. 70 of Protocol I (Relief actions); *cf. supra*, p. 815.

³ Supplemented by Art. 69 of Protocol I (Basic needs in occupied territories); *cf. supra*, p. 811.

⁴ Common Article 3, paragraph 1, sub-para (1)(a) *in fine*. It should also be noted that starvation may entail the total or partial disappearance of whole groups of people, which could amount to genocide, if brought about intentionally. Genocide is a crime against humanity, prohibited and punishable under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which applies to any form of genocide, including that perpetrated by a government in its own territory against its own nationals. See *The United Nations and Human Rights*, New York, 1973, p. 16.

⁵ An intervention by the delegation of the Holy See made it possible for this article to be adopted by consensus in a plenary meeting of the Conference. See *O.R.* VII, pp. 135-138, CDDH/SR.52, paras. 79-94.

⁶ Art. 52, Protocol I, and the commentary thereon, *supra*, p. 629.

⁷ *CE 1972, Commentaries*, p. 40.

- 4796 This rule was laid down for the benefit of civilians. Consequently the use of blockade and siege as methods of warfare remain legitimate, provided they are directed exclusively against combatants.⁸
- 4797 It will be recalled that a blockade consists of disrupting the maritime trade of a country or one of its coastal provinces. A siege consists of encircling an enemy location, cutting off those inside from any communication in order to bring about their surrender. A blockade is basically aimed at preventing supplies required for the fighting, i.e., military *matériel*, from reaching the enemy forces and is not directed specifically against civilians. However, the latter are in fact often the first to be affected, particularly children. The same is true of siege, from which civilians are the first to suffer. In some cases they may be evacuated for humanitarian reasons, but up to now there has been no express rule of law forbidding besieging forces to let civilians die of starvation.
- 4798 Thus the prohibition on starving civilians might seem unrealistic to some, but this is by no means the case. Protocol II is conceived in such a way that this humanitarian rule can be respected whatever the circumstances. Article 18 (*Relief societies and relief actions*), paragraph 2, actually provides for the organization of international relief actions in favour of the civilian population when the latter is suffering undue hardship owing to a lack of supplies essential for its survival. Between them these two provisions, which are closely linked, do not allow the argument of military necessity to be used to justify starving the civilian population. As soon as there is a lack of indispensable objects, the international relief actions provided for in Article 18 (*Relief societies and relief actions*) should be authorized to enable the obligation following from Article 14 to be respected.
- 4799 The text refers to methods of combat, while Protocol I, Part III, is entitled “Methods and Means of Warfare”. The ICRC draft proposed to use the same expression “Methods and Means of Combat” in both instruments.⁹ In Protocol I the Conference, however, preferred the term “Methods and Means of Warfare” because the term “combat” can be given a narrower interpretation than the word “warfare”.¹⁰ On the other hand, it was considered inappropriate to refer to warfare in an instrument concerning non-international armed conflicts.¹¹ Yet the Working Group did not attempt to define either of the words used in this first sentence.¹² It was merely a matter of adapting the terminology and warfare was

⁸ According to the Rapporteur of Committee III, the prohibition on starving civilians does not change the law applicable to naval blockade (*O.R.* XV, p. 279, CDDH/215/Rev.1). That law is laid down in the London Declaration Concerning the Laws of Naval War of 24 February 1909, which sets out the conditions for applying a blockade. That Declaration was signed by ten countries and is taken to represent customary law, although it was never ratified. See also commentary Art. 54, Protocol I, *supra*, p. 651. We should point out that in traditional international law, the declaration of a blockade in an internal armed conflict is equivalent to the recognition of belligerency, *supra*, p. 1321. However, “blockade” is a concept of public international law applicable in international armed conflict. That concept is only referred to in the context of Protocol II by analogy with certain factual circumstances.

⁹ *Commentary Drafts*, p. 41 (Protocol I, Part III) and p. 152 (Protocol II, Part IV).

¹⁰ *O.R.* XV, p. 267, CDDH/215/Rev.1, para. 20.

¹¹ *Ibid.*, p. 394, CDDH/236/Rev.1, para. 57.

¹² *Ibid.*, p. 267, CDDH/215/Rev.1, para. 20.

considered to be a more appropriate term in the context of an armed conflict between States.¹³ Starvation is prohibited as a method of combat, i.e., when it is used as a weapon to destroy the civilian population. It should be noted that even if starvation were not subject to an official legal prohibition, it is nowadays no longer an acceptable phenomenon, irrespective of how it arises (natural disaster or induced by man). Increasingly public opinion and public conscience have forced governments to face their responsibilities and prompted the international community to organize relief actions, which are never sufficient in view of the scale of the problem worldwide.

Second sentence

- 4800** This sentence develops the principle prohibiting starvation from being used against civilians by pointing out the most usual ways in which starvation is brought about. By using the word “therefore” certain acts are emphasized, but the list is not exhaustive. Starvation can also result from an omission. To deliberately decide not to take measures to supply the population with objects indispensable for its survival in a way would become a method of combat by default, and would be prohibited under this article.
- 4801** The verbs “attack”, “destroy”, “remove” and “render useless” are used to cover all eventualities, including pollution of water supplies by chemical agents or the destruction of a harvest by defoliants.¹⁴
- 4802** As indicated by the words “such as”, the list of protected objects is illustrative only. In fact, an exhaustive list might well have resulted in omissions or in making a somewhat arbitrary choice of objects.¹⁵
- 4803** “Objects indispensable to the survival of the civilian population” means objects which are of basic importance for the population from the point of view of providing the means of existence.
- 4804** Article 18 (*Relief societies and relief actions*), paragraph 2, mentions “supplies essential for [...] survival”. It may be appropriate to point out that these two expressions are synonymous each in its own context.
- 4805** The terms “foodstuffs” and “agricultural areas for the production of foodstuffs” must be understood in the broadest sense to cover the infinite variety of needs of the populations of different geographical areas throughout the world.
- 4806** The text does not distinguish between objects intended for the armed forces and those intended for civilians. Except for the case where supplies are specifically intended as provisions for combatants, it is prohibited to destroy or attack objects indispensable for survival, even if the adversary may benefit from them. The prohibition would be meaningless if one could invoke the argument that members of the government’s armed forces or armed opposition might make use of the

¹³ See commentary Art. 35, para. 3, Protocol I, *supra*, p. 410, which specifies that the term “methods of warfare” also covers combat, a term which is, for that matter, used several times in that Protocol (Art. 18, para. 3; Art. 65, para. 3).

¹⁴ O.R. XIV, p. 136, CDDH/III/SR.16, para. 41.

¹⁵ *Ibid.*, p. 137, para. 46.

objects in question. Of course, the possibility cannot be excluded that, for example, a source of drinking water might at some point be used by soldiers.

4807 What is the position if such objects hinder the enemy in observation or attack? This might be the case if crops were very tall and were suitable for concealment in a combat zone. It is prohibited to attack or destroy objects with the aim of starving out civilians. However, if the objects are used for military purposes by the adversary, they may become a military objective and it cannot be ruled out that they may have to be destroyed in exceptional cases, though always provided that such action does not risk reducing the civilian population to a state of starvation.¹⁶

4808 Is there a general obligation to respect such objects in the whole of the territory, i.e., not only those situated in the part of the territory controlled by the adversary, but also those in one's own territory?

4809 When the ICRC's expert submitted the article to the Committee, this question was answered affirmatively.¹⁷ During the discussions, this interpretation, which was the object of lengthy discussion in connection with the corresponding article of Protocol I, was neither confirmed nor dismissed with regard to Protocol II. It was argued that in an international armed conflict a State retained freedom of action in the territory under its own control, and that consequently it could not entirely be ruled out that the State would destroy everything on its own side under a "scorched earth" policy in case of imperative military necessity, for example, to halt the advance of enemy troops.

4810 As regards Protocol II, two points deserve a mention: one of a legal and one of a practical nature. In becoming a Contracting Party to the Conventions and to Protocol II, a State anyway accepts for purely humanitarian purposes that certain rules will be applicable to its own nationals within the confines of its own territory. If the characteristics of this sort of situation are taken into consideration, it is clear that objects in the possession of one of the parties may change hands rapidly, several times back and forth, depending on what part of the territory it controls.

4811 Further, it is not admissible that one of the parties could destroy or render useless objects indispensable to the survival of part of the population living in the part of the territory under its control because it suspected that the latter supported or sympathized with the adversary. It should also be recalled that collective punishments and pillage are prohibited by the Protocol.¹⁸

4812 To deprive the civilian population of objects indispensable to its survival usually results in such a population moving elsewhere as it has no other recourse than to flee. Such movements are provoked by the use of starvation, which is in such cases equivalent to the use of force. However, enforced movement is prohibited, except for the cases provided for in Article 17 (*Prohibition of forced movement of civilians*).

¹⁶ See Art. 54, para. 3(b), Protocol I and the commentary thereon, *supra*, p. 650.

¹⁷ O.R. XIV, p. 136, CDDH/III/SR.16, para. 43.

¹⁸ Art. 4, para. 2(b) and (g), *supra*, pp. 1374 and 1376.

4813 In cases where forced displacements are allowed under that article, “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”. If there are shortages, or if the means to organize relief are lacking, the responsible authorities should have recourse to international relief actions, as provided in Article 18 (*Relief societies and relief actions*), paragraph 2.

S.J.

Protocol II

Article 15 – Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Documentary references

Official Records

O.R. I, Part I, p. 195; Part III, p. 41 (Art. 28). *O.R.* IV, pp. 88-89. *O.R.* VII, p. 138, CDDH/SR.52, para. 95. *O.R.* XIV, pp. 154-160, CDDH/III/SR.18, paras. 16-48; p. 165, CDDH/III/SR.19, para. 14; pp. 175-179, CDDH/III/SR.20, paras. 28-56; p. 391, CDDH/III/SR.37, paras. 16-17; pp. 392-394, paras. 21-33. *O.R.* XV, pp. 293-294, CDDH/215/Rev.1, paras. 135-143; p. 323, *id.*, Annex (Art. 28); pp. 265-266, CDDH/III/275; p. 467, CDDH/407/Rev.1, paras. 70 and 72; p. 524, CDDH/III/391.

Other references

CE/3b, pp. 72, 75 and 134; p. 056, Annex XIX (Art. 17). *CE 1971, Report*, pp. 80-81, paras. 456-459; p. 92, *CE/COM III/26-27*; pp. 97-99, *CE/COM III/44* (Art. 15). *CE 1972, Report*, vol. I, pp. 116-117, para. 2.494; p. 146, paras. 3.136-3.137; vol. II, p. 82, *CE/COM III/PC 104. Commentary Drafts*, pp. 160-161 (Art. 28).

Commentary

General remarks

4814 During the conflicts which have characterized the last forty years, works and installations containing dangerous forces, particularly dykes and dams, have often

been the object of attacks and destruction resulting in serious consequences and leading to heavy losses among the civilian population.¹

4815 In order to safeguard the civilian population from this sort of catastrophe, the ICRC had already proposed immunity for such works and installations in its Draft Rules of 1956 for the Limitation of the Dangers incurred by the Civilian Population in Time of War.² It will be recalled that those Rules were drawn up for all kinds of armed conflict, irrespective of whether they are internal or international.³

4816 Article 15 has the same tenor as the first sentence of paragraph 1 of Article 56 of Protocol I (*Protection of works and installations containing dangerous forces*).⁴ The simultaneous negotiation of these two provisions in Committee led to some additions being made to the draft presented by the ICRC.⁵ These consisted of the ways in which the protection of such works and installations could be applied.⁶ The text as finally adopted was reduced to the simplest essentials; unlike Article 56 of Protocol I (*Protection of works and installations containing dangerous forces*), it expresses the general principle without providing for any exceptions, which means that the rule is stated more categorically.

4817 Protocol II does not set out to protect civilian objects generally.⁷ Works and installations containing dangerous forces are the object of special protection because of the serious consequences that may ensue if they are destroyed.

Text of the article

4818 This provision is aimed at protecting the civilian population against the effects which might result from the release of dangerous forces such as large quantities of water or radioactivity. For this purpose it prohibits attacks on dams, dykes and nuclear electrical generating stations if such attacks could release dangerous forces causing severe losses among the civilian population, even assuming such works and installations to be military objectives.⁸ The list is exhaustive, which does not mean that there are not other kinds of works or installations whose destruction is likely to entail heavy losses among the civilian population. Thus, for example, the problem of storage facilities for crude oil and oil products and the risks of oil rigs were raised during the Diplomatic Conference.⁹ In the end it was only possible to arrive at a consensus on the items listed above, though this does not exclude the protection of other types of installations under different international legal régimes.

¹ See historical information given in commentary Art. 56, Protocol I, *supra*, p. 665.

² Art. 17.

³ *Ibid.*, Art. 2.

⁴ Apart from some slight differences in the wording of the French text of the article.

⁵ Draft Art. 28. See commentary, *infra*, p. 1463.

⁶ O.R. XV, p. 323, CDDH/215/Rev.1.

⁷ See introduction to this Part, *in fine, supra*, p. 1446.

⁸ The concept of military objectives is defined in Art. 52, para. 2, Protocol I. Reference may be made to the commentary thereon, *supra*, p. 635.

⁹ O.R. XV, p. 352, CDDH/III/264/Rev.1.

- 4819** The extent of the protection of works and installations covered in this article is limited to cases in which an attack may cause severe losses among the civilian population. Thus such objects are not protected in themselves, but only to the extent that their destruction would release forces dangerous for the civilian population.
- 4820** This means that, assuming such a work or installation were a military objective, it could be attacked as long as the civilian population were not seriously endangered thereby. On the other hand, protection is automatic, irrespective of the civilian, military or combined use made of the installation or works, whenever an attack could cause the release of dangerous forces resulting in severe losses among the civilian population.
- 4821** The term “severe losses” is taken from military terminology, and clearly this must be judged in good faith on the basis of objective elements, such as the existence of densely populated areas of civilians (villages or towns) in the area which would be affected by the release of dangerous forces.
- 4822** The ICRC draft provided that the parties to the conflict would endeavour not to locate military objectives in the vicinity of such objects, in order to prevent the danger of indirect attacks, i.e., the incidental effects of an attack directed against a nearby military objective.¹⁰ In the absence of this special provision, which was not retained,¹¹ it is appropriate to recall that the civilian population is entitled to general protection against the effects of hostilities.¹² In any case, the prohibition laid down in this article covers attacks on military objectives in the direct vicinity of works or installations which might very well have the incidental effect of releasing dangerous forces and seriously injuring the civilian population. On the other hand, consciously locating military objectives in the vicinity of such works or installations would constitute a violation of the principle laid down in Article 13 (*Protection of the civilian population*), paragraph 1.
- 4823** Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 7, of Protocol I, provides for the optional identification of works and installations containing dangerous forces by means of three bright orange circles. A precise description is given in Annex I to Protocol I (Article 16 - *International special sign*).¹³
- 4824** This special optional identification is not specified in Protocol II. If a country were to decide to adopt it in time of peace for Protocol I, the identification would of course retain the same function and the same purpose in case of non-international armed conflict. However, such identification, which has an optional character, does not have the same importance in a situation covered by Protocol II. In fact, the forces engaged in a confrontation could be expected to be familiar with the location of dams, dykes and nuclear electrical generating stations, since

¹⁰ Draft Art. 28, para. 2.

¹¹ O.R. IV, p. 90, CDDH/427.

¹² See Art. 13 and the commentary thereon, *supra*, p. 1447.

¹³ See commentary Art. 56, para. 7, of Protocol I, *supra*, p. 675, and Article 16 of Annex I thereto, *supra*, p. 1295.

they are situated in their own country, in the territory of which the hostilities are taking place. Moreover, this element might play a favourable role in their protection as it is the interests of both of the parties to the conflict not to destroy such works and installations.

S.J.

Protocol II

Article 16 – Protection of cultural objects and of places of worship

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Documentary references

Official Records

O.R. I, Part I, p. 196. *O.R.* III, p. 213, CDDH/III/17. *O.R.* IV, pp. 65-66 (Art. 20 *bis*). *O.R.* VII, pp. 114-118, CDDH/SR.51, paras. 56-93; pp. 125-128, CDDH/SR.52, paras. 1-25; pp. 141-143, CDDH/SR.53, paras. 1-12; pp. 156-163, *id.*, Annex (Finland, Holy See, India, Indonesia, Netherlands, United Kingdom). *O.R.* XV, p. 107, CDDH/III/SR.49, para. 3; pp. 110-111, paras. 13-17, 19 and 21; p. 211, CDDH/III/SR.59, para. 11; p. 220, paras. 65 and 68-69; pp. 394-395, CDDH/236/Rev.1, paras. 60-63; p. 418, *id.*, Annex I; p. 437, CDDH/III/353; p. 456, CDDH/407/Rev.1, para. 30; p. 466, para. 68; p. 501, *id.*, Annex II; p. 520, CDDH/III/391.

Other references

CE/3b, pp. 70-71; pp. 022-025 (Annex VIII). *CRCE 1972, Report*, p. 68 (Annex I, point 08). J. de Breucker, "Pour les vingt ans de la Convention de La Haye du 14 mai 1954 pour la protection des biens culturels", *RBDI*, 1975/2. S.E. Nahlik, "La protection internationale des biens culturels en cas de conflit armé", 120 *Hague Recueil*, 1967/II, p. 61.

Commentary

General remarks

- 4825** This article corresponds to Article 53 (*Protection of cultural objects and places of worship*), sub-paragraphs (a) and (b), of Protocol I.¹ It includes cultural objects and places of worship amongst the small number of objects protected under Protocol II.
- 4826** As protection of cultural objects in the event of armed conflict was already dealt with by the Hague Convention of 1954,² adopted under the auspices of UNESCO, the ICRC had not proposed any rules relating to this matter in the draft Protocols. The basis for this provision was an amendment submitted to Committee III during the third session of the Diplomatic Conference.³
- 4827** The inclusion of the protection of cultural objects in the Protocols is aimed at highlighting the importance of safeguarding the heritage of mankind. The sponsors of the proposal also justified it on the ground that not all States are yet bound by the above-mentioned Hague Convention.⁴
- 4828** This article was the object of heated controversy, in particular concerning the question whether places of worship should be mentioned and whether there should be an express provision that it is without prejudice to the application of the Hague Convention. Thus, the reference to places of worship and the spiritual heritage of peoples, which was included in the initial text, was deleted in Committee and later reintroduced by an amendment submitted in the plenary meetings.⁵ These two points will be developed below.
- 4829** It should be noted that two delegations, while supporting the principle that cultural objects should be protected, considered that such a rule should not be included in a simplified instrument, when many other humanitarian norms, particularly those relating to the conduct of hostilities, were not retained.⁶

¹ Reference may be made to the commentary on Art. 53, Protocol I, *supra*, p. 639.

² The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, hereafter referred to as “the Hague Convention”, Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and the Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

³ O.R. IV, p. 65, CDDH/III/GT/95. During the second session of the Conference a similar proposal was submitted for Protocol I (O.R. III, p. 213, CDDH/III/17), and this was later taken up for Protocol II, without the reference to the prohibition of reprisals.

⁴ Moreover, the Conference adopted Resolution 20 on the protection of cultural property, inviting States to become Parties. For the list of States Parties, *cf. infra*, p. 1549.

⁵ See O.R. XV, p. 501, CDDH/407/Rev.1, Annex II; O.R. IV, pp. 65-66, CDDH/436 and CDDH/436/Rev.1 and Corr.1; O.R. VII, p. 115, CDDH/SR.51, para. 64; p. 141, CDDH/SR.53, para. 1.

⁶ O.R. VII, pp. 156-157, 162-163, CDDH/SR.53, Annex (Finland, United Kingdom); for other reasons for a negative vote or an abstention, *cf. ibid.*, pp. 159-162 (India, Indonesia, Netherlands). When it was finally put to the vote, the article was adopted by 35 votes to 15 with 32 abstentions (*ibid.*, p. 142, CDDH/SR.53, para. 6).

Reference to the Hague Convention

- 4830 This clarifies the relationship between the two instruments so as to avoid divergent interpretations.
- 4831 The Hague Convention is explicitly applicable in the event of non-international armed conflicts.⁷
- 4832 The expression “without prejudice to” means that the conditions of application of the Convention are not modified by the Protocol,⁸ only of course as far as a Contracting Party is bound by the Convention. If it is not, only Article 16 applies.
- 4833 The protection granted by the Convention is more extensive in one sense. In fact, it prescribes, on the one hand, that cultural property should be safeguarded against the foreseeable effects of armed conflict, which implies that measures must already be taken in peacetime;⁹ on the other hand, it prescribes respect for such property by refraining from any use of the property and its immediate surroundings, as well as appliances used for its protection, for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and also by refraining from any act of hostility directed against them.¹⁰
- 4834 Moreover, the High Contracting Parties undertake to prohibit, prevent and, if necessary, put an end to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property. It should be noted that the Convention allows for the possibility of derogation in the case of imperative military necessity,¹¹ while Article 16 of the Protocol prohibits any act of hostility without exception.
- 4835 Finally, the Hague Convention provides for special protection to be granted to a limited number of refuges, centres containing monuments, and other immovable cultural property of very great importance, provided that they:
- are situated at an adequate distance from any important military objective;
 - are not used for military purposes;

⁷ Art. 19 of the Convention:

“Conflicts not of an International Character

1. In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

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

3. The United Nations Educational, Scientific and Cultural Organization may offer its services to the Parties to the conflict.

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

⁸ In the French version the term “sans préjudice” used in Article 53, Protocol I, is replaced by “sous réserve” in this article without any change in meaning, as shown by the fact that the same term “without prejudice” is used in the English text of both articles. See *O.R.* VII, p. 143, CDDH/SR.53, para. 12.

⁹ See Arts. 3 and 19 of the Hague Convention.

¹⁰ See Arts. 4, para. 1, of the Hague Convention.

¹¹ *Ibid.*, Art. 4, para. 2.

– are entered in the “International Register of Cultural Property under Special Protection” drawn up by UNESCO.¹²

4836 The rule providing general protection as laid down in Article 4, paragraph 1, of the Convention may be waived in case of imperative military necessity. However, the rule providing immunity to property under special protection can be set aside only in case of unavoidable military necessity and this can be established only by the officer commanding a force the equivalent of a division in size or larger; moreover, the opposing party must be notified (Article 11, paragraph 2, of the Convention).

4837 It should be noted that, unlike Article 53 (*Protection of cultural objects and of places of worship*) of Protocol I, the article under consideration here does not make reference to other applicable international instruments. In the absence of an explanation on this point in the Official Records, it may be recalled that the Hague Conventions of 1907¹³ are not specifically applicable to non-international armed conflicts. As regards the Roerich Pact,¹⁴ this was intended to apply in times of peace as well as war, so that it is applicable at all times. On the other hand, it seems that the Conference did omit a reference to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property as well as the Convention concerning the Protection of World Cultural and Natural Heritage, adopted by UNESCO in 1970 and 1972 respectively.¹⁵ These omissions have no material consequences on protection.

Historic monuments and works of art

4838 The present article contains a generic reference to historic monuments and works of art, which should be understood in the generally accepted sense of these words. In this respect, Article 1 of the Hague Convention serves as a useful point of reference; it gives the following definition:

“Definition of Cultural Property

For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership:

a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as

¹² See Art. 8 of the Hague Convention: “Granting of special protection”. It should be noted that so far with one exception, special protection has only been granted to refugees.

¹³ Arts. 27 and 56 of the Hague Regulations of 1907. Also cf. Art. 5 of the Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War, and commentary Art. 53, Protocol I, *supra*, p. 639.

¹⁴ Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the “Roerich Pact”, after its originator, Professor Nicolas Roerich, adopted on 15 April 1935.

¹⁵ *Official records of the General Conference of UNESCO*, 16th and 17th sessions.

well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph a);

c) centres containing a large amount of cultural property as defined in sub-paragraphs a) and b), to be known as ‘centres containing monuments’.”

Places of worship

4839 The article includes a reference to places of worship. Although some delegations wished all places of worship to be covered,¹⁶ only the most important “which constitute the cultural or spiritual heritage of peoples” are actually included. These are places which have a spiritual importance independently of their cultural significance, and express the belief of a people.¹⁷

Cultural and spiritual heritage

4840 The “cultural and spiritual heritage of peoples” means those objects of which the importance transcends national borders and which are unique due to their relation to the history and culture of a people.¹⁸

4841 The original proposal referred to the heritage of a country, but it was considered better to use the term heritage “of peoples”, since problems of intolerance could arise with respect to religions which do not belong to the country concerned, and with respect to places where such religions are practised.

4842 The clause “which constitute the cultural or spiritual heritage of peoples” is intended to clarify the expressions “historic monuments, works of art or places of worship”, and refers to all three.¹⁹

4843 In general the adjective “spiritual” applies to places of worship, but it may be that a historic monument or work of art is attributed spiritual importance in the sense that it contributes to spiritual life. Similarly, a religious building may be of cultural value.

4844 The above-mentioned Article 1 of the Hague Convention refers to property which is “of great importance to the cultural heritage of every people”, while the Protocol refers to objects “which constitute the cultural or spiritual heritage of peoples”. It does not seem that these expressions have a different meaning. However, the reference to places of worship and to the spiritual heritage makes

¹⁶ See *O.R.* XV, p. 395, CDDH/236/Rev.1, para. 62.

¹⁷ In this context the term “people” refers to a cultural concept. For the legal concept of “people”, see commentary Art. 1, para. 4, Protocol I, *supra*, p. 41.

¹⁸ *O.R.* XV, p. 220, CDDH/III/SR.59, para. 68.

¹⁹ *Ibid.*, p. 111, CDDH/III/SR.49, para. 17.

the definition of protected objects more precise by introducing the criterion of spirituality. Furthermore, it follows from the text and the debates that the Conference intended to protect in particular the most important objects, a category akin to property granted special protection as provided in Article 8 of the Hague Convention. The fact that the text does not allow for any possibility of derogation also seems to suggest this.

