

**INTERNATIONAL COMMITTEE OF THE RED CROSS**

**Conference of Government Experts on the  
Reaffirmation and Development <sup>2</sup>  
of International Humanitarian Law  
Applicable in Armed Conflicts**

SECOND SESSION  
3 May - 3 June 1972

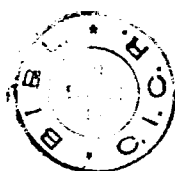
**REPORT  
ON THE WORK OF THE CONFERENCE**

**Volume I**



GENEVA  
July 1972

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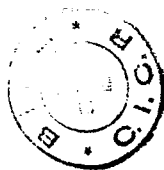
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**I**



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## INTRODUCTION

This report describes the work of the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the International Committee of the Red Cross in Geneva from 3 May to 3 June 1972.

Resolution XIII, adopted unanimously by the 21st International Red Cross Conference (Istanbul, 1969), asked the ICRC to pursue actively its efforts with a view to proposing, as soon as possible, concrete rules which would supplement existing humanitarian law and for this purpose to consult government experts.

In the spring of 1971, the ICRC therefore organized a Conference in which the experts of thirty-nine Governments took part. As it was unable to get through the whole of the agenda or to carry its work far enough, this assembly asked for another Conference to be held, with the possibility of wider participation by the international community. For this reason the ICRC, in a letter dated 27 September 1971, invited all the States explicitly Parties to the Geneva Conventions of 12 August 1949 to send experts to a second session of the Conference. Seventy-seven of them replied affirmatively to this appeal, and delegated more than four hundred experts.

After the Conference, the ICRC published, in August 1971, the *Report on the work of the Conference*. This was sent to all the Governments of States Parties to the Geneva Conventions and to all the national Red Cross Societies, and was made available to the twenty-sixth session of the General Assembly of the United Nations. The ICRC then proceeded to prepare drafts of international instruments, as comprehensive and specific as possible, bearing in mind the various opinions expressed during the first session. This work was not performed in isolation: experts of several nations were consulted, either in Geneva or in their own countries.

The ICRC also studied the work of the twenty-sixth General Assembly of the United Nations. It noted the Secretary-General's Report (A/8370) on the first session of the Conference. The General Assembly adopted two resolutions, entitled "Respect for human rights in armed conflicts" (2852 (XXVI) and 2853 (XXVI)), in which the Assembly welcomed the ICRC'S decision to hold a second session of the Conference, expressed the hope that it would arrive at definite conclusions and recommendations with regard to the action to be taken at governmental

level, and asked the Secretary-General to transmit various documents to the ICRC for consideration by the Conference; moreover, in a resolution 2854 (XXVI), entitled "Protection of journalists engaged in dangerous missions in areas of armed conflict", the United Nations General Assembly asked the Commission on Human Rights to send its report to the second session of the ICRC Conference of Government Experts.

The ICRC has likewise wished to carry on its work in close association with the National Red Cross, Red Crescent and Red Lion and Sun Societies. At different meetings, its representatives have presented the developments of law envisaged and collected views. A large Conference of Red Cross Experts was held in Vienna in March 1972 in order to make a thorough examination, jointly with the ICRC experts, of the draft legal instruments intended for submission to the second session of the Conference of Government Experts.

Aware, moreover, of the interest in its work in this field shown by numerous non-governmental organizations for many years, the ICRC organized a consultative meeting for several of them, in Geneva in November 1971, to obtain their point of view on some of the proposed developments.

The documentation submitted to the second session was very extensive. It comprised principally a draft additional Protocol to the Four Geneva Conventions of 12 August 1949 and a draft additional Protocol to Article 3 common to these four Conventions, each accompanied by its commentary, together with other ICRC documents, and documents from United Nations Organizations and some non-governmental organizations. A full list of these documents, with references, is given below.

As in the first session, the Conference formed four commissions, whose discussions were preceded and followed by plenary sessions. Commission I dealt with wounded, sick and shipwrecked persons; Commission II, with non-international armed conflicts; Commission III, with the civilian population, combatants and journalists; Commission IV, with the application of the law, general and final provisions, the preliminary declaration on the application of international humanitarian law in armed struggles for self-determination, and the draft Resolution concerning disarmament and peace. In conformity with the Rules of Procedure but according to its own working methods, each Commission set up sub-commissions,

drafting committees or co-ordinating committees; some of them took straw votes.

The Rules of Procedure which are given below, were adopted unanimously. They stated, in particular, that the experts were expressing their personal views, that, when necessary, votes could be taken as an indication of opinion, and, finally, that the Conference would refrain from any discussion of a polemical or political character.

The present report is in two volumes. The first contains, in addition to the ICRC'S account of the opening and final plenary sessions, the reports on the work of the four Commissions, as approved by the Commissions in question and by the Conference. The second volume contains the entire collection of written proposals submitted by the experts, preceded by the draft additional Protocols and other legal instruments presented by the ICRC to the second session.

The large number of participants in this second session, the results obtained from the work of the Commissions and from the plenary sessions—as may be seen from the present Report and its Annexes—and the constructive atmosphere prevailing during the meetings, have certainly given a strong impetus to the process of reaffirmation and development of international humanitarian law.

The present Report and its Annexes will be sent to

the Governments of States Parties to the 1949 Geneva Conventions and will be made available to the twenty-seventh session of the United Nations General Assembly, as well as to the National Red Cross Societies. Moreover, the ICRC intends to organize consultations of experts on specific subjects, to try to resolve, or at least to prepare for a Diplomatic Conference, certain technical points which could not be dealt with sufficiently thoroughly by the government experts.

The results of the two sessions of the Conference of Government Experts and, as far as possible, those of the consultative meetings of experts and of further studies by the ICRC on certain points will form the basis on which the ICRC will draft new proposed legal instruments. These will be received by the end of the spring of 1973 by the Governments of States Parties to the 1949 Geneva Conventions, as a preliminary to the Diplomatic Conference which, according to a statement made by the head of the delegation of Swiss experts at the final plenary meetings of the second session, should take place in Geneva in 1974.

Thus, the ICRC hopes that the international community will reaffirm and develop a system of international humanitarian law fully applicable to the reality of contemporary armed conflicts and capable of limiting their destructive effects.

## OFFICIAL OPENING SESSION

On 3 May, 1972, the opening ceremony of the second session of the Conference of Government Experts took place in the Palais des Expositions in Geneva.

Held under the chairmanship of Mr Marcel Naville, President of the International Committee of the Red Cross, the ceremony was attended by about 400 government experts, as well as by representatives of the United Nations Organization and of the Red Cross. The authorities of the Swiss Confederation and of the Republic and Canton of Geneva were also represented. Many members of the diplomatic corps and of international organizations, both governmental and non-governmental, were present.

Mr Naville, as President of the International Committee of the Red Cross, formally opened the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Then, referring to the work of the Conference, Mr Naville stated:

*It is almost a year since the opening of the first session of the Conference. It was attended by experts from thirty-nine governments, and it made possible a considerable step in the right direction: it will be recalled, in particular, that it approved two Draft Additional Protocols relating to the protection of the wounded and the sick in the event of international or internal armed conflict. In other matters submitted—the protection of the civilian population, the behaviour of combatants, the scope and status of medical aviation, the rules applicable in internal armed conflicts, and the reinforcement of the application of the law in force—in these various matters, the experts' work did not go so far, due to lack of time. Nevertheless, from their initial study emerged the lines of research to be followed and the objectives. They showed that solutions were possible and desirable.*

*These considerations led the ICRC and the experts gathered last year to the conclusion that a second session of the Conference was necessary.*

*When convening the present session, the ICRC complied with a recommendation, expressed by the great majority of the experts, to open the Conference more widely to the international community: on 27 September 1971, all Governments of States expressly Parties to the 1949 Geneva Conventions were invited to send experts to this second session. I would like to convey the gratitude of the International Committee of*

*the Red Cross to the States which have replied to its appeal and which have delegated here eminent experts whose co-operation and qualified opinions are essential to enable us to make progress along the course which we have set. Indeed, without the active support of Governments, the work undertaken cannot be brought to a conclusion.*

*It is appropriate to survey briefly at this stage how our work has been proceeding over the eleven months between the two sessions. The ICRC first drew up a report on the work of last year's Conference. This document, which has been forwarded to all Governments concerned, enables those experts who did not attend the first session to know exactly what subjects were discussed and should permit more rapid progress in the consideration of some items which may be considered as having been settled, at least we hope so.*

*The proposal having been made last year that the ICRC draw up draft rules which should be as complete and as definite as possible, our jurists set to work on two almost complete draft Protocols, intended to supplement the Geneva Conventions, and the study of which will constitute the main concern of our proceedings.*

*That work was not carried out in isolation. Many experts in various countries have been consulted, both in Geneva and in their own cities. They have helped us to draw up the Protocols, bearing in mind, as much as possible, the various opinions expressed, and incorporating those most worth retaining.*

*In November 1971, the ICRC organized in Geneva a consultative meeting with the non-governmental organizations which, for many years, have displayed great interest in the work undertaken in connection with international humanitarian law and have contributed not only their moral support but also their experience and specialized knowledge. The results and recommendations of that meeting are also presented in a report included in the documentary material.*

*So as to take into consideration the wishes of some of those institutions which are carefully following the development of humanitarian law, and which have previously had the opportunity to comment upon the ICRC's draft instruments and reports, the ICRC has invited these non-governmental organizations to send observers to the Conference here. By attending the work of the different commissions, the representatives of those organizations will have the opportunity of being directly informed of the discussions. It gives me*

pleasure to welcome them here among us and to tell you how much we have appreciated their co-operation and support.

The ICRC, moreover, at the beginning of this year, sent two missions which visited twelve African countries, in order to keep them informed of the progress in our studies and to further their interest in our common enterprise.

The ICRC is not unmindful, too, of the fact that the most fervent upholders of the reaffirmation and development of humanitarian law are to be found in Red Cross circles. It was therefore eager to associate the National Red Cross, Red Crescent and Red Lion and Sun Societies in its work. In Mexico, in October 1971, at a meeting of the International Red Cross, and in Baghdad, in March of this year, at a meeting of the National Societies of Arabic-speaking countries, ICRC representatives presented a detailed account of the present state of the questions under review. Finally, six weeks ago, the experts of thirty-six National Societies met in Vienna to carry out, together with delegates of the ICRC, a study in depth of the texts that are being submitted to you today, and valuable exchanges of views took place at the time. It must therefore be acknowledged that the ICRC has done its best to put before you drafts which have received widespread approval in the Red Cross world. It is with great pleasure that we welcome here a number of representatives of National Societies who will attend our meetings.

Concurrently and in close co-operation with the ICRC, the United Nations has continued to devote special attention to the various aspects of respect for human rights in armed conflicts. The Secretary-General of the United Nations presented a third report on this matter, the purpose of which was to provide the General Assembly at its twenty-sixth session with a survey of the results of the first session of the Conference of Government Experts and of other recent development relating to the protection of human rights in armed conflicts. Two resolutions adopted by the twenty-sixth General Assembly, and with which you are no doubt familiar, invite the Secretary-General and the ICRC to continue the work begun, and express the hope that the second session of the Conference of Government Experts will result in specific conclusions and recommendations for the further development of international humanitarian law for action at Government level. It moreover requested the Secretary-General to transmit to the ICRC his latest report, together with any further observations received from Governments, as well as the records of relevant discussions and resolutions of the General Assembly.

Thus, the very fruitful collaboration that has been established for many years between the United Nations and the ICRC is continuing satisfactorily, and it is in this spirit that I am happy to welcome among us today the representative of the Secretary-General, Mr Marc Schreiber, and members of his staff, who are taking part in our work.

We recall with gratification that the first session achieved concrete results largely due to the fact that the experts were careful to avoid any political or controversial discussion. I think it is imperative that that discipline be maintained.

When your Governments sent their experts to this second session they too refrained from considering their existing relations with one another. For this we thank them most warmly. In this context, I should like to remind you that the invitation extended to the Governments whose experts are here in no way implies that the International Committee takes any stand or passes judgement on the present or past attitude of those Governments with regard to humanitarian law and the implementation of the Geneva Conventions in specific cases.

We hope we have managed to provide conditions that will enable the Conference to achieve definite results. The ICRC is not the only one to set its hopes on that achievement. It knows full well that wide sections of world public opinion, a great many Governments and numerous public or private institutions are impatiently waiting for new instruments for the protection of victims of war and for the safeguarding of fundamental human rights. Ladies and Gentlemen, in your deliberations you should bear in mind mankind's anxious hope. Your work should make it possible in the near future to hold a meeting of plenipotentiaries from the majority of States, in order that the new rules which the world is waiting for may enter into effect without delay. The International Committee can then consider that its efforts have not been in vain, and devote itself with increased energy to the further tasks with which it will then be confronted.

On behalf of the authorities of the Republic and Canton of Geneva, Mr Henri Schmitt, President of the State Council, cordially welcomed the government experts to Geneva. He went on to say:

The Red Cross would never have existed if Henri Dunant, in the church of Castiglione, had not been moved to the depths of his being at the suffering of his fellow creatures and if this emotion, far from being a passing phase, had not grown within him until it enabled him to translate into practical form the compassion which he felt. Very often the general public discerns in peace-making organizations and conferences a lack of sympathy, a confrontation of selfish interests and an ineffective approach to realities which make the public question the utility of such meetings.

Our emotions are blunted by the weight of news thrust upon us, causing one feeling to be rapidly replaced by another. Modern methods of communication accustom us to living alongside suffering and help to harden our hearts. The daily reports of war, of famine, of natural disasters, no longer move us and are regarded merely as topical events. The work of diplomats can only bear fruit when allied to realism, the emotional force creating within us the zeal which leads to determination to get things done.

That is what most forcibly struck me about Henri Dunant's character: persistent emotion aroused in him by the sight of suffering was translated into practical arrangements which would never have seen the light of day without that emotion and that open-heartedness.

What realism in his proposals! They included

- (1) The formation of societies to organize in time of peace the assistance which could be provided by specially trained volunteers in co-operation with the military medical services, thereby preceding the National Red Cross Societies of today;
- (2) the intervention of those societies in peacetime epidemics and disasters; and
- (3) the independence granted the Red Cross organizations by the 1864 Geneva Convention.

If, as I have just said, the heart and the mind, and emotion and realism, must be allied, we must also, through the faith which inspires us, convince those men who, through the functions they discharge, can put the idea into practice; and here let me say how much hope we place in this power to convince which is an attribute of delegates to international conferences. It is they who, through their reports to governments, may push through decisions, thanks to their own sincere convictions. Far from being merely an executive, the government delegate may exert a decisive influence on the standpoint adopted by the country he represents. Here again, we are far from that so-called hardheartedness with which diplomats are so often reproached.

Henri Dunant had that great faculty of winning to his cause those able to bring it to fruition. Having said that, it now remains for us to set down our intentions in law and, if you will allow me, I shall make a number of general points regarding the development of conventions for the protection of war victims.

An international convention, especially when it concerns humanitarian principles, can be effective only if the principles it contains are accepted and adopted by all peoples. It must be more than an arrangement between governments or a document on relations between military high commands. An extension of international humanitarian law of the kind that you are to discuss can be fully effective only if the principles that it defends are rooted in the will of the peoples that you represent. It is therefore necessary to guarantee the activities of Red Cross Societies in all our countries, for these Societies form the very basis of the work of the neutral and impartial body, the International Committee.

In the absence of an agreement prohibiting recourse to war, faced with the difficulties confronting the international community in its efforts to secure international peace, in view of the present inability of international penal law to impose respect for principles on which we all nevertheless agree, we must rejoice in the efforts being made to broaden a whole sector of international law which has successfully withstood the test of time. Here, I think, we must prove ourselves realistic and must, regardless of our governmental

responsibilities, ensure the success of this work. I would even go so far as to say that, in sparing more of our fellow men from the effects of war, we are reinforcing the efforts of those who seek to codify the suppression of war itself. But what prejudices must be swept aside to ensure the maintenance of international peace—prejudices that constitute an attack on international penal law! It will probably still be years before agreement is reached on what Article 227 of the Treaty of Versailles defined as the principle of the suppression of supreme outrages against international morality and the sacred authority of treaties. It has to be admitted that the Geneva Convention of 22 April 1864, revised in 1906 and 1929, has its shortcomings due to the constantly changing nature of armed conflicts. I believe that it is more necessary than ever before, from a legal point of view, that the absence of any distinction between friends and enemies should be stressed all the more strongly since, in undeclared wars, the official non-intervention of the State machinery leaves whole populations defenceless.

Although the revisions of 1906 and 1929 enabled international legislation to be updated while capitalizing, if I may put it that way, from the experience gained during the course of past wars, the fundamental nature of the Geneva Conventions made it necessary to take the further step constituted by the proposals being made to you now and which are much more than simply an adaptation of the Conventions which bind us today. It is here that the moral authority of the ICRC is exerted; Switzerland, and Geneva in particular—the headquarters of this international committee—will do everything in their power to reinforce this moral authority throughout the world. We are fully aware, as politicians, placed in responsible positions in this country, that the International Red Cross can ensure respect for the treaties and conventions which you prepare only to the extent that the Red Cross itself is respected and is able to offer guarantees of its impartiality towards everyone. This is one of the reasons for which we feel that the political neutrality of Switzerland is essential to International Red Cross activities and impact in the world; it is also the reason why Geneva, the European Headquarters of the United Nations, once again declares its readiness to serve those who work for peace or to mitigate the suffering which exists in this world. Neutrality and indifference are poles apart; indeed, neutrality must allow feelings to intervene in the madness of mankind. Neutrality is something active and is based on solidarity with the world and it is in this sense that we understand the term.

