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

COMMENTARY

part one

Documentary material submitted by the International Committee of the Red Cross

GENEVA
January 1972
II
COMMENTARY
part one

Documentary material submitted by the
International Committee of the Red Cross

GENEVA
January 1972
CONTENTS

ABBREVIATIONS ........................................................... 1

DRAFT ADDITIONAL PROTOCOL TO THE FOUR GENEVA CONVENTIONS
OF AUGUST 12, 1949 ............................................................. 1

PART I

General provisions ........................................................... 4
Article 1.- Scope of the present Protocol .................................. 8
Article 2.- Terminology .................................................... 9
Article 3.- Legal status of the Parties ..................................... 10
Article 4.- Provisional application ....................................... 11
Article 5.- Beginning and end of application ............................ 13
Article 6.- Appointment of Protecting Powers and of their substitute ........................................ 14
Article 7.- Qualified persons ............................................. 19
Article 8.- Co-operation of the High Contracting Parties .............. 21
Article 9.- Meetings ..................................................... 23
Article 10.- Permanent body .............................................. 24

PART II

Wounded, sick and shipwrecked persons .................................. 27
Section I.- General provisions ........................................... 27
Article 11.- Definitions ................................................ 28
Article 12.- Protection and care ......................................... 29
Article 13.- Protection of persons ....................................... 31
Article 14.- Civilian medical establishments and units ................. 34
Article 15.- Discontinuance of protection of civilian medical establishments and units ........................................ 34
Article 16.- Civilian medical transport ................................... 35
Article 17.- Requisition .................................................. 36
Article 18.- Civilian medical personnel .................................. 38
Article 19.- Protection of medical duties ................................ 41
Article 20.- Role of the population ..................................... 44
Article 21.- Use of the distinctive emblem ................................ 45
Article 22.- Neutral States ................................................ 47
Section II.- Medical air transport ......................................... 48
Article 23.- Medical aircraft ............................................. 49
Article 24.- Protection .................................................... 50
Article 25.- Removal of the wounded ..................................... 52
Article 26.- Flight over the territories of the Parties to the conflict ........................................ 53
Article 27.- Identification ................................................. 54
Article 28.- Landing ....................................................... 55
Article 29.- Neutral States ................................................ 57

PART III

Combatants ................................................................. 60
Article 30.- Means of combat ............................................. 60
Article 31.- Prohibition of perfidy ....................................... 62
PART IV

Civilian population ..................................................... 75

Section I.- General provisions ........................................ 80

Article 40.- General protection of the civilian population ............. 81
Article 41.- Definition of the civilian population ....................... 82
Article 42.- Definition of objects of a civilian character ............... 85
Article 43.- Definition of military objectives .......................... 87
Article 44.- Definition of attacks ..................................... 90

Section II.- Protection of the civilian population against dangers resulting from hostilities ................................. 91

Chapter I.- Civilians ...................................................... 92

Article 45.- Respect for the civilian population ....................... 93
Article 46.- Safeguarding of the civilian population .................... 95

Chapter II.- Objects of a civilian character ................................ 96

Article 47.- Respect for objects of a civilian character ................ 97
Article 48.- Respect for and safeguarding of objects indispensable to the survival of the civilian population ...... 98

Chapter III.- Precautionary measures ................................... 100

Article 49.- Precautions when attacking ................................ 101
Article 50.- Principle of proportionality ................................ 102
Article 51.- Precautions against the effects of attacks ................. 104
Article 52.- Relationship of this Chapter to the other provisions of the present Protocol ............................... 105

Chapter IV.- Localities and objects under special protection ......... 105

Article 53.- Non-defended localities ("open cities") .................... 108
Article 54.- Neutralized localities ..................................... 113
Article 55.- Works and installations containing dangerous forces ............................................. 117
Article 56.- Relationship of this Chapter to the other provisions of the present Protocol ............................... 119

Section III.- Assistance to the civilian population ..................... 120

Chapter I.- Measures in favour of children ............................ 121

Article 57.- Protection of children ..................................... 122
Article 58.- Safeguarding of children ................................... 123
Article 59.- Mothers of infants .......................................... 124
Article 60.- Death penalty ............................................... 125
Article 61.- Repatriation .................................................. 126
Article 62.- Relationship of this Chapter to the Fourth Convention .............................................. 128

Chapter II.- Relief .......................................................... 128

Article 63.- Supplies ..................................................... 130
Article 64.- Humanitarian assistance ..................................... 131
Article 65.- Transit .......................................................... 132
Article 66.- Relationship of this Chapter to the Fourth Convention .............................................. 133

Section IV.- Civil defence organizations ................................ 134

Article 67.- Definition .................................................... 136
Article 68.- General protection ........................................... 139
Article 69.- Protection in occupied territories .......................... 141
Article 70.- Organizations of neutral States ........................................... 142
Article 71.- Markings .................................................................................. 144
Article 72.- Notification .............................................................................. 146

PART V

Execution of the Conventions and of the present Protocol ...................... 147

Section I.- General provisions ................................................................. 150
Article 73.- Detailed execution and unforeseen cases ................................ 150
Article 74.- Prohibition of reprisals and exceptional cases ....................... 151
Article 75.- Orders and instructions .......................................................... 153
Article 76.- Dissemination ........................................................................ 155
Article 77.- Rules of application ................................................................ 157

Section II.- Intergovernmental Organizations ........................................... 158
Article 78.- Accession ................................................................................. 158

PART VI

Final provisions ............................................................................................ 160
Article 79.- Signature ................................................................................. 161
Article 80.- Ratification ............................................................................. 161
Article 81.- Accession ................................................................................. 161
Article 82.- Reservations ........................................................................... 163
Article 83.- Entry into force ....................................................................... 162
Article 84.- Treaty relations upon entry into force of the present Protocol ........................................................................... 165
Article 85.- Denunciation ......................................................................... 167
Article 86.- Notifications .......................................................................... 168
Article 87.- Registration and publication ................................................. 168
Article 88.- Authentic texts and official translations .................................. 168

ANNEX I

Regulations on the marking and identification of medical aircraft ................ 170

ANNEX II

Draft Model Agreements .......................................................................... 171
1.- Draft Model Agreement creating non-defended localities ................... 172
2.- Draft Model Agreement creating neutralized localities ...................... 176
3.- Draft Model Agreement granting special protection to works containing dangerous forces .................................................. 179

PRELIMINARY DRAFT DECLARATION ON THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN ARMED STRUGGLES FOR SELF-DETERMINATION ........................................... 181
ABBREVIATIONS

Art. Article
chap. chapter
Com. Committee

Commentary, Geneva Conv. 1949

Commentary, First Geneva Conv. 1949
Commentary I,
The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 1952

Commentary, Second Geneva Conv. 1949
Commentary II,

Commentary, Third Geneva Conv. 1949
Commentary III,
The Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 1950

Commentary, Fourth Geneva Conv. 1949
Commentary IV,

common Art. 3
Article 3 common to the four Geneva Conventions of August 12, 1949

XXth Internat. Conf. Red Cross, Res. XXVIII, Vienna, 1965
XXth International Conference of the Red Cross, Vienna, October 1965, Resolution XXVIII, "Protection of Civilian Populations against the Dangers of Indiscriminate Warfare"

XXIst International Conference of the Red Cross, Istanbul, September 1969, Resolution XIII, "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts"
Geneva Conv. 1949
- Geneva Convention for the Amelioration of the Condition of Wounded and Sick in armed Forces in the Field, of August 12, 1949
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949
- Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949
- Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949

IVth Hague Conv. 1907
Convention No. IV concerning the Laws and Customs of War on Land; Annex to the Convention, Regulations concerning the Laws and Customs of War on Land (Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907, New York, Oxford University Press, 1915)

IXth Hague Conv. 1907

Hague Conv. 1954

Vienna Conv. 1969

Doc.
Document

ICRC
International Committee of the Red Cross


ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. ...

International Committee of the Red Cross; documents submitted to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May - 12 June 1971, first session, Documents I to VIII :

Document I, CE/2b, Introduction

Document II, CE/2b, Measures intended to Reinforce the Implementation of the Existing Law

Document III, CE/3b, Protection of the Civilian Population against Dangers of Hostilities

Document IV, CE/4b, Rules relative to Behaviour of Combatants

Document V, CE/5b, Protection of Victims of Non-International Armed Conflicts

Document VI, CE/6b, Rules Applicable in Guerrilla Warfare

Document VII, CE/7b, Protection of the Wounded and Sick

Document VIII, CE/8b, Annexes


ICRC, Draft Protocol I, 1972

ICRC, Draft Protocol II, 1972

ICRC, Draft Rules, 1956
International Committee of the Red Cross; XIXth International Conference of the Red Cross, New Delhi, 1957, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, Draft submitted by the ICRC, Geneva, September 1956

ICRC, Questionnaire D-0-1210b
International Committee of the Red Cross, Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949 (supervision and penalties), D-0-1210b, Geneva, September 1971

IDI
Institut de Droit international

p. (pp.)
page (pages)

para. (paras.)
paragraph (paragraphs)

Geneva Protocol, 1925

UNESCO
The United Nations Educational, Scientific and Cultural Organization

UN
United Nations Organization
UN, A/Res. 2444 (XXIII)  
United Nations  
General Assembly resolution  
2444 (XXIII) of 19 December 1958,  
"Respect for human rights in armed conflicts"

UN, A/Res. 2597 (XXIV)  
United Nations  
General Assembly resolution  
2597 (XXIV) of 16 December 1969,  
"Respect for human rights in armed conflicts"

UN, A/Res. 2677 (XXV)  
United Nations  
General Assembly resolution  
2677 (XXV) of 9 December 1970,  
"Respect for human rights in armed conflicts"

UN, A/Res. 2852 (XXVI)  
United Nations  
General Assembly resolution  
2852 (XXVI) of 20 December 1971,  
"Respect for human rights in armed conflicts"

UN, A/Res. 2853 (XXVI)  
United Nations  
General Assembly resolution  
2853 (XXVI) of 20 December 1971,  
"Respect for human rights in armed conflicts"

UN, Report of the Secretary-General A/7720, 1969  
United Nations General Assembly,  
twenty-fourth session, agenda item 61,  
Respect for human rights in armed conflicts,  
Report of the Secretary-General A/7720, 20 November 1969

UN, Report of the Secretary-General A/8052, 1970  
United Nations General Assembly,  
twenty-fifth session, agenda item 47,  
Respect for human rights in armed conflicts,  
Report of the Secretary-General A/8052, 18 September 1970

UN, Report of the Secretary-General A/8370, 1971  
United Nations General Assembly,  
twenty-sixth session, provisional agenda item 52 (a),  
Respect for human rights in armed conflicts,  
Report of the Secretary-General A/8370, 2 September 1971

UN, Note by the Secretary-General A/8313, 1971  
United Nations General Assembly,  
twenty-sixth session, agenda item 49,  
Respect for human rights in armed conflicts,  
Comments by Governments on the reports of the Secretary-General,  
Note by the Secretary-General A/8313 and A/8313/ Add. 1,2 and 3, of 15 June,  
6 October, 18 October and 22 October 1971
UN, Report of the Third Committee
A/8589, 1971

United Nations General Assembly,
twenty-sixth session, agenda item 49,
Respect for human rights in armed
conflicts,
Report of the Third Committee
A/8589, 15 December 1971

UN, Provisional Summary Records,
1971, Third Committee, A/C. 3/SR.
1885 to 1887 and 1889 to 1898

United Nations General Assembly,
twenty-sixth session, agenda item 49,
Respect for human rights in armed
conflicts,
Provisional Summary Records, 1971,
of the Third Committee
A/C. 3/SR. 1885 to 1887 and 1889 to 1898
DRAFT ADDITIONAL PROTOCOL TO THE
FOUR GENEVA CONVENTIONS OF
AUGUST 12, 1949

COMMENTARY
The High Contracting Parties,

Recalling that the recourse to force is prohibited in international relations,

Deploiring that despite this prohibition and notwithstanding all endeavours to proscribe armed conflicts they continue to occur and to cause a great deal of suffering which must be alleviated,

Noting that humanitarian rules retain all their validity despite the infringements which they suffered and believing that the observance of these rules in their entirety by all the Parties to the conflict will improve the likelihood of finding peaceful solutions,

Reaffirming the conventional and customary rules whereby the Parties to the conflict must make a distinction between protected persons and objects, on the one hand, and military objectives, on the other,

Emphasizing that the methods and measures which are today available to the armed forces do not always allow such a distinction to be made,

Believing, consequently, that it is essential to reaffirm and develop the rules ensuring the protection of the victims of armed conflicts and enshrining the principles of humanity and to supplement those measures intended to reinforce their implementation,

Have agreed on the following:

References 1/

First paragraph
- Charter of the United Nations, Preamble and Arts. 1 and 2.
- UN, A/Res. 2852 (XXVI), preambular para. 1.

1/ Most of the texts mentioned in the references are contained in the ICRC 1971 documentation (see ICRC, Conf. Gv't. Experts, Geneva, 1971, Doc. CE/3b, Annexes, and CE/8b).

Second paragraph
- ICRC, Draft Rules, 1956, Preamble, para. 2.
- IDI Resolution, Preamble, para. 2.
- UN, A/Res. 2675 (XXV), preambular para. 1.
- UN, A/Res. 2852 (XXVI), preambular para. 4.

Third paragraph
- UN, A/Res. 2853 (XXVI), preambular para. 4.
- IDI Resolution, preambular para. 5.

Fourth paragraph
- IDI Resolution, preambular paras. 2 and 3 and operative para. 1.
- UN, A/Res. 2444 (XXIII), operative para. 1 (c).
- UN, A/Res. 2675 (XXV), operative para. 2.

Fifth paragraph
- ICRC, Draft Rules, 1956, Preamble, para. 2.
- IDI Resolution, preambular para. 6.

Sixth paragraph
- ICRC, Draft Rules, 1956, Preamble, para. 3.
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2597 (XXIV).
- UN, A/Res. 2677 (XXV).
- UN, A/Res. 2852 (XXVI).
- UN, A/Res. 2853 (XXVI).
PART I

GENERAL PROVISIONS

General References

- Geneva Conv. 1949, common Art. 1, Arts. 8/8/8/9 and 10/10/10/11.
- ICRC, Questionnaire D-O-1210 b.
- UN, Internat. Conf. on Human Rights, Teheran, 1968, Res. XXIII.
- UN, A/Res. 2852 (XXVI).
- UN, A/Res. 2853 (XXVI).
- UN, Report of the Secretary-General A/8052, 1970, paras. 238 to 250 and Annex I, paras. 69 to 73.
- UN, Report of the Secretary-General A/8370, paras. 141 to 146.
INTRODUCTION

After having defined in its Article 1 the scope of this Draft Protocol, the present Part seeks to elaborate and supplement the general provisions of the Conventions relative to questions of application, of co-operation in their application and of supervision of such application.

During the first session of the Conference, a specific Commission was established - at the express request of several experts - to examine the measures intended to reinforce the implementation of the law in force.

Today, taking into due account certain opinions expressed on this subject in the course of the first session, taking likewise into account the Reports of the Secretary-General of the United Nations on Respect for Human Rights in Armed Conflicts and the examination of these Reports by the General Assembly of the United Nations at its twenty-fifth and twenty-sixth sessions, relying also on the ideas and suggestions put forward on this matter by various milieux, the ICRC is proposing provisions which it deems appropriate to reinforce international assistance in the application of the Conventions and of this Protocol, as well as the supervision of that application.

Pursuant to a wish expressed at the first session, the ICRC drew up a Questionnaire, which it addressed to all the States Parties expressly bound to the 1949 Conventions, so that they might make known their points of view on certain measures intended to reinforce the application of the Conventions. Nevertheless, the ICRC considered it possible already to draw up the texts of several articles of this Part, taking into account the proposals made by the experts at the first session. On the other hand, in the case of certain provisions, it has done no more - quite understandably - than indicate the titles, believing it necessary
to accumulate still other qualified opinions with regard to them and to await the replies to the Questionnaire mentioned above, in the case of two of the articles (Art. 8 para. 2 and Art. 10).

The international community manifests a lively interest in the question of the application of humanitarian rules relating to armed conflicts. Discussions during the first session brought out the fact that the experts want to give priority to considering what steps could be taken to improve the application of existing rules. The United Nations, for their part, have devoted a great deal of attention to this subject. In 1968, the International Conference on Human Rights, held in Teheran, had adopted a resolution 1/, requesting in particular, the General Assembly of the United Nations to invite the Secretary-General to study "steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts". Responding to this request, the Secretary-General took up this matter in parts of his Reports on respect for human rights in armed conflicts. During the twenty-fifth and twenty-sixth sessions of the General Assembly, the Third Committee examined this chapter; as a whole, the representatives agreed that the better application of existing rules was dependent on the political will of States; some delegates declared that, since the usefulness of any international agreement was dependent on its application, it was of decisive importance to examine the application of the instruments in force when considering the rules to be set up for the future; numerous speakers underscored the necessity to reinforce the international machinery for scrutiny of the application, as instituted by the Conventions and, in particular, to elaborate the system of the Protecting Powers; several of them expressed satisfaction that the decision had been reached to treat this as one of the questions of major importance during the second session of the Conference organized by the ICRC. At its twenty-sixth session, the General Assembly of the United Nations adopted two resolutions ("Respect for human rights in armed conflicts") in which it invited the ICRC to devote special attention, among the questions to be taken up, to "the need to ensure better application of existing rules relating to armed conflicts... including the need for strengthening the system of protecting Powers..." 2/ and it


2/ UN, A/Res. 2852 (XXVI), operative para.3(a).
emphasized that "effective protection for human rights in situations of armed conflicts depends primarily on universal respect for humanitarian rules" 3/.

As the ICRC shares this view, it proposes, in the preamble to this Protocol, to stress that the High Contracting Parties believe that it is essential not only to reaffirm and develop the rules ensuring the protection of the victims of armed conflicts and enshrining the principles of humanity, but also to supplement those measures intended to reinforce the implementation of these rules.

Furthermore, in concurrence with the opinions of several experts, the ICRC recalls the solemn undertaking by the High Contracting Parties, in virtue of Article 1, common to the Conventions, to respect and to ensure respect for the latter in all circumstances, and - in the present Part and in Part V - it proposes various means intended to implement this collective obligation of the High Contracting Parties. It likewise seeks to elaborate and reinforce the system of Protecting Powers, which constitutes the cornerstone of the machinery provided by the Conventions for supervising their application.

The present Draft Protocol in no respect opens the way to revision of the Conventions, but it seeks to elaborate and to supplement the provisions therein. As shown below 4/, the provisions of the Conventions which are neither elaborated nor supplemented will continue to apply as they stand, and their general principles will govern the application of the present instrument. This affirmation holds above all for the general provisions of the Conventions relating to application.

3/ UN, A/Res. 2853 (XXVI), preamble, para. 5.
4/ Cf. in particular the commentary on Arts. 5 and 84, as well as the introduction to Part V.
Article 1. - Scope of the present Protocol

1. The present Protocol elaborates and supplements the provisions of the four Geneva Conventions of August 12, 1949, for the Protection of Victims of War.

2. It is applicable in the situations provided for in Article 2 common to these Conventions.

References

Paragraph 1:
- UN, A/Res. 2853 (XXVI).

Paragraph 2:
- Geneva Conv. 1949, common Art. 2.
- Commentary, Geneva Conv. 1949, Art. 2 ("Application of the Convention").

Commentary

Paragraph 1:
In 1971, during the first session of the Conference of Government Experts, it was generally agreed that care should be taken not to raise the question of the revision of the Conventions, but rather to elaborate and supplement them where, taking into account the experiences of contemporary armed conflicts, they have proved to be inadequate before the requirements of humanity. The provisions of the present Draft Protocol thus constitute additional articles to the Conventions, and the provisions of these latter will consequently apply upon the entry into force of this Protocol.

Paragraph 2:
Article 2 common to the Conventions defines the situations in which these Conventions will have their application. These are: all cases of declared war or 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 (Art. 2, para. 1), and 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 (Art. 2, para. 2). Hence, there is no need for a formal declaration of war or for recognition of the existence of a state of belligerency for the application of the Conventions. The occurrence of de facto hostilities is sufficient. Thus any disagreement arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 common to the Conventions, even if one of the Parties to the conflict denies the existence of a state of belligerency. Paragraph 2 of this Article 2 only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Conventions in those particular circumstances. Thus, those cases where territory is occupied by military forces, without their being engaged in hostilities, are covered by this paragraph.

The present Protocol would find its application in the same type of situations.

Article 2. - Terminology

For the purposes of the present Protocol:
(a) "the Conventions" means the four Geneva Conventions of August 12, 1949, for the Protection of Victims of War;
(b) "First Convention", "Second Convention", "Third Convention", "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 August 12, 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949; the Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949;
(c) "substitute" means an organization replacing a Protecting Power under the Conventions.

Commentary

The purpose of this Article, as its title and its introductory words indicate, is only to state the particular
meaning of the terms used in the present Draft Protocol 5/.
It might be questioned whether other expressions should not
be included in this article. In the opinion of the ICRC, it
would not be necessary to define well-known concepts, such
as "Protecting Power", "Detaining Power", "Occupying Power".
It is important to point out that Articles 11, 41 to 44 and
67 of the present Draft Protocol likewise specify some of
the terms peculiar to certain Parts of this instrument.

Article 3.- Legal status of the Parties

The application of the Conventions and of the present
Protocol, as well as the conclusion of the annexed model
agreements or of special agreements, has no effect on the
legal status of the Parties to the conflict and, in
particular, involves no recognition of the adverse Party as
a State.

Commentary

According to the ICRC, it would be necessary to stipulate what is contained in the text of the present article,
so as better to ensure the fulfilment of the humanitarian
aims of the Conventions and of the present Protocol, as
well as of the agreements expressly provided for in these
instruments or of special agreements concluded by the High
Contracting Parties in accordance with the principles of
these instruments. Some States may, indeed, fear that in
certain conflicts the application of these instruments or
the conclusion of these various agreements might have
political or legal consequences which may affect the status
of the Parties to the conflict.

As examples of "annexed model agreements", mention may
be made among others - for the Conventions - of the "Draft
Agreement Relating to Hospital Zones and Localities" annexed
to the First Convention (Annex I) in accordance with its
Article 23, and of the "Model Agreement concerning Direct
Repatriation and Accommodation in Neutral Countries of
Wounded and Sick Prisoners of War" annexed to the Third
Convention, in accordance with its Article 110, and - for
the present Protocol - of the "Draft Model Agreement

5/ In more recent treaties, definitions are frequently
provided for the terms used. Cf. for example, Vienna Conv. 1969, Art. 2.
creating non-defended localities" (cf. below, Art. 53 and Annex II/1), and of the "Draft Model Agreement creating neutralized localities" (cf. below, Art. 54 and Annex II/2).

By "conclusion of the annexed model agreements" quite evidently what is to be understood is the conclusion of agreements based on the principles contained in the model agreements or the putting into effect of the model agreements as they stand. It would thus be more correct to replace the expression "the conclusion" by "the entry into force". The "special agreements" referred to in the present article signify the special agreements provided for in Article 6 common to the Conventions (Art. 7 of the Fourth Convention).

The general principle laid down in the present article found express stipulation in the Conventions only in their common Article 3 6/. Thus it would be desirable to elaborate and supplement the Conventions by emphasizing that their application may not affect the legal status of the Parties to the conflict. This same principle is also met with in Article 6 - see below - since many experts felt, as did the ICRC, that it was indispensable to introduce it in a specific manner into a provision relating to the international machinery of co-operation in and supervision of the application.

6/ Article 19 of the Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict, entitled "Conflicts not of an international character" likewise states in its paragraph 4: "The application of the preceding provisions shall not affect the legal status of the parties to the conflict".
References

- Vienna Conv. 1969, Art. 25 ("Provisional application").

Commentary

Bearing in mind the work, which led in 1969 to the adoption of the Vienna Convention on the Law of Treaties, undertaken by the United Nations International Law Commission in the field of the codification and progressive development of the law of treaties, the ICRC considers it could be useful to submit the question of the provisional application or the entry into force provisionally of the articles of the present Protocol to the experts for examination. In view of the novel character of such a provision, the ICRC does no more than give its heading and explain the ratio legis in the present commentary.

Article 25 of the Vienna Convention on the Law of Treaties states:

"Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

In the commentary on its draft articles, the International Law Commission had stated that this provision recognized a practice which occurred with some frequency today. It explained that owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned could specify in a treaty that it should come into force provisionally.

In the opinion of the ICRC, the question of the entry into force provisionally of the present Protocol, pending
ratification or accession by the Contracting Parties, would merit careful examination. Indeed, this question has quite special pertinence for an additional protocol to conventions of a humanitarian nature. This provision, which concerns the provisional application of the present Protocol, might find its place in Part VI 7/. The ICRC preferred to introduce it, pending the views of the experts, within the framework of Part I, which deals with general questions of application.

Article 5.- Beginning and end of application

References
- First Geneva Conv. 1949, Art. 5.
- Third Geneva Conv. 1949, Art. 5.
- Commentary, First Geneva Conv. 1949, Art. 5.
- Commentary, Third Geneva Conv. 1949, Art. 5.

Commentary
The First, Third and Fourth Conventions all contain a provision the purpose of which is to determine from what

7/ Cf. also the remarks on this subject presented below, in the commentary on Art. 83.
moment, and until when, it shall apply. Grave disputes on the subject during the Second World War made it necessary to include such a stipulation in the Conventions, particularly as regards prisoners of war and civilians.

As its Article 1 indicates, the present Draft Protocol seeks to elaborate and supplement the provisions of the four Conventions. Upon the entry into force of this Protocol, any modifications that have been introduced will have to be taken into account when applying the Conventions. Those provisions of the Conventions which are neither elaborated nor supplemented by the present Protocol will continue to be applied as they stand and their general principles will govern the application of the articles of this Protocol.

Would it be advisable to introduce into this Protocol a specific provision relative to the beginning and the end of its application? Such a provision, if it went into detail, might possibly turn out to be rather complicated.

Article 6.- Appointment of Protecting Powers and of their substitute

1. For the sole purposes of applying the Conventions and the present Protocol, each of the Parties to the conflict has the obligation to appoint a Protecting Power from the beginning of the hostilities, and must accept the activities on its territory of a Protecting Power appointed by the adverse Party. If, despite the foregoing, the appointment of a Protecting Power is not made, the Parties to the conflict shall accept, as substitute, the International Committee of the Red Cross or any other humanitarian organization.

2. The appointment and the acceptance of a Protecting Power, or of its substitute, for the sole purposes of applying the Conventions and the present Protocol, have no effect on the reciprocal legal status of the Parties to the conflict and, in particular, do not involve recognition of the adverse Party as a State.

3. The maintenance of diplomatic relations between the belligerent States does not constitute an obstacle to the appointment of Protecting Powers or of their substitute.
References

Paragraph 1:
- Geneva Conv. 1949, Arts.8/8/8/9 and 10/10/10/11.
- ICRC, Questionnaire D-0-1210 b, questions 1, 3, 9 and 12.
- UN, A/Res. 2852 (XXVI), operative para. 3(a).
- UN, Report of the Secretary-General A/7720, 1969, paras. 204 to 215, 219 to 220.
- UN, Report of the Secretary-General A/8052, 1970, paras. 239 to 244.

Paragraph 2:
- Geneva Conv. 1949, Arts.8/8/8/9 and 10/10/10/11.
- ICRC, Questionnaire D-0-1210 b, question 4.
Paragraph 3:
- Geneva Conv. 1949, Arts. 8/8/8/8/9 and 10/10/10/11.
- ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/2 b, pp. 16(c) and 31(b).
- ICRC, Questionnaire D-0-1210 b, question 5.

Commentary

General remarks:

In the documentation presented at the first session, the ICRC emphasized that the Conventions provided international machinery intended to guarantee an impartial supervision of their application and to facilitate that application. After having recalled, in particular, the system of scrutiny of application set up by the Conventions, it indicated the reasons which, in its opinion, provided an explanation why the machinery set up did not function satisfactorily and in consequence, it suggested certain improvements in the law.

At the first session, the experts examined the suggestions and presented a number of observations and proposals in this respect which enabled the ICRC to draw up the three paragraphs of the present article.

At its twenty-sixth session, the General Assembly of the United Nations, within its Third Committee, took these problems into consideration, and it adopted a resolution requesting the ICRC to devote special attention, among the questions to be taken up, to the need for strengthening the system of Protecting Powers contained in the Conventions 8/.

Paragraph 1:

Some of the experts put forward specific proposals for ensuring a better application of the provisions of the Conventions regarding the appointment of Protecting Powers or of their substitute 9/. In the Questionnaire D-0-1210 b, the ICRC asked whether the provisions intended to supplement the Conventions should lay down the procedure for the appointment of Protecting Powers or of their substitute.

8/ A/Res.2852 (XXVI), operative para. 3(a).
According to views emitted in certain quarters, the Protecting Powers should, in a modern context and with the humanitarian ends of the Conventions in view, be considered not only as the agents or representatives of the belligerents, but also as the agents of the international community. Numours questions relative to the institution of Protecting Powers still fall under international customary law; in particular this is true of the conditions governing their appointment (this involves a three-sided arrangement between the Protecting Power and each of the belligerents). Several experts consider, as does the ICRC, that it should be expressly stipulated, solely for the purpose of the application of the Conventions and of the present Protocol, that each of the Parties to the conflict shall appoint a Protecting Power and shall allow the Protecting Power appointed by the adverse Party to operate on its territory. Furthermore, such an appointment should be made as early as possible, that is to say, right from the beginning of hostilities. It would seem that the ICRC found it difficult to propose setting a more exact time limit in this respect.