The scope of the rule of protection

4845 Protection of cultural objects and places of worship is achieved by means of two complementary rules, each involving a prohibition:

- 1) it is prohibited to commit “any acts of hostility directed against”. An act of hostility means any act related to the conflict which prejudices or may prejudice the physical integrity of protected objects. In fact, the article does not only prohibit the bringing about of deleterious effects as such, but any acts *directed* against protected objects. Thus it is not necessary for there to be any damage for this provision to be violated;²⁰
- 2) it is prohibited to use protected objects in support of the military effort.

4846 “Military effort” means any military activities undertaken for the conduct of hostilities. The second prohibition is the counterpart of the first, indispensable to ensure respect for this rule. If such objects were used in support of the military effort, they could become military objectives, assuming that their total or partial destruction offered the adversary a specific military advantage, and as a result their protection would become illusory. In such a situation the question is if and exactly at what moment there is a right to attack such protected objects in the event that the second prohibition is not respected. Such a possibility should not be accepted without duly taking into account the fact that the objects concerned are of exceptional interest and universal value. All possible measures should be taken to endeavour putting a stop to any use in support of the military effort (by giving due warnings, for example) in order to prevent the objects from being destroyed or damaged. In any case this is the spirit of the provision: it is an invitation to safeguard the heritage of mankind.

S.J.

²⁰ On this point see also commentary Art. 53, sub-para. (a), Protocol I, *supra*, p. 647.

Article 17 – Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Documentary references

Official Records

O.R. I, Part I, p. 196; Part III, p.41 (Art. 29). *O.R.* IV, pp. 94-95. *O.R.* VII, p. 143, CDDH/SR.53, para. 14; p. 156, *id.*, Annex (Cyprus). *O.R.* XIV, p. 198, CDDH/III/SR.22, para. 7; pp. 224-227, CDDH/III/SR.24, paras. 44-59; pp. 229-231, CDDH/III/SR.25, paras. 1-15; pp. 391-394, CDDH/III/SR.37, paras. 18-33. *O.R.* XV, p. 213, CDDH/III/SR.59, paras. 21-25; pp. 288-296, CDDH/215/Rev.1, paras. 147-153; p. 367, CDDH/III/275 (Art. 29); p. 524, CDDH/III/391 (Art. 29).

Other references

CE/3b, p. 033 (Annex). *CE/6b*, pp. 29-30. *CE 1972, Report*, vol. I, p. 117, para. 2.503; vol. II, p. 50, *CE/COM II/85. Commentary Drafts*, p. 161 (Art. 29).

Commentary

General remarks

- 4847 The prohibition of forced movement is an important element in the protection of the civilian population. In fact, such displacements are all too often considered as measures falling within the range of military operations, and all too often

civilians are uprooted from their homes and forced to live in difficult or even quite unacceptable conditions.

4848 The problem was raised in 1949. In fact, Article 49 of the Fourth Convention already laid down some norms as protection against deportations, transfers and evacuations in or from occupied territories, and it was not considered necessary to supplement these rules in Protocol I.

4849 However common Article 3 is silent on this matter.¹ And yet the problem is particularly acute in situations of non-international armed conflict in which there have been cases, for example, of the forced movement of ethnic groups and national groups opposed to the central government.

4850 Article 17 serves to fill this gap in the protection. The ICRC introduced this provision in its draft; it was based on a proposal put forward by experts in 1972 and inspired by the wording of Article 49 of the Fourth Convention.² The text which was adopted, with a few additions, has the same tenor as the original draft.³

4851 It should be noted that the present article only covers forced movement and does not, of course, restrict the right of civilians to move about freely within the country, subject to any restrictions that may be imposed by the circumstances, or to go abroad.⁴

Paragraph 1

4852 This paragraph covers displacements of the civilian population as individuals or in groups within the territory of a Contracting Party where a conflict, within the meaning of Article 1 (*Material field of application*), is taking place. Forced movement beyond the national boundaries is dealt with in paragraph 2.

First sentence

4853 This sentence prohibits the forced displacement of the civilian population, except in exceptional circumstances of two kinds:

- 1) The security of the civilian population. It is self-evident that a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited.
- 2) Imperative military reasons. Military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. In this case, military necessity is qualified by referring to

¹ Although common Art. 3 is silent on the question of transfers as such, it does prohibit inhumane and degrading treatment.

² See *CE 1972, Report*, Vol. II, p. 50, CE/COM II/85, and Art. 49, paras. 1-3, Fourth Convention. See also Resolution 2675 (XXV) of the United Nations General Assembly, Principle 7.

³ Draft Art. 29.

⁴ *O.R. XIV*, p. 224, CDDH/III/SR.24, para. 46.

“imperative military reasons”; Article 49 of the Fourth Convention also refers to “imperative military reasons”. The French text uses a slightly different expression: “impérieuses raisons” while the Spanish text uses here the expression “razones imperiosas”. All these terms mean the same thing. The situation should be scrutinized most carefully as the adjective “imperative” reduces to a minimum cases in which displacement may be ordered.

4854 Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.

4855 The article prohibits forced movements “for reasons related to the conflict”. In fact, displacement may prove to be necessary in certain cases of epidemics or natural disasters such as floods or earthquakes. Such circumstances are not covered by Article 17, and this clarification was included in the text for that reason.⁵

Second sentence

4856 In accordance with this paragraph, forced movements must remain exceptional and be limited to cases where it is required by the security of the civilian population or imperative military reasons. In such cases “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”. Obviously the same conditions should apply to the movement itself. These practical points are aimed at guaranteeing the displaced population with decent living conditions. They are based on Article 49, paragraph 3, of the Fourth Convention. Security conditions are related to the location of camps intended for accommodating the population; they should not be situated in the vicinity of military operations and military objectives.⁶

4857 Like Article 49 of the Fourth Convention, Article 17 emphasizes that all possible measures must be taken. The reference to “all possible measures” takes into account the fact that there might be practical difficulties, but even so it should not serve to reduce the effect of the obligation in any way. It is essentially concerned with cases where evacuation may have to be improvised on short notice and where urgency is essential in order to protect the population against imminent and unforeseen dangers.⁷

Paragraph 2

4858 This paragraph prohibits compelling civilians to leave their own country for reasons connected with the conflict.

⁵ O.R. XV, p. 295, CDDH/215/Rev.1, paras. 149-150.

⁶ O.R. XIV, p. 224, CDDH/III/SR.24, paras. 44-47. On the concept of military objectives, see Art. 52, para. 2, of Protocol I, and the commentary thereon, *supra*, p. 635.

⁷ See *Commentary IV*, p. 281 (Art. 49).

- 4859 First, there is a question whether, within the meaning of this provision, the term “territory” is equivalent to country. The ICRC draft referred to “national territory”.⁸ Some amendments proposed substituting the formula “across the frontiers of the country of origin”.⁹ It is clear that there was never any doubt in anyone’s mind that the phrase was intended to refer to the whole of the territory of a country. However, the text states that it is prohibited to compel civilians to leave “their own territory”. In fact, this formula appears to be better suited to all the possible cases which might arise in a situation covered by Protocol II, and to take into account, in particular, situations where the insurgent party is in control of an extensive part of the territory. In this case the insurgents, too, should respect the obligation laid down here, and not compel civilians to leave the area under their authority.¹⁰
- 4860 The prohibition covers measures taken against civilians, either individually or in groups.
- 4861 An example would be expulsion of groups of civilians across the boundaries by armed forces or armed groups because of military operations. Basically these are the kind of cases that the Conference intended to cover.
- 4862 The problem may prove to be more complex in individual cases. In our view, to get one or more people to leave the country by means of threats should also be considered as forced movement.
- 4863 What is the position as regards deportation measures obliging an individual to leave his country?
- 4864 If such a measure arises from the situation of conflict, it constitutes forced movement within the meaning of this article; however, this conclusion is not without possible exceptions as, for example, a sentence following conviction giving the option to leave the territory, might not be considered as such.
- 4865 If the conviction is not related to the conflict, it is clear that that measure is not covered by the article under consideration here.
- 4866 Some delegations preferred to include explicit exceptions, but these were not adopted for the sake of simplification of the text.¹¹
- 4867 In specific cases each Contracting Party will probably seek an interpretation related to already existing national legislation on this subject, without losing sight of the humanitarian aim of the obligation imposed upon it by this article.
- 4868 Finally, it should be noted that national legislation concerning aliens is not affected by this provision.¹²

S.J.

⁸ Draft Art. 29.

⁹ *O.R.* IV, p. 94, CDDH/III/12 and CDDH/III/327.

¹⁰ See *O.R.* XIV, p. 325, CDDH/III/SR.24, para. 52.

¹¹ See *O.R.* XV, p. 324, CDDH/215/Rev.1 (Art. 29). The text read as follows: “except in cases in which individuals finally convicted of crimes are required to leave that territory or having been offered the opportunity of leaving the territory, elect to do so, or individuals are extradited in conformity with law”. See also *O.R.* IV, p. 103, CDDH/427.

¹² See *Commentary Drafts*, p. 161.

Protocol II

Article 18 – Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Documentary references

Official Records

O.R. I, Part I, p. 197; Part III, p. 43 (Arts. 33 and 35). *O.R.* IV, pp. 51 and 105-107. *O.R.* VII, pp. 145-150, CDDH/SR.53, paras. 23-61; pp. 155-158, *id.*, Annex (Australia, Belgium, Federal Republic of Germany, Holy See); pp. 163-164 (Cameroon). *O.R.* XII, pp. 348-354, CDDH/II/SR.88, paras. 24-50; pp. 403-412, CDDH/II/SR.94; pp. 413-419, CDDH/II/SR.95, paras. 2-46; p. 455, CDDH/II/SR.98, para. 1. *O.R.* XIII, p. 194, CDDH/221/Rev.1, Annex I (Art. 14); p. 384, CDDH/406/Rev.1, paras. 93-99; p. 396, *id.*, Annex (Art. 15); pp. 441-442, CDDH/II/440.

Other references

CE/3b, pp. 121-123. *CE/5b*, pp. 70-78. *CRCE 1971, Report*, p. 41. *CE 1971, Report*, p. 59 (Art. 23); p. 85, paras. 482-483. *CE 1972, Basic Texts*, p. 43 (Art. 33). *CE 1972, Commentaries*, Part II, pp. 71-72 (Art. 33). *CRCE 1972, Report*, p. 56. *CE 1972, Report*, vol. I, pp. 87-90, paras. 2.236-2.266; pp. 91-92, paras. 2.273-2.278. *Commentary Drafts*, pp. 167-168 (Art. 35).

Commentary**Historical background and general remarks**

4869 Article 18 is aimed at permitting and facilitating humanitarian activities in non-international armed conflicts for the purpose of assisting victims wherever they are and assuring them the protection to which they are entitled. Common Article 3 does not mention relief actions, and this gap has often been apparent in practice: for this reason the ICRC and the Red Cross Movement as a whole have wished to remedy it for a long time.¹ In 1957 the XIXth International Conference of the Red Cross had already adopted a resolution aimed at supplementing common Article 3 in the field of medical assistance.²

4870 In 1969 the XXIst International Conference of the Red Cross adopted a resolution entitled “Declaration of Principles for International Humanitarian Relief the Civilian Populations in Disaster Situations”.³ No distinction was made between international and non-international armed conflicts, and States were

“requested to exercise their sovereign and other legal rights so as to facilitate the transit, admission and distribution of relief supplies provided by impartial international humanitarian organizations for the benefit of civilian populations in disaster areas when disaster situations imperil the life and welfare of such populations”.⁴

Subsequently the United Nations General Assembly indicated that this statement was also applicable in situations of armed conflict.⁵ Although the suffering and the needs of civilian populations are much the same, irrespective of the type of conflict, the legal framework for organizing relief actions is much more difficult to set up in case of internal armed conflict. During the Diplomatic Conference, States in many cases showed themselves to be more concerned with preserving their national sovereignty than with undertaking to facilitate relief actions in all circumstances. This concern resulted in the adoption of a single provision with regard to assistance and relief: Article 18, which merely sets out the fundamental principles on which relief actions are based, without elaborating in any detail how they are to be implemented. The article lays down the conditions under which

¹ *CE 1972, Report*, Vol. I, p. 57, para. 2.23.

² Resolution XVII on medical care, XIXth International Conference of the Red Cross, New Delhi, 1957.

³ Resolution XXVI, XXIst International Conference of the Red Cross, Istanbul, 1969, *International Red Cross Handbook*, *op. cit.*, 12th ed., p. 661. See also introduction to Part IV, Section II, Protocol I.

⁴ Resolution XXVI, sub-para. (5), XXIst Conference, Istanbul, 1969.

⁵ Resolution 2675 (XXV) of the United Nations, Principle 8: “The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in Resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.”

victims of conflicts may be assisted and protected while giving States every guarantee of non-intervention; it consists of two paragraphs which each have a separate scope and purpose though they complement each other. Paragraph 1 deals with humanitarian assistance within the frontiers of the State in whose territory the armed conflict is taking place, while paragraph 2 provides for the possibility of organizing international relief actions there.⁶

Paragraph 1 – Activities of relief societies

4871 The whole of this provision is based on the principle that States are primarily responsible for organizing relief. Relief societies such as the Red Cross and Red Crescent organizations⁷ are called upon to play an auxiliary role by assisting the authorities in their task.

4872 The term “relief society” should be understood in its traditional broad sense.⁸ The Red Cross Movement, while playing a role of prime importance, does not have a monopoly on humanitarian activities, and there are other organizations capable of providing effective assistance.⁹

4873 As regards the activities of the Red Cross, it has proved particularly important to ensure the continuity of activities during a conflict so that assistance may be available to victims wherever they are. Article 63 of the Fourth Convention already met this concern in occupied territories.¹⁰ In a non-international armed conflict the central organization may be paralysed as a result of hostilities and local sections must be able to act independently when necessary. It was for this reason that the term “Red Cross organizations” was chosen, as it covers not only National Society in a narrow sense, but also its divisions, which may be located in part of the territory under the control of the adverse party. The same term also covers the case of a “Red Cross Society” set up during the hostilities which, while not recognized as such, nevertheless acts in accordance with the fundamental principles of the Red Cross as laid down by the International Conferences of the Red Cross.¹¹

⁶ In Protocol I, these rules are developed in the following Articles: Art. 17: Role of the civilian population and of aid societies, Art. 70: Relief actions and Art. 81: Activities of the Red Cross and other humanitarian organizations, *supra*, pp. 209, 815 and 935.

⁷ On the name and the emblem of the red lion and sun, *cf. supra*, commentary Art. 9, note 10, p. 1419.

⁸ The term “relief societies” originated in the Hague Regulations of 1899 Respecting the Laws and Customs of War on Land (Art. 15). It was used in the 1907 Regulations, and again in all the Geneva Conventions (1906: Art. 10; 1929: Art. 10; 1949: Arts. 18 and 26 of the First Convention, for example).

⁹ See *Commentary I*, p. 225 (Art. 26).

¹⁰ See *Commentary IV*, p. 330 (Art. 63).

¹¹ See *O.R.* pp. 348-354, CDDH/II/SR.88, paras. 24-50.

Role of the civilian population

4874 This paragraph provides *in fine* for the role which may be played by the civilian population by collecting and caring for the wounded, sick and shipwrecked.¹² This idea, which is new in the regulation of non-international armed conflict, actually follows from the original tenets of humanitarian law; the original Convention of 1864 already provided that “inhabitants of the country who bring help to the wounded shall be respected and shall remain free”.¹³

4875 Article 18, paragraph 2, of the First Convention of 1949, provides that:

“The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality.”

The phrase “collect and care for” was retained in Protocol II, and has kept the same meaning.¹⁴

4876 However, this article does not go as far as the Conventions, as it merely authorizes the civilian population to offer its services on its own initiative, and allows the authorities the possibility of declining such an offer. As drafted, the same restriction applies to the first sentence as regards activities of relief societies. This was a last minute reticence, as the draft put forward by the Committees of the Conference provided that the civilian population and relief societies “shall be permitted [...] to care for”.¹⁵ However, this wording should have no detrimental effect if the parties to the conflict fulfil their obligations. In fact, all possible measures must be taken to search, collect and care for the wounded, sick and shipwrecked;¹⁶ it is clear therefore that the authorities cannot arbitrarily refuse offers of assistance from relief societies and the civilian population in the face of urgent needs. It is also clear – though perhaps a reminder is in order – that the civilian population, whether or not directly participating in helping victims, must in all circumstances respect the wounded, sick and shipwrecked of either party.¹⁷

Paragraph 2 – International relief actions

4877 This paragraph lays down the principle that international relief actions should be undertaken in cases where “the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival”.

¹² Originally the role of the civilian population was dealt with in a separate article in the draft (Art. 14); it was subsequently incorporated into Art. 18 of Protocol II; see *O.R.* XIII, p. 194, CDDH/221/Rev.1, and *O.R.* IV, p. 51, CDDH/427.

¹³ Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field, Art. 5, para. 1.

¹⁴ The words “care for” implies “leaving the inhabitants completely free to undertake the entire treatment of a wounded or sick person until the time of his final recovery, if they wish to do so and possess the necessary means”. “To ‘collect’ a wounded man is to receive him into one’s house. But it may also mean to bring him in from where he is lying wounded.” *Commentary I*, p. 187 (Art. 18).

¹⁵ *O.R.* XIII, p. 194, CDDH/221/Rev.1.

¹⁶ Art. 7: Protection and care, and Art. 8: Search, see *supra*, pp. 1407 and 1413.

¹⁷ Art. 7, para. 1.

- 4878** Such external aid is complementary; it is only provided when the responsible authorities can no longer meet the basic necessities of the civilian population whose survival is in jeopardy.
- 4879** What is meant in particular is relief actions which may be undertaken by the ICRC or any other impartial humanitarian organization.
- 4880** The beneficiaries of such actions are civilians. The civilian population means all persons who do not or no longer participate in hostilities, including those deprived of their liberty for having committed an act related to the conflict. For that matter, Protocol II expressly recognizes the right of persons deprived of their liberty to receive relief.¹⁸
- 4881** Clearly it is not possible to draw up an exhaustive list of criteria to determine at what point the population is suffering “undue hardship”, but it is appropriate to take into account the usual standard of living of the population concerned and the needs provoked by hostilities,¹⁹ particularly medical requirements which are covered by the very general term “medical supplies”. In such circumstances consignments of relief are essential.
- 4882** International relief actions are based on fundamental conditions which provide every guarantee of non-intervention: i.e., that they are “of an exclusively humanitarian and impartial nature and [...] are conducted without any adverse distinction”.²⁰
- 4883** When these two conditions are fulfilled, relief actions “shall be undertaken subject to the consent of the High Contracting Party concerned”.
- 4884** In principle the “High Contracting Party concerned” means the government in power. In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay.
- 4885** The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. In fact, they are the only way of combating starvation when local resources have been exhausted. The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken. Consequently this would be a violation of Article 14 of the Protocol (*Protection of objects indispensable to the survival of the civilian population*).²¹

¹⁸ Art. 5, para. 1(c), *supra*, p. 1388.

¹⁹ See *Commentary Drafts*, p. 166.

²⁰ For the interpretation of this term see commentary Art. 70, Protocol I, *supra*, p. 815. It should be noted that a general guarantee of non-interference is explicitly laid down in Art. 3, para. 2, of Protocol II, which reads as follows: “Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.”; see *supra*, p. 1363.

²¹ See the commentary on the article, *supra*, p. 1455.

- 4886** Moreover, it should be noted that this provision requires that relief actions “shall be undertaken”. The use of the future tense implies an obligation which appears also in other versions of the text, for example, the French one: “seront entreprises”.
- 4887** If relief actions were carried out with great care and precision as to technical detail, it may be possible to overcome political or security objections which might be raised. The actions would have to strictly comply with any conditions that might be imposed (examples: arrangement of transits in accordance with a precise timetable and itinerary, checking on convoys).
- 4888** Implementation in such a way would serve to clearly establish responsibilities. Once relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys.
- 4889** In return, assistance by a humanitarian organization provides some important guarantees, for such organizations are run in such a way as to undertake and share responsibilities with the authorities at various levels:
- 1) *Vis-à-vis the victims*:
The humanitarian organization ensures that the assistance goes only to the beneficiaries, giving priority to the most vulnerable among them (women, children etc.). Professional methods and experience are valuable aids (for example, supervision of the distribution by means of marking recipients’ hands with indelible ink).
 - 2) *Vis-à-vis the authorities themselves*:
The humanitarian organization guarantees that there will be no illegal traffic and the authorities control its activities.
 - 3) *Vis-à-vis the donors*:
The humanitarian organization is in a position to give guarantees to those providing the relief that consignments will not serve any other purposes than those for which they are intended; its presence and its action, for which it must render accounts, will vouch for that.
- 4890** Such a guarantee of the proper use of relief is likely to enable the authorities to get more support from the international community.
- 4891** Article 18, paragraph 2, does not in any way reduces the ICRC’s right of initiative, as laid down in common Article 3²² since the conditions of application of the latter remain unchanged.²³
- 4892** Consequently the ICRC continues to be entitled to offer its services to each party without such a step being considered as interference in the internal affairs of the State or as infringing its sovereignty, whether or not the offer is accepted.
- 4893** In a case where the Protocol were no longer be applied, the ICRC, by the very nature of the mandate entrusted to it by the international community, would have

²² “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.” (para. 2).

²³ Art. 1, para. 1; see commentary Art. 1, *supra*, p. 1347.

to do all it could to ensure that the general principles of humanitarian law were safeguarded.

4894 With a view to the interests of victims it could undertake a relief action to assist them, wherever they are, while fully meeting its responsibilities, in particular as regards impartiality and non-discrimination.

S.J.

Part V – Final provisions

Documentary references (for the whole of the Part)*

Official Records

O.R. IV, pp. 113-121. *O.R.* VII, pp. 152-153, CDDH/SR.53, paras. 71-75. *O.R.* IX, pp. 356-362, CDDH/I/SR.67, paras. 7-44; p. 475, CDDH/I/SR.76, paras. 8-10. *O.R.* X, p. 246, CDDH/405/Rev.1, paras. 30-32.

Other references

CE 1972, Basic Texts, pp. 44-45 (final provisions). *CE 1972, Commentaries*, Part I, pp. 160-169 (final provisions); Part II, pp. 82-83 (final provisions). *CE 1972, Report*, vol. I, pp. 195-199, paras. 4.177-4.211. *Commentary Drafts*, pp. 171-176 (final provisions). Vienna Convention on the Law of Treaties (Parts II, III, VII and VIII).

Introduction

Purpose and content

4895 The purpose of this Part is to lay down rules on the way in which States may express their will to be bound by the Protocol (Article 20 – *Signature*, Article 21 – *Ratification*, Article 22 – *Accession*), and on the way in which they are bound by this instrument (Article 23 – *Entry into force*, Article 24 – *Amendment*, Article 25 – *Denunciation*), on formalities of notification and registration (Articles 26 – *Notifications* and 27 – *Registration*) and on authentic texts (Article 28 – *Authentic texts*).¹ In addition, it lays down the principle that the Protocol has to be disseminated, in Article 19 (*Dissemination*). With the exception of the two provisions relating to dissemination and denunciation,² these are formal matters which are resolved and formulated in the same way as in Protocol I, and the ICRC draft was adopted without modifications.

* However, the commentary on Art. 19 includes some references to the relevant documents.

¹ *O.R.* IX, p. 356, CDDH/I/SR.67, para. 8.

² See *infra*, pp. 1487 and 1501.

A brief historical note

- 4896 To a large extent the drawing up of the draft took into account the Vienna Convention on the Law of Treaties. The ICRC was guided, in particular, by the work of the International Law Commission of the United Nations in the field of the codification and progressive development of the law of treaties.³

Adoption

- 4897 During the Diplomatic Conference the final clauses of the two Protocols were entrusted to Working Group C of Committee I. In view of the fact that the wording of the provisions is identical, the articles of Protocol II were adopted by consensus without any discussion, after the corresponding articles of Protocol I had been discussed, and these had not given rise to any great controversy either.⁴
- 4898 As these articles are identical as regards their substance and structure, no separate commentary is necessary for Protocol II; therefore the reader is referred to the commentary on Articles 92 (*Signature*), 93 (*Ratification*), 94 (*Accession*), 95 (*Entry into force*), 97 (*Amendment*), 100 (*Notifications*), 101 (*Registration*) and 102 (*Authentic texts*) of Protocol I, which also applies for the corresponding final provisions of Protocol II.
- 4899 On the other hand, Article 19 (*Dissemination*) and Article 25 (*Denunciation*) are different, and therefore require a separate commentary.

Dissemination

- 4900 Strictly speaking, Article 19 (*Dissemination*) is not a final provision, but rather a measure of implementation. The draft contained a part specifically devoted to execution.⁵ Only the article concerning dissemination was retained in the final version of the Protocol. Therefore the Part, having lost its purpose, disappeared, and the one provision retained was included in Part V, “Final Provisions”. This simplification did not have any effect on the substance. In fact, it was provided, first of all, that parties to the conflict should take measures to ensure observance of the Protocol;⁶ that obligation follows in any case from Article 1 (*Material field of application*), paragraph 1, of the Protocol. Next, this Part contained two reminders: on the one hand, the possibility parties had to conclude special agreements,⁷ and on the other, the possibility of inviting an impartial

³ See United Nations, *United Nations Conference on the Law of Treaties, Official Records*, 1st and 2nd sessions, New York, 1971. This work also contains draft articles on the law of treaties with comments adopted by the International Law Commission at its 18th session. Cf. also *Commentary Drafts*, p. 171 and note 20 (Part VIII).

⁴ O.R. IX, p. 475, CDDH/I/SR.76, para. 8; O.R. X, pp. 202-205, CDDH/405/Rev.1, paras. 131-157.