Max Huber, former President of the International Committee of the Red Cross, in a speech made forty years ago to the Board of Governors of the League of Red Cross Societies on the 14th of October 1932, foresaw the need for the expansion of the Red Cross ideal, which still inspires you today, when he said that the role of the Red Cross was a great and noble one, that of being ever vigilant in order to perceive human suffering wherever it might appear in either new forms or in those which had not previously been noticed. To

*bring help where others did not was a task which could be assumed only by an organization completely disinterested and rich in human material and resources. That was the idea of service in the purest sense of the word.*

Mr Marc Schreiber, Director of the Human Rights Division, conveyed the best wishes of the Secretary-General of the United Nations to the government experts, and assured them of his personal interest in the work of the Conference. Mr Schreiber stated:

*The second session of the Conference is indeed an important new step forward in the co-operation that has been established for some years now between the United Nations and the International Committee of the Red Cross in the field of the protection of Human Rights in armed conflicts. The close and practical co-operation, stimulating sustained and fruitful efforts, corresponds to the wishes of the whole body of the United Nations members. In 1968, the International Conference on Human Rights, held in Teheran twenty years after the Declaration on Human Rights had been universally adopted, drew to the attention of the United Nations bodies the importance of the adequate steps that could be taken to secure the better application of existing humanitarian conventions and rules in all armed conflicts and the need for additional legal instruments to ensure the better protection of civilians, prisoners, and combatants in all armed conflicts and the limitation of the use of certain methods and means of warfare. The following year, additional impetus and new life to the work of the ICRC were given by the XXIXth International Conference of the Red Cross, in order to supplement existing humanitarian law.*

*The United Nations General Assembly gave effect to the Teheran resolution, and, while inviting the Secretary-General to undertake the studies requested, and examining the problems arising in this field at each of its sessions, often giving them the highest priority, it noted expressly in several resolutions its appreciation of the work done by the ICRC. The General Assembly took good care that the resolutions and reports submitted to it should be transmitted to the ICRC and that it should be kept informed by the Secretary-General of the results of the work of the Conference convened by the ICRC. The representatives of the ICRC have followed carefully the discussions of the General Assembly and of the Commission on Human Rights on questions dealing with the protection of human rights in armed conflicts, and the United Nations Secretariat has kept in touch as much as possible with its opposite numbers at the ICRC on the work that has been undertaken by both sides quite independently of each other, but with an evident desire for harmonization.*

*This is not the moment to recall in detail the points at issue expressed in the various resolutions of the General Assembly of the United Nations. These form part of the Conference documentation. Two resolutions*

*following two parallel lines of thought were adopted at the last session of the General Assembly on the general question of respect for human rights in armed conflicts. They requested the Secretary-General to report to the General Assembly on the results of our Conference. On two occasions, the General Assembly expressed the hope that the Conference would result in specific conclusions and recommendations for action at government level in respect of the reaffirmation and development of international humanitarian law. A third resolution requested the Conference to submit its observations on draft provisions already examined by the Commission on Human Rights to be included in an international convention on the protection of journalists engaged in dangerous missions in areas of armed conflicts, already examined by the Commission on Human Rights. The General Assembly recognized the need for such a convention and decided to examine this item as a matter of the highest priority at its next session.*

*There are two more remarks I would like to make. First of all, we need only look through the documentation provided to realize the usefulness of the first session of this Conference, held just over a year ago, and to applaud the extent and the quality of the work done by the ICRC since the Conference was adjourned. Even a cursory examination of the documents shows how far the viewpoints and opinions expressed during the first session have inspired the substance and the form of the proposals submitted by the jurists for our consideration. It is right to pay tribute not only to the skill and elegance with which they have composed difficult texts full of subtle distinctions but also to their wish to bear in mind as far as possible the various viewpoints expressed and the decisions made by international bodies. We know that the United Nations General Assembly, for instance, is concerned to ensure:*

*better application of existing rules relating to armed conflicts, particularly the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the four Geneva Conventions of 1949, including the need for strengthening the system of Protecting Powers contained in such instruments;*

*the reaffirmation and development of relevant rules, as well as other measures to improve the protection of the civilian population during armed conflicts, including legal restraints and restrictions on certain methods of warfare and weapons that have proved particularly perilous to civilians, as well as arrangements for humanitarian relief;*

*the evolution of norms designed to increase the protection of persons struggling against colonial and alien domination, foreign occupation and racist regimes;*

*the development of the rules concerning the status protection and humane treatment of combatants in international and non-international armed conflicts and the question of guerrilla warfare;*

*the adoption of additional rules regarding the protection of the wounded and sick.*



*Consideration has also been given to the wishes of the Commission on the Status of Women that better protection should be provided for women and children in periods of crisis or war, in the struggle for peace, self-government, national liberation and independence.*

*In closing, I would like to express the wish and the hope that, in carrying on our technical work based on the texts prepared by the ICRC and with the assistance which it so kindly provides, we never lose sight of those for whom this work is done, even if we do not mention them: the civilians, the prisoners, the wounded, the combatants themselves, often drawn helplessly into the throes of armed conflicts, the like of which only our age is capable of creating. The news media have reminded us enough of this during the past year and continue to do so every day. Nor do they disguise the disquiet among the public—more sensitive than ever before to the large-scale violations of human rights—who wish to safeguard and affirm the imperatives of human dignity and thus, without doubt, save civilization itself. The thought of the victims of armed conflicts should give us the determination to achieve acceptable results as speedily as possible, not merely to enrich international law, both present and future, but in the hope that our efforts will lead to the relief of indescribable misery*

*and an end to shameful and purposeless humiliation and degradation.*

*Let us think, too, in the same spirit of determination, of those who represent all that is best in the international community, who, in whatever capacity, bring relief and offer a certain degree of protection to victims of armed conflicts, either in their own localities or in the very areas where the victims themselves are to be found. Having said this, I feel I have to stress these complementary and co-ordinated efforts—some of which are better known than others — which have been so usefully undertaken by the United Nations and the Red Cross in many regions of the world over the past year.*

*“Peace is the underlying condition for the full observance of human rights and war is their negation”—as it is expressed in the Resolution of the Teheran Conference. Let us also think, then, of those who, whether at governmental or at any other level, attempt to stop armed conflicts, or prevent them from breaking out. In the tranquillity of this city, whose humanitarian traditions pay homage to humanity as a whole, let us do our best not to dash hopes but to spread encouragement.*



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- M. Harald HUBER  
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## RULES OF PROCEDURE OF THE CONFERENCE

*Rule 1.* — The Conference is convened and organized by the International Committee of the Red Cross (ICRC), which is anxious to obtain expert opinion on the reaffirmation and development of international humanitarian law applicable in armed conflicts.

2. The Conference shall be composed of experts appointed by the governments of States expressly bound by the Geneva Conventions of August 12, 1949.

Delegates of the United Nations Secretary-General shall also take part in the Conference.

A number of technical experts shall participate in the Conference in an advisory capacity. In addition, representatives of the National Red Cross Societies and of the non-governmental Organizations have been invited to attend the Conference as observers.

*Rule 2.* — The documentary material of the Conference shall consist principally of:

- (a) the documentation already submitted at the first session;
- (b) the Report on the Work of the Conference at its first session;
- (c) the Basic Texts and the Commentaries thereon, as well as other documents, prepared by the ICRC for the second session;
- (d) the document containing the replies to the Questionnaire D-O-1210 b concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949;
- (e) the Report on the Work of the Conference of Red Cross Experts, held in Vienna from 20 to 24 March 1972;
- (f) the Report, records and documents transmitted to the ICRC, in accordance with resolution 2853 (XXVI) adopted by the United Nations General Assembly on 20 December 1971;
- (g) the documents communicated to the ICRC by the United Nations Commission on Human Rights on the question of the protection of journalists engaged in dangerous missions in areas of armed conflict, in accordance with resolution 2854 (XXVI) adopted by the United Nations General Assembly on 20 December 1971.

*Rule 3.* — 1. All meetings of the Conference shall be held in private.

2. Information on the progress of the Conference shall be given regularly to the press.

*Rule 4.* — The secretariat of the Conference, set up by the ICRC, shall provide all the necessary services for the Conference and Commissions.

*Rule 5.* — 1. The Conference shall elect its President and three Vice-Presidents.

2. Each of the Commissions that will be constituted and among which the various subjects to be examined will be shared shall elect its own chairman and rapporteur. A legal expert of the ICRC shall assist the latter.

*Rule 6.* — The President of the Conference, the Secretary General, a representative of the ICRC and the chairmen of the Commissions shall constitute the Conference Bureau, which shall watch over the proper running of the Conference.

*Rule 7.* — 1. The experts shall speak in their personal capacity, and their statements shall not bind in any way the government that appointed them.

2. The Conference shall not adopt any resolutions or make any recommendations. However, as the ICRC must know which views are predominant at the Conference in order that proposals for rules might be determined, votes may be taken purely as an indicative measure; should there be present two or more experts from any one country, only one of them shall take part in a vote.

3. The purpose of the Conference, which is held under the auspices of the Red Cross, is to promote generally international humanitarian law applicable in armed conflicts; the Conference shall therefore eschew all discussions of a polemical or political nature.

*Rule 8.* — Experts may submit observations and proposals in writing.

The secretariat shall endeavour to have these documents translated into the working languages of the Conference and distributed to Conference members.

*Rule 9.* — French, English and Spanish shall be the working languages of the Conference. The secretariat shall arrange for the simultaneous interpretation of speeches made in one of these languages.

*Rule 10.* — The proceedings of each Commission shall be incorporated in a report that shall be examined by the Conference in plenary session in the course of its final meetings.

Questions examined directly by the Conference in plenary session shall also be incorporated in a report

that shall be, if possible, submitted to the Conference before it closes its meetings.

*Rule 11.* — The ICRC intends to prepare, after the Conference, an analytical report.

*Rule 12.* — All cases not covered by the present Rules shall be dealt with on the basis of the Statutes of the International Red Cross and the Rules of Procedure of the International Conference of the Red Cross, and according to generally established parliamentary custom.

## LIST OF DOCUMENTS SUBMITTED TO THE EXPERTS

### CONFERENCE OF GOVERNMENT EXPERTS

*First session* (Geneva, 24 May-12 June 1971)

#### ICRC Documents

##### Document I:

*Introduction.* (Document CE/1, Geneva, January 1971.)

##### Document II:

*Measures intended to reinforce the implementation of the existing law.* (Document CE/2, Geneva, January 1971.)

##### Document III:

*Protection of the civilian population against dangers resulting from hostilities.* (Document CE/3, Geneva, January 1971.)

##### Document IV:

*Rules relative to behaviour of combatants.* (Document CE/4, Geneva, January 1971.)

##### Document V:

*Protection of victims of non-international armed conflicts.* (Document CE/5, Geneva, January 1971.)

##### Document VI:

*Rules applicable in guerrilla warfare.* (Document CE/6, Geneva, January 1971.)

##### Document VII:

*Protection of the wounded and sick.* (Document CE/7, Geneva, January 1971.)

##### Document VIII:

*Annexes.* (Document CE/8, Geneva, January 1971.)

*Report on the work of the Conference* (Geneva, January 1971)

*Second session* (Geneva, 3 May-3 June 1972)

ICRC Documents

*Second session* (Geneva, 3 May-3 June 1972)

##### Volume I:

*Texts.* (Geneva, January 1972.)

##### Volume II:

*Commentaries, first and second parts.* (Geneva, January 1972.)

*Technical memorandum on medical marking and identification.* (Geneva, April 1972.)

*Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of 12 August 1949.* (Geneva, April 1972.)

### CONFERENCE OF RED CROSS EXPERTS

*First session.* (The Hague, 1-6 March 1971.)

*Report on the work of the Conference*

*Second session* (Vienna, 20-24 March 1972.)

*Report on the work of the Conference*

### UNITED NATIONS ORGANIZATION

*Report on the work of the Commission on the Status of Women, 24th session, 14 February-3 March 1972* (Economic and Social Council, E/5109, E/CN. 6/568)

*Documents concerning the protection of journalists engaged in dangerous mission, in areas of armed conflict*

(E/CN.4 (XXVIII)/CRP.5/Add.1, E/CN.4/L.1198, E/CN.4/L.1198/Rev.1, E/CN.4/L.1199, E/CN.4/L.1199/Corr.1 and E/CN.4/L.1202 to E/CN.4/L.1210)

### NON-GOVERNMENTAL ORGANIZATIONS

*Report of the consultative meeting on the reaffirmation and development of international humanitarian law applicable in armed conflicts.* (ICRC, Document D 1251 b, Geneva, November 1971.)

### WORLD VETERANS' FEDERATION (W.V.F.)

*The status of resistants in international conflicts.* (Paris 1971.)

### INTERNATIONAL UNION FOR CHILD WELFARE

*Remarks on the protection of children during armed conflicts.* (Geneva, April 1972.)

## REPORT ON THE INITIAL PLENARY MEETINGS

### I. PROCEDURE

0.1 Mr. Marcel Naville, President of the International Committee of the Red Cross, opened the meeting, after which the Conference elected Mr. Jean Pictet (Vice-President of the ICRC) President, and Mr. Willem Riphagen (Netherlands), Mr. Aurel Cristesco (Romania) and Mr. Keba M'Baye (Senegal) Vice-Presidents<sup>1</sup>.

0.2 The President of the Conference said that the same system as the one adopted at the first session of the Conference, as regards the consideration of the various subjects by the following four Commissions, would be adhered to: Commission I: Protection of the wounded, sick and shipwrecked; Commission II: Non-international armed conflicts; Commission III: Protection of the civilian population; protection of journalists engaged in dangerous missions; behaviour of combatants; Commission IV: Measures intended to reinforce the implementation of the existing law; general and final provisions; preliminary draft declaration on the application of international humanitarian law in armed struggles for self-determination; draft resolution concerning disarmament and peace.

0.3 The Rules of Procedure were submitted by the President of the Conference and approved. The President said that the Conference Bureau would be constituted in accordance with those rules and that the ICRC, which was responsible for the organization of the Conference, had designated Mr. P. Gaillard as Secretary General and Mr. A.-D. Micheli as Assistant Secretary General. He pointed out that the secretariat would draw up summary records of the plenary meetings of the Conference and that daily summary records of the Commissions' deliberations would not be made, but that the Rapporteur of each of the four Commissions would submit to the final plenary meetings full summary records of his own Commission's work. He added that written proposals which experts wished to be submitted would be circulated by the secretariat.

0.4 The President of the Conference said that, as the purpose of the Conference was to draft appropriate texts, the experts should formulate their proposals in the form of texts. He proposed that the two Draft Protocols prepared by the ICRC should be taken by the experts as a basis for discussion. He reminded the

experts that they were, also, to consider the question of the protection of journalists engaged in dangerous missions and other problems which it had not been possible to examine, for lack of time, at the first session. He said that the experts of the ICRC would present, in introductory statements, the subjects to be discussed by each Commission and pointed out the documentation that had been prepared by the ICRC for the experts. The Secretary General added that an information bureau had been set up to assist experts.

0.5 A Swiss expert declared that the Swiss Federal Council was prepared to convene a Diplomatic Conference at Geneva for the conclusion of agreements concerning humanitarian law.

### II. GENERAL DISCUSSION

#### (a) *Purpose of the Conference*

0.6 The subject on the Conference agenda was "the reaffirmation and development of international humanitarian law applicable in armed conflicts"; the task was vital, an expert said, for what we were witnessing in the world today was rather the contrary: a fast and far-reaching erosion of the most fundamental principles of the existing laws of war. He went on to say that there were two basic principles upon which the whole body of laws of war was founded, both formulated in the 1868 Declaration of St. Petersburg: one was that the only legitimate object during armed conflict was to weaken the military forces of the enemy, the rationale of this principle being the saving of the lives of persons who did not take part in the military contest and of non-military objects; the second basic principle was that which proclaimed that, while the purpose was to seek to put enemy soldiers out of action, unnecessary suffering should not be inflicted in particular by the use of certain weapons. The expert undertook to show that eroding forces, mainly new methods of waging war and measures whose effects were felt indiscriminately, were at work on these basic principles and tended to empty them of their substance.

0.7 Many experts also stressed that the work of the Conference had been rendered necessary as a result of the nature of contemporary armed conflicts and the means of combat employed particularly regarding the use of weapons of mass destruction.

0.8 A large number of experts laid emphasis on the importance and value of the Geneva Conventions of 1949. They considered that the question of their

<sup>1</sup> Mr. Keba M'Baye (Senegal) was not able to take part in the Conference. At the plenary meeting of 1 June, Mr. Philippe Mataga (Cameroon) was elected a Vice-President.

revision should not be raised, but rather that they should be *reaffirmed* and *developed*. When discharging their mission, the experts should not depart from a realistic approach to their task and should formulate proposals that would be acceptable and applicable by everyone. An excess of idealism, an expert said, betokened a measure of irresponsibility. The Conference, therefore, had to combine boldness with prudence and seek to balance the security of States against humanitarian requirements.

0.9 Some experts thought that the maintenance of peace constituted the best protection of human rights; the United Nations Charter had outlawed the use of force in nearly all cases. The work of the Conference should be carried out by taking into account the international law in force and, in particular, the principles of national sovereignty, non-interference in the domestic affairs of States and the right of peoples to self-determination.

0.10 In the texts to be drafted, the relationship between the Additional Protocols and the law in force (Geneva and Hague Conventions) should be more strictly defined, and care should be taken not to weaken or to repeat the provisions of the latter.

0.11 One of the experts laid stress on the fact that the rules of humanitarian law should follow the principle of the reciprocity and balance of rights and obligations.

(b) *Relations and co-operation between the Secretary-General of the United Nations and the International Committee of the Red Cross.*

0.12 Several experts expressed satisfaction with the co-operation established between the United Nations and the ICRC concerning the work being carried out in the field of humanitarian law and hoped that this efficacious collaboration would be pursued further.

(c) *Role of the ICRC*

0.13 All the experts welcomed the ICRC's decision to convene a second session and to invite to it all States who were Parties to the Geneva Conventions of 1949. They expressed their thanks to the ICRC for the documentary material it had prepared for the Conference and which constituted a sound basis for discussion. Some experts wondered whether the Conference would manage to get through all the work that had to be done and whether the convening of a third session would have to be considered, but they all gave an assurance to participate in a constructive spirit.

### III. SPECIFIC PROBLEMS

(a) *International and non-international armed conflicts*

0.14 The vast majority of the experts were in favour of retaining the distinction between the two types of

conflict. They approved the preparation of two Draft Additional Protocols. One expert, however, observed that the problems ought to be approached from a new angle and that the inseparable nature of the safeguarding of victims of armed conflicts ought not to be forgotten. In this respect, he was gratified to find that, in some sections, the two Draft Protocols contained identical provisions, and he wondered whether it would not have been possible to confine oneself to a single instrument.

0.15 In this connection, an expert referred to a proposal put forward at the first session by two delegations: to combine the two Protocols into a single one, which would be divided into three parts. The first part would lay down minimum principles which would hold good for all armed conflicts, and would in this way avoid duplication; the second part would grant a wider protection to the victims of specific conflicts, in particular of international armed conflicts; and the third part would strengthen the implementation of the Geneva Conventions and of the Protocols additional to the Conventions, and would, in this respect, lay down the distinction between international and non-international conflicts.

0.16 A very large number of experts asserted that armed struggles for self-determination were international armed conflicts, within the meaning of Article 2 common to the four Geneva conventions. An expert asked that clearer definitions of this type of conflict should be established and that its international character should be unequivocally stated; another said that he did not approve the draft Declaration, as formulated by the ICRC.

0.17 A distinction had to be drawn between non-international armed conflicts and situations involving internal disturbances and public emergency. In a general way, it was considered that these different situations should be more clearly defined.

0.18 Several speakers thought that problems of internal disturbances and internal tensions were not covered by the Geneva Conventions and were therefore not within the competence of the Conference; they raised too many difficulties and clashed with principles of international law relating to national sovereignty and with the principle of non-interference. In contrast, an expert felt that these situations should be examined.

0.19 According to some experts, a distinction had to be drawn between the aggressor and the victim of aggression, for the latter ought to enjoy wider protection. Other experts, however, stressed that the rules of international humanitarian law should be applied equally to all the victims of an armed conflict.

(b) *Wounded, sick and shipwrecked*

0.20 All speakers were agreed on giving this category of victims greater protection during an armed conflict. One of the experts thought that the

respect for personnel and *ad hoc* medical units could be still further developed.

(c) *Combatants*

0.21 As a preliminary step, an expert stressed the need for the concept of honourable conduct between combatants to be preserved.

