II
COMMENTARY
part two

Documentary material submitted by the
International Committee of the Red Cross

GENEVA
January 1972
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CONTENTS

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

DRAFT ADDITIONAL PROTOCOL TO ARTICLE 3 COMMON TO THE
FOUR GENEVA CONVENTIONS OF AUGUST 12, 1949............................ 1

CHAPTER I

Scope of the Protocol .............................................................................................. 2
Article 1.- Material field of application ................................................................. 3
Article 2.- Personal field of application ................................................................. 7
Article 3.- Beginning and end of application ......................................................... 8

CHAPTER II

General protection of the population .................................................................... 10
Article 4.- Torture and ill-treatment ................................................................. 12
Article 5.- Terrorism, reprisals, pillage ............................................................. 13
Article 6.- Measures in favour of children ...................................................... 15

CHAPTER III

Protection of the wounded, sick and shipwrecked ........................................ 20
Article 7.- Protection and care ........................................................................... 22
Article 8.- Search ................................................................................................. 24
Article 9.- Role of the population ..................................................................... 25
Article 10.- Medical and religious personnel .................................................. 27
Article 11.- Medical establishments and transports ........................................ 28
Article 12.- Evacuation ....................................................................................... 29
Article 13.- The distinctive emblem ................................................................ 30

CHAPTER IV

Civilian population .............................................................................................. 32
Article 14.- Definition of the civilian population ............................................. 36
Article 15.- Respect for and safeguarding of the civilian population ............ 38
Article 16.- Respect for and safeguarding of objects indispensable to the survival of the civilian population ................................................................. 41
Article 17.- Precautions when attacking ........................................................... 43

CHAPTER V

Combatants ........................................................................................................... 45
Article 18.- Means of combat ........................................................................... 45
Article 19.- Prohibition of perfidy ................................................................... 45
Article 20.- Recognized signs .......................................................................... 45
Article 21.- Emblems of nationality .................................................................. 46
Article 22.- Safeguard of an enemy hors de combat ........................................... 46
Article 23.- Conditions of capture and surrender .......................................... 46
Article 24.- Aircraft occupants ......................................................................... 46
CHAPTER VI

Persons whose liberty has been restricted ........................................ 48

Article 25.- Treatment of combatants who have fallen into
the power of the adversary ........................................ 49

Article 26.- Treatment of persons whose liberty
has been restricted ........................................ 52

CHAPTER VII

Penal prosecutions ...................................................... 57

Article 27.- Individual responsibility .................................. 58

Article 28.- Penal prosecutions against combatants ............. 58

CHAPTER VIII

Relief .......................................................... 63

Article 29.- Relief for the population ................................ 64

Article 30.- Humanitarian assistance ............................ 65

Article 31.- Consignment of essential supplies for
the civilian population ..................................... 67

Article 32.- Recording and information ............................ 69

Article 33.- National Red Cross and other relief societies .... 71

Article 34.- Civil Defence Organizations ........................... 73

CHAPTER IX

Executory provisions .................................................. 74

Article 35.- Regulations ............................................ 75

Article 36.- Special agreements ................................... 75

Article 37.- Co-operation in the observance of
the present Protocol ........................................ 76

Article 38.- Legal status of the Parties to the conflict ...... 78

Article 39.- Dissemination of the present Protocol .......... 79

Article 40.- Rules of application ................................ 81

CHAPTER X

Final provisions .................................................... 82

Article 41.- Signature ............................................ 82

Article 42.- Ratification .......................................... 82

Article 43.- Accession ............................................ 82

Article 44.- Entry into force ...................................... 82

Article 45.- Treaty relations upon entry into force
of the present Protocol .................................... 83

Article 46.- Notifications .......................................... 83

Article 47.- Registration and publication ...................... 83

Article 48.- Authentic texts and official translations ....... 83

ANNEX

Regulations concerning special cases of armed conflicts
not of an international character .................................. 84

DRAFT RESOLUTION CONCERNING DISARMAMENT AND PEACE
TO BE ANNEXED TO THE FINAL ACT
OF THE DIPLOMATIC CONFERENCE ................................. 90
ABBREVIATIONS

Art. Article
chap. chapter
Com. Committee

Commentary, Geneva Conv. 1949

Commentary, First Geneva Conv. 1949

Commentary, Second Geneva Conv. 1949

Commentary, Third Geneva Conv. 1949

Commentary, Fourth Geneva Conv. 1949

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"

Conv. Convention
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<tr>
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<tr>
<td>First Geneva Conv. 1949</td>
<td>Geneva Convention for the Amelioration of the Condition of Wounded and Sick in armed Forces in the Field, of August 12, 1949</td>
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<tr>
<td>Second Geneva Conv. 1949</td>
<td>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949</td>
</tr>
<tr>
<td>Third Geneva Conv. 1949</td>
<td>Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949</td>
</tr>
<tr>
<td>Fourth Geneva Conv. 1949</td>
<td>Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949</td>
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<td>IVth Hague Conv. 1907</td>
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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/1b, 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

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ICRC, Draft Rules, 1956

ICRC, Questionnaire D-O-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-O-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
United Nations General Assembly resolution 2444 (XXIII) of 19 December 1958, "Respect for human rights in armed conflicts"

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

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

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

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

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


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

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


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 ARTICLE 3 COMMON TO THE FOUR GENEVA
CONVENTIONS OF AUGUST 12, 1949

COMMENTARY
CHAPTER I

SCOPE OF THE PROTOCOL

General references

- Common Art. 3.
- First Geneva Conv. 1949, Art. 5.
- Third Geneva Conv. 1949, Art. 5 (1).
- Fourth Geneva Conv. 1949, Arts. 6 and 13.
- UN, A/Res. 2676 (XXV).
- UN, A/Res. 2852 (XXVI).
- UN, A/Res. 2853 (XXVI).
- Commentary, Third Geneva Conv. 1949, pp. 34 to 37.
- ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, Com. II, paras. 99, 100, 104 to 110 and 129 to 191; Annexes, CE/Plen./2 bis, Canadian Draft Protocol to the Geneva Conventions of 1949 relative to Conflicts Not International in Character, prepared and submitted by the Canadian Experts, Art. 1; Explanatory Notes to the Draft Protocol, Art. 1; CE/Com.II/1, 5, 6, 8 corr. 1, 9, 10, 11, 12, 13, 17, 17b, 18, pp. 61 to 65.
- UN, Report of the Secretary-General A/8052, 1970, paras. 130 to 134 and 137 to 142.
- UN, Report of the Secretary-General A/8370, 1971, paras. 115 to 119.
Article 1. - Material field of application

The present Protocol, which elaborates and supplements Article 3 common to the four Geneva Conventions of August 12, 1949 (hereinafter referred to as common Article 3), shall apply to all conflicts not of an international character referred to in common Article 3 and, in particular, in all situations where, in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority.

References

- UN, A/Res. 2676 (XXV).
- UN, A/Res. 2852 (XXVI).
- UN, A/Res. 2853 (XXVI).
- Commentary, Third Geneva Conv. 1949, pp. 34 to 37.
- ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, Com. II, paras. 99, 100, 104 to 110 and 129 to 191; Annexes, CE/Plen./2 bis, Art. 1; CE/Com.II/1, 5, 6, 8 corr. 1, 9, 10, 11, 12, 13, 17, 17b, 18, pp. 61 to 65.
- UN, Report of the Secretary-General A/8052, 1970, paras. 130 to 134 and 137 to 142.
- UN, Report of the Secretary-General A/8370, 1971, paras. 115 to 119.

Commentary

First part of the sentence:

The present Protocol, which elaborates and supplements Article 3 common to the four Geneva Conventions of August 12, 1949 (hereinafter referred to as common Article 3), shall apply to all conflicts not of an international character referred to in common Article 3 ...

This provision shows the basic principle on which the whole of the Draft Additional Protocol is founded: the Protocol will be applicable to all cases of armed conflict not of an international character as referred to in common Article 3.
Common Article 3 does not explain the notion of armed conflict not of an international character; it merely stipulates that common Article 3 shall be applicable "in the case of armed conflict not of an international character". However, it has generally been agreed that the conflicts referred to in common Article 3 are those which are characterized by hostilities involving armed forces within the confines of a single country 1/. During discussion of the definition of armed conflict not of an international character, many government experts pointed out the need to make a clear distinction between situations constituting armed conflict not of an international character and internal disturbances and tensions or even acts of banditry or criminal behaviour covered by civil law 2/. Three experts submitted a joint proposal specifically excluding such minor disturbances and offences under State laws 3/. Accordingly, Article 1 of the present Draft Protocol states that the said Protocol shall be applicable to cases of armed conflict, as referred to in common Article 3.

Many experts admitted that there was a need to develop or supplement the provisions in Article 3 and that this should be done by means of one or more additional protocols despite the difficulties existing in this connection.

... and, in particular, in all situations where, in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority.

Common Article 3 leaves authorities involved considerable freedom to assess the nature of events occurring on their territory. However, the ICRC, concerned to note that governments were refusing to apply common Article 3 by denying the existence of a conflict not of an international character, wondered whether it might not be better to define the notion of


armed conflict not of an international character in order to limit this freedom of assessment. 4/ It consequently submitted to the first session of the Conference of Government Experts a number of draft rules which, while being in no way exhaustive but merely serving as examples, could be used to establish the existence of an undeniable case of conflict not of an international character.

Both during the general discussion and when the question of "definition" was being examined, the experts of Commission II concluded that there was a need for a definition of armed conflict not of an international character 5/ and they appointed a Drafting Committee to elaborate such a definition. The Drafting Committee worked on the basis both of the proposals made by the ICRC and those submitted by the experts 6/. It submitted to Commission II a draft definition as a basis for the application of the Protocol, thereby opening the way for discussion. However, the Commission was unable to agree on a final wording and decided that the ICRC should continue the work.

The ICRC concentrated its efforts on paragraph 1 of the draft definition drawn up by the Drafting Committee, while trying to take paragraph 2 into account 7/.

The ICRC tried to define the notion of armed conflict not of an international character by means of a flexible and general formula which was meant to serve as an example and which was not, therefore, intended to cover all situations constituting armed conflict not of an international character ("in particular").

It nevertheless tried to offer a fairly clear definition of armed conflict not of an international character, in order to prevent the High Contracting Parties from evading their obligations, and to show, without the slightest doubt, that the Protocol does not refer to simple internal disturbances or tensions.


The situations envisaged must involve a number of material elements in order to be considered as armed conflicts not of an international character, i.e.

There must be hostilities, that is, acts of violence, committed by means of arms, by the Parties to the conflict with the intention of forcing the adversary to submit to their will. Such hostile actions must be of a collective nature and be committed by a group having reached a degree of organization and able to carry out concerted action. Such hostilities cannot, therefore, be the acts of isolated individuals, and the opposing forces must consequently be organized armed forces under the command of a responsible authority. That implies that such armed forces are subject to a system of internal discipline which enables them to respect all or some of the law of armed conflicts 8/. That does not mean that the degree of organization cannot vary from that of the regularly constituted and trained government armed forces to that of more or less structured insurgent forces; there must, however, be a minimum of organization below which it is not permissible to go 2/.

Finally the hostilities must take place in the territory of one of the High Contracting Parties.

In this way, the ICRC has tried to synthesize paragraphs 1 and 2 of the draft drawn up by the Drafting Committee, in accordance with the wishes of certain experts 10/. It considered that when hostilities meet a number of objective criteria - and a sufficient degree of organization of the armed forces is a determining factor in this connection - it was no longer necessary to distinguish between the hostile activities of the armed forces of the authority in power and those of rebel armed forces. It considers that, in this way, it has provided a flexible and general formula covering all situations constituting armed conflict between armed forces which have reached a degree of organization.

8/ See Art. 25, Chap. VI and Art. 28, Chap. VII of Draft Protocol II.

2/ See Art. 25, Chap. VI and Art. 28, Chap. VII of Draft Protocol II.

It rejected certain criteria such as the duration and gravity of the armed conflict and the intensity of hostilities, considering them to be too subjective and likely to lead to endless discussion of the conditions in which they were to be applied and, furthermore, because they were covered by the principle of organization.

Article 2. - Personal field of application

The present Protocol shall apply to all persons, whether military or civilian, combatant or non-combatant, who are in the territory of one of the High Contracting Parties where an armed conflict within the meaning of Article 1 of the present Protocol is occurring.

References


Commentary

This provision is based on Article 1 (2) of the Draft Protocol prepared and submitted by the Canadian experts. Its aim is to make it clear that the provisions of the Protocol shall be applicable, without any distinction, to all persons who are in the territory of one of the High Contracting Parties where an armed conflict not of an international character is occurring.

The effect of this provision is to extend the scope of the rules applicable in cases of armed conflict not of an international character to cover combatants. In fact, common Article 3 is applied only to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, ..." while the present Protocol, which actually contains provisions
concerning combatants, must be applied to all persons, combatant and non-combatant, military and civilian.