⁵ Part VII of the draft (Execution of the present Protocol), Arts. 36-39.

⁶ Draft Art. 36 (Measures for execution).

⁷ *Ibid.*, Art. 38 (Special agreements).

humanitarian organization such as the ICRC to co-operate in the observance of the provisions of the Protocol.⁸ These two rules are already contained in common Article 3, and consequently also apply for Protocol II.⁹

Denunciation provision

- 4901 The ICRC did not consider it necessary to include a denunciation provision in the draft of Protocol II. Working Group C of Committee I submitted a proposal¹⁰ from a concern to maintain symmetry with Protocol I. This was adopted by consensus and constitutes the present Article 25 (*Denunciation*).¹¹ In this respect it should be noted that there is an omission in Articles 26 (*Notifications*) and 27 (*Registration*), as these do not mention notification of denunciation to Parties to the Conventions and to the Secretariat of the United Nations. As that article was adopted in Committee before the proposal to include a provision on denunciation was submitted, this was probably merely a technical error.

Reservations

- 4902 As in Protocol I, Protocol II does not contain a special provision concerning the possibility of making reservations. This consequently remains subject to the law of treaties. On this point, reference may also be made to the commentary on Protocol I.¹²

S.J.

⁸ *Ibid.*, Art. 39 (Co-operation in the observance of the present Protocol).

⁹ Common Art. 3, paras. 2-3. On this point see also introduction to Part I and Art. 18, para. 2, *supra*, pp. 1343 and 1478.

¹⁰ O.R. IV, p. 118, CDDH/I/350/Rev.1.

¹¹ See commentary Art. 25, *infra*, p. 1501.

¹² Cf. introduction to Part VI, Protocol I, *supra*, p. 1059.

Article 19 – Dissemination

This Protocol shall be disseminated as widely as possible.

Documentary references

Official Records

O.R. I, Part I, p. 196; Part III, p. 44 (Art. 37). *O.R.* IV, p. 110. *O.R.* VII, p. 151, CDDH/SR.53, para. 62. *O.R.* IX, pp. 232-234, CDDH/I/SR.58, paras. 48-55; pp. 241-244, CDDH/I/SR.59, paras. 29-44; pp. 285-289, CDDH/I/SR.62, paras. 3-32; p. 308, CDDH/I/SR.64, para. 16; p. 311, para. 32; p. 480, CDDH/I/SR.76, para. 43. *O.R.* X, pp. 155-156, CDDH/I/323/Rev.1.

Other references

CE 1971, Report, p. 112. *CE 1972, Basic Texts*, p. 44 (Art. 39). *CE 1972, Commentaries*, Part II, pp. 76-78 (Art. 37). *CE 1972, Report*, vol. I, p. 96, paras. 2.319 and 2.326. *Commentary Drafts*, pp. 169-170 (Art. 37).

Commentary

- 4903 Dissemination is a legal obligation under the Conventions,¹ reaffirmed and developed in the Protocols. It is based on the obligation undertaken by States when ratifying or acceding to the Conventions to “respect and to ensure respect [...] in all circumstances”, which also applies to common Article 3.²
- 4904 However, we are concerned here with the first express mention of this obligation in the regulation of non-international armed conflicts. Protocol II develops and supplements common Article 3,³ so that dissemination of the one is inextricably bound up with dissemination of the other.

¹ Art. 47/48/127/144 of the Conventions.

² Common Article 1 of the Conventions.

³ See Art. 1, para. 1, Protocol II, and the commentary thereon, *supra*, p. 1350.

- 4905 The ICRC draft⁴ laid down more detailed measures by making a distinction between dissemination which should be implemented in time of peace and that required in time of armed conflict, and also according to whether it was intended for the armed forces or for civilians. Similar indications are given in the corresponding Article 83 of Protocol I (*Dissemination*). Only the brief wording of the article under consideration here was retained. It merely lays down an obligation in general, without specifying what it entails.
- 4906 Dissemination should be carried out as widely as possible. The choice of means is left to the Contracting Party or to the parties to the conflict. Some delegations argued that an unduly detailed provision could produce difficulties for States,⁵ particularly as regards implementation in time of armed conflict.
- 4907 Dissemination plays two important roles which are emphasized in Resolution 21 relating to this subject, adopted at the end of the Diplomatic Conference; on the one hand, knowledge of the law is a factor for the effective application of the law, on the other, it is a factor for engendering a spirit of peace.
- 4908 There is no mechanism in Protocol II designed to guarantee its application such as that of Protecting Powers or their substitute.⁶ Therefore dissemination is *a fortiori* an essential measure of application.⁷ In fact, the ICRC had included it in Part VII of its draft on measures for execution of the Protocol.⁸
- 4909 It is self-evident that in time of peace the obligation falls on the Contracting Party. In case of an armed conflict which meets the criteria of Article 1 of the Protocol (*Material field of application*), it will be up to both the government authorities and those responsible in the insurgent party, to take all necessary measures for disseminating the contents of the instrument to those carrying responsibility under their authority, military personnel as well as civilians.
- 4910 A law that is not known cannot be applied, but a knowledge of the law should not be restricted to situations of conflict, for over and above rules of law, it is a matter of inculcating moral principles with a view to limiting violence and preserving peace. Thus dissemination should properly be seen in its context; it is fully recognized by the United Nations as an integral part of education aimed at preserving world peace by promoting “understanding, tolerance and friendship among all nations”, in accordance with the Universal Declaration of Human Rights.⁹
- 4911 At a practical level, it may at first sight seem difficult for a State to disseminate rules applicable in a potential situation of non-international armed conflict. However, hope of getting protection under Protocol II cannot in itself prompt a Party to initiate such a conflict; the deep-rooted reasons that could give rise to such conflicts are of quite a different nature.¹⁰

⁴ Draft Art. 37.

⁵ O.R. IX, p. 243, CDDH/I/SR.59, para. 39.

⁶ However, it should be recalled that an impartial humanitarian organization such as the ICRC may assist in supervising the application of common Article 3 (under the terms of its paragraph 2) and of the Protocol. See introduction to Part I, *supra*, p. 1343.

⁷ See O.R. IX, p. 241, CDDH/I/SR.59, para. 30.

⁸ In the end the Part “Execution of the present Protocol” (Arts. 36-39 of the draft) was not adopted as such. On this point, see introduction to Part V, *supra*, p. 1483.

⁹ Universal Declaration of Human Rights, Art. 26, para. 2.

¹⁰ O.R. IX, p. 242, CDDH/I/SR.59, para. 33.

- 4912 However, it should especially be recalled that the philosophy and principles of humanitarian law remain the same whatever the nature of the conflict. The same is true for instruction. For example, in military training programmes the behaviour which soldiers should be taught such as respect for and protection of enemies *hors de combat*, the wounded and civilians, are exactly the same. In academic fields, instruction in the law of armed conflict, as urged by the United Nations,¹¹ follows naturally from the teaching of human rights, both being systems of law protecting human beings in specific circumstances. These two bodies of law are already being taught in certain institutions under a single integrated programme.¹²
- 4913 Brief though Article 19 is, its adoption represents a significant development. It intimates that the purely humanitarian quality of the rules governing non-international armed conflicts is recognized, and that disseminating them contributes to creating a spirit of peace without in any way acting as an incitement to rebellion.¹³

S.J.

¹¹ Resolutions 2852 (XXVI), 3032 (XXVII), 3500 (XXX) and 32/34 of the United Nations General Assembly.

¹² For example, the International Institute of Human Rights (Strasbourg); Inter-American Institute of Human Rights (San José, Costa Rica).

¹³ See also commentary Art. 83, Protocol I, *supra*, p. 959.

Protocol II

Article 20 – Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

4914 Cf. references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 92 of Protocol I, *supra*, p. 1067.

Protocol II

Article 21 – Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

4915 *Cf.* references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 93 of Protocol I, *supra*, p. 1071.

Protocol II

Article 22 – Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

4916 Cf. references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 94 of Protocol I, *supra*, p. 1075.

Protocol II

Article 23 – Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.
2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

4917 *Cf.* references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 95 of Protocol I, *supra*, p. 1079.

Protocol II

Article 24 – Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.
2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

4918 Cf. references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 97 of Protocol I, *supra*, p. 1093.

Article 25 – Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.
2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

Commentary

General remarks

4919 This provision is based on a proposal of Working Group C of Committee I. It was not contained in the ICRC draft.¹ It was adopted by consensus and became the present Article 25.²

4920 This is a simplified version of Article 99 of Protocol I (*Denunciation*) adapted for the special context of situations of non-international armed conflicts. The Conventions all have a provision on denunciation³ and therefore it was considered logical for Protocol I, which supplements and develops them, to also contain such a right.⁴ On the other hand, the ICRC draft did not contain a denunciation provision for Protocol II. This approach was based on the fact that the instrument would only be applied in the territory of one High Contracting Party and would not concern relations between States. It seemed to the ICRC that a State which has undertaken to respect the fundamental humanitarian guarantees vis-à-vis its own nationals in the circumstances referred to in Article

¹ O.R. IV, p. 118, CDDH/I/350/Rev.1 (Art. 44 *bis*).

² O.R. IX, p. 475, CDDH/I/SR.76, para. 10.

³ Arts. 63/62/142/158 common to the Conventions.

⁴ *Commentary Drafts*, p. 108 (Art. 87).

1 of the Protocol (*Material field of application*) would have no reason at all to denounce such an instrument.

- 4921 In fact, it was from a concern to maintain uniformity with Protocol I that such a provision was incorporated in the final provisions of Protocol II. It is to note that up to now there has been no case of denunciation of the Conventions, which leads one to hope that the right to take such step will remain theoretical.

Paragraph 1

- 4922 This paragraph constitutes a recognition of the right to denounce the Protocol, while limiting the effects of such denunciation. It is a unilateral right of the High Contracting Party. The denunciation takes effect six months after notification in writing to the depositary in accordance with paragraph 2. This period is shorter than that of one year, adopted for the Conventions and for Protocol I. The Official Records do not give a reason for this difference. No doubt it should be seen as a reflection of the intention of the Conference to reserve a broad prerogative for States in their internal sphere.

- 4923 The effect of the denunciation is suspended when a Contracting Party is engaged in a situation referred to in Article 1 of the Protocol (*Material field of application*) at the time that it notifies its intent to denounce the Protocol or during the following six months.⁵ In such a case, despite the denunciation by the State concerned, the Protocol will continue to be applicable until “the end of the armed conflict”. This term should be understood in the same way as in Article 2 (*Personal field of application*), paragraph 2, i.e., the end of active hostilities, the point at which military operations on both sides cease.

- 4924 Moreover, those who are still deprived of their liberty or whose liberty is still restricted for reasons related to the armed conflict, continue to enjoy the protection of the Protocol until their final release. This measure is virtually the same as that laid down in Article 2 of the Protocol (*Personal field of application*).

- 4925 The reference to persons deprived of their liberty, or whose liberty has been restricted, covers everyone whose liberty is restricted in any way.⁶ Although the text does not specifically say so, the group of persons protected in this way includes those who are detained for reasons related to the conflict only at the end of hostilities, and not only those who had already been deprived of their liberty before and had not yet been released.⁷

- 4926 The provisions of the Protocol which such persons continue to enjoy are those of Part II (*Humane treatment*), viz., Article 4 (*Fundamental guarantees*), Article 5 (*Persons whose liberty has been restricted*) and Article 6 (*Penal prosecutions*).

⁵ Similarly, any denunciation of the Conventions would be kept in abeyance if the denouncing Party were in a situation as described in the common Articles 2 or 3 on the date when it denounces the Conventions, or at any time during the twelve months following that date (Arts. 63/62/142/158 common to the Conventions).

⁶ See Art. 2, para. 2, and Art. 5, para. 3, and the commentary thereon, *supra*, pp. 1360 and 1393.

⁷ See commentary Art. 2, para. 2, *supra*, p. 1360.

Paragraph 2

- 4927 Any denunciation, like ratification and accession, should be made by a notification in writing to the depositary, which shall transmit it to all the High Contracting Parties.
- 4928 Notification of a denunciation to the Parties to the Conventions and to the Secretariat of the United Nations is not provided for in Articles 26 (*Notifications*) and 27 (*Registration*).⁸ This omission should be considered as a technical error resulting from the fact that the denunciation provision under consideration here was adopted only after the above-mentioned articles.⁹
- 4929 Should the case ever arise, this omission should obviously be rectified and a notification made.

S.J.

⁸ Unlike the corresponding Articles 100 and 101 of Protocol I, *cf. supra*, p. 1113 and 1117.

⁹ See introduction to this Part, *supra*, p. 1483.

Protocol II

Article 26 – Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:

- (a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;
- (b) the date of entry into force of this Protocol under Article 23; and
- (c) communications and declarations received under Article 24.

4930 Cf. references and introduction to this Part, *supra*, p. 1483 (in particular the paragraph under the heading of “denunciation provision”) and the commentary on Article 100 of Protocol I, *supra*, p. 1113.

Protocol II

Article 27 – Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.
2. The depositary shall also inform the Secretariat of the United Nations of all ratifications and accessions received by it with respect to this Protocol.

4931 Cf. references and introduction to this Part, *supra*, p. 1483 (in particular the paragraph under the heading of “denunciation provision”) and the commentary on Article 101 of Protocol I, *supra*, p. 1117.

Protocol II

Article 28 – Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

4932 *Cf.* references and introduction to this Part, *supra*, p. 1483 and the commentary on Article 102 of Protocol I, *supra*, p. 1119.

Resolutions Adopted at the Fourth Session of the Diplomatic Conference (CDDH)* and Extracts from the Final Act

* Only Resolutions 17, 18, 19, 20, 21, 22 and 24 of the fourth session of the Conference are reproduced here. Those adopted during the first three sessions, and Resolution 23 adopted at the fourth, concern the work of the Conference and are not general in scope. For the text of all the Resolutions see *O.R.* I, Part I, p. 201 (4th session); Part II, p. 1 (for the 4 sessions).

RESOLUTION 17**Use of certain electronic and visual means of identification by medical aircraft protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Considering that:

- (a) in order to avoid their engagement by combatant forces there is an urgent need for both electronic and visual identification of medical aircraft in flight,
- (b) the Secondary Surveillance Radar (SSR) systems has the capability of providing unique identification of aircraft and of *en route* flight details,
- (c) the International Civil Aviation Organization is the most appropriate international body to designate SSR modes and codes in the range of circumstances envisaged,
- (d) this Conference has agreed to the use of a flashing blue light as a means of visual identification to be employed only by aircraft exclusively engaged in medical transport,¹

Recognizing that the designation in advance of an exclusive, world-wide SSR mode and code for the identification of medical aircraft may not be possible owing to the extensive deployment of the SSR system,

1. *Requests* the President of the Conference to transmit to the International Civil Aviation Organization this document, together with the attached documents of this Conference, inviting that Organization to:
 - (a) establish appropriate procedures for the designation, in case of an international armed conflict, of an exclusive SSR mode and code to be employed by medical aircraft concerned; and,
 - (b) note the agreement of this Conference to recognize the flashing blue light as a means of identification of medical aircraft, and provide for that use in the appropriate International Civil Aviation Organization documents;
2. *Urges* the Governments invited to the present Conference to lend their full co-operation to this endeavour in the consultative processes of the International Civil Aviation Organization.

*Fifty-fourth plenary meeting
7 June 1977*

¹ See Annex to this Resolution.

Annex**Articles 6 and 8 of the Regulations contained in Annex I to Protocol I***Article 6 – Light signal*

1. The light signal, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended blue colour is obtained by using, as trichromatic co-ordinates:
 green boundary $y = 0.065 + 0.805x$
 white boundary $y = 0.400 - x$
 purple boundary $x = 0.133 + 0.600y$
 The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.
2. Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible.
3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles and medical ships and craft, the use of such signals for other vehicles or ships is not prohibited.

Article 8 – Electronic identification

1. The Secondary Surveillance Radar (SSR) system as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used to identify and to follow the course of medical aircraft. The SSR mode and code to be reserved for the exclusive use of medical aircraft shall be established by the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, in accordance with procedures to be recommended by the International Civil Aviation Organization.
2. Parties to a conflict may, by special agreement between them, establish for their use a similar electronic system for the identification of medical vehicles and medical ships and craft.

RESOLUTION 18

Use of visual signalling for identification of medical transports protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Considering that:

- (a) in order to avoid attacks upon them there is a need for the improved visual identification of medical transports,
- (b) this Conference has agreed to the use of a flashing blue light as a means of visual identification to be employed only by aircraft exclusively engaged in medical transport,¹
- (c) by special agreement, Parties to a conflict may reserve the use of a flashing blue light for the identification of medical vehicles and medical ships and craft, but, in the absence of such agreement, the use of such signals for other vehicles or ships is not prohibited;
- (d) in addition to the distinctive emblem and the flashing blue light, other means of visual identification, such as signal flags and combinations of flares, may be used eventually to identify medical transports,
- (e) the Inter-Governmental Maritime Consultative Organization is the most appropriate international body to designate and promulgate visual signals to be employed within the maritime environment,

Having noted that, though the Geneva Conventions of 12 August 1949 recognize the use of the distinctive emblem to be flown by hospital ships and medical craft, this use is not reflected in relevant documents of the Inter-Governmental Maritime Consultative Organization,

1. *Request* the President of the Conference to transmit to the Inter-Governmental Maritime Consultative Organization this resolution, together with the documents of this Conference, inviting that Organization to:
 - (a) consider introduction into the appropriate documents, such as the International Code of Signals, the flashing blue light as described in Article 6 of Chapter III of the Regulations contained in Annex I to Protocol I;
 - (b) provide for recognition of the distinctive emblem in the appropriate documents (see Article 3 of Chapter II of the said Regulations);

¹ See Annex to this Resolution.

- (c) consider the establishment both of unique flag signals and of a flare combination, such as white-red-white, which might be used for additional or alternative visual identification of medical transports;
2. *Urges* the Governments invited to this Conference to lend their full co-operation to this endeavour in the consultative processes of the Inter-Governmental Maritime Consultative Organization.

*Fifty-fourth plenary meeting
7 June 1977*

Annex

Articles 3, 6, 10 and 11 of the Regulations contained in Annex I to Protocol I

Article 3 – Shape and nature

1. The distinctive emblem (red on a white ground) shall be as large as appropriate under the circumstances. For the shapes of the cross, the crescent or the lion and sun, the High Contracting Parties may be guided by the models shown in Figure 2.
2. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.



Fig. 2: Distinctive emblems in red on a white ground

Article 6 – Light signal

1. The light signal, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended blue colour is obtained by using, as trichromatic co-ordinates:

green boundary	$y = 0.065 + 0.805x$
white boundary	$y = 0.400 - x$
purple boundary	$x = 0.133 + 0.600y$

The recommended flashing rate of the blue light is between sixty and one hundred flashes per minute.

2. Medical aircraft should be equipped with such lights as may be necessary to make the light signal visible in as many directions as possible.
3. In the absence of a special agreement between the Parties to the conflict reserving the use of flashing blue lights for the identification of medical vehicles and ships and craft, the use of such signals for other vehicles or ships is not prohibited.

Article 10 – Use of international codes

Medical units and transports may also use the codes and signals laid down by the International Telecommunication Union, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization. These codes and signals shall be used in accordance with the standards, practices and procedures established by these Organizations.

Article 11 – Other means of communication

When two-way radiocommunication is not possible, the signals provided for in the International Code of Signals adopted by the Inter-Governmental Maritime Consultative Organization or in the appropriate Annex to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used.

RESOLUTION 19**Use of radiocommunications for announcing and identifying medical transports protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Considering that:

- (a) it is vital that distinctive and reliable communications be used for identifying, and announcing the movement of, medical transports,
- (b) adequate and appropriate consideration will be given to communications related to the movement of a medical transport only if it is identified by an internationally recognized priority signal such as "Red Cross", "Humanity", "Mercy" or other technically and phonetically recognizable term,
- (c) the wide range of circumstances under which a conflict may occur makes it impossible to select in advance suitable radio frequencies for communications,
- (d) the radio frequencies to be employed for communicating information relative to the identification and movement of medical transport must be made known to all parties who may use medical transports,

Having noted:

- (a) Recommendation No. 2 of the International Telecommunication Union (ITU) Plenipotentiary Conference, 1973, relating to the use of radiocommunications for announcing and identifying hospital ships and medical aircraft protected under the Geneva Conventions of 1949,
- (b) Recommendation No. Mar2-17 of the International Telecommunication Union World Maritime Administrative Radio Conference, Geneva, 1974, relating to the use of radiocommunications for marking, identifying, locating, and communicating with the means of transport protected under the Geneva Conventions of 12 August 1949, concerning the protection of war victims and any additional instruments of those conventions, as well as for ensuring the safety of ships and aircraft of States not Parties to an armed conflict;
- (c) the memorandum by the International Frequency Registration Board (IFRB), a permanent organ of the International Telecommunication Union (ITU), relating to the need for national co-ordination on radiocommunication matters;

Recognizing that:

- (a) – the designation and use of frequencies, including the use of distress frequencies,
 - operating procedures in the Mobile Service,

- the distress, alarm, urgency and safety signals, and
 - the order of priority of communications in the Mobile service
- are governed by the Radio Regulations annexed to the International Telecommunication Convention;
- (b) these Regulations may be revised only by a competent ITU World Administrative Radio Conference;
 - (c) the next competent World Administrative Radio Conference is planned for 1979 and that written proposals for the revision of the Radio Regulations should be submitted by Governments about one year before the opening of the Conference,
1. *Takes note with appreciation* that a specific item has been included on the agenda of the World Administrative Radio Conference, Geneva, 1979, which reads:

“2.6 to study the technical aspects of the use of radiocommunications for marking, identifying, locating and communicating with the means of medical transport protected under the 1949 Geneva Conventions and any additional instruments of these Conventions”;
 2. *Requests* the President of the Conference to transmit this document to all Governments and organizations invited to the present Conference, together with the attachments representing the requirements, both for radio frequencies and for international recognition of an appropriate priority signal, which must be satisfied in the proceedings of a competent World Administrative Radio Conference;¹
 3. *Urges* the Governments invited to the present Conference to make, as a matter of urgency, the appropriate preparations for the World Administrative Radio Conference to be held in 1979 so that the vital requirements of communications for protected medical transports in armed conflicts may be adequately provided for in the Radio Regulations.

*Fifty-fourth plenary meeting
7 June 1977*

¹ See Annex to this Resolution.

Annex**Articles 7, 8 and 9 of the Regulations contained in Annex I to Protocol I***Article 7 – Radio Signal*

1. The radio signal shall consist of a radiotelephonic or radiotelegraphic message preceded by a distinctive priority signal to be designated and approved by a World Administrative Radio Conference of the International Telecommunication Union. It shall be transmitted three times before the call sign of the medical transport involved. This message shall be transmitted in English at appropriate intervals on a frequency or frequencies specified pursuant to paragraph 3. The use of the priority signal shall be restricted exclusively to medical units and transports.
2. The radio message preceded by the distinctive priority signal mentioned in paragraph 1 shall convey the following data:
 - (a) call sign of the medical transport;
 - (b) position of the medical transport;
 - (c) number and type of medical transports;
 - (d) intended route;
 - (e) estimated time *en route* and of departure and arrival, as appropriate;
 - (f) any other information such as flight altitude, radio frequencies guarded, languages and secondary surveillance radar modes and codes.
3. In order to facilitate the communications referred to in paragraphs 1 and 2, as well as the communications referred to in Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol, the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, may designate, in accordance with the Table of Frequency Allocations in the Radio Regulations annexed to the International Telecommunication Convention, and publish selected national frequencies to be used by them for such communications. These frequencies shall be notified to the International Telecommunication Union in accordance with procedures to be approved by a World Administrative Radio Conference.

Article 8 – Electronic identification

1. The Secondary Surveillance Radar (SSR) system, as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944, as amended from time to time, may be used to identify and to follow the course of medical aircraft. The SSR mode and code to be reserved for the exclusive use of medical aircraft shall be established by the High Contracting Parties, the Parties to a conflict, or one of the Parties to a conflict, acting in agreement or alone, in accordance with procedures to be recommended by the International Civil Aviation Organization.
2. Parties to a conflict may, by special agreement between them, establish for their use a similar electronic system for the identification of medical vehicles, and medical ships and craft.

Article 9 – Radiocommunications

The priority signal provided for in Article 7 of these Regulations may precede appropriate radiocommunications by medical units and transports in the application of the procedures carried out under Articles 22, 23, 25, 26, 27, 28, 29, 30 and 31 of the Protocol.

RESOLUTION 20**Protection of cultural property**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Welcoming the adoption of Article 53 relating to the protection of cultural objects and places of worship as defined in the said Article, contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),

Acknowledging that the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocol, signed at The Hague on 14 May 1954, constitutes an instrument of paramount importance for the international protection of the cultural heritage of all mankind against the effects of armed conflict and that the application of this Convention will in no way be prejudiced by the adoption of the Article referred to in the preceding paragraph,

Urges States which have not yet done so to become Parties to the aforementioned Convention.

*Fifty-fifth plenary meeting
7 June 1977*

RESOLUTION 21**Dissemination of knowledge of international humanitarian law
applicable in armed conflicts**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Convinced that a sound knowledge of international humanitarian law is an essential factor for its effective application,

Confident that widespread knowledge of that law will contribute to the promotion of humanitarian ideals and a spirit of peace among nations,

1. *Reminds* the High Contracting Parties that under the four Geneva Conventions of 1949 they have undertaken to disseminate knowledge of those Conventions as widely as possible, and that the Protocols adopted by the Conference reaffirm and extend that obligation;
2. *Invites* the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:
 - (a) encouraging the authorities concerned to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities, in a manner suited to national circumstances;
 - (b) undertaking in peacetime the training of suitable persons to teach international humanitarian law and to facilitate the application thereof, in accordance with Articles 6 and 82 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);
 - (c) recommending that the appropriate authorities intensify the teaching of international humanitarian law in universities (faculties of law, political science, medicine, etc.);
 - (d) recommending to educational authorities the introduction of courses on the principles of international humanitarian law in secondary and similar schools;
3. *Urges* National Red Cross, Red Crescent and Red Lion and Sun Societies to offer their services to the authorities in their own countries with a view to the effective dissemination of knowledge of international humanitarian law;
4. *Invites* the International Committee of the Red Cross to participate actively in the effort to disseminate knowledge of international humanitarian law by, *inter alia*:
 - (a) publishing material that will assist in teaching international humanitarian law, and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols.