If, despite the foregoing obligations, the system of Protecting Powers failed, nevertheless, to function, the Parties to the conflict should accept as substitute the International Committee of the Red Cross or any other impartial humanitarian organization. Numerous experts and various bodies pointed out that the first and, especially, the third paragraphs of common Article 10 (Art. 11, paras. 1 and 3 of the Fourth Convention), rather than providing the Parties to an armed conflict with mere discretion to seek a substitute for Protecting Powers in case these failed to be appointed, laid a legal obligation upon them to appoint such a substitute, in particular by calling upon a humanitarian organization such as the ICRC. At the first session, a representative of the ICRC explained that the International Committee had recently given careful attention to this question and that it had arrived at the conclusion that all the tasks falling to a Protecting Power under the Conventions could be considered humanitarian functions; in other words, the ICRC was ready to take upon itself all the functions entrusted to Protecting Powers by the Conventions. Many experts welcomed this statement with satisfaction. One of them asked whether such functions of the ICRC would include the supervision of the observance of


the Conventions as well as the recording of violations and the publication that would have to be made of its findings. On this point the ICRC wished to reaffirm here that, just like the Protecting Powers themselves, it must not become a fact-finding body empowered to make public reports on violations of the provisions of the Conventions. It might be pointed out in this connection that the commentary on Article 10 below examines the question of the creation of a permanent impartial body, possibly of a judiciary nature, empowered to investigate into allegations brought before it of non-observance of the provisions of the humanitarian conventions and to report its findings, possibly to the General Assembly or to the Security Council of the United Nations.

In Questionnaire D-0-1210 b, questions are raised in this context as to the role of the ICRC, co-operation between the ICRC and the UN in supervision, and the activities that other organizations might be called upon to perform in this respect.

**Paragraph 2:**

In the documentation presented at the first session, the ICRC had pointed out that certain States did not appoint a Protecting Power out of fear that such an appointment would have a political aspect and could be, in particular, interpreted as their recognition of the adverse Party as a State. It had suggested that Article 8 common to the Conventions (Art. 9 of the Fourth Convention) be elaborated and supplemented by stipulating that the appointment of a Protecting Power or of a substitute, solely for the purpose of applying the Conventions, had no effect on the reciprocal legal status of the Parties to the conflict, and in particular involved no recognition of the adverse Party as a State. The ICRC asked, in Questionnaire D-0-1210 b, if such an additional provision should be stipulated, and it pointed out that all the experts who had, at the first session, taken up the question of the non-political character of the appointment of Protecting Powers, felt that this was a matter of fundamental importance. In one of his reports on respect for human rights in armed conflicts, the Secretary-General of the United Nations also expressed the hope that it would be stressed that the designation of a Protecting Power had only humanitarian consequences and would not generate political or legal consequences which might affect the status of the Parties to the conflict.

This paragraph is a reaffirmation of the general principle set forth in Article 3 above. It is clear that there is a fundamental necessity for such a reaffirmation to be stated in a provision relative to international machinery for co-operation and supervision of the application of the Conventions.
In the documentation presented at the first session, the ICRC had indicated that, in certain conflicts, the belligerents, who had not broken off diplomatic relations, had not, for that reason, appointed Protecting Powers.

Examining this question at the first session, several experts considered that the non-severance of diplomatic relations should not constitute an obstacle to the appointment of Protecting Powers or of their substitute. Taking these remarks into account, the ICRC, in Questionnaire D-0-1210 b, asked whether it was desirable to elaborate and supplement the Conventions by a provision such as the one appearing in the present draft of the article.

It is evident that more imperative requirements could lead to stipulating the obligatory appointment of Protecting Powers or of their substitute even if diplomatic relations are not broken off between the belligerent States.

Paragraph 3:

Article 7.- **Qualified persons**

With a view to facilitating application of the provisions of the Conventions and of the present Protocol relative to the Protecting Powers and to their substitute, the High Contracting Parties shall endeavour to train a qualified personnel on a national basis. For this purpose, they shall establish lists of persons whose names will be transmitted to the Parties concerned by the International Committee of the Red Cross.

**References**

- Geneva Conv. 1949, common Art. 1, Arts. 8/8/8/9 and 10/10/10/11.
- ICRC, Questionnaire D-0-1210 b, question 6.
- UN, Internat.Conf. on Human Rights, Teheran, 1968, Res.XXIII.
Commentary

In 1965, the XXth International Conference of the Red Cross adopted a resolution entitled "Personnel for the Control of the Application of the Geneva Conventions", in which it considered that "with a view to ensuring the application of the humanitarian Conventions and the scrutiny of this application, it is essential 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", and it invited "the States parties to the Conventions to envisage the possibility of setting up groups of competent persons for the discharge of these functions, entrusted to them in the Conventions, under the direction of the Protecting Powers or their possible substitutes". The ICRC had declared that it was prepared to contribute to the training of these persons. However, as it indicated in the documentation submitted at the first session, no one, so far, had come forward and no group had presented itself.

At the Conference of Red Cross Experts held in The Hague in March 1971, one participant presented a suggestion regarding the training of legal advisers who would be attached to the officers in charge of military units. Their principal duty would be the dissemination of the Conventions and the instruction of the rank and file on the law of armed conflicts. Several government experts thought that this suggestion merited consideration.

In the course of the first session, some experts put forward a specific proposal 12/ suggesting that ad hoc supervision teams be trained by some States on a national basis. This personnel, which would be registered both with the ICRC and the United Nations, should be available at all times upon request of the Parties concerned. In conformity with the wish expressed at the first session, the ICRC included this problem in its Questionnaire D-O-1210 b and considered it would be useful, pending the receipt of replies to the Questionnaire, to prepare forthwith a draft article on this point. The attention of certain quarters, in particular among the medical profession, has since a long time been focussed on this question. It is undeniable that the implementation of such a provision would contribute to reinforcing the collective application of the Conventions in conformity with the principle of common Article 1.

Article 8.- Co-operation of the High Contracting Parties

1. The High Contracting Parties being bound, by the terms of Article 1 common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of these Conventions and of the present Protocol, in particular by making an approach of a humanitarian nature to the Parties to the conflict and by relief actions. Such an approach shall not be deemed to be interference in the conflict.

2. Role of the regional governmental Organizations

References

Paragraph 1:
- Geneva Conv. 1949, common Art. 1.
- ICRC, Questionnaire D-O-1210 b, question 2.
- UN, A/Res. 2852 (XXVI), operative para. 3(a).
- UN, A/Res. 2853 (XXVI), preamble, para. 6.
Paragraph 2:
- ICRC, Questionnaire D-O-1210 b, question 11.
- UN, Report of the Secretary-General A/8370, 1971, para. 146(d).

Commentary

Paragraph 1:
In 1968, the International Conference on Human Rights, in its resolution XXIII, noted that "States parties to the Red Cross Geneva Conventions sometimes failed to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict".

At the first session, several experts stressed the imperative character of the humanitarian law applicable in armed conflicts. Reference in particular was made to Article 1 common to the Conventions, which, it was stated, provided the legal basis for collective action by the international community.

It may be considered that the High Contracting Parties as a whole have received a superior mandate, that of co-operating in the application of the Conventions, and some refer to collective responsibility in this respect. In a proposal 13/, some experts urged the ICRC to prepare a study on the role to be played by the Parties to the Conventions to effectuate the collective interest of the conventional community in ensuring respect for the Conventions.

The invitation extended to the High Contracting Parties to co-operate in the application of the Conventions by an approach of a humanitarian nature to the Parties to the conflict - and in particular by an offer of humanitarian aid - would, as the ICRC sees it, make it possible to specify the role they are called upon to play in conformity with their undertaking in common Article 1.

Paragraph 2:

Some experts considered, at the first session, that supervisory functions regarding the application of the Conventions could be entrusted to regional governmental organizations. In its Questionnaire D-0-1210 b, the ICRC requested Governments to give their views on this point; it will not be possible for a draft provision to be prepared before their replies are communicated.

Article 9 - Meetings

1. The Depositary State of the Conventions and of the present Protocol shall, whenever it deems this expedient, convene a meeting of representatives of the High Contracting Parties. The purpose of the meeting will be to study problems concerning the application of the Conventions and of the present Protocol. The meeting may likewise examine any amendment to these instruments proposed by a High Contracting Party, and in this respect shall decide as to the measures to be taken.

2. Moreover, a meeting shall be convened by the Depositary State at the request of at least one-fifth of the High Contracting Parties or of the International Committee of the Red Cross.

References

- Geneva Conv. 1949, common Art. 1.
- Hague Conv. 1954, Art. 27.
- ICRC, Questionnaire D-0-1210 b, question 2.
- UN, A/Res. 2852 (XXVI ,operative para.3(a).
- UN, A/Res. 2853 (XXVI), preamble, para. 6.
Commentary

During the first session, some experts presented a proposal 14/ entitled "Existing possibilities for a better application of the Geneva Conventions of August 12, 1949" which suggested inter alia, that the ICRC might prepare a special study of the collective enforcement of the Conventions under the principle of common Article 1, and that it might examine detailed practical measures to implement this principle of collective enforcement.

In accordance with a wish expressed at the first session, the ICRC, in its Questionnaire D-0-1210 b, asked whether the Parties to the Conventions could and should exercise collective supervision of the application under Article 1 common to the Conventions and, if so, what procedure might be envisaged.

In the opinion of the ICRC, which drew upon Article 27 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, concluded at The Hague in 1954, meetings of representatives of the High Contracting Parties could be convened for the purpose, in particular, of studying problems concerning the application of the Conventions and of the present Protocol. Such meetings could likewise examine any proposal presented by a High Contracting Party bringing amendments to these instruments.

Article 10.- Permanent body

References

- Geneva Conv. 1949, Arts. 10/10/10/11, para. 1.
- ICRC, Questionnaire D-O-1210 b, questions 7 and 8.
- UN, A/Res. 2852 (XXVI), operative para. 3(a).
- UN, A/Res. 2853 (XXVI), preamble, para. 6.
- UN, Report of the Secretary-General A/7720, 1969, paras. 221 to 227.
- UN, Report of the Secretary-General A/8052, 1970, paras. 245 to 250, 269, and Annex I, paras. 69 to 73.
- UN, Report of the Secretary-General A/8370, 1971, paras. 146 and 147.
  A/C. 3/SR.1889, p. 5, A/C. 3/SR.1893, pp. 10 and 11,

Commentary

In the documentation it presented at the first session, the ICRC called attention to the fact that the High Contracting Parties had the option, under the first paragraph of Article 10 common to the Conventions (Art. 11 of the Fourth Convention), to seek an organization as a replacement for the Protecting Powers. It pointed out that this might equally be either an institution set up exclusively for the purposes of common Article 10, or an already existing organization, and it emphasized that this possibility had not yet been exploited.
At the first session, certain experts stated that they favoured the creation of additional international machinery. Several expressed the opinion that the creation of a new organ should be envisaged either within the framework, or at least under the aegis of the United Nations. Some opposed this latter idea fearing that political influences might be exercised on such a body. In the opinion of most of the experts, the powers of any such new organ would have to consist in scrutiny of the observance of the Conventions.

The creation of a permanent, impartial body or commission, possibly of a judicial nature, could also be envisaged. It would be empowered to investigate on allegations submitted to it of non-observance of the provisions of humanitarian conventions and to report its findings on these allegations, possibly to the General Assembly or to the Security Council of the United Nations. Various non-governmental organizations presented proposals on this subject 15/.

In accordance with indications made at the first session, the ICRC, in Questionnaire D-0-1210 b, asked if a new supervisory body should be set up, and if the setting-up of a permanent supervisory body within the United Nations was possible and desirable. Considering its fundamental importance and the often divergent positions adopted regarding this question, it will not be possible for the ICRC to prepare a draft article on this matter before receiving and examining the replies to the above-mentioned Questionnaire. In this instance, only the title of the provision appears in the present text of the Draft Protocol.

It should be pointed out that at the twenty-sixth session of the United Nations General Assembly, in the course of discussions of the Third Committee on respect for human rights in armed conflicts, a number of representatives spoke in favour of a body which, within the framework of the United Nations, could assume the role of Protecting Power. Some of them hoped that there would be close co-operation between the ICRC and the UN in this matter.

15/ Cf. the references for this article. At its ninth Congress held at Helsinki, Finland, from 15 to 19 July, 1970, the International Association of Democratic Lawyers requested its General Secretary to ask the Secretary-General of the United Nations Organization to bring to the attention of the General Assembly "the need for the establishment within the United Nations framework of an impartial investigating body or commission empowered to receive, investigate and report on all allegations of violation or non-observance of the humanitarian conventions".
PART II

WOUNDED, SICK AND SHIPWRECKED PERSONS

SECTION I

GENERAL PROVISIONS

References


INTRODUCTION

The 1971 Conference of Government Experts adopted a complete Draft Protocol relating to the protection of the wounded and sick in international armed conflicts. It followed very closely the text which the ICRC had prepared with the help of various medical associations.

Since then, the ICRC has had to make a few changes necessitated mainly by the inclusion of these provisions as a chapter of a more general Protocol. These changes do not, however, in any way modify the substance of the draft that the Government Experts had already approved and which the ICRC does not wish to call in question in view of the care which the experts took in the matter.

Commentary

The above-mentioned Draft Protocol, adopted by the first session, was to supplement the Fourth Convention. In order to avoid a mass of Protocols, the ICRC proposes that the Protocols relating to international armed conflicts
be amalgamated to form a single additional Protocol to the
Conventions, subdivided into Parts, Sections and Chapters.
Logically, therefore, the shipwrecked should be mentioned
among the persons protected by a Protocol which would,
consequently, supplement the Second Convention, too.

The decision to prepare only one Draft Additional
Protocol to the Conventions resulted in the elimination of
the Preamble to Draft Protocol I, as proposed by the
government experts at the 1971 Conference. The ideas
contained therein now appear in the Preamble to the present
Draft Protocol submitted by the ICRC.

Article 1, entitled "Application of the Protocol", has
been replaced by Article 1 in Part I of the present Protocol,
entitled "General Provisions".

Article 11.— Definitions

For the purposes of the present Part:

(a) the term "medical establishments and units" means
hospitals and other fixed medical establishments,
medical and pharmaceutical stores of such establishments,
mobile medical units, blood transfusion centres and
other installations designed for medical purposes;

(b) the term "medical transports" means the transport of
wounded, sick, shipwrecked and infirm persons,
expectant mothers and maternity cases, medical personnel,
medical equipment and supplies, by ambulance or by any
other means of transport, excluding transport by air;

(c) the term "medical personnel" means personnel regularly
and exclusively engaged in the operation or
administration of medical establishments and units,
including personnel assigned to the search for,
removal, transport and treatment of wounded, sick,
shipwrecked and infirm persons, expectant mothers and
maternity cases;

(d) the term "distinctive emblem" means the distinctive
emblem of the red cross (red crescent, red lion and sun)
on a white background.

References
  para. 46, p. 24, and p. 29, Art. 2.
- Vienna Conv. 1969, Art. 2.
Commentary

General remarks:

In order to respect the recommendations of the Vienna Convention on the Law of Treaties of 23 May 1969, the ICRC has proposed some purely drafting changes to Article 2 of Protocol I adopted by the Conference. It proposes, inter alia, that each paragraph begin with the words "the term...".

As the present Draft Protocol is to supplement the Conventions, there seemed to be no point in defining "protected persons". It goes without saying that they include all those mentioned in the Conventions and in the present Draft Protocol, and this explains why paragraph 2 has been deleted. Perhaps it might have been as well to refer to this in Article 2, Part I of the present Draft Protocol.

Paragraphs (b) and (c):

The ICRC proposes that expectant mothers be added to the list of persons to benefit from medical transportation or the care of medical personnel. There is, in fact, no question that women in the advanced stages of pregnancy do need special care and should therefore be included among those who benefit from the treatment dispensed by the medical services.

Article 12.- Protection and care

1. All wounded, sick and shipwrecked persons, as well as infirm persons, expectant mothers and maternity cases, shall be the object of special protection and respect.

2. Such persons shall, in all circumstances, be treated humanely and shall receive, with the least possible delay, the medical care that their condition requires, without any discrimination.

References

Commentary

Paragraph 1:
Obviously the persons who are to benefit from special protection may be either wounded or sick; they do not need to be both wounded and sick. Further, the ICRC proposes that the expression "non-combatants or combatants rendered hors de combat" be dropped. Such specification is superfluous as it has always been implicit in the term "wounded and sick". According to the Commentary referred to above: "They (the words 'wounded and sick') cover combatants who have fallen by reason of a wound or sickness of any kind, or who have ceased to fight and laid down their arms as a consequence of what they themselves think about their health". The Conference thought it advisable to make this point in the text of the Draft Protocol it had prepared. However, the term "combatant" which it used was suitable provided that the text related solely to the Fourth Convention. In that context, the term automatically applies to civilians, but does not do so in a Protocol which supplements all four Conventions.

In the latter case, the term "combatant" could be construed as a substantive within the meaning of the Hague Convention of 1907, according to which combatants are members of the armed forces of the belligerent parties. Confusion of that kind could be prejudicial to armed civilians who, if wounded or sick, are equally protected by this Part of the Protocol.

Paragraph 2:
The ICRC proposes a more concise version of this paragraph. It considers that the term "discrimination" embodies the idea of "less favourable treatment" and that it is therefore superfluous to add "without any adverse distinction". Furthermore, the enumeration made by the Conference seems to be superfluous, especially if it is given by way of example. Sight should not be lost of the fact that the provisions of the Conventions are generally interpreted stricto sensu and that consequently any enumeration becomes dangerous as it takes on an exhaustive character.

What is more, it is impossible to list every possible form of discrimination in such an article.
Article 13.— Protection of persons

1. All unjustified acts, whether of commission or omission, that endanger the health or the physical or mental well-being of a protected person within the meaning of the Conventions and the present Protocol are prohibited.

2. Accordingly, it is prohibited to subject protected persons to any experiment or treatment, including the removal or transplant of organs, not warranted on remedial grounds. The prohibition applies even in cases where the protected person gives his assent.

References

Commentary

Paragraph 1:
This paragraph needs no comment.

Paragraph 2:
The ICRC proposes that the words "... including removal or transplant of organs..." be deleted. This idea is in fact covered by the words "experiment or treatment". The ICRC is of the opinion that the right place for such an explanation is a commentary rather than the text of a convention.

Further, some experts felt that some explanation should have been given as to the therapeutic advantage envisaged. Here the point is obviously that it is in the interest of all protected persons that their physical and mental well-being be preserved.

Article 14.— Civilian medical establishments and units

1. Civilian medical establishments and units shall in no circumstance be attacked. They shall at all times be respected and protected by the Parties to a conflict.
2. Parties to a conflict shall provide such medical establishments and units with a certificate identifying them for the purposes of the present Protocol.

3. With the authorization of the State, medical establishments and units shall be marked with the distinctive emblem.

4. To obviate the possibility of any hostile action, the Parties to a conflict shall take the necessary steps, in so far as military considerations permit, to make known the location of medical establishments and units and to mark them with the above-mentioned distinctive emblem, in such a way as to make them clearly visible to the opposing forces.

5. The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

References
- First Geneva Conv. 1949, Arts. 19, 22, 38, 39, 42.

Commentary

General remarks:

It was found that there was nothing in the Fourth Convention equivalent to Articles 19, 22 and 42 of the First Convention which protect fixed medical establishments and mobile medical units. This provision therefore supplements Article 18 of the Fourth Convention which makes allowance only for strictly "civilian" hospitals.

Such an addition is the corollary of Article 12 of the present Draft Protocol. The improvement in the protection of the wounded and the sick in fact implies similar improvement protection for the installations of the civilian or military health services affording such protection.

Moreover, this draft meets the requirements of modern warfare in which, in most cases, civilian health services will probably be placed under the authority of the State and in which a trend may be noted towards a merger of civilian and military health services.
The text that the ICRC proposed at the first session mentioned "blood transfusion centres". As the experts at the Conference considered that type of "medical" centre as just another of the "medical units", they considered it pointless to mention it. Similarly the experts rejected the list of persons to be cared for by medical units.

The ICRC proposes that this paragraph be altered, in order to make it more imperative, by replacing the expression "... may in no circumstances..." by "... shall in no circumstances...".

This provision has been inserted to avoid abuse as far as possible.

The introduction of the notion of "civilian medical establishments and units" implies that they be marked.

It would be as well to use the term "protective emblem" in place of "distinctive emblem". The role of the emblem in cases of armed conflict is essentially to provide better protection for certain persons, buildings or equipment deserving particular protection within the meaning of the Conventions.

The ICRC proposed to the first session that the texts of Article 42 (4) of the First Convention and Article 18 (4) and (5) of the Fourth Convention be repeated. Those provisions had themselves been taken from the 1929 Geneva Conventions. The 1971 Conference of Experts made a few purely editorial changes.

After the text of the Draft Protocol had been drawn up and it was too late to make any changes, the ICRC received from some experts a suggestion that the words "to obviate the possibility of any hostile action..." be replaced by "to shield them from the risk of any hostile action...". The latter wording is in fact more satisfactory in that it takes greater account of the fact that it is impossible to prevent combat.

The text of this paragraph was prepared by the 1971 Conference. It needs no comment.
Article 15.— Discontinuance of protection of civilian medical establishments and units

1. The protection to which civilian medical establishments and units are entitled shall not cease unless they are used to commit outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, setting, wherever appropriate, a reasonable time limit and after such warning has remained unheeded.

2. The fact that wounded, sick and shipwrecked members of the armed forces are treated in such medical establishments and units shall not be deemed to be an act harmful to the enemy; nor shall the presence of small arms and ammunition taken from such members of the armed forces and not yet handed over to the competent service.

References

Commentary

Paragraph 1:
The text of this article, the provisions of which were taken from the above-mentioned articles of the Conventions, was added at the request of the Conference in order to bring the provisions of this Part into line with those of the Conventions.

The 1929 and 1949 Conferences did not consider it necessary to define "harmful act". In 1949, the ICRC proposed a more explicit wording which was not adopted by the Diplomatic Conference: "acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations".

Medical establishments and units must maintain a neutral attitude vis-à-vis the adverse Party. They must refrain from any form of direct or indirect interference in military operations.

The prohibition of the performance of "harmful acts" is however limited by the obligation incumbent on these medical establishments and units to discharge their humanitarian duties.
Paragraph 2:
The text of this paragraph is that of Article 19 (2) of the Fourth Convention. The ICRC proposes the addition of the term "shipwrecked", as the present Draft Protocol will henceforth supplement all four Conventions. For this very reason, it might be worth considering whether certain provisions from Article 22 of the First Convention might not be added, as they specify the acts for which such units or establishments may not be deprived of the protection provided for in Article 14 of the present Draft Protocol.

Article 16. — Civilian medical transports

1. Ambulances and other vehicles used as medical transport by civilian medical establishments and units shall be respected and protected at all times. They shall be furnished with a certificate issued by a competent authority and attesting to their medical nature.

2. Other means of transport, whether used in isolation or in convoy, on land or on waterways, assigned temporarily to medical transport shall be respected and protected while being used for such purpose.

3. With the assent of the competent authority, all the foregoing means of transport shall be marked with the distinctive emblem. Those covered by paragraph 2 above may display the distinctive emblem only while they are carrying out their humanitarian mission.

4. The provisions of Article 15 of the present Protocol shall likewise be applicable to medical transports.

References
- First Geneva Conv. 1949, Arts. 19 to 35.
- Fourth Geneva Conv. 1949, Art. 2.

Commentary
The aim of this article is to supplement the Fourth Convention's provisions relating to medical transports. It lays particular stress on the fact that protection must
be afforded to the transport of the wounded, of the sick or of medical equipment.

At the first session, the ICRC proposed a draft article which, being applicable both to military and civilian medical services, would have the advantage of clarifying the relevant provisions of Articles 19 and 35 of the First Convention by defining and condensing them.

The first session did not endorse that proposal and limited its examination to civilian medical transports, pointing out that the main aim of the article was to supplement the provisions of the Fourth Convention relating to this matter. In fact, the provisions of Article 21 of that Convention provide only for the protection of hospital-trains and convoys of medical vehicles on land.

The provisions of the present draft article have made good these shortcomings by extending protection both to single medical transports and to those using waterways.

Furthermore, the provisions of this article stipulate that civilian medical transport vehicles may also be used to carry equipment - a point that was not covered by the Fourth Convention.

Finally, this draft article makes a clear distinction between transport vehicles which are in permanent use for medical purposes and those which are used for such purposes only occasionally. Whereas the former are permanently protected, the latter are covered by such protection only while on medical missions. This distinction has already been made, but not clearly enough, in the First Convention, where the provisions on this point are scattered.

It is worth stressing that, like the protective emblem, all medical markings must be removed from a temporarily medical vehicle on completion of its mission.

Article 17.- Requisition

1. The right of an Occupying Power to requisition medical establishments and units and their movable and immovable assets, as well as the services of their medical personnel, shall be exercised only temporarily and in case of urgent necessity, and subject to the further conditions that suitable arrangements are made for the treatment of protected persons within the meaning of the Conventions and of the present Protocol, and that the necessary steps are taken in advance for tending the wounded, the sick and the shipwrecked, and for providing suitable hospital accommodation for the civilian population.
2. The equipment, material and stores of medical establishments and units shall not be requisitioned so long as they are needed for the civilian population.

References
- First Geneva Conv. 1949, Arts. 33 and 35.

Commentary

This draft article supplements and explains the provisions of the Fourth Convention to which it refers. Article 57 of that Convention is concerned with the requisitioning only of hospitals in occupied territory. The provisions of the present draft article also refer to the requisitioning of medical establishments and units and of their personnel. The Occupying Power shall be entitled to requisition such medical establishments, units and personnel only temporarily and in case of urgent need, that is to say that the Occupying Power may not requisition them as long as its own medical establishments, units and personnel, are sufficient to tend the wounded and the sick of its occupying army. Nor may it make such requisitions for other than medical purposes. Furthermore, such requisitions shall under no circumstance cause harm to the wounded and the sick already undergoing treatment in such medical establishments and units before the requisitioning. The Occupying Power undertaking such a requisition shall further be obliged to take all steps necessary to ensure the continued care of the wounded and sick receiving treatment in such medical establishments and units. The Occupying Power shall, as laid down in the Fourth Convention, also take steps to meet the needs of the whole civilian population in the matter of hospital treatment.

The ICRC proposes a few changes in the text adopted by the first session. It proposes using the expression "... protected persons within the meaning of the Conventions and of the present Protocol...", which seems to be more precise than "protected persons". It also proposes adding "the shipwrecked" to the list of persons entitled to special protection. The reason for this proposal is the fact that the present Draft Protocol supplements the Conventions.
Article 18. - Civilian medical personnel

1. Civilian medical personnel duly recognized or authorized by the State, as well as the medical personnel of National Red Cross (Red Crescent and Red Lion and Sun) Societies assigned to the medical treatment of protected persons, shall be respected and protected.

2. The aforesaid medical personnel shall be identified by means of an identity card bearing a photograph of the holder and embossed with the stamp of the responsible authority; while on duty, the medical personnel shall wear on the left arm a stamped armlet bearing the distinctive emblem. The armlet shall be issued by the State to which the personnel belong.

3. In so far as possible, every assistance shall be given to civilian medical personnel to enable them to carry out their humanitarian mission to the best of their ability. In particular, they shall have access to any place where their services are required, subject to such measures of supervision and security as the Parties to the conflict may judge necessary.

4. In the event that the above-mentioned personnel fall into the hands of the adverse Party, they shall be granted all facilities necessary for the performance of their duties. In no circumstance shall they be required or compelled to carry out tasks unrelated to their mission.

5. The persons in charge of each medical establishment and unit shall at any time make available to the competent national or occupying authorities an up-to-date list of its personnel.

References
- First Geneva Conv. 1949, Arts. 24, 26 and 28.
- Internat. Red Cross Handbook 1971, p. 332, quoted below (ref. 5).
- Commentary, Fourth Geneva Conv. 1949, pp. 156 et seq.
Paragraph 1:

The purpose of this article is thoroughly explained in Document VII which the ICRC submitted to the 1971 Conference of Experts.

That purpose is expressly to extend protection to all medical personnel, provided they are recognized by the State. Article 20 of the Fourth Convention confined its protection to hospital personnel. Several other provisions of that Convention implicitly granted some protection to medical personnel. In the circumstances, it seemed advisable expressly to state the position of the civilian medical personnel. The ICRC therefore proposed at the first session that all civilian personnel be granted protection, provided they were organized and authorized by the State. Considering that the State was not the only institution likely to organize a health service, the Conference decided to adopt only the second condition, namely authorization by the State.

Under the draft article proposed, the civilian medical personnel of National Red Cross Societies shall enjoy the same protection. It will be observed that in the case of such medical personnel no "authorization" is provided for. This is due to the fact that, if a National Red Cross Society is to exist as such, it must already have been recognized by the State as a "voluntary aid society auxiliary to the public authorities" (Cf. ref. 5).