Article 3.- **Beginning and end of application**

The present Protocol shall apply from the time when the armed conflict begins until the end of hostilities. However, after the end of hostilities, persons who are interned or detained after sentence has been passed in respect of an act committed in relation to the armed conflict, and who have not been released, as well as persons arrested on charges relating to the armed conflict, shall enjoy the protection of Article 26 of the present Protocol for as long as their liberty shall be restricted.

**References**

- First Geneva Conv. 1949, Art. 5.
- Third Geneva Conv. 1949, Art. 5 (1).

**Commentary**

The words "from the time when the armed conflict begins" are meant to show that the present Protocol is to be applied from the very first acts of violence, even if armed combat does not continue and has claimed very few victims.

The Protocol shall cease to be applied at the end of hostilities, that is when a general cease-fire is declared.

All measures, with the exception of those of a penal nature, restricting the freedom of persons who have committed an act in connection with the armed conflict, should, in principle, cease thenceforth. Yet, for security reasons, the victorious Party frequently continues to hold captive internees or detainees who could endanger its existence. Likewise, it may happen that, after hostilities, such authorities might resort to mass arrests of persons who, in one way or another, might have acted against them during hostilities.
Such persons might be held for an unspecified, and frequently very long, period. It is therefore important that they should enjoy at least a minimum of protection. This is the reason for the clause which states that they shall enjoy the protection of Article 26 of the present Protocol for as long as their liberty is restricted.

This is not an excessive requirement, for Article 26 lays down the minimum treatment to be applied to all detainees under all circumstances.

Remark

Should any interned combatants who may be subject to Article 25 of the present Draft Protocol not be released at the end of hostilities, they should be granted prisoner-of-war treatment throughout the duration of their captivity. The ICRC has prepared an alternative proposal to this effect, which it is submitting for the consideration of the experts:

"The present Protocol shall apply from the time when the armed conflict begins until the end of hostilities. However, after the end of hostilities, persons who are interned or detained after sentence has been passed in respect of an act committed in relation to the armed conflict, and who have not been released, as well as persons arrested on charges relating to the armed conflict, shall enjoy the protection of Articles 25 and 26 of the present Protocol for as long as their liberty is restricted."
CHAPTER II

GENERAL PROTECTION OF THE POPULATION

General references

- Common Art. 3.
- First Geneva Conv. 1949, Arts. 12 (2) and 46.
- Second Geneva Conv. 1949, Arts. 12 (2) and 47.
- Universal Declaration of Human Rights, 1948, Art. 5.
- International Covenant on Civil and Political Rights, 1966, Arts. 6 (5) and 7.
- UN, A/Res. 1386 (XIV), Declaration of the Rights of the Child.
- UN, ECOSOC, Res. 1515 (XLVIII).
INTRODUCTION

Chapter II is intended to institute general protection for the population as a whole against the effects of armed conflict and especially against the arbitrary decisions of the Party to the conflict exercising power over it.

A general provision sanctioning the principle of unconditional respect for the individual might have seemed to provide a sufficient guarantee for the community at large. However, as early as 1949, the many examples of barbaric acts perpetrated during the World Wars led the High Contracting Parties to expressly prohibit, during international conflicts, resort to torture and cruel treatment, collective punishments, pillage and reprisals against persons protected by the Conventions. They likewise imposed a partial prohibition on such practices during conflict not of an international character. In fact, although common Article 3 provides protected persons with a guarantee of humane treatment, the principle is further defined by the prohibition of acts incompatible with such treatment.

Articles 4, 5 and 6 of the present Draft Protocol are an attempt to strengthen and clarify the principle of humane treatment by imposing a permanent and absolute prohibition on certain acts – terrorism, reprisals, pillage, rape and indecent assault – which are not explicitly mentioned in the list of acts forbidden by common Article 3. In addition, as the prohibition of torture, stipulated in common Article 3 (1) (a), has frequently proved ineffectual, an effort has been made to strengthen it by calling upon the responsible authorities of the Parties to the conflict to take all practical measures to ensure that such acts do not take place. Finally, the protection of that part of the community not engaged in fighting has been reaffirmed, especially of children, mothers of infants and women responsible for their care.
Article 4.—Torture and ill-treatment

In order that the prohibition stipulated in common Article 3 (1)(a) should obtain its fullest effect, the Parties to the conflict shall take all necessary measures to ensure that their military or civilian agents should not commit, nor issue orders to commit, nor condone acts of torture or brutality.

References
- Common Art. 3 (1) (a).
- First Geneva Conv. 1949, Art. 12 (2).
- Second Geneva Conv. 1949, Art. 12 (2).
- Fourth Geneva Conv. 1949, Art. 32.
- Universal Declaration of Human Rights, 1948, Art. 5.

Commentary

Common Article 3 (1) (a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture".

Furthermore, the prohibition of torture has been sanctioned by many international instruments, especially the European Convention on Human Rights (Art.3) and the International Covenant on Civil and Political Rights (Art.7). It has been dealt with in provisions that cannot be waived even in cases of exceptional public emergency or armed conflict.
Despite this explicit prohibition, cruel treatment, brutality and torture have been frequently practised during the armed conflicts not of an international character which have occurred since 1949. What is worse is that there are those who consider torture as an effective, and therefore indispensable, means of countering terrorism.

The ICRC, which is deeply concerned by this development, did not want simply to reiterate an existing prohibition. It felt that it would be more to the point if the Parties to the conflict were to undertake to give this prohibition full effect by taking all measures necessary to ensure that such acts were no longer committed. They would therefore have to give their military and civilian agents precise instructions to that effect and would have to supervise their activities.

Article 5.- Terrorism, reprisals, pillage

1. Acts of terrorism, as well as reprisals against persons and objects indispensable to their survival, are prohibited.

2. Pillage is prohibited.

3. Women and children shall be protected, in particular against rape and any form of indecent assault.

References

- First Geneva Conv. 1949, Art. 46.
- Second Geneva Conv. 1949, Art. 47.
- Third Geneva Conv. 1949, Art. 13 (3).
- Fourth Geneva Conv. 1949, Arts. 27 (2) and 33.
Commentary

Paragraph 1:

The four Conventions prohibit reprisals against persons and property under their protection, just as they forbid acts of terrorism in international armed conflicts. However, common Article 3 does not reiterate these prohibitions in connection with armed conflicts not of an international character, but that does not in any way mean that such acts are permitted.

Acts of terrorism against civilians should be categorically and explicitly forbidden for they run counter to all principles based on humanitarian and just considerations. Such practices are all too frequent in armed conflicts not of an international character. In fact, Parties to a conflict, which try by every possible means to ensure the support of the people, without which victory is not possible, have no hesitation in putting such people under pressure by committing acts which affect guilty and innocent without discrimination. There are those who feel that they cannot do without terrorism, at the beginning of the conflict at least, because of the effective way in which it establishes their hold on the people. The ICRC considers that, as is the case with torture, which is in a way the counter-measure against terrorism, such acts should be explicitly prohibited.

As the ICRC has pointed out 11/, although reprisals are not mentioned in the list of acts prohibited by common Article 3, it goes without saying that any measure of reprisal involving one of the acts mentioned in sub-paragraphs (a) to (d) thereof is forbidden, as are all measures which are incompatible with the humane treatment unconditionally required by the first paragraph of common Article 3 (1). Some people have occasionally cast doubt thereon and so the ICRC has considered it necessary to categorically stipulate this prohibition.

Paragraph 2:

The scope of this prohibition is general, as is the case with Article 33 (2) of the Fourth Convention and its purpose is to spare people the suffering caused by the theft or destruction of their property. It is a question of protecting the people both against pillage resulting from individual acts of discipline and against organized pillage.

Paragraph 3:
This provision is based on Article 27 (2) of the Fourth Convention which condemns certain acts committed against women and children in times of armed conflict. It should be remembered that such acts have been, and will continue to be, prohibited throughout the world and in all circumstances. Women and children have absolute right to respect for their dignity without any unfavourable distinction being made.

Article 6.— Measures in favour of children

1. 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.

2. To this end, the Parties to the conflict undertake, at least:
   (a) to ensure the identification of children, particularly by making them wear identity discs;
   (b) to take care that children who are orphaned or separated from their families as a result of armed conflict are not left abandoned;
   (c) to endeavour to conclude local agreements for the removal of children from combat zones; such children shall be accompanied by persons responsible for ensuring their safety; all necessary steps shall be taken to permit the reunion of members of families temporarily separated;
   (d) to take care that children under fifteen years of age do not take any direct part in hostilities.

3. The death penalty shall not be pronounced on civilians below eighteen years of age at the time when the offence was committed, nor on mothers of infants or on women responsible for their care. Pregnant women shall not be executed.

References
- International Covenant on Civil and Political Rights, 1966, Art. 6 (5).
- UN, A/Res. 1368 (XIV), Declaration of the Rights of the Child.
- UN, ECOSOC, Res. 1515 (XLVIII).

Commentary

General remarks:

Various contacts, some of them quite recent, have been made with the main organizations concerned, which were sent a "questionnaire on the protection of children in time of armed conflict" (ICRC, D 1221, 1971). In the 1972 proposals, the experience and suggestions of those organizations were taken into consideration to a great extent.

One of the delicate questions was whether or not criteria should be set with regard to children and, if so, what they should be. The Geneva Conventions do not define the meaning of "children". Medical, sociological or legal criteria might be considered, and also the fact that the age up to which schooling is compulsory varies throughout the world from 14 to 16 years and one of the main organizations involved is concerned, in practice, with boys up to 15 and girls up to 18 years old. The relevant provisions of the Fourth Convention, which applies to armed conflicts of an international character, adopt age as the criterion depending on the case in point.

12/ E.g. UNICEF, the International Union for Child Welfare (IUCW), the World Confederation of Organizations of the Teaching Profession (WCOTP), the World Medical Association (WMA), etc.

13/ The Conventions refer to children (Art. 50); children under seven years (Arts. 38 (5) and 50 (5)); children under twelve (Art. 24 (3)); children under fifteen (Arts. 14 (1), 37 (5) and 50 (5)); persons ... under eighteen years of age (Art. 68 (4)). As will be seen, the age criterion occasionally offers certain guarantees in this case; it has been included only in paras. 2 (d) and 3.
Paragraph 1:

It seemed necessary to start by setting a general standard for the type of protection to which children are entitled 14/. Specific cases of such protection are given in the subsequent paragraphs.

Paragraph 2:

The aim of sub-paragraph (a) of this provision is the same, with regard to armed conflicts not of an international character, as that of Articles 24 (3), 50 (2) and 136 of the Fourth Convention, i.e. when, by mischance, children are separated from their families, their re-assembly will be made possible or easier and they will in all cases be readily identifiable. One practical measure is to provide children with identity discs but the Parties to a conflict are free to choose the identification system which they consider best 15/.

Sub-paragraph (b) of this provision takes the ideas expressed in Articles 24 (1) and 50 (3) of the Fourth Convention and applies them to armed conflicts not of an international character.

Sub-paragraph (c) of this provision refers to a situation which is further dealt with in Article 12 (Evacuation) 16/. As the words "removal from combat zones" show, it is a matter of protecting children from the more serious dangers resulting from hostilities and, in order to do this, it is frequently advisable to move them, this being an exceptional and, if possible, temporary measure as the second part of the sentence shows. This particular operation should in principle, always be carried out on the child's national territory for it has been found to be harmful to a child to

14/ See CE/Com.III/32.

15/ Art. 24 (3) of the Fourth Convention makes such allowance for children under twelve, for the XVIIth International Red Cross Conference (Stockholm, 1948) considered that upwards of that age children were generally capable of stating their own identity; however, it should be pointed out that certain categories of children especially the deaf and dumb or the mentally handicapped are still in need of such measures even beyond the age of twelve. (Cf. Commentary IV, Art. 24).

16/ Art. 12 must always be interpreted in the best interest of the child and especially in accordance with the principle of family unity; expectant mothers and maternity cases cannot be arbitrarily separated from their other young children.
remove him from his natural environment 17/. The wording of this article rules out the possibility of deporting children or forcing their parents to send them abroad.

Sub-paragraph (d) covers all those eventualities which need to be considered in order to ensure the effective protection of children 18/. The child, more than anyone else, deserves respect under all circumstances but how are combatants to observe such a rule if that same child indulges in acts of hostility? In this respect, the responsibility of all Parties to conflict is involved; that of the military and civilian authorities alike. The problem is twofold. Neither regular nor irregular armed forces should recruit, or allow to be recruited as combatants, children under fifteen years of age. This age limit, based on the relevant provisions of the Fourth Convention, provides a guarantee, for in the absence of a clear stipulation of this kind, children below fifteen are likely to be called up.

Paragraph 3:

This provision appears to concern three categories of persons, i.e. civilians below eighteen years of age, mothers of infants (or women responsible for their care) and pregnant women.

The prohibition of the application of the death penalty to children is based on Article 68 (4) of the Fourth Convention and Article 60 of the Draft Protocol I.