- (b) organizing, on its own initiative or when requested by Governments or National Societies, seminars and courses on international humanitarian law, and co-operating for that purpose with States and appropriate institutions.

Fifty-fifth plenary meeting
7 June 1977

RESOLUTION 22**Follow-up regarding prohibition or restriction of use
of certain conventional weapons**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Having met at Geneva for four sessions, in 1974, 1975, 1976 and 1977, and having adopted new humanitarian rules relating to armed conflicts and methods and means of warfare,

Convinced that the suffering of the civilian population and combatants could be significantly reduced if agreements can be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects,

Recalling that the issue of prohibitions or restrictions for humanitarian reasons of the use of specific conventional weapons has been the subject of substantive discussion in the *Ad Hoc* Committee on Conventional Weapons of the Conference at all its four sessions, and at the Conferences of Government Experts held under the auspices of the international Committee of the Red Cross in 1974 at Lucerne and in 1976 at Lugano,

Recalling, in this connexion, discussions and relevant resolutions of the General Assembly of the United Nations and appeals made by several Heads of State and Government,

Having concluded, from these discussions, that agreement exists on the desirability of prohibiting the use of conventional weapons, the primary effect of which is to injure by fragments not detectable by X-ray, and that there is a wide area of agreement with regard to landmines and booby-traps,

Having also devoted efforts to the further narrowing down of divergent views on the desirability of prohibiting or restricting the use of incendiary weapons, including napalm,

Having also considered the effects of the use of other conventional weapons, such as small calibre projectiles and certain blast and fragmentation weapons, and having begun the consideration of the possibility of prohibiting or restricting the use of such weapons,

Recognizing that it is important that this work continue and be pursued with the urgency required by evident humanitarian considerations,

Believing that further work should both build upon the areas of agreement thus far identified and include the search for further areas of agreement and should, in each case, seek the broadest possible agreement,

1. *Resolves* to send the report of the *Ad Hoc* Committee and the proposals presented in that Committee to the Governments of States represented at the Conference and to the Secretary-General of the United Nations;
2. *Request* that serious and early consideration be given to these documents and to the reports of the Conferences of Government Experts of Lucerne and Lugano;
3. *Recommends* that a Conference of Governments should be convened not later than 1979 with a view to reaching:
 - (a) agreements on prohibitions or restrictions on the use of specific conventional weapons including those which may be deemed to be excessively injurious or have indiscriminate effects, taking into account humanitarian and military considerations; and
 - (b) agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further such agreements;
4. *Urges* that consultations be undertaken prior to the consideration of this question at the thirty-second session of the United Nations General Assembly for the purpose of reaching agreement on the steps to be taken in preparation for the Conference;
5. *Recommends* that a consultative meeting of all interested Governments be convened during September/October 1977 for this purpose;
6. *Recommends further* that the States participating in these consultations should consider *inter alia* the establishment of a Preparatory Committee which would seek to establish the best possible basis for the achievement at the Conference of agreements as envisaged in this resolution;
7. *Invites* the General Assembly of the United Nations at its thirty-second session, in the light of the results of the consultations undertaken pursuant to paragraph 4 of this resolution, to take any further action that may be necessary for the holding of the Conference in 1979.

Fifty-seventh plenary meeting
9 June 1977

RESOLUTION 24**Expression of gratitude to the host country**

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,

Having been convened at Geneva at the invitation of the Swiss Government,

Having held four sessions, in 1974, 1975, 1976 and 1977, during which it considered two draft Protocols additional to the Geneva Conventions of 12 August 1949, which had been prepared by the International Committee of the Red Cross,

Having benefited throughout its four sessions from the facilities placed at its disposal by the Government of Switzerland and by the authorities of the Republic and Canton and of the City of Geneva,

Profoundly appreciative of the hospitality and courtesy accorded to the participants of the Conference by the Government of Switzerland and by the authorities and the people of the Republic and Canton of Geneva and of the City of Geneva,

Having concluded its work by the adoption of two Protocols additional to the Geneva Conventions of 12 August 1949 and of various resolutions,

1. *Expresses* its sincere gratitude to the Government of Switzerland for its unfailing support for the work of the Conference and in particular to Mr. Pierre Graber, President of the Conference, Federal Councillor, Head of the Federal Political Department of the Swiss Confederation, whose wise and firm guidance has contributed so much to the Conference's success;
2. *Expresses* its sincere gratitude to the authorities and the people of the Republic and Canton of Geneva and of the City of Geneva for the generous hospitality and courtesy which they showed to the Conference and those participating in it;
3. *Pays a tribute* to the International Committee of the Red Cross and to its representatives and experts who devotedly and patiently advised the Conference on all matters arising in connexion with the draft Protocols and whose attachment to the principles of the Red Cross has served as an inspiration to the Conference;
4. *Expresses* its appreciation to Ambassador Jean Humbert, Secretary-General of the Conference, and to the entire staff of the Conference for the provision of efficient services at all times throughout the four years' duration of the Conference.

Fifty-eighth plenary meeting
9 June 1977

EXTRACTS FROM THE FINAL ACT

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the Swiss Federal Council, held four sessions in Geneva (from 20 February to 29 March 1974, from 3 February to 18 April 1975, from 21 April to 11 June 1976 and from 17 March to 10 June 1977). The object of the Conference was to study two draft Additional Protocols prepared, after official and private consultations, by the International Committee of the Red Cross and intended to supplement the four Geneva Conventions of 12 August 1949.

One hundred and twenty-four States were represented at the first session of the Conference, 120 States at the second session, 107 States at the third session and 109 States at the fourth session.

In view of the paramount importance of ensuring broad participation in the work of the Conference, which was of a fundamentally humanitarian nature, and because the progressive development and codification of international humanitarian law applicable in armed conflicts is a universal task in which the national liberation movements can contribute positively, the Conference by its resolution 3 (I) decided to invite also the national liberation movements recognized by the regional intergovernmental organizations concerned to participate fully in the deliberations of the Conference and its Main Committees, it being understood that only delegations representing States were entitled to vote.

The International Committee of the Red Cross, which had prepared the two draft Additional Protocols, participated in the work of the Conference in an expert capacity.

The Conference drew up the following instruments:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Annexes I and II;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

These Additional Protocols were adopted by the Conference on 8 June 1977. They will be submitted to Governments for consideration and will be open for signature on 12 December 1977, at Berne, for a period of twelve months, in accordance with their provisions. These instruments will also be open for accession, in accordance with their provisions.

Done at Geneva, on 10 June 1977, in Arabic, English, French, Russian and Spanish, the original and the accompanying documents to be deposited in the Archives of the Swiss Confederation.

In witness whereof, the representatives have signed this Final Act.

Instruments^{*}

^{*} This list comprises all international instruments (treaties, declarations and other instruments), whether in force or not, which are cited in the text of the Commentary. They are listed in chronological order according to their date of adoption.

The reference given is the one most commonly available in English or, where appropriate, in French.

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- 1864**
22 August Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.
Signed at Geneva.
in: Deltenre, p. 31.
Schindler/Toman, p. 213.
- 1868**
29 November/
11 December Declaration to the Effect of Prohibiting the Use of certain Projectiles in Wartime.
Signed at St. Petersburg.
in: Deltenre, p. 49.
Schindler/Toman, p. 95.
- 1883**
20 March Convention for the Protection of Industrial Property.
Signed at Paris.
in: *The Consolidated Treaty Series*, Vol. 161, 1882-1883, p. 409.
- 1899**
29 July Convention (I) for the Pacific Settlement of International Disputes.
Signed at The Hague.
in: Deltenre, p. 67.
- 29 July Convention (II) Concerning the Laws and Customs of War on Land and Regulations annexed to this Convention.
Signed at The Hague.
in: Deltenre, p. 95.
- 29 July Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864.
Signed at The Hague.
in: Deltenre, p. 125.
- 29 July Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.
Done at The Hague.
in: Deltenre, p. 135.
- 29 July Declaration Concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases.
Done at The Hague.
in: Deltenre, p. 139.

- 29 July* Declaration Concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body.
Done at The Hague.
in: Deltenre, p. 143.
- 1906**
6 July Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.
Signed at Geneva.
in: Deltenre, p. 161.
Schindler/Toman, p. 233.
- 1907**
18 October Convention (I) for the Pacific Settlement of International Disputes.
Signed at The Hague.
in: Deltenre, p. 187.
- 18 October* Convention (III) Relative to the Opening of Hostilities
Signed at The Hague.
in: Deltenre, p. 243.
- 18 October* Convention (IV) Concerning the Laws and Customs of War on Land and Regulations annexed to this Convention.
Signed at The Hague.
in: Deltenre, p. 251.
Schindler/Toman, p. 57.
- 18 October* Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in War on Land
Signed at The Hague.
in: Deltenre, p. 283.
Schindler/Toman, p. 847.
- 18 October* Convention (VI) Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities.
Signed at The Hague.
in: Deltenre, p. 297.
Schindler/Toman, p. 703.
- 18 October* Convention (VII) Relative to the Conversion of Merchant Ships into War-Ships.

	Signed at The Hague. in: Deltenre, p. 307. Schindler/Toman, p. 709.
<i>18 October</i>	Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines. Signed at The Hague. in: Deltenre, p. 315. Schindler/Toman, p. 715.
<i>18 October</i>	Convention (IX) Respecting Bombardments by Naval Forces in Time of War. Signed at The Hague. in: Deltenre, p. 327. Schindler/Toman, p. 723.
<i>18 October</i>	Convention (X) for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. Signed at The Hague. in: Deltenre, p. 339. Schindler/Toman, p. 245.
<i>18 October</i>	Convention (XI) Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War. Signed at The Hague. in: Deltenre, p. 355. Schindler/Toman, p. 731.
<i>18 October</i>	Convention (XII) Relative to the Establishment of an International Prize Court. Signed at The Hague. in: Deltenre, p. 365. Schindler/Toman, p. 737.
<i>18 October</i>	Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War. Signed at The Hague. in: Deltenre, p. 399. Schindler/Toman, p. 855.

- 18 October** Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons.
Signed at The Hague.
in: Deltenre, p. 417.
Schindler/Toman, p. 141.
- 1909** Declaration concerning the Laws of Naval War.
26 February Done at London.
in: Deltenre, p. 601.
- 1919** Versailles Peace Treaty.
28 June Signed at Versailles.
in: *The Consolidated Treaty Series*, Vol. 225, 1919, p. 189.
- 1922-1923** Rules concerning the Control of Wireless Telegraphy in Time
December to of War and Air Warfare.
February Fixed by the Commission of Jurists entrusted with Studying and Reporting on this Revision of the Laws of War, assembled at The Hague on December 11, 1922.
in: Deltenre, p. 819.
Schindler/Toman, p. 147.
- 1925** Protocol for the Prohibition of the Use in War of Asphyxiating,
17 June Poisonous or other Gases, and of Bacteriological Methods of Warfare.
Signed at Geneva.
in: Deltenre, p. 443.
Schindler/Toman, p. 109.
- 6 November** Union Convention of Paris, March 20, 1883, for the Protection of Industrial Property, revised at Brussels, December 14, 1900, at Washington, June 2, 1911, and at The Hague, November 6, 1925.
Done at The Hague.
in: League of Nations, *Treaty Series*, Vol. 74, p. 289, No. 1743.
- 1926** Slavery Convention.
25 September Signed at Geneva.
in: League of Nations, *Treaty Series*, Vol. 60, p. 253, No. 1414.

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- 1929**
27 July Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.
Signed at Geneva.
in: League of Nations, *Treaty Series*, Vol. 118, p. 303, No. 2733.
Deltenre, p. 461.
Schindler/Toman, p. 257.
- 27 July* Convention Relative to the Treatment of Prisoners of War.
Signed at Geneva.
in: League of Nations, *Treaty Series*, Vol. 118, p. 343, No. 2734.
Deltenre, p. 491.
Schindler/Toman, p. 271.
- 1930**
22 April International Treaty for the Limitation and Reduction of Naval Armament.
Signed at London.
in: League of Nations, *Treaty Series*, Vol. 112, p. 65, No. 2608.
- 1935**
15 April Treaty for the Protection, in Time of War and Peace, of Historic Monuments, Museums and Institutions of Arts and Science (Roerich Pact).
Signed at Washington.
in: League of Nations, *Treaty Series*, Vol. 167, p. 290, No. 3874.
Deltenre, p. 761.
- 1936**
6 November Procès-verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of April 22, 1930.
Signed at London.
in: League of Nations, *Treaty Series*, Vol. 173, p. 353, No. 4025.
Deltenre, p. 565.
- 1943**
30 October Declaration on German Atrocities.
Adopted at Moscow by United Kingdom, United States and USSR.
in: *Foreign Relations of United States, Diplomatic Papers 1943*, Vol. I, General, U.S. Government Printing Office, Washington, 1963, p. 768.
- 1944**
7 December Convention on International Civil Aviation.
Signed at Chicago.
in: United Nations, *Treaty Series*, Vol. 15, p. 295, No. 102.

- 1945**
26 June Charter of the United Nations.
Signed at San Francisco.
- 8 August* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, containing the Charter of the International Military Tribunal.

Signed at London.
in: United Nations, *Treaty Series*, Vol. 82, p. 280, No. 251.
- 16 November* Constitution of the United Nations Educational, Scientific and Cultural Organisation.
Signed at London.
in: United Nations, *Treaty Series*, Vol. 4, p. 275, No. 52.
- 1946**
19 January Charter of the International Military Tribunal for the trial of major war criminals in the Far East.
Proclaimed at Tokyo.
in: *International Law Documents 1946-47*, Vol. 45, Naval War College, U.S. Government Printing Office, Washington, 1948, p. 319.
- 1947**
10 February Treaty of Peace with Italy.
Signed in Paris.
in: United Nations, *Treaty Series*, Vol. 49, p. 3, No. 747.
- 1948**
9 December Convention on the Prevention and Punishment of the Crime of Genocide.
Adopted by the General Assembly of the United Nations.
in: United Nations, *Treaty Series*, Vol. 78, p. 277, No. 1021.
- 10 December* Universal Declaration of Human Rights.
Adopted by the General Assembly of the United Nations (Resolution 217 A (III)).
- 1949**
12 August Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
Signed at Geneva.
in: United Nations, *Treaty Series*, Vol. 75, p. 31, No. 970.

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- 12 August* Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea.
Signed at Geneva.
in: United Nations, *Treaty Series*, Vol. 75, p. 85, No. 971.
- 12 August* Convention (III) Relative to the Treatment of Prisoners of War.
Signed at Geneva.
in: United Nations, *Treaty Series*, Vol. 75, p. 135, No. 972.
- 12 August* Convention (IV) Relative to the Protection of Civilian Persons in Time of War.
Signed at Geneva.
in: United Nations, *Treaty Series*, Vol. 75, p. 287, No. 973.
- 1950**
4 November Convention for the Protection of Human Rights and Fundamental Freedoms.
Signed at Rome.
in: United Nations, *Treaty Series*, Vol. 213, p. 221, No. 2889.
- 14 December* Statute of the Office of the United Nations High Commissioner for Refugees.
Adopted by the General Assembly of the United Nations (Resolution 428 (V)).
- 1951**
28 July Convention Relating to the Status of Refugees.
Signed at Geneva.
in: United Nations, *Treaty Series*, Vol. 189, p. 137, No. 2545.
- 1954**
14 May Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of this Convention.
Done at The Hague.
in: United Nations, *Treaty Series*, Vol. 249, p. 240, No. 3511.
- 28 September* Convention Relating to the Status of Stateless Persons.
Done at New York.
in: United Nations, *Treaty Series*, Vol. 360, p. 117, No. 5158.

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- 1955**
6 June Agreement constituting an International Commission for the International Tracing Service.
Done at Bonn.
in: *Bundesanzeiger*, No. 241, 14 December 1955.
- 6 June* Agreement on the Relations between the International Commission for the International Tracing Service and the International Committee of the Red Cross.
Done at Bonn.
in: *Bundesanzeiger*, No. 241, 14 December 1955.
- 1956**
7 September Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery.
Done at Geneva.
in: United Nations, *Treaty Series*, Vol. 266, p. 3, No. 3822.
- 1958**
29 April Convention on the Territorial Sea and the Contiguous Zone.
Done at Geneva.
in: United Nations, *Treaty Series*, Vol. 516, p. 205, No. 7477.
- 29 April* Convention on the High Seas.
Done at Geneva.
in: United Nations, *Treaty Series*, Vol. 450, p. 11, No. 6465.
- 1959**
20 November Declaration of the Rights of the Child.
Proclaimed by the General Assembly of the United Nations (Resolution 1386 (XIV)).
- 1 December* The Antarctic Treaty.
Signed at Washington.
in: United Nations, *Treaty Series*, Vol. 402, p. 71, No. 5778.
- 1961**
18 April Vienna Convention on Diplomatic Relations.
Done at Vienna.
in: United Nations, *Treaty Series*, Vol. 500, p. 95, No. 7310.
- 30 August* Convention on the Reduction of Statelessness.
Adopted at New York.
in: United Nations, Document A/CONF. 9/15, 1961.

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- 1963**
24 April Vienna Convention on Consular Relations.
Done at Vienna.
in: United Nations, *Treaty Series*, Vol. 596, p. 261, No. 8638.
- 14 September* Convention on Offences and Certain Other Acts Committed on Board Aircraft.
Signed at Tokyo.
in: ICAO, Official Records, No. 8364, 1963.
- 1965**
21 December International Convention on the Elimination of All Forms of Racial Discrimination.
Adopted by the General Assembly of the United Nations (Resolution 2106 (XX)).
in: United Nations, *Treaty Series*, Vol. 660, p. 195, No. 9464.
- 1966**
16 December International Covenant on Economic, Social and Cultural Rights.
Adopted by the General Assembly of the United Nations (Resolution 2200 (XXI)).
in: United Nations, *Treaty Series*, Vol. 993, p. 3, No. 14531.
- 16 December* International Covenant on Civil and Political Rights.
Adopted by the General Assembly of the United Nations (Resolution 2200 (XXI)).
in: United Nations, *Treaty Series*, Vol. 999, p. 171, No. 14668.
- 1967**
31 January Protocol Relating to the Status of Refugees.
Done at New York.
in: United Nations, *Treaty Series*, Vol. 606, p. 267, No. 8791.
- 1968**
26 November Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.
Adopted by the General Assembly of the United Nations (Resolution 2391 (XXIII)).
in: United Nations, *Treaty Series*, Vol. 754, p. 73, No. 10823.
- 1969**
23 May Vienna Convention on the Law of Treaties.
Concluded at Vienna.
in: United Nations Conference on the Law of Treaties, 1st and 2nd Sessions, Official Records (United Nations publication, Sales Number E.70.V.5).

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- 10 September* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.
- Concluded at Addis Abeba.
- in: United Nations, *Treaty Series*, Vol. 1001, p. 45, No. 14691.
- 22 November* American Convention on Human Rights ("Pact of San José").
- Signed at San José de Costa Rica.
- in: OAS Official Records, OEA/Ser.K/XVI/1.1.
- 1970**
24 October Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.
- Adopted by the General Assembly of the United Nations (Resolution 2625 (XXV)).
- 14 November* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
- Adopted at Paris by the UNESCO General Conference.
- in: UNESCO, Official Records, 16th Session.
- 16 December* Convention for the Suppression of Unlawful Seizure of Aircraft.
- Signed at The Hague.
- in: ICAO, Official Records, No. 8920, 1971.
- 1971**
23 September Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
- Signed at Montreal.
- in: ICAO, Official Records, No. 8966, 1971.
- 1972**
10 April Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.
- Opened for Signature at London, Moscow and Washington.
- in: United Nations, *Treaty Series*, Vol. 1015, p. 163, No. 14860.
- 16 June* Declaration on the Human Environment.
- Adopted at Stockholm.

- in: United Nations, *Monthly Chronicle*, Vol. 9, No. 7, July 1972, p. 86.
- 16 November** Convention Concerning the Protection of World Cultural and Natural Heritage.
Adopted at Paris by the UNESCO General Conference.
in: UNESCO, Official Records, 17th Session.
- 1973**
30 November International Convention on the Suppression and Punishment of the Crime of *Apartheid*.
Adopted by the General Assembly of the United Nations (Resolution 3068 (XXVIII)).
in: United Nations, *Treaty Series*, Vol. 1051, p. 243, No. 14861.
- 3 December** Declaration of the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.
Adopted by the General Assembly of the United Nations (Resolution 3074 (XXVIII)).
- 1974**
25 January European Convention on the Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes.
Adopted by the Council of Europe.
in: Council of Europe, *European Treaty Series*, No. 82.
- 31 May** Agreement on Disengagement between Israeli and Syrian Forces and Protocol to Agreement on Disengagement between Israeli and Syrian Forces concerning the United Nations Disengagement Observer Force.
Signed at Geneva.
in: United Nations, *Monthly Chronicle*, Vol. 11, No. 6, June 1974, p. 26.
- 1976**
10 December Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.
Approved by the General Assembly of the United Nations (Resolution 31/72).
- 1977**
3 July OAU Convention for the Elimination of Mercenarism in Africa.
Adopted at Libreville.
in: OAU Official Document, CM/817 (XXIX).

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- 1978**
23 August Vienna Convention on Succession of States in Respect of Treaties.
Concluded at Vienna.
in: United Nations Conference on the Succession of States in Respect of Treaties, Official Records, Vol. III, Documents of the Conference (United Nations publication, Sales Number E.79.V.10).
- 1979**
17 December International Convention against the Taking of Hostages.
Adopted by the General Assembly of the United Nations (Resolution 34/146).
- 1980**
10 October Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.
– Protocol on Non-Detectable Fragments (Protocol I).
– Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II).
– Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons (Protocol III).
Concluded at Geneva.
in: United Nations, Document A/CONF.95/15 and Corr.1, 2, 3, 4 and 5.
- 1981**
21 June African Charter on Human and Peoples' Rights.
Adopted by the 18th Assembly of Heads of State and Government in Nairobi.
in: Council of Europe, *Human Rights in International Law, Basic Texts*, 1985, p. 207.
- 1982**
6 November International Telecommunication Convention.
Done at Nairobi.
in: ITU, *Final Protocol, Additional Protocols, Optional Additional Protocol, Resolutions, Recommendation and Opinions*, Geneva, 1982.
- 10 December United Nations Convention on the Law of the Sea.
Concluded at Montego Bay (Jamaica)
in: United Nations, Document A/CONF.62/122 and Corr.1 to 11.

1984
10 December

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Adopted by the General Assembly of the United Nations (Resolution 39/46).

**Signatures, Ratifications, Accessions
and Successions
to the major relevant Treaties
as of 31st December 1984**

Name and Alphabetical Order of States

For reasons of practicality, the alphabetical order of States as well as their names may be different in the table to the official ones.

Explanation of Information given in the Table

Date and Means by which States have expressed their consent to be bound by a Treaty:

- R = Ratification;
- A = Accession or Acceptance;
- S = Succession;
- the dates indicate, in order, the day, the month and the year.

Reservations and Declarations indicated by the sign *, with the exception of Declarations under Article 90 of Protocol I, for which there is a separate column (information only given for the Geneva Conventions and their Additional Protocols).

Signature (s), relevant date and indication of any Declaration (*) subject to the same proviso mentioned above (information only given for the Additional Protocols).