0.22 By emphasizing *de facto* reciprocity in the application of humanitarian law by regular armed forces and guerrilla fighters, an expert proposed to grant to the latter, when captured, the same treatment as that accorded to those known as regular soldiers. In connection with Article 38 in Draft Protocol I, another speaker considered that it should not be turned down on the pretext that it would cover indiscriminate acts committed by terrorists, but that three conditions relating to combatants should be fulfilled: that they were under the orders of a commander responsible for them; that they should wear a clearly visible distinctive sign or should openly display their weapons; and, lastly, that they should observe the laws and customs of war. The problem was heightened by the fact that sometimes guerrilla fighters did not exercise control over a given territory and did not have adequate material means for respecting humanitarian law. In such a case, any prisoners taken by them should be handed over to friendly States.

0.23 An expert supported Article 38 in Draft Protocol I and Article 25 in Draft Protocol II. Another expert demanded that mercenaries fighting against "freedom fighters" should be considered as war criminals, while, on the other hand, partisan members of movements that obeyed the laws and customs of armed conflicts should enjoy the protection of the Third Geneva Convention.

(d) *Civilian population*

0.24 A very large number of experts paid special attention to this problem. According to them, civilians should be granted wider protection than that expressly conferred on them by the law in force. One way of doing this was to grant facilities to civil defence organizations, but the creation of zones under special protection raised fears and misgivings: the commander of an attack should not seize upon this pretext to subject other areas to massive bombing.

0.25 Speaking in support of Articles 45 and 46 in Draft Protocol I, an expert said that the civilian population should also be secure against threats proffered or attacks carried out by guerrilla fighters, who could terrorize it or use it as a shield.

0.26 One expert said that the general protection of civilians should be provided for and that it was not advisable to draw up special provisions in favour of certain categories of civilians, for example, children.

(e) *Methods and means of combat and prohibition of weapons*

0.27 In the opinion of several experts, the crux of the matter could be found under this heading. They pointed out that texts of conventions or resolutions already prohibited the use of weapons of mass destruction or of weapons with indiscriminate effects, and some of them expressed their disapproval of both the concept and the content of the Draft Resolution concerning Disarmament and Peace as well as the fifth paragraph of the Preamble to Draft Protocol I. Reference was made to studies already undertaken, which went further than the prohibition of the use of certain weapons, and to the study which the twenty-sixth General Assembly of the United Nations requested the Secretary-General to prepare on napalm and incendiary weapons. The question of weapons causing injury to man or to his natural environment was also raised.

0.28 An expert regretted that the ideas contained in the ICRC Draft Rules of 1956 and in Resolution I adopted by the Institute of International Law in 1969 were not retained, while another recalled the proposals put forward at the recent Conference of Red Cross Experts at Vienna: to proclaim the prohibition of methods and means

- (a) that do not allow any distinction to be made between the civilian population and combatants, and between non-military objects and military objectives;
- (b) that cause needless suffering or are particularly cruel, and
- (c) that destroy man's natural environment.

0.29 In the view of another expert, the population had become practically the only objective of enemy attacks; the phenomenon of a war waged by the people against electronic methods of warfare, to which the term biocide or ecocide has been given, existed in a number of situations today.

0.30 An expert said that the ICRC, in its proposals relating to civilian population, submitted to the experts' consideration definitions of military objectives and of non-military objectives and recalled the principle that the civilian population as such shall never be the object of attack, nor shall objects of a civilian character be attacked. He, however, wondered whether those rules, which were very useful and indeed indispensable, were related to presently available methods of warfare. *Target area bombing*, in order to reach scattered military objectives, was a form of combat that was being used more extensively. It was an expensive form of warfare, not only from an economic standpoint, but also as regards lives lost. It was a method that was legally questioned by several authorities, just as its military value was questioned. It was obvious, in any case, that the very nature of the method in question was one disregarding the distinction between military objectives, on the one hand, and civilians and civilian property, on the

other. Further, progress in the sphere of *electronic warfare* had been tremendous and there was no reason to doubt that anything that could be located could be destroyed by instant communication. The disturbing question which came to mind was whether this electronic method would locate only military targets, and whether it could make a distinction between them and civilian population. If it could not do so, then another eroding force was at work upon the traditional distinction between permissible and non-permissible targets. A good deal had been written about *ecological warfare*. It was suggested that there was "ecocide" where the destruction sought and inflicted by the attacker was on such a scale or the methods employed by the attacker were of such a nature that severe damage was inflicted upon the ecosystem. It seemed to this same expert that such disastrous results of warfare should simply not occur if the traditional basic rule requiring the distinction to be made between military objectives, on the one hand, and civilians and civilian objects, on the other, were respected. If it were confirmed that massive destruction of large areas were inconsistent with the requirement that only military objectives should be attacked, if it were admitted that neither poison nor herbicides were permissible weapons, and if it were agreed that dykes, dams and sources of energy intended for essentially peaceful purposes should be given special protection, then the essential legal elements would be there to prevent ecological warfare.

0.31 It was at times considered that *starvation* as a method of warfare was prohibited. But the same expert observed that starvation was not so much a method of war as the result of some other methods, such as blockade, siege, destruction of supplies, etc. This situation could be prevented from occurring by a strict adherence to the existing rules and the acceptance of new provisions for the protection of objects which were indispensable to the survival of the civilian population for imposing a complete ban on biological and chemical means of warfare, in particular upon the use of herbicides, and, finally, for the forwarding and transit of relief supplies.

0.32 An expert said that the basic ban upon weapons calculated to cause unnecessary suffering—to be found in the IVth Hague Convention of 1907 and in the Draft Additional Protocol to the four Geneva Conventions—was a basic principle which was not elaborated upon. Not even the Hague rules prohibiting the use of poison were recorded in the ICRC draft. He asked why it was that the ICRC, since 1956, had no longer submitted any draft rules on some specific weapons, and wondered whether the experience of the efforts in 1956 to prohibit "blind" weapons had been too discouraging. The expert reminded his listeners that already in 1971 the ICRC approach was too timid and that a group of experts had submitted a working paper which contained, *inter alia*, a chapter on *prohibited methods and means of warfare*. The chapter contained express provisions

on delayed action weapons, napalm and other incendiary weapons, and fragmentation (and pellet) bombs, but it did not deal with nuclear weapons or biological and chemical weapons. The expert pointed out that this working paper had received a good deal of support from government experts and from the United Nations General Assembly which had adopted on it a resolution.

0.33 The question of particularly cruel weapons, other than ABC-weapons, was not discussed in any official forum. The General Assembly resolution mentioned above contained, *inter alia*, a request to the Secretary-General to prepare, with the assistance of qualified government experts, a report on incendiary weapons and all aspects of their possible use. But it seemed that the Secretary-General had great difficulty in securing an equally-balanced group of experts, though only a preliminary study had been called for. The expert thought that all governments would accept to examine jointly how far the horror limit was set and that they would not content themselves with Draft Article 30(2), in Draft Protocol I, which simply contained a general clause.

0.34 Other experts laid stress on the close relationship that existed between the need for the prohibition of weapons of mass destruction or particularly dangerous weapons and a better protection for the civilian population.

#### (f) *Draft Resolution concerning Disarmament and Peace*

0.35 The documentary material submitted by the ICRC contained a Draft Resolution concerning Disarmament and Peace to be annexed to the Final Act of a future Diplomatic Conference. Several experts said that they could not but agree on the basic principles of the resolution, but they had doubts whether it was appropriate that they should be expressed in this form, and one of the experts pointed out that this kind of resolution did not have much significance. Two experts expressed the wish that specific provisions relating to the prohibition of certain particularly cruel weapons and of weapons with indiscriminate effects should be expressly laid down in the Draft Protocols.

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#### (g) *Guerrilla warfare*

0.36 An expert emphasized that there was a danger that the basic distinction between military objectives, on the one hand, and the civilian population and non-military objects, on the other, was blurred by guerrilla warfare. There was, however, no simple way of finding a solution to this problem; there seemed to be broad agreement that it was desirable to grant legal protection to the captured guerrilleros, but it was not possible to get rid of the presumption that a person in civilian clothes and not carrying any weapons was indeed a civilian; hence, the imperative requirement that guerrilleros should respect the basic principles.

(h) *Reinforcement of the application of the law*

0.37 Many experts said that effective application of the Geneva Conventions of 1949 was a primary necessity. Some pointed out that though the supervision of application of the rules should be reinforced, nevertheless the principles of national sovereignty and of non-interference in the domestic affairs of States had to be respected. In this context, two experts opposed the creation of an international supervisory body, while, on the other hand, one expert was in favour of such a body.

0.38 Other experts, on the contrary, expressed the hope that certain traditionally accepted ideas about national sovereignty would be discarded with a view to facilitating the application of the law, and that it was primarily a question of justice and political willingness. One of the experts supported the ICRC proposals concerning Protecting Powers and their substitutes; he said that he was in favour of the ICRC performing the role of substitute, provided, however, that it assumed all the obligations of one, even if breaches of the law had to be stated publicly. In this connection, the expert thought that it might perhaps be difficult for the ICRC to carry out this function while remaining a neutral and impartial body, and he concluded that, in his view, fruitful co-operation between the United Nations and the ICRC could be carried out without the latter's neutrality being in any way impaired.

0.39 In the opinion of one of the experts, paragraph 1 of Article 10/10/10/11 of the Geneva Conventions of 1949 allowed the duties incumbent on the Protecting Powers to be entrusted to a United Nations body, whose functions would be to supervise the application of the law in force, and which would fulfil certain requirements of that article. Provision could be made for the States Parties to the Geneva Conventions to designate beforehand a United Nations body, or a neutral State, or the ICRC, as Protecting Power, so that, in case of conflict, the Protecting Powers should immediately begin to function. The same expert declared that, in a non-international armed conflict, he would have no objection to the ICRC offering automatically its services and that that offer should be accepted.

0.40 An expert said that some sort of machinery should be devised for the designation of Protecting Powers within a stated time-limit.

0.41 Several speakers said that the designation of Protecting Powers could not take place without the consent of all the Parties to the conflict.

(i) *Penal sanctions*

0.42 The problem of the application of international humanitarian law raised also that of sanctions brought against persons who had committed breaches of that law. Two experts wished to see those sanctions made more severe, and one of them observed that the repression of breaches should be internationally carried out and that the United Nations could play an important part in the application of realistic sanctions.

(j) *Reservations*

0.43 In the opinion of one of the experts, reservations were a means whereby internationally contracted obligations could be evaded. Concerning prisoners of war, for example, they should not be denied the right to send messages to their next of kin, to obtain relief, to receive visits, not to speak of other elementary privileges. That same expert, however, considered that Article 82 in Draft Protocol I should be deleted. Two experts, though they did not express any opinion on the reservations to the law in force, thought that in the new Protocols, reservations should be avoided, either by prohibiting them altogether, or by stating those which would be the only ones to be allowed and so limiting them.

0.44 Certain experts said they were in favour of a re-examination of the reservations formulated by States at the time they ratified the Conventions of 1949. The hope was expressed, finally, that, in the draft articles, exceptions and derogations—taking into account, in particular, military requirements—the effect of which was to nullify the provisions, should be removed.

(k) *Role of National Red Cross Societies*

0.45 An expert emphasized the importance of specifying and strengthening the role of National Red Cross Societies and of providing guide-lines to international co-operation between them.



## REPORT OF COMMISSION I

### Wounded, sick and shipwrecked persons

(DRAFT PROTOCOL I, PART II)

*Rapporteur* : Dr B. JAKOVLEVIC (Yugoslavia)

#### INTRODUCTION

1.1 Commission I met 18 times between 5 May and 31 May, 1972. During its first meeting the Commission elected its officers, namely : Dr Nagendra Singh (India), Chairman ; Dr Ikbāl Al-Falloujī (Iraq), Vice-Chairman ; Dr Carlos Alberto Dunshee de Abranches (Brazil), Vice-Chairman ; Dr Bosko Jakovljević (Yugoslavia), Rapporteur ; Mr Guy Winteler (ICRC), Secretary. The ICRC was represented by Dr Jean Pictet, Vice-President of the ICRC and President of the Conference, and Mr Frédéric de Mulinen.

1.2 The task of the Commission was to examine the protection of the wounded, sick and shipwrecked in international armed conflicts. The Commission decided to take as the basis of its work the document "Basic Texts I", Articles 11 to 29, prepared by the ICRC in January 1972 and sent to the Governments participating in the Conference. It also took into consideration the other documents submitted by the ICRC for this Conference, in particular the Report on the first session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 24 May to 12 June, 1971, the Report on the Conference of Red Cross Experts, held in Vienna from 20 March to 24 March, 1972, and the Technical Memorandum on Medical Marking and Identification.

1.3 On the proposal of the ICRC, a sub-commission of technical experts on the marking and identification of medical transports was formed. The Commission directed this sub-commission to start its work immediately and to report its findings in time for them to be taken into account in the examination of Articles 23 to 29.

1.4 The Commission decided to include in its agenda the question of the position of National Red Cross (Red Crescent, Red Lion and Sun) Societies.

1.5 The Commission examined the questions mentioned above in its meetings from 5 May to 12 May, from 15 May to 17 May, and on 24 May and 31 May, 1972. The list of experts participating in the work of the Commission is attached to the present Report.

The Commission elected a Drafting Committee which, on the basis of the discussions in the Commission, prepared texts for consideration by the Commission. The following were elected to the Drafting Committee : Dr Nagendra Singh (India), Mr Waldemar Solf (USA), Mr G. P. Temme (Australia), Don Francisco Javier Sanchez del Rio (Spain), Mr René Coirier (France), Mr J. E. Makin (United Kingdom), Dr Inokentii Krasnopeev (USSR), Rear-Admiral E. Deddes (Netherlands), Dr Bosko Jakovljević (Yugoslavia) and Dr Jean Pictet, Mr Frédéric de Mulinen and Mr Guy Winteler (ICRC). The work of the Drafting Committee was open to all members of the Commission, and the following also took part in its work : Dr Ikbāl Al-Falloujī (Iraq), Dr Carlos Alberto Dunshee de Abranches (Brazil), Prof. Paul de Geouffre de la Pradelle (Monaco), Mr Michael Hass (Austria), Mr Mahmoud Aboul Nasr (Egypt), Mr Kiyohiko Koiké (Japan), Major E. Gonsalves (Netherlands), Mr Esbjörn Rosenblad (Sweden), Col. Div. E. Dénéréaz (Switzerland), Lt-Col. John Lowe (USA), Mr Philippe Eberlin (ICRC) and others. The Drafting Committee met 11 times between 12 May and 23 May.

1.6 On the basis of the ICRC text, the amendments proposed by the experts and the discussion in the Commission, the Drafting Committee prepared and submitted texts which were examined by the Commission in its meetings between 12 May and 24 May, and adopted, after some modification, as the recommendations of the Commission. Some experts, however, made reservations on Section II of Part II, as they considered that the Commission had no power to take decisions.

1.7 Every subject was examined three times, in the Commission, in the Drafting Committee, and again in the Commission, before the final texts were drafted. The protection of wounded, sick and shipwrecked persons was examined in 1971, during the first session of the Conference of Government Experts, which recommended texts on the subject based on the assumption that they would supplement only the Fourth Geneva Convention. The 1972 text, however, is intended to supplement all four Conventions. A proposal to define and limit the scope of Section I was made, but was not accepted by the Commission.

Consequently, at this Conference, it was thought necessary to re-examine the whole question and to discuss thoroughly many aspects of each article, bearing this change in mind, before formulating the texts of the recommendations.

1.8 The questions debated in the Commission were divided into three parts: (I) the protection of wounded, sick and shipwrecked persons in all situations, apart from air transport; (II) medical air transport; (III) the position of National Red Cross Societies. The main issues debated are set out below, in the order of the articles proposed by the ICRC, in order to show the various views expressed and the reasons for the changes proposed in the ICRC texts on the most important questions. Besides the views expressed in the debate, experts submitted many amendments to the texts which served as a basis of the work. In many cases, the Commission's texts were based on these amendments. The texts of all written amendments are given in Volume II of this Report.

## CHAPTER I

### General provisions

#### (PART II, SECTION I)

##### Article 11

##### ICRC DRAFT

#### *Article 11. — Definitions*

For the purposes of the present Part:

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

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

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

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

1.9<sup>1</sup> The question was discussed whether it was necessary to include in the definitions the distinction

<sup>1</sup> Cf. CE/COM I/2, 3, 4 and 15.

between permanent and temporary medical establishments and units and the permanent and temporary personnel of such establishments and units. The Commission held that as this distinction was made in the corresponding Articles (14 and 18), there should be definitions both of permanent and temporary establishments and of their personnel.

1.10 Since special rules, different from those applicable to land- or water-based transport, had been established for medical air transport, the latter was omitted from the proposed definitions. It was felt, however, that such discrimination in relation to air transport should not be made in the definition, which did not affect the substantive rules governing the conditions for the use of medical air transport.

1.11 The term "shipwrecked" was also included in the definitions. In the draft produced at the first session of the Conference of Government Experts in 1971, the protection of the wounded and sick was to be an addition to the Fourth Geneva Convention. Since the new draft Protocol submitted by the ICRC was to be annexed to all four Conventions, the shipwrecked were included throughout the Protocol wherever there was mention of wounded and sick persons. This, however, postulated previous definition of the term "shipwrecked". In this connection, the view was expressed that the question of the adaptation of Part II of the draft Protocol to the Second Geneva Convention should be the subject of further study.

1.12 The view was expressed that all definitions should be placed under the general provisions of the Protocol.

#### COMMISSION'S DRAFT

#### *Article 11. — Definitions*

*For the purposes of the present Part:*

(a) the term "medical establishments and units" means hospitals and other fixed medical establishments, medical and pharmaceutical stores of such establishments, mobile medical units, blood transfusion centres and other installations used for medical purposes;<sup>2</sup>

(b) the term "medical transport" means the transport of wounded, sick, shipwrecked and infirm persons, expectant mothers, maternity cases and new-born infants, medical personnel, medical equipment and supplies;

(c) the term "medical personnel" means personnel regularly and exclusively engaged in the operation or administration of medical establishments or units, including personnel assigned to the search for, removal, transport or treatment of wounded, sick, shipwrecked, infirm persons, expectant mothers or maternity cases and new-born infants;<sup>2</sup>

<sup>2</sup> Add a mention of permanent or temporary character.

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

(e) the term "shipwrecked persons" means any person who is in peril at sea as a result of the destruction, loss, or disablement of the vessel or aircraft in which he was travelling, and who is in need of humanitarian assistance and care, and who refrains from any hostile act.

## Article 12

### ICRC DRAFT

#### Article 12. — Protection and care

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

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

1.13 While accepting the general principle of the protection and care of the wounded, sick and shipwrecked, the view prevailed that it was necessary to state explicitly that this special protection applied not only to non-combatants, but also to combatants, provided that they were *hors de combat*. (See CE/COM I/2 and 3.)

1.14 The Commission discussed whether special protection should extend also to new-born babies. One view was that this was not necessary, since these babies, if sick, were covered by the present article and, if not sick, they were covered by Article 57 of the draft Protocol and by the general provisions on the protection of all civilian persons. The Commission favoured the other view, that, since maternity cases were included in this article, it was logical to include the new-born, as they certainly needed special care, even when they were not sick. It was further proposed, instead of listing all the additional categories (infirm persons, expectant mothers, maternity cases and new-born infants), to include a general clause "and other persons needing medical care". The Commission was in favour of listing all the additional categories in Article 12 only ; other articles should refer as necessary to Article 12, in order to avoid repetition of such a long list.