The other aid societies mentioned in Article 26 of the First Convention must obtain the requisite authorization in order to benefit from the protection provided by this draft article.

Paragraph 2:

In time of war, besides the international Red Cross organizations, only the personnel of military medical units and establishments and the personnel of aid societies recognized and authorized by their Governments (Cf. First Geneva Conv. 1949, Art. 26) may, within the meaning of that Convention, display the protective emblem.

The personnel of civilian hospitals are also authorized to wear the protective emblem, within the meaning of the provisions of the Fourth Convention, provided the hospitals are in an occupied territory or a zone of military operations. The civilian medical personnel of a civilian hospital located elsewhere than in the two aforementioned areas shall have a right to protection, but not, however, to the use of the protective emblem. These provisions of the Conventions relative to the use of the protective sign would not be sufficient for the protection of a modern health service, which no longer makes any distinction between military and
civilian health services. The simplest solution of granting the right to use the protective emblem to all medical personnel recognized or authorized by the State seems preferable.

**Paragraph 3:**

This provision comes from the Draft Rules. It introduces two ideas which are new although inspired by the spirit and the general principles of the Conventions.

To carry out their humanitarian mission to the best of their ability, a doctor or a nurse will need extraneous co-operation: they must be provided with premises, means of transport, medicaments, an escort, and so forth. That assistance is required to be given "in so far as possible"; it therefore is not an obligation.

Moreover, experience has shown that that assistance has often been rendered nugatory by obstacles preventing the movement of medical personnel. These are the obstacles which medical circles ask to have removed, without prejudice of course to the legitimate measures of supervision and security that the authorities may consider it necessary to take.

**Paragraph 4:**

The text of this paragraph was drafted with the idea that this Part of the present Draft Protocol would supplement the Fourth Convention. This being the case, the expression "In the event that the above-mentioned personnel fall into the hands of..." refers to a situation in which the civilian medical personnel, like the entire civilian population, would find themselves in occupied territory, and the text of this paragraph would supplement the provisions of the said Fourth Convention.

The four Conventions being supplemented by this Protocol, the problem of harmonizing the provisions of this paragraph with those of the First Convention arises.

Article 28 of that Convention lays down the position of military medical personnel who have fallen into the hands of the enemy after an encounter, and grants them several advantages. They shall not be regarded as prisoners of war; they shall be retained only in so far as the care of prisoners of war demands and, if so retained, shall enjoy all the advantages provided by the Conventions. If then the State's entire health service is incorporated in the army of the Party to a conflict, Article 28 of the First Convention and the provisions of this paragraph shall apply. If, on the other hand, the State health service is totally incorporated in a State civilian medical service, the provisions of Article 28 of the First Convention shall not apply and, as civilians, the members of that civilian health service cannot be held as prisoners of war, or even
retained within the meaning of the aforementioned Article 28. But then, since the article provides for the retention of military medical personnel for the care of prisoners of war, the captor might be inclined to give Article 28 an extensive interpretation, and thereupon retain civilian medical personnel on the grounds of the shortage of military medical personnel. The civilian medical personnel might then, owing to its civilian status, not benefit from the treaty provisions in favour of prisoners of war.

Would it not be desirable to have a provision clearly stating the situation of medical personnel not incorporated in the army, either because that army had no medical service of its own or because its health service was supplemented by a civilian medical service?

Paragraph 5:
This paragraph was added at the first session. It is identical with Article 20 (4) of the Fourth Convention. This provision allows the persons in charge of medical establishments and units, as well as the national or occupying authorities, to make sure that no abuse occurs in regard to the wearing of the armlet.

Article 19. - Protection of medical duties

1. *In no circumstance shall the exercise of medical activities compatible with professional rules be deemed an offence, regardless of the person benefiting therefrom.*

2. *In no circumstance shall medical personnel be compelled by any authority to violate any provision of the Conventions or of the present Protocol.*

3. *Medical personnel shall not be compelled to perform acts or carry out work contrary to professional rules.*

4. *Medical personnel shall not be compelled to inform an occupying authority of the wounded, sick and shipwrecked under their care. An exception shall be made in the case of compulsory medical regulations for the notification of communicable diseases.*

References

- First Geneva Conv. 1949, Art. 18.
- Resolution concerning medical secrecy during armed conflicts.
- Third International Congress on the Neutrality of Medicine, Rome, April 1968.
Commentary

Paragraph 1:
This provision is based on the principle stated in Article 18 (3) of the First Convention, which it explains and supplements by extending the application of that article to members of the civilian medical service.

The changes made in the statement of this principle stem from the finding that a doctor's legitimate activity, which is a source of protection, is not limited to "nursing". 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 advise, and so forth. That is why the more general expression "medical activities" is used. In addition, and to make allowance for national laws which do not authorize just any "medical activities", this article specifies, as in fact those laws require, that the activities must be "consistent with professional rules".

Paragraph 2:
The provisions of this paragraph were drawn up by the first session. It goes without saying that the prohibition contained therein implicitly relates to any person belonging to one of the Parties to the conflict. The first session nevertheless made a point of issuing a reminder that it applies equally in respect of medical personnel.

In order to avoid the irksome listing of prohibited acts, the first session decided to prohibit the compelling of medical personnel to violate any provision of the Conventions or of the present Draft Protocol. It will be noted that in the proposed new text the ICRC has deleted the expression "Geneva Convention for the protection of victims of war". It considered that the term "Convention" should be enough.

Paragraph 3:
The provisions of this paragraph might be merged with those of paragraph 2. While the latter prohibits any coercion to carry out acts contrary to the Conventions, this paragraph contains the same prohibition as regards acts contrary to professional rules. Those rules are determined by the international and national communities of physicians. At the first session, the ICRC proposed a text prohibiting any coercion of a member of the medical personnel to commit an act contrary to his professional conscience. The first session rightly preferred to base the prohibition on professional rules which were better defined, more objective and universally known.
Paragraph 4:

This paragraph deals with a specific aspect of "medical secrecy," namely respect for that principle in case of international armed conflict.

This paragraph is designed to solve a difficult problem which has been discussed very thoroughly in medical circles. It has long been called, wrongly it would appear, "medical secrecy" 1/. The point at issue is actually the non-delation of the wounded and the sick.

During the debates which led to the conclusion of the Geneva Conventions in 1949, some voices were raised in favour of stating precisely in the Conventions that doctors and the population may not conceal the wounded and the sick collected by them from any military control, on the grounds that they would infringe their neutral status by doing so.

Others were opposed to this, fearing it would confer legitimacy on measures taken by occupation authorities to compel doctors and the population to denounce wounded members of the enemy forces or of resistance movements and which would sometimes prevent the wounded from receiving attention. There were also those who advocated stipulating non-delation.

Finally it was decided not to mention this controversial issue in the First Convention. But it has still not been resolved and in the future we must expect conflict between military requirements and the dictates of conscience. For that reason the study was resumed.

The International Law Association (Buenos Aires, 1968) and the Congress on the Neutrality of Medicine (Rome, 1968) studied this question and advocated categorical postulation of the non-delation principle.

The promoters of the Draft Protocol finally came up with this exemption clause, one which is consistent with the spirit of medical deontology. It lays down that the doctor may not be compelled to denounce the wounded or the sick under his care to the occupation authorities.

In fact, a doctor may legitimately wish to prevent someone from taking action he considers to be dangerous for other human lives, just as, in peacetime, he may wish to prevent a delinquent who has consulted him from continuing on a career of crime.

1/ "Medical secrecy" is generally construed as the secrecy which a doctor should maintain about the nature of his patients' illnesses.
Normally doctors may reasonably expect the wounded whom they notify to the authorities to be treated as provided for in the Conventions.

While the first session approved the draft article submitted by the ICRC, it nevertheless considered that it should expressly state the obligation of the medical personnel to report any cases of communicable disease which might have come to their notice. The first session considered that in this case the general interest should prevail over the interest of a limited number of individuals.

**Article 20. Role of the population**

1. The competent civilian and military authorities shall permit inhabitants and relief societies, even in invaded or occupied areas, spontaneously to give shelter to and tend the wounded, sick and shipwrecked of whatever nationality.

2. The civilian population shall respect these wounded, sick and shipwrecked persons and shall refrain from committing acts of violence against them.

3. No one shall be molested or convicted for having tended wounded, sick and shipwrecked persons.

**References**

- First Geneva Conv. 1949, Art. 18.
- Commentary, First Geneva Conv. 1949, pp. 183 et seq.

**Commentary**

The provisions of this article fill a gap in the Second and Third Conventions, which contain no equivalent provision relating to the assistance which the civilian population or relief societies might render the wounded, the sick or shipwrecked members of armed forces at sea, or civilians.

The need to extend the principle of Article 18 of the First Convention - which was already contained in the parent Convention of 1864 - to the two aforementioned Conventions is imperative, the more so as, in modern warfare, soldiers and civilians are exposed to the same risks and will receive the same care from the medical personnel and from civilians prepared to render assistance.
The provisions of this article summarize those of the aforementioned Article 18. After the Draft Protocol had been drawn up, and when it was too late to change it, the ICRC wondered whether it might not be advisable to introduce into this article the full provisions of Article 18.

The provisions of Article 20 of this Protocol do not, in fact, contain those of the first paragraph of Article 18, which expressly states that the military authorities may appeal to the "charity of the inhabitants". Moreover, it would be preferable to provide, as is done in Article 18, that the charity of the inhabitants shall be "voluntary", so as to prevent any possible abuse by the population.

In the interest of the wounded and of the sick, it would also be advisable to introduce into this article a provision granting the necessary protection and facilities to those who respond to the appeal. The last sentence in the first paragraph of Article 18 ("Should the adverse Party take or retake control of the area, he (sic) shall likewise grant these persons the same protection and the same facilities") should also be introduced into this article, in order to remind the armed forces that they cannot entirely free themselves of their treaty obligations towards the population.

Article 21.— Use of the distinctive emblem

From the outbreak of hostilities the High Contracting Parties shall adopt special measures for supervising the use of the distinctive emblem and for the prevention and repression of any misuse of the emblem.

References
- First Geneva Conv. 1949, Arts. 38 to 44, 53, 54.
- Second Geneva Conv. 1949, Arts. 41 to 45.
Commentary

Articles 14, 16 and 18 of this Draft Protocol confer special protection both on civilian medical establishments and units and on civilian medical transport vehicles and civilian medical personnel, and authorizes them to display the special protective emblem as a means of identification. In the circumstances, it was natural that the Contracting Parties should be reminded that they must supervise the use of the protective sign, in order to prevent and repress any misuse.

The provisions concerning the use of the protective sign are complex. This factor has certainly made for some instances of misuse. It would therefore be worth while to clarify and simplify these provisions. The XXth International Conference of the Red Cross, which met in Vienna in 1965, adopted regulations on the use of the red cross, red crescent and red lion and sun emblems by National Societies. The question now arises whether, like the International Conference of the Red Cross, the Parties to the Conventions should not equip themselves with similar regulations, which would clearly and precisely state who was entitled to use the protective sign, and in what circumstances and by what methods they could exercise that right, in accordance with the provisions of the Conventions.

Moreover, as stressed in the appended technical report on problems of markings denoting the medical mission, "medical marking" as provided for in the Conventions is insufficient. The mere display of the protective sign by medical personnel or medical establishments and units is not enough in modern armed conflicts, particularly in the case of medical aircraft.

If at the second session the experts of the working group responsible for studying means of marking agree to propose to governments the international use of an additional uniform system, such as radio-electric, optico­luminous or electro-acoustic signalling methods that serve the same purpose as the red cross emblem (or the red crescent or red lion and sun emblem), it would be advisable to supplement the Conventions with provisions relating to the use, the limitation and the prevention of any misuse of such complementary means of medical identification.

In the documentation submitted to the first session, the ICRC proposed that the emblem of the Staff of Aesculapius on a blue background should serve as a distinctive sign for all civilian medical personnel not incorporated in a State-organized medical service. The Conference did not agree to the proposal, arguing that the new sign afforded no special protection, that it concerned only a relatively small number of persons, and that the existence of two different signs might give rise to confusion.
Article 22.— Neutral States

Neutral States shall apply, by analogy, the provisions of the present Protocol to wounded, sick and shipwrecked persons and to medical personnel of the Parties to the conflict received or interned in their territory.

References
- First Geneva Conv. 1949, Art. 4.
- Second Geneva Conv. 1949, Art. 5.
- Third Geneva Conv. 1949, Art. 4 B (2).

Commentary

The ICRC proposes that this article be added to those drawn up by the first session. This decision seemed necessary in order to ensure that it was applied by neutral States in whose territory persons protected by the Conventions and this Draft Protocol would be received or interned.

As the Draft Protocol is additional to the Conventions, this article fills a gap in the Fourth Convention which lacked any equivalent provision.

Having drawn up the text of the proposed Protocol, and when too late to change it, the ICRC wondered whether it might not be advisable expressly to lay down in this article that neutral States shall, by analogy, apply not the provisions of the Draft Protocol alone, but those of the Conventions as well. Moreover, it would certainly have been preferable to replace the enumeration of protected persons by a more general formula such as "persons protected within the meaning of the Conventions and of this Protocol". By means of such a formula the danger latent in an unavoidably restricted enumeration would be eliminated.

Lastly, it should be noted that it might be advisable to supplement the provisions of this article by making allowance, as does Article 4 of the Third Convention, for more favourable treatment which neutral States may deem it expedient to grant.
SECTION II

MEDICAL AIR TRANSPORT

INTRODUCTION

By making the flight of medical aircraft subject to agreement between belligerents, the 1949 Diplomatic Conference had, as has been said, clipped the wings of medical aviation.

Yet aircraft, particularly in view of the development of helicopters, are invaluable for the survival and treatment of casualties.

The main reason for the plenipotentiaries' circum­ spection in 1949 was that at that time there were no adequate means of identifying medical aircraft to anti-aircraft forces which could fire on planes before seeing them.

Since then, however, technical progress has been such that, according to the experts, there should no longer be any insuperable obstacle.

The ICRC therefore suggested to the Commission médico-juridique de Monaco that it draw up draft rules relating to medical aviation, accompanied by technical specifications for aircraft identification systems. The Monaco Commission, in 1965, drew up drafts which the ICRC included in the documentary material which it submitted to States preparatory to the 1971 Conference of Government Experts 1/

This Conference did not have time to consider the question thoroughly but fully recognized its importance

1/ See Document VII, Protection of the Wounded and Sick, especially p. 56.
and deemed it essential to develop the relevant law. It expressed the hope that before the second session governments would closely examine the matter and that the ICRC would continue its study thereof.

Complying with the desire of the Conference of Experts in general that the ICRC draw up complete draft Protocols, the Committee hereby submits to the government experts the draft of a Protocol chapter on medical air transport, together with annexed rules for the marking and identification of aircraft. This draft, intended to supplement the Conventions is, in the main, based on the draft of the Commission médico-juridique de Monaco, which was considered in some quarters to be too complex. The technical specifications relating to identification have been slightly changed following the ICRC's consultations as requested by the 1971 Conference of Experts.

Article 23. - Medical aircraft

1. In the present Protocol the term "medical aircraft" refers to aircraft used by the military and civilian medical services of the Parties to the conflict, permanently or temporarily but exclusively for medical duties, namely for the evacuation and transport of military or civilian wounded, sick, shipwrecked and infirm persons, expectant mothers and maternity cases, as well as for the transport of medical personnel, equipment and material.

2. All medical aircraft shall carry a certificate issued by the responsible authority and attesting to the medical nature of their functions.

References

- First Geneva Conv. 1949, Art. 36.
- Fourth Geneva Conv. 1949, Art. 22.
- Commentary, First Geneva Conv. 1949, pp. 288 to 289.
Commentary

Paragraph 1 :

It seemed appropriate to start the provisions with a definition of "medical aircraft" as applied in the Conventions. The expression covers not only aeroplanes but also helicopters, seaplanes, zeppelins and any other or new "flying machine". It includes both military and civilian aircraft, so that in that respect the Draft Protocol completes the above-mentioned articles of the Conventions.

In accordance with the articles to which reference is made, medical aircraft are aircraft which are exclusively employed for the removal of military and civilian wounded, sick and shipwrecked persons, the infirm and maternity cases, or for the transport of military and civilian medical personnel and equipment.

Paragraph 2 :

The experts at the May-June 1971 Conference deemed it necessary to specify that States should provide civilian medical units with a document attesting to their medical character. Without reviewing here the considerations which prompted that decision, it seemed useful to include such a provision for the protection of civilian and military medical aircraft and their occupants, in order to standardize the rules relating to the protection of medical transport.

Such a document, moreover, would be the only valid proof of the medical nature of an aircraft fallen into the hands of an enemy and which, for one reason or another, had not been signaled as such at the time of its capture. It is worth while to repeat that a medical vehicle's right to protection is something which is quite independent of its identification.

Article 24.- Protection

1. Permanent medical aircraft shall be respected and protected at all times.
2. Temporary medical aircraft shall be respected and protected throughout their mission.
References
- First Geneva Conv. 1949, Arts. 19 and 36.
- Fourth Geneva Conv. 1949, Art. 22.

Commentary

Paragraph 1:
Modern warfare demands efficiently organized military and civilian medical services, and their constant adaptation to contemporary requirements in order to secure for wounded, sick and shipwrecked persons the care which their condition necessitates.

Many countries have equipped their military and civilian medical services with "medical aircraft".

The use by military and civilian medical services of aircraft necessarily implies the constant protection of such aircraft, whether they are on the ground, on water or in the air, and whether they are conveying casualties or are empty. Consequently, they may permanently display the protective sign and be equipped with technical systems for their easy identification.

Paragraph 2:
It may not infrequently occur that during armed conflict other military planes are used temporarily for medical purposes, such as for the removal of wounded and sick from fighting areas. Such temporarily medical aircraft shall, throughout their mission, have the same protection as permanently medical aircraft, that is to say both in flight, even if empty while on the way to pick up casualties and medical material, and on the ground while embarking and disembarking. During that period, they may signal their identity by displaying the protective sign or by the use of technical medical aviation identification systems, provided of course that they are not at the time armed for combat purposes.

As soon as such an aircraft has carried out a medical mission it shall be stripped of its protective sign and of any signaling system used exclusively by medical aircraft.
Article 25.— Removal of the wounded

1. In areas of military operations the Parties to the conflict shall, save in cases of imperative military necessity, permit the removal and evacuation of wounded, sick and shipwrecked persons by medical aircraft and particularly helicopters.

2. The removal and evacuation shall be carried out with the utmost possible speed.

References
- First Geneva Conv. 1949, Art. 15.
- Second Geneva Conv. 1949, Art. 18.

Commentary

Paragraph 1:

The Geneva Conventions having laid down rules for the search for, removal and evacuation of the wounded, the sick and the shipwrecked "at all times, and particularly after an engagement" (see First Conv., Art. 15; Second Conv., Art. 18; and Fourth Conv., Art. 16), it was necessary for Parties to have the means of doing so, inter alia by granting special protection for air transport.

As a result of aviation development, the victims of armed conflict can nowadays be evacuated quickly and receive more effective care.

By the use of helicopters, the evacuation of the wounded can be carried out in record time, sometimes in a matter of minutes, thereby increasing considerably the chances of survival of severe casualties.

Such protection for medical aircraft is conceivable, however, only in so far as it involves no threat to the security of the Parties in conflict. Consequently, flight of an enemy medical aircraft over a theatre of operations may be forbidden if imperative military necessity so demands. This restriction should not be generalized, but applied to a particular sector and, if possible, should be temporary.

Paragraph 2:

The rapid removal and evacuation of the wounded, the sick and the shipwrecked, provided for in paragraph 2 of this article, takes into account not only the imperative
need of security for the two Parties in conflict, but also
the necessity for prompt action for the benefit of the
victims, both during and immediately after fighting.

Article 26.- Flight over the territories of
the Parties to the conflict

Subject to the provisions of Article 25 of the present
Protocol, medical aircraft shall not fly over enemy or
enemy-occupied territory save by prior agreement between the
relevant Parties to the conflict. The agreement shall cover
in particular the routes, times and heights of flights as
well as the means of identification of medical aircraft.

References
- First Geneva Conv. 1949, Arts. 15 and 36.
- Second Geneva Conv. 1949, Arts. 18 and 39.
- Fourth Geneva Conv. 1949, Arts. 17 and 22.
- IVth Hague Conv. 1907, Regulations, Art. 42.

Commentary
As used in the Draft Protocol, territory means any
area of land or sea over which a State exercises sovereignty.

The expression "occupied territory" should be broadly
interpreted. "Occupied" means not only occupied in the
sense in which it is used in public international law, but
also actual military control of any area of land or sea
whether that area belongs to a State, is a res communis
or has a special international status.

This article, therefore, is essentially concerned with
a factual situation from the military point of view. Its
purpose is to authorize flight by medical aircraft over any
area of land or sea which is incontrovertibly under enemy
control at the time of the flight.

Whereas Article 25 makes provision for flight over
areas where fighting is going on, that is to say over areas
in which the identity of the belligerent in control is not
definite, Article 26 provides for flight over areas in which
the Party in control is quite definite. The latter article
repeats, in a simplified form, the provisions of the
articles referred to above.
This article could be invoked, for example, in the cases mentioned in Article 15 (3) of the First Convention (Article 18 of the Second and 17 of the Fourth: removal from besieged or encircled areas of wounded, sick and shipwrecked persons and passage of medical personnel and medical equipment on their way to such areas).

Whilst prior agreement is not necessary for flight over a theatre of operations, it is for flight over areas of land or sea controlled by one of the Parties to a conflict.

In view of the rapid development of aircraft detection and identification systems, and their availability to the health services of Parties in conflict, an agreement on the means of identifying such aircraft has been proposed. Such an agreement will provide an additional guarantee of safety to such aircraft, which will be identified all the more easily for having been covered by a prior agreement among the belligerents.

Article 27. – Identification

1. With the agreement of the responsible authority, medical aircraft may be marked with the distinctive emblem (red cross, red crescent, red lion and sun). When flights are undertaken under an agreement such as is provided for in Article 26 of the present Protocol, the aircraft shall always bear the distinctive emblem.

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.

References

- First Geneva Conv. 1949, Art. 36

Commentary

Paragraph 1:

Obviously, if medical aircraft are to be protected properly, especially when evacuating the wounded from a theatre of operations (Cf. draft Article 25 of the present
Draft Protocol), they must be marked by a protective emblem and must also use the most modern systems of identification and marking.

Paragraph 2:

With this need in mind, the ICRC has annexed to the present Draft Protocol, as an integral part thereof, proposed regulations drafted by technical experts on the marking and identification of medical aircraft. These regulations will facilitate, or even obviate the need for, the conclusion by belligerents of a special agreement on this question, which, especially during hostilities, is often very difficult.

It was not thought advisable, however, to make the use of the various identification systems compulsory. It was judged preferable to leave it to the responsible authority to decide whether to use them or not, in order to make allowance for the military exigencies of an armed conflict.

Article 28.—Landing

1. Medical aircraft flying over enemy or enemy-occupied territory shall obey any order to land or alight on water.

2. In the event of a landing, on land or on water, whether forced or in compliance with a summons, on enemy or enemy-occupied territory, by a medical aircraft covered by an agreement concluded under Article 26 of the present Protocol or carrying out a mission under Article 25, the aircraft with its occupants may resume its flight after examination, if any.

3. In the event of a landing, on land or on water, whether forced or in compliance with a summons, on enemy or enemy-occupied territory by any other medical aircraft, the aircraft may be made subject to the law of armed conflicts, on condition that the captor assumes responsibility for caring for the wounded, sick and shipwrecked persons on board. In the latter case the treatment of the medical personnel and the members of the crew shall be consistent with the Conventions. The medical equipment and material shall remain available for the treatment of the wounded, sick and shipwrecked persons.
References

- First Geneva Conv. 1949, Art. 36.
- Fourth Geneva Conv. 1949, Art. 22.

Commentary

General remarks:

For a definition of "enemy-occupied territory", see the commentary to draft Article 26 of the present Draft Protocol.

This Article 28 is an advance on the Conventions, in that it specifies the action a Party may take in respect of an enemy medical aircraft forced to land or alight on water in territory belonging to or controlled by that Party. Whereas the Conventions stipulate that, in such cases, the wounded, the sick, the shipwrecked and the aircraft crew all become prisoners of war, the present Draft Protocol treats them differently, according to whether an agreement of the sort laid down in Article 26 has been concluded or not. If it has, then for obvious humanitarian reasons and because the aircraft has been authorized to fly over enemy or enemy-occupied territory, it may resume its flight after examination, if any. In the absence of such an agreement, military security is the determinant factor: the aircraft not having been granted authorization to fly over the territory, the enemy may take precautions against possible abuse, subjecting the aircraft to the law of war if it considers it necessary to do so. In that event, of course, the wounded, sick and shipwrecked aboard must be cared for, and must be treated, like the air crew, according to the Conventions. The Draft Protocol also lays down what action may be taken in respect of the equipment, which must not be used for any purpose other than that for which it was intended.

Paragraph 1:

This paragraph partially reproduces the idea contained in paragraph 4 of the articles of each of the Conventions mentioned above. The obligation to land or to alight on water in compliance with a summons "provides the adverse Party with a safeguard; it is his one real means of defence against abuse".

Paragraph 2:

This provision needs no comment.
Paragraph 3:
This provision needs no comment.

Article 29.—Neutral States

1. Except by prior agreement, medical aircraft shall not, subject to the provisions of paragraph 3 below, fly over or land on the territory of a neutral State. They shall be respected throughout their flights and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water.

2. The agreement shall cover in particular the routes, times and heights of flights, as well as the means of identification of the aircraft.

3. In the absence of an agreement and in the event of urgent necessity, medical aircraft may, at their own risk, fly over, and land on, the territory of neutral States. They shall make every effort to give notice of the flight and to identify themselves. The neutral State concerned shall, to the extent possible, respect such aircraft.

4. In the event of a landing, on land or on water, in the territory of a neutral State, whether forced or in compliance with a summons, the aircraft, with its occupants, may resume its flight after examination, if any.

5. Any wounded, sick or shipwrecked persons disembarked from a medical aircraft with the consent of the local authorities on the territory of a neutral State shall, unless agreed otherwise between the neutral State and the Parties to the conflict, be detained by the neutral State where so required by international law, 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 Power to which the wounded, sick and shipwrecked persons belong.

References
- First Geneva Conv. 1949, Art. 37.
Commentary

General remarks:

It came to light that there was in the Fourth Convention no equivalent of the above-mentioned articles concerning flights by civilian medical aircraft of the Parties to a conflict over the territories of neutral States. The present article is intended to fill this gap.

Paragraphs 1, 2, 3:

The present wording of the above-mentioned articles is not very satisfactory. The first sentence stipulates these articles as a general rule that the medical aircraft of the Parties to a conflict may fly over the territory of neutral States, unless the latter impose conditions or restrictions on such flights. However, the circumstances of modern warfare do not always allow the neutral States time to notify the Parties to the conflict of their conditions. The medical aircraft of the Parties to the conflict may then find themselves in an ambiguous and hence dangerous situation, whenever their position is such that they need to fly over the territory of a neutral State.

There is, furthermore, a contradiction between the first and the last sentences of these articles. Whereas the first sentence authorizes medical aircraft in general to fly over the territory of neutral States, the third seems to authorize these States to attack them if no prior agreement concerning their flight has been concluded. What is more, the wording of this last sentence is shockingly brutal, and is not appropriate to humanitarian convention.

In the interest of medical air transport, the rules governing its activities should be clear-cut. This is why the ICRC proposes the general rule of establishing a prior agreement between the Parties to the conflict and the neutral State authorizing flights over its territory.

Such a provision may seem severe, but it is attenuated by the proposal in paragraph 3, which covers the case of flights over the territory of a neutral State by medical aircraft of the Parties to the conflict, where no prior agreement has been concluded between the Party to the conflict concerned and the neutral State, for reasons beyond their control – distress, bad weather, technical difficulty, etc. In this situation, the medical aircraft of the Party to the conflict and the neutral State have mutual obligations – the medical aircraft must "make every effort to give notice of the flight and to identify itself", while the neutral State must do its utmost to respect it.
Paragraph 4:

This paragraph also fills a gap in the aforesaid articles. Unlike the provisions concerning flight by medical aircraft over the territory of a Party to the conflict, the above articles contain no provisions concerning the occupants of a medical aircraft which has been obliged through necessity or in compliance with a summons, to land or to alight on water in the territory of a neutral State.

The provisions of paragraph 4 of Article 36 of the First Convention and of Article 39 of the Second Convention, it must be admitted, are implied. It would certainly be preferable for such provisions to be embodied in an article.

Paragraph 5:

This paragraph reproduces the third paragraph of the above-mentioned articles. The ICRC has, however, seen fit to use the expression "hostilities" instead of "operations of war", in keeping with modern developments in legal terminology.