Abbreviations of Titles of Instruments

<i>Title of Instrument</i>	<i>Abbreviation</i>
Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, of 12 August 1949 (First Convention)	C.I
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, of 12 August 1949 (Second Convention)	C.II
Geneva Convention Relative to the Treatment of Prisoners of War, of 12 August 1949 (Third Convention)	C.III
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Convention)	C.IV
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977	P.I
Declaration provided for under Article 90 of Protocol I (preliminary acceptance of the competence of the International Fact-Finding Commission)	P.I 90

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977	P.II
Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, of 17 June 1925	P.1925
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954	C.1954
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972	C.1972
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, of 10 December 1976	C.1976
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, of 10 October 1980	C.1980
International Covenant on Economic, Social and Cultural Rights, of 16 December 1966	Cov. I
International Covenant on Civil and Political Rights, of 16 December 1966	Cov. II
European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950	ECHR
American Convention on Human Rights ("Pact of San José"), of 22 November 1969	ACHR

S : 09.08.71	—	07.08.80	S : 21.05.73	C1:1904	R : 04.09.73	C1:1912	C1:1916	C1:1926	C2:1912	C2:1916
R : 22.02.55	R : 07.08.80*	—	R : 07.08.80	—	—	R : 04.02.74	—	R : 08.04.82	—	R : 19.08.75
R : 28.06.51	—	—	A : 24.02.84*	R : 10.05.26	R : 07.06.57	—	—	—	R : 19.08.75	A : 04.11.80
S : 26.02.65	A : 08.04.80	—	A : 08.04.80	—	A : 04.12.61	—	—	—	A : 21.01.83	A : 21.0
S : 20.10.65	—	—	—	S : 05.11.66	—	—	—	—	A : 29.12.78	A : 22.0
A : 30.11.56*	s : 12.12.77	—	s : 12.12.77	R : 02.03.59	A : 16.01.74	R : 28.11.72	R : 25.05.78	R : 20.07.82	R : 08.11.73	R : 08.1
A : 03.09.54	s : 23.12.77*	—	s : 23.12.77	R : 25.04.29	R : 11.08.67	R : 07.04.83	R : 24.05.83	—	—	R : 17.12.73
A : 02.08.58	R : 28.02.78	—	R : 28.02.78	A : 03.05.67	A : 25.07.60	R : 06.06.75	R : 22.06.78	—	—	—
R : 05.06.56	s : 22.03.78*	—	—	R : 30.05.31	R : 09.02.81	R : 10.12.75	A : 23.08.83	—	—	—
S : 13.04.81	—	—	—	—	—	—	—	—	—	—
R : 14.05.52	s : 12.12.77	—	s : 12.12.77	A : 03.05.83	—	R : 19.09.73	—	A : 21.07.83	—	—
A : 11.07.84	A : 11.07.84	—	A : 11.07.84	—	A : 20.09.60	—	—	—	R : 24.01.78	R : 24.0
A : 21.02.74*	—	—	—	—	—	—	—	—	—	—
S : 22.07.68	—	—	—	—	—	—	—	—	R : 15.02.77	R : 15.0
A : 11.04.57	—	—	—	—	—	—	—	—	—	—
R : 22.02.51	s : 12.12.77	—	s : 12.12.77	A : 18.10.66	A : 24.02.58	—	—	—	—	—
A : 31.12.65	s : 12.12.77	—	s : 12.12.77	—	—	—	—	—	R : 17.02.81	—
R : 03.08.54*	s : 12.12.77	—	s : 12.12.77	A : 11.10.52	R : 17.05.56	R : 27.12.72	R : 19.04.78	R : 14.06.82	R : 17.01.74	R : 17.0
A : 10.08.65	s : 12.12.77	—	s : 12.12.77	A : 02.11.67	—	R : 15.02.73	—	—	—	—
R : 09.11.50	—	—	—	R : 09.04.30	R : 16.06.58	R : 15.07.74	R : 15.12.78	R : 01.03.84	R : 22.08.79	R : 22.0
A : 30.09.58	—	—	—	S : 21.01.71	R : 10.01.67	—	—	—	A : 10.04.79	A : 10.0
R : 20.02.57	s : 12.12.77	—	s : 12.12.77	A : 05.11.29	R : 22.06.59	R : 22.08.73	—	—	R : 24.06.75	R : 24.0
A : 14.02.56	—	—	A : 08.09.31	A : 29.08.30	R : 21.12.67	—	—	—	R : 25.01.71	R : 25.0
R : 27.09.62	s : 12.12.77	—	s : 12.12.77	A : 20.02.69	—	R : 27.10.72	R : 16.12.82	—	—	—
R : 06.07.51*	—	—	—	R : 03.04.28	R : 03.10.57	—	—	—	—	—
R : 1.12.51	s : 12.12.77*	—	s : 12.12.77*	A : 27.07.70	R : 09.05.58	R : 30.05.75	R : 27.11.81	—	R : 15.09.78	R : 15.0
S : 28.12.61	s : 12.12.77	—	s : 12.12.77	—	A : 24.01.80	—	—	—	—	—
S : 17.07.64	—	—	—	S : 28.07.70	—	A : 13.08.75	—	—	R : 03.10.75	R : 03.1
A : 21.04.53	—	—	—	R : 21.05.70	—	R : 18.06.82	A : 09.06.82	A : 09.06.82	R : 21.06.79	R : 21.0
A : 29.05.51	R : 01.05.79	—	R : 01.05.79	A : 17.03.77	R : 02.10.57	R : 30.05.75	—	—	R : 28.05.75	R : 28.0
A : 08.12.58	—	—	—	A : 21.03.83	R : 04.04.62	—	—	—	—	—
A : 20.09.66	—	—	—	A : 06.07.70	—	A : 07.01.76	—	—	A : 01.05.72	A : 01.0
—	—	—	—	—	—	—	—	—	—	—
A : 27.08.57*	—	—	—	—	—	—	—	—	A : 14.09.81	A : 14.0
A : 16.08.66*	R : 15.01.82*	—	R : 15.01.82	—	—	—	A : 08.11.84	—	—	—
A : 02.09.67	—	—	—	A : 15.12.71	A : 06.06.69	R : 18.07.72	A : 02.01.80	—	—	—
A : 29.10.56	R : 18.11.80	—	R : 18.11.80	—	—	R : 20.03.73	R : 05.10.78	A : 03.01.83	—	—
R : 10.04.51	—	—	—	A : 17.04.69	R : 01.06.60	R : 26.03.75	—	—	A : 03.11.72	A : 03.1
S : 20.05.68	—	—	—	S : 10.03.72	—	R : 06.09.77	—	—	—	—
A : 29.03.54	—	—	—	A : 17.06.27	—	—	—	—	—	—
A : 22.05.56	A : 07.06.78	—	A : 07.06.78	A : 29.12.71	R : 19.11.57	—	—	—	A : 15.05.70	A : 15.0
R : 21.09.50	s : 12.12.77	—	s : 12.12.77	—	A : 28.04.60	—	—	—	—	—
R : 01.07.53	s : 12.12.77	—	s : 12.12.77	R : 01.09.36	R : 29.09.61	R : 23.03.76	—	—	R : 18.08.83	R : 18.0

CITY/CLINICAL			PATIENT			LAB			TESTS			RESULTS			TREATMENT			OUTCOME		
S : 13.07.63	A : 24.08.62	A : 05.01.68	S : 13.10.78	—	—	S : 13.10.78	A : 02.08.67	A : 10.12.70	A : 03.11.61	—	—	—	—	—	A : 05.10.78	—	—	R : 22.09.71	R : 21.01.72	
—	—	—	—	—	—	—	A : 14.09.70	S : 27.12.66	A : 12.12.60	—	—	—	—	—	A : 05.10.78	—	—	—	—	
A : 24.05.65	S : 22.08.68	—	—	—	—	—	S : 21.09.64	—	A : 18.05.61	R : 07.04.75	—	—	—	—	—	—	—	A : 16.07.74	A : 16.01.73	
S : 27.10.62	S : 18.08.70	R : 29.10.52	A : 14.03.80	—	—	A : 14.03.80	—	S : 12.03.68	—	—	—	—	—	—	—	—	—	A : 12.12.73	A : 12.11.72	
R : 05.07.50	R : 20.12.58	—	A : 22.03.82	—	—	A : 22.03.82	A : 28.05.32	R : 08.04.74	R : 07.05.56	R : 08.08.72	—	—	—	—	—	—	R : 11.02.82	A : 23.03.81	A : 23.01.80	
A : 26.07.56	S : 12.12.77	—	A : 10.03.83	—	—	—	A : 06.01.67	A : 06.12.68	R : 10.12.57	R : 05.09.72	—	—	—	—	—	—	R : 08.06.82	—	R : 18.11.74	
A : 14.03.83	A : 14.03.83	—	—	—	—	S : 12.12.77	A : 13.10.70	—	A : 04.11.64	—	—	—	—	—	—	—	R : 03.05.79	R : 03.01.78	—	
A : 18.10.83	—	—	A : 18.10.83	—	—	A : 18.10.83	—	—	—	—	—	—	—	—	—	—	—	—	—	
A : 07.02.64	R : 03.08.54	R : 02.05.59	—	—	—	—	A : 09.05.69	—	—	—	—	—	—	—	—	—	—	—	—	
R : 02.05.59	S : 27.11.78	—	S : 12.12.77	—	—	S : 12.12.77	R : 31.10.30	A : 24.05.30	R : 14.10.58	R : 22.06.81	R : 15.04.83	—	—	—	—	—	R : 11.12.78	R : 11.11.77	—	
R : 17.12.53	S : 12.12.77	—	—	—	—	S : 12.12.77	A : 24.05.30	—	—	R : 13.12.72	A : 07.09.84	—	—	—	—	—	R : 28.12.78	R : 28.11.77	—	
S : 16.04.64	R : 08.06.79	—	—	—	—	S : 05.04.67	A : 15.10.68	R : 27.07.32	R : 25.11.59	R : 07.08.75	—	—	—	—	—	—	A : 12.03.80	A : 12.01.79	—	
S : 09.06.61	—	—	—	—	—	A : 15.10.68	—	—	A : 05.06.61	R : 23.06.72	—	—	—	—	—	—	—	—	—	
R : 03.08.51	R : 14.12.81	14.12.81	—	—	—	R : 01.08.73	R : 01.08.73	R : 15.02.79	R : 19.09.61	R : 03.07.73	R : 15.02.79	R : 07.06.83	—	—	—	—	R : 13.09.72	R : 13.01.71	—	
—	—	—	—	—	—	A : 26.10.77	—	—	A : 26.10.77	—	—	—	—	—	—	—	—	—	—	
A : 31.01.74	A : 29.03.84*	—	A : 29.03.84*	—	—	A : 27.03.59	R : 25.09.74	—	—	R : 25.09.74	—	—	—	—	—	—	—	—	—	
R : 12.06.51*	S : 12.12.77	—	S : 12.12.77	—	—	A : 17.07.62	R : 20.03.74	—	A : 27.10.80	R : 20.03.74	—	—	—	—	—	—	R : 08.03.77	R : 08.01.76	—	
A : 10.02.56	S : 12.12.77	—	—	—	—	—	A : 27.10.80	A : 28.10.80	—	A : 27.10.80	A : 28.10.80	—	—	—	—	—	—	—	—	
S : 26.05.76	—	—	—	—	—	A : 09.06.76	—	—	—	A : 09.06.76	—	—	—	—	—	—	R : 28.04.78	R : 28.01.77	—	
R : 23.10.61	R : 15.02.56	—	S : 12.12.77	—	—	—	R : 21.05.73	—	—	—	—	—	—	—	—	—	R : 07.06.74	R : 07.01.73	—	
R : 06.10.52	S : 12.12.77	—	S : 12.12.77	—	—	R : 06.08.56	R : 25.01.73	R : 08.06.78	—	R : 25.01.73	R : 08.06.78	—	—	—	—	—	R : 18.03.77	R : 18.01.76	—	
R : 26.11.54	S : 12.12.77*	—	S : 12.12.77*	—	—	—	R : 15.05.75	—	—	R : 15.05.75	—	—	—	—	—	—	R : 02.06.83	R : 02.01.82	—	
R : 14.03.61*	—	—	—	—	—	A : 31.07.73	R : 17.04.75	—	—	R : 17.04.75	—	—	—	—	—	—	R : 31.07.78	R : 31.01.77	—	
A : 15.10.75	—	—	—	—	—	A : 21.03.58	R : 26.07.79	R : 06.05.83	—	—	—	—	—	—	—	—	R : 09.12.74	R : 09.11.73	—	
R : 01.06.54	S : 28.03.78	—	S : 28.03.78	—	—	—	R : 20.05.75	—	—	—	—	—	—	—	—	—	A : 16.04.75	A : 16.01.74	—	
S : 21.03.64	A : 19.11.84	—	A : 19.11.84	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
S : 18.09.81	A : 07.10.82	—	A : 07.10.82	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
A : 01.04.81	A : 08.04.83	—	A : 08.04.83	—	—	—	—	—	—	—	—	—	—	—	—	—	—	A : 09.11.81	A : 09.11.80	
S : 23.08.84	A : 23.08.84	—	A : 23.08.84	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
A : 29.08.53	S : 22.06.78	—	S : 22.06.78	—	—	R : 09.02.56	R : 11.03.75	—	—	R : 11.03.75	—	—	—	—	—	—	—	—	—	
A : 21.05.76	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
A : 18.05.63	S : 23.04.63	—	S : 12.12.77	—	—	A : 20.01.71	R : 24.05.72	—	—	—	—	—	—	—	—	—	R : 13.02.78	R : 13.01.77	—	
A : 08.11.84	A : 08.11.84	—	A : 08.11.84	—	—	—	R : 26.03.75	—	—	R : 26.03.75	—	—	—	—	—	—	—	—	—	
S : 31.05.65	—	—	—	—	—	—	A : 11.10.79	—	—	A : 11.10.79	—	—	—	—	—	—	—	—	—	
A : 27.04.73	A : 27.04.73	—	—	—	—	—	R : 29.06.76	—	—	R : 29.06.76	—	—	—	—	—	—	—	—	—	
S : 06.07.81	—	—	—	—	—	—	R : 02.12.75	—	—	R : 02.12.75	—	—	—	—	—	—	—	—	—	
—	—	—	—	—	—	—	S : 17.06.81	S : 19.06.81	—	S : 17.06.81	S : 19.06.81	—	—	—	—	—	S : 17.03.82	S : 17.01.81	—	

[illegible]

Resolutions of the Red Cross and of the Diplomatic Conferences*

* This list comprises the resolutions cited in the text of the Commentary.

International Conference of the Red Cross

Xth International Conference, 30 March-7 April 1921, Geneva

- XIV, Civil War

XVIth International Conference, 20-24 June 1938, London

- XIV, Rôle and Activity of the Red Cross in Time of Civil War

XVIIth International Conference, 20-30 August 1948, Stockholm

- XXVI, Work of National Societies on behalf of Enemy Prisoners of War and Civilian Internees.

XIXth International Conference, 28 October-7 November 1957, New Delhi

- XVII, Medical Care
- XIX, Relief in the Event of Internal Disturbances

Centenary Congress of the International Red Cross, 2-10 September 1963, Geneva

- IV, Implementation and Dissemination of the Geneva Conventions

XXth International Conference, 2-9 October 1965, Vienna

- XVIII, International Relief Actions – Revision of Principles
- XXI, Implementation and Dissemination of the Geneva Conventions
- XXII, Personnel for the Control of the Application of the Geneva Conventions
- XXVIII, Protection of Civilian Populations against the Dangers of Indiscriminate Warfare
- XXIX, Personnel of Civil Defence Services
- XXXI, Protection of Victims of Non-International Conflicts

XXIst International Conference, 6-13 September 1969, Istanbul

- IX, Dissemination of the Geneva Conventions
- XII, War Crimes and Crimes against Humanity
- XV, Status of Civil Defence Service Personnel
- XVI, Protection of Civilian Medical and Nursing Personnel
- XVII, Protection of Victims of Non-International Armed Conflicts
- XVIII, Status of Combatants in Non-International Armed Conflicts
- XXI, Contacts between National Societies in Cases of Conflict

- XXVI, Declaration of Principles for International Humanitarian Relief to the Civilian Populations in Disaster Situations

XXIInd International Conference, 8-15 November 1973, Teheran

- V, The Missing and Dead in Armed Conflicts
- XII, Implementation and Dissemination of the Geneva Conventions
- XIII, Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts
- XV, Reinforcement in the Additional Protocols of the Rôle of National Societies
- XVIII, Blood Transfusion

XXIIIrd International Conference, 15-21 October 1977, Bucharest

- VII, Dissemination of Knowledge of International Humanitarian Law applicable in Armed Conflicts and of the Fundamental Principles of the Red Cross
- XI, Misuse of the Emblem of the Red Cross
- XII, Weapons of Mass Destruction
- XXI, Environment

XXIVth International Conference, 7-14 November 1981, Manila

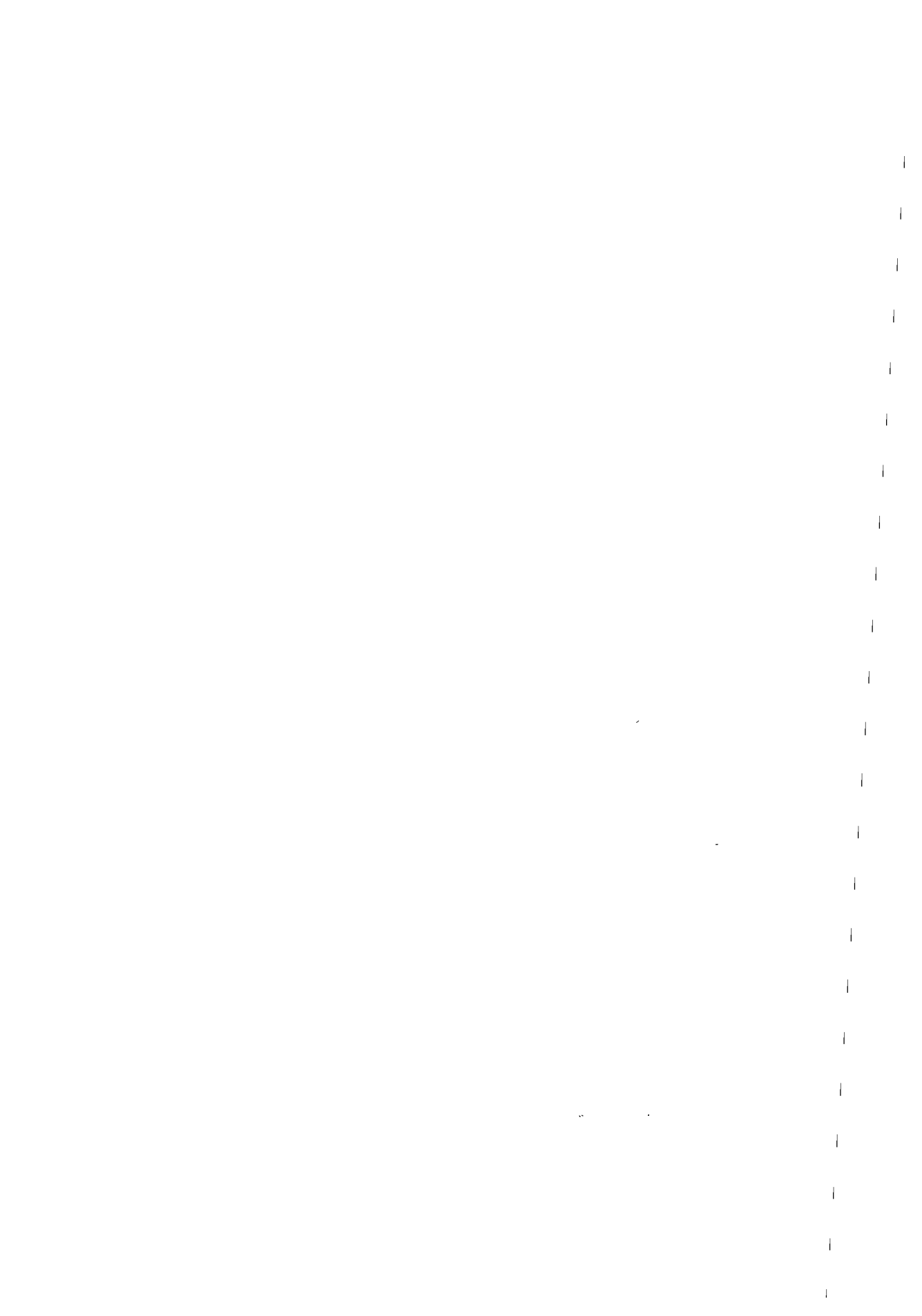
- X, Dissemination of Knowledge of International Humanitarian Law and of the Red Cross Principles and Ideals

1949 Diplomatic Conference:

- 1, The Reference of Disputes to the International Court of Justice
- 5, Misuse of the Red Cross Emblem
- 6, Radiocommunications between Hospital Ships and Warships and Military Aircraft
- 7, Radio Signal of Hospital Ships
- 8, Appeal for Peace
- 10, Recognition of a Party to a Conflict by Powers not taking Part in such Conflict

1974-1977 Diplomatic Conference:

- 3, Participation of National Liberation Movements in the Conference
- 17, Use of certain Electronic and Visual Means of Identification by Medical Aircraft protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- 18, Use of Visual Signalling for Identification of Medical Transports protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- 19, Use of Radiocommunications for announcing and identifying Medical Transports protected under the Geneva Conventions of 1949 and under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- 20, Protection of Cultural Property
- 21, Dissemination of Knowledge of International Humanitarian Law applicable in Armed Conflicts
- 22, Follow-up regarding Prohibition or Restriction of Use of Certain Conventional Weapons



Resolutions adopted by International Bodies

Organs of the United Nations, the High Commissioner for Refugees, the Council of Europe and the International Conference on Human Rights*

* This list comprises the resolutions cited in the text of the Commentary

General Assembly of the United Nations

<i>No.</i>	<i>Date</i>	<i>Title</i>
55 (I)	19 November 1946	National Red Cross and Red Crescent Societies.
95 (I)	11 December 1946	Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal.
177 (II)	21 November 1947	Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.
260 A (III)	9 December 1948	Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and Text of the Convention.
545 (VI)	5 February 1952	Inclusion in the International Covenant or Covenants on Human Rights of an Article relating to the Right of Peoples to Self-determination.
637 (VII)	16 December 1952	The Right of Peoples and Nations to Self-determination.
1167 (XII)	26 November 1957	Chinese Refugees in Hong-Kong.
1386 (XIV)	20 November 1959	Declaration of the Rights of the Child.
1388 (XIV)	20 November 1959	Report of the United Nations High Commissioner for Refugees.
1501 (XV)	5 December 1960	Expression of Appreciation to the United Nations High Commissioner for Refugees.
1514 (XV)	14 December 1960	Declaration on the Granting of Independence to Colonial Countries and Peoples.
1599 (XV)	15 April 1961	The Situation in the Republic of the Congo.
1671 (XVI)	18 December 1961	Problem raised by the Situation of Angolan Refugees in the Congo.
1673 (XVI)	18 December 1961	Report of the United Nations High Commissioner for Refugees.

<i>No.</i>	<i>Date</i>	<i>Title</i>
1783 (XVII)	7 December 1962	Continuation of the Office of the United Nations High Commissioner for Refugees.
1784 (XVII)	7 December 1962	The Problem of Chinese Refugees in Hong Kong.
1815 (XVII)	18 December 1962	Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.
1959 (XVIII)	12 December 1963	Report of the United Nations High Commissioner for Refugees.
1966 (XVIII)	16 December 1963	Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.
2018 (XX)	1 November 1965	Recommandation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
2103A (XX)	20 December 1965	Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.
2105 (XX)	20 December 1965	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
2182 (XXI)	12 December 1966	Question of Methods of Fact-Finding.
2200 (XXI)	16 December 1966	International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights.
2312 (XXII)	14 December 1967	Declaration on Territorial Asylum.
2329 (XXII)	18 December 1967	Question of Methods of Fact-Finding.
2383 (XXIII)	7 November 1968	Question of Southern Rhodesia.

<i>No.</i>	<i>Date</i>	<i>Title</i>
2396 (XXIII)	2 December 1968	The Policies of <i>Apartheid</i> of the Government of South Africa.
2444 (XXIII)	19 December 1968	Respect for Human Rights in Armed Conflicts.
2465 (XXIII)	20 December 1968	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
2508 (XXIV)	21 November 1969	Question of Southern Rhodesia.
2547 (XXIV)	11 December 1969	Measures for Effectively combating Racial Discrimination and the Policies of <i>Apartheid</i> and Segregation in Southern Africa.
2548 (XXIV)	11 December 1969	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
2597 (XXIV)	16 December 1969	Respect for Human Rights in Armed Conflicts.
2621 (XXV)	12 October 1970	Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
2625 (XXV)	24 October 1970	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.
2652 (XXV)	3 December 1970	Question of Southern Rhodesia.
2673 (XXV)	9 December 1970	Protection of Journalists in Dangerous Missions in Areas of Armed Conflict.
2674 (XXV)	9 December 1970	Respect for Human Rights in Armed Conflicts.
2675 (XXV)	9 December 1970	Basic Principles for the Protection of Civilian Populations in Armed Conflicts.
2676 (XXV)	9 December 1970	Respect for Human Rights in Armed Conflicts.

<i>No.</i>	<i>Date</i>	<i>Title</i>
2677 (XXV)	9 December 1970	Respect for Human Rights in Armed Conflicts.
2707 (XXV)	14 December 1970	Question of Territories under Portuguese Administration.
2708 (XXV)	14 December 1970	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.
2795 (XXVI)	10 December 1971	Question of the Territories under Portuguese Administration.
2796 (XXVI)	10 December 1971	Question of Southern Rhodesia.
2816 (XXVI)	14 December 1971	Assistance in Cases of Natural Disaster and other Disaster Situations.
2840 (XXVI)	18 December 1971	Question of the Punishment of War Criminals and of Persons who have committed Crimes against Humanity.
2852 (XXVI)	20 December 1971	Respect for Human Rights in Armed Conflicts.
2853 (XXVI)	20 December 1971	Respect for Human Rights in Armed Conflicts.
2854 (XXVI)	20 December 1971	Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict.
2871 (XXVI)	20 December 1971	Question of Namibia.
2958 (XXVII)	12 December 1972	Assistance to Sudanese Refugees returning from Abroad.
3032 (XXVII)	18 December 1972	Respect for Human Rights in Armed Conflicts.
3058 (XXVIII)	2 November 1973	Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict.

<i>No.</i>	<i>Date</i>	<i>Title</i>
3068 (XXVIII)	30 November 1973	International Convention on the Suppression and Punishment of the Crime of <i>Apartheid</i> .
3074 (XXVIII)	3 December 1973	Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity.
3102 (XXVIII)	12 December 1973	Respect for Human Rights in Armed Conflicts.
3103 (XXVIII)	12 December 1973	Basic Principles of the Legal Status of the Combatants struggling against Colonial and Alien Domination and Racist Régimes.
3112 (XXVIII)	12 December 1973	United Nations Fund for Namibia.
3143 (XXVIII)	14 December 1973	Report of the United Nations High Commissioner for Refugees.
3220 (XXIX)	6 November 1974	Assistance and Co-operation in Accounting for Persons who are Missing or Dead in Armed Conflicts.
3245 (XXIX)	29 November 1974	Human Rights in Armed Conflicts: Protection of Journalists engaged in Dangerous Missions in Areas of Armed Conflict.
3264 (XXIX)	9 December 1974	Prohibition of Action to Influence the Environment and Climate for Military and other Purposes Incompatible with the Maintenance of International Security, Human Well-being and Health.
3314 (XXIX)	14 December 1974	Definition of Aggression.
3318 (XXIX)	14 December 1974	Declaration on the Protection of Women and Children in Emergency and Armed Conflict.
3319 (XXIX)	14 December 1974	Respect for Human Rights in Armed Conflicts.
3435 (XXX)	9 December 1975	United Nations Environment Programme.