1.15 The Commission held that it was not enough to say that protected persons should receive protection and care "without any discrimination": it was advisable to list the various criteria on which discrimination was not allowed, not as an exhaustive but as an illustrative list, and to this effect to use the formulation of Article 3 of draft Protocol I adopted at the first session of the Conference of Government Experts in 1971.

### COMMISSION'S DRAFT

#### Article 12 — Protection and care

1. All wounded and sick persons, whether non-combatants or combatants rendered hors de combat, and other persons who are or may be in serious need of medical attention such as maternity cases and new-born infants together with shipwrecked persons at sea, the infirm and expectant mothers shall be the object of particular protection and respect.

2. In all circumstances these persons shall be treated humanely and shall receive the medical care and attention necessitated by their condition with the least possible delay, and without any adverse distinction or discrimination founded on race, colour, caste, nationality, religion, political opinion, sex, birth, wealth or any other similar criteria.

## Article 13

### ICRC DRAFT

#### Article 13 — Protection of persons

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

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

1.16 While accepting the general principle that this article should prohibit all unlawful acts endangering health, the Commission endeavoured to word it with the greatest precision. It discussed the terms "unjustified", "illegal", "wrongful" and "culpable". One view was that it was necessary to prohibit any act endangering health. Another view was that it was impossible to omit any qualification, because there were acts which endangered health but which were permitted (in surgery, for instance, where dangerous operations necessary for the long-term health of the patient were undertaken, or in self-defence). In discussing the term "illegal", one view was that this term may permit acts dangerous to health which it was intended to prohibit. Some doctors tried to defend their behaviour in the Second World War on the ground that it was in conformity with the law in force in their country at the time. The other view was that the term "illegal" covered both municipal law and international law, including humanitarian law, and therefore could not be taken as an excuse for committing acts which endanger health. It was also proposed to use the term "unjustified", as it covered both legal and moral rules. Another proposal was to say "all unlawful acts or omissions contrary to

the rules and general principles of International Humanitarian Law". The experts were unable to agree on one term and therefore recommended the text proposed by the Drafting Committee with alternatives. It was also proposed to add "wilful" (CE/COM I/2) omissions, considering that only such acts were intended to come within the prohibition of Article 13.

1.17<sup>1</sup> The Commission debated the question whether the prohibition of various acts under this article would cover all acts endangering health, or only those which "seriously" (CE/COM I/3) endangered it. One view was that many things in everyday life endangered health, such as smoking, but it was obviously not the intention to prohibit this. The Commission, however, preferred not to include the word "seriously" because the article covered only unlawful acts, not all acts.

1.18 The question was discussed whether all persons should be protected by the prohibition of this article, or only the "protected ones", within the meaning of this Part of the draft Protocol. The view prevailed that the protection should be limited to protected persons, and that such persons should be defined. It was proposed that this should be left to the ICRC to study and prepare a text after the second session of the Conference.

1.19 The Commission endeavoured to formulate in the best possible way the idea of prohibiting unwarranted experiments on human beings. It was proposed to substitute the words "on remedial grounds" by "on therapeutic or prophylactic grounds" (CE/COM I/3), in the interest of the patient himself, in order to cover also acts that may be evoked for prophylactic reasons. The Commission, however, preferred the wording of Article 13 of the Third Geneva Convention, namely, "not justified by the medical treatment".

#### COMMISSION'S DRAFT

##### *Article 13. — Protection of persons*

1. *All<sup>2</sup> acts or omissions that endanger the health or the physical or mental well-being of a protected person are prohibited.*

2. *Accordingly it is prohibited to subject protected persons to physical mutilation or to medical or scientific experiments of any kind, including the removal or transplant of organs, which are not justified by the medical, dental or hospital treatment of the person concerned and carried out in his interest. This prohibition applies even in cases where the protected person gives his assent.*

<sup>1</sup> Cf CE/COM I/15.

<sup>2</sup> Alternatives :

(a) insert the word "unjustified";  
(b) insert the word "wrongful".

#### Article 14

#### ICRC DRAFT

##### *Article 14. — Civilian medical establishments and units*

1. Civilian medical establishments and units shall in no circumstance be attacked. They shall at all times be respected and protected by the Parties to a conflict.

2. Parties to a conflict shall provide such medical establishments and units with a certificate identifying them for the purposes of the present Protocol.

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

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

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

1.20<sup>3</sup> The principle of the extension of protection to all kinds of civilian medical institutions was accepted as one of the main new additions to the Geneva Conventions, and the Commission discussed various questions in relation to this extension. As this principle was subject to observance of the condition that such institutions would refrain from committing acts harmful to the enemy, as stated in the following article, it was proposed to begin the article with the words "Subject to the provisions of Article 15 (1)" (CE/COM I/2). The Commission felt, however, that this was not necessary, since Article 14 expressed the principle, and exceptions were given in other articles.

1.21 While the protection of civilian medical units and establishments from attack was accepted as a principle, one view was that this should be expressed by the words "shall not be the object of attack", and another, that it would be better to say "shall not be attacked". Both of these formulations are used in the Geneva Conventions.

1.22 The Commission discussed the question whether protection should be given only to permanent medical establishments and units which exclusively serve this purpose, or also to temporary ones. It was agreed that temporary institutions should also be protected, but only during the time when they were engaged in this humanitarian mission;

<sup>3</sup> Cf. CE/COM I/2, 5 and 13.

therefore, the words "permanent and temporary" should be added. Corresponding changes should be introduced in the definitions (Article 11).

1.23 In order to ensure that only those institutions devoted to the treatment of the wounded and sick may claim protection under this article, it was proposed and agreed that such institutions should be recognized by the competent authorities of each State on whose territory they function.

1.24 It was proposed that the protection should cover both public and private medical establishments, and that this should be stated in the present Protocol. The Commission held, however, that private institutions were covered in so far as they were authorized by the State to enjoy the protection afforded by the draft Protocol, so that this need not be stated in the article.

1.25 The Commission discussed the question whether marking with the distinctive emblem should be done in time of peace, or only in time of war (CE/COM I/2). One view was that it was unrealistic to expect that, at the outbreak of hostilities, all medical establishments would be, within a short time, marked with the emblem; therefore, it was indispensable to do it in time of peace. The other view was that it would not be acceptable to cover towns in peace-time with a great number of emblems on every medical institution, particularly since Red Cross Societies used this emblem for their peace-time activities. The Commission favoured the view that in peace-time the marking was permitted but not compulsory.

1.26 The question was discussed whether the use of the emblem in time of war should be compulsory, in order to render medical establishments visible to the adverse party, or to make it optional, because the parties may have had reasons not to mark their establishments with the emblem. The Commission was more in favour of this second view, so that the marking would depend upon the decision of a competent authority.

1.27 The question was debated whether it should be obligatory to make known the location of fixed medical establishments. One view was that it should be so (CE/COM I/5). According to the other view, the Parties should be free to decide this. The Commission felt that Parties should be free, in certain cases, not to make known the location, and replaced the words "in so far as military considerations permit" by "as far as possible"; it also decided to limit this rule to fixed establishments, considering that such an obligation could not apply to mobile units.

#### COMMISSION'S DRAFT

*Article 14. — Civilian medical establishments and units.*

1. *Civilian medical establishments and units, whether permanent or temporary, shall in no cir-*

*cumstances be the object of attack. They shall at all times be respected and protected by the Parties to the conflict.*

2. *The appropriate Party to a conflict shall provide these medical establishments and units with a certificate identifying them for the purposes of the present Protocol.*

3. *With the authorization of the competent authority, medical establishments and units shall be clearly and visibly marked with the distinctive emblem.*

4. *The Parties to the conflict shall, as far as possible, make known to each other the location of fixed medical establishments and units.*

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

#### Article 15

#### ICRC DRAFT

*Article 15. — Discontinuance of protection of civilian medical establishments and units*

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

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

1.28 The Commission was in favour of the proposal to make clear in paragraph 2 of this article that the presence in the said establishments and units not only of members of the armed forces undergoing treatment but likewise of those waiting to be treated or awaiting examination with a view to possible treatment shall not deprive the said establishments and units of the protection afforded to them. It seemed preferable, therefore, to replace the words "are treated in such medical establishments and units" by the words "are in such medical establishments and units for medical treatment".

#### COMMISSION'S DRAFT

*Article 15. — Discontinuance of protection of civilian medical establishments and units*

1. *The protection to which civilian medical establishments and units are entitled shall not cease un-*

*less they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a warning has been given, setting, wherever appropriate, a reasonable time limit and after such warning has remained unheeded.*

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

## Article 16

### ICRC DRAFT

#### *Article 16. — Civilian medical transports*

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

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

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

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

1.29 The question whether this article should cover all transports, including transport by air, or not, was debated at length. One point of view was that modern technology had made such big advances that it permitted great progress in the field of medical transports by the extensive use of aircraft, and such transport should not be discriminated against but placed on an equal footing with other types of medical transport (CE/COM I/6). The opposite view was that air transport required special rules to regulate the conditions for its use, because of the danger incurred in the use of aircraft for military purposes (intelligence, etc.); the First Geneva Convention of 1949 had already established a special legal regime for medical aircraft, and any new rules would require careful drafting to satisfy the various interests concerned. The Commission favoured the view that this article should be limited to transport on land and on water, leaving the question of transport by air to be regulated by Articles 23-29 of the present Protocol.

1.30 The Commission accepted the proposal to use the words "competent authority" instead of "the State", considering that this term was more appropriate. Some experts thought this would cover liberation wars.

1.31 The Commission was in favour of the proposal to formulate paragraph 2 in such a way as to make it clear that when temporary medical vehicles carrying wounded or sick were used in convoys, such convoys should be composed exclusively of other vehicles performing the same function.

### COMMISSION'S DRAFT

#### *Article 16. — Civilian medical transports on land or water*

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

2. *Other means of transport, assigned temporarily for medical transport, whether used in isolation or in convoy with other medical transport, shall be respected and protected while being used for such purpose.*

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

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

## Article 17

### ICRC DRAFT

#### *Article 17. — Requisition*

1. The right of an Occupying Power to requisition medical establishments and units and their movable and immovable assets, as well as the services of their medical personnel, shall be exercised only temporarily and in case of urgent necessity, and subject to the further conditions that suitable arrangements are made for the treatment of protected persons within the meaning of the Conventions and of the present Protocol, and that the necessary steps are taken in advance for tending the wounded, the sick and the shipwrecked, and for providing suitable hospital accommodation for the civilian population.

2. The equipment, material and stores of medical establishments and units shall not be requisitioned so long as they are needed for the civilian population.

1.32 After extensive discussion, the text proposed by some experts, which was based on a formulation of Article 57 of the Fourth Geneva Convention of 1949, was used as the basis of paragraph I (see also CE/COM I/3 and 13).

1.33 The words "the right of an Occupying Power" were changed to "The Occupying Power may", in order to avoid stressing particularly the rights of Occupying Powers.

1.34 The interpretation of this article, according to which requisition may be effected on behalf of any military wounded and sick persons, regardless of the Party they belonged, was examined. It was considered unnecessary to state "of its own Power", but it was felt necessary to add "including prisoners of war", to make the position clear to all those who would have to apply the rule.

1.35 The question was debated whether the Occupying Power should be obliged to make suitable arrangements for the care of the patients in advance, immediately upon deciding to requisition, or "in due course". The view prevailed that in the interests of the patients it would be necessary for this obligation to be carried out quickly; therefore, the word "immediately" was added.

1.36 Several experts pointed out that paragraph 2 of the ICRC text contradicted paragraph 1. According to Article 11 of the draft Protocol, equipment, material and stores formed an integral part of medical establishments and units. For this reason, it was proposed to limit the prohibition contained in paragraph 2 of Article 17 to the requisition of equipment, material and stores not forming part of the medical establishments and units mentioned above.

1.36a The view was accepted that in this paragraph no mention of the shipwrecked should be made, because it concerned situations on land.

#### COMMISSION'S DRAFT

##### *Article 17. — Requisition*

1. *The Occupying Power may requisition civilian medical establishments and units, their movable and immovable assets, and the services of their medical personnel only temporarily and only in case of urgent necessity for the care of military wounded and sick, including prisoners of war, and then on condition that suitable arrangements are immediately made for the care and treatment of the patients normally served by these establishments and units, and for the needs of the civilian population for medical treatment.*

2. *Medical equipment, material and stores other than those mentioned in paragraph 1, shall not be requisitioned so long as they are needed for the civilian population.*

#### *Article 18*

#### ICRC DRAFT

##### *Article 18. — Civilian medical personnel*

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

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

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

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

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

1.37<sup>1</sup> The Commission discussed many questions relating to this article, endeavouring precisely to regulate the categories and conditions of the protection extended by the draft Protocol to such personnel. A proposal was made (CE/COM I/4) to extend to temporary medical personnel the protection afforded to permanent medical personnel. The view was accepted that temporary personnel should also be protected while employed on medical duties: this would cover those persons carrying out certain missions or tasks in the protected institutions, such as, for example, doctors and professional medical personnel not otherwise employed in protected institutions, persons trained for specific duties, such as first-aid teams, etc. A special paragraph 3, for such personnel, was added, based on the wording of Article 20, paragraph 3, of the Fourth Convention.

1.38 The Commission was in favour of the wording "recognized and authorized by the competent authority of the Party to the conflict" instead of "State".

<sup>1</sup> Cf. CE/COM I/15.

1.39 A view was expressed that civilian medical personnel should be protected only if organized. Another view was that, as they belonged to an establishment recognized by the State, they were in fact organized. This view prevailed.

1.40 A proposal was made to include under the protection of this article individual members of the medical profession, such as the village doctor, who did not belong to a recognized institution, in particular because of his role during active hostilities. The other view, which prevailed, was that protection could be afforded under the terms of this article only to those who belonged to establishments duly authorized by the competent authorities.

1.41 The limits of the assistance to be rendered to medical personnel and the facilities to be given in cases when they fell into the hands of the adverse party (paragraphs 3 and 4) were discussed together. One view was that the limitation of this assistance by the requirements of security and the words "in so far as possible" (see also CE/COM I/13) would make it ineffective, and that in principle such clauses should be avoided. The opposite view was that it was unreasonable to expect Parties to the conflict to give assistance and facilities; the rule should be limited to binding the parties not to prevent personnel from performing their duties (CE/COM I/2). After discussion a working group was formed, composed of experts of eight countries which had submitted written or oral amendments to these two paragraphs; the group proposed a text (CE/COM I/12), which the Commission accepted. In it, a difference was made between occupation, in which case the principle was set that "every assistance shall be given", and invasion, in which case "all assistance that is possible shall be given". In both cases, the access to places where their services were required was made subject to such measures of supervision and security as were necessary. One view, supported by others, was that the word "security" should be deleted, but the majority felt that this word should remain.

1.42 The term "In the event that the above-mentioned personnel fall into the hands of the adverse party" was criticized on the ground that, according to Article 28 of the First Geneva Convention, military medical personnel did not become prisoners of war, while the wording of Article 18 of the draft Protocol could be interpreted to mean that civilian medical personnel became prisoners of war. Furthermore, civilian medical personnel as civilians were not subject to capture. Therefore it was proposed to delete these words, and this was agreed.

1.43 The question was put whether it was necessary to include the National Red Cross (Red Crescent, Red Lion and Sun) Societies, and if so, whether the personnel of the Societies required special recognition and authorization by a competent State body, or whether the matter was sufficiently covered by the general authorization which every State gives to its National Society. The Commission favoured the view

that the National Societies should be mentioned; concerning the recognition of its personnel, the Commission made no recommendation.

1.44 The question of the protection of religious personnel in the same way as medical personnel was raised at the Commission. One view was that religious personnel were, under the First Geneva Convention, placed on an equal footing in regard to protection as medical personnel. The other view was that this referred only to religious personnel in the armed forces; but in the civilian sphere there was no corresponding body of religious personnel similar to that of organized medical establishments. As this question was new and had not been carefully studied before, it was proposed to mention it in the report and to request the ICRC to study it.

1.45 A proposal was made (CE/COM I/15) that an annex be added to this Protocol, giving the model of the identity card for civilian medical personnel, with the statement that the bearer of the card was protected by this Protocol, on the lines of Annex II of the First Geneva Convention of 1949. The Commission was in favour of this proposal.

#### COMMISSION'S DRAFT

##### *Article 18. — Protected civilian medical personnel*

1. *Civilian medical personnel, whether permanent or temporary, duly recognized or authorized by the competent authority of the Party to the conflict, as well as the medical personnel of National Red Cross (Red Crescent and Red Lion and Sun) Societies, shall be respected and protected.*<sup>1</sup>

2. *In zones of military operations and in occupied territory, the above personnel shall be recognizable by means of an identity card, as per Annex I of this Protocol, certifying their status, bearing the photograph of the holder, and embossed with the stamp of the competent authority of the Party to the conflict, and also by means of a stamped, water-resistant armlet bearing the distinctive emblem which they shall wear on the left arm. The armlet shall be issued by the competent authority of the Party to the conflict which embosses the identity card.*

3. *Temporary medical personnel shall be entitled to respect and protection and to wear the armlet as provided in and under the conditions prescribed in the previous paragraphs, while they are employed on medical duties. The identity card shall state the duties on which they are employed.*

4. *The management of each civilian medical establishment and unit shall at all times hold at the*

##### <sup>1</sup> Alternative :

1. *Civilian medical personnel, whether permanent or temporary, as well as the medical personnel of National Red Cross (Red Crescent, Red Lion and Sun) Societies, all duly recognized or authorized by the competent authority, shall be respected and protected.*



*disposal of the competent national or occupying authority an up-to-date list of its personnel.*

*5. During occupation every assistance shall be given by the Occupying Power to civilian medical personnel to enable them to carry out their humanitarian mission to the best of their ability. During invasion all assistance that is possible shall be given by the adverse forces to civilian medical personnel. In both cases, they shall have access to any place where their services are required, subject to such measures of supervision and security as the appropriate Party to the conflict may judge necessary, and in no circumstance shall they be required or compelled to carry out tasks unrelated to their mission.*

## Article 19

### ICRC DRAFT

#### *Article 19. — Protection of medical duties*

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

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

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

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

1.46 While considering favourably the principle that acts in conformity with professional rules should not be punishable, the Commission debated several questions in order precisely to regulate the protection of the medical mission, because this article is an innovation in the system of the Geneva Conventions. A proposal was made to specify that medical acts would not be an offence against municipal or occupational penal law (CE/COM I/2 — see also CE/COM I/13). On the other hand, the view was advanced that this specification was not necessary, and the Commission preferred this latter view.

1.47 The Commission was in favour of the proposal to replace the words “professional rules” by “professional ethics”.

1.48 A proposal was made to specify that the offence was to be measured according to rules in force in the area of the activities of medical personnel (CE/COM I/2), because these rules varied from country to country. Another view was that medical personnel should operate under their national law, especially in professional matters, and not under

the law of the territory in which they were working. The Commission preferred not to include this specification in the article.