The second sentence in paragraph 2 of the above-mentioned articles has not been included, because it is a general provision of the laws of neutrality and, as such, not appropriate in a specific provision.
PART III

COMBATANTS

INTRODUCTION

In the main, this Part encompasses the minimum humanitarian rules which, in their own mutual interest, all combatants must observe at all times in their dealings with one another when conducting armed operations. However bitter the struggle may be and however essential the aims, combatants cannot set themselves above any regulation and they owe their adversaries a minimum of respect. Over the years, this respect has led to basic moral principles - such as the prohibition of perfidy and acts causing unnecessary suffering - to principles embodied in conventions - such as the prohibition of abuse of the red cross emblem or the enemy flag - and to humanitarian principles - such as safeguarding the captured or defenceless enemy. The application of those rules, should dispose any combatant to recognize in his adversary, however bitter he may be, a human being similar to himself.

Furthermore, this Part is based, in particular, on the United Nations General Assembly resolutions 2852 (XXVI) (Arts. 1 and 3) and 2853 (XXVI) (Arts. 1 and 2 (f)).

Article 30.—Means of combat

1. Combatants' choice of means of combat is not unlimited.
2. It is forbidden to use weapons, projectiles or substances calculated to cause unnecessary suffering, or particularly cruel methods and means.
3. In cases for which no provision is made in the present Protocol, the principle of humanity and the dictates of the public conscience shall continue to safeguard populations and combatants pending the adoption of fuller regulations.

References
- IVth Hague Conv. 1907, Preliminary Declarations, para. 8.
- IVth Hague Conv. 1907, Regulations, Arts. 22 and 23 (e).
- Geneva Conv. 1949, Arts. 62 (I), 63 (II), 142 (III), 158 (IV).
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2852 (XXVI).

Commentary

Paragraph 1:
The text of Article 22 of the Hague Convention reads as follows:

"The right of belligerents to adopt means of injuring the enemy is not unlimited".

The terms "right" and "injuring" were eliminated at the request of the government experts at the first session. Furthermore, the term "combatants" has replaced "belligerents" which implies "jus ad bellum".

Paragraph 2:
The text of Article 23 (e) of the Hague Convention reads as follows:

"It is forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering".

The word "methods" was added at the request of the government experts at the first session, as was the idea of cruelty in accordance with United Nations General Assembly resolution 2852 (XXVI) (fourth preambular para.). Apart from having an obvious humanitarian basis, this prohibition on the causing of unnecessary suffering is founded on the strict notion of military necessity, according to which that necessity sets the limit to legality.
Paragraph 3:

This paragraph takes up the principle of what is known as the Marten's clause in the Preliminary Declarations of the Fourth Hague Convention of 1907, which reads as follows:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of the public conscience".

The International Committee of the Red Cross considers that it is essential that the underlying principles of this paragraph form part of any future regulation.

Article 31.— Prohibition of perfidy

1. It is forbidden to kill or injure by resort to perfidy. Unlawful acts betraying an enemy's confidence, such as the abuse of an international convention, truce or humanitarian negotiation, the misuse of internationally recognized protective signs, the feigning of surrender, the use in combat of the enemy's distinctive emblems, are deemed to constitute perfidy.

2. Ruses of war are not considered as perfidy. Ruses of war are those acts, such as camouflage, traps, mock operations, and misinformation, which, whilst infringing no recognized rule, are intended to mislead the enemy or to induce him to act recklessly.

References
- IVth Hague Conv. 1907, Regulations, Art. 23 (b) and (f), Art. 24, Lieber 15, 16, 65, 117.
Commentary

Paragraph 1, first sentence:
The corresponding text from Article 23 (b) of the Hague Regulations reads as follows:

"It is forbidden ... to kill or wound treacherously individuals belonging to the hostile nation or army".

The term "treacherously" was considered inappropriate and was replaced by "resort to perfidy", in this paragraph. In general, acts which are perfidious are those which use the instruments of peace and humanity for war and attack. The illicit acts covered by this provision also include those which violate Article 1 (3), that is those which run counter to the laws of humanity and the requirements of public conscience.

Paragraph 1, second sentence:
This provision needs no comment.

Paragraph 2, first sentence:
Article 24 of the Hague Regulations reads as follows:

"Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible".

This article, therefore, lumps together ruses of war and the obtaining of information, which is unfortunate at a time when there is only too great a readiness to use violence to extract information. A ruse is licit, if only because it is the only way to wage war while avoiding bloodshed. But it cannot make licit that which is not, nor can it excuse unjustified breaches of commitments. There is some opposition to including this paragraph, on the grounds that it has no place in a humanitarian convention.

Paragraph 2, second sentence:
This provision needs no comment.

Article 32. Recognized signs

It is forbidden to make improper use of the flag of truce, the protective sign of the red cross (red crescent, red lion and sun), the protective sign for cultural property and other protective signs specified in international conventions.
References

- IVth Hague Conv. 1907, Regulations, Arts. 23 (f) and 32.
- First Geneva Conv. 1949, Arts. 44, 53 and 54.
- Second Geneva Conv. 1949, Arts. 44 and 45.

Commentary

The texts of both Articles 32 and 33 have been taken from Article 23 (f) of the Hague Regulations which states that:

"It is forbidden ... to make improper use of a flag of truce, of the national flag or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention".

This point, which at the Hague was dealt with in one article, has here been split between Articles 32 and 33. Obviously, reference to the protective sign for cultural property, selected at The Hague in 1954, is an innovation. Moreover, the door has purposely been thrown open to the lex ferenda. It is possible, for example, to imagine the United Nations flag used when sending an observer or relief supplies into an area of armed conflict. Only the protective sign affords the protection of the Convention, as opposed to indicative signs, with their many forms and meanings, such as a red cross broach, the white attire of sailors or mountain regiments or a cultural sign on unclassified property. A red cross on a wounded and defenceless person, on the other hand, shall always afford protection.
Article 33. - Emblems of nationality

It is forbidden to make improper use of enemy or neutral flags, military insignia and uniforms. In combat their use is forbidden at all times.

References

- IVth Hague Conv. 1907, Regulations, Art. 23 (f).
- First Geneva Conv. 1949, Arts. 42 and 43.
- Second Geneva Conv. 1949, Art. 43.
- Third Geneva Conv. 1949, Arts. 27 and 93.

Commentary

First sentence:

The prohibition here is the same as that applicable to international signs, i.e. a prohibition of improper use. Total prohibition, sought by some, while possible in the air, would hardly seem feasible on land. The draft Hague text envisaged prohibiting the use of the adversary's flag "in order to mislead the enemy". However this was omitted for 'editorial purposes'. The principle of infiltration while wearing enemy uniform but without opening fire was accepted by the Nuremberg International Military Tribunal in the Skorzeny Case. The removal of equipment captured on the battle field and possibly the evacuation of prisoners of war may involve the use of enemy emblems as may the clothing worn by escaping prisoners. Enemy uniform without insignia may be worn when necessary by prisoners where the climate so dictates; national flags on medical units and possibly on prisoner of war camps are tolerated or authorized depending on the case in point.

Second sentence:

This prohibition is absolute.
Article 34.- Safeguard of an enemy hors de combat

1. It is forbidden to kill or wound an enemy who, having laid down his arms, or no longer having any means of defence, has surrendered at discretion.
2. 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.
3. A captor shall provide for persons falling into his power even if he decides to release them.
4. Nevertheless, sentences may subsequently be passed for infringements of the law of armed conflict, consistent with the procedure recognized in international law.

References
- IVth Hague Conv. 1907, Regulations, Art. 23 (c) and (d).
- Geneva Conv. 1949, Common Art. 3 (1).
- First Geneva Conv. 1949, Arts. 13 and 49.
- Second Geneva Conv. 1949, Arts. 13 and 50.
- Third Geneva Conv. 1949, Arts. 4 and 129.
- Genocide Conv. 1948, Art. V.

Commentary

Paragraph 1:

The corresponding text in the Hague Regulations is worded as follows in Article 23 (c):

"It is forbidden ... to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered 'at discretion'".

This has inadvertently been reproduced as Article 34 (1) in the document entitled "Basic Texts" giving the English version of the Draft Additional Protocols. It should be
corrected to read:

"It is forbidden to kill or wound an enemy who, having laid down his arms, no longer has any means of defence, or who has surrendered at 'discretion'."

The alternative - "having laid down his arms or having no longer any means of defence" - which appears in the Hague Regulation, was removed at the request of the first session of Government Experts and was replaced by another alternative in the text of the paragraph under discussion, viz "having laid down his arms or ... has surrendered at discretion".

Paragraph 2:

This is a renewal of the rule stipulated in Article 23 (d) of the Hague Regulations, which reads:

"It is forbidden ... to declare that no quarter will be given".

What this actually means is that it is forbidden to declare the adversary an outlaw and to wage battle accordingly. The Hague rule could have been maintained but a more explicit wording was requested. Moreover the word "quarter" cannot easily be translated from English. Be that as it may, the prohibition of outlawing subsists, as the refusal of jus ad bellum does not affect the obligations resulting from jus in bello.

Paragraph 3:

The general principle here is a new one; it concerns what are known as "privileged" combatants, that is those coming in the categories listed in Article 4 of the Third Geneva Convention as well as the "non-privileged", that is, the others.

Paragraph 4:

The text of this paragraph, too, is new. The circumstances prevailing today are no longer those of the Hague; as jus ad bellum is almost universally condemned, combatants are likely to be accused of war crimes. Moreover, certain methods of combat, an objectionable inheritance from the Second World War, help to confuse the issue. It is important that the principles set forth in the foregoing paragraphs should not be impaired. The possible problem of war crimes must be settled apart.
Article 35.– Conditions of capture and surrender

1. A combatant is captured when he falls into the power of an enemy.

2. The following, inter alia, shall be considered to have fallen into the power of an enemy:
   a) any disarmed combatant unable to defend himself or express himself in territory taken, even temporarily, by an enemy;
   b) any combatant expressing by the usual means or by his attitude his intention to surrender, and abstaining from any violence.

References

- IVth Hague Conv. 1907, Regulations, Art. 23 (c) and (f).

Commentary

Paragraph 1:

This article is new. It would seem that in 1907 little thought was given to the conditions in which surrender might or might not take place. As one expert pointed out at the first session of the Conference, "if the situation is clear, it is simple, if it is not, everything will depend on the captor's self-control". However, many voices were raised in favour of a clarification, which this article attempts to offer. This paragraph defines the meaning of "capture". Capture is deemed to have taken place once a combatant "falls into the power" of the enemy, as is explicitly stated in Article 4 of the Third Convention. (Here the conditions of air warfare must be set apart for, in such combat, one Party may virtually be in the power of the other which rules the airspace: in fact, the air force does not capture and these situations can hardly be confused with the purposes of the present article.)
Paragraph 2:

Once capture has been effected, that is when one side has "fallen" into the power of the other, the circumstances of that "fall" have to be determined. Such is the purpose of paragraph 2 which allows for two possibilities, i.e. either the combatant that has succumbed expresses himself (sub-para. (b)) or he does not (sub-para. (a)).

a) The dominated adversary does not express himself either because he is too seriously wounded to do so or because he simply does not want to. His orders may forbid his doing so. However, he has no choice, his means of combat are exhausted and his retreat cut off. Despite his silence, the conditions of Article 4 (1) of the Third Convention are entirely fulfilled, i.e. he has laid down his arms and he no longer has any means of defence. On the arrival of the enemy he is, inevitably, captured.

b) The dominated adversary expresses his intention to cease combat. This he shall do by one of the recognized means and in accordance with the place, time and situation. The main thing is to be sure that the gesture is understood without any ambiguity. It was felt that it would be rather delicate to try, at this point, to draw up a list which would necessarily be incomplete and, regardless of the precautions taken, of a restrictive nature. The white flag is still the most convenient way of manifesting this intention although its use is not by any means limited to this possibility alone. Lastly, the text expresses something which should be self evident and that is that the actions of someone who surrenders must accord scrupulously with the declaration of intention. No unprovoked hostile act can be admitted from that moment on.

Article 36.— Aircraft occupants

The occupants of aircraft in distress who parachute to save their lives, or who are compelled to make a forced landing, shall not be attacked during their descent or landing unless their attitude is hostile.
References

Commentary

This article is entirely new. In the era of The Hague, there was no "vertical" dimension to military operations. Consequently a proposal, which reflects the customs which have grown up since the appearance of air warfare, was formally submitted to the first session of the Conference of Government Experts and at which the situation of airmen in distress was compared to that of the shipwrecked.

It is essential that a distinction be made between airmen in distress and assault paratroops. It was said that the difference between the two resided in their intention, which could be recognized from outward signs. Marginal cases could arise, such as that of paratroops jumping from a plane in distress but forming part of an airborne mission which may or may not have reached its combat area; airmen in distress landing beyond the lines and escaping capture; airmen in distress who refuse to surrender on touchdown, in the hope that they will be rescued by allied forces. There is no getting away from the fact that this last-mentioned possibility could weaken the effect of this article.

The term aircraft should be taken to mean any flying machine, present or future.

Article 37.- Independent missions

1. Members of armed forces and other combatants complying with the conditions laid down in Article 4 of the Third Convention who enter territory controlled by an enemy in order to gather and transmit information of a military order shall not be considered as spies. Similarly, military and non-military personnel openly carrying out their mission of liaison or communication between units of their own armed forces or with the enemy armed forces shall not be considered as spies.

2. Members of armed forces and other combatants fulfilling the conditions of Article 4 of the Third Convention and who enter areas or territories controlled by an enemy
with the intent of carrying out destruction shall not be considered as saboteurs within the meaning of Article 5 of the Fourth Convention.

3. In the event of their capture, persons referred to in the two preceding paragraphs shall be prisoners of war.

References

- IVth Hague Conv. 1907, Regulations, Arts. 29, 32 to 34.
- Third Geneva Conv. 1949, Art. 4.
- Fourth Geneva Conv. 1949, Arts. 5 and 68.
- Commentary, Fourth Geneva Conv. 1949, pp. 52 to 58.

Commentary

Paragraph 1:

The text of this paragraph partly reproduces, with some adaptations, Article 29 of the Hague Regulations which reads as follows:

"A person can only be considered as 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.

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: soldiers and civilians, carrying out their mission openly, entrusted with the delivery of dispatches 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 dispatches and, generally, of maintaining communications between the different parts of an army or territory".

The present paragraph varies from the abovementioned text on three points which appeared essential. Firstly, it was considered that the definition of a spy was out of place in a humanitarian convention. Consequently, the first
paragraph of the aforementioned Article 29 of the Hague Regulations has been omitted. Secondly, limitation to the "zone of operations" is no longer relevant to the seeking of information and so it, too, has been omitted. Finally, the outdated references in the second paragraph of Article 29, such as "dispatches" and "persons sent in balloons" have also been omitted.

It will further be noted that Articles 30 and 31 of the Hague Regulations do not appear in this text either.

As all definitions of spies have been eliminated, these two articles of the Regulations which are pre-eminently concerned with spies no longer have any reason to exist in the present Protocol. Moreover, these provisions of The Hague read as follows:

"Article 30. A spy taken in the act shall not be punished without previous trial".

"Article 31. 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".

Article 38.— Guerrilla fighters

1. In the event of their capture, members of militias or volunteer corps, including those of organized resistance or independence movements not belonging to the regular armed forces but belonging to a Party to the conflict, even in the case of a government or of an authority not recognized by the Detaining Power, shall be treated as prisoners of war within the meaning of the Third Convention, provided that such militias, volunteer corps or organized resistance or independence movements fulfil the following conditions:

(a) that in their operations they comply with the requirements of the principles of the law of armed conflicts and of the rules laid down in the present Protocol;

(b) that in their operations they show their combatant status by openly displaying their weapons or that they distinguish themselves from the civilian population either by wearing a distinctive sign or by any other means;

(c) that they are organized and under the orders of a commander responsible for his subordinates.
2. Individual infringements of the foregoing conditions shall not entail forfeiture of prisoner-of-war treatment for the other members of the organization who have observed those conditions.

3. Combatants not fulfilling the foregoing conditions shall, in the event of their capture, be afforded guarantees not less favourable than those laid down in Article 3 common to the Conventions.

References
- Third Geneva Conv. 1949, Art. 4.
- UN, A/Res. 2852 (XXVI).

Commentary
This article gives a summary of the minimum rules suggested in CE/6b "Rules Applicable in Guerrilla Warfare", submitted by the ICRC to the 1971 Conference of Government Experts.

The mention of organized movements of freedom fighters was the outcome of a United Nations General Assembly resolution on respect for human rights in periods of armed conflict 1/.

Article 39. - Organization and discipline

Armed forces shall be organized and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect of the present rules and of the other rules applicable in armed conflicts.

1/ UN, A/Res. 2852 (XXVI), para. 2.
References

- IVth Hague Conv. 1907, Art. 1; Regulations, Art. 1.
- Third Geneva Conv. 1949, Arts. 4A. (2) and 127.
- Fourth Geneva Conv. 1949, Art. 144.
- XXth Internat. Conf. Red Cross, Vienna, 1965, Res. XXI, paras. 3 and 4, Res. XXV.

Commentary

First sentence:

The first article of the Hague Regulations stipulates that "the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps" fulfilling certain disciplinary conditions.

At the first session of the Conference of Experts, many delegations spoke in favour of this provision and there seemed to be a greater need for a general provision than for a special rule applicable to any particular bodies of troops which it would be difficult to list.

Second sentence:

This second sentence is a consequence of the former and is derived both from Article 1 of the Fourth Hague Convention and from proposals submitted at the first session of the Conference of Experts. Article 1 of the Hague Convention reads as follows:

"The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention".

The text of this article implicitly poses the further problem of distributing instructions for, as the Hague Convention says, a ratification cannot be applied to a rule that has not been published. Ignorance of the law is no excuse, as the adage goes, for laws are published. The problem of the order from a superior, running counter to the laws in force, will be referred to in Article 76.
PART IV

CIVILIAN POPULATION

General References 1/

- IVth Hague Conv. 1907, Regulations.
- IXth Hague Conv. 1907.
- Rules concerning the control of wireless telegraphy in time of war and air warfare 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.
- ICRC, Draft Protocol II, 1972, Arts. 6, 14, 15, 16, 17, 29, 30, 31 and 33.
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2675 (XXV).
- UN, A/Res. 2852 (XXVI), operative para. 3 (b).
- UN, A/Res. 2853 (XXVI), operative para. 2 (d).

INTRODUCTION

1. Projects 1971/1972

The above-mentioned references, in particular the documentation submitted by the ICRC to the first session of the Conference of Government Experts held in 1971, make it possible for the introduction to this Part to be restricted to two points: firstly, the development will be indicated in the conception and wording of the present drafts, as compared with those of 1971 and, secondly, this Part IV will be examined in relation to the Geneva Convention of 12 August 1949 relative to the protection of civilian persons in time of war (hereinafter referred to as the Fourth Convention). With regard to the protection of the civilian population, the main differences between the 1971 project and the present drafts reside in their field of application, their economy and, sometimes, the scope of the matters dealt with 2/.

2/ See these proposals in ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Part One, Title IV.
2. Field of application

The 1971 project was intended to cover all armed conflicts, similar to the Draft Rules of 1956 2/, the minimum rules suggested in the report of the Secretary-General of the United Nations 4/ and the relative international resolutions 5/. One expert pointed out in this connexion that "the problems of technique in the conduct of hostilities were the same in all warfare and that differences in means and methods might result from the different situations of the Parties to a conflict, whether international or non-international" 6/. Thus, the means of conventional, guerilla, or anti-guerilla warfare, blockades or economic warfare, can be found singly or collectively in armed conflicts of all types and the situation of the civilian population is just as precarious and threatened in any one or other of these cases.

Nevertheless, the idea of a Protocol relating to the protection of the civilian population which would be applicable in all armed conflicts was not retained by the majority of the government experts, according to whom a distinction between international and non-international armed conflicts had to be maintained, by virtue of the characteristics proper to each of the forms these conflicts might take - even if that distinction was sometimes very blurred. That is why, for the protection of the civilian population as well as for other spheres, the ICRC has chosen to present, firstly, the rules applicable in international armed conflicts (contained in the present Part IV) and, secondly, the rules applicable in internal armed conflicts, these rules very often containing the essence of those applicable to international conflicts (see Draft Protocol II, Arts. 6, 14, 15, 16, 17, 29, 30, 31 and 33).


4/ See UN, Report of the Secretary-General A/8052, 1970, paras. 34 to 44.

5/ See, in particular, UN, A/Res. 2444 (XXIII) and A/Res. 2675 (XXV), and XXth Internat. Conf. Red Cross, Res. XXVIII, Vienna, 1965.

3. Economy of the draft

The idea behind the ICRC proposals in 1971 - that is, that of knowing the distinction between basic rules and their regulations of execution - was not supported, some experts considering it as being in-opportune 7/. Consequently, in the present draft, all the rules given in Part IV are of an equal value. The 1971 proposals were conceived with a view to establishing a Protocol of a unique character; that is, relating solely to the protection of the civilian population. At present, in view of the ICRC's decision to include all matters relating to international conflicts in a single Protocol additional to the Conventions, the rules relative to the protection of the civilian population are, therefore, no more isolated, but form part of a whole.

Part IV is divided into four sections: Section I: "General Provisions"; Section II: "Protection of the civilian population against dangers resulting from hostilities"; Section III: "Assistance to the civilian population" and Section IV: "Civil Defence Organizations".

4. Subjects

The subjects dealt with in the present Part are, in essence, the same as those appearing in the ICRC documents published in 1971 8/. In the present Draft Protocol, the object has been to include all the ideas expressed in the form of complete articles; thus, the provisions of Articles 53 to 72 will be relatively new.

5. Relation to the Fourth Convention

Like the whole of the project of Protocol I, the provisions of Part IV have the sole objective of reaffirming and developing the law in force. The rules relating to the protection of the civilian population thus elaborate and supplement the Conventions, because they are considered to be indispensable, having regard to the lessons learned from the two World Wars, and from armed conflicts since then.

The Fourth Convention, relative to the protection of civilian persons in time of war, is primarily concerned with the protection of civilians who are in the power of the enemy against any arbitrary action by the latter. It is true that this Convention contains a Part II which has a wider scope and is aimed at the general protection of populations against certain consequences of war. But this Part, valuable as it is, falls well short of protecting – as it should – civilian population against the dangers resulting from such consequences of war and, in particular, against the dangers of bombardments and other hostile acts – both as regards their direct and indirect effects. The purpose of the present Part is, precisely, to elaborate and supplement as fully as possible the few provisions already contained in Part II of the Fourth Convention.

The present Part does not contain the criterion of the nationality of protected persons, as provided by Article 4 of the Fourth Convention. The provisions of the present Part cover the whole of the civilian population, whether groups of people or isolated individuals, and without any discrimination being made, even one of nationality. Whereas Sections I, III and IV expand the provisions of written law, Section II deals with a field which has been governed up to now mainly by customary law and barely touched upon by the Fourth Convention. As its Commentary indicates 9/, the Fourth Convention does not deal in a general manner, or explicitly, with the protection of the civilian population against dangers resulting from hostilities; apart from some exceptions appearing in its Part II, it deals mainly with the question of occupation.

The present Part thus constitutes an indispensable complement, affirming principles of international law that are generally recognized, but not yet affirmed expressly in a conventional instrument. It would seem, fortunately, that, at the present time, a step in that direction is generally considered to be both possible and indispensable, especially if one takes into account the relevant international resolutions, almost all of which have been adopted unanimously, both by the International Conferences of the Red Cross and the General Assembly of the United Nations.

6. Documentation

It is unnecessary to say how valuable were the proposals – numerous and varied – submitted by the governmental

experts at the first session dealing with the protection of the civilian population 10/. The ICRC paid the closest attention to all of them, and they have largely inspired the present drafts. The proposal CE/Com.III/44, which was an outstanding work of synthesis, was adopted by the Red Cross in particular; unfortunately, it could not be examined at the first session through lack of time 11/.

SECTION I

GENERAL PROVISIONS

Introduction

Similar to the Conventions 12/, Section I of the present Part comprises definitions, sometimes very detailed ones. The experience gained from armed conflicts since 1949 has shown that definitions, as well as the very precise provisions of the Conventions, help both the Parties to the conflict to understand better their obligations and, thus, respect them better, and any third party - such as ICRC delegates - to promote better the rights of protected persons. This Section will start with a very general principle of protection, which indicates the objective pursued in Part IV: to ensure respect for, and the safeguarding of, the civilian population and objects of a civilian character; this article is followed by four definitions - different, but complementary.

10/ See ICRC, Conf. Gvt. Experts, Geneva 1971, Report, CE/Com.III/1 to 44; these proposals will be systematically mentioned in the references of articles inspired by them.


Article 40. - General protection of the civilian population

The civilian population and objects of a civilian character shall be protected against dangers resulting from hostilities.

References

- IXth Hague Conv. 1907, Arts. 1 to 3.
- Fourth Geneva Conv. 1949, Arts. 24 to 37.
- Rules concerning the control of wireless telegraphy in time of war and air warfare 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, Arts. 23 to 25.
- ICRC, Draft Protocol II, 1972, Chap. IV.
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2675 (XXV).
- IDI Resolution.
- ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, paras. 440 to 453, 458 and 459, and CE/Com.III/1, 2, 4, 5, 6, 7, 10, 12, 13, 14, 15, 15b, 16, 17, 18, 19, 24, 26, 27, 28, 32 and 44.

Commentary

The principle of general protection in favour of the civilian population, imposes reciprocal and complementary obligations on all the Parties to the conflict - obligations which will be specified in Articles 45 to 48. Taking its inspiration from the general provisions of the Hague Convention of 1954 13/, the conception of protection

13/ See Hague Conv. 1954, Arts. 2, 3 and 4; this terminology departs from that used up to now in the Conventions (see Fourth Conv., Art. 16 para. 1) and in the preceding Parts (see above Arts. 12 para. 1, 14 para. 1, 24 para. 1); standardization will, therefore, be necessary in this connexion for Draft Protocols I and II.
embraces two ideas here: the obligations to respect protected persons and objects and safeguard them. Because of the obligation of respect, the Parties to the conflict shall not launch attacks against protected persons and objects (Arts. 45 and 47) and shall take precautions when launching attacks (Arts. 49 and 50); because of the obligation to safeguard them, they shall not deliberately expose them to attacks (Arts. 46 and 48) and shall take precautions against the consequences of attacks (Art. 51).

Dangers resulting from hostilities comprise, for protected persons and objects, two kinds of risk: that of suffering from the direct consequences of attacks launched against them illicitly and that of suffering from the secondary consequences of an attack launched against a military objective. As will be seen below, these two situations have been dealt with, in a distinct and more detailed manner, in the following Section: Chapters I and II (Arts. 45 to 48) are designed to eliminate the direct risk, whereas Chapters III and IV (Arts. 49 to 55) are designed to reduce, as far as possible, the indirect risk.

Hostilities consist of all actions and activities designed to weaken the military strength of the adversary. Despite the prohibitive or restrictive rules of Section II, the civilian population will continue to incur considerable risks resulting from hostilities. In order to counterbalance these risks, it has been provided that the Parties to the conflict shall take, or tolerate, positive measures: they appear in Section III (Assistance to the civilian population) and Section IV (Civil Defence Organizations).

Article 41. — Definition of the civilian population

1. Any person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities is considered to be a civilian.

2. The civilian population comprises all civilian fulfilling the conditions stipulated in the foregoing paragraph.

3. Proposal I: The presence, within the civilian population, of individuals who do not conform to the definition given in paragraph 1, does not prevent the civilian population from being considered as such, reservation being made for Article 45 paragraph 5, 49, 50 and 51 of the present Protocol.
Proposal II: The presence, within the civilian population, of individual combatants, does not prevent the civilian population from being considered as such, reservation being made for Articles 45 paragraph 5, 49, 50 and 51 of the present Protocol.

4. In case of doubt as to their civilian character, the persons mentioned in paragraph 1 shall be presumed as belonging to the civilian population.

References

Commentary

General remarks
Because it governs mainly occupation, the Fourth Convention affirms, in Article 4 (Definition of protected persons), the criterion of nationality 14/. The present

14/ Whereas the present Part covers the civilian population (whether groups of persons or individuals), the Fourth Convention protects more particularly individuals who are nationals of one of the signatory States. There are, therefore, three categories of persons who do not benefit from the Fourth Convention:

1) nationals of a State which is not a signatory to the Convention (by virtue of Art. 4 para. 2, of the Fourth Convention);
2) stateless persons;
(continued on page 83)
Part, because it governs mainly the conduct of hostilities, makes these provisions apply to all civilian who satisfy the condition set out in the first paragraph of Article 41.

Paragraph 1:
The fact that one condition is not fulfilled is sufficient to deprive a person of his being considered a civilian: either by his membership of the armed forces (criterion of military status), or by his direct participation in hostilities (criterion of military or combatant activity) \(^{15/}\). Conversely, any other person must be considered as a civilian.

Paragraph 2:
This paragraph needs no comment.

Paragraph 3:
The two alternative proposals contain the same idea: in order to avoid any abuse, the civilian population has always to be considered as such, even in the case where a number of isolated combatants are present \(^{16/}\). Nevertheless, combatants, during their operations, must not use the civilian population as a shield (see Art. 46).

(continued from page 82)

3) nationals of a signatory Power, vis-à-vis their State of origin. (For example, nationals of one State (A), having sought refuge in another State (B), may not, if (B) is occupied by (A), benefit from the provisions of the Fourth Convention; this situation was known during the second world war in occupied France, where there were German refugees who had fled from the Hitler regime).