<i>No.</i>	<i>Date</i>	<i>Title</i>
3452 (XXX)	9 December 1975	Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
3454 (XXX)	9 December 1975	Report of the United Nations High Commissioner for Refugees.
3455 (XXX)	9 December 1975	Humanitarian Assistance to the Indo-Chinese Displaced Persons.
3500 (XXX)	15 December 1975	Respect for Human Rights in Armed Conflicts.
31/19	24 November 1976	Respect for Human Rights in Armed Conflicts.
31/35	30 November 1976	Report of the United Nations High Commissioner for Refugees.
32/34	28 November 1977	Question of East Timor.
32/44	8 December 1977	Respect for Human Rights in Armed Conflicts.
32/67	8 December 1977	Report of the United Nations High Commissioner for Refugees.
32/68	8 December 1977	Continuation of the Office of the United Nations High Commissioner for Refugees.
33/26	28 November 1978	Report of the United Nations High Commissioner for Refugees.
34/60	29 November 1979	Report of the United Nations High Commissioner for Refugees.
35/41	25 November 1980	Report of the United Nations High Commissioner for Refugees.
35/135	11 December 1980	Refugee and Displaced Women.
35/187	15 December 1980	Refugee and Displaced Children.

<i>No.</i>	<i>Date</i>	<i>Title</i>
39/46	10 December 1984	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Security Council of the United Nations

<i>No.</i>	<i>Date</i>	<i>Title</i>
161 A	21 February 1961	The Congo Question.
169	24 November 1961	The Congo Question.
239	10 July 1967	Question concerning the Democratic Republic of the Congo.
241	15 November 1967	Question concerning the Democratic Republic of the Congo.
405	14 April 1977	Complaint by Benin.

Economic and Social Council of the United Nations

<i>No.</i>	<i>Date</i>	<i>Title</i>
1655 (LII)	1 June 1972	Assistance in the Relief, Rehabilitation and Resettlement of Sudanese Refugees.
1705 (LIII)	27 July 1972	Assistance to Southern Sudanese Refugees returning from Abroad.
1741 (LIV)	4 May 1973	Assistance to Southern Sudanese Returnees and Displaced Persons.
1799 (LV)	30 July 1973	Assistance to Southern Sudanese Returnees and Displaced Persons.
1870 (LVI)	17 May 1974	Model Rules of Procedure for United Nations Bodies dealing with Violations of Human Rights.
1877 (LVII)	16 July 1974	Assistance to Southern Sudanese Returnees and Displaced Persons.

<i>No.</i>	<i>Date</i>	<i>Title</i>
2011 (LXI)	2 August 1976	Report of the United Nations High Commissioner for Refugees.
1978/39	1 August 1978	Humanitarian Assistance Programmes of the United Nations High Commissioner for Refugees in the Horn of Africa.
1980/8	28 April 1980	Assistance to Displaced Persons in Ethiopia.
1980/54	24 July 1980	Relief and Rehabilitation for Displaced Persons in Ethiopia.

Executive Committee of the High Commissioner for Refugees

<i>No.</i>	<i>Date</i>	<i>Title</i>
22 (XXXII)	October 1981	Protection of asylum seekers in situations of large scale influx.

Council of Europe

<i>No.</i>	<i>Date</i>	<i>Title</i>
690	8 May 1979	Resolution on the Police.
858	8 May 1979	Recommendation on the Police.

International Conference on Human Rights (Teheran)

<i>No.</i>	<i>Date</i>	<i>Title</i>
VIII	11 May 1968	The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights.
XXIII	12 May 1968	Human Rights in Armed Conflicts.

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* The bibliography comprises all the publications and documents cited in the text of the Commentary.

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Index *

* This index refers to pages of the text of the Commentary. Given the accompanying texts the index does not cover the footnotes.

- abuse**, *see also* breaches, emblem, repression 125, 126, 131, 151, 156, 162, 163, 166, 168, 170, 171, 178, 179, 186, 193, 195, 219, 221, 223, 231, 234, 235, 298, 300, 302, 311, 323, 329, 330, 335, 336, 382, 427, 437, 439, 445-450, 454, 456, 457, 460, 466, 489, 523, 536, 675, 732, 736, 751, 755, 779, 787, 788, 799, 836, 892, 904, 986, 998, 1202, 1365, 1418, 1434, 1437, 1438, 1442
- act, omission and failure to act**, *see also* breaches, health 149, 152, 153, 155, 159-161, 163, 198, 335, 352, 554, 572, 861, 862, 872-874, 876, 882, 905, 934, 976, 979, 980, 989, 992, 993, 998, 999, 1005-1012, 1033, 1053, 1057, 1058, 1107, 1111, 1339, 1340, 1373, 1383, 1385, 1391, 1392, 1399, 1400, 1408, 1418, 1421, 1458
- act harmful to the enemy**, *see also* hostile act 173-177, 180, 246, 247, 251, 261, 269-271, 304, 733, 734, 736, 769-772, 775, 776, 791, 796, 798-800, 1435
- activity of a medical character**, *see also* medical personnel 110, 148, 180, 191, 198, 206, 280, 363
- additional (character of the Protocols)**, *see also* Article 3 common, reaffirmation and development 19, 20, 31, 33, 34, 39, 41, 106, 281, 296, 341, 564, 601, 746, 821, 827, 854, 931, 992, 1011, 1047, 1059, 1068, 1081, 1083, 1085, 1086, 1109, 1111, 1331, 1333, 1339, 1343, 1345, 1347, 1350, 1364, 1365, 1397, 1487
- adverse distinction**, *see also* circumstances (in all) 23, 28, 37, 56, 137, 139, 140, 143, 145, 147, 148, 156, 180, 185, 193, 202, 509, 615, 679, 802, 806, 811, 813, 815, 817, 818, 821, 823, 833, 845, 854, 861, 870, 1324, 1357, 1358, 1367, 1370, 1371, 1392, 1404, 1407, 1417, 1422, 1450, 1475, 1479, 1481
- aggression**, *see also* adverse distinction 23, 28, 29, 37, 390, 531, 580, 603, 615, 616, 620, 679, 852, 853, 1044
- agreements** 74, 84, 97, 101, 280, 283, 284, 287, 288, 290-296, 299, 305-313, 315-317, 319, 320, 324, 325, 327-333, 349, 362, 363, 365, 370-374, 376, 377, 399, 433, 435, 469, 500, 666, 674, 675, 698, 699, 701, 705-707, 709, 712, 782, 785, 819, 820, 824, 829, 833, 836, 932, 933, 957, 997, 998, 1037, 1056, 1143-1145, 1147, 1183, 1201, 1207, 1211, 1247, 1250, 1251, 1257, 1263, 1270, 1273, 1275, 1292, 1325, 1328, 1352, 1405, 1414, 1484
- aircraft (medical)**, *see* transportation (medical)
- aircraft (non-medical)**, *see* warfare
- airmen**, *see also* warfare 125, 296, 310, 387, 494, 497, 500, 501, 1279
- air space**, *see also* transportation (medical), warfare 290, 294, 298, 300, 682, 823
- aliens**, *see also* civilians, refugees 559, 580, 581, 848, 886, 1001, 1359, 1474
- Allied High Commission for Germany** 858

amnesty, *see also* prosecution (penal), punishments 1332, 1395, 1401, 1402

annexation, *see also* occupation (law of) 74

apartheid, *see also* racism 1001, 1002

arbitrary, *see also* guarantees (fundamental) 160, 269, 391, 393, 394, 397, 553, 583, 596, 610, 655, 685, 740, 819, 833, 842, 868, 882, 937, 1351, 1358, 1370, 1389, 1478

arbitration, *see also* tribunal 839

area, *see* zone

armed forces, *see also* combatants, armed groups 35, 40, 55, 60, 99, 113, 120, 134, 168, 180, 181, 185, 186, 195, 225, 284, 334, 336, 350, 415, 432, 463, 484, 485, 497, 499, 500, 505-519, 522, 525, 526, 532, 538-540, 542, 544-548, 550, 551, 553, 555, 558, 561-571, 573, 577, 579-581, 598, 600, 603, 608, 610, 611, 617-621, 635, 638, 651, 657, 670, 671, 680, 681, 685, 693, 699, 701-703, 705, 706, 710, 711, 724, 735, 739, 769, 773, 782, 791, 793-799, 828, 835, 897, 901, 909, 917, 918, 920-923, 932, 947-955, 959, 961-963, 983, 1008, 1009, 1011, 1017-1023, 1053, 1057, 1176, 1319, 1320, 1324, 1329, 1330, 1332, 1344, 1347, 1349, 1351-1355, 1367, 1377-1380, 1386, 1391, 1396, 1408, 1410, 1420, 1435, 1450, 1453, 1458, 1474, 1488

armed groups, *see also* combatants, responsible command 505, 508, 514, 1319, 1320, 1322, 1329, 1332, 1344, 1347, 1349, 1351-1355, 1367, 1380, 1386, 1408, 1450, 1453, 1474

armistice, *see also* cease-fire 67, 306, 353, 362, 544, 709, 1054

arms, *see also* combatants, methods and means of warfare, warfare 175, 177-179, 271, 283, 309, 383, 387, 389, 390, 393, 394, 398, 399, 401, 402, 404-410, 414, 415, 418, 420, 422, 441, 442, 444, 579, 583, 586, 593-595, 611, 618, 621, 623, 633, 653, 673, 674, 680, 682, 775-778, 1022, 1285, 1287, 1435, 1458

bacteriological (biological) ~ 398, 401, 427, 590-592, 606, 607, 617, 623

chemical ~ 387, 398, 405, 427, 590-592, 594, 606, 607, 617, 623

conventional ~ 398, 402, 403, 405, 419, 423, 442, 443, 477, 591, 594, 595, 603, 607, 617, 621, 662, 669, 683, 769

defensive ~ 304

new ~ 387, 421, 424-428, 509, 932

nuclear ~ 398, 427, 477, 586-596, 623

arms for protected personnel, *see* hostile act

arrest, *see also* detention 855, 861, 862, 867, 871, 876, 885, 886, 891, 894, 897, 1028, 1354, 1355, 1358, 1360, 1393

Article 3 common, *see also* additional (character of the Protocols), reaffirmation and development 21, 41, 46, 49, 72, 108, 865, 872, 874, 878, 1090, 1109, 1110, 1319, 1324-1329, 1331, 1333, 1336-1338, 1341, 1343-1345, 1348-1354, 1358, 1362, 1364, 1365, 1368, 1372-1375, 1386, 1396, 1397, 1403, 1404, 1408, 1413, 1418, 1424, 1432, 1438, 1443, 1451, 1453, 1472, 1476, 1485, 1487

assigned residence, *see also* deprivation of liberty 154, 356, 619, 847, 875, 876, 886, 1001, 1360

assistance in criminal matters (mutual), *see also* breaches, repression 934, 979, 1025, 1027, 1028, 1030

asylum, *see also* refugees 321, 334, 336, 1030

attacks, *see also* methods and means of warfare, precautions 146, 165-167, 169-171, 175-177, 250, 264, 265, 271, 293, 296, 297, 299, 300, 302, 325, 329, 368, 383, 401, 437, 438, 441, 443, 461, 466, 467, 471, 479, 482-488, 491, 493, 497-499, 501, 502, 515, 517, 519, 527, 529, 533-536, 538, 539, 547, 586, 588, 589, 598, 599, 601-608, 612, 613, 616, 618, 619, 622, 625-638, 647, 648, 651, 652, 655-657, 661, 665, 667-674, 677, 679-682, 684, 686, 687, 689, 691-693, 699, 702, 704, 710, 714, 722, 739, 742, 777, 793, 795, 797, 832, 834, 922, 932, 933, 983, 984, 989, 990, 995-998, 1002, 1009, 1218, 1408, 1421, 1431, 1433, 1434, 1446-1448, 1450-1453, 1455, 1458, 1459, 1461-1463, 1470

indiscriminate ~ 398-400, 404-407, 586, 595, 613, 615-617, 620-626, 679, 685, 989, 995, 996, 1022, 1449

authorities (not recognized), *see also* self-determination 48, 505-508, 510, 611

aviation, *see* transportation (medical), warfare

banditry, *see also* breaches 305, 359, 511, 829

basic needs of the civilian population, *see* civilians

battlefield, *see* hostilities

belligerent, *see also* combatants 358, 381, 382, 384, 386, 397, 400, 446, 462, 463, 470, 506, 508-510, 540, 544, 578, 583, 587, 593, 604, 605, 607, 612, 625, 626, 631, 645, 647, 667, 673, 681, 682, 687, 712, 824, 837, 879, 898, 936, 984, 992, 1144, 1320-1322, 1344

blockade, *see also* methods and means of warfare, relief, warfare 653, 654, 810, 823, 943, 1321, 1330, 1333, 1457

blood transfusion, organ transplants, *see also* act, omission and failure to act, ethics (rules of medical) 114, 129, 149, 152, 156-158, 162, 1433

bombardements, *see also* attacks, warfare 167, 171, 191, 367, 368, 486, 584, 587, 590, 595, 598, 613, 624, 630, 631, 644, 678, 682, 686, 688, 716, 721, 726, 909, 1387, 1434

booty, *see also* pillage 803, 804

breaches (grave breaches), *see also* assistance in criminal matters (mutual), extradition, sanction, war crimes 38, 151, 158, 159, 161, 163, 170, 204, 291, 298, 303, 305, 315, 319, 320, 323, 324, 330, 331, 335, 336, 381, 385, 437, 448, 458, 484, 514, 519, 523-526, 538-540, 543, 551, 555, 557, 559, 581, 616, 618, 628, 648, 655, 670, 675, 679, 685, 707, 712, 744, 788, 799, 848, 854, 855, 861, 872, 876, 887-889, 891, 894, 896, 897, 903-905, 925, 932, 934, 973-980, 982, 984, 987, 989-1003, 1005-1017, 1019-1023, 1025-1030, 1032, 1033, 1037, 1039, 1040, 1045-1047, 1054, 1056, 1111, 1363, 1400, 1427, 1452

camouflage, *see also* medical units, military objectives 429, 438, 441, 443, 444, 534, 567, 1174, 1422

capitulation, *see also* armistice 67, 476

capture, *see also* combatants, prisoners of war 48, 117, 177, 179, 186, 191, 258, 264, 266, 267, 276, 349, 385, 429, 432-434, 481, 484, 489, 499, 501, 513, 528, 538-540, 542, 544-551, 561, 564, 569, 570, 600, 608, 618, 619, 629, 635, 636, 648, 688, 694, 709, 799, 800, 901, 923, 999, 1331, 1332, 1344, 1367, 1371, 1410

cease-fire, *see also* armistice 68, 306, 353, 458, 1275

Central Tracing Agency (CTA), *see also* information (humanitarian) 345, 349, 352-354, 360, 361, 858, 907, 910, 914, 915, 936, 938, 1379, 1390

chaplain, *see* religious personnel

children, *see also* civilians, combatants, prisoners of war 113, 117, 118, 159, 442, 512, 584, 587, 697, 757, 815, 818, 821, 822, 838, 842, 884, 891-905, 907-915, 933, 1335, 1367, 1369, 1375-1381, 1395, 1401, 1402, 1414, 1457

circumstances (in all), *see also* possible (if) 23, 29, 33, 37, 65, 66, 94, 147, 170, 197, 264, 353, 437, 485, 527, 613, 615, 623, 671, 843, 845, 853, 855, 861, 939, 1055, 1085, 1086, 1324, 1344, 1367, 1372, 1374, 1407, 1410, 1414, 1423, 1426, 1434, 1435, 1439, 1441, 1444, 1447, 1450, 1468, 1476, 1487

citizenship, *see* nationality

civil defence, *see also* armed forces, civilians, emblem 113, 126, 178, 195, 447, 451, 453, 455, 485, 584, 589, 695, 702, 703, 713-767, 769-789, 791-804, 933, 1137-1139, 1149, 1151, 1194, 1283-1293, 1419, 1420

civilian objects, *see also* military objectives 404, 584, 585, 589, 590, 593, 597-601, 607, 608, 612, 613, 616, 617, 619, 620, 623-625, 629-638, 640, 645, 647, 649, 652, 669, 672, 677, 680, 681, 684-688, 691, 693, 701, 712, 742, 839, 841, 842, 964, 985, 989, 995-997, 1009, 1334, 1446, 1456, 1462

civilians (civilian population), *see also* attacks, combatants, methods and means of warfare 33, 35, 45, 110, 111, 117, 119, 120, 122, 138, 146, 170, 177, 181, 182, 184-187, 195, 204, 209-220, 240, 256, 257, 259, 277, 351, 383-385, 398, 400, 404, 406, 411, 414, 417, 429, 437, 438, 442, 454, 482, 483, 491, 496, 498, 499, 501, 502, 509, 514-517, 519, 522, 526-529, 532-538, 546, 548-550, 553, 554, 557, 558, 562, 563, 567, 570, 575, 579, 583-590, 593, 595, 597-605, 607-628, 631, 632, 634-638, 651-659, 661-665, 669-673, 677, 679-689, 691-695, 697, 701, 703, 704, 709, 712-717, 719-725, 727, 729-731, 733-735, 737, 739-742, 745, 747-749, 751-753, 756-761, 766, 771, 773, 779, 781, 782, 791, 792, 794-797, 801, 804-807, 809-811, 813-823, 826, 827, 832, 834, 837, 839, 841, 842, 846, 847, 850, 853, 867, 868, 870, 872, 875, 878, 888, 889, 898, 904, 915, 917-923, 933, 936, 955, 956, 959, 961-967, 976, 983-985, 989, 990, 995-997, 1000, 1001, 1009, 1014, 1021, 1022, 1057, 1111, 1156-1158, 1292, 1326, 1330, 1333, 1335, 1336, 1339, 1344, 1359, 1364, 1365, 1375, 1377, 1383, 1386-1389, 1391, 1396, 1397, 1408-1410, 1415, 1421, 1424, 1443-1445, 1447-1453, 1455-1463, 1471-1476, 1478, 1479, 1488, 1489

colonial domination and alien occupation, *see* self-determination

combatants, *see also* armed forces, civilians, *hors de combat* 33, 45, 46, 48, 117, 120, 121, 133, 134, 146, 173, 175, 177, 180, 212, 214, 273, 274, 366, 381, 383-386, 395, 400, 406, 430, 435, 459, 465, 473, 475, 477, 481, 483, 485, 487, 491, 497-499, 503, 505, 506, 508-511, 513, 515-517, 519-529, 532-542, 544-549, 551, 554, 556, 558, 566, 568, 571, 573-575, 578-581, 585, 590, 595, 597-600, 611, 612, 619, 631, 635, 674, 680, 697, 699, 701, 702, 704, 707, 769, 773, 778, 798, 801, 835, 857, 867, 868, 870, 875, 878, 901, 902, 952, 964, 987, 995, 997, 1111, 1186, 1325, 1329, 1331, 1332, 1344, 1359, 1369-1371, 1386, 1397, 1435, 1452, 1457, 1458

commanders, *see also* act, omission and failure to act, armed forces, respect and ensure respect 95, 294, 312, 391, 392, 399, 490, 539, 644, 679, 681, 682, 684, 703, 772, 934, 947-950, 952-954, 956, 967

duties of ~ 514, 962, 1011, 1013, 1015, 1017-1023

commandos, *see also* combatants, methods and means of warfare 119, 167, 476, 489, 501, 570

Commission médico-juridique de Monaco 92, 97, 102, 280, 1148, 1206, 1403

Commission on Human Rights, *see* United Nations

communication, *see* identification

compensation, *see* reparation

complicity, *see* breaches

compulsion, *see also* civilians, medical personnel, prisoners of war 106, 198, 203-208, 512, 580, 745, 749, 750, 752, 753, 838, 862, 898, 976, 982, 1395, 1400, 1417, 1421-1423, 1425, 1427, 1471, 1473, 1474

confiscation, *see also* civilian objects, requisition 657, 1374

contraband of war, *see* warfare

control *see also* supervision 114, 131, 162, 166-168, 179, 223, 234, 235, 256, 260, 263, 282, 284, 333, 377, 422, 450, 454, 517, 643, 737, 759, 760, 763, 769, 772, 826, 827, 834, 873, 921, 989, 992, 1017-1020, 1022, 1162, 1163, 1385, 1434, 1437, 1441, 1480

~ of territory 153, 191, 194, 195, 209, 219, 238, 275, 280, 283, 287, 289-292, 294, 295, 300, 306, 309, 310, 315-317, 320, 327, 349, 362, 370, 493, 495, 497, 498, 500, 502, 561, 566, 571, 580, 601, 604, 605, 651, 658, 659, 669, 692, 710, 741, 815-817, 829, 832, 833, 838, 872, 1321, 1331, 1347, 1349, 1350, 1352, 1353, 1377, 1426, 1459, 1474, 1477

—

conviction, *see also* breaches, guarantees (judicial), prosecution (penal) 199, 200, 209, 216, 881, 864

correspondents (war), *see* journalists

Cosmos Spacecraft/Search and Rescue Satellite Aided Tracking (COSPAS/SARSAT) 1258, 1259, 1275

craft (medical), *see* transportation (medical)

craft (non-medical), *see* warfare

crimes against humanity, *see* war crimes

criminal law, *see* penal law

cultural objects, *see also* civilian objects 96, 104, 445, 447, 456, 457, 606, 607, 617, 631, 632, 639-649, 702, 742, 978, 984, 990, 999, 1002, 1056, 1334, 1336, 1446, 1465-1470

custom, *see also* *jus cogens*, reaffirmation and development 20, 33, 35, 38, 60, 61, 78, 261, 266, 270, 381, 383, 384, 391-394, 396-399, 402, 404, 425, 433, 434, 440, 446, 447, 449, 458, 462, 466, 476, 480, 486, 495, 510, 511, 523, 526, 562, 585-587, 590, 593, 594, 598, 606-608, 611, 615, 617, 628, 654, 680, 688, 689, 698, 700, 706, 791, 803, 855, 882, 890, 907, 922, 930, 936, 947, 948, 956, 986, 987, 1011, 1045, 1053, 1060, 1063, 1084, 1086, 1090, 1092, 1108, 1111, 1114, 1148, 1320-1322, 1341, 1342, 1367, 1381, 1443, 1448, 1450, 1451

dams, *see* works and installations containing dangerous forces

dead, *see also* Central Tracing Agency, family, gravesites 110, 198, 203, 209, 218, 237, 240, 303, 304, 339-341, 343, 347, 349, 350, 355, 357, 359-362, 365-379, 442, 488, 498, 717, 730, 908, 932, 964, 1183, 1379, 1413, 1415

decolonization, *see* self-determination

denouncement (by medical personnel), *see* ethics (rules of medical)

deportation, *see* transfers (forced)

depository 104, 105, 517, 963, 969-971, 1037, 1042, 1044, 1051, 1052, 1064, 1070-1073, 1075, 1077-1081, 1083, 1088, 1089, 1093, 1095, 1096, 1099, 1103-1108, 1110, 1113-1117, 1119-1121, 1146, 1189, 1485, 1493, 1495, 1499, 1501-1503, 1505, 1507, 1509

deprivation of liberty, *see also* assigned residence, detention, internment 69, 149, 153, 154, 156, 160, 162, 822, 862, 875, 877, 885, 893, 1001, 1329, 1330, 1332, 1339, 1344, 1357, 1358, 1360, 1364, 1365, 1367, 1378, 1379, 1383-1387, 1389-1393, 1395, 1422, 1453, 1479, 1501, 1502

derogation, *see also* human rights law 392, 393, 524, 563, 626, 649, 651, 748, 843, 844, 865, 871, 873, 876, 879, 881, 898, 1340, 1365, 1366, 1397, 1399, 1456, 1467, 1470, 1472

deserters, *see* combatants

Detaining Power, *see also* detention, prisoners of war 48, 84, 351, 373, 489, 510, 525, 539, 543, 549, 555, 556, 800, 888, 905, 944, 1010, 1056

detection, *see* identification

detention (detainees), *see also* civilians, deprivation of liberty, internment 43, 69, 111, 149, 151, 153, 154, 156, 162, 190, 240, 325, 333, 349, 352, 355, 356, 358, 359, 365-368, 370, 489, 559, 834, 861, 862, 874, 875, 877, 885, 886, 888, 891, 894, 897, 903, 976, 1324, 1330, 1352, 1355, 1358, 1360, 1365, 1379, 1383, 1384, 1386-1391, 1393, 1395, 1410, 1502

deterrence, *see* arms

development of humanitarian law, *see* reaffirmation and development

disarmament, *see also* arms, attacks, methods and means of warfare 422, 424, 425, 592

discernment, *see also* breaches, children, combatants 160, 901, 905

discipline, *see* armed forces

discrimination, *see* adverse distinction

dissemination of international humanitarian law, *see also* armed forces, legal advisers, legislation (national) 26, 93-95, 99, 312, 828, 865, 927, 930, 933, 948, 959-968, 1009, 1020, 1021, 1483, 1484, 1487-1489

disturbances and tensions (internal), *see also* human rights law 41, 721, 867, 910, 911, 939, 1319, 1322, 1323, 1328, 1331, 1340, 1345, 1347, 1349, 1354-1356

doctors, *see also* medical personnel 93, 96, 125, 147, 148, 152, 153, 155, 160, 163, 202, 204, 205, 207, 223, 833, 1325, 1326, 1404, 1424-1427

dress (civilian), *see also* uniform 438, 470, 471, 516, 529, 532, 534, 536, 542, 702

dykes, *see* works and installations containing dangerous forces

emblem (signs, signals), *see also* breaches, combatants, identification, methods and means of warfare 108, 111, 114, 125, 126, 131, 134, 135, 161, 167, 170, 219, 221-224, 226-235, 261, 264-266, 269, 280, 298, 300, 312, 330, 335, 336, 382, 383, 429, 433, 437, 439, 441, 442, 444-451, 454-471, 483, 486, 487, 500, 565, 606, 643, 644, 666, 675, 689, 699, 703-707, 713, 732-734, 736, 741, 742, 744, 779, 781-789, 791, 793, 797, 799, 802, 804, 828, 832, 834, 914, 919, 922, 933, 942, 964, 989, 991, 993, 998, 999, 1021, 1106, 1137-1139, 1141, 1143-1149, 1151, 1153-1155, 1159, 1161-1164, 1167-1169, 1173-1177, 1179-1183, 1185-1196, 1199-1211, 1215-1219, 1247-1251, 1257, 1258, 1261, 1265, 1269-1271, 1275, 1279, 1283, 1284, 1286, 1288-1293, 1295-1298, 1326, 1403, 1418, 1421, 1434, 1437-1442, 1463

enquiry, *see also* International Fact-Finding Commission 80, 97, 101, 350, 352-354, 365, 377, 378, 858, 1035, 1038-1041, 1044-1052