1.49 It was agreed that while the term “medical personnel” as used in Article 18 meant personnel working in medical establishments which enjoyed special protection under this Protocol, the purpose of Article 19 was to protect the performance of medical activities and should cover all persons who were engaged in such activities, regardless of whether they were in protected institutions or not. In order to make this clear, the words “medical personnel” were changed to “any person engaged in medical activities”.

1.50 It was proposed to extend the scope of paragraph 2 of this article, which contained an important rule, to cover any future Protocols, and therefore the words “the present Protocol” were changed to “any Protocol thereto”.

1.51 The question was discussed whether to limit the scope of paragraph 3 of this article to physicians and surgeons, or to extend it to all categories of medical personnel. The view prevailed that it should cover all categories of medical personnel who in their work had to respect professional rules of the medical profession.

1.52 It was proposed that paragraph 3, which states that medical personnel may not be compelled to perform acts contrary to professional rules, should also prohibit their being compelled to abstain from acts demanded by professional rules (CE/COM I/4). This proposal was accepted.

1.53 The attention of the Commission was drawn to the fact that in some small ships or isolated units or places urgent medical acts, including minor surgery, might be performed also by skilled personnel, in cases when there were no medical personnel available, and that such practice might be contrary to some professional rules. An amendment was formulated to cover this situation but it was not adopted.

1.54 Proposals (CE/COM I/2 and 5) were made to specify what kind of information the medical personnel should not be compelled to give: about diseases, or about the identity of their patients. One view was that this prohibition concerned only contagious diseases, another was that the identity of protected persons should not be disclosed. The view prevailed that no changes in the text proposed by the ICRC should be introduced, as it should be clear, according to circumstances and in the light of professional rules, what information should not be disclosed.

1.55 A proposal was submitted to exclude the medical personnel of the occupying Power from the rule set out in the first sentence of paragraph 4. The Commission, however, decided to substitute the words “adverse Party” for “occupying authority” and solve the problem this way.

1.56 The Commission debated the character of the information which the medical personnel will not be

required to give to the occupying Power, in particular because of the difference of the English and the French wording ("inform" and "dénoncer"). Proposals were made to unify the two texts, or to use the terms "inform", "denounce", "announce". The Commission preferred to adopt the term "inform" (English) and "informer" (French).

#### COMMISSION'S DRAFT

##### *Article 19. — Protection of medical duties in general*

1. *In no circumstances shall any person be punished for carrying out medical activities compatible with professional ethics, regardless of the person benefiting therefrom.*
2. *In no circumstances shall any person engaged in medical activities be compelled by any authority to violate any provision of the Conventions or of any Protocol thereto.*
3. *Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to professional rules designed for the benefit of persons listed in Article 12 of this Protocol or to abstain from acts demanded by such rules.*
4. *Any person engaged in medical activities shall not be compelled to inform an adverse Party of persons listed in Article 12 who are under his care. An exception shall be made in the case of compulsory medical regulations for the notification of communicable diseases.*

#### Article 20

##### ICRC DRAFT

##### *Article 20. — Role of the population*

1. The competent civilian and military authorities shall permit inhabitants and relief societies, even in invaded or occupied areas, spontaneously to give shelter to and tend the wounded, sick and shipwrecked of whatever nationality.
2. The civilian population shall respect these wounded, sick and shipwrecked persons and shall refrain from committing acts of violence against them.
3. No one shall be molested or convicted for having tended wounded, sick and shipwrecked persons.

1.57<sup>1</sup> In accordance with the views taken on Article 12, it was considered necessary to extend the scope of this and other subsequent articles to all the categories of persons mentioned in Article 12.

1.58 The question of relief societies was discussed. One view was that they were a part of the civilian

<sup>1</sup> Cf. CE/COM I/2 and 13.

population, that it was not clear what kind of societies were covered by this article and that, therefore, "relief societies" should not be mentioned expressly. The Commission was in favour of the other view, that the civilian population, when giving aid to the above-mentioned categories of war victims, acted, mostly in an organized way, through relief societies of various kinds, and that therefore the text proposed by the ICRC, which was based on Article 18 of the First Geneva Convention, should not be changed.

1.59 A proposal was made to add provisions which would correspond to Article 21 of the Second Geneva Convention, and by which appeal was to be made to the commanders of various ships, yachts and boats to come to the assistance of the shipwrecked. The Commission was favourable to that proposal, and included it in the text in brackets, as proposed by the Drafting Committee, so that it should be submitted for further consideration. The purpose of this proposition was to allow humanitarian action on behalf of the shipwrecked, even if they were not protected by the Second Convention, and the Commission thought it useful to state this expressly.

#### COMMISSION'S DRAFT

##### *Article 20. — Role of the population*

1. *The civilian population shall respect the persons listed in Article 12 of this Protocol even if they belong to the adverse Party, and shall refrain from committing acts of violence against them. The competent civilian and military authorities of the Parties to the conflict shall permit inhabitants and relief societies, even in invaded or occupied areas, spontaneously to give them shelter and to tend them.*
2. *No one shall be molested or convicted for having sheltered or tended persons listed in Article 12, even if they belong to the adverse Party.*
- [3. *The Parties to the conflict may appeal to the charity of commanders of merchant vessels, yachts or other craft, to take on board and care for persons listed in Article 12, and to collect the dead. Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.*]

#### Article 21

##### ICRC DRAFT

##### *Article 21. — Use of the distinctive emblem*

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

1.60 The words "from the outbreak of hostilities", were deleted, since such measures could be undertaken in time of peace.

1.61 It was proposed to make reference in this article to Articles 75 (1) and 77 of the draft Protocol, concerning the laws and other measures to secure the application of this Protocol (CE/COM I/2). The Commission, however, felt that such a reference was not necessary, since the rules were contained in the draft Protocol, and also because the system of referring one article to another had not been adopted in the Conventions.

1.62 One expert made a statement to the effect that the emblem of the Red Shield of David should be recognized in the same way as the Red Cross, Red Crescent, and Red Lion and Sun, by adding the words "Red Shield of David" to the other emblems, or by the words "or any other red sign used as a distinctive sign with the knowledge of the adversary". He stated that the emblem had been used since 1948 by the medical services of the armed forces and the National Society of his State. He saw no reason for discriminating between the emblems, and his Government had made a reservation to that effect to the Convention. Another expert made a statement that the proposal to introduce new additional distinctive emblems would provoke many other similar requests, and this would create confusion in the signs. If any change was to be proposed, it would be necessary to endeavour to unify the emblems, not to multiply them. A similar proposal had been made at the Conference of 1971 and was rejected. This latter statement was supported by one expert. The Commission took note of these statements.

1.63 The proposal was adopted to make a change in this article, which would cover other modern methods and means of identification of medical aircraft (flashing blue light, radio and radar, etc.) regulated in detail in a special annex to this Protocol.

#### COMMISSION'S DRAFT

*Article 21<sup>1</sup>. — Use of the distinctive emblem and distinctive signal*

*The High Contracting Parties shall adopt special measures for supervising the use of the distinctive emblem and distinctive signal and for the prevention and repression of their misuse.*

#### Article 22

#### ICRC DRAFT

*Article 22. — Neutral States*

Neutral States shall apply, by analogy, the provisions of the present Protocol to wounded, sick and

<sup>1</sup> It was proposed that this article should become Article 74 A (in Part V, "Execution of the Conventions and of the present Protocol").

shipwrecked persons and to medical personnel of the Parties to the conflict received or interned in their territory.

1.64 The view prevailed that the words "neutral States" should be changed to "States not party to the conflict", because the concept of neutrality was changing, and this new phraseology was broader and expressed better the position of such States.

1.65 The Commission debated the meaning of the words "by analogy". It was considered that the rules of this Protocol could not all apply in full to neutral States, because they were drafted for the Parties to a conflict; they should be applied *mutatis mutandis*. The Commission was not in favour of adopting these latter words and preferred to leave the words "by analogy", which expressed the idea well.

#### COMMISSION'S DRAFT

*Article 22. — States not party to the conflict*

*States not party to the conflict shall apply, by analogy, the provisions of the present Protocol to persons listed in Article 12 of this Protocol and to medical personnel.*

#### CHAPTER II

#### Medical air transport

#### (PART II, SECTION II)

#### *Report of the Technical Sub-Commission*

1.66 Before examining the draft rules on medical air transport the Commission considered the report of the Technical Sub-Commission. The question of the identification of medical transports by modern means of signalling had been studied by a Sub-Commission of technical experts. Ten States and four specialized organizations were represented in it. Its detailed report is reproduced in Annex III.

The Sub-Commission had dealt with medical air, land and sea transport. Concerning the two latter, it did not present concrete proposals, and suggested that complementary studies be undertaken. On the other hand, standards, practices and procedures were recommended for medical air transport. It was proposed that they should become a special annex to the Protocol. As is said in their title, they are simply recommendations to the Parties to a conflict and not compulsory measures. The basic principle according to which the State is in control of the distinctive emblem would apply also to the complementary means of signalling.

The recommendations concerned four different matters: improving the visibility of the red cross emblem, introduction of a blue light signal, radio

[special frequency and prefix "MEDICAL"] and the use of a single Secondary Surveillance Radar code.

In order to adapt the recommendations to future technical progress, the Sub-Commission suggested a periodical revision.

The Commission examined that part of the report of its Sub-Commission dealing with medical air transport. The findings of the Sub-Commission showed what were the new technical possibilities for identification of medical aircraft. These should enable a much greater use of aircraft as a means of evacuation and transport of the wounded and sick to be made. Several experts expressed the opinion that on the basis of these new techniques it was possible to elaborate new rules for the use of medical air transport. It was pointed out that the recommended means of identification could be used both in the battle area and for long-range transport. It was also pointed out that the use of some of these technical means required State action through appropriate international organizations (e.g., agreement on radio frequencies).

The chairman of the Commission commended the Sub-Commission for its report.

One important problem still remained, that of a simplified procedure for periodic revision of the Annex to the Protocol. The Commission therefore added to draft Annex II a new provision (1.4) requesting the ICRC to convene if necessary a special group of experts. From time to time States could appoint such experts if they wished. This group should be competent to review the Annex according to new technical developments.

### *General debate*

1.67 Before examining the articles on medical air transport, a general debate was held in the Commission, in which this subject was approached from various angles.

One expert pointed out that the chances of survival of a wounded man would be greatly increased if he were evacuated quickly to a medical establishment or unit where he could receive adequate treatment. New methods of signalling could ensure that the medical aircraft was more easily identified.

In the interest of the evacuation of the wounded, medical flights in areas under the control of the Party using medical aircraft need be subject only to the requirement that they should approach the battle area as medical aircraft as well as leave it as such.

For the overflight of territory under the control of the adverse Party, only tacit agreement should be required (see CE/COM I/1).

Under this proposal, the medical aircraft should be placed under the control of the military services of

a Party to the conflict. The proposal of this expert was supported by several others.

One expert, seconding the idea that no prior agreement was required in the battle area, submitted an amendment to that effect (CE/COM I/10).

Another expert submitted a document (CE/COM I/6) in which his concept of the rules for medical air transport was presented. He considered that the proposal mentioned above referred mainly to military medical aircraft used in battle areas, while in his proposal he paid particular attention to the use of civilian medical aircraft and the transport of wounded in long-range flights to distant hospitals. He pointed out that the progress from the humanitarian point of view consisted in allowing the medical aircraft to fly without prior agreement also in the battle areas. In principle, he was in favour of the proposal submitted by one expert (CE/COM I/1). He developed in particular the idea of the necessity of internationalizing medical aviation, of rendering assistance to all the Parties to the conflict by neutral States and international organizations, in order to eliminate the difference in availability which could exist between Parties to a conflict in modern means of medical air transport.

Several experts criticized the document submitted by one expert (CE/COM I/1). One of them pointed out that the technical progress achieved should be viewed in the light of military, political and humanitarian aspects, and therefore he had great reservations as to the proposals to change the norms established in the Conventions concerning air transport. The new proposals discriminated against States which did not have modern technical means of air transport, so that the proposed rules would legislate in favour of the Party to the conflict which was privileged in this respect. The law should not favour such a discrimination, which would not be realistic. It would be against small States and liberation movements, which were devoid of technical means. Modern technology served to dehumanize war and to increase the suffering of those who did not possess it. All the Parties to the conflict should have the possibility of having modern means of medical air transport. Furthermore, the proposed rules would infringe sovereign rights, which was unacceptable. Therefore, the operation of medical aircraft without prior agreement was not acceptable.

Several experts supported the declaration of the experts mentioned in the preceding paragraph. One of them pointed out that the use of aircraft without prior agreement would be a threat to the security of the Parties to the conflict, that it would be difficult for a commander to expose his combatants to the danger of an enemy aircraft flying over his lines and gathering intelligence data, etc. The proposed rules would affect the balance which should be maintained. He submitted amendments to the text proposed by the ICRC (CE/COM I/11). Other experts, who supported the declaration mentioned in the pre-

ceding paragraph, pointed out that the new legislation should not be made over the heads of small countries now at war, and that all interests, not only technological reasons, should be taken into account. Another emphasized the necessity to have in mind the views of developing countries. One expert, while supporting the said declaration, submitted two amendments (CE/COM I/5 and 7), according to which flights in areas of military operations should be permitted only by agreement.

One expert, supporting the proposals made in document CE/COM I/1, expressed the idea that the Parties to the conflict should collect the wounded of all Parties. The idea, another expert remarked, was idealistic, as the Party collecting the enemy wounded would make them prisoners of war.

One expert stated that he was in favour of practical measures to facilitate the movement of the wounded and sick and therefore supported the proposal made under document CE/COM I/1 with one major reservation; he had submitted amendments to that text (CE/COM I/8). In CE/COM I/1, he said that the distinction between the situation covered by Articles 25 and 26 would create confusion, because both areas were completely undefined, and could change from hour to hour, while the rules were quite different. He considered that military commanders would be placed in an unacceptable position if they were obliged to agree to the passage of an alien aircraft through the air space under their control; even in peacetime, overflight by an unidentified aircraft without prior clearance was not permitted. He would agree with the idea behind one amendment (CE/COM I/5), but not with the text, because such a text would prevent a medical evacuation in the areas of military operations. He proposed therefore the addition of the following words: "Even if prior agreement has not been obtained, a medical aircraft shall not be the object of attack by any person who has positively identified it in time as a medical aircraft".

An expert, replying to the suggestion that medical aircraft would provide an advantage to the technologically advanced countries with air superiority, reminded the Commission that under the principle of non-discrimination the wounded of both sides would benefit from rapid air evacuation. He pointed out also, that a Party with air superiority did not need medical aircraft for reconnaissance or the performance of hostile acts. He added that if medical aircraft were allowed to operate freely in the battlefield, medical aircraft might be the only aircraft flying on the side which lacked air superiority.

One expert pointed out the role which international medical aircraft might have in cases of natural disasters which might occur also in time of war.

1.68 The question was discussed which of the texts would be taken as a basis for the work of the Commission. Several experts were in favour of the text submitted in document CE/COM I/1; others were in favour of the text submitted by the ICRC.

One expert proposed that a working group should unify all the proposed texts and submit them for the consideration of the Commission. The majority of the Commission was, however, in favour of taking the text submitted by the ICRC as a base of discussion of this Section of the Protocol.

## Article 23

### ICRC DRAFT

#### *Article 23. — Medical aircraft*

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

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

1.69 Several definitions of medical aircraft were proposed in written amendments (CE/COM I/1, 6 and 10), one of which (CE/COM I/1) was taken as a basis for the elaboration of this article, because it was the most detailed and included various aspects of the definition.

1.70 The Commission debated what kind of aircraft should be included in the definition. One view was that all categories of aircraft, which by their own force are maintained in the air, should be covered, including hovercraft. The view prevailed, however, that hovercraft should be considered as a surface vehicle in the sense of this Protocol, because it was never much detached from the sea or land. The Commission was in favour of the definition "medical aircraft means any medical air transport".

1.71 The Commission debated whether all medical aircraft, civilian as well as military, should always be controlled by the military services of a Party to the conflict or not. Some experts considered that in time of war it was indispensable to place these aircraft under military control, because all flights would be under military control. Others were of the view that it was necessary to distinguish between operational control of the flight, which would certainly be in the hands of armed forces, and control in the sense of authorization and of verification that all the conditions for an aircraft to be medical were fulfilled. One view was that private aircraft as well as those of international organizations should not be forgotten, and that they could not be always under military control. The view prevailed that any medical aircraft must be under the direction of a State

authority, but that it would be best to leave to each State the freedom to determine which authorities were competent to exercise this control; the words "under the direction of a competent authority of a Party to the conflict" were therefore adopted. It was also considered that the distinction between military and civil, public and private aircraft was not necessary, since all had to be directed by the competent authority, regardless of the ownership.

1.72 The view prevailed that a distinction between permanent and temporary medical aircraft should be maintained, as in the ICRC text. Both would have to be exclusively used for a medical mission, but the difference was that the permanent ones were used indefinitely for that purpose.

1.73 As proposed in one amendment (CE/COM I/1), the term "medical air mission" was defined in this article, because this term was employed at various places in Section II.

1.74 The Commission debated the question whether the concept of a medical mission included the right of medical aircraft to engage in search and rescue, as proposed in the amendment taken as a basis for the text (CE/COM I/1). It was recommended that this should be accepted only at sea. Proposals were made in this connection to extend rescue and search also on both land and water, in cases when persons were exposed to grave danger, such as in the desert or jungle, or the "shipwrecked" of space. One view was that such an extension of the mission, to cover equally search on land, should not be allowed, because at sea shipwrecked persons were always *hors de combat*, while on land this was not the case. Another view was that, as the experience from a recent war made clear, there were cases in which persons on land were in situations similar to that of a shipwrecked person. In this respect, experts from four countries submitted an additional text, to cover these situations on land and water. In discussing this proposal, the question was raised whether inland waters should be included under this rule. Another question was discussed, namely, how to arrive at the definition of persons exposed to grave danger. Several experts pointed out that such terms were used in Article 60 in the Fourth Convention. It was suggested to include the proposed additional text in Article 23 but to leave in suspense the two questions mentioned above. The Commission, however, could not agree completely with the text and was more in favour of including the whole proposal in brackets, in order to permit its further consideration at a later Conference.

The Commission also drew attention to the need to examine the applicability of the provisions of draft Article 25 to medical missions at sea.

1.75 The question was debated at length whether protection covered the aircraft only during flight, or also during maintenance periods, when it was being prepared for flight or when waiting for a medical

mission, as proposed by one amendment. The Commission preferred the view that protection must necessarily cover also these other activities, otherwise the aircraft might be destroyed on land before beginning its mission. In this connection it was considered useful to adopt the words "any other activities exclusively intended for the performance of the mission".

1.76 The Commission was in favour of the proposal (CE/COM I/1) to define the "distinctive signal", and to include under this definition all modern devices which are recommended to facilitate identification of medical aircraft. The technical details of these signals are given in Annex II. Because technological developments may bring forward new methods and techniques of identification, it was considered useful to elaborate a procedure for amending the Annex from time to time. The Commission was in favour of a proposal that the ICRC should convene a group of experts, if the Contracting Parties considered it desirable, and that it should be possible to include experts from international organizations in the work of such a group.