Moreover, it is regrettable that even nationals of a signatory State to the Fourth Convention have no assurance that it will be applied to them in all circumstances, having regard to Art. 5 (Derogations).

\(^{15/}\) Thus, the person who, individually, without even belonging to any particular movement, fires on the enemy becomes, once discovered, a military objective. If he attempts to conceal himself in the crowd, para. 3 becomes applicable, as well as the articles mentioned therein. This paragraph specifies the duties of the civilian population, as Art. 20 para. 2.

\(^{16/}\) No matter if combatants fulfil, or not, the conditions of Art. 4 of the Third Convention; this is only determinant for the status of prisoner of war.
Paragraph 4:

This provision is of capital importance: a presumption in favour of the civilian population is established 17/. Two complementary obligations arise from it: firstly, that of identifying military objectives (see Art. 49 a) 18/ and secondly, that – for combatants – of avoiding any mixing with civilians (see Art. 46).

Article 42.—Definition of objects of a civilian character

1. Objects which, by their nature or use, answer the needs of the civilian population, are considered as objects of a civilian character.

2. Objects of a civilian character comprise, in particular, objects which are indispensable to the survival of the civilian population, as well as those serving mainly pacific or helpful purposes.

3. In case of doubt as to the nature and destination of objects mentioned in paragraph 1, crops, provisions and other foodstuffs, drinking water reserve supplies and dwellings and buildings designed for the shelter of the civilian population, or which the latter habitually uses, shall be presumed to be objects of a civilian character.

References

- IVth Hague Conv. 1907, Regulations, Arts. 25 and 27.
- IXth Hague Conv. 1907, Arts. 1 and 3.
- ICRC, Draft Rules, 1956, Art. 6 para. 2.
- UN, A/Res. 2675 (XXV), operative paras. 5 and 6.
- IDI, Resolution, operative para. 3.

17/ This idea is inspired by Art. 5 para. 2 of the Third Convention.

18/ The contrary presumption should not, therefore, be admitted.
Commentary

Paragraph 1:
Objects of a civilian character (formerly described as "non-military objects" in the previous ICRC projects) are defined in a positive manner. The criteria of the nature and use (or function) of same, have also been retained here, but in relation to the needs of the civilian population 19/.

Paragraph 2:
This paragraph needs no comment 20/.

Paragraph 3:
As with the civilian population, and for the same reasons, a presumption is introduced here in favour of objects of a civilian character. In order to facilitate the application of this provision, the objects have been referred to in a sufficiently broad manner for the vital interests of the civilian population to be preserved. The same consequences as those mentioned previously in Article 41 arise from it: firstly, that of identifying military objectives (Art. 49 a), and, secondly, that of avoiding the use of objects of a civilian character in military operations (Arts. 47 in fine and 48 para. 2).

19/ In the present project, objects of a civilian character are not protected as such, but only for the purpose of assuring better protection for the civilian population itself and of preserving a minimum degree of well being for the latter.

In the English version, the French term "bien" can be translated either by property, or by object; the latter term was finally chosen.

20/ In accordance with the wishes expressed by many governmental experts, the wording of this article has been made to conform more closely to the definition contained in the IDI resolution (Art. 3).
Article 43. - Definition of military objectives

Only those objectives which, by their nature or use, contribute effectively and directly to the military effort of the adversary, or which are of a generally recognized military interest, are considered as military objectives.

References
- ICRC, Draft Rules, 1956, Art. 7 and annexed list.
- ICRC, Draft Protocol I, 1972, Preamble, paras. 4 and 5.
- UN, A/Res. 2852 (XXVI), operative para. 3 (b).
- UN, A/Res. 2853 (XXVI), operative para. 2 (d).
- IDI Resolution, operative para. 2.

Commentary

First of all, it is necessary to dispel a misunderstanding: it may seem, at first sight, paradoxical and shocking to define a licit objective in a humanitarian instrument; that is, to indicate what military personnel may attack. The purpose of this must be clearly understood: a definition of military objectives is only included because it enables the protection to which the civilian population is entitled to be more clearly established. Up to now, instruments of the law in force, such as the Conventions and the Hague Convention of 1954, have only alluded to this concept, without defining it. The experience gained from armed conflicts has adequately shown the dangers that its abusive interpretation has incurred for the civilian population as a whole.

The wording proposed has been inspired by that of the IDI resolution 21/, which also contains the criteria of the nature and function of objectives 22/

21/ However, the idea of military advantage, contained in Art. 3 in fine, of this resolution (and in para. 3 of Art. 7 of the Draft Rules of 1956) has been abandoned here; the question of the definition is quite distinct from that of the licitness of destruction. The conception of military advantage will, therefore, be found below, in Art. 50.

22/ Para. 2 of Art. 7 of the Draft Rules of 1956 mentions only the criterion of nature.
The adverbs "effectively" and "directly" indicate the relationship of sufficient causality which should exist between the objective, on one hand, and the military effort, on the other 23/. Thus, conversely, objects of a civilian character may not be destroyed on the pretext that they might cloak a military character, or be used in military operations, in the more or less hypothetical future 24/.

In the commentary to Article 7 of the Draft Rules of 1956, a list of military objectives was established, but with the object of limiting this concept as much as possible 25/

---


24/ See proposals CE/Com.III/27 (Definition).

25/ The list is as follows:

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 I 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.

(continued on page 88)
(continued from page 87)

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;
   c) factories or plants 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 transport 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.
If it were felt to be opportune, the definition proposed here could be made the subject of a declaration by the forthcoming Diplomatic Conference, a declaration separate from the present Draft Protocol; such a declaration would be binding only on those States who signed it.

Article 44.- Definition of attacks

Acts of violence, whether offensive or defensive, committed against the adversary by means of weapons, in the course of hostilities, are considered as attacks.

References
- ICRC, Draft Rules, 1956, Art. 3.

Commentary

This text reproduces almost word for word Article 3 of the Draft Rules of 1956. It is clear that each time the term attack, and the words derived from it, are used, they refer only to military operations or those of a military character, determined and limited - both as regards time and space - which gives this concept a very precise definition. Care must be taken not to confuse the author of an attack, within the meaning of the Protocol, with the person who takes the initiative in instigating an armed conflict. The author of an attack is one who, whatever his position at the outbreak of hostilities, carries out militarily an operation. Thus, depending on the geographical situation, one or other of the Parties to the conflict may find itself simultaneously or alternately in the situation of being the author of an attack at one point and the object of one at another.
SECTION II

PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS RESULTING FROM HOSTILITIES

Introduction

This second Section, relating to the protection of the civilian population against dangers resulting from hostilities, deals with a field governed up to now mainly by customary law and by the Hague Conventions of 1907, but partly also by Part II of the Fourth Convention 26/.

The two first Chapters (Civilians and Objects of a civilian character) cover direct risks from attacks, the two latter (Precautionary measures, Localities and property under special protection) dealing with indirect risks 27/.

Experts pointed out that the proportion of civilians killed in armed conflicts during this century had constantly increased at an alarming rate 28/.

26/ In lege ferenda, the following fruitless attempts to improve the law in force concerning the limitation of hostilities, by making it more specific, must be mentioned here: the rules concerning the control of wireless telegraphy in time of war and air warfare 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, and the Draft Rules of 1956 (see ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Annexes Nos. XIX and XXII).

27/ See above, commentary on Art. 40.

28/ According to these experts, the civilian population only accounted for 5 per cent of those killed during the first world war; this percentage rose to 48 per cent of those killed during the second world war, 84 per cent for the Korean war and even more for more recent conflicts; see the following documents in this connexion: UN, A/0.3/SR.1780, (address by the delegate from Ceylon) and A/C.3/SR.1885 (address by the delegate from Sweden), 1971.
Chapter I
CIVILIANS

Introduction

Two complementary aspects of protection are dealt with in this Chapter and the next: Respect and Safeguarding 29/.

Here, it is only a question of civilians in general, as defined in Article 41. Specific protection for certain categories of civilian, contested by some 30/, have been made the subject of several written proposals 31/. The ICRC has retained them with regard to children and civil defence personnel further on in this Part IV 32/, and with regard to wounded and sick in Part II 33/. On the other hand, the ICRC considered that it would be too dangerous to multiply the number of special cases overmuch, since it would tend to weaken the protection due to the civilian population as a whole 34/. In view of the fairly broad definition of the latter, categories of non-specified persons thus benefit from the rules of protection of the

29/ See above, the commentary on Art. 40.
31/ See CE/Com.III/18, 21, 22, 23, 32, 34, and 44 Arts. 8 to 10.
32/ See Arts. 57 to 62 (Measures in favour of children) and Arts. 67 to 72 (Civil Defence Organizations).
33/ See above, Arts. 11 to 22.
34/ Two proposals have been tabled with regard to members of police forces (see GE/Com.III/22 and 34). It seemed difficult in the circumstances for the ICRC to establish any provisions on this subject, because the status of police differs so much from one country to another and, because the police force is sometimes directly involved in armed conflicts. Allusion is, however, made to the presence of police forces in para. 4 of Arts. 53 and 54.
civilian population in general. The same applies to women, for example 35/, provided they do not participate directly in hostilities; civilian clergy (that is, not military chaplains) who, by virtue of the law in force, are already assured of exercising their functions 36/; refugees 37/, and aged persons 38/.

Article 45.- Respect for the civilian population

1. The civilian population as such, as well as individual civilians, shall never be made the object of attack.
2. In particular, terrorization attacks shall be prohibited.
3. Attacks which, by their nature, are launched against civilians and military objectives indiscriminately, shall be prohibited.
4. Attacks directed against the civilian population or individual civilians by way of reprisals shall be prohibited.
5. Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.

35/ See Arts. 14, 16 para. 1, 23 para. 1, 27 para. 2 (see CE/Com.III/23 iii and 44 Art. 8), 119 para. 2 and 124 124 para. 3 of the Fourth Convention; above, Part II, Art. 12; below, Part IV, Art. 59; Draft Protocol II, Art. 6 paras. 3 and 12.
36/ See Arts. 58, 76 para. 3, 93 and 126 of the Fourth Convention.
37/ See above, footnote 14; see Art. 44 of the Fourth Convention.
38/ It is more difficult still to determine the criteria of age than those of youth; the Fourth Convention does not provide for, with respect to aged people, any more favourable treatment than for the civilian population as a whole.
References

- IVth Hague Conv. 1907, Regulations, Art. 25.
- Fourth Geneva Conv. 1949, Arts. 27, 31, 32 and 33.
- ICRC, Draft Rules, 1956, Art. 6 paras. 1 and 3.
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2675 (XXV), operative paras. 2, 4 and 7.
- IDI Resolution, Basic Principles, Arts. 4, 6 and 8.
- ICRC, Conf. Gvt. Experts, Geneva 1971, Report, paras. 440 to 453 and CE/Com.III/2, 4, 10, 12, 13, 14, 15, 16, 17, 18, 19 Arts. 3 and 4, 21, 22, 23 iv and vi, 24, 32, 34 and 44 Arts. 5 to 10.

Commentary

Paragraph 1:

This paragraph specifically mentions the general principle of the prohibition on launching attacks against protected persons, a principle borrowed from customary law and reaffirmed in the relevant international resolutions (quoted in the above references). It was thought preferable to specify that protection applied both to groups of civilians (civilian population) and individual civilians (civilians). The three succeeding paragraphs are cases of application.

Paragraph 2:

The general rule having been established, the second paragraph concerns a case in point, too well known in practice for it to be ignored. It is clear that this is only one example of an attack, the motivation of which is given, exceptionally.

Paragraph 3:

As opposed to the preceding paragraph, this paragraph stipulates, objectively, the illicit character of attacks "of a nature" to harm protected persons: it is related to the principle - referred to in the preamble - by which belligerents must make, in all circumstances, a distinction between protected persons and objects, on one hand, and
military objectives, on the other. This paragraph implies that the Parties to the conflict do not have an unlimited choice as to the means of harming the enemy.

**Paragraph 4:**
The prohibition on attacks launched by way of reprisal, expands that of Article 33 of the Fourth Geneva Convention, both as regards beneficiaries thereof (all civilians within the meaning of the definition) and as regards the nature of the act of reprisal (attacks, and not simply repressive measures taken by the occupying power) 39/.

**Paragraph 5:**
By virtue of the foregoing rules, it is clear that protected persons and objects should not be attacked and that belligerents shall limit their destruction to military objectives; but what happens when the two categories overlap - in time and in space; that is, when civilians are located within a military objective? This situation should be avoided to the fullest extent possible (see below, Art. 51), but it occurs in practice: particularly in the case of persons linked to the military effort, especially workers in armaments factories 40/. The problem cannot, therefore, be avoided without running the risk of creating serious ambiguity. Military personnel who are led to apply the rules of Part IV must know what provisions they are observing, otherwise, it is to be feared that the lack of clarity (and realism) will compromise the applicability of all these rules, with the result that they will be declared to be unobservable.

**Article 46.** - **Safeguarding of the civilian population**

The civilian population or individual civilians shall never be used in an attempt to shield, by their presence, military objectives from attack.

---

39/ See footnote 14.

References

- Third Geneva Conv. 1949, Arts. 19 para. 3 and 23 para. 1.
- Fourth Geneva Conv. 1949, Art. 28.
- ICRC, Draft Rules, 1956, Art. 6 para. 3.

Commentary

This provision is supplementary to Article 28 of the Fourth Convention, both with regard to the beneficiaries (all civilians within the meaning of the definition) and to the circumstances (dangers resulting from hostilities and no longer simply from occupation). It is necessary, moreover, to prohibit expressly the use of civilians as a shield. This practice is already expressly prohibited in the case of prisoners of war (in particular by Article 23 para. 1 of the Third Convention).

Chapter II

OBJECTS OF A CIVILIAN CHARACTER

Introduction

This Chapter differs from the preceding one in two respects. Firstly, it makes a distinction between objects of a civilian character in general and those which are indispensable to the survival of the civilian population. Secondly, it confers a large scope only on the protection of objects indispensable to survival; it did not seem possible, in effect, to transpose the provisions of Article 45 to cover objects of a civilian character in general, since the prohibition on reprisals and that of abusive exposure raise very complex problems.

41/ See footnote 14.
Article 47.- Respect for objects of a civilian character

Objects of a civilian character shall never be attacked, provided they are not used either directly or mainly for a military purpose.

References

- IVth Hague Conv. 1907, Regulations, Arts. 22, 25, 26 and 27.
- IXth Hague Conv. 1907, Arts. 1 to 3.
- Fourth Geneva Conv. 1949, Art. 53.
- ICRC, Draft Rules, 1956, Art. 6 para. 2.
- UN, A/Res. 2675 (XXV), operative paras. 5 and 6.
- IDI Resolution, operative paras. 4 and 8.

Commentary

The prohibition on attacks launched against objects of a civilian character is expressly stipulated, whereas the problem of reprisals remains open. It was necessary to be specific here, with regard to the loss of protection, because the definition of objects of a civilian character had not tackled the problem 42/. The word "directly" translates the idea of the necessary causality between the use of an object and its effect on the military level 43/. The word "mainly" touches on the principle of proportionality (see Art. 50 below), applicable to mixed objectives (for which a definition has been purposely avoided) 44/. The term "military purpose" has been taken from the law in force 45/.

42/ As opposed to Art. 41 (Definition of the civilian population), Art. 42 (Definition of objects of a civilian character) is positive; Art. 47 contains only the criterion of function, since that of nature seemed useless, because any object can be transformed.

43/ See footnote 23.


45/ See IVth Hague Conv. 1907, Regulations, Art. 27 para. 1 in fine.
Article 48.- Respect for and safeguarding of objects indispensable to the survival of the civilian population

1. Attacks launched against objects indispensable to the survival of the civilian population by way of reprisals are prohibited.

2. The Parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed, shall refrain from:
   a) using them in an attempt to shield military objectives from attack;
   b) destroying them, except in cases of unavoidable military necessity and only for such time as that necessity remains.

References

Commentary

General remarks

As compared to the preceding article, the above text confers reinforced protection on certain objects: objects indispensable to the survival of the civilian population. The wider scope of this provision is justified by virtue of the vital interest that these objects represent for the civilian population. As the definition has indicated (Art. 42), either crops, provisions or other foodstuffs may be concerned, although these are mentioned only by way of example, since it is true that as regards food and shelter, needs differ considerably according to the people concerned. This provision could constitute one of the ways in which to fight against famine as a method of warfare - a method adopted by belligerents in ancient times and by those of the last few decades as well 46/. Experience gained from armed conflicts has shown that when food is in short supply, it is the civilian population - and particularly children - who suffer the most. Since it is

46/ See below, Section III, Arts. 63 to 66.
impossible to distinguish what is entirely destined for the civilian population from what is only partially so, it has to be admitted that a field of corn or rice, or even a water reservoir, is not of use to the civilian population alone. Nevertheless, it cannot be claimed that these objects are potential military objectives or mixed objectives without justifying methods of total warfare in the most explicit manner, and these are unanimously rejected by the conscience of the peoples of the world.

Paragraph 1:
The prohibition on attacks launched as a method of reprisals, follows on from that of Article 33 of the Fourth Convention, both with regard to objects (all indispensable objects and not only those that belong to nationals of States which are signatories to the Fourth Convention) and circumstances (dangers resulting from attacks in the course of operations, and not only from arbitrary measures adopted by the occupying Power) 47/.

Paragraph 2:
Sub-paragraph a refers to the abusive use of indispensable objects, a conception already referred to above in connexion with persons 48/.

Sub-paragraph b envisages the principle of the prohibition on destroying these objects, to be applied to all Parties to the conflict, except where there is unavoidable military necessity 49/; this rule thus has an almost absolute character, any derogation being authorized only very exceptionally.

47/ See footnote 14.
48/ The abusive use of objects under special protection is already partially affirmed by the law in force; see, in particular, Art. 21 of the First Convention; see also above, Art. 15 para. 1.
49/ Art. 68 para. 1 below refers to "imperative military necessity" which allows more latitude to military authorities; these two degrees of necessity have been borrowed from the Hague Convention of 1954, from Arts. 4 para. 2, and 11 para. 2.
Chapter III
PRECAUTIONARY MEASURES

Introduction

A comment of a terminological nature is necessary here. In the previous ICRC drafts, use was made of expressions such as "active precautions" or "measures of respect", with regard to the obligation on the author of the attack - and "passive precautions", or "measures of safeguard" for obligations on the party in whose power the civilian population and objects of a civilian character found themselves. These terms, considered to be too abstruse, have been replaced by the expressions "precautions when attacking" and "principle of proportionality" (Arts. 49 and 50) in the first case, and by "precautions against the effects of attacks", in the second (Art. 51).

Whereas the rules of protection are designed to eliminate the direct risks from attacks, the precautionary measures tend to reduce, as far as possible, the indirect risks from attacks, that is, the secondary effects of operations directed against military objectives, which affect the civilian population. The examination of these delicate problems can lead to a pessimistic observation: the rules of protection contained in Articles 45 to 48 and the measures of precaution contained in Articles 49 to 51 do not confer an absolute immunity on the civilian population. This observation ought to oblige States to adopt, or tolerate, measures of a complementary nature in favour of the civilian population (as provided in Section III - Assistance to the civilian population - and Section IV - Civil Defence Organizations). On another level, this same observation serves only to stress the value of efforts made towards peace ⁵⁰/.

⁵⁰/ See below, Resolution on Disarmament and Peace.
Article 49.— Precautions when attacking

So that the civilian population, as well as objects of a civilian character, who might be in proximity to a military objective be spared, those who order or launch an attack shall, when planning and carrying out the attack, take the following precautions:

a) they shall ensure that the objectives to be attacked are not civilians, nor objects of a civilian character, but are identified as military objectives; if this precaution cannot be taken, they shall refrain from launching the attack;

b) they shall warn, whenever circumstances permit, and sufficiently in advance, the civilians threatened, so that the latter may take shelter.

References

- IVth Hague Conv. 1907, Regulations, Art. 27.
- Rules concerning the control of wireless telegraphy in time of war and air warfare, 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, contained in Arts. 22 to 25.
- UN, A/Res. 2675 (XXV), operative para. 3.
- ICRC, Conf. Gvt. Experts, Geneva 1971, Report, paras. 460 to 467 and CE/Com.III/7, 29b, 30, 31, 33, 36, 37 and 44 Arts. 18 (a) and (d) and 19.

Commentary

The purpose of this provision is given in the first sentence: to spare the civilian population, as well as objects of a civilian character, who might be in proximity to a military objective 51/.

51/ The situation of civilians within a military objective is the subject of Art. 45 para. 5.
As the word "might" indicates, this situation should be exceptional, particularly because of the obligations upon the Party in whose power the civilian population and objects of a civilian character find themselves 52/.

Those who order an attack shall take precautions with regard to its conception and those who carry it out, with regard to its execution. The precautions in question consist of, firstly, identifying military objectives, by reason of the presumption 53/ from which the civilian population and objects of a civilian character benefit and, secondly, warning the civilians who are threatened, if possible. The rule contained in sub-paragraph (a) has been accorded an imperative nature, hence the obligation to renounce an attack where necessary, whereas sub-paragraph (b) has been given a conditional one 54/.

Article 50.- Principle of proportionality

1. Those who order or launch an attack, shall refrain from doing so when the probable losses and destruction are disproportionate to the concrete military advantage sought by them.

2. In application of this principle, the Parties to the conflict shall refrain from attacking as one sole objective, by means of bombardments or any other methods, an area comprising several military objectives which are some distance from each other and situated in populated regions.

3. When there is a choice among several objectives for obtaining the same military advantage, those who order or launch an attack shall choose the objective which presents the least danger to the civilian population and objects of a civilian character.

52/ The Party concerned must not, by virtue of Arts. 46 and 48 para. 2 (a), use persons and objects in an attempt to place certain military objectives in shelter from attacks; on the other hand, he is recommended, in Art. 51, to evacuate the civilian population from military objectives and vice-versa.

53/ According to Arts. 41 para. 4 and 42 para. 3.

54/ Many experts consulted in 1970 even felt that the general rule of warning had fallen into disuse.
References

See references quoted in the preceding article.
- ICRC, Draft Rules, 1956, Arts. 8, 9 and 10.
- ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, CE/Com.III/30, 31 and 44 Arts. 18 (b) and (c), and 19.

Commentary

Paragraph 1:
The first sentence contains the principle of proportionality: it is before the attack that an estimate should be made of the probable losses and destruction that the civilian population and objects of a civilian character would suffer, so that the competent military commander can take this into consideration in time. The military factor - its counterpart - is strictly limited to the concrete advantage that belligerents seek on the military level. This first paragraph would constitute a brake on any tendency towards total warfare, in which all persons and objects, potentially military or transformable into military objectives, are condemned to annihilation.

Paragraph 2:
This type of attack is prohibited, because it does not respect the distinction between protected persons and property, on one hand, and military objectives on the other, whatever the means employed (land and aerial bombardments, long-distance shelling, etc.) 55/.

Paragraph 3:
This paragraph corresponds to a practice generally admitted in military circles, that of choosing the least harmful solution.

55/ See ICRC, Draft Rules, 1956, commentary on Art. 10 and above, Preamble, paras. 4 and 5.
Article 51. - Precautions against the effects of attacks

1. The Parties to the conflict under whose control the civilian population and objects of a civilian character are placed, shall take the necessary precautions against dangers resulting from attacks.

2. They shall endeavour, either to remove them from the vicinity of the threatened military objectives, subject to the provisions of Article 49 of the Fourth Convention, or to avoid that these military objectives are permanently situated within densely populated regions.

References

See the references quoted in the preceding articles.
- ICRC, Draft Rules, 1956, Art. 11.

Commentary

Whereas the two preceding rules are aimed at the author of a possible attack, this one concerns the Party in whose power civilians and objects of a civilian character find themselves. This Party is not absolved of all responsibility, on the contrary, even when the article has a conditional nature (which is translated by the term: "the Parties shall endeavour"). It is clear that the application of precautions during the attack depends, to a large extent, on the application of precautions against the consequences of attacks. These are complementary obligations. However, it is difficult to give the above-mentioned rule an imperative nature, because it often happens that the Party in whose power the civilian population finds itself is not, materially, in a position to evacuate them from military objectives, or to remove military objectives from the presence of the latter, for reasons of a material, geographical, financial or humanitarian nature 56/.

56/ See examples of military objectives given in footnote 25; many of them are immovable and their military character or importance may vary according to the circumstances. See also Art. 14 para. 5 above.
In order to avoid an abusive interpretation, it seemed advisable to make an express reservation for Article 49 of the Fourth Convention. Moreover, the ICRC has already referred to the fears it has with regard to evacuations and transfers of persons and the creation of zones specifically for the civilian population 57/.

Article 52.— Relationship of this Chapter to the other provisions of the present Protocol

The precautionary measures described above do not dispense the Parties to the conflict in any way from observing, in all circumstances, the other provisions of the present Protocol.

Commentary

This article needs no comment.

Chapter IV

LOCALITIES AND OBJECTS UNDER SPECIAL PROTECTION

Introduction

The provisions of the present Chapter constitute an additional means of ensuring better protection for the civilian population through the creation of sites which are secure from military operations: non-defended localities (Art. 53), neutralized localities (Art. 54) and works and installations containing dangerous forces (Art. 55).

57/ See ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Part One, Title III, Chap. 1 and below, Arts. 53 to 55. The status conferred on certain localities never implies a mass and forced removal or transfer of the civilian population.
I. Non-defended localities and neutralized localities, as their names indicate, are populated sites. For this reason, the more precise term "locality" has been used rather than that of "zone", used in earlier ICRC documents 58/.

Non-defended localities are included, as from the time their status is conferred upon them, within areas of military operations: their state of non-defence and their willingness not to offer any resistance to the advance of the enemy, should permit the latter to occupy these localities without striking a blow. Neutralized localities, on the other hand, are initially situated outside areas of military operations: their exclusion from the war effort and their geographical location which, in general, would not be of any military interest, must keep the localities mentioned in Article 54 outside the sphere of military operations and, in particular, outside areas of so-called strategic bombardment. It can be seen, therefore, that where the ratio legis of non-defended localities is to allow their peaceful occupation, that of neutralized localities is to ensure that they are kept outside the sphere of military operations and, consequently, free from the effects of hostilities.

The law in force already recognizes certain types of zone within which the civilian population enjoys reinforced protection; but all of them suffer from certain inadequacies. Articles 53 and 54 of the present Draft Protocol attempt to complete and expand the relative provisions at present in force:

- The hospital zones mentioned in Articles 23 of the First Convention and 14 of the Fourth Convention provide special protection for a limited number of beneficiaries (wounded and sick, aged persons, expectant mothers, etc.) and require their transfer to these localities. Such transfers and the capacity of these zones or localities to care for them, can create serious difficulties. Such difficulties are however, obviated by granting special protection, not only to certain categories of individual because they happen to be located in certain localities, but to the localities as a whole: such protection is thus applied to the entire civilian population and no transfer is necessary; this is what is provided for in Articles 53 and 54 of the present Draft Protocol.

- Neutralized zones, as described in Article 15 of the Fourth Convention, although they provide for a wider category of beneficiaries, often entail the transfer of the latter. Articles 53 and 54 of the present Draft Protocol offer the advantage, as compared with the above-mentioned article, of being more complete and more detailed.

- Protection applied to an entire locality is already provided for by Article 25 of the Regulations concerning the laws and customs of war on land - Annex to The Hague Convention of October 18, 1907. Nevertheless, as opposed to hospital, safety and neutralized zones, the localities protected by virtue of the said Article 25 do not enjoy a status conferred upon them by agreement, but are the result of a simple de facto situation and are not subject to any supervision. This gives rise to a risk: very often the adversary will not possess any guarantee that a locality is non-defended; he will not know, for example, whether or not installations considered by him, with good reason, to be military objectives, such as an armaments factory, an airfield or a railway station, are any longer of military significance. This risk will be particularly grave where localities situated near combat zones are concerned and where the belligerents are induced to launch a preventive attack against everything which appears to them to have a military character.

By stipulating that non-defended localities and neutralized localities are guaranteed by agreement and by providing for a system of inspection, optional for the former and compulsory for the latter, Articles 53 and 54 of the present Draft Protocol constitute an improvement over Article 25 of the Hague Regulations.

II. With regard to objects under special protection, this includes works and installations containing dangerous forces. Where a procedure has not been established in time of peace, the belligerents may conclude an agreement - drawn up in terms as flexible as those applying to localities - conferring a special status upon such property. The terms of the latter appear in a common Model Agreement (Annex II). Since the procedure and object envisaged for these localities and property are very similar, they have been included here in a single Chapter.
Article 53.- Non-defended localities
("open cities")

1. It is prohibited to attack, by any means whatsoever, populated sites upon which the Parties to the conflict have conferred, by agreement, the status of non-defended localities and which, consequently, no longer constitute an obstacle to the advance of the enemy.

2. This agreement may be either express or tacit, or may consist of reciprocal and concordant declarations. It may be concluded either directly, or through the medium of a Protecting Power, its substitute, or a neutral and impartial intermediary. The Parties may to this end, and in the absence of a special agreement, implement the provisions of the Model Agreement annexed to the present Protocol.

3. The subject of such an agreement may be any locality situated in a zone of military operations from which armed forces and all other combatants, as well as mobile weapons and mobile military equipment, have been evacuated and in which no use will be made of fixed military installations.