Entretiens consacrés au droit international médical 108, 199, 223, 1403

environment, *see also* attacks, methods and means of warfare 387, 389, 393, 404, 407, 410-420, 592, 653, 661-664, 668, 1009, 1058

erga omnes, *see* respect and ensure respect

escape, *see* prisoners of war

escort, *see* picket

espionage, *see also* armed forces, combatants 122, 195, 295, 306, 358, 461, 462, 464, 469-471, 486, 499, 501, 528, 540, 543, 549, 551, 553, 558, 559, 561-570, 575, 888, 901

ethics (rules of medical), *see also* medical personnel 108, 148-150, 152, 153, 155-158, 160, 193, 194, 197, 198, 200-206, 208, 215, 217, 976, 1159, 1392, 1404, 1408, 1411, 1422, 1423, 1425-1427

evacuation, *see also* civilians, prisoners of war 128, 176, 245, 246, 280, 479, 489, 490, 654, 669, 686, 693, 717, 720, 723, 727, 729, 838, 842, 857, 880, 898, 907-914, 933, 1000, 1146, 1183, 1203, 1291, 1292, 1379, 1381, 1383, 1387, 1390, 1391, 1414, 1415, 1436, 1457, 1472, 1473

execution (summary), *see* guarantees (fundamental)

experiments (medical or scientific), *see* ethics (rules of medical)

extradition, *see also* breaches, war crimes 278, 848, 934, 974, 975, 978, 979, 1025-1030

failure to act, *see* act, omission and failure to act

families, *see also* Central Tracing Agency, civilians, information (humanitarian), prisoners of war 110, 197, 203, 206, 340, 343-347, 350-354, 357-359, 361, 362, 365, 367, 369, 371, 373-377, 379, 584, 612, 693, 842, 847, 857-859, 862, 880, 886, 890, 897, 898, 903, 907-915, 933, 1367, 1378, 1379, 1383, 1390, 1415, 1425

flag of truce, *see* emblem

force majeure, *see also* breaches, proportionality 267, 296, 322, 1057, 1058

foreigners, *see* aliens

francs-tireurs, *see* combatants

genocide, *see also* breaches, war crimes 607, 654, 887, 978, 980, 1029, 1340

good faith, *see also* interpretation, perfidy 35, 58, 320, 382, 395, 399, 430, 433, 439, 450, 473, 497, 523, 589, 625, 669, 671, 682, 683, 704, 710, 734, 756, 757, 804, 1343, 1399, 1402, 1449, 1463

good offices, *see also* neutrality 75, 82, 83, 85, 86, 370, 1037, 1046, 1050

gravesites, *see also* dead, information (humanitarian) 340, 344, 347, 350, 365-372, 375-379, 442, 908, 1413, 1415

guarantees (fundamental), *see also* disturbances and tensions (internal), human rights law 123, 151, 258, 323, 366, 383, 499, 537, 543, 546, 555, 556, 558, 559, 563, 564, 570, 576, 584, 837, 838, 842, 843, 847, 850, 861, 865, 903, 933, 992, 1333-1335, 1339, 1344, 1358, 1360, 1365, 1367, 1369, 1371, 1373, 1374, 1376, 1386, 1393, 1405

guarantees (judicial) *see also* guarantees (fundamental), human rights law, penal law, prosecution (penal) 538, 539, 555-559, 564, 847, 861, 865, 867, 878, 879, 884-889, 903, 933, 975-977, 990, 1003, 1006, 1009, 1325, 1332, 1339, 1355, 1358, 1360, 1365, 1366, 1371, 1374, 1395, 1398, 1400, 1429

guerrilla, *see also* combatants, methods and means of warfare 383-386, 437, 438, 489, 515, 516, 520-523, 526-529, 531, 532, 534-536, 541, 542, 544, 546, 547, 549, 552, 558, 1208, 1332, 1444

health, *see also* act, omission and failure to act, breaches 111, 149, 150, 154-158, 161, 182, 183, 185, 192, 195, 200, 218, 356, 369, 413, 437, 616, 618, 661, 663, 861, 872, 907, 912, 976, 989, 995, 996, 998, 1367, 1373, 1379, 1383, 1386, 1387, 1389, 1390-1392, 1415, 1460, 1473

High Commissioner for Refugees (UNHCR) 85, 846, 847, 852, 858, 859, 879, 913

high seas, *see* warfare

homicide, *see also* Article 3 common, breaches, guarantees (fundamental) 861, 872, 888, 976, 1324, 1367, 1373

hors de combat, *see also* combatants, methods and means of warfare 147, 212, 382, 400, 401, 403, 404, 409, 437, 475, 476, 479-488, 491, 494-499, 501, 502, 512, 548, 583, 726, 769, 774, 960, 989, 998, 1324, 1339, 1370, 1371, 1489

hospitals, *see also* medical personnel, medical units, wounded, sick and shipwrecked 114, 128-130, 132, 133, 162, 166, 168, 171, 174, 176, 182, 185, 186, 190, 191, 451, 977, 1151, 1436

hostage, *see also* Article 3 common, breaches, guarantees (fundamental) 861, 874, 880, 881, 976, 978, 1324, 1367, 1375

hostile act, *see also* act harmful to the enemy 113, 117-120, 298, 479, 484, 485, 487-489, 491, 493, 496, 499, 500, 542, 545, 618, 619, 639, 642, 647, 665, 699, 701, 703, 707, 796, 820, 837, 868, 1002, 1345, 1364, 1375, 1408, 1409, 1421, 1431, 1432, 1435, 1436, 1465, 1467, 1470

hostilities, *see also* hostile act, war, warfare 39, 40, 48, 68, 129, 154, 189-191, 222, 231, 267, 326, 333, 336, 349-353, 357-359, 361-363, 365, 367-372, 395-397, 400, 411, 497, 519, 528-530, 532, 535, 543, 552, 554, 555, 569, 583, 585, 586, 600, 601, 617, 618, 654, 682, 688, 689, 707, 714, 716, 720, 721, 724, 726, 845, 848-850, 852, 854, 855, 908, 912, 932, 948, 984, 985, 987, 993, 1000, 1001, 1057, 1319, 1320, 1326, 1330, 1332, 1335, 1352, 1353, 1358-1360, 1377, 1386, 1395, 1401, 1414, 1428, 1453, 1463, 1464, 1466, 1470, 1477, 1502

participation in ~ 120, 326, 333, 335, 463, 482, 485, 505, 509, 510, 514-517, 542-545, 549, 550, 553, 554, 556, 558, 559, 567, 571, 575, 576, 579, 581, 588, 599, 612, 613, 618, 619, 697, 698, 762, 791, 794, 798, 799, 870, 875, 897, 899-903, 922, 932, 933, 992, 993, 1324-1326, 1330-1332, 1339, 1344, 1359, 1365, 1367, 1370, 1378, 1380, 1391, 1395, 1407, 1410, 1443, 1447, 1448, 1450, 1453, 1456, 1479

Human Rights Committee, *see also* United Nations 1042

human rights law, *see also* disturbances and tensions (internal), guarantees (fundamental) 43-46, 51-53, 154, 278, 322, 323, 334, 346, 381, 384, 474, 576, 577, 607, 806, 841-844, 865, 871-873, 875, 876, 879, 881, 882, 884, 885, 892, 893, 898, 899, 904, 1034, 1041-1043, 1048-1051, 1327, 1328, 1337, 1339, 1340, 1356, 1358, 1365-1367, 1369, 1376, 1397, 1399, 1401, 1488, 1489

humanitarian, *see* organizations (humanitarian)

humanity (principle of), *see also* necessity 33, 392, 400, 433, 589, 712, 818, 941, 960, 984, 986, 987, 1111, 1337, 1341, 1374

identification, *see also* emblem, methods and means of warfare 111, 124, 133-135, 142, 189, 190, 196, 221-228, 230, 231, 235, 253, 261, 265, 271, 272, 280, 281, 293, 296, 299, 304, 306, 307, 309, 310, 312, 325, 327, 328, 362, 483, 666, 675, 680, 682, 706, 779-787, 797, 798, 803, 917-920, 923, 924, 932-934, 1100-1102, 1106, 1137-1149, 1151, 1153-1159, 1161-1164, 1167, 1169, 1175, 1176, 1185-1195, 1199-1202, 1205, 1207, 1211, 1217-1219, 1247-1251, 1257-1259, 1261-1263, 1266, 1267, 1269, 1274, 1283-1288, 1291, 1292, 1296, 1303, 1438, 1463

identity card, *see* identification

ill-treatment, *see also* Article 3 common, guarantees (fundamental), human rights law 111, 146, 156, 310, 485, 861, 976, 1355, 1365, 1367, 1408, 1413, 1415

impartiality, *see also* organizations (humanitarian) 62, 75, 83-86, 92, 98, 101, 137, 143, 169, 202, 253, 259, 260, 264, 361, 394, 450-453, 462, 464, 552, 654, 707, 813, 815, 817, 818, 861, 878, 940, 941, 945, 960, 1037, 1041-1043, 1052, 1104, 1395, 1398, 1475, 1476, 1479, 1481, 1484

in absentia, *see also* conviction 883, 1400

inalienability of rights, *see* guarantees (fundamental)

indecent assault, *see also* children, guarantees (fundamental), women 861, 874, 891, 892, 897, 900, 1367, 1375, 1390

infants, *see* children

information (humanitarian), *see also* Central Tracing Agency, detention (detainees), families, prisoners of war 207, 340, 343, 349, 350, 353-356, 359-361, 373, 379, 858, 918, 1379, 1415

information (military), intelligence data, *see also* medical units, spies 270, 299, 302, 303, 331, 440, 441, 468, 561, 562, 565-570, 607, 608, 680-682, 836, 901, 945

insignia, *see* emblem

inspection, *see also* supervision 121-123, 162, 163, 256, 269, 271, 315, 317-319, 321, 322, 325, 329-332, 337, 352, 608, 688, 815, 824

instigation, *see* breaches

Institute of International Law 267, 633, 983, 1321, 1322

instruction, *see* dissemination of international humanitarian law

insurgents (insurrection), *see also* combatants, guerrilla, war 627, 867, 1320, 1321, 1325, 1326, 1329, 1332, 1335, 1339, 1344, 1345, 1349, 1351-1353, 1359, 1362, 1399, 1420, 1435, 1441, 1474, 1488

integrity (physical or mental), *see* act, omission and failure to act

interference, *see also* organizations (humanitarian), relief, right of initiative of ICRC 759, 762-764, 815, 820, 1321, 1323, 1333, 1335, 1343, 1345, 1361-1364, 1425, 1435, 1477, 1480

International Association of Lighthouse Authorities 1291

International Atomic Energy Agency (IAEA) 1296

International Civil Aviation Organization (ICAO) 309, 458, 1101-1103, 1146, 1190, 1193-1195, 1207-1210, 1216, 1217, 1247-1250, 1265, 1266, 1270, 1273-1275, 1279-1281, 1292

International Civil Defense Organization (ICDO) 764, 765, 783, 1290, 1291

International Commission on Illumination (CIE) 1103, 1187, 1206, 1207

-
- International Committee for the Neutrality of Medicine** 92, 93, 1403
- International Committee of Military Medicine and Pharmacy** 1403
- International Court of Justice (ICJ)**, *see also* United Nations 51, 1043, 1044
- International Electrotechnical Commission (IEC)** 1103, 1187, 1206, 1248
- International Fact-Finding Commission** 934, 1037-1052, 1070, 1073, 1078, 1115
- International Federation of Air-Line Pilots Associations (IFALPA)** 1279, 1280
- International Frequency Registration Board (IFRB)** 1192, 1193
- International Institute of Humanitarian Law** 963, 964
- International Law Association (ILA)** 205, 1403
- International Lifeboat Conference (ILC)** 1148, 1210, 1211, 1263
- International Maritime Organization (IMO)** (formerly Inter-Governmental Maritime Consultative Organization — IMCO) 458, 1101-1103, 1106, 1146, 1169, 1187, 1193-1196, 1210, 1216, 1251, 1265-1267, 1269, 1271, 1275, 1292
- International Maritime Satellite Organization (INMARSAT)** 1103, 1258, 1259, 1275
- International Organization for Standardization (ISO)** 1154, 1155
- International Radio Consultative Committee (CCIR)** 1255
- International Refugee Organization (IRO)** 858
- International Society of Military Law and the Law of War** 603, 622
- International Telecommunication Union (ITU)** 1101-1103, 1146, 1187, 1189-1195, 1203, 1215-1218, 1251, 1258, 1262, 1265, 1266, 1275, 1292
- International Tracing Service (ITS)**, *see also* Central Tracing Agency, information (humanitarian) 858
- International Union for Child Welfare (IUCW)** 909
- internment (internees)**, *see also* civilians, detention, prisoners of war 149, 153, 162, 237, 240, 259, 276-278, 326, 334, 336, 351, 356, 357, 366-369, 619, 740, 814, 847, 861, 862, 864, 867, 875-878, 885, 886, 891, 894, 897, 913, 940, 944, 1001, 1015, 1018, 1050, 1379, 1383, 1385-1387, 1389-1391, 1393, 1395, 1410

interpretation, *see also* additional (character of the Protocols), reaffirmation and development 23, 24, 28, 47, 51, 58, 106, 395, 418, 433, 523, 556, 951, 956, 957, 970, 1010, 1013, 1014, 1059-1061, 1070, 1073, 1078, 1085, 1091, 1106, 1115, 1120-1122, 1338, 1405, 1409, 1435, 1446

interpretative declarations, *see* reservations

invasion, *see also* *levée en masse*, occupation 209, 215, 216, 383, 510, 511, 528, 531-533, 541, 599, 604, 615, 651, 658, 723, 857

journalists, *see also* civilians 584, 838, 842, 917-924, 933, 934, 1303

jurisdiction (universal), *see* breaches

jus ad bellum, *see also* war 26, 28, 60, 476, 616, 1054

jus cogens, *see also* custom, derogation, Martens clause 27, 28, 51, 392, 433, 524, 1111, 1340, 1341

jus in bello, *see also* additional (character of the Protocols), custom, war 26, 28, 424, 425, 506, 616, 679, 982, 1054, 1055

laws of war, *see* custom

League of Red Cross and Red Crescent Societies, *see also* National Societies 410, 859, 911, 935, 937, 941-943, 966, 1403

legal advisers, *see also* armed forces, commanders, dissemination 95, 927, 933, 947-956, 962, 1020, 1021, 1023

legality, *see also* arbitrary, arms, guarantees (judicial) 874, 882, 887, 1399, 1429

legislation (national), *see also* breaches, dissemination, legal advisers, respect and ensure respect 19, 59, 207, 208, 212, 213, 215, 278, 334, 376, 377, 450, 516, 517, 538, 539, 555, 557, 610, 750, 845, 849, 851, 854, 862, 867, 877, 881-883, 887, 888, 894, 895, 903, 905, 923, 927, 929-931, 933, 934, 962, 965, 969, 970, 975, 980, 981, 992, 1006, 1010, 1015, 1023, 1025-1030, 1069, 1072, 1077, 1080, 1115, 1122, 1146, 1154, 1325, 1332, 1344, 1352, 1366, 1380, 1398-1402, 1423, 1426, 1428, 1429, 1474

levée en masse, *see also* combattants, invasion 501, 510, 511, 532, 533, 541, 611, 902

liberation, *see also* deprivation of liberty, prisoners of war 65, 66, 69, 238, 284, 373, 384, 385, 390, 479, 482, 489-491, 553, 554, 801, 861, 862, 877, 886, 894, 1009, 1107, 1109, 1110, 1360, 1379, 1384, 1385, 1393, 1394, 1501, 1502

looting, *see* pillage

manuals (military), *see also* armed forces, dissemination, legislation (national) 443, 495, 566, 593, 603, 948, 963

Martens clause, *see also* custom, humanity, *jus cogens* 24, 38, 39, 392, 393, 395, 399, 511, 1111, 1341

matériel, *see* medical materials

medical duties, *see also* medical personnel 111, 222, 265, 717, 725, 789, 836, 932, 1424

medical materials (matériel) and medical objects, *see also* medical units, requisition, transportation (medical) 111, 114, 130, 132, 133, 142, 181, 183, 185, 192, 222, 223, 225, 226, 233, 242, 250, 262, 264, 268, 303, 319, 442

medical needs of the civilian population, *see* civilians

medical objects, *see* medical materials

medical personnel, *see also* emblem, identification, wounded, sick and shipwrecked 98, 107, 108, 110, 111, 113-115, 124-130, 132, 133, 138, 140, 141-143, 146, 149, 151, 156, 161, 170, 173, 177-179, 181, 183-186, 189-196, 198-200, 202-205, 219, 221-228, 233, 240, 242, 245-247, 250, 256, 259-261, 264, 268, 273, 299, 303, 319, 321, 323, 333-336, 452, 453, 485, 505, 515, 600, 702, 725, 731, 760, 774, 779, 781, 788, 789, 799, 833-835, 932, 976, 989, 992, 1014, 1137-1140, 1145, 1147, 1151, 1153-1155, 1157-1159, 1161-1164, 1167, 1176, 1179, 1182, 1183, 1186, 1189, 1194, 1286, 1325, 1403, 1404, 1415, 1417-1422, 1424-1428, 1432, 1437-1440, 1442

medical procedures, *see also* ethics (rules of medical) 117, 118, 146, 149-157, 160-163, 186, 190, 198, 199, 203, 356, 1383, 1392, 1393, 1407, 1408

medical secrecy, *see* ethics (rules of medical)

medical units, *see also* emblem, medical personnel, transportation (medical) 110, 113, 114, 125, 127-129, 132, 133, 135, 137-141, 143, 165-183, 185, 192, 195, 219, 221, 222, 225, 226, 229-231, 233, 242, 249-251, 282, 447, 451-455, 464, 471, 724, 732, 779, 785, 788, 795, 804, 932, 989, 992, 1137-1139, 1142, 1167, 1176, 1186, 1194, 1199, 1200, 1202, 1216, 1219, 1251, 1257, 1258, 1261, 1265, 1325, 1404, 1419-1421, 1424, 1431-1440, 1442

mercenaries, *see also* combatants, prisoners of war 323, 358, 476, 549, 551, 553, 558, 571-581, 870

methods and means of warfare, *see also* arms, combatants, warfare 215, 224, 226, 381, 382, 384, 389, 390, 392, 393, 398, 399, 406, 409-414, 416, 418, 421, 422, 424, 425, 430, 440, 442, 477, 485, 487, 508, 544, 563, 583, 586, 589, 590, 593, 595, 599, 606, 607, 613, 621-623, 653, 661-663, 677, 682, 713, 819, 820, 932, 953, 1446, 1455, 1457, 1458, 1479

military action, military effort, *see also* warfare 191, 268, 301, 620, 629, 633, 635, 636, 639, 648, 651, 656, 657, 669, 671, 707, 711, 1002, 1465, 1470

military advantage, *see also* necessity 299, 301, 477, 566, 600, 613, 618-620, 624-626, 629, 631-633, 635-637, 648, 669, 672, 677, 680, 683-687, 694, 827, 995, 1470

military objective, *see also* attacks, civilian objects, methods and means of warfare 165, 167, 169-171, 176, 268, 299, 404-406, 516, 528, 536, 548, 589, 590, 593, 595, 597-600, 612, 613, 619-622, 624-628, 630-638, 640, 643, 647, 648, 665, 668-670, 672, 674, 677, 679-682, 684, 687, 691, 693, 694, 701, 704, 726, 742, 797, 802, 932, 933, 964, 987, 990, 996, 997, 1003, 1009, 1021, 1259, 1459, 1461-1463, 1467, 1469, 1470, 1473

military operations, *see also* attacks, methods and means of warfare, war 65-68, 175, 302, 351, 383, 385, 402, 438, 439, 458, 459, 461, 464, 466, 467, 477, 482, 483, 498, 516, 519, 527-529, 531, 539, 546, 547, 572, 587, 600, 603, 606, 608, 613, 615, 617, 627, 634, 636, 659, 665, 669-672, 677, 678, 680, 682, 684, 686, 688, 691, 694, 699, 702, 707, 709-712, 738, 772, 775, 847, 909, 914, 945, 947, 953, 997, 1009, 1018, 1109, 1249, 1347, 1349, 1352-1354, 1360, 1379, 1380, 1415, 1447, 1449, 1450, 1452, 1471, 1473, 1474, 1502

militia, *see* combatants

minorities, *see also* adverse distinction, self-determination 53, 74

minors, *see* children

missing, *see also* Central Tracing Agency, family, guarantees (fundamental) 110, 339-341, 343-345, 347, 349-352, 354, 355, 357, 359, 360, 498, 502, 858, 932, 1355, 1415

national liberation (war of), *see* self-determination

National Red Cross and Red Crescent Societies, *see also* League, organizations (humanitarian) 91, 93, 94, 99, 100, 109, 113, 126, 142, 168, 209, 213, 234, 259, 349, 352, 361, 410, 450, 453, 454, 714, 786, 913, 931, 932, 935-944, 962, 966, 1141, 1142, 1159, 1169, 1175, 1176, 1218, 1330, 1379, 1419, 1420, 1438-1440, 1475, 1577

nationality, *see also* adverse distinction, civilians, emblem 56, 148, 258, 334, 355, 375, 378, 461-471, 557, 558, 610, 689, 751, 819, 847, 848, 850-855, 867, 875, 876, 878, 940, 975, 1010, 1056, 1359, 1478

nationals, *see also* aliens, civilians, mercenaries 38, 40, 80, 98, 146, 149, 151, 153, 154, 156, 160, 171, 200, 202, 216, 258, 259, 276, 321, 322, 336, 342, 350, 351, 356-358, 365-368, 370, 372, 567, 571, 578, 580, 606, 654, 692, 745, 751, 801, 806, 813, 819, 838, 839, 842, 845-848, 854, 855, 859, 868, 869, 875, 878, 879, 886, 890, 902, 907, 911-913, 917, 940, 944, 976, 989, 993, 1000, 1026, 1029, 1038, 1042, 1048, 1051, 1359, 1459, 1472, 1501

naval forces, *see* warfare

navy or merchant navy, *see* warfare

necessity 181, 184, 186, 296, 446, 511, 683, 685, 745, 756, 757, 803, 807, 833, 900, 909, 931, 949, 987, 1280

military ~ 95, 171, 192, 290, 378, 392-396, 399, 400, 403, 404, 408, 484, 487, 524, 587, 604, 621, 626, 642, 647, 651, 656, 659, 689, 693, 697, 734, 737, 740, 743, 744, 749, 791, 796, 804, 806, 831, 835, 836, 912, 976, 1000, 1174, 1200, 1444, 1456, 1457, 1459, 1467, 1468, 1471-1473

overriding public ~ 365, 377-379

state of ~ 391, 392

urgent ~ 754, 826

negligence, *see* breaches

neutrality, *see also* impartiality, Protecting Powers 36, 60-62, 74, 78, 81, 84, 96, 98, 101, 122-124, 137, 140-142, 153, 168, 169, 210, 212, 213, 237-240, 253, 257-260, 263, 264, 274, 276, 278, 281, 310, 315, 321, 322, 325-337, 351, 356, 357, 360, 368, 429, 439, 441, 451-453, 459, 461-465, 469-471, 485, 565, 570, 578, 607, 645, 654, 657, 759-763, 767, 818, 820, 824, 825, 832, 834, 837, 838, 859, 869, 890, 908, 909, 911, 913, 914, 939, 941-944, 960, 999, 1048, 1050, 1056, 1143, 1144, 1191, 1201, 1218, 1250, 1251, 1257, 1425, 1426, 1428, 1435

newborn-babies, *see* children

non bis in idem, *see* guarantees (judicial)

non-defended localities, *see also* zones 584, 589, 675, 697-706, 913, 989, 997, 998

non-refoulement, *see* refugees

nuclear generating stations, *see* works and installations containing dangerous forces

Nuremberg (Military Tribunal of), *see also* breaches, prosecution (penal), war crimes 381, 391, 587, 607, 688, 882, 887, 888, 978-980, 1003, 1006

nursing personnel, *see* medical personnel

objects indispensable to the survival of the civilian population, *see* civilians

occupation (law of), occupied territories, *see also* annexation, civilians, Occupying Power, self-determination 33, 40, 54, 55, 65-69, 71-75, 153, 154, 162, 181-187, 189-194, 205, 207, 209, 215, 216, 219, 221, 227, 229, 349, 351, 356-360, 365-367, 370, 381, 383, 384, 466, 468, 506, 508, 529-533, 536, 543-545, 553, 558, 559, 561-570, 598, 605, 607, 611, 631, 641, 644, 652, 653, 659, 669, 684, 686, 694, 699, 701-703, 705, 706, 712, 714, 735, 738, 745-759, 761, 766, 767, 779, 783, 791, 799, 801, 803, 805-807, 810-814, 815, 817, 823, 829, 832, 833, 845, 847, 848, 852, 853, 855, 857, 866, 869, 875, 876, 878, 879, 886, 889, 898-900, 903, 907, 912, 913, 940, 943, 976, 977, 989, 1000, 1009, 1018, 1020, 1044, 1107, 1109, 1147, 1151, 1456, 1472, 1477