#### COMMISSION'S DRAFT

#### Article 23. — Definitions

##### 1. For the purposes of the present Section :

- (a) *the term "medical aircraft" means any medical air transport under the direction of a competent authority of a Party to the conflict whenever used exclusively in the performance of a medical air mission. Medical aircraft may be either permanent or temporary.*
- (b) *the term "permanent medical aircraft" means an aircraft assigned exclusively and indefinitely for use as a medical aircraft.*
- (c) *the term "temporary medical aircraft" means an aircraft, other than a permanent medical aircraft, while exclusively employed on a medical mission.*
- (d) *the term "medical air mission" means the evacuation or transport by medical aircraft of any person described in Article 12 of this Protocol, medical personnel or medical equipment protected by the Conventions or any Protocol thereto, or any other activities exclusively intended for the performance of the mission. At sea, a medical air mission includes the search for and rescue of the shipwrecked. [On land and on water under the national jurisdiction of the adverse Party (or on internal waters), with the agreement of the competent authority of the Parties to the conflict, a medical air mission may include the search for and rescue of the persons listed in Article 12 of this Protocol and persons exposed to grave danger.<sup>1</sup>]*

<sup>1</sup> Proposal submitted by Iraq, Japan, Monaco and the United States of America.

(c) the term "distinctive signal" means one or more of the devices recommended for signalling and identifying medical aircraft and designated for the exclusive use of medical aircraft in Annex II of this Protocol. This Annex may be amended from time to time pursuant to the procedures prescribed therein.

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

## Article 24

### ICRC DRAFT

#### Article 24. — Protection

1. Permanent medical aircraft shall be respected and protected at all times.

2. Temporary medical aircraft shall be respected and protected throughout their mission.

1.77 One view was that in Article 24 only the general principle of protection should be stated while other articles would elaborate the conditions. Another view, which was favoured by the Commission, was that the use of medical aircraft was basically different from the use of other medical transports, where in principle the general rule applied; for the operation of the medical aircraft in many situations, an agreement was indispensable for the performance of its mission, and also other conditions had to be fulfilled, because of the nature of this means of transport. Therefore, the Commission was in favour of the formulation that the protection applied only when the aircraft was fulfilling these various conditions, which varied from one situation to another, as set out in Part II of the draft Protocol.

1.78 In the text of this article, the distinction between permanent and temporary aircraft and the principle that temporary aircraft could be protected only when they were used as such were adopted.

1.79 Several proposals were submitted in an amendment (CE/COM I/1), in order to ensure that medical aircraft were not misused for military purposes while performing the medical mission. In this connection additional paragraphs were drafted, prohibiting: (a) the use of aircraft in order to acquire any military advantage (such as intelligence); (b) the use which would render military objectives immune from military operations (patterned after Article 28 of the Fourth Geneva Convention); (c) armament, except small arms belonging to the wounded and sick, and arms necessary for the defence of medical personnel and crew (patterned after Article 22 of the First Geneva Convention); (d) the carrying of cameras and other intelligence-gathering equipment.

## COMMISSION'S DRAFT

#### Article 24. — Protection

1. Permanent medical aircraft, when complying with the provisions of this Protocol, shall not be the object of attack but shall be respected and protected at all times.

2. Temporary medical aircraft, when complying with the provisions of this Protocol, shall not be the object of attack but shall be respected and protected throughout their mission.

3. The Parties to the conflict are prohibited from using their medical aircraft in order to acquire any military advantage over any other Party to the conflict. The presence of medical aircraft may not be used to render military objectives immune from military operations.

4. Medical aircraft shall not carry cameras or other intelligence-gathering equipment or intelligence personnel other than those who are wounded or sick. They are prohibited from transporting persons or equipment not included in the definition of medical air mission.

5. Medical aircraft shall contain no armament other than small arms and ammunition belonging to the wounded and sick and not yet handed over to the proper authorities, and such small arms as may be necessary to permit the medical personnel and crew members to defend themselves and the persons listed in Article 12 of this Protocol.

## Article 25

### ICRC DRAFT

#### Article 25. — Removal of the wounded

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

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

1.80 The Commission discussed thoroughly the principles on which a medical aircraft would be allowed to operate in the battle area (see CE/COM I/1, 5, 6, 8, 10 and 11). One view was that, in the interest of quick evacuation of the wounded and sick, medical aircraft should be allowed to operate freely (CE/COM I/1) and that they should notify their presence by various means of signalling and identification. The opposite view was that the use of aircraft in the battle area could be permitted only by agreement between the local military commanders (CE/COM I/5), because considerations of military necessity and in particular the security of armed forces in the battle area should be taken into account. In this discussion



arguments and reasons in favour of various solutions on medical air transport were advanced and developed. The view prevailed that in principle an agreement was necessary. The ICRC French text "autoriseront" was not clear. One written amendment (CE/COM I/5) was taken as a basis for the formulation, but was amended by other experts. In this way, the majority was in favour of a formulation according to which an agreement was necessary in principle, and could be concluded in any possible way. There were, however, exceptions to this principle which were formulated in other paragraphs of this article. In the process of drafting, this formulation was changed to some extent. One expert declared his dissatisfaction with the change introduced in an already accepted text, but the majority was of the view that the new formulation was acceptable.

1.81 During the debate, it became evident that it was necessary to define the term "battle area". According to some experts, "battle area" should be defined as an area where opposing ground forces were in hostile contact. One view, however, was that it was not within the competence of the Conference to define the battle area.

1.82 A further element introduced was that the rules of Article 25 should apply in the ground battle area under the control of friendly forces as well as in areas where such control was not clear.

1.83 Another distinction was made between the "forward part" and the "rear part" of the battle area, and the text provided that the agreement was required only in the "forward part".

1.84 It was proposed that after the principle of the necessary agreement, set out in paragraph 1 of this article, a second paragraph should be added, which would grant protection from attack even if prior agreement had not been obtained, if the medical aircraft was positively recognized as such. This paragraph was discussed and various views were expressed. One view was that for humanitarian reasons any medical aircraft, which had been recognized without any doubt as such, should not be attacked in spite of the fact that prior agreement had not been obtained. Another view was that this paragraph seemed to be in contradiction to paragraph 1, and it could be accepted on the understanding that it would be applied only as an exception, while the rule of obligatory agreement set out in paragraph 1 should be the principle; therefore, in this paragraph, it should be stated that it applied only in exceptional circumstances. The majority of the Commission did not feel, however, that it was necessary to add these words.

1.85 A new rule was added according to which, at the discretion of the appropriate commander, the Party using medical aircraft in the combat zone under its control could advise the adverse Party of the fact that the medical aircraft would operate in that zone (CE/COM I/1). The reason for this was

to give better protection to medical aircraft. One view was that this rule was not necessary.

#### COMMISSION'S DRAFT

##### *Article 25. — Removal of wounded from battle area*

1. *In the forward part of the battle area under the control of friendly forces, and in areas where such control is not clear, the protection against attack provided in Article 24 of this Protocol can be effective only by agreement between the local military authorities of the Parties to the conflict. The agreement may be concluded in every possible way and may cover the routes, times, heights of flight, number of aircraft as well as other means of identification.*

2. *Even if prior agreement has not been obtained, a medical aircraft shall not be the object of attack by any person who has positively recognized it as a medical aircraft.*

3. *In the rear part of the battle area medical aircraft belonging to friendly forces may perform their medical air mission without prior agreement.*

4. *The medical air mission should be carried out with the utmost possible speed.*

5. *At the discretion of the appropriate commander the Party using medical aircraft may give an adverse Party notification of the fact that medical aircraft will operate in that part of the combat zone which is under the control of the Party using the medical aircraft and may provide such information as will aid an adverse Party in the identification of such aircraft. [Alternative proposed by the ICRC : — The Party using medical aircraft in flights over territory under its control may, with the consent of the appropriate commander, notify the opposing Party of such flights. The notification shall include all information required for the identification of the said aircraft.]*

6. *For the purposes of this article, the term "battle area" means an area where opposing ground forces are in hostile contact with each other.*

#### Article 25 A

##### ADDITIONAL ARTICLE

1.86 It was proposed (CE/COM I/1) that a new rule be adopted, according to which search and rescue at sea should be permitted, subject to imperative military necessity. The main purpose of this rule would be to allow the removal and evacuation of wounded, sick and shipwrecked persons in areas where opposing naval forces were in hostile contact. The majority of the Commission was favourable to the inclusion of such an article. It was agreed that this rule could not apply to inland waters, but the question was left open whether it could be applied to waters under the jurisdiction of the opposing Party. The proposed text therefore contains two alternatives.



## COMMISSION'S DRAFT

### *Article 25 A. — Search and rescue at sea*

#### *Alternative 1 :*

*[At sea, but not over inland waters.]*

#### *Alternative 2 :*

*[At sea but not over waters under the national jurisdiction of the adverse Party.]...*

*... the Parties to the conflict shall not, save in cases of imperative military necessity, interfere with the search for, or removal and evacuation of the persons listed in Article 12 of this Protocol by medical aircraft. This provision shall apply especially in areas where opposing naval forces are in hostile contact with each other.*

## Article 26

### ICRC DRAFT

### *Article 26. — Flight over the territories of the Parties to the conflict.*

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

1.87 In the general debate on medical air transport, different views were presented on the subject of the article (see CE/COM I/1, 5, 6 and 10); one that the overflight of enemy-controlled territory should be permitted, subject only to notification and to the right of the party controlling the territory to require reasonable alternative routes (CE/COM I/1); the other, that this overflight was possible only after an agreement had been obtained. Other views contained solutions in which both principles were combined (free flying or flying only by agreement), such as the proposal that an exception to the principle of agreement was possible when circumstances made it difficult to conclude an agreement (CE/COM I/10). The majority of the Commission was in favour of the view that an agreement was necessary, and discussed the formulations to express this view. An amendment was taken as a basis for the text adopted and was redrafted to express the principle of obligatory agreement set out above. In this connection, it was proposed, in order to facilitate the use of medical aircraft in the situation covered by this article, not to use the term "an agreement", which might be interpreted as requiring a lengthy and complicated procedure, but to use the term "assent of the adverse Party". The Commission, however, held the view that the word "agreement" in no way implied any formal agreement concluded under a complicated procedure, but that this agreement prior to the flight

might be granted in any way possible, using modern technological means of communication between the Parties. Another proposal was to use the term "clearance", current in aviation, but the Commission held the view that it was better to use the term "agreement" which would also be clear to those who were not specialists.

1.88 The question was discussed whether the article should contain the enumeration of various elements to be covered by agreement, such as routes, times, heights, etc., or should leave such details to be determined by the agreement. The majority of the Commission was in favour of including these elements, in order to provide the Parties concerned with the elements on which they could arrive at an agreement. Further, to facilitate such agreements and thus permit the use of medical aircraft, it was decided to draft a special article (26 A) which would suggest a procedure to the parties. It was expected that in this way the concluding of agreements would be speeded up.

1.89 The question was raised whether the formulation "the party may condition clearance on reasonable alternative routes," etc. in Article 26 A did not imply the obligation to give clearance, and left only the right to change the route or time or height. The majority of the Commission felt that such a formulation did imply the right to refuse clearance, as could be seen from the text of Article 26 and the title of Article 26 A.

## COMMISSION'S DRAFT

### *Article 26. — Overflight of territories controlled by the adverse Party*

*Medical aircraft shall continue to enjoy the respect and protection provided under Article 24 of this Protocol while they are flying over territory physically under the control of the adverse Party, provided prior agreement from the competent authority of the adverse Party has been obtained. The agreement shall cover in particular the routes, times, heights of flight, number of aircraft as well as the means of identification of medical aircraft. The Party employing the medical aircraft shall ensure that they comply with the requirements laid down in Article 26 A and Article 27 of this Protocol while flying over such territory.*

## COMMISSION'S DRAFT

### *Article 26 A. — Procedure for agreements*

*1. In order to facilitate agreements under Articles 25 and 26 of this Protocol, the Parties employing medical aircraft shall provide to the adverse Party timely notification of the particulars covered by those articles and any other information which will aid in the identification of the aircraft, together with an undertaking to comply with the provisions of para-*

graphs 4 and 5 of Article 24 of this Protocol, and the means of identification proposed.

2. *The adverse Party will acknowledge receipt of the information in paragraph 1 above and may condition clearance on reasonable alternative routes, times and heights of flight and other conditions, and the Party employing medical aircraft shall comply with such requirements.*

## Article 27

### ICRC DRAFT

#### *Article 27. — Identification*

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

2. Apart from the distinctive emblem, medical aircraft may be fitted with a system of signals and identification, in accordance with the Rules attached as an annex to the present Protocol.

1.90 The question was discussed whether marking with the red cross emblem should be obligatory or not. One view was that it should be obligatory, otherwise it would be difficult to identify the aircraft and it would be exposed to attacks. The view of the majority of the Commission was, however, that, although marking is very important and desirable, States should be left to decide whether they would use this right to mark their aircraft with the emblem or not. Therefore, in the final formulation, the marking was conditioned on the assent given by competent authorities of each party using the aircraft.

1.91 In the ICRC text, it was proposed to make the marking compulsory in cases of agreements provided in Article 26. The Commission discussed that question. One view was that, in all cases in which agreement was necessary, the marking should be compulsory; the other, that Parties to the conflict should be free in this respect (see also CE/COM I/1 and 5), because of the necessity sometimes to improvise medical aircraft without having marked them before the beginning of their mission, either for lack of time or for reasons of camouflage. It was also proposed to make marking obligatory in cases covered by Article 26 but not in those covered by Article 25 (over the battlefield), as the necessities of battle might not allow any time to do so. The Commission preferred to make the marking of aircraft compulsory when operating in all situations where an agreement was required.

1.92 The proposal was made to compel the Parties to the conflict to adopt modern techniques of identification (CE/COM I/1). One expert pointed out that this rule did not obligate States to invest in sophis-

ticated equipment to identify medical aircraft, unless they possessed sophisticated surface-to-air or air-to-air missiles capable of destroying beyond visual range. Some doubts were expressed concerning the advisability and feasibility of obliging developing countries to acquire expensive equipment to receive signals transmitted by medical aircraft. It was stressed that it should be possible for all States, rich or poor, to agree to this Protocol. The view prevailed that the formulation should be qualified with "shall do its utmost to adopt".

1.93 The proposal was made to expressly prohibit the use of special signals contrary to the provisions of the Conventions and of this Protocol (CE/COM I/1), i.e., to misuse such signals. The Commission, however, was of the view that such a clause was not necessary, because it existed in the general provisions of this Protocol.

1.94 The Commission agreed, on the recommendation of the Technical Sub-Commission on "Marking and identification of medical transports", to establish a rule which would permit the technical methods, practices and procedures for identification of medical aircraft, set out in Annex II to this Protocol, to be revised and amended from time to time, in accordance with technological developments (see Commentary on Article 23).

### COMMISSION'S DRAFT

#### *Article 27. — Identification*

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

2. *Apart from the distinctive emblem, medical aircraft may be fitted with one or more distinctive signals.*

3. *Each Party to a conflict shall do its utmost to adopt and implement reasonable methods and procedures designed to provide for the identification and protection of medical aircraft which are transmitting the distinctive signal and displaying the distinctive emblem.*

## Article 28

### ICRC DRAFT

#### *Article 28. — Landing*

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

2. In the event of a landing, on land or on water,

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

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

1.95. Various amendments were proposed to this article (CE/COM I/1, 7 and 8). The majority of the Commission was in favour of taking as a basis of the text to be adopted, the proposals contained in amendment CE/COM I/1, because it was elaborated in detail and covered all possible situations. In this connection the question was raised as to the legal position of a medical aircraft flying without prior agreement, or contrary to an agreement in cases where agreement was required. The view prevailed that, in such situation, the aircraft should be treated in the same way as aircraft in breach of an agreement i.e., where it was established that it was not a medical aircraft within the meaning of the present Protocol. Consequently it could be seized and its crew and passengers treated according to the applicable provisions of the Geneva Conventions and of the present Protocol.

1.96 The question was discussed whether the presence in a medical aircraft of any person not belonging to the crew, medical personnel or the wounded and sick deprived the aircraft of its immunity, or whether in such a case, the interest of the wounded should prevail. The Commission did not come to a decision on that question.

1.97 In connection with that part of paragraph 2 relating to the situation of an aircraft which had landed or flown without prior agreement when such agreement was required, one expert stated that he considered that this rule should be interpreted in such a way as not to suggest that agreement could be refused. He had in mind the situation when it was necessary to continue at once the transport by air of wounded and sick evacuated from the battlefield. He was surprised that persons entitled to protection in the first phase of their evacuation (under the provisions of Article 25) without prior agreement could not continue to enjoy this right during the second phase. He referred, in this connection, to the concept of "continuous voyage" as contained in the international law of sea warfare, and considered

that agreement to proceed with the second phase of evacuation should not be refused or delayed by long negotiations.

#### COMMISSION'S DRAFT

##### *Article 28. — Landing*

1. Medical aircraft flying over territory physically under the control of an adverse Party as provided in Article 26 of the present Protocol may be ordered to land or, as appropriate, alight on water in order to permit inspection and verification of the character of the aircraft. Medical aircraft shall obey every such order.

2. In the event of a landing whether ordered, forced, or the result of fortuitous circumstances, an aircraft is subject to inspection to determine whether it is a medical aircraft within the meaning of Article 23 of this Protocol. If inspection discloses that it is not a medical aircraft within the meaning of Article 23 of this Protocol, or if it is in violation of the conditions prescribed in Article 24 of this Protocol, or if it has flown without prior agreement, it may be seized and the crew and passengers shall be treated in accordance with the applicable provisions of the Conventions and of this Protocol. Such seized aircraft as are designed to serve as permanent aircraft may be used only as medical aircraft thereafter.

3. If inspection discloses that the aircraft is a medical aircraft within the meaning of Article 23 of this Protocol, the aircraft, its crew, its medical personnel and its passengers shall not be subject to capture, detention or internment but shall be permitted to continue their mission.

4. Inspection shall be conducted expeditiously in order not unduly to delay any medical treatment.

#### Article 28 A

##### ADDITIONAL ARTICLE

1.98 On the basis of a proposal (CE/COM I/1), a new article was included to define the status of flight crews. In the article, a distinction was made between the permanent and temporarily assigned members of flight crews.