4. The presence, in these localities, of military medical personnel, civil defence organizations, police forces, wounded and sick military personnel, as well as military chaplains, is not contrary to the conditions stipulated in paragraph 3 of the present Article.

5. The Parties to the conflict may mark these localities. In this case, they shall use the distinctive emblem described in the Model Agreement mentioned above.

6. If the enemy should occupy them, it may, in taking the precautions mentioned in Articles 49 to 51 of the present Protocol, render useless or destroy the military objectives which these localities may contain.

7. A non-defended locality will lose its status when it no longer fulfills the conditions stipulated in paragraph 3 of the present Article, or when one or other of the Parties to the conflict has denounced the above-mentioned agreement.

8. The provisions of the present Article do not affect, in any way whatsoever, the obligations resulting from Article 25 of the Regulations respecting the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of October 18, 1907.

References
- IVth Hague Conv. 1907, Regulations, Art. 25.
- IXth Hague Conv. 1907, Arts. 1 to 3.
Commentary

General remarks:

With regard to the title of this article, the name "non-defended localities" was preferred to the current expression "open cities" which, nowadays, is an ambiguous one since it is sometimes used to designate towns referred to in Article 54 of the present Draft Protocol that are situated outside combat areas: the latter are not, in effect, "open" to occupation.

Paragraph 1:

The first paragraph, first of all, mentions the prohibition on attacking non-defended localities and gives the reason for this: these localities no longer constitute an obstacle to the advance of the enemy. It then indicates that the Parties to the conflict may confer the status of non-defended locality on certain localities by means of an agreement which can be concluded according to the methods set out in the following paragraph.

Such an agreement does not imply the recognition by the adversary as a State 59/. The provisions of the present paragraph do not exclude recourse to simpler procedures, as for example, a unilateral declaration made by the civilian or military authorities of the soliciting Party. Provision should, therefore, be made for an obligation on the part of the adversary to respond to such a declaration, unless he has good reasons for believing that the facts alleged by the soliciting Party are untrue. In this case, he must either request guarantees (e.g., demand that supervision be carried out), or make a formal refusal.

59/ See Art. 3 of the present Draft Protocol.
This paragraph, which is concerned with the practical aspect, deals, firstly, with the form that the agreement constituting non-defended localities may take and, secondly, with the methods by which it may be concluded:

(a) First of all, it is provided that the agreement can be either express or tacit: in the latter case, the willingness of the solicited Party will be demonstrated by conclusive acts — generally by his behaviour. The agreement may thus consist of reciprocal and concordant declarations addressed to the opposing Party either directly or through the medium of a neutral and impartial intermediary. The agreement may be made in written or oral form, which is allowed for by international law (see Art. 3 of the Vienna Convention on the Law of Treaties). It is even conceivable that the negotiation and conclusion of these agreements could be carried out by telegraph or radio, particularly in cases of emergency.

(b) Negotiations preceding the conclusion of the agreement shall be carried out by the Parties to the conflict directly or, if that is not possible, by a Protecting Power, its substitute, or any other neutral and impartial intermediary. This relatively vague expression has been introduced deliberately, so as to allow for as wide a range of intermediaries as possible, thus increasing the chances of concluding an agreement. Although the text does not so specify, it must be allowed that intermediaries could lend their good offices, not only when requested to do so, but also spontaneously.

This paragraph does not specify by whom the agreement must be concluded. In fact, the interested Parties should be allowed sufficient latitude on this point. It is obvious that, in many cases, agreements relating to the creation of such localities cannot be concluded through the usual channels, but only through competent persons at the point of contact between military forces. Such persons may be either military commanders or civilian authorities, particularly municipal ones.

The expression "in the absence of a special agreement" means that the Parties may reach agreement on bases different from those laid down in the Model Agreement. It should be allowed to serve as a model, however, because it contains a certain number of essential points on which an understanding between the interested Parties should be reached before the agreement is finally concluded: delimitation of the locality, markings, duration of the agreement, supervision.
Paragraph 3:

This paragraph enumerates the conditions to be fulfilled in order that agreement may be concluded. At the same time, it gives a definition of the state of non-defence, which is not found in Article 25 of Regulations of The Hague of 1907. It would, therefore, appear necessary to define this state with respect to current conflicts, having regard to the methods of modern warfare.

In the first place, a non-defended locality is situated, at least at the moment when it is created, in an area of military operations: this is one of the features which distinguishes it from the neutralized locality. In the second place, in order that it may be considered as non-defended, it must fulfil two conditions: armed forces, arms and mobile military materials must have been evacuated from it. No attempt has been made to introduce the notion of military objective - of too broad a nature here - because activities linked to the military effort remain tolerated 60/. The expression "any other combatant" was introduced deliberately: it applies to irregular armed forces. The next condition is that fixed military installations should not be used. It has not been suggested that the soliciting Party should destroy them; once the locality has been occupied, it will be for the enemy to decide whether he wishes to do so or use them for his own purposes.

Objectively, the result of this is that this locality is no longer in a position to offer resistance to the enemy. Subjectively, it will manifest its determination not to participate in the hostilities.

It will be seen that this definition does not prohibit the carrying out of activities linked to the military effort. Indeed, the creation of non-defended localities is designed to permit the enemy to occupy them peacefully. Activities linked to the military effort do not constitute - at least directly and for the locality in question - a feature of defence and are not, therefore, of such a nature as to impede the advance of the adversary.

Paragraph 4:

This paragraph needs no special comment: its basis is paragraph 4 of the Draft Rules of 1956. By "police forces" is meant civilian police and not military police. The categories of persons affected by this paragraph not constituting a factor in the defence of this locality, it is reasonable that they should be allowed to remain there.

60/ See footnotes 24 and 26.
Paragraph 5:

The marking of localities is of immense practical value: it is necessary that troops be immediately aware, beyond any doubt, that they are situated in a non-defended locality. Nevertheless, not only do markings not have any constitutive effect, but they are not even compulsory. The text says indeed: "the Parties may identify". Purposely, no attempt has been made to impose markings, for fear that the difficulties of practical application would prevent or delay the creation of a non-defended locality.

If, however, the Parties decide to mark the locality, they will have no choice as to the sign to be used: the uniformity of the emblem is, in fact, a guarantee of its effectiveness; the liberty to select an emblem in each particular case would entail confusion. The emblem chosen is that described in the Model Agreement; that is, identical with that described in Article 6 of Annex I to the Fourth Convention. It is thus an emblem which already exists 61/.

Paragraph 6:

This paragraph takes account of the case where the locality is occupied and has been occupied peacefully. The enemy "may" now either disable or destroy the military objectives that these localities may contain. The verb "may" indicates that the enemy simply has this faculty open to him. Instead of disabling or destroying them, however, he will have the faculty to turn these military objectives to his own advantage. If, however, the enemy decides to disable or destroy them, he must take the precautions laid down in Articles 49 to 51. Thus, the risk incurred by the civilian population is almost nil. It is provided that military objectives may be disabled or destroyed; this conception could not be incorporated in paragraph 3, because it also includes industries such as an armaments factory and because, as we have said, activities linked to the military effort are tolerated. On the other hand, this conception can be incorporated here. The military objectives that these localities might contain include both the fixed military installations mentioned in paragraph 3 - which cannot be evacuated, but of which no use has been made - and constructions such as an airfield, a railway station, etc. Reservation is made for Article 53 of the Fourth Convention.

61/ During a recent armed conflict, neutralized localities were identified by means of the red cross emblem and not by red stripes on a white background.
Paragraph 7:
This paragraph refers to the cessation of the status of non-defended locality. The first hypothesis needs no special comment. The second embraces the denunciation of the agreement by one or other of the Parties. So that measures appropriate for the protection of the civilian population may be taken, the denunciation must not have its effects applied immediately, but only after a certain period of time, as provided by Article 6, paragraph 2, of the Model Agreement.

Paragraph 8:
This paragraph makes a reservation for Article 25 of the Regulations concerning the laws and customs of war on land - Annex to the IVth Hague Convention of 18 October 1907. The object of this provision is to stipulate that the present article does not abrogate the regulation of The Hague: this regulation takes into account de facto a state of non-defence. On the other hand, the present article confers a conventional status on a locality.

Article 54.- Neutralized localities

1. It is prohibited for the Parties to the conflict to extend their military operations to populated sites on which they have conferred by agreement the status of neutralized localities and which, consequently, are no longer of military interest to the Parties to the conflict.

2. This agreement may be either express or tacit, or may consist of reciprocal and concordant declarations. It may be concluded either directly, or through the medium of a Protecting Power, its substitute, or a neutral and impartial intermediary. It shall fix the methods of supervision. The Parties may to this end, and in the absence of a special agreement, implement the provisions of the Model Agreement annexed to the present Protocol.

3. The subject of such an agreement may be any locality situated outside a zone of military operations from which armed forces and all other combatants, as well as mobile weapons and mobile military equipment, have been evacuated, in which no use will be made of fixed military installations and where any activity linked to the military effort has ceased.
4. The presence, in these localities, of military medical personnel, civil defence organizations, police forces, wounded and sick military personnel, as well as military chaplains, is not contrary to the conditions stipulated in paragraph 3 of the present Article.

5. The Parties to the conflict may mark these localities. In this case, they shall use the distinctive emblem described in the Model Agreement mentioned above.

6. When a neutralized locality becomes included in an area of military operations, it shall retain its status. A neutralized locality shall lose its status if it does not fulfil the conditions stipulated in paragraph 3 of this Article or if one or the other of the Parties to the conflict has denounced the above-mentioned agreement; nevertheless, instead of denouncing the agreement, the Parties to the conflict shall endeavour to confer upon the locality in question the status of a non-defended locality.

References
- IVth Hague Conv. 1907, Regulations, Art. 25.
- IXth Hague Conv. 1907, Arts. 1 to 3.
- ICRC, Draft Rules, 1956, Art. 16.
- UN, Report of the Secretary-General A/7720, 1969, paras. 145 to 152.
- UN, Report of the Secretary-General A/8370, 1971, paras. 79 to 82.

Commentary

General remarks:
First of all, a distinction should be made between this draft article and Article 15 of the Fourth Convention relating to neutralized zones. These latter are, in effect, situated in areas of military operations. Moreover, the difficulties of a practical nature which may be raised by
the creation of a neutralized locality should not be minimized, especially when they relate to supervision.

**Paragraph 1:**

This paragraph is similar to paragraph 1 of Article 53, but, since it concerns localities which, at the time of concluding the agreement, are situated outside the combat zone, the Parties to the conflict are under the obligation not to extend their operations to these localities, from the moment that they become of no military interest, or, at least, not of immediate interest. The expression "military operations" has a broader meaning than the word "attack", used in the preceding article. Indeed, non-defended localities are already situated, at the time of concluding the agreement, in an area of military operations: it is precisely that these localities should not be the object of attack within this zone which is most desired. In the present article, on the other hand, it is desired to avoid that the locality should become the object of military operations - this is the first object of this article. The second is that these localities should not be the object of so-called strategic bombardments, nor of occupation by airborne troops. For this reason, the soliciting Party is under the obligation to refrain from any activity linked to the military effort.

**Paragraph 2:**

This paragraph 2 is identical to paragraph 2 of Article 53, except that it provides for supervision. With regard to non-defended localities the Parties may, of course, introduce a system of supervision; nevertheless, since it would often be difficult to do so in an area of operations in this latter case, however, it would not be advisable to make it compulsory.

With regard to neutralized localities, on the other hand, it is hardly conceivable that they should not have a system of supervision: indeed, the locality being situated outside combat zones, it would escape the direct surveillance of the enemy. Uncertainty in this case would be too great if no system of inspection existed.

**Paragraph 3:**

This paragraph contains a definition of the neutralized locality. The two features which distinguish it from the non-defended locality are the following:

(1) Neutralized localities are situated, at the time of the conclusion of the agreement, outside areas of operations; the object of the provision is, precisely, to prevent these localities from becoming the object of military operations.
(2) A supplementary condition is here added to those required for non-defended localities: all activities linked to the military effort must have ceased. This condition is easily understood if it is desired that these localities should not be the object of any attack, especially of a strategic nature. The existence of all these conditions will mean that these localities will not constitute any interest of a military nature; they should, therefore, be excluded from the sphere of hostilities. Localities likely to be made the subject of such an agreement would be, mainly, tourist centres and cultural capitals; the status of neutralized locality would be the more easily conferred upon them if they were situated away from obligatory access routes.

**Paragraph 4:**
See commentary on Article 53, paragraph (4).

**Paragraph 5:**
See commentary on Article 53, paragraph (5).

**Paragraph 6:**
The first sentence stipulates that if a neutralized locality is situated within an area of military operations, it does not, for that fact, lose its status. On the contrary, if a neutralized locality is created outside zones of combat and is destined to remain beyond the sphere of hostilities, it is essential that it retains its status when, as a result of the execution of military operations, it finds itself incorporated into such zones.

The second sentence relates to the end of the status of neutralized locality. The first hypothesis needs no special comment. The second refers to the case where armies are approaching a neutralized locality. If one of the Parties, for reasons of a military nature, decides to occupy it, he shall denounce the agreement. It is then provided that instead of denouncing it, purely and simply, the Parties should confer upon this locality the status of non-defended locality, since the required conditions already exist.
Article 55.— Works and installations containing dangerous forces

1. Without prejudice to other provisions of the present Protocol and so as to spare the civilian population and objects of a civilian character from dangers which may result from the destruction of, or damage to, works and installations — such as dykes, hydroelectric dams and sources of power — through the release of natural or artificial forces, the High Contracting Parties concerned are invited:

(a) to agree, in peace time, on a procedure which would allow, in all circumstances, special protection to be given to those works which are designed for essentially peaceful purposes;

(b) to agree, in time of armed conflicts, to special protection being given to certain works or installations, provided they are not directly or mainly used for a military purpose. To this end, they may implement the provisions of the Model Agreement annexed to the present Protocol.

2. When these works or installations are used directly or mainly for a military purpose and their destruction or damage would entail the annihilation of the civilian population, the Parties to the conflict shall take, exercising particular care, the precautionary measures required by Articles 49 to 51 of the present Protocol.

References
- Hague Conv. 1954, Arts. 8 to 11.

Commentary

General remarks:

This covers a specific case within the framework of indirect risks; not those resulting from an attack itself (explosion, fragmentation, etc.) but the release of substances contained by such constructions.
Paragraph 1:
Apart from a few changes in the wording, the first paragraph repeats Article 17 of the Draft Rules. In view of the interest shown by several not fully industrialized countries, it was conjectured whether, under sub-paragraph (a), a special protection system could be set up in peace time, with a procedure for registration and objection and with marking procedures based on those of the 1954 Hague Convention. In sub-paragraph (b), the present text breaks new ground by advocating a Model Agreement (annexed to Protocol). Such an agreement would be concluded in a flexible manner in an armed conflict where there was no peace time procedure for registration 62/. This special protection system by agreement related this provision for works and installations containing dangerous forces to those concerning localities entitled to special status and this is why they have all been brought together in the same Chapter.

Paragraph 2:
Compared with the previous ICRC proposal, the second paragraph is a considerable innovation. In view of the interest at stake (the risk of annihilating the civilian population), an exceptional attempt is made here to defer or avoid an attack being directed at a target which might be considered as a military objective by virtue of utilization 63/. The belligerents' attention is particularly drawn to the precautionary measures as a whole. Once again, the protection of the civilian population will depend on the additional though different measures taken by all the Parties to the conflict. It might be advisable to include, either here or in a third paragraph, the idea of forewarning, in stronger terms than in Article 49, paragraph (b).

62/ See Annex II and commentary below.
63/ If an object is used either directly or mainly for a military purpose, it is or becomes a military objective; see Art. 47; and Hague Conv. 1954, Art. 8 para. (3).
Article 56.- Relationship of this Chapter to the other provisions of the present Protocol

The agreements conferring special protection on localities or objects do not dispense the Parties to the conflict, in any way, from observing the other provisions of the present Protocol.

Commentary

It was felt necessary to make an explicit reservation on the other articles of the present Protocol, because the ICRC considers that the special protection accorded to a locality or an object should never weaken the general protection of the population and civilian objects. Naturally, the conclusion of an agreement conferring special status on a locality or an object could never authorize the Parties to a conflict to make indiscriminate attacks on the rest of the territory concerned.
SECTION III

ASSISTANCE TO THE CIVILIAN POPULATION

Introduction

This Section proposes some positive measures in favour of the civilian population, to alleviate their situation when exposed or likely to be exposed to the dangers involved in hostilities 64/: firstly, children in particular (Chap. I "Measures in favour of children") and then the whole civilian population in general (Chap. II "Relief").

These measures are found in the 1971 Draft 65/ and have been requested by the experts consulted to date 66/.

---

64/ See commentary on Art. 40 above and the introduction to Section II, Chap. III.

65/ See ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Part One, Title II, Chap. 3/3; and Title III, Chap. 4 and 5.

Chapter I
MEASURES IN FAVOUR OF CHILDREN

Introduction

The Fourth Convention already has a number of provisions in favour of children, the importance and value of which should be stressed 67/. Since then, the General Assembly of the United Nations has adopted the "Declaration of the Rights of the Child", and the Economic and Social Council a number of resolutions on "the protection of women and children in periods of emergency or in time of war, in periods of struggle for peace, national liberation and independence". These were mentioned in the documentation presented to the first session of the Conference of Government Experts and have been carefully examined by the ICRC 68/.

The tragic events that have taken place several times since the Second World War have led the ICRC to analyse their causes, so as to strengthen and clarify the law in force.

The main organizations concerned 69/ have been contacted, some quite recently, and have been submitted a "Questionnaire on the protection of children in time of armed conflict" (ICRC, D 1221, 1971). In the present proposals, the experience of these organizations has been taken into account and their suggestions have been broadly taken up.

One delicate question was whether a definition of a child should be attempted and if so what it should be. The Conventions do not make clear what should be understood by "children". Medical, sociological or legal criteria might

---

67/ They are, furthermore, specifically listed under Art. 62.


69/ Inter alia: UNICEF, the International Union for Child Welfare (IUCW), the World Confederation of Organizations of the Teaching Profession (WCOTP), the World Medical Association (WMA), etc.
be considered. By way of illustration, the school-leaving age oscillates around the world between fourteen and sixteen years of age, and one of the principle organizations concerned is concerned with boys up to the age of fourteen years and with girls up to the age of eighteen. In the Fourth Convention the criterion of age is sometimes invoked 70/.

As can be seen, the criterion of age may at times provide guarantees and has been flexibly adopted according to the nature of the provisions advanced in this Chapter.

Article 57.- Protection of children

Children shall be the object of special protection. The Parties to the conflict shall provide them with the care and aid which their age and situation require.

References

- Fourth Geneva Conv. 1949, Arts. 14, 21, 23, 24, 38 sub-para. 5, 50, 68 para. 4 and 140.
- UN, A/Res. 1386 (XIV), Declaration of the Rights of the Child, principles 8, 9 and 10.
- UN, ECOSOC, Res. 1515 (XLVIII).

70/ Thus, it mentions children (Art. 50), children under seven years (Art. 38 sub-para. 5 and Art. 50 para. 5), children under twelve years (Art. 24 para. 3), children under fifteen years (Art. 14 para. 1, Art. 23 para. 1, Art. 24 para. 1 and Art. 38 sub-para. 5) and protected persons under eighteen years of age (Art. 68 para. 4).
Commentary

It was thought necessary to propose a general rule recommending positive measures for the protection of children \(^{71}\).

Article 58.- Safeguarding of children

Proposal I: The Parties to the conflict shall take care that children aged under fifteen years shall not take a direct part in hostilities.

Proposal II: The Parties to the conflict shall not recruit children of under fifteen years for service in their armed forces, nor accept their voluntary enrolment.

Proposal III: The Parties to the conflict shall not recruit children of under fifteen years for service in their armed forces, nor accept their voluntary enrolment. Children of under fifteen years shall not be used as auxiliaries of armed forces, in particular for transporting or camouflaging weapons or military equipment or for laying mines.

References

See references quoted under the preceding article.


Commentary

General remarks:

More than anyone else, the child is entitled to protection in all circumstances. But how are the combatants to observe this rule, if the child itself commits hostile acts? It is the responsibility of all the Parties to the conflict, both military and civilian.

To provide adequate protection for children, all possible aspects must, therefore, be considered 72/.

Three proposals have been put forward, two of which would simply lay down the minimum age for combatants, while the third would also prevent the employment of children for military purposes.

**Proposals I and II:**
The first two proposals fairly explicitly express the same idea. The regular and irregular armed forces should neither recruit nor accept as volunteers children under fifteen years of age as combatants. The age limit, which is based on the previously mentioned provisions of the Fourth Convention, provides a guarantee against abusive recruitment of younger and younger children, which might be expected without such a specific limit.

**Proposal III:**
This adds another idea: preventing the employment of children not only as combatants but also as auxiliaries of armed forces, whether as volunteers or under orders. On occasion, the belligerents have not hesitated to conceal weapons or ammunition on the person of infants. In the view of the ICRC, no possible purpose can justify this kind of practice. On the other hand, there are borderline cases that the experts are invited to comment upon, e.g., the carrying or transmission of messages and intelligence activities.

Given the provisions of Article 20 paragraph 3 (Role of the population), children having tended the wounded or the sick, whether civilian or military, for example, by obtaining food or medicine for them, should be neither molested nor be convicted merely for having done so.

**Article 59.- Mothers of infants**
The death penalty shall not be pronounced on mothers of infants or on women responsible for their care.

References

- UN, A/Res. 1386 (XIV), Declaration of the Rights of the Child, principles 2, 4 and 6.

Commentary

This article develops the provisions of Article 24 of the Fourth Convention. It seeks, as it were, to apply to armed conflict the points contained in principle 6 of the "Declaration of the Rights of the Child" which states that: "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother ...".

This article covers both mothers (real, adoptive, etc.) and women responsible for the care of a child.

It is proposed in this article and the next, that the death penalty shall not be "pronounced" on the protected person. It might equally have been said that the latter should not be "executed" 73/.

Article 60. - Death penalty

In no case shall the death penalty be pronounced on civilians who are under eighteen years at the time of the offence. Pregnant women shall not be executed.

73/ The death penalty might then be pronounced but not carried out in casu (a comparison might also be made here of Art. 68 para. 4 of the Fourth Conv. and Art. 6 para. 5 of the International Covenant on Civil and Political Rights).
References

- Fourth Geneva Conv. 1949, Art. 38 sub-para. 5 and Art. 68 para. 4.
- International Covenant on Civil and Political Rights, 1966, Art. 6 para. 5.
- See commentary to Art. 41 and footnote 14.

Commentary

The first sentence of this provision supplements Article 68, paragraph 4 of the Fourth Convention, which excludes persons other than those mentioned in Article 4 of the said Convention. Reference should also be made to footnote 14.

The second sentence is based on the aforementioned article of the International Covenant on Civil and Political Rights. Until now, the intention has been to protect the pregnant woman rather than the unborn child. The latter is intended here. When, according to the custom or practice of many States that still impose the death penalty, the execution of a pregnant woman is stayed or commuted, the intention is to save the child.

Article 61. - Repatriation

1. So as to permit and 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.

2. In so far as it is possible each card will contain 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 at which and the place where the child was found;
(i) the date at 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.

References
- UN, A/Res. 1386 (XIV), Declaration of the Rights of the Child, principles 4, 5 and 6.

Commentary

General remarks:

This provision supplements Article 26 of the Fourth Convention, which stipulates that "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 one another and of meeting, if possible...". Because of the care or treatment children may receive abroad, in a country not involved in the hostilities, the obligation to facilitate enquiries should also be extended to cover the latter country. As paragraph 1 indicates, the sole intention is to permit and facilitate the return of the children to their families and country. The ICRC has deliberately excluded from its study long or permanent residence of children abroad, considering that past experience had shown that this, on the whole, was against the interests of the children themselves. This view was widely shared by the organizations concerned 74/, which all agreed that care should be taken not to remove children from their environment and resettle them abroad. Sometimes, special care and treatment can only be obtained abroad - it is solely for this situation, which should remain the exception - that the provision has been designed.

Paragraph 1:
The card mentioned shall contain the information listed in paragraph 2, together with photographs of the child (full face and profile) to be taken as soon as possible 75/.

74/ These organizations expressed their views at the NGO meeting mentioned in footnote 56.
75/ When armed conflicts have lasted a number of years, parents have sometimes been unable to recognize their children from whom they had been separated.
Paragraph 2:
The surname (a) must be clearly distinguishable from the first name (b), by being written in capitals or underlined, so as to speed up the tracing and consequently the reunion. Of course, it will not always be possible to fill all the details in this paragraph, especially for children of tender years lacking any means of identification. It will be the task of the Central Tracing Agency in Geneva to make any further enquiries or cross-checks. The Central Agency will, naturally, act in liaison with the authorities of the child's country of birth (in particular, with the tracing service 76/), as well as with other interested bodies.

Article 62.— Relationship of this Chapter to the Fourth Convention

The preceding measures do not dispense the Parties to the conflict, in any way whatsoever, from observing, in all circumstances, the provisions of Articles 14, 24, 38(5), 50, 68 paragraph 4 and 140 of the Fourth Convention.

Commentary

This article needs no comment.

Chapter II
RELIEF

References
- Fourth Geneva Conv. 1949, Arts. 23, 55 and 59 to 61.

Introduction

The Fourth Convention does not treat uniformly the question of supplies and relief for the civilian population. Entitlement depends on the personal situation, their situation in relation to the authorities and also the kind of relief involved. For example, Article 23 stipulates the obligation to allow free passage to consignments of medical supplies intended for civilians in general, whereas foodstuffs are granted free passage only for children under fifteen, expectant mothers and maternity cases. On the other hand, Article 55 states that the occupying Power has the duty of ensuring both medical and food supplies for the whole population.

In 1969, the XXIst International Conference of the Red Cross adopted Resolution XXVI entitled "Declaration of Principle for International Humanitarian Relief to the Civilian Population in Disaster Situations". Operative paragraph 4 requests that relief "be provided without discrimination" and further that "the offer of such relief by an impartial international humanitarian organization ought not to be regarded as an unfriendly act". Operative paragraph 5 of the same resolution requests all States "to exercise their sovereign and other legal rights so as to facilitate the transit, admission and distribution of relief supplies" provided by the organizations mentioned in operative paragraph 4. Nowhere in the Declaration is the case of armed conflict mentioned. This lacuna is filled by operative paragraph 8 of the United Nations General Assembly Resolution 2675 (XXV) which specifies that: "The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in Resolution XXVI adopted by the XXIst 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."
The second Report of the Secretary-General of the United Nations on "Respect for Human Rights in Armed Conflicts", 1970, proposes norms relating to "the entitlement of civilians to receive, under conditions acceptable to the authorities in control of the territories where the civilians find themselves, international assistance and relief, including medical supplies, essential foodstuffs and other items necessary for survival" (A/8052 para. 42 (j)).

The general desire to have compulsory rules for relief was manifest at the 1971 Conference of Government Experts. The ICRC was encouraged to take Istanbul Resolution XXVI as a guide, and to specify that it should be applied in armed conflicts.

In line with its over-all conception of the furtherance of humanitarian law, the ICRC feels it essential to extend the existing rules so as to cover the whole population of all Parties in conflict. The ensuing advantage is twofold: discrimination against certain sections of the population is removed, and the system is made clear and simple — a by no means negligible consideration, given the difficult conditions under which large-scale relief operations are often carried out.

Lastly, the ICRC has arranged the subject matter with three criteria in mind, namely: supplies delivered by the Party to the conflict on which the population depends (Art. 3), humanitarian assistance (Art. 64), that is to say, external supplies provided to a Party to the conflict; and transit via the territory or airspace of a Contracting Party (Art. 65). The Chapter is set out with this grouping in mind.

Article 63.— Supplies

The Parties to the conflict shall ensure, to the fullest extent of their capacity and without making any distinction of an unfavourable character, the supply of goods indispensable to the civilian population placed under their control, in law or in fact. If domestic resources are inadequate, they shall endeavour to import the necessary goods.

References
- IVth Hague Conv. 1907, Regulations, Art. 42.
Commentary

First sentence:

It is no longer solely the occupying Power, but all Parties to the conflict, that are duty bound to provide supplies for the population dependent upon them. The words "to the fullest extent of their capacity" are taken from the lex lata. The prohibition of all discrimination is taken, worded differently, from operative paragraph 4 of Istanbul Resolution XXVI.

The words "placed under their control, in law or in fact" are based on the definition of occupied territory in Article 42 of the 1907 Hague Regulations respecting War on Land.

With regard to the concept of "indispensable goods", see Article 42 of the present Draft Protocol.

Second sentence:

The occupying Power is duty bound to import indispensable goods when the resources of the territory are inadequate. However, it is not possible to extend this obligation to all the Parties to a conflict. A Party subjected to a blockade would scarcely be in a position to import goods; hence the modified expression "shall endeavour".

Article 64. - Humanitarian assistance

1. To the fullest extent possible, the Parties to the conflict shall accept and facilitate relief actions destined exclusively to the civilian population placed under their control, in law or in fact.

2. The offer of relief, whether emanating from a State, a National Red Cross Society, or any other recognized relief society, or from the International Committee of the Red Cross, or from any other impartial humanitarian body, in favour of the inadequately supplied civilian population, should not be regarded as an unfriendly act.