Occupying Power, *see also* occupation 68, 74, 162, 181-183, 185, 186, 189, 192-194, 238, 366, 367, 370, 559, 562, 605, 627, 659, 669, 693, 694, 703, 706, 735, 740, 743, 745-759, 761, 766, 767, 801, 804-806, 810-814, 833, 846, 848, 855, 875, 876, 885, 894, 904, 905, 912, 913, 937, 976, 989, 1008

offence, *see* breaches

Order of Malta 85

organ transplants, *see* blood transfusion

Organization for African Unity (OAU) 85, 572, 852

Organization of American States (OAS) (formerly the Pan-American Union) 645

organizations (humanitarian), *see also* National Societies, Protecting Powers, relief 62, 75, 82-84, 109, 137, 143, 169, 253, 259, 260, 264, 343-346, 352, 361, 363, 451-453, 703, 705, 707, 762, 814, 818, 819, 825, 857, 859, 879, 913, 927, 935, 944, 992, 1035, 1325, 1345, 1346, 1364, 1379, 1476, 1479, 1480, 1485

Pan-American Union, *see* Organization of American States

parlementaire, *see also* emblem 457, 703, 705

partisans, *see* combatants

peace (in time of), *see also* dissemination, respect and ensure respect 91, 94, 99, 171, 221, 234, 450, 474, 642, 662, 668, 692-694, 697, 707, 709, 710, 719, 723, 765, 779, 784, 786-788, 832, 848, 882, 932-934, 936, 952, 953, 956, 957, 959, 962, 1140, 1155, 1157, 1207, 1209, 1211, 1263, 1266, 1275, 1281, 1440, 1462, 1467, 1468, 1488

penal law, *see also* breaches, legislation (national), prosecution (penal) 94, 199, 358, 513, 514, 538-540, 550, 562, 617, 679, 876-878, 880, 882, 895, 896, 903-905, 973, 975, 977, 1005, 1006, 1058, 1374, 1386, 1395, 1397, 1399, 1429

penalty, *see* punishment

perfidy, *see also* breaches, emblem, methods and means of warfare, ruses 215, 409, 429-444, 448, 458, 460, 469, 470, 488, 519, 523, 527, 537, 539, 542, 565, 567, 586, 619, 702, 904, 989, 991, 993, 998, 999

Permanent Court of International Justice (PCIJ) 1055

picket (military), *see also* medical units, relief 173, 178, 179, 673, 834, 1435

pillage, *see also* banditry, breaches 166, 177, 179, 310, 803, 828, 839, 1367, 1376, 1413, 1415, 1452, 1459, 1467

pilots, *see* airmen

piracy 271

poison, *see* arms

police, *see also* armed forces, civilians 505, 517, 518, 699, 702, 703, 707, 728, 829, 875, 876, 1206, 1320, 1352, 1355

political prisoners, *see also* detention, disturbances and tensions (internal), human rights law 44, 1355

possible (if), *see also* circumstances (in all) 170, 171, 394, 748, 895, 897, 900, 907, 914, 935, 944, 962, 965, 970, 1005, 1381, 1385, 1407, 1410, 1413, 1414, 1471, 1473, 1478, 1487, 1488, 1493

power (in the ~ of) 40, 111, 140, 146, 149, 151, 153, 160, 253, 256, 259, 261, 267, 273, 475, 479, 481, 483-486, 488, 519, 532, 543, 544, 546, 547, 561, 565, 584, 610, 773, 778, 791, 793, 803, 804, 834, 837, 838, 841, 842, 847, 848, 854, 855, 861, 865, 866, 868, 869, 874, 878, 897, 922, 976, 989, 992, 994, 999, 1026, 1329, 1331, 1334, 1344, 1365, 1371, 1375, 1386, 1397, 1422

precautions, *see also* attacks, civilians, methods and means of warfare 171, 479, 489, 608, 614, 620, 626, 627, 648, 665, 672, 673, 677, 679, 681-683, 688, 691, 692, 704, 712, 714, 716, 744, 907, 914, 933, 996, 1022, 1446, 1449

principles of the law of war, *see also* custom 20, 27, 31, 33, 34, 36, 146, 346, 382, 393-395, 427, 433, 594, 1053, 1400, 1407

prisoners of war, *see also* armed forces, combatants, detention 44, 48, 49, 117, 120, 121, 138, 153, 179-181, 186, 207, 259, 273, 274, 277, 302, 320, 333, 358, 361, 373, 381, 383, 385, 386, 441, 467, 471, 474, 479, 481, 484-490, 499-501, 503, 510, 511, 513, 519-526, 528, 537-558, 561, 563-565, 569-571, 573-576, 580, 587, 612, 619, 702, 703, 735, 773, 778, 791, 793, 800, 802, 837, 864, 867, 868, 870, 874, 878, 888, 889, 897, 902, 903, 905, 918, 923, 932, 936, 940, 944, 964, 976, 983, 990, 992, 993, 1000, 1001, 1014, 1015, 1056, 1327, 1329, 1332, 1344, 1352, 1365, 1385, 1386, 1388

proportionality, *see also* breaches, methods and means of warfare 176, 397, 477, 488, 595, 613, 617, 620, 621, 624-626, 648, 672, 677, 683-686, 734, 804, 818, 827, 975, 984, 987, 989, 995-997, 1056, 1450

prosecution (penal), *see also* breaches, guarantees (fundamental), guarantees (judicial) 159, 199, 209, 216, 278, 385, 525, 538, 539, 558, 575, 836, 843, 855, 862, 867, 874, 876, 878, 882, 884, 886-889, 948, 974, 975, 981, 1001, 1008, 1022, 1026, 1027, 1029, 1055, 1331, 1332, 1344, 1360, 1386, 1395-1397, 1402

prostitution (forced), *see also* children, guarantees (fundamental), women 861, 874, 891, 892, 1367, 1375, 1390

Protecting Powers, *see also* neutrality, organizations (humanitarian), substitute 31, 57, 61-63, 75-89, 91-93, 95-98, 100, 101, 149, 161-163, 272, 295, 310, 346, 349, 360, 370, 371, 463, 465, 543, 549, 550, 554, 557, 674, 675, 693, 703, 705, 707, 753, 762, 767, 815, 819, 824-829, 832-835, 855, 878, 879, 885, 907, 909, 913, 914, 944, 967, 976, 1035, 1044, 1049, 1488

public order, *see also* guarantees (fundamental), human rights law, necessity 531, 699, 703, 707, 728, 741, 852, 853, 885, 1020, 1320, 1323, 1355, 1360-1362

publicity of judgments, *see* guarantees (judicial)

punishments, penalty, *see also* breaches, guarantees (fundamental), sanction 199, 200, 202, 204, 209, 216, 217, 467, 469, 519, 524, 525, 533, 538, 540, 545, 554, 564, 685, 752, 799, 828, 861, 862, 873, 874, 879-882, 888, 891-893, 895-898, 902, 904, 905, 978, 979, 981, 982, 1325, 1330, 1332, 1367, 1373, 1374, 1378, 1395, 1399-1402, 1426, 1427, 1429, 1452, 1459

qualified persons, *see also* dissemination, National Red Cross and Red Crescent Societies, Protecting Powers 31, 91-101, 794, 832, 932, 951, 962, 963, 1040, 1049

quarter, *see also* *hors de combat*, methods and means of warfare 382, 458, 473-477, 480, 488, 490, 1335, 1367, 1369, 1371

racism, *see also* *apartheid*, self-determination 28, 33, 44, 45, 53-55, 137, 139, 143, 654, 851-853, 857, 875, 888, 990, 1001, 1002, 1324, 1340, 1355, 1357, 1370, 1411

radar, *see* emblem

radio, *see* emblem

ransom, *see also* guarantee (fundamental), hostage 474

rape, *see* indecent assault

reaffirmation and development, *see also* additional (character of the Protocols), Article 3 common, custom 20, 23, 25, 28, 29, 38, 39, 45, 47, 48, 76, 77, 99, 382, 387, 390, 392, 398-400, 431, 432, 446, 447, 475, 482, 563, 583, 587, 593, 594, 615, 619, 641, 654, 679, 806, 810, 948, 960, 977, 984, 1034, 1085, 1090, 1148, 1319, 1323-1328, 1339, 1345, 1348, 1350, 1375, 1398, 1408, 1410, 1413, 1422, 1444, 1445, 1489

release, *see* liberation

rebels, *see also* combatants, guerrilla, insurgents 1320, 1332, 1351, 1489

reciprocity, *see also* circumstances (in all), reprisals, retortion 37, 38, 336, 394, 971, 982, 1054, 1200, 1452

red cross, red crescent, red lion and sun, *see* emblem

Red Cross and Red Crescent, *see* National Red Cross and Red Crescent Societies

refugees, *see also* aliens, civilians, stateless persons 154, 258, 275, 350, 625, 702, 838, 842, 845-855, 869, 870, 879, 911, 913, 992, 1030, 1359

regular army, *see* combatants

relief, *see also* civilians, occupation (law of), prisoners of war 84, 94, 98, 154, 584, 654, 657, 714, 749, 766, 805-807, 810, 811, 813-829, 831-836, 847, 898, 938, 943, 945, 1326, 1333, 1336, 1346, 1364, 1383, 1388, 1393, 1446, 1457, 1458, 1460, 1475-1481

relief societies, *see also* National Red Cross and Red Crescent Societies, organizations (humanitarian) 110, 111, 113, 137, 140-142, 169, 209, 210, 213-215, 218-220, 240, 259, 263, 451-454, 855, 936, 940, 944, 945, 992, 1419-1421, 1439, 1475, 1477, 1478

religious personnel, *see also* medical personnel 113-115, 127, 128, 130, 184, 189, 190, 193, 195, 196, 221, 225, 227, 240, 256, 261, 273, 303, 319, 321, 453, 485, 505, 515, 600, 702, 717, 725, 726, 779, 788, 871, 976, 989, 992, 1139, 1151, 1153-1155, 1157-1159, 1161-1164, 1179, 1182, 1383, 1388, 1389, 1415, 1417-1422, 1432, 1433, 1437, 1438, 1440, 1442

remains of deceased, *see* dead

reparation, *see also* breaches, compensation 38, 80, 573, 574, 803, 982, 1053-1056, 1058

repatriation, *see also* civilians, human rights law, prisoners of war 65, 66, 69, 334-336, 373-377, 834, 855, 862, 886, 902, 911, 990, 1000, 1001, 1056, 1107, 1109, 1110

repression, *see also* breaches, sanction, war crimes 158, 159, 216, 221, 223, 234, 235, 448, 514, 732, 779, 787, 788, 889, 934, 973, 974, 977, 980, 989, 991, 992, 998, 1005-1007, 1010, 1011, 1015, 1023, 1026, 1029, 1030, 1032, 1034, 1047, 1058

reprisals, *see also* circumstances (in all), reciprocity, retortion 241, 242, 381, 397, 399, 425, 476, 586, 598, 604, 613, 626-629, 634, 639, 642, 649, 651, 652, 657, 661, 664, 665, 668, 673, 839, 881, 974, 982-987, 1032, 1372-1374

requisition, *see also* civil defence, civilian objects, medical units 120, 122-124, 181-187, 194, 263-267, 269, 270, 305, 315, 322, 324, 325, 331, 332, 335, 642, 644, 657, 745, 754-757, 761, 803, 804, 839, 880

rescue, *see also* tracing 120-124, 146, 483, 496, 500, 501, 714, 717, 724, 726, 1211, 1258, 1259, 1269, 1270, 1275, 1410

rescue craft, *see* transportation (medical)

reservations, *see also* custom, *jus cogens* 85, 526, 616, 638, 888, 1059-1065, 1070, 1073, 1078, 1090, 1115, 1485

residence (forced), *see* assigned residence

resistance, *see also* combatants, occupation (law of) 40, 55, 154, 205, 383, 385, 506-508, 510, 511, 513, 523, 526, 531, 532, 542, 545, 611, 753

respect and ensure respect, *see also* circumstances (in all), dissemination, legislation (national) 33, 35-38, 79, 166, 191, 434, 523, 925, 927, 930, 939, 950, 1032, 1052, 1487

responsibility (international) 46, 392, 423, 463, 562, 925, 1007, 1053-1058

responsible command, *see also* commanders 55, 383, 505, 508, 510, 512, 515, 517, 532, 611, 1008, 1011, 1347, 1349, 1352, 1353

retortion, *see also* reciprocity, reprisals 243, 982

right of initiative of ICRC, *see also* disturbances and tensions (internal) 85, 879, 935, 938, 939, 1345, 1354, 1480

riot, *see* disturbances and tensions (internal)

ruses, *see also* methods and means of warfare, perfidy 429, 433, 436, 439-441, 443, 444, 567

sabotage, *see also* combatants, methods and means of warfare 195, 476, 501, 551, 559, 673, 722, 901, 1380

sanction, *see also* breaches, punishments, war crimes 154, 158, 200, 212, 458, 522, 528, 535, 537, 539, 554, 563, 569, 570, 799, 836, 874, 961, 980, 984, 986, 994, 1006, 1007, 1010-1012, 1023, 1053, 1374, 1426, 1429

“scorched earth”, *see* starvation

scrutiny, *see* suspension

search, *see* tracing

secret code, *see* transportation (medical)

security, *see also* civilians, evacuation, guarantees (fundamental) 194, 214, 270, 297, 298, 306, 310, 317, 367, 543, 559, 563, 564, 575, 577, 740, 745, 748, 754, 759, 763, 767, 801, 826, 831, 857, 859, 885, 933, 937, 945, 1332, 1359, 1360, 1363, 1386

seizure, *see* requisition

self-defence, *see also* aggression, methods and means of warfare, war 26, 390, 615, 620, 776, 983, 1035, 1055

self-determination (right of ~), *see also* combatants, guerrilla, resistance 25, 33, 39, 41-55, 68, 73, 382, 462, 503, 507, 508, 511, 514, 529, 530, 535-537, 542, 557, 572, 580, 817, 867, 900, 956, 1047, 1068, 1083, 1088-1092, 1116, 1118, 1323, 1324, 1328, 1331, 1332, 1334

sex, *see also* adverse distinction 137, 143, 861, 874, 893, 1324, 1357, 1370, 1411

ships (merchant), *see* warfare

ships and crafts (medical), *see* transportation (medical)

ships, *see* warfare

shipwrecked, *see also* wounded, sick and shipwrecked 113, 118-124, 130, 146, 193, 211, 256, 259, 318, 486, 494, 495, 497, 1251, 1275, 1403, 1409, 1410, 1414

sick, *see* wounded, sick and shipwrecked

sign, *see* emblem

signal, *see* emblem

simulation, *see* ruses

Skorzeny (Case) 466-468

slavery, *see* human rights law

spies, *see* espionage

starvation, *see also* civilians, methods and means of warfare, relief 409, 604, 651-659, 662, 671, 743, 819, 820, 829, 1455-1459, 1479

stateless persons, *see also* refugees 838, 842, 845, 846, 849, 850, 854, 869, 870, 911, 992, 1030, 1359

substitute for Protecting Power, *see also* organizations (humanitarian), Protecting Powers 57, 62, 63, 75-78, 81, 83-87, 89, 92, 95-97, 100, 161, 163, 272, 295, 310, 346, 360, 753, 762, 767, 824, 825, 827, 829, 832-834, 1035, 1488

summons, *see* warning

superfluous injury (unnecessary suffering), *see also* arms, methods and means of warfare 382, 386, 389, 393, 394, 399-404, 406-409, 414, 418, 422, 442, 477, 488, 590, 592, 593, 595, 598

supervision, *see also* control, Protecting Powers, respect and ensure respect 35, 76-80, 85, 88, 92, 94-97, 154, 161, 163, 189, 195, 215, 221, 699, 704, 705, 707, 710, 779, 787, 788, 815, 819, 823-825, 832-835, 862, 913, 952, 953, 984, 1032, 1034, 1043, 1048, 1207, 1262, 1383, 1390, 1438, 1441, 1480, 1488

supplies, *see also* relief 129, 654, 806, 807, 810-813, 815, 817, 821, 823, 826, 827, 832, 834, 1455, 1457, 1458, 1475, 1478

suppression, *see* repression

surrender, *see also* capitulation, capture, *hors de combat* 117, 382, 429, 436, 437, 457, 458, 475, 476, 479-481, 483, 484, 486-488, 493-502, 532, 618, 685, 1021, 1371

tensions, *see* disturbances and tensions (internal)

terrorism, *see also* Article 3 common, guarantees (fundamental), methods and means of warfare 393, 526, 536, 538, 876, 979, 1367, 1375, 1452

Tokyo (Military Tribunal of) 978, 1015

torture, *see also* Article 3 common, guarantees (fundamental), human rights law 861, 873, 874, 883, 976, 978, 1324, 1340, 1341, 1367, 1373, 1427

tracing, *see also* Central Tracing Agency, family, wounded, sick and shipwrecked 128, 146, 209, 218, 245, 246, 299, 305, 306, 310, 319, 320, 340, 349-352, 354, 359-362, 500, 570, 584, 731, 1251, 1258, 1269, 1270, 1275, 1413-1415, 1419, 1478

transfers (forced), *see also* civilians 749, 750, 847, 853, 855, 857, 858, 875, 888, 912, 976, 989, 1000, 1446, 1459, 1460, 1471-1474

transportation (medical), *see also* emblem, medical personnel, medical units 109, 110, 113-116, 120, 121, 123, 125, 127-133, 137-139, 143, 192, 195, 211, 221, 222, 224-226, 229-233, 242, 245-247, 249-251, 253-273, 275-285, 287-313, 315-337, 442, 451-455, 458, 464, 500, 565, 607, 608, 689, 714, 779, 785, 788, 932, 976, 977, 989, 992, 1100, 1101, 1137-1148, 1167-1169, 1174-1176, 1186-1195, 1199-1211, 1215-1219, 1247-1251, 1257, 1258, 1261-1263, 1265-1267, 1270, 1273-1275, 1279-1281, 1291, 1326, 1409, 1410, 1419, 1420, 1431-1440, 1442

treachery, *see also* perfidy 322, 382, 432, 442

tribunal, *see also* guarantees (judicial) 159, 490, 510, 543-545, 550-557, 564, 565, 570, 576, 612, 619, 861, 878, 885, 903, 1022, 1325, 1374, 1395, 1397, 1398

truce, *see* cease-fire

UNESCO, *see* United Nations Educational, Scientific and Cultural Organization

uniform, *see also* armed forces, combatants, emblem 122, 148, 382, 383, 443, 444, 446, 461, 464, 465, 467-471, 510, 512, 517, 519, 522, 526, 527, 529, 532, 534, 536, 537, 542, 546-549, 561, 565-568, 611, 901, 902, 922, 999, 1009

United Nations 23, 25-27, 37, 44, 47, 59, 85, 384, 406, 429, 439, 445, 446, 459, 469, 507, 565, 573, 575, 588, 621, 703, 709, 829, 921, 978, 999, 1030-1032, 1034, 1035, 1049, 1118, 1120, 1323, 1327, 1331, 1339, 1363, 1373, 1444, 1445, 1451, 1488, 1489

~ Charter 23, 25-28, 33, 41, 42, 44-46, 51-54, 73, 77, 385, 511, 615, 1031, 1034, 1035, 1054, 1117, 1118, 1323, 1328, 1362, 1506

~ Commission on Human Rights 42, 919

~ Division of Human Rights 340, 345, 347

~ Economic and Social Council (ECOSOC) 852, 886, 919

~ Environment Programme (UNEP) 410, 411

- ~ General Assembly 42-44, 48, 74, 339, 341, 381, 384, 390, 403, 509, 572, 588, 589, 662, 852, 873, 899, 911, 919, 920, 960, 978, 1001, 1118, 1373, 1444, 1476
- ~ International Law Commission (ILC) 392, 524, 978, 979, 1054, 1484
- ~ Relief and Rehabilitation Administration (UNRRA) 858
- ~ Secretary-General 340, 961, 1110, 1117, 1118, 1485, 1503, 1507
- ~ Security Council 572, 615, 1035, 1363

United Nations Educational, Scientific and Cultural Organization (UNESCO) 640, 643, 645, 909, 960, 1466, 1468

unnecessary suffering, *see* superfluous injury (unnecessary suffering)

violations, *see also* breaches, respect and ensure respect 38, 46, 80, 97, 101, 170, 203, 213, 233, 242, 243, 265, 315, 317, 319, 320, 322, 324, 328, 330, 332, 381, 384, 392, 397, 437, 440, 441, 469, 513, 519, 523, 525, 526, 528, 535, 537, 539, 540, 549, 556, 562, 595, 604, 613, 616, 627, 628, 634, 648, 654, 679, 685, 712, 902, 979, 982, 985, 987, 989, 990, 995, 996, 999, 1011, 1017, 1022, 1031, 1033, 1037, 1038, 1044-1047, 1049-1051, 1053-1058, 1159, 1325, 1380, 1463, 1470, 1479

volunteers (corps), *see* combatants

war, *see also* warfare 21, 25, 39, 40, 48, 267, 392, 399, 879, 880, 1218, 1453

civil ~ 46, 1321, 1322, 1342

war crimes, *see also* breaches, crimes against humanity, repression, violations 159, 334, 378, 444, 526, 562, 587, 606, 685, 843, 862, 882, 887-889, 956, 977-979, 981, 990, 1002, 1003, 1006, 1014, 1030, 1055, 1400

warfare, *see also* combatants, methods and means of warfare 131, 138, 180, 256, 273, 274, 384, 398, 400, 417, 427, 439, 470, 605, 606, 661, 667, 810

air ~ 381, 439, 476, 483, 485-487, 493-502, 509, 541, 566, 586, 587, 590, 598, 601, 605-607, 622, 674, 677, 687-689, 1143, 1144, 1203

naval ~ 121-124, 257, 258, 265, 268-271, 274, 275, 278, 283, 284, 289, 293, 294, 381, 387, 435, 439, 444, 461, 462, 469, 470, 486, 487, 566, 601, 605-607, 644, 654, 657, 677, 687, 688, 1141, 1144, 1145, 1148, 1149, 1186

war on land 289, 606, 607

warning, summons, *see also* medical units, transportation (medical) zones 176, 271, 297, 397, 607, 608, 622, 628, 630, 648, 677, 686, 687, 702, 712, 717, 720, 722, 769, 771, 987, 1431, 1436, 1470

warships (craft), *see* warfare

weapons, *see* arms

white flag, *see* emblem, parlementaire

women, *see also* children, civilians, deprivation of liberty 113, 118, 239, 250, 262, 584, 815, 821, 822, 842, 862, 866, 871, 880, 885, 886, 891-896, 900, 905, 915, 933, 1375, 1376, 1383, 1390, 1395, 1401, 1402

works and installations containing dangerous forces, *see also* breaches, civilians, emblem, methods and means of warfare 447, 455, 591, 592, 616, 658, 665-675, 695, 702, 932, 989, 996, 1137-1139, 1149, 1295-1298, 1335, 1446, 1461-1464

World Administrative Radio Conference (WARC), *see also* International Telecommunication Union 458, 1190, 1191, 1193, 1195, 1215-1218, 1251, 1263

World Health Organization (WHO) 1403

World Medical Association 200, 1403

worship (places and objects of), *see also* cultural objects 422, 639, 640, 646-648, 812, 821, 990, 1002, 1336, 1465-1470

wounded, sick and shipwrecked, *see also* civilians, combatants, *hors de combat* 107-111, 113, 114, 116-126, 129-134, 137, 138, 145-147, 151, 157, 158, 166, 167, 171-173, 176, 179-182, 184-186, 190, 192, 193, 195, 197, 198, 200-220, 222, 223, 231, 232, 238, 240-242, 245-247, 249, 250, 253, 255-258, 261, 262, 264, 265, 268-271, 274-278, 294, 298, 299, 303, 305, 306, 310, 311, 315, 318-320, 323-325, 327, 330-335, 362, 400, 404, 437, 442, 452, 454, 476, 479, 483, 486-488, 490, 498, 500, 502, 515, 520, 548, 607, 631, 644, 688, 689, 697, 702, 725, 726, 733, 741, 743, 771, 774, 821, 822, 835, 864, 918, 976, 985, 989, 992, 1000, 1022, 1146, 1147, 1183, 1186, 1188, 1203, 1263, 1273, 1291, 1324-1326, 1328, 1339, 1341, 1352, 1365, 1371, 1379, 1383, 1386, 1393, 1403-1405, 1407-1411, 1413-1415, 1418, 1419, 1422-1425, 1427-1429, 1432-1439, 1475, 1478, 1489

zone, *see also* civilians, methods and means of warfare, neutrality, wounded, sick and shipwrecked 190, 221, 222, 227, 281, 283, 284, 288, 290, 291, 294, 295, 300, 305-310, 315-317, 320, 327, 349, 362, 486, 498, 566, 608, 654, 683, 697, 717, 726, 834, 847, 1147, 1163, 1292, 1379, 1440

combat ~ 80, 191, 192, 294, 312, 363, 598, 621, 674, 710, 738, 769, 772, 775-779, 783, 913, 917, 920, 921, 923, 1151, 1176, 1179, 1180, 1183, 1189, 1383, 1387, 1391, 1414, 1459

contact ~ 287-290, 292, 300, 305, 306, 308, 310, 317, 319, 327, 362, 637, 638, 699, 701

demilitarized ~ 584, 589, 675, 697, 701, 707-712, 913, 933, 989, 997, 998

medical ~ 169, 454, 697

neutral ~ 697, 1263

security ~ 705, 711, 723, 784, 894, 913

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