1.99 Permanent members of flight crews under this article have the status of permanent medical personnel within the meaning of Articles 24 and 26 of the First Geneva Convention. In this connection, one expert expressed the view that the purpose to be attained by this article should be to give them a more favourable status than that of temporary personnel mentioned in paragraph 2 of Article 28 A. The proposed reference to the articles of the First Geneva Convention would subject these members of the crew to capture. In his opinion, when the aircraft is ordered or forced to land, the crew should be liberated, as well as the aircraft and its occupants ;

otherwise, this would encourage the Parties to the conflict to order medical aircraft to land in order to capture their crews. Therefore, he proposed that the status of the crew be determined by analogy to Article 36 of the Second Convention ("Crews of hospital ships"), under which the crews are not subject to capture. In connection with paragraph 2 of Article 28 A (temporary crew of medical aircraft), the same expert had no objection in principle, but he considered it would be better to determine their status by analogy to Articles 24 and 26 of the First Convention ("Permanent personnel"), rather than Article 25 ("Auxiliary personnel"). Several experts, however, held the opposite view, namely that the permanent crew of medical aircraft could not be treated as the crew of hospital ships, because there was a fundamental difference in their situation. The crew of an aircraft spent a great part of their time on land, and they should be subject to the rules concerning the crew and/or drivers of other medical transports. When they fell into the hands of the enemy they should be subject to capture, like all other military medical personnel. It was also suggested that the status of a crew be determined by Article 37 of the Second Geneva Convention, i.e., the article relative to the personnel of ships other than hospital ships. The Commission favoured the view that the text should be maintained as proposed, i.e., to determine the status of the crew according to the corresponding articles of the First Geneva Convention.

1.100 One expert proposed that temporary crews of medical aircraft should not be obliged to have an identity card, as in certain urgent cases it would not be possible to furnish them with the card in time, and this would prevent medical air missions from being carried out. Moreover the card served no purpose. The other view, which prevailed, was that such a rule would be open to abuses and that the requirement of an identity card should be obligatory.

#### COMMISSION'S DRAFT

##### *Article 28 A. — Flight crews*

1. *Persons permanently and exclusively assigned to duties as flight crew of medical aircraft shall have the status and protection of permanent medical personnel within the meaning, as appropriate, of Article 24 of the First Convention (military medical personnel), Article 26 of the First Convention (personnel of National Red Cross Societies and that of other Voluntary Aid Societies) and Article 18 of this Protocol (civilian medical personnel) and shall benefit from the safeguards accorded to such persons under the Conventions and this Protocol. They may wear the distinctive emblem and shall carry the identity document prescribed by the Conventions and this Protocol.*

2. *While in the performance of their medical air mission, persons temporarily assigned to duties as flight crew of medical aircraft shall have the status and protection of temporary medical personnel under Articles 25 and 29 of the First Convention or Article 18 of this Protocol. They may wear the distinctive emblem and shall carry the appropriate identity card which shall state the duties on which they are employed as prescribed by the Conventions and this Protocol. If temporary military medical personnel fall into the hands of the adverse Party (unless allowed to continue their mission under paragraph 3 of Article 28 of this Protocol), they shall be prisoners of war, but shall be employed in their medical duties in so far as the need arises.*

#### Article 29

#### ICRC DRAFT

##### *Article 29. — Neutral States*

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

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

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

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

5. Any wounded, sick or shipwrecked persons disembarked from a medical aircraft with the consent of the local authorities on the territory of a neutral State shall, unless agreed otherwise between the neutral State and the Parties to the conflict, be detained by the neutral State where so required by international law, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the Power to which the wounded, sick and shipwrecked persons belong.

1.101 In accordance with the view taken on Article 22, the words "Neutral States" were replaced by "States not Parties to the conflict".

1.102 The question was discussed whether this article was really necessary, because flight over the territory of neutral States was regulated by Article 37 of the First Geneva Convention and by corresponding articles of other Geneva Conventions. It was agreed that this article was necessary because it regulated situations which were not covered by the Geneva Conventions, in particular cases of flights without prior agreement.

#### COMMISSION'S DRAFT

##### *Article 29. — States not Parties to the conflict*

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

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

3. *Should a medical aircraft, in the absence of an agreement, because of urgent necessity, be forced to fly over or land on the territory of a State not Party to the conflict, the medical aircraft shall make every effort to give notice of the flight and to identify itself. The State not Party to the conflict shall, to the extent possible, respect such aircraft.*

4. *In the event of a landing, on land or on water, in the territory of a State not Party to the conflict, whether forced or in compliance with a summons, the aircraft, with its occupants, may resume its flight after examination, if any.*

5. *Any persons listed in Article 12 of this Protocol disembarked from a medical aircraft with the consent of the local authorities on the territory of a State not Party to the conflict shall, unless agreed otherwise between the State not Party to the conflict and the Parties to the conflict, be detained by the State not Party to the conflict where so required by international law, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the Power to which the wounded, sick and shipwrecked persons belong.*

6. *The States not Parties to the conflict shall apply any conditions and restrictions on the passage or landing of medical aircraft on their territory equally to all Parties to the conflict.*

#### Article 29 A

#### ADDITIONAL ARTICLE

1.103 The Commission decided to propose a new article (cf. CE/COM I/1 and 6) corresponding to the provisions of Article 27 of the First Geneva

Convention and extending the possibility of assistance by States not Parties to the conflict in matters of medical air transport. This possibility was also extended, by paragraph 2 of the new article, to organizations of an international character, under the same conditions as provided for in Article 27 of the First Convention; these may be international organizations (such as the United Nations and its specialized agencies, the International Red Cross and other non-governmental organizations) and international bodies such as those covered by the Convention of the International Civil Aviation Organization (Article 70 of this Convention).

#### COMMISSION'S DRAFT

##### *Article 29 A. — Aircraft of relief societies of States not Parties to the conflict and of organizations of an international character*

1. *The provisions of Article 27 of the First Convention shall apply to permanent medical aircraft and their flight crews and medical personnel furnished to a Party to the conflict by a recognized relief society of a State not Party to the conflict.*

2. *The provisions of Article 27 of the First Convention shall also apply to permanent medical aircraft, flight crews and medical personnel furnished for humanitarian purposes by an organization of an international character, on the condition that such an international organization carries out the same requirements as are to be performed by the Government of a State not Party to the conflict under the aforesaid Article 27.*

#### COMMENTS OF A GENERAL CHARACTER RELATING TO SECTION II

1.104 In the final session of Commission I, the following comments of a general character were made concerning Section II on medical air transport (Articles 23-29): — One expert declared that the text elaborated by the Drafting Committee did not eliminate the serious objections raised by him in the general debate concerning the articles in Section II of Part II of the First Protocol proposed by the ICRC (Articles 23-29), and that he felt compelled by the new text to emphasize the objections. These referred fundamentally to the basic conception of the proposed rules of this modern means of transport, which were in principle of a discriminatory character against the wounded, sick and shipwrecked of those Parties to the conflict which did not possess such means. His objections were also directed against the restrictions which the rules tried to impose on the sovereign rights of the States. He said that the military implications of the use of this means of transport had not been sufficiently examined; and he objected to the dangerous vagueness of different terms used in that text. These objections referred in particular to Articles 23, 24 (paragraphs 2, 3, 4

and 5), 25, 25 A, 26, 26 A, 27 (paragraph 3), 28 (paragraphs 1, 2 and 3), 28 A, 29 (paragraphs 3 and 4), 29 A and also to the article without a number. This point of view was supported by some experts.

1.105 One expert submitted his reservation concerning Section II, "Medical air transport" of Part II, draft Protocol I, as worded by the Drafting Committee. The present text did not in all articles exactly reflect the discussions and the proposals accepted by the Commission. In some articles it contained rules which had not been discussed or which had been rejected by the Commission. The reservations referred to Articles 23, 25, 25 A, 26 A, 27 and 28 A. Article 25, in particular, which had been adopted on the basis of proposal CE/COM I/5 (one paragraph only), had had in part its meaning reversed.

### CHAPTER III

#### **National Red Cross Societies and other humanitarian organizations**

1.106 This question was examined on the basis of a proposal submitted by a group of experts from several States (CE/COM I/9). It was considered that Red Cross (Red Crescent, Red Lion and Sun) Societies could play a meaningful role in favour of victims of armed conflicts.

The assistance and the various types of activities of the Red Cross were of the greatest importance for the alleviation of the condition of victims, and therefore all Parties to the conflict should encourage these activities.

1.107. The proposal was made to extend the benefits of this article also to other humanitarian, non-Red Cross, organizations, which perform similar activities to those of the Red Cross. It was felt, however, that this extension should be limited to those other organizations which have been duly recognized or authorized by their Governments and which were

engaged exclusively in humanitarian activities based on the same principle of impartial assistance extended to war victims as is the case with the Red Cross.

1.108 In order to meet the various remarks made on this subject in the Commission, experts from several States jointly submitted a new draft of this article; the Commission was in favour of this text.

1.109 The place of this additional article in the Protocol was not determined. It was proposed to call it Article 65 A or 73 A, and it was left to the ICRC to take a decision on the matter.

#### COMMISSION'S DRAFT

*Article... — National Red Cross Societies and other humanitarian bodies*

*1. The Parties to the conflict shall extend to the National Red Cross (Red Crescent, Red Lion and Sun) Societies and to International Red Cross bodies all facilities and assistance necessary for the performance of their humanitarian activities to be carried out in accordance with the Red Cross principles as defined by International Red Cross Conferences.*

*2. For the purposes of this article, the term "humanitarian activities" means medical relief and other purely humanitarian activities to be carried out impartially in favour of victims of armed conflicts.*

*3. Facilities and assistance similar to those mentioned in paragraph 1 of this article are also to be rendered to other civilian humanitarian organizations, which are duly recognized or authorized by their Governments and are performing exclusively humanitarian activities.*

1.110 One expert expressed the opinion, supported by another expert, that there should be better co-ordination of the activities of various organizations engaged in relief, as they also had an important mission to perform in time of war. This applied to bodies such as the WHO, UNESCO, UNICEF, some non-governmental organizations, etc. Perhaps the idea of an international relief charter should be further developed and studied.

## ANNEXES

### to Report of Commission I

#### ANNEX I

DRAFT ANNEX I TO THE ADDITIONAL PROTOCOL  
TO THE FOUR GENEVA CONVENTIONS OF AUGUST 12, 1949

**Model of the Identity Card referred to  
in Article 18 of the present Protocol**  
(to be prepared)

#### ANNEX II

DRAFT ANNEX II TO THE ADDITIONAL PROTOCOL  
TO THE FOUR GENEVA CONVENTIONS OF AUGUST 12, 1949

**Recommended International Standards,  
Practices and Procedures for the Identification and  
Signalling of Medical Aircraft**

##### *Chapter I. General*

1.1 The following are standards, recommended practices and procedures for the signalling and identification of medical aircraft.

1.2 Adoption of some or all of these measures is likely to lead to a more positive identification of medical aircraft, thereby lessening the chance of their becoming the object of attack.

1.3 A joint international group of technical experts should periodically review and revise this annex and recommend improvements, where appropriate, in medical aircraft identification standards, practices and procedures.

1.4 The International Committee of the Red Cross is invited to convene the group whenever it deems it to be necessary, after having requested the Contracting Parties, if they wish, to nominate experts. International specialized organizations may also delegate representatives to meetings.

##### *Chapter 2.*

##### *Recommended Standards, Practices and Procedures*

#### 2.1 VISUAL IDENTIFICATION

##### 2.1.1 *Emblem.*

The distinctive emblem provided for in the present Protocol will be conspicuously displayed.

*Colour* : Red on a white field.

*Location* : Affixed so that it is visible in all directions.

##### 2.1.2 *Light Signal.*

A distinctive light, affixed and operating as specified, should be provided.

*Colour* : Blue.

*Type* : Flashing or flashing strobe.

*Flashing characteristics* : Flash frequency should lie between 40 and 100 flashes per minute.

*Location* : The lamp(s) should be so located that light is visible in as many directions as possible.

#### 2.2 NON-VISUAL IDENTIFICATION

##### 2.2.1 *Radio*

A radio message, prefixed by the word "MEDICAL", can be used to transmit a position on an agreed or specified frequency at frequent intervals during a medical air mission. Pending adoption of a suitable form of speech for aeronautical radio-communication between Parties to the conflict, the English language shall be used.

##### 2.2.1.1 *Message content*

(a) MEDICAL (followed by aircraft identification).

(b) Number(s) and aircraft type(s).

(c) Route.

(d) Altitude.

(e) Timings.

(f) Other information (for example, radio frequency(ies), language, secondary surveillance radar-mode and code).

##### 2.2.1.2 *Frequency Assignment.*

States are urged to propose specific frequency(ies) for the transmission of medical messages. These proposals should be submitted to the International Telecommunication Union (ITU) for consideration and inclusion in the Radio Regulations annexed to the International Telecommunication Convention (Montreux, 1965).<sup>1</sup>

##### 2.2.2 *Secondary Surveillance Radar (SSR).*

The SSR system, as specified by the International Civil Aviation Organization (ICAO), Annex 10 — Aeronautical Telecommunications, should be used in identification throughout a medical air mission.

<sup>1</sup> The above is consistent with Recommendation No 34 of the ITU Administrative Radio Conference (Geneva, 1959).

### 2.2.2.1 Mode/Code

(a) Mode: 3/A.

(b) Code (to be agreed upon or specified by the Parties).

### 2.2.2.2 Code Assignment.

A unique SSR code for ultimate universal use is recommended. Its designation should be co-ordinated through the International Civil Aviation Organization (ICAO) and subsequently included in the appropriate ICAO document(s).<sup>1</sup>

## ANNEX III

### Report of the Technical Sub-Commission on Marking and Identification of Medical transports

#### Introduction

1. The Sub-Commission of technical experts on the "marking and identification of medical transports" met in Geneva from 5 to 10 May 1972 at the invitation of the International Committee of the Red Cross (ICRC) in its Note to Governments (Reference D-O-1243 b, dated 26 February 1972).

2. The Chairman of Commission I (Wounded, Sick and Shipwrecked Persons), under whose auspices the Sub-Commission met, directed that the technical experts should concentrate on recommending practical means of improving the signalling and identification of medical aircraft. A second item to be considered was the problem of identification of medical transport on land and sea.

3. A list of the members of the Sub-Commission appears as Annex III A, attached.

#### Medical aircraft

4. The Sub-Commission based much of its work on a series of background documents and studies undertaken under the auspices of the ICRC. These included:

ICRC Conference of Government Experts (Geneva, 1971) CE/7b

ICRC — I Basic Texts (Geneva, 1972)

ICRC — II Commentary (Part I) (Geneva, 1972)

ICRC Technical Memorandum (Questionnaire) (Geneva, 1972)

ICAO Annex 2 (6th edition), 1970

ICAO Annex 8 (5th edition), 1962

ICAO Annex 10, Vols I and II (2nd edition), 1968

ICAO Annex 12 (5th edition), 1970

ITU Radio Regulations annexed to the ITU Convention (Montreux, 1965)

Final Acts of the ITU Administrative Conference (Geneva, 1959) Recommendation No. 34

5. The possible means of identification and/or signalling of medical aircraft were considered under several headings. It was generally agreed that, apart from the

<sup>1</sup> Until such time as a universal worldwide code is established, States should allocate a unique national SSR code to designate medical missions.

use of the distinctive emblem, all other recommended methods of signalling and identification of medical aircraft should be optional. Thus, rather than prescribing obligatory regulations and/or rules for States for the marking and identification of medical aircraft, it was agreed to provide recommended international standards, practices and procedures. This was done in the form of an Annex to the Draft Additional Protocol to the four Geneva Conventions of 12 August 1949, a copy of which is attached as Annex III B.

### 6. Visual identification

(a) *Distinctive emblem.* It was decided not to specify the dimensions of the distinctive emblem because of the wide variation in aircraft shapes, sizes and configurations. Moreover, failure to conform to over-precise dimension specifications could thereby result in inadvertent deprivation of an aircraft's protection under the Geneva Conventions.

#### (b) Light signals

(1) *Red, green, white.* It was necessary to eliminate red, green and/or white light signals since their use is already prescribed by the International Civil Aviation Organization (ICAO) for international civil air operations.

(2) *Yellow, orange.* While not specifically used for aircraft signalling or identification, yellow is used by hovercraft. Further, surfaced submarines display an orange light and expert opinion warned of the risk of confusion in distinguishing between yellow and orange.

(3) *Blue.* Flashing blue lights are not prescribed for use in air operations and were selected by the Sub-Commission as the best of the available colour alternatives to designate a medical mission.<sup>2</sup>

(4) *Flash Characteristics.* The use of flashing lights with a precisely specified frequency of flash was rejected, since to achieve such precision would be technically complex and therefore unnecessarily costly. It was decided to recommend the use of a flashing or strobe light whose frequency lies between 40 and 100 flashes per minute, this being the same as recommended by the ICAO for anti-collision purposes.<sup>3, 4</sup>

### 7. Non-visual identification

(a) *Audible signals.* The use of audible signals as a means of identification of medical aircraft was considered in order to establish the feasibility of audible signalling under conditions of poor visibility. It was concluded that the problems of installing sirens, bells, whistles and/or loudspeaker horns on aircraft raised no insurmountable technical difficulty; nevertheless, the use of such devices was rejected because of their association with psychological warfare operations.

(b) *Radio.* The use of aircraft radio, where available, is recommended to make known the medical nature of the mission. The problems associated with radio frequency and language compatibility were covered.

<sup>2</sup> It is recommended that the ICRC should specify the colour co-ordinates of the blue which should be used.

<sup>3</sup> This recommended light signal has the merit of being technically uncomplicated and therefore should be inexpensive.

<sup>4</sup> When implementing the blue flashing light proposal ((3) and (4) above) it may be necessary to consider its implication on international civil aviation standards.



These problems will have to be referred to States (2.2.1.2 of Annex III B).

(c) *Radar*. Specialized techniques involving the processing of primary radar signals for identification (as proposed by the International Electrotechnical Commission) were discounted on grounds of technical complexity and cost. Secondary surveillance radar (SSR), the use of which is increasing worldwide, is recommended to make known the medical nature of the mission. The co-operation of States will be needed to deal with this aspect (2.2.2.2 of Annex III B).

#### *Land Medical Transport*

8. Detailed study of identification and signalling of land medical transport was undertaken by Working Group I whose results were subsequently considered by the Sub-Commission. This report and associated proposals, contained in Annex III C, cover broadly visual identification (colour, location and illumination) of the distinctive emblem, use of visual and/or light signals, audible identification methods, radio communications and radar detection.

9. The proposals are wide-ranging and raise several complex technical questions. They are largely new and are not in general based on previous analysis under ICRC auspices.

10. It was proposed that Annex III C should be formally considered by Commission I, but the majority of the technical experts were of the opinion that further detailed examination of these proposals should be undertaken by a specially convened group having expertise in the particular areas covered in Annex III C, in the same way as the present Sub-Commission is principally expert in air operations.

11. Amongst the problems which will require further study are, for example, the extent to which certain of the proposals are compatible with international conventions and the practical difficulties of using radio and radar for surface vehicle identification.

#### *Sea Transport*

12. During discussion in the Sub-Commission, the adequacy of marking requirements for hospital ships, as specified in Article 43 of the Second Geneva Convention, was called into question. The Sub-Commission was unable to formulate recommendations on this subject. A majority of technical experts held the view that detailed examination of this question should be undertaken by a group having expertise in marine and naval matters.

#### *Conclusion*

13. The adoption of some or all of the recommended standards, practices and procedures for the signalling and identification of medical aircraft, as contained in Annex III B, is likely, in the opinion of all the technical experts, to lead to the more positive identification of medical aircraft, thereby lessening the chance of some of them becoming the object of attack.

#### *Recommendation*

14. It is recommended that an international group of technical experts should review Annex III B periodically

to revise and update the identification and signalling standards, practices and procedures in the light of technological advances.