3. Nevertheless, the Parties to the conflict shall have the right to prescribe the technical arrangements for the conveyance of relief. They may not, in any way whatsoever, divert relief consignments from their proper destination nor delay their conveyance. They have the right to be reasonably satisfied through the Protecting Power, its substitute or an impartial humanitarian organization, that these consignments are exclusively used for the relief of the needy civilian population.
References
- Fourth Geneva Conv. 1949, Arts. 59 to 61.

Commentary

Paragraph 1:
The obligation to accept relief is extended to all the Parties to the conflict, with the proviso "to the fullest extent possible" to allow for the realities of a war situation. The obligation to facilitate relief actions takes due heed of operative paragraph 5 of Istanbul Resolution XXVI.

Paragraph 2:
The National Red Cross Societies would like to see their role in international relief actions strengthened. A proposal to that effect (Annex III) was put forward by the Yugoslav and Swiss experts at the Conference of Government Experts in 1971. The ICRC believes it advisable to add the National Red Cross Societies and possibly other relief societies to the list of suppliers.

Paragraph 3:
Apart from the Protecting Power, its substitute or an impartial humanitarian organization may also provide the necessary guarantee as to the destination of relief. This condition corresponds with the control system laid down in Article 6 of the present Draft Protocol.

Article 65.- Transit

1. The High Contracting Parties shall grant free passage to relief consignments destined exclusively to the civilian population of another, even if it should be an enemy, Contracting Party.

2. These Parties shall have the right to prescribe the technical arrangements for the conveyance of relief. They may not, in any way whatsoever, divert relief consignments from their proper destination, nor delay their conveyance. They have the right to be reasonably satisfied, through the
Protecting Power, its substitute, or an impartial humanitarian organization, that these consignments are exclusively used for the relief of the needy civilian population.

References

- Fourth Geneva Conv. 1949, Arts. 23 and 59.

Commentary

Paragraph 1:
This paragraph needs no comment.

Paragraph 2:
Apart from the fact that this paragraph refers to all the Contracting Parties, it corresponds, word for word, with Article 64, paragraph 3, above. For the smooth running of relief actions, it is essential that international law be the same in the State through which the relief transits as in the area controlled by the receiving Power.

Article 66.- Relationship of this Chapter to the Fourth Convention

1. The preceding measures do not dispense, in any way whatsoever, the Parties to the conflict from observing, in all circumstances, the provisions of Articles 55, 59, 60, 61, 62, 63, 108, 109, 110 and 111 of the Fourth Convention.

2. Article 10 of the Fourth Convention is reserved.

Commentary

This article needs no comment.
SECTION IV

CIVIL DEFENCE ORGANIZATIONS

Introduction

Neither in the documents submitted by the ICRC to the first session of the Conference of Government Experts nor in the Conference itself were the place and nature of rules concerning non-military civil defence organizations permanently settled. In its documentation 77/, the ICRC had initially proposed the inclusion of these rules in a special section of the Draft Protocol, possibly as the Regulations of execution. This part, in the nature of an addition, would have been optional, in that States would have been free to be bound by it or not. Similarly, when introducing the question in Commission III, the ICRC expert recalled that such rules might be made an annex to the Protocol relative to the protection of the civilian population, to which the States might possibly adhere.

In the documents the ICRC is now submitting to the government experts, the rules relative to civil defence organizations constitute an integral part of the Draft Additional Protocol to the four Conventions since it is a Section of Part IV - "Civilian Population" - (Art. 34 of the Draft Additional Protocol to Common Art. 3 provides special guarantees for civil defence organizations in the case of non-international armed conflicts as well): the ICRC considered that, since civil defence personnel consisted of a category of civilians - those coming to the aid of the victims of armed conflicts - such rules would be appropriately placed in this part of the Protocol. However, these are civilians who, by the very nature of their duties and by the fact that they wear a uniform and are organized on a para-military pattern, are exposed to particularly grave risks. It is, therefore, quite normal that they, like some other categories of civilians, be granted a special, more specific form of protection. Under existing law, however, only Article 63 of the Fourth Convention provides civil defence organizations certain guarantees.

The purpose of this Section is to strengthen these guarantees. It first attempts to define those civil defence organizations which, if they fulfil the desired conditions, might be granted special protection, although these rules, nonetheless, leave the States free to organize their civil defence services as they wish. Secondly, it lays down the guarantees that the organizations, their personnel and their equipment should enjoy, not only in occupied territory, but in all circumstances.

The articles in this Section closely follow the proposals contained in the documents submitted to the first session of the Conference and take into account the proposals made by the experts. It was not possible, however, through lack of time, to get their advice on the majority of the complementary questions and the unresolved problems in Chapter 5 of Part Two of Document III. The ICRC has not, therefore, proposed any articles on these points, but would be happy if they were discussed at the second session.

General references

- Fourth Geneva Conv. 1949, Art. 63 para. 2.
- UN, Report of the Secretary-General A/8370, 1971, paras. 90 to 92.
Article 67.- Definition

1. Those organizations, which are set up or recognized by their Government and whose exclusive function, in time of armed conflict, is to ensure the survival and living conditions of the civilian population exposed to dangers resulting from hostilities or natural disasters, shall be considered to be civil defence organizations within the meaning of the present Protocol. Their tasks, which they fulfil without exercising any discrimination, are mainly the following:

(a) the tracing of, and the giving of first aid and medical care to victims;
(b) the safeguarding, particularly by fire-fighting, of persons, either civilians or military personnel hors de combat;
(c) the protection of objects indispensable to the survival of the civilian population;
(d) the provision of material and social assistance to the civilian population;
(e) the administration of essential public utility services, indispensable to the civilian population;
(f) the maintenance of order in disaster areas;
(g) preventive measures (warning, evacuation, etc.);
(h) the construction and administration of shelters.

2. These organizations have no military character whatsoever and do not carry out any combat missions. They may, however, be organized on a military pattern and be attached to military authorities. Their personnel may, in the discharge of their tasks, co-operate with military personnel.

3. In order to ensure the maintenance of order in disaster areas, or for the purpose of legitimate self-defence linked to their tasks, personnel of civil defence organizations are authorized to carry light weapons.

References

Commentary

General remarks:

The purpose of this article is to set out, by providing a definition of civil defence organizations, the objective criteria such bodies must meet in order to benefit from the protection accorded to them in the present Draft Protocol.

Paragraph 1:

At the first session, several experts, referring to the documents submitted to them by the ICRC, stressed the close link between the proposals relating to the definition and those covering duties. They suggested that the projected rules should combine those two elements 78/. The criterion of belonging to an organization and that of the function therein enable the Parties to a conflict and the Occupying Power to recognize the group of persons entitled to protection. The present definition takes this into account.

This paragraph, which deals with the functions of a civil defence organization, states that they are to be exclusive. For this reason, the possibility for the personnel of civil defence organizations to be allowed, exceptionally, to perform tasks which would not be strictly humanitarian, although not being those of combatants (repair of roads or lines of communication used by the army, fire-fighting in exclusively military aerodromes, etc.), and which was mentioned in the ICRC documents 79/ and was put, as a proposal 80/ to the first session, has not been maintained. The ICRC has, however, submitted this question to the experts and would be pleased to have their opinions.


The functions of civil defence organizations are to protect the civilian population, not only from the dangers resulting from hostilities, but also from those resulting from natural disasters. In coming to the aid of the victims of natural disasters in times of armed conflict, the personnel of civil defence organizations are exposed to the same dangers as they would if coming to the aid of the victims of an armed conflict. This provision clearly demonstrates the ratio legis of this Section - to facilitate the exercise, by the civil defence organizations, of their relief functions. It is laid down that these activities shall be exercised without any discrimination, in particular with regard to the nationality and civilian or military status of the victims.

This paragraph also includes a list of examples of the humanitarian functions of civil defence organizations.

Sub-paragraph (a) is intended to make clear that civil defence personnel is called upon to administer only first aid, medical care being the task of the medical personnel.

Fire-fighting, mentioned under sub-paragraph (b), is included because its humanitarian character was disputed at the first session of the Conference. Fire-fighting can be directly associated with military action, if it contributes to the preservation of military objectives. It is, nonetheless, vital to the safety of the civilian population. To meet these two points, it has not been included as a separate activity, but as a means of accomplishing a humanitarian task, the nature of which is undisputed.

The function of maintaining order (sub-para. (f)) must be qualified. It is, therefore, restricted to disaster areas.

To avoid abuses, only those organizations of an official character, that is to say, established or recognized by their governments, are entitled to special protection.

Paragraph 2:

This sets out the second condition civil defence organizations must fulfil in order to be entitled to special protection - to have no military character whatsoever. It is important that the notion regarding the non-military nature must be clearly brought out, because civil defence bodies are often called upon to work with military units and are

themselves military in appearance. The enemy must not be able to use these facts as a pretext for refusing special protection to organizations fulfilling the necessary requirements. The para-military organization of civil defence bodies should not detract from their civilian nature — for in no case do they carry out any combat missions. The same applies to their subordination to military authorities, by which is meant that they may be drafted and placed under the authority of the Ministry of War or Defence, or receive orders from a military commander. The last sentence of this paragraph shows that the personnel of civil defence organizations may even co-operate with military personnel, provided that their functions remain strictly humanitarian.

**Paragraph 3:**

In certain specific circumstances, the bearing of light weapons by their personnel does not deprive civil defence organizations of their civilian status.

**Article 68.— General protection**

1. Civil defence organizations shall be protected. They shall at all times be authorized to accomplish their tasks; when they accomplish them in combat zones, their activity shall not be hindered, except in the case of imperative military necessity.

2. The personnel of civil defence organizations shall never be attacked.

3. Buildings, equipment and means of transport belonging to civil defence organizations shall never be attacked or destroyed. The same shall apply to those assigned temporarily to them for any emergency relief action, for such time as this temporary use endures.

**References**

- Fourth Geneva Conv. 1949, Art. 63 para. 2.
- XXth Internat. Conf. Red Cross, Vienna, 1965, Status of Personnel of Civil Defence Organizations, Report presented by the ICRC, Conf. D. 5 b/1, IV, Section II; Summary of the Report presented by the ICRC, Conf. D. 5 b/1, Heading IV, Section II.
Commentary

General remarks:
This article deals with the protection of civil defence organizations in general, whereas Article 69 is concerned with their protection in occupied territories.

The first paragraph is concerned with the protection of these organizations as such; paragraph 2, with the protection of personnel, and paragraph 3, with the protection of buildings, equipment and means of transport. The same pattern is followed in Article 69.

Paragraph 1:
The first sentence is quite general in scope and recalls Article 40 of the present Draft Protocol. The second sentence shows that the special protection accorded to civil defence organizations should enable them to accomplish their tasks. The expression "imperative military necessity" is taken from Article 4 of the 1954 Hague Convention, which also recognizes the concept of "unavoidable military necessity" (Art. 11).

Paragraph 2:
This paragraph repeats, in slightly different words, Article 45 paragraph 1, of the present Draft Protocol. The personnel concerned include both permanent and temporary staff.

Paragraph 3:
The protection of civil defence organizations being based on their function, it follows that the buildings, equipment and means of transport, which do not belong to them, but are simply lent in times of great need, should be protected only during the period when they are so used. There is
room for doubt as to whether the stipulation of "urgent relief action" desired by some experts consulted by the ICRC, should be maintained.

Article 69.– Protection in occupied territories

1. In occupied territories, civil defence organization shall receive every facility from the responsible authorities for accomplishing their tasks, subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power. The latter shall not be permitted to introduce in the management or personnel of these organizations any changes which could jeopardize the efficacious discharge of their tasks; it shall not be also permitted to demand that these organizations should discharge their tasks by giving priority to victims belonging to the said Power.

2. If they should fall into the power of the enemy, the personnel of civil defence organizations shall not be made prisoners of war, but shall enjoy, at least, the guarantees granted by the Fourth Convention. The Occupying Power may not compel permanent personnel to undertake activities other than those stipulated in Article 67 of the present Protocol, nor oblige them to serve outside occupied territories; on the other hand, it may employ temporary personnel on work mentioned in Article 51 of the Fourth Convention.

3. Buildings, equipment and means of transport belonging to civil defence organizations shall remain for the use of the civilian population. They may only be requisitioned temporarily, in cases of urgent necessity, and provided the requisition does not seriously jeopardize the protection of the civilian population.

References

See references to Article 68.

Commentary

General remarks:

Like Article 63 of the Fourth Convention, this article is intended to guarantee that civil defence organizations are in a position to carry out their tasks in a normal manner. There is a tendency, however, for it to extend and improve several points in Article 63.
Paragraph 1:
The last sentence of this paragraph, which is designed to protect organizations as such, is a specific case of the rule in Article 67 that protection be granted without discrimination.

Paragraph 2:
It is self-evident that civil defence personnel, being exclusively civilian, cannot be made prisoner and are entitled to the guarantees granted by the Fourth Convention. This is a new provision: it is nowhere to be found in the ICRC documents and no proposal of this kind was made at the first session.

The second sentence draws a distinction between permanent and temporary personnel. The adjective "permanent" refers to personnel whose names have been properly entered on the civil defence register and who are always on call, in other words, to full-time personnel. The first part of this sentence is intended to prevent permanent personnel from being obliged to carry out other tasks than their own or from being transferred, for in the event of territory becoming occupied, civil defence personnel will still be needed there, as it may very likely be the scene of further military operations, with all their concomitant dangers. Temporary personnel, however, may be treated in the same way as other civilians.

Paragraph 3:
This paragraph does not take up again the distinction between the equipment belonging to the civil defence organizations and that temporarily assigned to them, which is to be found in Article 68 paragraph 3. It protects only equipment belonging to the civil defence organizations. The protection of any other equipment in occupied territory would be difficult to enforce, because of the misuse it would possibly cause.

Article 70.—Organizations of neutral States

1. The protection conferred by the present Protocol shall also be granted to personnel and equipment belonging to those civil defence organizations of neutral States which, with the approval of their own governments and after having notified the opposing Party accordingly, were to offer their assistance to the civil defence organizations of a Party to the conflict, with the latter's agreement and under its authority.
2. **In no circumstances shall this assistance be considered as interference in the conflict.**

**References**

- First Geneva Conv. 1949, Art. 27.
- XXth Internat. Conf. Red Cross, Vienna, 1965, Status of Personnel of Civil Defence Organizations, Report presented by the ICRC, Conf. D. 5 b/1, IV, Section II/IV; Summary of the Report presented by the ICRC, Conf. D. 5 b/1, Heading IV, Section II, Chap. IV.

**Commentary**

**General remarks:**

This paragraph reiterates, by analogy, the concept contained in Article 27 of the First Convention. The assistance of civil defence organizations from neutral countries could be of particular advantage during armed conflicts in developing countries, which frequently do not possess their own civil defence services. This possibility, which was not covered by the documents prepared for the first session, had already been considered by the ICRC in previous studies. 83/

**Paragraph 1:**

This paragraph needs no comment.

**Paragraph 2:**

In view of the similar situations involved, this paragraph repeats Article 27, paragraph 3, of the First Convention.

---

Article 71.— Markings

1. The distinctive emblem of civil defence organizations consists in .... The personnel of civil defence organizations shall 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; while on duty, they shall wear on the left arm a stamped armband bearing the distinctive emblem, issued by the State to which they belong.

2. The identification of personnel and the marking of buildings, equipment and medical transports of civil defence organizations are governed by Articles 14, 16 and 18 of the present Protocol.

3. Temporary personnel, medical and non-medical, as well as buildings, equipment and means of transport used temporarily for any emergency relief action, may bear the distinctive emblem only when actually discharging their tasks.

4. From the outbreak of hostilities, the High Contracting Parties shall adopt special measures for supervising the use of the distinctive emblem and for the prevention and repression of any misuse of the emblem.

References

- First Geneva Conv. 1949, Art. 41.
- XXth Internat. Conf. Red Cross, Vienna, 1965, Status of the Personnel of Civil Defence Services; Report presented by the ICRC, Conf. D. 5 b/1, IV, Section III, I and II; Summary of the Report presented by the ICRC, Conf. D. 5 b/1, Heading IV, Section III, Chaps. I and II.

Commentary

General remarks:

The question of markings produced numerous observations at the first session of the Conference of Experts, a clear
indication of its importance  
84/, for it is vital to make civil defence organizations recognizable by an emblem of their own. Furthermore, the choice of the emblem should not be left to the discretion of each State; a uniform emblem must be universally adopted.

Paragraph 1:
No distinctive emblem has yet been proposed. The red cross (red crescent, red lion and sun) on a white ground should be rejected, since it is already the emblem of medical personnel and must be confined to very specific activities. Its use should also not be allowed to spread too far. The ICRC feels that civil defence organizations might use an already existing emblem, consisting of oblique red bands on a white ground  
85/. It would like an ad hoc group of civil defence experts to be set up at the second session, to go into this question further.

Markings for civil defence personnel are, in principle, the same as for civilian medical personnel as described in Article 18 of the present Draft Protocol. Reference should be made to the commentary on this article.

Paragraph 2:
This paragraph refers to the medical personnel and equipment of civil defence organizations. Since it proposes the same distinctive emblem as for civilian medical personnel and equipment, reference should be made to the commentaries on Articles 14, 16 and 18 of the present Draft Protocol.

Paragraph 3:
This paragraph is modelled on Article 41 of the First Convention. It is based on the concept of protection while on duty and is intended to restrict the wearing of the distinctive emblem and, thus, to avoid any misuse.

Paragraph 4:
This paragraph is identical to Article 21 of the present Draft Protocol. Reference should be made to the commentary on this article.

85/ See Annex I, Art. 6, of the Fourth Convention.
Article 72.- Notification

Each of the High Contracting Parties shall notify the International Committee of the Red Cross /the Depositary State/ which of its civil defence organizations may enjoy the protection under the present Section.

References


Commentary

The purpose of this article is to enable those States parties to the Protocol to be informed, through the ICRC or the depositary State, which civil defence organizations of the other High Contracting Parties are entitled to special protection.
PART V

EXECUTION OF THE CONVENTIONS AND OF THE PRESENT PROTOCOL

General References

- Geneva Conv. 1949, articles relating to the execution of the Conventions and to the repression of abuses and infractions.
- ICRC, Questionnaire D-0-1210, question 15.
- UN, Report of the Secretary-General A/8370, 1971, paras.148 to 156.
INTRODUCTION

In the present Part, a certain number of proposals for elaborating and supplementing the Conventions are put forward by the ICRC; as the various references indicate, the Red Cross has for a long time focussed its attention on these questions. International Conferences of the Red Cross have, in fact, examined and adopted various resolutions on the questions of the dissemination of humanitarian rules applicable in time of armed conflict, the repression of breaches of the Conventions, reprisals and the accession of intergovernmental Organizations - particularly the UN - to the Conventions.

Section I of this Part deals with certain points which the ICRC has taken into consideration in Document II ("Measures intended to reinforce the implementation of the existing law") of the documentation submitted to the experts at the first session. Various suggestions in this field were presented in the course of that session, as also at the Red Cross experts' meeting held at The Hague in 1971. In particular, proposals were put forward on the reinforcement of rules governing the repression of breaches of the Conventions. It is appropriate to explain why the ICRC considers it premature at the present stage to take certain of these proposals into account. The following suggestions, in particular, were made by experts:

- to reaffirm and develop the principles of personal responsibility for war crimes;
- to set up an international criminal tribunal or, pending its establishment, to make at least arrangements for some kind of international presence at proceedings concerning war crimes brought before a national tribunal;
- to elaborate model laws which would permit the standardization of penalties for breaches of humanitarian law;
- to set up an international penal code;
- to draft a provision relative to the question of superior orders;
- to supplement those articles in the Conventions concerning breaches by setting up a provision relative to breaches by omission.

In the present draft, the ICRC provides for an article relating to superior orders (see below, Art. 75, para. 2). Article 13, paragraph 1 (see above), deals with unjustified
omissions. Regarding the other proposals, the ICRC points out that, in Questionnaire D–O–1210 b, it asked what would be the most appropriate steps to reinforce the rules relative to penal sanctions against persons committing breaches of the Conventions. It is on the basis of the replies received that it will be possible to work out in what way the law in this field may be elaborated and supplemented.

In the documentation presented at the first session, the ICRC emphasized that, although at the present stage of development of international humanitarian law it appeared that one could not go beyond the limits of national laws governing the repression of breaches, it was important that the different domestic penal legislations should be, as far as possible, standardized in this respect and be applicable to all alike, whether nationals or enemies, without distinction. It expressed the hope that the States concerned might be urged to supplement their legislation in this respect or to introduce a special legislation. It wishes to point out that the general principles of the provisions of the Conventions relative to the repression of abuses and infractions - in particular those dealing with grave breaches and with the responsibilities of the Contracting Parties - shall govern the application of the articles of this additional Protocol, in so far as they are neither elaborated nor supplemented.

Pending the receipt of replies to the above-mentioned Questionnaire, the ICRC believes that the following might well be included in the present Part, not counting the proposals already put forward:

- a provision which, like in Article 14 of the International Covenant on Civil and Political Rights 1/, would reaffirm certain general principles of penal law;

- a provision relative to penal sanctions which, for the purpose of application of this Protocol, would state that "the High Contracting Parties shall, within the framework of their penal legislation, adopt all necessary measures to punish those guilty of breaches of the present Protocol. Persons shall be considered as guilty of a breach if they have committed, given the order to commit, or tolerated their subordinates committing an action constituting such a breach, or persons whose omission to act constitutes or leads to such a breach".

1/ Covenant adopted and open to signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December, 1966.
SECTION I
GENERAL PROVISIONS

Article 73. - Detailed execution and unforeseen cases

The High Contracting Parties, acting through their civilian and military authorities, shall ensure the detailed execution of the Articles of the Conventions and of the present Protocol and provide for unforeseen cases, in conformity with the general principles of the Conventions and of the present Protocol.

References
- First Geneva Conv. 1949, Art. 45.
- Second Geneva Conv. 1949, Art. 46.
- Commentary, First Geneva Conv. 1949, Art. 45.
- Commentary, Second Geneva Conv. 1949, Art. 46.

Commentary

The present provision should be considered as a complementary part of Article 1 common to the Conventions. It is by their compliance with this dual duty of detailed execution and provision for unforeseen cases that the Contracting Parties will meet in full the obligation they have incurred under this Article.

Even when elaborated and supplemented by the present Protocol, the Conventions will remain primarily the expression of general rules. It is therefore necessary to provide that executive measures shall be taken by the Contracting Parties, in order to regulate in detail the actual situations which arise. Furthermore, it is clear that these instruments - however complete they may be - cannot settle all the cases which might arise in the course of a conflict. That is why it is desirable to stipulate that the Contracting Parties will have to work out solutions for unforeseen cases in conformity with the general principles of the Conventions and of the present Protocol.
Article 74.- Prohibition of reprisals and exceptional cases

1. Measures of reprisal against persons and property protected by the Conventions and by the present Protocol are prohibited.

2. In cases where reprisals are not yet prohibited by the law in force, if a belligerent considers that it must resort thereto, it shall observe the following minimal conditions:
   (a) the resort to reprisals must be officially announced as such;
   (b) only the qualified authority can decide on resort to reprisals;
   (c) the reprisals must respond to an imperative necessity;
   (d) the nature and scope of the reprisals shall never exceed the measure of the infraction which they seek to bring to an end;
   (e) the belligerent resorting to reprisals must, in all cases, respect the laws of humanity and the dictates of the public conscience;
   (f) reprisals shall be interrupted as soon as the infraction which gave rise to them has come to an end.

References
- Geneva Conv. 1949, Arts.46/47/13/33.
- Vienna Conv. 1969, Art. 60 para. 5.
- UN, A/Res. 2625 (XXV) (Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States);
- UN, A/Res. 2675 (XXV), principle 7.
Commentary

General remarks:

In the documentation presented at the first session, the ICRC referred to the provisions of the Conventions which prohibit reprisals against protected persons and property, and it proposed to elaborate and supplement them in particular by providing that the civilian population taken as a whole, like the individuals who constitute it, must never be made the object of reprisals. Furthermore, it considered that reprisals by belligerents during the conduct of hostilities, where they are not yet prohibited by the law in force, should not go beyond certain limits imposed by the requirements of humanity, and in this connection it mentioned certain principles which should be re-established and reaffirmed.

At the first session, some experts declared that, in the light of the Charter of the United Nations and resolutions of the General Assembly and the Security Council, reprisals carried out by belligerents should no longer be considered as a measure of law enforcement and hence should be abolished or at least should be bound by the severest limits and defined in the strictest possible fashion. Others, however, considered that reprisals were still a legal device that was reasonably efficacious. As a whole, the experts reached agreement on the prohibition of reprisals against civilians.

Paragraph 1:

Article 45 of this Draft Protocol provides, in paragraph 4, that attacks directed against the civilian population or individual civilians by way of reprisals shall be prohibited, and Article 48 prohibits reprisals against objects indispensable to the survival of the civilian population.

The present provision reaffirms and provides in a general manner for the prohibition of reprisals against persons and property protected by the Conventions and by this Protocol.

Paragraph 2:

Since there is as yet no general prohibition of reprisals by belligerents in the conduct of hostilities, it would be appropriate to reaffirm certain norms which regulate and limit resort to such reprisals. Nevertheless, some authorities consider that this question is linked to the problem of weapons and, referring to the work and the resolutions of the United Nations on the subject, they
consider that it would be preferable that it should be placed in the context of the prohibition or limitation of the use of weapons, and in particular weapons of mass destruction.

The various principles of international customary law set forth under sub-paragraphs (a) to (f) have already appeared in some national military manuals, and in 1880 the Institute of International Law had explicitly stated some of them in adopting the Oxford Manual 2/.

It should be noted that the principle appearing under (d) is generally called the "principle of proportionality", and that, as was observed at the first session, the principle mentioned under (e) serves to remind belligerents having recourse to reprisals that they should not forget that the law of armed conflict is a compromise between humanitarian considerations and military necessities.

Although the ICRC deems it necessary to reaffirm these restrictions in respect to measures of reprisal which might still be resorted to within the framework of the law of armed conflict, it is nonetheless convinced that all resort to reprisals should be avoided, in particular by reinforcing the scrutiny of the regular observance of the law and by the repression of violations.

---

Article 75.- Orders and instructions

1. The civilian and military authorities of the High Contracting Parties shall, through the official channels, issue to their subordinates orders and instructions intended to ensure respect for the provisions of the Conventions and of the present Protocol, and shall supervise the execution thereof.

2. The High Contracting Parties shall determine the procedure to be followed for the application of the principle under which a subordinate is exempted from any duty to obey an order which would lead him to commit a grave breach of the provisions of the Conventions and of the present Protocol.

References

Paragraph 1:
- IVth Hague Conv. 1907, Regulations, Art. 1.
- Geneva Conv. 1949, common Art. 1.

Paragraph 2:
- Geneva Conv. 1949, Arts. 49/50/129/146 ("Penal sanctions: I. General observations") and Arts. 50/51/130/147 ("II. Grave breaches").
- UN, A/Res. 3 (I).
- UN, A/Res. 95 (I).

Commentary

Paragraph 1:
The present provision \( \frac{3}{3} \) should be considered as a complementary part of Article 1 common to the Conventions. Indeed, in undertaking that their civilian and military authorities shall issue, through the official channels and at all levels, the orders and instructions calculated to ensure respect for the provisions of the Conventions and of the present Protocol, and by supervising the execution thereof, the Contracting Parties comply with the general undertaking they assumed under common Article 1 to ensure respect for the Conventions in all circumstances.

Paragraph 2:
In the documentation presented at the first session, the ICRC referred to the principles of international law

\( \frac{3}{3} \) This provision is patterned after Article 1 of the IVth Convention of The Hague of 1907, which states: "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.".
recognized by the Charter of the International Military Tribunal of Nuremberg and the judgment of this Tribunal. These principles were affirmed by the General Assembly of the United Nations in its resolutions 3 (I) and 95 (I) and subsequently formulated by the United Nations International Law Commission at the request of the General Assembly. In particular, it considered that the basic question of superior orders should be settled at the national level, in a manner consistent with the guidelines laid down in the Judgment of the Nuremberg Tribunal, namely, that it should be possible for soldiers to refuse to obey an order which, if carried out, would constitute a serious infraction of humanitarian rules. The military regulations of some countries already contain a provision regarding superior orders and submission to rank, whereby superiors must only issue orders which conform to international law and subordinates are relieved from the obligation to obey an order which would be contrary thereto and which would cause them to commit a crime or an offence.

At the first session, some experts shared this view and considered that it would be desirable to supplement the Conventions by the inclusion of a provision relative to superior orders, taking as basis the principles recognized by the Nuremberg Tribunal. In its work, the United Nations International Law Commission set forth this principle in the following manner: "The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires."

Some experts considered that the set of principles of international law consecrated by the Nuremberg Tribunal should be taken into consideration for this present reaffirmation of humanitarian law.

Article 76.- Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Protocol as widely as possible, in their respective countries, and, in particular, to include the study thereof in their programmes of military and civil instruction, so that it may become known to the armed forces and to the civilian population.
2. The military and civilian authorities who, in time of armed conflict, assume responsibilities in respect of protected persons and property, must be fully acquainted with the provisions of the present Protocol.