To be as broad as possible, the protection of children should take account of all eventualities, especially those affecting mothers or, where there is no mother, the woman who replaces her. How important the mother's presence is to an infant must not be forgotten, so that, the ideas mentioned in principle 6 of the "Declaration of the Rights of the Child" should be adopted for application in cases of armed conflict. The principle in question states that "The child for the full and harmonious development of his or her 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".

17/ However, the very exceptional possibility of a child's receiving special treatment or care abroad should not be rejected out-of-hand, if essential to the cure or surgical treatment of the child and provided that the permission of the parents or authorities responsible for the child is obtained.

18/ See CE/Com.III/23 (i) and (ii).
This is intended to cover both legitimate and adoptive mothers and women responsible for the care of a child.

The last sentence concerns the unborn child. Hitherto, there has been a tendency to protect the expectant mother as such rather than the unborn child. It is the latter idea which is envisaged here. When, in accordance with the custom or practice of States which still apply the death penalty, the execution of an expectant mother is postponed or waived, the intention is to save the life of the child 19/.

19/ The experts will decide on the two degrees considered in this paragraph (which are based on Art. 68 (4) of the Fourth Convention, and Art. 6 (5) of the Covenant on Civil and Political Rights respectively), i.e. not to sentence expectant women to death or not to carry out the sentence.
CHAPTER III

PROTECTION OF THE WOUNDED, SICK AND SHIPWRECKED

General references

- Common Art. 3.
- First Geneva Conv. 1949, Arts. 12, 15, 18, 19, 24, 26, 28, 35, 38.
- Second Geneva Conv. 1949, Arts. 12 and 18.
- Fourth Geneva Conv. 1949, Arts. 16, 17, 32.
- Draft Rules for the Protection of the Wounded, Sick and Civil Medical and Nursing Personnel in Time of Conflict, presented by the International Committee of the Red Cross to the International Conferences of the Red Cross in Vienna (1965) and Istanbul (1969).
- UN, Report of the Secretary-General A/8370, 1971, para. 123 and Annex II.
INTRODUCTION

Common Article 3 (2) states "The wounded and sick shall be collected and cared for". Although independent of the first sub-paragraph of paragraph 1, this provision supplements the idea of humane treatment. Furthermore - and here lies the crux of the matter - it reaffirms, for cases of armed conflicts not of an international character, the underlying principle of the First Convention.

Nevertheless, common Article 3 was not long in showing itself to be inadequate in this respect. The text says nothing of the protection to be afforded doctors and other medical personnel, medical establishments and transports, or of the respect due to the sign of the red cross.

This situation prompted the ICRC to submit to the first session of the Conference of Government Experts a Draft Additional Protocol to the Conventions Relative to Conflicts not International in Character 20/; this Draft, comprising six provisions, was, in the mind of its authors, intended to constitute only one chapter of an Additional Protocol to common Article 3.

Commission I examined that draft during the first session of the Conference of Government Experts. After six meetings, the Commission elected a Drafting Committee which, on the basis of proposals made by the ICRC, prepared a new text. The new draft was then examined by the Commission which adopted it with certain amendments 21/.

This text, as adopted by Commission I, has been incorporated in the present Draft Protocol, mainly in Chapter III. Although every effort was made to change the provisions as little as possible, as they had been unanimously accepted by the members of Commission I, some changes in presentation were inevitable, due in the main to the regrouping of certain subjects.

For instance, what was Article 2, Search and Recording, has now become Article 8, Search; the second paragraph, which refers to the recording of enemy wounded, sick and dead, is to be found, in a slightly different guise in Article 32, Recording and Information, of the present Draft Protocol and the article in question is quite general as it applies to all victims of armed conflicts not of an international character.


The basic principles of the former Article 7, Medical assistance by other States or by impartial humanitarian organizations, now appear in Article 30, Humanitarian assistance, which forms part of Chapter VIII on Relief.

Lastly, the erstwhile Article 9, Legal Status of Parties to the conflict, appears in Chapter IX on Executory Provisions.

Article 7.— Protection and care

1. All wounded, sick and shipwrecked persons, military and civilian, 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.

3. All unjustified acts, whether of commission or omission, that endanger their person or their physical and mental health are prohibited.

References

- Common Art. 3.
- Third Geneva Conv. 1949, Art. 13 (1).
- Fourth Geneva Conv. 1949, Arts. 16 (1) and 32.
- Draft Rules for the Protection of the Wounded, Sick and Civil Medical and Nursing Personnel in Time of Conflict, presented by the International Committee of the Red Cross to the International Conferences of the Red Cross in Vienna (1956) and Istanbul (1969). (Hereinafter referred to as the Draft Rules).
Commentary

Paragraph 1:

The ICRC felt that it was necessary to strengthen the protection of the wounded and the sick by recalling the respect due to them under all circumstances 22/. Commission I accepted the opinion that all wounded and sick persons must be accorded special protection. It added maternity cases to those persons already considered as wounded and sick within the meaning of Article 16 of the Fourth Geneva Convention 23/.

The opinion was expressed that such protection should similarly be extended to children under 15 years of age. However, Commission I decided that only the wounded, sick and the like should be mentioned here as it considered that children were already covered by provisions on general protection applicable to civilians and that, should it appear advisable to prepare new rules, they should come within the framework of the protection of the civilian population. In fact, the special measures for the welfare of children laid down by the Fourth Convention do not appear in common Article 3. Aware of the urgent need for basic protection for children in cases of armed conflict not of an international character, the ICRC prepared a draft provision which will be found in Article 6 of Chapter II, on the General protection of the population.

Paragraph 2:

It is not enough simply to respect the wounded, the sick and the shipwrecked; they must be cared for also. Consequently, the duty to abstain is accompanied by an obligation to take definite and active measures to ensure that such persons benefit from medical treatment and care immediately and without any discrimination whatsoever.

Commission I worded the prohibition of discrimination as follows: "... without any adverse distinction or discrimination founded on race, colour, caste, nationality, religion, political opinion, sex, birth, wealth or any other similar criteria".

However, this principle, which reminds us that when faced with suffering, we must no longer make any distinction between comrades in arms and adversaries, is to be found


in common Article 3 in the form of an non-exhaustive list - "or any other similar criteria" - which blocks all loopholes. As this principle affects the whole of the Additional Protocol to common Article 3, it did not seem appropriate to repeat it in this provision.

**Paragraph 3:**

The idea, contained in the text submitted by the ICRC 24/, of reinforcing the protection of the wounded and the sick by explicitly prohibiting acts which endanger health - especially pseudo-medical experiments - and by forbidding voluntary or unjustified omissions, was accepted by Commission I as being applicable to armed conflicts both international and not international in character.

**Article 8. - Search**

At all times, particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded, sick and shipwrecked and to ensure their adequate care.

**References**

- First Geneva Conv. 1949, Art. 15 (1).
- Second Geneva Conv. 1949, Art. 18 (1).
- Fourth Geneva Conv. 1949, Art. 16 (2).

Commentary

This article reproduces, with a view to their extension to cover armed conflicts not of an international character, those provisions of the Geneva Conventions which relate to the search for the wounded, the sick and the shipwrecked. 25/

In its original proposal, the ICRC had amalgamated the question of seeking the wounded, the sick and the dead with the recording thereof. The article entitled "Search and Recording" had a second paragraph which reads as follows:

"Parties to the conflict shall endeavour to communicate to each other all details on enemy wounded, sick and dead in their hands" 26/.

Commission I discussed ways in which it might be possible to adapt the rule on communicating to the opposing Party details of wounded, sick and dead, in order to make that rule applicable in cases of armed conflict not of an international character. During the discussion it was pointed out that it might occasionally be difficult to make such communications. It was therefore decided to word the rule in such a way that, should it be impossible to communicate the relevant information, the Party on which such an obligation was incumbent would have to publish it 27/.

In the end, the ICRC decided in favour of settling all the matters relating to recording and information by a single provision - Article 32 of the present Draft Protocol - which would be valid for all victims of armed conflicts.

Article 9.- Role of the population

1. The civilian population shall respect the wounded, sick and shipwrecked and refrain from committing acts of violence against them.
2. No one shall be molested or convicted for having tended the wounded, sick and shipwrecked.

References
- First Geneva Conv. 1949, Art. 18 (1) in fine and (2).

Commentary

Paragraph 1:
The first paragraph of the above-mentioned article is a reminder of the principle of inviolability which appears at the end of Article 18 (2) of the First Convention: "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence."

Paragraph 2:
The second paragraph explicitly forbids penalties against any person for having tended the wounded or sick.

The reaffirmation of these two basic principles in connection with armed conflict not of an international character, was necessary in view of the very nature of the conflict. Hate between brothers at daggers-drawn can be such that it becomes necessary to recall the respect due to the wounded and sick in all circumstances and without distinction.

Furthermore, the Parties to a conflict which rely on the support of the civilian community, and do not hesitate, where necessary, to force civilians to tend their wounded and sick, must respect the principle that people cannot be penalized for such relief work.

Moreover, it is pointed out that Article 18 of the First Convention, from which the above-mentioned article is drawn, is based on the fundamental principle that the wounded and sick must not only be respected, but also tended forthwith. This implies that the military authorities must be able to call on the inhabitants to collect and tend the wounded and sick but, on the other hand, these same inhabitants shall be authorized to tend the wounded and sick of their own accord. These ideas are not explicit in Article 9 of the present Draft Protocol, so that it might be as well to add to this provision an opening paragraph reading as follows:

"The Parties to the conflict may call on the civilian population to collect the wounded, sick and shipwrecked;
likewise the civilian population shall be authorized to collect and tend the wounded, sick and shipwrecked of their own accord”.

Article 10. - Medical and religious personnel

Military and civilian medical personnel as well as chaplains and other persons carrying out similar functions shall, in all circumstances, be respected and protected throughout their mission. Should they fall into the hands of the adverse Party, they shall be likewise respected and protected; they shall be granted all facilities necessary for the discharge of their functions and shall not be compelled to carry out tasks unrelated to their mission.

References
- First Geneva Conv. 1949, Arts. 24, 26 (1), 28 (2).

Commentary
First sentence:
Military and civilian medical personnel as well as chaplains and other persons carrying out similar functions shall, in all circumstances, be respected and protected throughout their mission.

As pointed out in the documents that the ICRC prepared for the first session of the Conference of Experts, common Article 3 has an obvious shortcoming where the wounded and sick are concerned, i.e. no express mention is made of protection for doctors, other members of the medical personnel, and religious personnel.

Two important stages have to be passed in order to make good this shortcoming:

Firstly, the Conventions applicable to international armed conflict have to be supplemented to ensure that, regardless of the circumstances, civilian medical personnel
are entitled to respect and protection while carrying out their humanitarian mission; the Conventions have for a long time embodied such a provision for the benefit of military medical personnel. 28/ It is true that civilian personnel have not totally lacked protection as several of the provisions of the Fourth Convention apply to civilian hospitals and certain categories of civilian personnel. It does, however, appear necessary that such protection be clearly stipulated in a general provision.

Secondly, such protection has to be extended to cover both military and civilian medical personnel in armed conflict not of an international character. 29/

These proposals were accepted by Commission I. The final text relating to armed conflicts not of an international character includes a provision (now Article 10, previously Art. 4) 30/, which confirms protection for members of the medical and civilian personnel throughout their mission.

Third sentence:

they shall be granted all facilities necessary for the discharge of their functions and shall not be compelled to carry out tasks unrelated to their mission.

In accordance with a well established principle, the medical personnel must be enabled to continue its mission for as long as is necessary.

Article 11.- Medical establishments and transports

1. Fixed establishments and mobile medical units, both military and civilian, which are solely intended for the care of the wounded, sick and shipwrecked, shall in no circumstances be attacked, but shall, together with their equipment, at all times be respected and protected by the Parties to the conflict.

2. Transports of wounded, sick and shipwrecked persons, or of medical personnel or equipment, shall be respected and protected in the same way as mobile medical units.

References
- First Geneva Conv. 1949, Arts. 19 (1) and 35 (1).

Commentary
Even though Article 7 and 10 of the present Draft Protocol strengthen protection for the wounded, sick and shipwrecked, both military and civilian, and for military and civilian medical personnel responsible for their care, it would be as well to extend such protection to fixed and mobile medical establishments and units, to their equipment, and to medical transports assigned exclusively to the care of the wounded and sick.

Article 12.—Evacuation

The Parties to the conflict shall endeavour to conclude local agreements for the removal from areas where hostilities occur of the wounded, sick and shipwrecked, the infirm, expectant mothers and maternity cases.

References
- First Geneva Conv. 1949, Art. 15 (2).
- Second Geneva Conv. 1949, Art. 18 (2).
Commentary

The documentation that the ICRC submitted to the first session of the Conference of Government Experts did not contain any provision relating to the evacuation of the wounded and sick. However, the Draft Protocol to Common Article 3 prepared and submitted by the Canadian Experts contained a provision on evacuation which was worded as follows: "The Parties to the conflict shall endeavour to conclude local arrangements for the removal from areas where hostilities are taking place of wounded or sick, infirm, expectant mothers, maternity cases, and children under fifteen".

Commission I adopted the above-mentioned provision on the evacuation of the wounded and the sick, influenced by the existing provisions in the Conventions and the Draft Protocol prepared and submitted by the Canadian Experts.

Article 13.- The distinctive emblem

1. The emblem of the red cross (red crescent, red lion and sun) on a white background is the distinctive emblem of the medical services of the Parties to the conflict and of Red Cross organizations. It shall not be used for any other purpose and shall be respected in all circumstances.

2. From the outbreak of hostilities the Parties to the conflict 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. 38.

Commentary

Here, once again, common Article 3 was felt to be seriously lacking.

Commission I decided that the distinctive and recognized emblem of the red cross (the red crescent and red lion and sun) could be used in armed conflicts not of an international character to increase the protection which is to be afforded medical establishments and transports and their personnel and that it is to be respected under all circumstances, that is, to the same extent as in international conflicts.
CHAPTER IV

CIVILIAN POPULATION

General references /*

- 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 intrusted with studying and reporting on this revision of the laws of war, assembled at The Hague on 11 December 1922.
- ICRC, Draft Protocol I, 1972, Part IV.
- 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).

*/ Most of the texts mentioned in the references are contained in the annexes to the 1971 documents (see ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Annexes I to XXV, and CE/8b, Annexes).
INTRODUCTION

1. **1971/1972 Drafts**

With the aforementioned references and particularly with the documents which the ICRC submitted to the first session of the Conference of Government Experts, in 1971, the introduction to this Chapter may be confined to two points: a description of the trend in the conception and preparation of these drafts as compared with the 1971 drafts, and a comparison of this Chapter IV with the Convention relative to the protection of civilian persons in time of war (hereinafter referred to as the Fourth Convention). As regards the protection of the civilian population, the main differences between the 1971 draft and the present drafts lie in their field of application, their economy and, at times, the range of subjects they cover 32/.

2. **Field of application**

The aim of the 1971 draft, like that of the 1956 Draft Rules 33/, was to cover all armed conflicts, the standard minimum rules proposed in the report of the Secretary-General

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33/ See ICRC, Draft Rules, 1956, Art. 2.
of the United Nations 34/, and the relevant international resolutions 35/. One expert observed 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" 36/. Methods of conventional warfare, guerrilla warfare, anti-guerrilla warfare, blockade and economic warfare therefore tallied and merged, whatever the type of armed conflict, and the situation of the civilian population was as precarious and threatened in one case as in another.

Nevertheless, the idea of a Protocol relating to the protection of the civilian population and applicable to all types of armed conflict, was not retained by the majority of the government experts, who thought a distinction should be maintained between an international armed conflict and an armed conflict not international in character, in view of the specific features of either type of conflict, even if the distinction might at times be very tenuous. For the protection of the civilian population and for other subjects, the ICRC has preferred to submit rules applicable in an international armed conflict (contained in Draft Protocol I, Chapter IV) and rules applicable in an armed conflict not international in character, which often embody the essence of the rules valid in the case of an international conflict (see Protocol II, Arts. 14, 15, 16, 17 contained in this Chapter IV and in Arts. 6, 29, 30, 31 and 34).

3. Economy of the Draft

The guiding idea underlying the ICRC's 1971 proposals, namely to make a distinction between basic rules and regulations of execution, was not taken into consideration because some of the experts did not regard it as opportune 37/. In the present draft of Chapter IV, therefore, all the rules are alike in value. The 1971 proposals were designed to establish a distinct Protocol relating solely to the protection of the civilian population. Now that the ICRC has

34/ See UN, Report of the Secretary-General A/8052, paras. 34 to 44.
35/ See, inter alia, UN, A/Res. 2444 (XXIII) and A/Res. 2675 (XXV), and XXth Internat. Conf. Red Cross, Res. XXVIII, Vienna, 1965.
decided to embody all subjects relating to a non-international conflict in one Protocol additional to Article 3 common to the Geneva Conventions, the rules on the protection of the civilian population are no longer considered separately but as part of the whole.

4. Subjects

The subjects dealt with are those of Protocol I (Part IV), but the proposals are confined to the most fundamental concepts and relate to only four articles: definition of the civilian population (Art. 14), respect for and safeguarding of the civilian population (Art. 15), respect for and safeguarding of objects indispensable to the survival of the civilian population (Art. 16), and precautions when attacking (Art. 17). Further on 38/, it will be seen in what circumstances the civilian population can enjoy the same protection as in an international armed conflict.

5. Relationship with the law in force

Like Part IV of Draft Protocol I, this Chapter represents a development in the law in force. The provisions, which relate without any discrimination to the civilian population as a whole, whether groups or individuals are involved, deal with a sphere so far governed by customary law and hardly touched by the Fourth Convention relative to armed conflicts international in character: the limitation of dangers resulting from hostilities 39/. These dangers involve two kinds of risk for persons and objects: the risk of sustaining the direct effects of unlawful attacks directed against them and the risk of sustaining the secondary effects of an attack directed against a military objective. As will be seen below, the two situations have been dealt with differently: Articles 15 and 16 tend to eliminate direct risk, while Article 17 tends, as far as possible, to diminish indirect risk. Hostilities include any action or activity designed to weaken the opponent's military power. Despite the prohibitory or restrictive rules laid down in Articles 15 to 17, the civilian population will still be exposed to great suffering. To counterbalance that suffering, the Parties to a conflict shall take or allow the positive measures contained in Articles 6 (Measures in favour of children), 31 (Consignment of essential supplies for the civilian population) and 34 (Civil Defence Organizations).

38/ See below commentary on Regulations appended.

6. Documentation

Needless to say, the many different proposals on the protection of the civilian population submitted by government experts to the first session have proved invaluable. The ICRC has made a careful study of all the proposals and has been guided by them in preparing the present drafts. In particular, it has based itself on Proposal CE/Com.III/44, a notable joint effort which, owing to lack of time, it was unfortunately not possible to consider at the first session.

Article 14.- 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 is composed of all civilians fulfilling the conditions in paragraph 1.

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.

Proposal II: The presence, within the civilian population, of individual combatants, does not prevent the civilian population from being considered as such.

References


40/ See ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, CE/Com.III/1 to 44. These proposals will be systematically mentioned in references to the articles based on them, as will the related provisions of Draft Protocol I.

Commentary

The definition proposed in the three paragraphs of this article is the same as that of Protocol I (Art. 41). It will be recalled that the latter no longer adopts the criterion of nationality or any other discriminatory criterion, and that it lays down in an objective manner the requirements which a person must meet in order to qualify as a civilian. On the other hand, in the case of an armed conflict not international in character, the definition does not keep the idea of expressing a presumption in favour of the population 42/.

Paragraph 1:

The fact that a person is a member of the regular or irregular armed forces (criterion of military status) or that he takes a direct part in hostilities (criterion of military or combatant activity) shall be enough to prevent him from qualifying as a civilian 43/. Any other person will be considered to be a civilian.

Paragraph 2:

This paragraph needs no comment.

Paragraph 3:

The alternative proposals embody the same idea: that in order to avoid misuse, the civilian population shall continue to be considered as such, even where it includes individual combatants.

42/ This idea is drawn from Art. 5 (2) of the Third Convention.

43/ This means that a person who, although not a member of any movement, individually fires a shot, on being located shall become a military objective. Should that person try to conceal himself in a crowd, paragraph 3 shall be applicable.
Article 15.- Respect for and safeguarding of 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. Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.
4. The civilian population or individual civilians shall never be used in an attempt to shield, by their presence, military objectives from attack.

References
- IVth Hague Conv. 1907, Regulations, Art. 25.
- Third Geneva Conv. 1949, Arts. 19 (3) and 23 (1).
- Fourth Geneva Conv. 1949, Arts. 27, 28, 31, 32 and 33.
- ICRC, Draft Rules, 1956, Art. 6 (1) and (3).
- UN, A/Res. 2444 (XXIII).
- UN, A/Res. 2675 (XXV), operative paras. 2, 4 and 7.
- IDI Resolution, operative paras. 4, 6 and 8.

Commentary

This article imposes reciprocal and complementary obligations on all Parties to a conflict. Again it reflects the two aspects of protection 44/: on the one hand, the obligation of the Parties to a conflict to respect protected persons, therefore refraining from making them the object of

attack (Art. 15 (1) to (3)) and taking precautions when launching an attack (Art. 17); and, on the other hand, the obligation of the Parties to a conflict to safeguard protected persons, therefore refraining from attacking them deliberately (Art. 15 (4)), and, further, to endeavour to take precautions against the effects of attack 45/. The above proposal implies that the civilian population must not be subject to the direct risk of attack and must not be exposed to attack.

The concept of attack is understood to have the same meaning as it has in Draft Protocol I, Article 44 of which states: "Acts of violence, whether offensive or defensive, committed against the adversary by means of weapons, in the course of hostilities, are considered as attacks".

Whenever this term and words derived therefrom are used, they relate solely to operations of a military character, determined and limited alike by time and space, which lends the concept a very strict meaning.

Since Article 5 above (terrorism, reprisals, pillage) prohibited reprisals against protected persons, it was not necessary to lay down that attacks by way of reprisals against the civilian population were prohibited 46/.

Paragraph 1:
This paragraph expressly mentions the general principle that it is prohibited to direct attacks against protected persons, which principle was taken from customary law and reaffirmed in the relevant international resolutions (mentioned in the above references). It has seemed advisable to specify that protection holds good for groups (civilian population) and individuals (civilians) alike. The two paragraphs below are fields of application.

Paragraph 2:
The general principle having been stated, the second paragraph deals with a concrete case which in practice is only too familiar and which cannot therefore be passed over. Obviously it is only one example among others of attack, the reason for which is mentioned as an exception.

Paragraph 3:
This paragraph, unlike the previous one, objectively refers to the unlawful character of attacks which "by their

nature" may affect protected persons. It is related to the principle that belligerents must in all circumstances draw a distinction between protected persons and objects on the one hand, and military objectives on the other 47/. By virtue of this rule, the choice of methods whereby the belligerents can injure the enemy is not unlimited.

By virtue of the rules previously laid down, it is clear that protected persons may not be attacked and that belligerents must confine themselves to destroying military objectives 48/. But what happens when the two categories overlap, in time and in space, that is, when civilians are within a military objective? While this situation should be avoided as far as possible, it is one which in practice arises, especially in the case of persons linked with the military effort, such as workers in armaments factories 49/. The problem cannot therefore be evaded lest it lead to serious ambiguity. Army men who are called upon to apply the rules of Chapter IV must know what course they are to follow; otherwise there is a danger that the application of the rules as a whole may be jeopardized by a lack of clarity (and realism), and it may be claimed that the rules cannot be observed.

Paragraph 4:

This provision may be compared with Article 28 of the Fourth Convention, which is applicable de lege lata only to conflicts of an international character. Using civilians as a shield should be expressly prohibited. In an international armed conflict, that practice is already expressly prohibited with regard to prisoners of war (particularly by Article 23 (1) of the Third Convention). It is very desirable that agreement should be reached on a provision of this nature, for the civilian population as a whole and in all circumstances.

47/ Art. 43 of Draft Protocol I proposes the following 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".

48/ See preceding footnote.

Article 16.- Respect for and safeguarding of objects indispensable to the survival of the civilian population

Proposal I:
1. Objects indispensable to the survival of the civilian population shall not be the object of attack.
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.

Proposal II:
1. Objects indispensable to the survival of the civilian population shall not be the object of attack.
2. The Parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed shall refrain from destroying them or using them in an attempt to shield military objectives from attack.

References
- IVth Hague Conv. 1907, Regulations, Arts. 22, 25 and 27.
- IXth Hague Conv. 1907, Arts. 1 to 3.
- Fourth Geneva Conv. 1949, Art. 53.
- ICRC, Draft Rules, 1956, Art. 6 (2).
- UN, A/Res. 2675 (XXV), operative paras. 5 and 6.
- IDI Resolution, operative paras. 4 and 8.
- ICRC, Conf. Gvt. Experts, paras. 454 to 459, and CE/Com.III/19, Arts. 5, 12 to 14, 24, 26, 27, 28, 38 and 44.

Commentary

Two different versions are proposed, the second of which contains a more formal prohibition than the first. In this Chapter, unlike Draft Protocol I, it has seemed difficult
to adopt a general rule on the protection of objects of a civilian character. Reference may be made to Articles 42, 47 and 48 of Draft Protocol I.

Even in Draft Protocol I, it has seemed difficult and hazardous to define objects indispensable to the survival of the civilian population, owing to the fact that food and housing differ very appreciably according to the needs of the people concerned. Thus crops, provisions and other foodstuffs may be involved. The provision relating to indispensable objects might be one of the means of fighting starvation as a method of warfare resorted to by belligerents in ancient times and during recent decades. It cannot be repeated too often that in armed conflicts experience has shown that where food shortages occur, it is the civilian population - and particularly children - who are directly affected. Since it is impossible to distinguish between what is entirely or only partly intended for the civilian population, it must be agreed that a wheat field or a rice field, or water reserve supplies, are not meant to be used by civilians alone. Yet it cannot be claimed that those objects are military objectives or mixed objectives without thereby expressly justifying those methods of total warfare which have been unanimously condemned by the conscience of mankind.