References

- UN, A/Res. 2852 (XXVI), operative para. 7.
- UN, Report of the Secretary-General A/7720, 1969, paras. 117 to 121.
- UN, Report of the Secretary-General A/8052, 1970, paras. 251 to 256.
- UN, Report of the Secretary-General A/8370, 1971, paras. 154 to 156.

Commentary

The dissemination of the humanitarian rules applicable in time of armed conflict constitutes a vital measure for strengthening the implementation of the law.

The Red Cross has long shown, by the work it has carried out, the importance it attributes to this task. It is one of the fields in which the National Red Cross (Red Crescent, Red Lion and Sun) Societies are called upon to play a role, as auxiliairies to the public services. The Secretary-General of the United Nations has likewise
stressed the primary necessity of ensuring publicity, dissemination and teaching of international instruments of a humanitarian character and of the corresponding rules adopted at the national level.

Each of the Conventions contains an article relative to dissemination, and it is important that this article should be reaffirmed for the present Protocol.

Article 77.- Rules of application

The High Contracting Parties shall communicate to one another, through the Depositary State, the laws and regulations which they adopt to ensure the application of the present Protocol.

References

Commentary
As indicated in the Commentary on the Conventions 4/, the widest possible interpretation should be given to the expression "laws and regulations": this means all legal documents issued by the executive and legislative authorities connected in any way with the application of the Conventions.

4/ Cf., for example, Commentary on the Fourth Convention, ad Art. 145.
SECTION II
INTERGOVERNMENTAL ORGANIZATIONS

Article 78. - Accession

References

- ICRC, Memorandum of 10 November 1961, sent to the governments of all the States Parties to the Conventions and members of the UN, concerning the application of these Conventions by the contingents placed at the disposal of the United Nations.
- UN, Report of the Secretary-General A/7720, 1969, paras. 9 and 114.
Commentary

Certain experts believe that the Conventions should be open to accession by inter-governmental organizations. They consider, in particular, that the accession of the United Nations would be of value as an example to be followed and would produce beneficial effects. As may be seen from the references mentioned above, the Red Cross has been giving attention to this question for several years. In 1969, the President of the ICRC stated in a letter addressed to the Secretary-General of the United Nations, in which he presented his observations on the preparation of the study requested in pursuance of resolution 2444 (XXIII) adopted by the General Assembly: "... we have for a long time hoped, as the wish has been expressed at several Red Cross Conferences, that the United Nations, by regular accession, formally undertake to have applied the Geneva Conventions and the other provisions of a humanitarian character each time the forces of the United Nations are engaged in operations". In this connection, the Secretary-General of the United Nations stated that the regulations issued for these forces provided that their members should observe the principles and spirit of the general international conventions applicable to the conduct of military personnel and he stressed that the conventions in question included, inter alia, the Geneva Conventions of 1949. In addition, he pointed out through the mouth of his representative speaking at the first session that the question of the training and discipline of the military personnel belonging to the United Nations Peace-Keeping Forces had hitherto been considered the responsibility of the various Governments which provided national contingents and not that of the Organization, and that the problem had, for some time, been under study by a United Nations Special Committee on peace-keeping operations.

The question arises whether, in addition to the United Nations, it might be desirable to invite inter-governmental, in particular regional, organizations, or even other bodies subject to international law, to accede to the Conventions.

It should be made clear that it is because of the present provision that this Draft Protocol never speaks of "States parties to the Conventions" but always of the "Parties to the Conventions". As can be readily understood, the ICRC restricts itself to submitting this question to the experts for examination without proposing any text for the article.
General References

- Vienna Conv. 1969, Part II ("Conclusion and entry into force of treaties"), Part III ("Observance, application and interpretation of treaties"), Part VII ("Depositaries, notifications, corrections and registration"), and Part VIII ("Final provisions").

INTRODUCTION

Most of the articles of Part VI concern questions of form and could be examined later at a conference of plenipotentiaries. Nevertheless, wishing to be thorough and to advance the work as far as possible, the ICRC has prepared drafts of the articles. Besides, some of the provisions of this Part concern questions of substance: this is particularly true of Article 82, relating to reservations, and of Article 85, entitled "Denunciations".
The articles relating to matters of form call for very little comment. Regarding these, the ICRC considered it necessary to take into account the contribution of the International Law Commission of the United Nations to the codification and progressive development of the law of treaties, and which resulted, in 1969, in the adoption of the Vienna Convention on the Law of Treaties, mentioned in the references for this Part. This Convention, which codified recently the law of treaties, may no doubt be of great help when drafting new international agreements. The ICRC gives here only a general outline of the procedure, leaving it to the Contracting Parties to fill in the articles the dates and other details they deem necessary. However, it has been pointed out by some that there is an ever-increasing use of less formal types of international agreements; hence they consider that the entry into force of the present Protocol should involve a minimum of formality and that, for example, it could well acquire binding force by signature alone.

---

Article 79.- Signature

The present Protocol shall be open until ... ... 197... at ..., for signature by the Parties to the Conventions.

Article 80.- Ratification

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Depositary State.

Article 81.- Accession

1. The present Protocol shall remain open for accession by any Party to the Conventions which has not signed it.
2. The instruments of accession shall be deposited with the Depositary State.
Article 83.- Entry into force

1. The present Protocol shall enter into force when ... instruments of ratification or accession have been deposited.

2. Thereafter, it shall enter into force, for each High Contracting Party, as soon as its instrument of ratification or of accession has been deposited.

References

Article 79:

Article 80:
- Geneva Conv. 1949, Arts. 57/56/137/152.

Article 81:
- Geneva Conv. 1949, Arts. 60/59/139/155.

Article 83:

Commentary

These several articles deal with the procedure of conclusion and entry into force of this Protocol.

Within the meaning of the present draft, the signature (Art. 79) by a Party is subject to ratification (Art. 80). Given the importance of the Protocol, it has been found necessary to submit it, like the Conventions, to ratification; but, as mentioned above, provision might also be made for it to acquire binding force by signature alone.

With regard to the Depositary State, the functions of which are defined in Articles 9, 80 to 82 and 85 to 88 of this Draft Protocol, it will be recalled that Switzerland is the depositary of the Conventions.

Article 83 calls for a certain number of remarks. Patterned after the 1969 Vienna Convention, it provides, in its first paragraph, for the entry into force of the Protocol after the deposit of a certain number, still to be fixed, of instruments of ratification or of accession. Its paragraph 2 provides that thereafter it shall enter into force, for each High Contracting Party, "as soon as the instrument of ratification or of accession has been
deposited"; it must, however, be recognized that there is a growing tendency, especially in the case of multilateral treaties, to provide for a lapse of time between the moment when the consent of a Party to bind itself by the treaty is expressed and the moment when the treaty enters into force; if it were decided to provide for such a time-lag, the question would then arise whether it would be necessary to envisage a provision which, as in the Conventions (Arts. 62/61/141/157), would stipulate that the situations provided for in Article 2 common to the Conventions shall give immediate effect to ratifications deposited or accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation. It should be noted that in Article 4 of the present Draft Protocol, the provisional application of the latter before its entry into force is envisaged; as indicated above in the commentary on Article 4 1/, if it were deemed suitable to introduce a provision on this point, it should probably be included in the present Part.

Article 82.— Reservations

1. The High Contracting Parties, when signing, ratifying the present Protocol or acceding thereto, shall not formulate any reservation to Articles ... .

2. Further to the prohibition stipulated in the preceding paragraph, a reservation incompatible with the object and purpose of the present Protocol shall not be permitted.

Procedure to be established for determining, in each case, whether a reservation is compatible with the object and purpose of the present Protocol:

3. A reservation may be withdrawn at any time by notification to this effect addressed to the Depositary State.

1/ Cf. supra.
References
- Vienna Conv. 1969, Part II, Section 2.- Reservations (Arts. 19 to 22).
- ICRC, Questionnaire D-0-1210 b, question 13.
- UN, A/Res. 2853 (XXVI), operative para.4.

Commentary

General remarks:
The Conventions contain no provision relative to reservations.

In the course of the first session, one of the experts said that it would be desirable to examine the question of reservations, and that the possibility of formulating reservations to humanitarian rules ought to be limited, if not precluded. It was, in particular, considered that reservations to the existing system under the Conventions, affecting supervision, should be withdrawn or reconsidered, unless they were designed to strengthen the humanitarian purposes of these Conventions; the ICRC put forward a question on this subject in Questionnaire D-0-1210 b.

As indicated above in the references, the Secretary-General of the United Nations has dealt with this question in each of his reports on respect for human rights in armed conflicts and, at the twenty-sixth session of the General Assembly, it was examined attentively by a number of representatives sitting on the Third Committee. The General Assembly adopted a resolution in which, among other points, it called upon States to review, as a matter of
priority, any reservations they might have made to the humanitarian rules in force (A/Res. 2853 (XXVI), operative para. 4).

As is known, the question of reservations has been a matter of lengthy discussion in the course of recent years. In particular, it has been examined by the International Court of Justice, in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and by the International Law Commission - cf. the above-listed references. An important section of the Vienna Convention of 1969 is devoted to it.

This article, which proposes to limit the possibility of formulating reservations to the rules of the present Protocol, is thus patterned after recent developments of the law of treaties concerning the subject.

Paragraph 2:

As this draft indicates, it would be desirable to set up a procedure for determining in each case whether a reservation is compatible with the object and purpose of the Protocol. For example, in this connection, mention may be made of Article 20, paragraph 2, of the International Convention on Elimination of All Forms of Racial Discrimination 2/, which provides:

"...

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."

Article 84.— Treaty relations upon entry into force of the present Protocol

1. When the Parties to the Conventions are also Parties to the present Protocol, the Conventions apply as elaborated and supplemented by the present Protocol.

2/ Adopted and open for signature and ratification by the General Assembly of the United Nations in its resolution 2106 A (XX) of 21 December 1965.
2. As between a Party to the Conventions and to the present Protocol, and a Party solely to the Conventions, only the latter apply.

References

- Vienna Conv. 1969, Art. 30 ("Application of successive treaties relating to the same subject-matter") and Art. 40 ("Amendment of multilateral treaties").
- UN, Draft articles on the law of treaties and commentaries, ad Arts. 26 and 36.

Commentary

This article refers to the new treaty situation created by the entry into force of the present Protocol. There will then be two categories of Parties to the Conventions: (a) those which are Parties to the Conventions only, and (b) those which are Parties both to the Conventions and to their additional Protocol. To be sure, the rules set out in the two paragraphs of this article appear to state primary truths and it might be asked whether it is indeed necessary to state them in a special provision. The ICRC believes that, considering the importance of the present Protocol and the additive nature of its provisions, it is not without value to stress explicitly the way in which mutual relations between the Parties to the Conventions are to be governed when this instrument enters into force.

In another respect, it is proper to recall here paragraph 3 of Article 2, common to the Conventions; that paragraph, relative to armed conflicts in which the belligerents are not all Parties to the Conventions provides:

"... Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

As has been indicated above in the introduction to Part I 3/, the articles of the Conventions which are neither elaborated nor supplemented by the present Protocol

3/ Cf. supra.
shall continue to be applied as such and their general principles shall govern the application of the present instrument. In this respect, particular stress should be given to the second sentence of paragraph 3 cited above and it should be emphasized that, in conformity with that provision, the Powers in conflict which are parties to this Protocol shall be bound by it in relation to the Power which is not a party thereto, if the latter accepts and applies the provisions thereof.

Article 85.— Denunciation

1. In case a High Contracting Party should denounce the present Protocol, the denunciation shall only take effect one year after the receipt of the instrument of denunciation. However, if on the expiry of that year, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities and, in any case, until the operations of release and repatriation of the persons protected by the present Protocol are completed.

2. The denunciation shall be notified in writing to the Depositary State, which shall transmit it to all the High Contracting Parties.

3. The denunciation shall have effect only in respect of the denouncing Party. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of general international law.

References
- Vienna Conv. 1969, Art. 56 ("Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal").

Commentary

The Conventions expressly provide for a right of denunciation. Yet it is well to underscore the fact that, ever since these Conventions came into existence, no State has ever denounced them.
As a matter of fact, it might be asked whether it was appropriate to provide for the right of denunciation in an additional Protocol to humanitarian conventions. Some consider that this should not be done. It is, however, important to recall that this option exists in virtue of customary law, and that it is advisable to limit it, as the Conventions have done.

Article 86.—Notifications

The Depositary State shall inform all the Parties to the present Protocol of the following particulars:
(a) signatures affixed to the present Protocol, ratifications and accessions under Articles 80 and 81 of the present Protocol;
(b) the date of entry into force of the present Protocol under its Article 83;
(c) communications and declarations received under Articles 72, 77 and 82 of the present Protocol;
(d) denunciations under Article 85 of the present Protocol.

Article 87.—Registration and publication

After its entry into force, the present Protocol shall be transmitted by the Depositary State to the Secretariat of the United Nations Organization for registration and publication, in accordance with Article 102 of the United Nations Charter.

Article 88.—Authentic texts and official translations

1. The original of the present Protocol, of which the French and English texts are equally authentic, shall be deposited with the Depositary State.
2. The Depositary State shall arrange for official translations of the present Protocol to be made into Arabic, Chinese, Russian and Spanish.
References

Article 86:
- Vienna Conv. 1969, Art. 78 ("Notifications and communications").

Article 87:
- Geneva Conv. 1949, Arts. 64/63/143/159 ("Registration with the United Nations").
- Vienna Conv. 1969, Art. 80 ("Registration and publication of treaties").

Article 88:
- Geneva Conv. 1949, Arts. 55/54/133/150 ("Languages").
- Vienna Conv. 1969, Art. 85 ("Authentic texts").

Commentary

These articles need no comment.
ANNEX I

REGULATIONS ON THE MARKING AND IDENTIFICATION OF MEDICAL AIRCRAFT

The matter will be studied partly on the basis of the documentation that the ICRC presented to the first session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva from 24 May to 12 June 1971*, and partly on the basis of a special technical note drawn up by the ICRC.

Commentary

This Annex needs no comment.

ANNEX II

DRAFT MODEL AGREEMENTS

INTRODUCTION

Annex II contains three Draft Model Agreements conferring special protection on non-defended localities, neutralized localities and works containing dangerous forces (Arts. 53, 54 and 55 of the present Draft Protocol). Because these three drafts are similar, though not identical, the ICRC had initially considered submitting to the experts one single model agreement, with variants, but decided later, for the sake of clarity, to submit three texts.

These Draft Model Agreements have been framed so as to be pragmatic in form: they contain the appropriate provisions which are necessary for an agreement to be drawn up in conformity with Articles 53, 54 and 55 of the present Draft Protocol. Their purpose is to facilitate the conclusion of such an agreement. To this end, the Parties to the conflict have merely to fill in the blank spaces, make a choice where two or more options are offered and maintain or discard any article that is optional.
1. Draft Model Agreement creating non-defended localities

Article 1.- Creation and delimitation

1. Under the present Agreement, the Contracting Parties confer, in accordance with Article 53 of the Additional Protocol to the four Geneva Conventions of August 12, 1949 (hereinafter called the Protocol), the status of non-defended locality in the town of ... and in the village of ... .

2. The delimitation of this locality shall be as follows: here follow the geographic co-ordinates of the locality and/or indications fixing its boundaries, by means of natural features or artificial landmarks, such as rivers, lakes, hills, dams, roads, etc. A map may be attached.

Commentary

This article needs no comment.

Article 2.- Markings

First possibility 1/: This locality shall be recognized by oblique red bands on a white ground placed on its boundaries, especially on highways, and in places where they are clearly visible. Should the locality be occupied by one of the Parties, the latter shall remove all markings.

Second possibility 1/: This locality shall not be marked in any way.

1/ The signatories of the present Agreement have the choice of one or the other of these two possibilities.
Commentary

The sign consists of oblique red bands on a white ground, as is the case for hospital and safety zones already mentioned in the Conventions 2/. Such a solution is desirable for two reasons: firstly, it would be advisable to avoid increasing the number of emblems, which might be detrimental to their efficacy; secondly, of the already existing emblems, the red cross would be a difficult choice, because of its precise connotation.

The emblems must be visible from the air as well as from the ground. At night, they must be illuminated.

The freedom to mark or not to mark a locality is dictated by practical considerations. While it is very important that a non-defended locality be recognized as such by the actual combatants, the Parties to the conflict may not always have the time to display the markings. This should not hinder the conclusion of an agreement nor should it prevent the locality being accorded its special status. In this case, however, it would be important to state explicitly that the locality will not be marked. The locality must be protected 2/, even without markings, and the combatants must, therefore, be aware of the fact. Furthermore, if one of the Parties occupies the locality, it becomes once again "defended" and the markings must be removed.

Article 3.— Supervision 4/

A Commission composed of ... shall supervise whether the locality of ... fulfils the conditions laid down in paragraph 3 of Article 53 of the Protocol. To that end, the members of the Commission shall have free access, at all times, to the locality of .... Every facility, particularly that of communication, shall be granted to them, in order that they may discharge their mission of supervision.

2/ Annex I to the Fourth Convention, Art. 6.

3/ For the non-constitutiveness of markings, cf. commentary on Art. 53, para. 5, supra.

4/ This article is optional.
Commentary

This article does not specify the composition of the supervisory commission, so as to give the Parties the greatest possible leeway. It may be bipartite and include representatives of the two belligerent Parties.

The Protecting Powers or their substitutes may also carry out supervision within the framework of their general mandate. A neutral and impartial body may similarly be called upon.

This article is optional. Because the localities concerned are in combat zones, it is not possible to impose compulsory supervision, given the practical difficulties its implementation would give rise to on the spot.

Article 4.- Violation of the Agreement

First possibility 5/: If the supervisory Commission observes any facts contrary to the provisions of Article 33 of the Protocol, it shall immediately advise the Power or authorities in whose territory the locality is situated. In serious cases, the Commission shall inform the Power which has recognized the status of the locality. This Power may then either address a warning to the opposing Party, or denounce the present Agreement.

Second possibility 6/: The Party in possession of convincing evidence of the violation of the present Agreement shall address to the other a warning giving a reasonable period of notice. If this warning is ignored, the Party may denounce the present Agreement.

Commentary

This article sets out the successive steps that may be taken when the Agreement is violated.

5/ If there is supervision.
6/ If there is no supervision.
Article 5.— Coming into Force

The present Agreement shall come into force on ... (here follow date and time).

Commentary

Given the circumstances and the urgency with which the Agreement will most often be concluded, it would scarcely be feasible to subject it to ratification. Although it is not stated in the article, the Agreement will be, without doubt, signed in most cases either by the military commanders of the operational zone or by the local civilian authorities, usually, the town council.

Article 6.— Duration

1. Unless the present Agreement is denounced by one or the other of the Parties, it shall remain in force up to the moment when the locality is occupied by one or the other of the Parties.
2. In the event of denunciation, the latter shall come into effect ... hours following notification to the opposing Party.

Commentary

Paragraph 1:
This article provides for the termination of the Agreement either through denunciation by one or the other of the Parties, or through occupation of the locality by the troops of one or the other of the Parties. In this latter case, the locality ceases to fulfil the conditions laid down in Article 53, paragraph 3.

Paragraph 2:
This paragraph needs no comment.
2. Draft Model Agreement creating neutralized localities

Article 1.— Creation and delimitation

1. Under the present Agreement, the Contracting Parties confer, in accordance with Article 54 of the Additional Protocol to the four Geneva Conventions of August 12, 1949 (hereinafter called the Protocol), the status of neutralized locality /on the town of .../ /on the village of .../.

2. The delimitation of this locality shall be as follows: /here follow the geographic co-ordinates of the locality and/or indications fixing its boundaries, by means of natural features or artificial landmarks, such as rivers, lakes, hills, dams, roads, etc. A map may be attached./

Commentary

This article is identical to Article 1 of the first Draft Model Agreement and likewise requires no comment.

Article 2.— Markings

First possibility 7/ : This locality shall be recognized by oblique red bands on a white ground placed on its boundaries, especially on highways, and in places where they are clearly visible. Should the locality be occupied by one of the Parties, the latter shall remove all markings.

Second possibility 7/ : This locality shall not be marked in any way.

Commentary

See the commentary on Article 2 of the first Draft Model Agreement.

7/ The signatories of the present Agreement have the choice of one or the other of these two possibilities.
Article 3.- Supervision

A Commission composed of ... shall supervise whether the locality of ... fulfils the conditions laid down in paragraph 3 of Article 54 of the Protocol. To that end, the members of the Commission shall have free access, at all times, to the locality of ... Every facility, particularly that of communication, shall be granted to them, in order that they may discharge their mission of supervision.

Commentary

This article is identical to Article 3 of the first Draft Model Agreement. Here, however, supervision is compulsory, for the reasons given in the commentary on Article 54, paragraph 2.

Article 4.- Violation of the Agreement

If the supervisory Commission observes any facts contrary to the provisions of Article 54 of the Protocol, it shall immediately advise the Power or authorities in whose territory the locality is situated. In serious cases, the Commission shall inform the Power which has recognized the status of the locality. This Power may then either address a warning to the opposing Party, or denounce the present Agreement.

Commentary

See commentary on Article 4 of the first Draft Model Agreement.

The second possibility contained in the first Draft Model Agreement has not been included here, since supervision is compulsory in this case.
Article 5.- Coming into force

The present Agreement shall come into force on ... (here follow date and time).

Commentary

See the commentary on Article 5 of the first Draft Model Agreement.

Article 6.- Duration

1. Unless the present Agreement is denounced by one or the other of the Parties, it shall remain in force up to the end of hostilities.
2. In the event of denunciation, the latter shall come into effect ... hours following notification to the opposing Party.

Commentary

Paragraph 1:

Like Article 6 of the first Draft Model Agreement, this article provides for the termination of the Agreement through its denunciation by one or the other of the Parties. However, the ratio legis of Articles 53 and 54 8/ not being the same, the latter part of this paragraph had to be worded differently: neutralized localities are intended to remain so until the end of hostilities and it is only then that the Agreement will end.

Paragraph 2:

This paragraph is identical to paragraph 2 of Article 6 of the first Draft Model Agreement and needs no further comment.

8/ Cf. the introduction to Protocol I, Part IV, Section II, Chapter IV.
3. Draft Model Agreement granting special protection to works containing dangerous forces

Article 1.- Creation and delimitation

1. Under the present Agreement, the Contracting Parties confer, in accordance with Article 55 of the Additional Protocol to the four Geneva Conventions of August 12, 1949 (hereinafter called the Protocol), special protection /on the dam of ... /on the dyke of ... /

2. The delimitation of this work shall be as follows: /here follow the geographic co-ordinates of the work, and/or indications fixing its boundaries, by means of natural features or artificial landmarks, such as rivers, lakes, hills, roads, etc. A map may be attached./

Article 2.- Markings

First possibility 9/: This work shall be recognized by oblique red bands on a white ground placed on its boundaries, especially on highways, in places where they are clearly visible. Should the work be occupied by one of the Parties, the latter shall remove all markings.

Second possibility 9/: This work shall not be marked in any way.

Article 3.- Supervision 10/

A Commission composed of ... shall supervise whether the work of ... fulfils the conditions laid down in paragraph 1 (b) of Article 55 of the Protocol. To that end, the members of the Commission shall have free access, at all times, to the ... . Every facility, particularly that of communication, shall be granted to them, in order that they may discharge their mission of supervision.

9/ The signatories of the present Agreement have the choice of one or the other of these two possibilities.

10/ This article is optional.
Article 4.— Violation of the Agreement

First possibility 11/: If the supervisory Commission observes any facts contrary to the provisions of Article 55 of the Protocol, it shall immediately advise the Power or authorities in whose territory the work is situated. In serious cases, the Commission shall inform the Power which has recognized the status of the work. This Power may then either address a warning to the opposing Party, or denounce the present Agreement.

Second possibility 12/: The Party in possession of convincing evidence of the violation of the present Agreement shall address to the other a warning giving a reasonable period of notice. If this warning is ignored, the Party may denounce the present Agreement.

Article 5.— Coming into force

The present Agreement shall come into force on ... (here follow date and time).

Article 6.— Duration

1. Unless the present Agreement is denounced by one or the other of the Parties, it shall remain in force up to the moment when the work is occupied.

2. In the event of denunciation, the latter shall come into effect ... hours following notification to the opposing Party.

Commentary

Since this Draft Model Agreement is similar, mutatis mutandis, to the Draft Model Agreement creating non-defended localities, reference should be made to the commentary on the latter.

11/ If there is supervision.
12/ If there is no supervision.
PRELIMINARY DRAFT
DECLARATION ON THE APPLICATION
OF INTERNATIONAL HUMANITARIAN LAW
IN ARMED STRUGGLES
FOR SELF-DETERMINATION

COMMENTARY
The undersigned plenipotentiaries, in the name of their respective governments:

Considering that the principle of the right of peoples to self-determination is given official sanction in, inter alia, the Charter of the United Nations, the International Covenants on Human Rights, and resolutions of the United Nations General Assembly,

Considering that the implementation of this principle still encounters difficulties and sometimes entails armed struggles which cause great suffering and a large number of victims,

Considering that it is incumbent upon the international community to endeavour to mitigate that suffering,

1. Declare that the Geneva Conventions of 12 August 1949, the Additional Protocol to the said Conventions, and other humanitarian rules of international law limiting the use of weapons and means of injuring the enemy should be applied in armed struggles waged by peoples for their right to self-determination within the meaning of the definition of that right in Article 1 common to the International Covenants on Human Rights, adopted by the United Nations General Assembly on 16 December 1966;

Proposal I : 2. Declare that, failing full application of those provisions, the Parties to such struggles shall in all circumstances observe, by analogy, at least the rules in Article 3 common to the four Geneva Conventions of 12 August 1949, as well as those of the Additional Protocol to that article.

Proposal II : 2. Declare that, failing full application of those provisions, the Parties to the struggles shall in all circumstances observe at least the rules appended to this Declaration.
References

- UN, A/Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see The principle of equal rights and self-determination of peoples).
- UN, A/Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples.
- UN, A/Res. 2446 (XXIII).
- UN, A/Res. 2597 (XXIV).
- UN, A/Res. 2674 (XXV).
- UN, A/Res. 2676 (XXV).
- UN, A/Res. 2852 (XXVI).
- UN, Report of the Secretary-General A/8370, 1971, paras. 134 to 137.

Commentary

General remarks:

When the problem of "liberation" wars was considered at the first session of the Conference, several experts expressed the idea, which received strong support, that to establish a distinct legal instrument such as a Declaration was the best solution to the complex and difficult problem posed by conflicts of that type. Drawing inspiration from that idea, the ICRC proposes the text of the foregoing Declaration. The text is described as a preliminary draft because there are a number of point in abeyance on which the experts will need to pronounce at the second session.
The Declaration might be adopted at a Diplomatic Conference or at some other intergovernmental gathering such as the United Nations General Assembly; it could be signed immediately and could enter into force or be subject to ratification.

Paragraph 1:
It was desired to give the Declaration as general a character as possible, which in fact meets the wishes of the majority of the experts. To this end, of all the texts relative to the principle of self-determination, it was deemed advisable to refer to Article 1 of the 1966 International Covenants on Human Rights. Not only does that article contain a definition of the peoples' right to self-determination, but it is part of one of those instruments which, while not yet in force, enjoy universal scope and recognition.

Paragraph 2:
The words "failing full application" are meant to indicate that, in practice, the principle affirmed in paragraph 1, namely the application of all international humanitarian law valid in international conflicts may, for a number of reasons, encounter material and other difficulties. Full application may frequently not be possible, or it may not be possible for a fairly long time. Until it does become possible - which is the aim that must be pursued - it is nevertheless important that hostilities and other acts of violence carried out during armed struggles for self-determination should be subject to a certain number of minimum humanitarian rules which all those participating in the struggles must observe in all circumstances.

The ICRC proposes two alternatives for the minimum rules. Proposal I has the advantage of being simple: it refers to a body of rules that already exist (Art. 3) or that have been drafted (Additional Protocol). The words "by analogy" clearly show that very frequently those rules cannot be applied as such. They are meant to indicate above all that the reference to Article 3 and the Additional Protocol does not imply that armed struggle for self-determination is regarded as a non-international conflict.

This proposal may, however, also have drawbacks, particularly as it provides for the application of the rules of the Additional Protocol. The latter has, in fact, been formulated in terms of the existence of an "armed conflict", that is, a struggle which already presents a certain degree of intensity (hostilities of a collective nature, organized armed forces, etc.), while armed struggles for self-determination often tend, particularly at the outset, to be
characterized not so much by those features as by individual action, by elements which are usually described as "internal disturbances". Yet even at this stage, it is desirable that those taking part in such struggles should, like the civilian population, have the benefit of minimum rules of protection.

Hence ICRC Proposal II, which implies the establishment of a specific body of rules suited to the types of struggle considered above.

A part of those rules might undoubtedly be based on the principles contained in Article 3 common to the Geneva Conventions and on certain essential rules embodied in the Additional Protocol to that article. In other matters, such as the fate of captured combatants fighting for self-determination, and the protection of civilian population, rules even more liberal than those contained in the Additional Protocol might be contemplated.

The ICRC submits these alternatives to the experts for consideration and, until such time as it learns their opinion, will itself have occasion to study the subject further, so that, if Proposal II is adopted at the second session, it may be able to single out the principal components which are likely to facilitate the rapid establishment of the proposed body of rules.