Paragraph 1:
This paragraph prohibits belligerents from directing attacks against objects indispensable to the civilian population. For such objects, it acts as the counterpart of Article 15 (1).

Paragraph 2:
Sub-paragraph (a) refers to the misuse of indispensable objects, a concept already encountered with regard to persons.

Sub-paragraph (b) considers the principle of prohibiting all Parties to the conflict from destroying such objects except in cases of "unavoidable military necessity" for the security of the armed forces. In the first proposal,

50/ See Arts. 28 to 33 below.
51/ See Art. 15 (4). The misuse of objects under special protection is already partly penalized by the law in force, at least in an international armed conflict (e.g. Art. 21 of the First Convention).
therefore, the rule is imperative, while in the second it is absolute. The waiver provided for in the first proposal, however, is entirely exceptional 52/.

Article 17.- Precautions when attacking

So that the civilian population, as well as objects indispensable to its survival, 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 intrusted with studying and reporting on this revision of the laws of war, assembled at The Hague on 11 December 1922, Arts. 22 to 25.
- ICRC, Draft Rules, 1956, Arts. 8, 10 and 11.
- UN, A/Res. 2675 (XXV), operative para. 3.

52/ The Hague Conv. of 1954 refers, in Arts. 4 (2) and 11 (2), respectively, to "where military necessity imperatively requires" and "unavoidable military necessity".
A word must be said about terminology. In earlier ICRC drafts, the expressions "active precautions" or "measures of respect" were used in the case of the obligations of the author of an attack, and "passive precautions" or "measures of safeguarding" in the case of the obligations of the Party having in its power the civilian population and the objects indispensable to that population. These terms, which were considered unduly restrictive, were replaced by the expressions "precautions against attack" and "precautions against the effects of attack". In Draft Protocol II, however, no attempt has been made to introduce a rule relating to precautions against the effects of attacks (see ICRC, Draft Protocol I, 1972, Art. 51, and its commentary).

While the rules of protection aim at eliminating the direct risk of attack, i.e. actual attack directed against the civilian population, measures of precaution tend, as far as possible, to reduce any indirect risk of attack, namely the secondary consequences - affecting the civilian population - of operations directed against military objectives. The purpose of this provision is stated in the first sentence: "that the civilian population, as well as objects indispensable to its survival, who might be in proximity to a military objective may be spared" 53/. The use of the conditional would indicate that the situation would need to be exceptional, particularly in view of the obligations of the Party which has in its power the civilian population and the objects indispensable to the latter 54/.

Those who order an attack shall take precautions in planning it, and those who launch it, in carrying it out. These precautions consist, on the one hand, in identifying military objectives and, on the other, in warning the threatened civilians wherever that is possible. The rule contained in sub-paragraph (a) has been endowed with an imperative nature (hence the obligation to refrain, should the case arise, from launching the attack), while sub-paragraph (b) is of a conditional one 55/.

53/ The situation of civilians within a military objective is dealt with in Art. 15 (3).
54/ In accordance with Art. 15 (4), the Party to the conflict shall not use persons or objects that may be indispensable to their survival in an attempt to shield military objectives from attack; moreover, it is recommended that the Party to the conflict shall remove the civilian population from military objectives, and vice versa.
55/ Many of the experts consulted in 1970 considered that the general rule of warning had fallen into disuse.
CHAPTER V

COMBATANTS

Article 18.- 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.

Article 19.- Prohibition of perfidy

1. It is forbidden to kill or injure by resort to perfidy. Unlawful acts betraying an enemy's confidence are deemed to constitute perfidy.
2. Ruses of war are not considered as perfidy.

Article 20.- 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.
Article 21.- Emblems of nationality

It is forbidden to make improper use of enemy insignia and uniforms. In combat their use is forbidden at all times.

Article 22.- Safeguard of an enemy hors de combat

1. 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.
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 in his power even if he decides to release them.

Article 23.- 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.

Article 24.- 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.

For the references and the commentary to the articles in this Chapter, see those relating to Combatants in Part III of the Draft Additional Protocol to the four Conventions.
The text given here as Article 22 (1) is in fact Article 23 (c) of the Hague Regulations, which has been reproduced by inadvertance. Article 22 (1) should 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."
CHAPTER VI

PERSONS WHOSE LIBERTY HAS BEEN RESTRICTED

General references

- Third Geneva Conv. 1949, Arts. 4, 13 (1), 15, 19, 23 (1), 34, 35, 36, 47 (2), 71 (1), 72 (1), 125.
INTRODUCTION

This chapter is devoted to the protection and treatment of persons whose liberty has been restricted because of some act that they had committed in connection with the armed conflict.

Combatants have been divided into two categories, namely - (1) those belonging to the regular armed forces and to the armed forces that fulfil the conditions laid down in Article 4 (A) (2) of the Third Geneva Convention and who shall receive treatment similar to that which the said Convention stipulates for prisoners of war; and (2) other combatants who do not meet the conditions mentioned above but who shall, throughout their captivity, be treated in a humane manner as set forth in Article 26 of the present Draft Protocol. The treatment of combatants is further dealt with in Article 28 (Chapter VII, Penal prosecutions), to the Commentary on which reference may be made.

Civilians shall be covered by Article 26; regardless of the reason for their arrest, provided that such reason originated in the armed conflict.

It is pointed out that Article 26, in accordance with Article 3 of the present Draft Protocol, is to remain in force so long as a restriction remains on the liberty of persons for an act committed in relation with an armed conflict not of an international character, whether they are arrested during or after the hostilities.

Article 25.- Treatment of combatants who have fallen into the power of the adversary

Members of regular armed forces and members of those armed forces which have fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall receive, after having fallen into the power of the adversary, a treatment similar to that provided for prisoners of war in the said Convention.
Commentary

Common Article 3 does not confer any immunity on combatants nor does it accord them any special treatment during captivity. However, in its Commentary, the ICRC had already considered that "once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4. A. (2), the spirit of Article 3 certainly requires that members of the insurgent forces should not be treated as common criminals" 56/.

This concern of the ICRC was shared in particular by the XXIst International Conference of the Red Cross held in Istanbul in September 1969, which adopted resolution XVIII relating to the status of combatants in non-international armed conflicts; that resolution states the view "that combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention of 12 August 1949 should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war".

Thus encouraged, the ICRC submitted the matter to the first session of the Conference of Government Experts 57/. The subject was briefly examined by Commission II of the Conference 58/.

The solution here proposed in Article 25 is that which was envisaged in Istanbul and affords prisoner-of-war treatment to combatants belonging to armed forces conforming to the provisions of Article 4 of the Third Convention. Such a solution does not, as may be thought, set rebel armed forces participating in hostilities on a privileged footing, but rather ensures that once hostilities have reached a certain magnitude all combatants fallen into the hands of an adversary shall receive humane and fair treatment. In fact, if insurgent combatants who have fought loyally are given certain guarantees, members of the legal government armed forces are also assured of humane treatment should they be captured. The ultimate aim of such a provision is to avoid an escalation of acts of inhumane violence and a spiral of reprisals.

It should be stressed that:

1. the conditions set forth in Article 25 have to be complied with by the armed forces. A grave breach committed by a single member of such armed forces, while still punishable, cannot deprive other combatants of the treatment to which they are entitled;

2. of all the conditions embodied in Article 4. A. (2), only one cannot be met by insurgent armed forces, that is they cannot belong to a Party to the conflict. The purpose of this condition, in cases of international armed conflict, is to establish the international responsibility of the State to which such insurgents are linked for the acts of a resistance movement, and in this way to ensure that the resistance movement observes the law of armed conflict. In the case of non-international armed conflict, it should suffice for the insurgent armed forces to be led by a responsible authority and subject to a system of internal discipline enabling them to meet the conditions of Article 4 (b), (c) and (d);


3. by requesting humane treatment similar to that stipulated by the Third Convention, the intention is not to impose upon Parties to a conflict obligations which it would be materially impossible for them to assume, such as obligations relating to the pecuniary resources of prisoners of war.

Article 26.- Treatment of persons whose liberty has been restricted

1. Subject to Article 25 of the present Protocol, all other persons whose liberty has been restricted, whether interned or detained after sentence has been passed, in respect of an act committed in relation to the armed conflict, shall in all circumstances be respected and treated humanely, without any adverse distinction.

2. All unjustified acts, whether of commission or omission, that endanger their person or their physical and mental health are prohibited.

3. The Parties to the conflict shall respect, as a minimum, the following provisions:
   (a) they shall provide for the maintenance of the persons referred to in paragraph 1 above and for the medical attention which their state of health requires;
   (b) places of internment and detention shall not be set up in areas close to combat zones. The persons referred to in paragraph 1 above shall be evacuated when the places where they are interned or detained become particularly exposed to dangers arising out of the conflict, if their evacuation can be carried out in adequate conditions of safety;
   (c) the persons referred to in paragraph 1 above shall be allowed to practise their religion and receive spiritual assistance from chaplains and other persons performing similar functions;
   (d) the persons referred to in paragraph 1 above shall be allowed to send and receive letters and cards. The Parties to the conflict may limit the number of letters and cards sent by each person if they deem it necessary;
   (e) the persons referred to in paragraph 1 above shall be allowed to receive individual or collective relief.
4. Subject to temporary and exceptional measures, the Parties to the conflict shall agree to and facilitate visits to the persons referred to in paragraph 1 above, carried out by an impartial humanitarian body such as the International Committee of the Red Cross.

References


Commentary

Paragraph 1:

Article 26 is intended to ensure that all persons whose liberty has been restricted - who are not accorded the treatment mentioned in Article 25 - receive at least a minimum of humane treatment throughout the period of their captivity.

These are persons who, in one way or another, have supported one side in a conflict and have therefore been interned without appearing before a court or who have been sentenced to imprisonment for having infringed the laws of the land e.g. combatants, in the hands of the adversary, who had belonged to armed forces not meeting the conditions laid down in Article 25, or civilians who have committed an act considered to be a danger to the security of one or other of the Parties to the conflict or whose liberty has
been restricted in view of their political attitude and opinion.

It was necessary to provide a general provision strengthening the protection of persons whose liberty has been restricted and recalling the respect to which they are entitled in all circumstances; there is firstly the question of respect for the physical person; it is forbidden to kill, wound or even endanger persons whose liberty has been restricted; the person must be protected not only from agents of the detaining Party but also from fellow detainees. However, respect for the individual goes beyond physical protection and must include every essential attribute of the personality of the person in captivity.

Paragraph 2:

The obligation to respect persons whose liberty has been restricted and to treat them humanely is explicitly stated in paragraph 2 in the form of a strict prohibition of acts absolutely incompatible with this duty. This prohibition is valid at all times especially when a protected person may legitimately become the subject of severity. The dictates of humanity must be heeded even when security or repressive measures are applied.

Paragraph 3:

(a) Maintenance should be understood to mean the supply of things necessary to the life and up-keep of persons whose liberty has been restricted. Therefore to provide for their maintenance means to provide suitable dwellings, sufficient wholesome food and clothing. This obligation is strengthened by the duty to provide such medical care as their state of health demands. Although the supply of food, clothing, medicaments, medical equipment and dwellings to the community is incumbent above all on the Parties to a conflict, they shall, in so far as possible, accept relief aid whenever they are unable to meet their obligations.

(b) This provision rests on the principle that a person whose liberty has been restricted may not be held in a region where he or she is exposed to danger resulting from the conflict. In the case of combatants, this means that not only must they be evacuated as soon as possible after their capture and placed in internment camps at a

59/ See Arts. 29 and 30 of the present Draft Protocol.
reasonable distance from the fighting area, but also that this same internment camp must be evacuated as fighting draws closer. However, such transfers may only be made in sufficiently safe and humane conditions. Should such safety not be guaranteed, a transfer may only take place if the detainees would be in greater danger remaining where they are than they would be if transferred.

(c) This provision guarantees persons whose liberty has been restricted the right to practice their religion freely in accordance with the principle of equality of treatment stated in paragraph 1. Respect for this provision implies that the organization and the administration of the place of internment or of detention should not be incompatible with the practice of the religion. A fair balance must be struck between the compelling of persons whose liberty has been restricted to comply with the discipline of the place of detention, and the obligation of the Party to the conflict to authorize such detainees to practice their religion.

(d) This provision reiterates the basic principle of the Third and Fourth Conventions according to which prisoners of war and civilian internees are entitled to keep in touch with the outside world.

Although according to this principle persons whose liberty has been restricted should be authorized to send and receive an unlimited number of letters and cards, problems of security or lack of means of transport may prevent its total application. Therefore the authorities concerned may limit correspondence sent by or to persons whose liberty has been restricted.

(e) In accordance with the principles of the Conventions, relief may be individual or collective; personal relief consists of the sending of a specific package by a donor to a particular internee or detainee; collective relief consists of standard anonymous packages or bulk goods by any number of donors.

Paragraph 4:

Once they are visited by an impartial and independent body, the detainees' fate becomes less uncertain; they cannot be inhumanely treated, they emerge from "Nacht und Nebel", they are no longer held incommunicado.

This provision calls upon the Parties to a conflict to grant facilities to any body which gives sound guarantees of impartiality. It reinforces the right, as embodied in common Article 3 (2), to take humanitarian
initiative in a specific sphere, namely, visits to persons whose liberty has been restricted. Nevertheless, the task thereby entrusted to the International Committee of the Red Cross or any other impartial body must not be permitted to limit the other activities benefiting victims of armed conflict.

Under the "temporary and exceptional measures", Parties to a conflict may suspend the work of the organizations referred to in Article 26 (4). However, they may not do so without due cause: there must be a genuine threat to their security and the measures they take may not be kept in force after the circumstances which justified them.

The purpose of visits to persons deprived of their liberty is to provide material aid and spiritual comfort by way of inspection of places of internment and detention, distribution of relief, assistance in the organization of leisure time activities.
CHAPTER VII

PENAL PROSECUTIONS

General references

- Fourth Geneva Conv. 1949, Art. 33 (1).
- International Covenant on Civil and Political Rights, 1966, Art. 9 (1).
- UN, Report of the Secretary-General A/8370, 1971, para. 123, paras. 131 to 133.
Article 27.— Individual responsibility

No person may be punished for an offence he or she has not personally committed. Collective penalties are prohibited.

References

- Fourth Geneva Conv. 1949, Art. 33 (1).
- International Covenant on Civil and Political Rights, 1966, Art. 9 (1).

Commentary

This provision lays down a basic principle of municipal law, that is to say that penal responsibility is personal in nature. The principle is extended by the prohibition of collective punishment; in other words, of any kind of penalties inflicted on persons or whole groups of persons for acts which they have not committed 60/.

Article 28.— Penal prosecutions of combatants

After having fallen into the power of the adversary, combatants who will have fulfilled the conditions stipulated in Article 25 of the present Protocol, as well as those

60/ Commentary, Fourth Geneva Conv. 1949, pp. 224 to 225.
combatants who, without having fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, will have at least, in the course of their operations, distinguished themselves from the civilian population by some distinctive sign or by any other means and who had complied with the provisions of the present Protocol, shall not be punishable by death if they become the object of penal prosecutions only by reason of having taken part in hostilities or having been members of armed forces.

References

- UN, Report of the Secretary-General A/8052, 1970, paras. 153 to 156 and 166 to 194.
- UN, Report of the Secretary-General A/8370, 1971, paras. 123 and 131 to 133.

Commentary

Common Article 3 forbids only summary justice, but does not confer any immunity. It no way impairs the right to prosecute, sentence and punish in keeping with the rule of law. This applies also to combatants fallen into the hands of the enemy and who may be liable to severe penalties merely for having taken part in the hostilities, however fairly they may have fought, if the law applicable to them permits.

In Document V submitted to the first session of the Conference of Government Experts, the ICRC proposed rules for the deferment of capital punishment 61/.

That proposal was in line with the growing tendency to apply the death penalty to fewer types of crime 62/.

This article reverts to that problem and proposes the abolition of the death sentence in the case of two types of combatants:

1. members of armed forces which have fulfilled the conditions laid down in Article 25 of the present Draft Protocol;

2. members of armed forces who, whilst not having fulfilled those conditions, have nevertheless complied with certain basic standards in the conduct of hostilities.

It will be observed that Article 25 does not grant the first of these categories of combatant any immunity for having fought; in fact it grants them the treatment, if not the status, to which prisoners of war are entitled: hence, the necessity for Article 28, forbidding their execution for having taken part in hostilities.

The second category generally comprises combatants employing guerrilla warfare methods in hostilities and therefore not complying with all the conditions of Article 4 A (2) of the Conventions.

There could nevertheless be no question of applying Article 28 - which grants the combatant a privilege - unless the second category of combatant respects certain basic humanitarian requirements. Such requirements are considered by the ICRC to be: firstly, the taking of measures to make the combatant distinguishable from the civilian population in order not to wittingly endanger the population and, secondly, the observance of certain minimum rules in the conduct of operations.

In other words, the absolute requirement of displaying a fixed and distinctive sign recognizable at a distance and the bearing of arms openly is discarded, those conditions having been considered to be in contradiction with guerrilla warfare in general and to be outmoded, since they are not always respected by the regular armed forces themselves. The means whereby guerrilla fighters may make themselves clearly distinguishable from the civilian population, even at a distance, is left to their discretion. The distinctive sign is mentioned merely by way of example. However, before any engagement, combatants must be able to identify with certainty the enemy opposing them.

62/ UN, Report of the Secretary-General A/8052, para. 155.
So far as the conduct of hostilities is concerned, it was deemed sufficient, in the context of Article 28 - and in view of the fact that the present Draft Protocol contains not only provisions based on the four 1949 Geneva Conventions, but also provisions on the protection of the civilian population and combatants - to stipulate the observance thereof; the reason for this was to make allowance for circumstances during hostilities.

This introduces flexibility in the provisions of Article 4 A (2) but only, it will be noticed, so far as capital punishment is concerned. Nevertheless, it should not be overlooked that all combatants not having complied with the said provisions of Article 4, whoever they may be, shall, upon capture, be entitled to benefit under Article 26 of this Draft Protocol.

In the two complementary Articles, 26 and 28, the ICRC has endeavoured to guarantee humane treatment for guerrilla fighters. Such treatment consists, on the one hand, of decent detention conditions throughout their captivity and, on the other, if they are members of armed forces complying with certain conditions, of exemption from the death sentence for having merely taken part in the hostilities.

The ICRC realizes the difficulties raised by Article 28 and has therefore drafted two alternative propositions for submission to the experts.

The first alternative does not specifically mention the death penalty, but grants both categories of combatant the benefit of attenuating circumstances which should suffice to preclude the death sentence.

The second alternative merely provides for deferment of execution until the end of hostilities, if the death sentence is pronounced. Such deferment of execution should, in most cases, suffice to ensure that the death sentence is not carried out.

Proposal I:

"After having fallen into the power of the adversary, combatants who will have fulfilled the conditions stipulated in Article 25 of the present Protocol as well as those combatants who, without having fulfilled the conditions stipulated in Article 4 A (2) of the Convention relative to the Treatment of Prisoners of War, will have, at least in the course of their operations, distinguished themselves
from the civilian population by some distinctive sign or by any other means and who had complied with the provisions of the present Protocol, shall be entitled to plead attenuating circumstances if they become the object of penal prosecutions only by reason of having taken part in hostilities or having been members of armed forces."

Proposal II:

"If, only by reason of having taken part in hostilities or having been members of armed forces, the death sentence is pronounced on combatants who will have fulfilled the conditions stipulated in Article 25 of the present Protocol as well as on those combatants who, without having fulfilled the conditions of Article 4 A (2) of the Convention relative to the Treatment of Prisoners of War will have, at least, in the course of their operations, distinguished themselves from the civilian population by some distinctive sign or by any other means and who had complied with the provisions of the present Protocol, execution of the sentence shall be deferred until the end of hostilities."
CHAPTER VIII

RELIEF

General references

- First Geneva Conv. 1949, Arts. 16, 27 (3).
- UN, A/Res. 2675 (XXV).
- XXth Internat. Conf. Red Cross, Vienna, 1965, Status of Personnel of Civil Defence Organizations, Report submitted by the ICRC, Conf. D.5 b/1, Part IV, Section 2; Summary of Report submitted by the ICRC, Conf. D.5 b/1, Part IV, Section II.
Article 29. - Relief for the population

The Parties to the conflict shall ensure, to the fullest extent of the means available to them and without any adverse distinction, the provision of foodstuffs, clothing, medical and hospital stores and shelter facilities necessary for the population in the territory under their control.

References

- Fourth Geneva Conv. 1949, Art. 55 (1).

Commentary

The above article reaffirms the principle that it is incumbent on the Parties to the conflict, in the first place, to ensure the provision of supplies for the population in the territory under their control.

The term "population" is general; it is not confined to the civilian population but includes combatants and civilians interned or sentenced for an act committed in connection with the armed conflict. That is the meaning conveyed by Articles 25 and 26 (3) (a) concerning the treatment of persons deprived of liberty, to the commentary on which reference may be made.
The phrase "to the fullest extent of the means available to them", however, shows that the material difficulties with which the Parties to the conflict might be confronted, particularly in the case of an armed conflict not of an international character, have been borne in mind. They must then, in good faith, do all they can to ensure the provision of supplies for the population 65/.

Article 30.—Humanitarian assistance

1. If the population is inadequately supplied in foodstuffs, clothing, medical and hospital stores and shelter facilities, or if the wounded, sick and shipwrecked, military and civilian, need medical assistance, the Parties to the conflict shall, to the fullest possible extent, agree to and facilitate impartial relief activities undertaken by humanitarian bodies, such as the International Committee of the Red Cross and National Red Cross Societies.

2. The Parties to the conflict shall have the right to prescribe the technical arrangements under which the passage of relief supplies shall be allowed. They shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.

3. In no circumstances shall this assistance be considered as interference in the conflict.

References

- First Geneva Conv. 1949, Art. 27 (3).
- Fourth Geneva Conv. 1949, Arts. 23 (4), 59 (1) and 60.
- UN, A/Res. 2675 (XXV).

Commentary

Paragraph 1:

Where the Parties to a conflict are unable to ensure supplies for the population in accordance with Article 29 of the present Draft Protocol, or sufficient care for the wounded, the sick and the shipwrecked, they shall accept offers of relief made to them by humanitarian organizations.

The wording "to the fullest extent of the means available to them" shows that the political difficulties or problems of security that may beset such offers have been borne in mind. The Parties to the conflict may not, however, make such a reservation lightly; any restrictions imposed on relief action must arise from a real threat to security.

The danger that relief societies may misuse their humanitarian action to engage in acts hostile to one or other of the Parties to the conflict is limited by the fact that only activities regarded as impartial are provided for in the above article. The International Committee of the Red Cross and National Red Cross Societies are mentioned here merely as an instance of bodies capable of carrying out activities of this nature.

Commission I decided to include in the Draft Protocol relative to the protection of the wounded and the sick in armed conflicts not of an international character a provision entitled "Medical assistance by other States or by impartial humanitarian organizations" 64/.

During the Commission's discussion of the proposal, the view was expressed that such a rule might jeopardize the State's sovereign right to decide to accept or refuse such assistance. The ICRC has therefore refrained from making any express mention of relief action which might be carried out by States, which does not mean that it proposes to ignore such action. On the contrary, it recognises its value and essential usefulness. Moreover, the wording of Article 30 (1) gives the Parties to the conflict full latitude to accept any offer of relief.

Paragraph 2:

By authorizing the passage and distribution of relief, the Parties to the conflict shall be entitled to stipulate the technical arrangements for forwarding such relief; they may lay down rules for it to be forwarded at prescribed times and on prescribed routes, to ensure the safety of the convoys and avoid any abuse 65/.

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65/ Commentary, Fourth Geneva Conv. 1949, p. 184
The Parties to the conflict shall not, however, take any steps, or take advantage of the latitude they are allowed in fixing technical conditions, to delay the forwarding of relief. Nor may they change the destination of relief supplies.

**Paragraph 3:**

This provision, which is based on Article 27 (3) of the First Convention, lays down that in no circumstance shall impartial relief activities be considered as participation in hostilities or the infringement of national sovereignty. It should be borne in mind that such humanitarian action might be rendered to only one of the Parties to the conflict and nevertheless maintain its impartial character 66/.

**Article 31.** - **Consignment of essential supplies for the civilian population**

1. In cases of blockade or siege, the Parties to the conflict or any High Contracting Party concerned shall allow the free passage of all consignments of essential foodstuffs, clothing, medical and hospital stores and shelter facilities, intended only for civilians.

2. The Parties to the conflict or any High Contracting Party concerned shall have the right to prescribe the technical arrangements under which the passage of relief supplies shall be allowed. They shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.

3. The Parties to the conflict or any High Contracting Party concerned may make such permission conditional on the distribution only to the persons benefited thereby being made under the supervision of an impartial humanitarian body.

**References**

- Fourth Geneva Conv. 1949, Art. 23.

Commentary

Paragraph 1:

It has often been pointed out that while blockade and siege are lawful methods of warfare, genocide is strictly prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide. Article 1 of that Convention reads thus:

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

In Article II (c), the Convention specifies that genocide means "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", the acceptation of group being that of "a national, ethnical, racial or religious group".

In the case of an armed conflict not international in character, it is highly desirable that a blockade and a siege shall provide for the same humanitarian exceptions - for the benefit of the civilian population alone - as already admitted in the case of an international armed conflict 67/. The aim is to supply the civilian population, in good time, with the relief indispensable for its survival. The right of free passage will naturally be contingent on conditions designed to ensure that the consignments shall not serve ends other than those set forth in Article 31.

The principle of free passage is general in scope. It shall be respected by all Parties to the conflict, who shall allow the passage of consignments intended for the civilian population in the territory under the control of the adversary. Free passage shall also be allowed, where necessary, by a third State having a common frontier with the besieged area.

67/ Fourth Geneva Conv. 1949, Art. 23.
Moreover, one cannot discount outright the possibility that the Parties to the conflict might respect this principle for the benefit of the aforementioned third State if the effects of the blockade or siege were also felt by the civilian population of that State.

Thus, the principle of free passage of relief supplies applies to all consignments intended for the civilian population of any Party to the conflict or of any Contracting Party.

**Paragraph 2:**
For this provision, reference may be made to the commentary on Article 30 (2).

**Paragraph 3:**
Assistance by an impartial humanitarian body is the best guarantee that relief supplies will actually reach those for whom they are intended, and them alone.

There must be constant surveillance in order that no unlawful traffic may be possible.

**Article 32. — Recording and information**

1. The International Committee of the Red Cross shall, if it deems necessary, propose to the Parties to the conflict the organization of information bureaux to which they shall communicate all relevant information on victims of the events who may be in their power. The dead shall also be recorded.

2. Each information bureau shall transmit to the other bureaux, if necessary through the Central Tracing Agency, the information thus obtained and shall transmit them to the next of kin concerned; the information bureaux shall also be responsible for replying to all enquiries concerning victims of the events and shall take the necessary steps to search for them; this is subject to reservations concerning cases where the transmission of information or the search might be detrimental to the victims of the events or to their relatives.

**References**
- First Geneva Conv. 1949, Art. 16.
Commentary

General remarks:

This article is an attempt to ensure that the rule relating to the communication of any relevant information on the victims of events is applicable in armed conflicts not international in character.

Paragraph 1:

The Conventions call upon each of the Parties to constitute an Information Bureau. This procedure has not seemed suited to the specific conditions prevailing in armed conflict not international in character, mainly for the following reasons: the Parties to a conflict - and particularly the Party opposing the authorities in power - will not always have the material resources to set up and operate such bureaux themselves. Besides, owing to the nature of armed conflict, the families of the victims will not necessarily be in the territory controlled by the adverse Party. It is therefore to be feared that with this information a Party to a conflict may bring pressure to bear on the families of persons it has in its power, inter alia to obtain information on the activities of their relatives. And, lastly, families might for obvious security reasons hesitate to ask the information bureaux to make enquiries about a relative.

These considerations have led to the conclusion that, as a neutral and impartial body, the ICRC should be entrusted with the organizing of such bureaux.

Paragraph 2:

When the victims and the families are both in an area under the control of one of the Parties to the conflict, communication of information and tracing on request will be a comparatively easy matter. When the victims and the families are separated owing to the hostilities, the information
bureaux should transmit the information to one another, if possible direct, or through the Central Tracing Agency should direct communication be disrupted.

Article 33. - National Red Cross and other relief societies

1. Subject to temporary and exceptional measures taken by the Parties to the conflict to guarantee their security, the National Red Cross (Red Crescent, Red Lion and Sun) Society and its branches shall be able to pursue their activities in accordance with the rules of the Red Cross as stated by International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions.

2. Other humanitarian relief organizations created during the hostilities shall be permitted to carry out their activities in accordance with the principles of humanity, impartiality and neutrality.

3. In no circumstances shall the fact of having taken part in the humanitarian activities of the organizations referred to in paragraphs 1 and 2 above be considered to be punishable.

References

Commentary

General remarks:

This provision answers a concern felt by the Red Cross throughout the world: the need to ensure that the National
Society and other relief societies may continue their activities in times of armed conflict not international in character, and to protect them against any arbitrary decision of the Parties to the conflict.

Paragraph 1:
This paragraph provides for the continuance of the activities of a duly recognized National Red Cross Society and of other relief societies already approved by the government authorities in peace time.

National Society sections shall pursue their activities even where, owing to the hostilities, the central organization is paralysed, and even where they are within territory under the control of the opposing Party and cut off from the central organization. The National Society and its sections shall continue to act in accordance with the Red Cross rules 68/ wherever they are able to do so.

Temporary and exceptional steps taken by the Parties to the conflict may momentarily suspend the activities of the National Society and other relief societies. Such steps will be taken only where real danger threatens the security of the Parties to the conflict, and only during the events which give rise to them.

Paragraph 2:
It has frequently been observed that organizations for relief and humanitarian assistance have been set up, in the course of armed conflicts not international in character, particularly by the Party opposing the authorities in power. Those organizations have proved themselves useful in areas where a National Society has very often been unable to pursue its activities. The ICRC has therefore proposed that the action of these organizations be recognized in so far as they comply with the fundamental principles on which Red Cross action is based.

Paragraph 3:
This paragraph needs no comment.

Article 34.- Civil Defence Organizations

1. Subject to temporary and exceptional measures taken by the Parties to the conflict to guarantee their security, civil defence organizations shall be allowed to carry out their humanitarian tasks; they shall at all times be protected.

2. In no circumstances shall the fact of having taken part in the humanitarian activities of such organizations be considered to be punishable.

References

- Fourth Geneva Conv. 1949, Art. 63 (2).
- XXth Internat. Conf. Red Cross, Vienna, 1965, Status of Personnel of Civil Defence Organizations, Report submitted by the ICRC, Conf. D.5 b/1, Part IV, Section II; Summary of Report submitted by the ICRC, Conf. D.5 b/1, Part IV, Section II.
- UN, Report of the Secretary-General A/8370, 1971, paras. 90 to 92

Commentary

Paragraph 1:

This paragraph embodies the principle that civil defence organizations shall be authorized to carry out their tasks in an armed conflict not of an international character. To this end, they are to be granted special protection.

The "temporary and exceptional measures taken by the Parties to the conflict" can only momentarily suspend their activities. In this context, see commentary on paragraph 1 of Article 33.

Paragraph 2:

This paragraph needs no comment.
CHAPTER IX

EXECUTORY PROVISIONS

General references

- First Geneva Conv. 1949, Art. 47.
- Third Geneva Conv. 1949, Art. 127 (1).
- Fourth Geneva Conv. 1949, Art. 144 (1).
- XXth Internat. Conf. Red Cross, Vienna, 1965, Res. XXI.
- Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949 (supervision and penalties), Question 14, p. 11.
- UN, Report of the Secretary-General A/7720, 1969, paras. 117 to 121.
- UN, Report of the Secretary-General A/8370, 1971, paras. 154 to 156.
Article 35. - Regulations

The Regulations concerning special cases of armed conflicts not of an international character (hereinafter called the Regulations) shall constitute an integral part of the present Protocol; the procedure by which the present Protocol is to be applied is also valid for the Regulations.

References

Commentary

The purpose of the above article is to establish the legal link between the present Draft Protocol and the Regulations appended thereto. These Regulations are an integral part of the Protocol; they would not, as such, be separately open to signature or accession; moreover, the procedure for application of the Regulations would be laid down in the relevant provisions of the Protocol.

Article 36. - Special agreements

The Parties to the conflict shall endeavour to bring into force, either by means of special agreements, or by declarations addressed to the International Committee of the Red Cross, all or part of the other provisions of the four Geneva Conventions of August 12, 1949, and of the Additional Protocol to the said Conventions.

References
- Common Art. 3 (3).
Commentary

This article repeats paragraph 3 of common Article 3 and adapts it to the new treaty situation which would arise on the adoption of an Additional Protocol to the Four Conventions.

While the Parties to a conflict are only required to observe common Article 3 as supplemented by its Additional Protocol, each Party nevertheless remains free to respect other provisions of international humanitarian law. Article 36 above encourages them to do so; hostilities might assume such proportions that common Article 3, even though elaborated and supplemented by its Additional Protocol, could no longer ensure adequate human treatment for the victims.

The conclusion of agreements between Parties to a conflict will never constitute implicit recognition of the adversary's existence and status as a belligerent. In this connection, reference may be made to the commentary on Article 36.

Experience has shown, however, that the conclusion of agreements is often difficult, particularly when hostilities have developed to some extent. The ICRC has therefore considered it advisable to provide that the Parties to a conflict may individually commit themselves to applying other provisions of international humanitarian law, in their entirety or in part, by means of a suitable declaration addressed to the ICRC.

Article 37.—Co-operation in the observance of the present Protocol

Each Party to the conflict, to the fullest possible extent, shall call upon a body which offers all guarantees of impartiality and efficacy to co-operate in the observance of the provisions of the present Protocol and its Regulations and of the other provisions of the four Geneva Conventions of August 12, 1949, and of the Additional Protocol to the said Conventions brought into force in accordance with Article 36 of the present Protocol.
References
- Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949 (supervision and penalties), Question 14, p. 11.

Commentary

As the ICRC pointed out in document CE/5b dealing with the protection of victims of non-international armed conflict submitted to the first session of the Conference of Government Experts, the implementation of common Article 3 is first and foremost the responsibility of each of the Parties to the conflict. There is no machinery whereby any organized body may co-operate in the carrying out of that function; moreover, there is no procedure under which the Parties to the conflict can communicate with one another direct.

In view of the extent of armed conflicts not of an international character and the conditions which prevail during those hostilities, the Parties are not always able to assume that supervision alone; in the interest of the victims as well as in their own interest, the Parties to the conflict should be supported in that task. The ICRC has therefore felt it was necessary to urge them to call upon an impartial and effective body.

The Parties to the conflict would call upon a body of their own choosing, and that body's appointment need not necessarily be based on an agreement between them. That body would exercise its functions within the territory under the control of the Party which requested its co-operation.
That body would offer full guarantees as to impartiality and efficacy and it would have sufficient material and financial means to carry out its task.

"To the fullest possible extent" is a formula which shows that the difficulties which the Parties to the conflict might have to face have been taken into account. Such a reservation could be stipulated only if the action of such a body presented a real and direct danger for the Parties to the conflict.

Being aware of the difficulty to which Article 37 gives rise, the ICRC made this suggestion only as a preliminary step. When the time comes to study the question, reference will also be made to all replies made by Governments to the questionnaire concerning measures intended to reinforce the implementation of the Conventions (supervision and penalties).

Article 38.- Legal status of the Parties to the conflict

The legal status of the Parties to the conflict shall not be affected by the application of the provisions of the present Protocol and its Regulations and of all or part of the other provisions of the four Geneva Conventions of August 12, 1949, and the Additional Protocol to the said Conventions brought into force in accordance with Article 36 of the present Protocol, and by the conclusion of any other agreement.

References
- Common Art. 3 (4).

Commentary

This provision adapts paragraph 4 of common Article 3 to the new treaty situation which would arise as the result of the coming into effect of the Additional Protocols to the Four Conventions and to common Article 3.
Implementation of common Article 3, as elaborated and supplemented by its Additional Protocol, and the giving of effect to all other provisions of international humanitarian law will never constitute even implicit recognition of the existence and the belligerent status of the adversary. The sole aim of international humanitarian law, both in the case of an international armed conflict and in that of a non-international armed conflict, is to ensure humane treatment for the victims in all circumstances.

Article 39.- Dissemination of the present Protocol

1. The High Contracting Parties undertake, in time of peace, to disseminate the text of the present Protocol as widely as possible to the whole population; they shall include the study thereof in their programmes of military and civil instruction.

2. In time of armed conflict, the responsible authorities of the Parties to the conflict shall take appropriate measures to bring the provisions of the present Protocol and its Regulations to the knowledge of all, combatants and non-combatants alike.

References

- First Geneva Conv. 1949, Art. 47.
- Third Geneva Conv. 1949, Art. 127 (1).
- Fourth Geneva Conv. 1949, Art. 144 (1).
- XXth Internat. Conf. Red Cross, Vienna, 1965, Res. XXI.
- UN, Report of the Secretary-General A/7720, 1969, paras. 117 to 121.
- UN, Report of the Secretary-General A/8370, 1971, paras. 154 to 156.
Commentary

General remarks:

Under the four Conventions, the Contracting Parties undertake to disseminate the text of those Conventions as widely as possible, in time of peace as in time of armed conflict. This obligation is of a very general nature: the dissemination is to be made at all times to the whole population, as a knowledge of the legal principles is the prerequisite of their proper implementation.

All the experts consulted on the matter held the view that dissemination of the Conventions was indeed of vital importance. Education of the population was a better guarantee of respect for humanitarian principles than any penalty. They laid stress on the fact that the need for dissemination, which was recognized by the Conventions, also held good for the other rules of the law of armed conflicts as well as for those which would be adopted following the work for the reaffirmation and development of international humanitarian law.

Article 39 above draws inspiration from the provisions of the four Conventions, while bearing in mind the special nature of non-international armed conflict.

Paragraph 1:
The words "and in time of armed conflict" were left in paragraph 1 owing to a printing error; they should be deleted.

Paragraph 1 stresses the need to disseminate, in time of peace and to the whole population, those provisions which must be respected in case of a non-international armed conflict.

In this context, the education of the civilian population is, in fact, as important as instruction to military personnel; it is often from the population that those members of the armed forces who oppose the authorities in power are recruited.

Paragraph 2:
It should be recalled that in periods of armed conflict the duty to spread knowledge of international humanitarian law is incumbent on all Parties to the conflict, including

the authorities responsible for the rebel Party. Such authorities shall, to the utmost of their possibilities, remind the members of their armed forces and the community inhabiting the territory under their control of the essential provisions of the present Protocol.

Article 40. — 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 and its Regulations.

For the references and commentary to the above article, see commentary to Article 77 of the Draft Additional Protocol to the Four Conventions, Part V, Execution of the Conventions and of the present Protocol.
CHAPTER X

FINAL PROVISIONS

Article 41.- Signature

The present Protocol shall be open until ... ... 197... at ..., for signature by the Parties to the four Geneva Conventions of August 12, 1949.

Article 42.- Ratification

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

Article 43.- Accession

1. The present Protocol shall remain open for accession by any Party to the four Geneva Conventions of August 12, 1949, which has not signed the present Protocol.
2. The instruments of accession shall be deposited with the Depositary State.

Article 44.- 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.
Article 45.- Treaty relations upon entry into force of the present Protocol

When the Parties to the four Geneva Conventions of August 12, 1949, are also Parties to the present Protocol, common Article 3 shall apply as elaborated and supplemented by the present Protocol.

Article 46.- 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 43 and 44 of the present Protocol;

b) the date of entry into force of the present Protocol under its Article 45.

Article 47.- 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 48.- 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.

For the references and the commentary to the articles in this Chapter, see those relating to the Final Provisions in Part VI of the Draft Additional Protocol to the four Conventions.
ANNEX

REGULATIONS CONCERNING SPECIAL CASES OF ARMED
CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

General references

- ICRC, Internat. Conf. Red Cross, Istanbul, 1969,
  Doc. D.S. 4 a, b, e, pp. 99 and 100.
  pp. 13 to 22.
- ICRC, Conf. Red Cross Experts, The Hague, 1971, Report,
  p. 44.
  paras. 282 to 311; Annexes, CE/Com.II/4, p. 61;
  CE/Com.II/16, p. 64.
- UN, Report of the Secretary-General A/7720, 1969,
  para. 172.
- UN, Report of the Secretary-General A/8052, 1970,
  para. 135.
- UN, Report of the Secretary-General A/8370, 1971,
  paras. 126 to 130.

INTRODUCTION

These Regulations, appended to the Draft Additional
Protocol to Article 3 common to the four Conventions relate
to two situations of non-international armed conflict of
a specific type:

1. The insurgent party controls part of the territory
and effectively exercises public power there.
2. One or more States grant the Party or Parties to the conflict assistance in the form of armed forces taking a direct part in the hostilities.

It is clearly observable that in these conflicts the means of fighting have become much more powerful and destructive than those used in the armed conflicts referred to in Article 1 of the Draft Protocol. The victims caused by the hostilities are therefore much more numerous.

In formulating these proposals, the ICRC is moved solely by humanitarian considerations: to ensure sufficient and suitable humane treatment for the victims of armed conflict.

The ICRC in no way proposes to make any changes in the principles of international public law or in the legal system instituted by the four Conventions.

It therefore does not pronounce any opinion on the lawfulness of outside aid, nor does it ask on what grounds, in international law, a foreign State may render the assistance of its armed forces. Again, it does not propose to change the legal characterization of those conflicts; although akin to inter-State armed conflicts and undoubtedly having many international features, they would still be non-international armed conflicts.

The purpose of the ICRC is to ensure that, once certain specific material criteria are fixed, the Parties to the conflict shall apply international humanitarian law as widely as possible, in their own interest as well as in the interest of the victims.

Article I.- Effective organization of the Party opposing the authorities in power

When, in case of armed conflict not of an international character in the territory of one of the High Contracting Parties, the Party opposing the authorities in power has a government which exercises effective power, by means of its administration and adequately organized armed forces, over a part of the territory, the Parties to the conflict shall apply all the provisions of the four Geneva Conventions of August 12, 1949, and the Additional Protocol to the said Conventions.
References


Commentary

The above article relates to a situation where a non-international armed conflict has reached a certain stage and in many respects has the characteristics of an inter-State armed conflict, the balance of the contending forces, the extent of the hostilities and the large number of victims being such that in fact it is in the interest of both Parties to the conflict to apply international humanitarian law as widely as possible. Experience has shown that this has, indeed, been the case in armed conflicts of this nature.

As the ICRC stressed at the first session of the Conference of Government Experts, it wishes this practice to be embodied in a new provision of international humanitarian law. That wish was shared by some experts, who considered that the situation could not be allowed to remain extra muros 71/.

The ICRC proposal is based on the assumption that a number of material elements are presented by the Party opposing the authorities in power: it controls, and effectively exercises its power over a part of the territory. This implies that it has not only an organized army which ensures that it has territorial control, but also an administration capable of assuming and operating the public services; army and administration alike depend on a government.

Where such material elements are presented by the insurgent Party - regardless of any recognition of belligerent status by the authorities in power - the two sides

shall respect the provisions of the four Conventions and of the Additional Protocol to those Conventions. In accordance with Article 38 of the Draft Protocol, the legal status of the Parties to the conflict shall not be affected by the application of the aforementioned international humanitarian law.

Article 2.— Outside aid in armed conflict not of an international character

When, in case of armed conflicts not of an international character in the territory of one of the High Contracting Parties, the armed forces of other States take a direct part in the hostilities, the relations between the Parties to the conflict shall be governed as follows:

(a) the relations as between the authorities in power and the States that aid the Party opposing the authorities in power shall be governed by the four Geneva Conventions of August 12, 1949, and the Additional Protocol to the said Conventions; the same shall apply to the relations between States aiding the authorities in power and States aiding the Party opposing the authorities in power;

(b) the relations between the authorities in power and the Party opposing those authorities shall be governed by at least the provisions in common Article 3 and in the present Protocol. Moreover, the Parties to the conflict shall grant to all captured combatants prisoner-of-war treatment as laid down in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, and shall apply to civilians the provisions of Part IV relative to the civilian population of the Additional Protocol to the Geneva Conventions:

(1) when only the authorities in power benefit from other States' assistance;

(2) when both authorities in power and the Party opposing them benefit from other States' assistance.

(c) all the relations between the Parties to the conflict shall be governed by the four Geneva Conventions of August 12, 1949, and the Additional Protocol to the said Conventions, when the Party opposing the authorities in power fulfils the conditions stipulated in Article 1 of these Regulations, whether or not it is aided by other States.
References

- UN, Report of the Secretary-General A/8370, 1971, paras. 128 to 130.

Commentary

The above article is based on the assumption that an armed conflict occurs within the territory of a High Contracting Party, and that not only the authorities in power and the insurgent Party take part in it, but also one or more foreign States which render one Party or the other assistance in the form of armed forces taking part in the hostilities.

Sub-paragraph (a) governs relations between the States engaged in armed conflict, viz:

Relations between the authorities in power and the State(s) which assist(s) the insurgent Party;

Relations between State(s) which assist(s) the authorities in power and State(s) which assist(s) the insurgent Party.

The conflict between the aforementioned States shall be regarded as an international armed conflict. The treaty relations of those States shall be governed by Article 2 common to the four Conventions and Article 84 of the Draft Additional Protocol to those Conventions.

The relations between the authorities in power and the State or States assisting them shall be governed by the treaty of assistance concluded by them.

Sub-paragraph (b) governs the relations between the insurgent Party, on the one hand, and the authorities in power and foreign States, on the other. Those relations
shall in all circumstances be governed by at least common Article 3, as elaborated and supplemented by its Additional Protocol. Moreover, when the authorities in power and the insurgents alike benefit by the assistance of a third State, all the Parties to the conflict - authorities in power, insurgents and other States - shall grant all captured combatants prisoner-of-war treatment as laid down in the Third Geneva Convention, and shall respect the provisions relating to the protection of the civilian population. The expression "prisoner-of-war treatment" shall be understood to convey the same meaning as the title of the Third Convention.

**Remark**

Should foreign States transfer prisoners of war either to the authorities in power or to the insurgents, they shall not thereby be absolved from responsibility for the treatment of the captured combatants; they shall ascertain that the authorities to which they hand over the prisoners are able to give them prisoner-of-war treatment. Should those authorities fail to discharge their obligations, the foreign States shall take effective measures to remedy the situation or shall ask that the prisoners of war be returned to them.
DRAFT RESOLUTION CONCERNING DISARMAMENT AND PEACE TO BE ANNEXED TO THE FINAL ACT OF THE DIPLOMATIC CONFERENCE

COMMENTARY
The Conference,

noting that the Geneva Conventions and their Additional Protocols do not contain any express provision concerning weapons of mass destruction, blind, poisonous and particularly cruel weapons, and weapons with indiscriminate effects, believing nevertheless that these weapons are contrary to the dictates of humanity and that, in armed conflicts, the members of the international community must absolutely renounce their use, expresses the hope that the prohibition of the production, stockpiling and use of such weapons will be confirmed or proclaimed and that these measures will lead to general and complete disarmament, urges, moreover, the Parties to the Conventions to spare no effort for the preservation of peace.

References
- Declaration of St. Petersburg of 1868, preambular paras. 4 and 5, operative paras. 1 and 2.
- IVth Hague Conv. 1907, Art. 23 (a) and (e).
- UN, A/Res. 2852 (XXVI), preambular para. 6, operative para. 5.

1/ Annex XXV to Document CE/3b lists the principal documents - conventions, resolutions and reports - published by international organizations on the subject of weapons.
Commentary

In its Resolution XIV (Weapons of Mass Destruction), the XXIst International Conference of the Red Cross (Istanbul, September 1969) requested the United Nations to pursue its efforts in that field and requested the ICRC to continue to give the matter its close attention 2/. The proposed resolution relates to disarmament and peace; it also mentions weapons of mass destruction, blind, poisonous and particularly cruel weapons, and weapons with indiscriminate effects.

The NGO representatives, meeting in November 1971, unanimously affirmed that the very possibility of the aforementioned weapons being used would jeopardize any efforts to reaffirm and develop international humanitarian law applicable in armed conflicts, and expressed the hope that it would be possible to proclaim without any ambiguity the prohibition of specific weapons (per se). It should be recalled that the government experts voiced differing opinions regarding the approach to that fundamental problem 2/.

2/ Since then, the ICRC has exercised its action at three levels. At the moral level, it has unceasingly proclaimed that indiscriminate weapons are incompatible with the respect due to persons and objects protected by the law in force (see ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/3b, Part One, Title III, Chap. 3, in which the ICRC expressed the wish that the Powers might renounce the use of any chemical weapons in all armed conflicts); at the practical level, it called upon States not yet parties to accede to the Geneva Protocol of 1925, and stated the results of that approach (see ICRC, Annual Report 1970, pp. 101 and 102); at the legal level, it took cognizance of, and drew attention to, the principal studies undertaken in that sphere, and in its 1971 documentation it indicated some of the problems which still remained acute.

3/ See ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, paras. 30, 422, 476 and 477, and UN, Report of the Secretary-General A/8315, 1971. Some experts pointed out that there were still some lacunae with regard to certain weapons of a current type, the use of which at times acutely affected the civilian population. The point at issue was therefore a question relating to the law of armed conflict which, according to the experts, would be considered by the second session of government experts; cf., inter alia, UN, Document A/C.3/SR.1885 (statement by Sweden).
The Draft Rules, prepared by the ICRC in 1956, contained an Article 14 which related to specific weapons. The provision had been strongly criticized, and this may have been one of the main reasons why the Draft was, after all, not retained by the Powers.

Thus there were two contradictory requirements: on the one hand, that the current work on reaffirmation and development should not be delayed or jeopardized by a question which remained as critical as ever, while, on the other hand, a basic aspect of the law of armed conflict should not be evaded. The solution proposed by the ICRC and which consisted in the adoption of a resolution, appeared to meet the requirements to some extent.

Dealing as it does with a text distinct from the two Protocols, the resolution will allow parallel discussions to be pursued in other important fields. As an annex to the Final Act of the Diplomatic Conference, the resolution will be of the formal nature called for by the gravity of the questions involved.

The first preambular paragraph recalls the lack of any express provision concerning weapons of mass destruction in the Conventions, inasmuch as this field has always been governed by other conventions, in the framework of intergovernmental organizations 4/.

The second preambular paragraph expresses the hope of the public conscience and indicates that all States should renounce the use of such weapons, whatever the circumstances.

The first operative paragraph mentions the three stages at which the weapons should be prohibited, and contains a reminder that general and complete disarmament should remain the principal objective of the work undertaken in this sphere.

The second operative paragraph embodies an appeal for peace, which alone can give the peoples of the world absolute immunity.

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4/ As, for example, the Geneva Protocol of 1925, in the context of the League of Nations Conference for the Reduction and Limitation of Armaments.