John W. Lowe  
Chairman  
Technical Sub-Commission

### ANNEX III A

#### **Composition of Technical Sub-Commission on Signalling and Identification of Medical Aircraft**

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Lt-Col. J. LOWE  
United States Army, Washington

##### *Rapporteur*

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#### **WORKING GROUP I ON LAND MEDICAL TRANSPORT**

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##### *Chairman*

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Intergovernmental Maritime Consultative Organization, London

### ANNEX III B

#### Recommended International Standards, Practices and Procedures for the Identification and Signalling of Medical Aircraft

See Annex II of the report of Commission I

### ANNEX III C

#### Report of Working Group I of the Technical Sub-Commission

##### A. GENERAL

1. The Working Groups entrusted with the examination of this problem has based its study on the document prepared by the ICRC. It has taken account of the commentaries made in that document and has noted certain delegations' answers to the Questionnaire. The practical field demonstration given by the Swiss Non-Commissioned Officers' Association was much appreciated.

2. The Working Group has tried to summarize the ideas, as expressed by the various participants, on each of the matters raised in the "Technical Memorandum" prepared by the ICRC, in such a way as to reach a conclusion. The conclusions given below have, in general, been presented in the form of recommendations.

##### I. Question (1):

*What modern means are there for increasing the luminous capacity of the distinctive emblem?*

##### Question (2):

*Is the distinctive emblem visible to infra-red monitoring?*

3. It is recommended that, in order to make the distinctive emblem more readily visible, modern methods should be used (e.g., materials, fabrics and paints that increase the luminous capacity of the emblem, both by day and night, and processes which render it more visible to infra-red monitoring).

##### II. Question (3):

*Should a uniform colour be recommended for all means of transport used by the medical services? If so, what colour?*

4. From a technical point of view, it would be easier to identify medical transports and units if a uniform colour were adopted. However, this process can be adopted only for permanent means of medical transport and units, for it is obviously impracticable for occasional or temporary vehicles or units. Nevertheless, even if a uniform colour is adopted, medical vehicles and

units will have to bear the distinctive emblem of the red cross.

5. We agree that the best colour would appear to be "orange-yellow".

##### III. Question (4):

*Does the armband worn on the left arm by medical personnel still offer sufficient protection? If not, what form of protection should be adopted?*

6. The individual armband, bearing the distinctive emblem of the red cross, worn solely on the left arm, is insufficient.

7. In view of what was said in answering question (3) above, the most effective method would be to adopt whatever "uniform colour" is chosen for all clothing and equipment worn and carried by medical personnel protected by the Geneva Conventions. Such personnel should also wear the distinctive emblem of the red cross.

8. Should the "uniform colour" method not be adopted, then at least the distinctive emblem of the red cross must be made more easily visible. To do this, the personnel concerned should wear the emblem, not only on the left arm, but also on the right arm, the chest, the back and on their helmets.

##### IV. Question (5):

*Should there be specific instructions as to the location and illumination of the distinctive emblem used on means of medical transport? If so, what instructions?*

9. No, such measures should not give rise to further provisions but may result in two kinds of recommendations.

(a) First, concerning *location* — it will suffice to recommend that the distinctive emblem of the red cross be used as frequently as possible and necessary, account being taken of the size of the vehicle and the potential size of the emblem necessary to show that the vehicle is of a medical nature. Generally speaking, where land vehicles are concerned, this means an emblem on each side, one on the front, one on the back and one on the top.

(b) Secondly, concerning *illumination* — this should be recommended, but not be required in all circumstances, as there are cases in which illumination may not be desirable for understandable military reasons. The authority taking the decision shall be responsible for the fact that the medical vehicle may not be distinguishable from any other vehicle.

##### V. Question (6):

*Ought the use of visual signals, as provided for in the International Code of Signals for Search and Rescue and in Annex 12 "Search and Rescue" published by the ICAO, be recommended to meet the needs of military medical services? Should other signals be added, and if so, what signals?*

10. The use of such visual signals ought to be recommended in all cases, with an additional sign, where necessary, to show the medical nature of the assistance or service required. The additional sign could be that of the red cross.

11. The suggestion that new signals, specifically for medical purposes, be created, could be considered but only as a part of existing code systems and certainly not in a red cross document or regulation.

VI. Question (7):

*Does the signalling of means of medical transport by flashing blue lights have any disadvantages? If so, what disadvantages? Do other systems of luminous signalling need to be studied?*

12. A. Signalling with flashing blue lights has the following disadvantages:

- (a) other coloured lights have greater range than blue;
- (b) as blue has already been adopted by various bodies for other uses, confusion could result;
- (c) should the Red Cross adopt a uniform colour as recommended in paragraph 3, that colour would probably not be blue. It is, therefore, not desirable that, in addition to the distinctive emblem, there be other colours characteristic of the Red Cross.

B. The idea of signalling with flashing lights should not, however, be abandoned and could be considered, but it might be better if some other colour were substituted for blue.

VII. Question (8):

*Should the use of a system of medical-unit sonic signalling be recommended for use in cases where other systems of signalling become ineffective? If so, what system of sonic signalling could be recommended?*

13. Even if the sonic signalling system did not allow for exact localization of those means of transport thus equipped, its adoption should be recommended, for it can indicate the presence of a medical vehicle in any given area. Such a system has the further advantage of ensuring that medical manoeuvres are given priority on friendly territory.

14. The best sonic signalling system for land vehicles might be a device which could transmit with sufficient intensity the letter "M" in morse at, say, the rate of 15 letters per minute. Of the means proposed in the answers to the ICRC Questionnaire, the siren would appear to be the most effective. However, as it may be possible for vehicles other than those permanently used for medical purposes to be equipped with such devices, the usual sonic warning devices should still be retained for temporary medical vehicles in particular, and they, too, can put out the letter "M" in morse.

VIII. Question (9):

*Should medical services be given the possibility of using international radio frequencies in order to improve the safety and speed with which the wounded are evacuated and to make it possible to keep track of medical missions?*

15. A special radio frequency to meet the specific needs of medical land transport should be recommended. This frequency should be internationally chosen from those normally used by land-based troops for other purposes, in particular, for ground-air liaison.

IX. Question (10):

*Would it be advisable to lay down rules specifically for the use of medical unit telecommunications by belligerents, especially for announcing airborne evacuation of wounded? Would it thereby be possible to avoid negotiating flight schedules?*

16. Only the first part of the question concerns land transport, and indeed the question deals more specifically with the problems of air evacuation. However, if transmission rules did exist to announce and facilitate air evacuation there is no doubt that, in certain cases, some of them could not be applied to land medical evacuation.

17. Consequently, the answer to this question is that it would be as well to establish some appropriate medical telecommunications procedure for use between belligerents especially if international agreement has been reached on a special frequency for medical needs.

X. Question (11):

*Could national telecommunications administrations and their co-ordination committees now propose frequencies reserved for international medical-unit radio communications? If so, what are those frequencies?*

18. No, this matter cannot be dealt with at national level. It can be settled only by an international agreement under the supervision of the ITU.

XI. Question (12):

*Are the radio identification signal transmission systems prepared by the experts suitable for improving the safety of means of medical transport? If not, what systems should be studied?*

19. The radio identification signal transmission system is of no particular interest to land transport. However, once a special frequency for medical needs exists, it can be used, for example, for signalling the presence of a medical vehicle by transmitting the appropriate radio signal.

XII. Question (13):

*Can civilian and military air and sea traffic control bodies study an international radar code of non-belligerence for identification of and signalling by medical aircraft, ships and units?*

20. An international radar code of non-belligerence for the identification and signalling of medical aircraft, ships and units is technically possible. It would be desirable to adopt such a code for medical land transports and units in view of the likely development of the radar equipment carried by land units. If such a code were available it would also make it possible to identify medical land transports and units from the sea or air.

21. Such a code must be established under the aegis of the ITU, for matters of such a technical nature should not appear in a general Red Cross regulation.

XIII. Question (14):

*Should an independent system of radar identification be studied apart from radar interrogation? Can a system of radar identification echo transmission be adopted for*

*the use of medical services? If not, what other system should be considered?*

22. Any study intended to improve the signalling and identification techniques to be used by medical transports and units is worthy of recommendation. Of such techniques, those which make identification by radar possible without interrogation could be usefully applied by medical land transports and units.

## B. PROPOSAL FOR AN ANNEX TO THE FOUR GENEVA CONVENTIONS OF AUGUST 12, 1949

### *Chapter 1 General*

1.1 This Annex contains recommendations concerning standards, practices and procedures for the signalling and identification of medical transports and installations.

1.2 Adoption of some or all of the recommended measures, as far as possible, would permit more definite identification of medical transports and installations.

### *Chapter 2 Surface medical transports and installations*

#### *2.1 Visual identification*

2.1.1 *Emblem.* The distinctive emblem as provided for in Article 38 of the First Convention and Article 41 of the Second Convention should be conspicuously displayed. Maximum visibility should be ensured by making the emblem of suitable size, perceptible to infra-red monitoring, and by using the most modern methods, materials and coating to make it clearly distinguishable at the greatest range in conditions of poor visibility.

2.1.2 *Colour.* In addition to the identification by the distinctive emblem provided for in the Conventions, which should be used at all times, it is recommended that a uniform colour should be adopted to facilitate identification of surface medical personnel, transports and installations; the colour used should be carrot yellow.

#### *2.1.3 Location of the emblem*

2.1.3.1 The distinctive emblem shall be displayed on both arms, on the top of the helmet and on the back and front of uniforms worn by the personnel protected by the Conventions, even if they wear uniforms of the standard colour referred to in paragraph 2.1.2 of this Annex.

2.1.3.2 On medical ships, vehicles and installations, the distinctive emblem shall be, as far as possible, displayed in such a way as to be clearly visible from any direction.

2.1.4 *Illumination of the emblem.* Whenever practicable, the distinctive emblem shall be illuminated in order to increase the distance from which it can be recognized. However, even if a medical ship, vehicle or installation is able to illuminate the emblem, such illumination shall not be compulsory if military considerations make it inadvisable.

2.1.5 *Use of visual signals.* The use of visual signals in accordance with the International Code of Signals for Search and Rescue is authorized for military medical services. If such signals are used, they shall always be

accompanied by the distinctive emblem, which shall be of about the same size as the individual Code signals used.

2.1.6 *Light signal.* Whenever possible, medical surface transports and installations shall be provided with distinctive light signals consisting in the intermittent flashing of a group of two long flashes, representing the letter M of the Morse code, transmitted about 15 times per minute. The colour of the light shall be the standard carrot yellow recommended for general medical service use.

#### *2.2 Sonic identification*

2.2.1 All permanent medical surface transports shall be provided with a sonic system powerful enough to be heard in the normal operating conditions of the transport in which it is installed. The system shall consist of a siren emitting intermittent groups of two long blasts, representing the letter M of the Morse code, at a frequency of about 15 groups per minute.

2.2.2 Other surface transports used temporarily for medical purposes may use their own sonic system, provided that they emit a similar group of signals, which shall be agreed for identification purposes.

#### *2.3 Radio-communication and radio-detection*

2.3.1 *Radio-communication.* Radio-communication shall be permitted, for the purposes of identification and communication, for surface medical transports and installations. For the transmission of messages of a humanitarian character, it is recommended that a special frequency should be adopted, at international level, for use by surface medical services for ground-to-ground and ground-to-air communications.

2.3.2 *Special rule.* In addition to the use of existing codes and of the ITU Radio Regulations, it is recommended that, whenever possible, the said regulations should be improved and new ones established, by means of special agreements between belligerents, in order to improve the communications of the surface medical services, particularly with regard to the airborne evacuation of the sick and wounded.

2.3.3 *Radio-identification.* Surface medical transports and installations shall, when required, transmit radio messages for the purpose of identification. Such messages shall contain:

- (a) the word "medical";
- (b) the identification signal of the medical transport or installation;
- (c) other information as required, especially concerning the specific or general mission.

2.3.4 *Radar.* Once an international radar code for non-belligerents has been adopted for the purposes of signalling and identifying medical services, it should be used, as far as possible, by surface medical transports and installations.

### *Chapter 3 Medical air transport*

3.1 It is recommended that if a standard colour is adopted for all medical uniforms, transports and installations, then the colour adopted for the aircraft light signal should be the same, namely, carrot yellow instead of the blue light proposed in paragraph 2.1.2 of Annex II to the Report of Commission I.

## ANNEX III D

### Identification and Marking of Hospital Ships

Remarks submitted by the observer of the Intergovernmental Maritime Consultative Organization (IMCO) London.

1. Article 43 of the Second Geneva Convention specifies that hospital ships and small craft shall be marked as follows :

- (a) all exterior surfaces shall be white ;
- (b) one or more dark red crosses, as large as possible, shall be painted and displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air.

2. It can be stated that such visual markings are neither sufficient nor effective, and that perhaps the whole of Article 43 needs to be reviewed. It appears necessary to explore all the possibilities which are offered by :

- (a) radio and electronic means,
- (b) sound signals,
- (c) visual signals.

Radar identification and/or radio signals might satisfy a requirement for long-range, all-weather identification and tracking.

A maritime satellite system, under study at present by IMCO with the co-operation of other organizations concerned, could also be considered as relevant to the case of hospital ships.

3. The above possibilities would require systematic examination for which there is no time available at the present Conference. It is therefore recommended that the Conference requests the ICRC to study the matter as soon as possible.

4. In case of local conflicts, it is possible that ships to which the Conventions apply may come into contact with non-belligerents which comply with a different body of laws and regulations. The study mentioned in the previous paragraph should have among its terms of reference the task to ensure compatibility with requirements applicable to other users of the marine environment and to examine whether, and to what extent, certain provisions of the said Conventions concerning marking and signalization of hospital ships should be cross-referenced in other international instruments and agreements in order to achieve wider publicity and to prevent contradictions.

5. If a hospital ship is involved in an incident, the case should be treated as a usual distress case and the established procedure for search and rescue should be applicable. The international distress frequencies (500 and 2182 KHz) should not be used (as suggested in ICRC, Conf. Gvt Experts, Geneva, 1971, Doc. CE/7b, p. 65) for purposes other than those prescribed by the ITU Radio Regulations. In any case, such use is not permitted unless the Radio Regulations are amended.

6. In some of the documents and comments, reference is made to the International Code of Signals and

examples are given, derived from the 1931 edition of the Code which is now obsolete. A new version of the Code was adopted by IMCO some years ago for universal application. The new version, already in use, is intended exclusively for safety of navigation and for cases of distress ; it can be used by all means of transmission, and incorporates a considerable part of what was in the Q Code with a view to replacing the latter in part.

7. It is suggested that those provisions of the Conventions which might be termed "technical" be updated and revised as frequently as necessary by means of a quick and easy procedure. This will ensure that the Conventions are kept up to date and makes better use of technological developments.

8. An incidental remark concerns Article 26 of the Second Convention, which specifies the minimum size of hospital ships as "2000 tons gross". It is generally accepted that gross tonnage is not a good indication of size, since it was not devised for such purpose, particularly in reference to passenger ships. It is preferable to use length as the unit of measurement.

## ANNEX III E

### International Telecommunication Requirements for Hospital Ships and Medical Aircraft

Proposal submitted  
by the expert of the Federal Republic of Germany

1. *Radio links* : The international distress and calling frequency of 2182 KHz is reserved only for transmissions with the types of modulation A3 (= amplitude modulation, double sideband) and A3H (= amplitude modulation, single sideband), specification VO-FUNK, No. 984, issued by the German postal, telephone and telegraph authorities. These types of modulation must, therefore, be provided also for automatic transmitters sending identification signals for hospital ships.

This also applies to the military distress frequency of 243 MHz. The proposal for automatic transmitters to send identification signals for hospital ships should include the frequencies 500 KHz (telegraphy, modulation type A2 and A2H), 8364 KHz (telegraphy, modulation type A2 and A2H) and 156.8 MHz (radio-telephony, modulation type F3).

2. *Coastal radio stations* : In the proposal relating to the frequencies to be watched by the coastal radio stations, the safety and calling frequency of 156.8 MHz should be mentioned.

Reason : In the exchange of information in the maritime radio service, emphasis has shifted, throughout the world, to radio-telephony ; consequently, the safety and assistance frequency of VHF marine radio has acquired considerable importance and should be included in the rule for FM communications of hospital ships.

3. *Rules applicable to protected ships and small craft* : In the proposal for equipping hospital ships with telecommunications, there should be added :

- radio installations which are able to transmit and receive on the 156.8 MHz safety and calling frequency;
- portable seaworthy emergency radio installations which are able to transmit and receive on the international safety, distress and calling frequencies 500 and 2182 KHz and the military distress frequency 243 MHz.

4. *Direct communication* : The regulations cover only telecommunications between hospital ships and/or

medical aircraft and hostile (enemy) warships and/or aircraft. A further regulation is required to cover telecommunications necessary for humanitarian reasons between hospital ships and/or medical aircraft and warships and/or aircraft of friendly or allied forces.

5. *Important messages from a warship or a military aircraft to a hospital ship* : The tables produced by the Expert Commission of the ICRC (Compilation of Important Messages from Warships or Military Aircraft to Hospital Ships on the International Signalling Book principles) can be accepted completely.

## REPORT OF COMMISSION II

### Protection of victims of non-international armed conflicts

*Rapporteur* : J. DE BREUCKER (Belgium)

#### NOTICE

The two Draft Additional Protocols prepared by the ICRC contained identical, or at least very similar, provisions on certain subjects — particularly on wounded, sick and shipwrecked persons, the civilian population, and combatants. As these subjects had to be examined first in relation to international armed conflicts by Commissions I and III, the agenda of Commission II had to take into account the work of the other two Commissions. For this reason, the report of Commission II was drawn up as the Commission's work proceeded, and *according to the agenda, which does not follow the order of the Chapters in Draft Protocol II*.

#### INTRODUCTION

2.1 In accordance with the Rapporteur's suggestion, which was approved by the Commission at the beginning of the discussions, this report aims to reflect the views expressed by the different experts without, however, mentioning the speaker's names. Bearing in mind the need to set out the reactions to the subject matter, these views have in a number of places been grouped, although the Rapporteur has endeavoured constantly to report as faithfully as possible the various shades of opinion which emerged during the discussions.

2.2 Commission II began its work on Friday 12 May at 10 a.m. The Commission elected Mr D. Miller (Canada) as its Chairman and Colonel Tranggono (Indonesia) as its Vice-Chairman. Mr J. De Breucker (Belgium) was chosen as Rapporteur and Miss Perret (ICRC) carried out the duties of Secretary to the Commission. From the ICRC, Mr Gallopin, ICRC representative, Mrs Bujard, and, for some of the time, Messrs Malinverni, Mirimanoff-Chilikine, de Preux, Veuthey and Winteler, ICRC legal experts, took part in the work of Commission II. They introduced and commented on the subject dealt with by the Commission, the *Draft Additional Protocol to Article 3, common to the four Geneva Conventions* of August 12, 1949, presented in Volume I (Basic

Texts) and commented on in Volume II (Commentary, Part II), published by the ICRC.

In addition, the Commission set up a Drafting Committee with the following members: Mr H. Knitel (Austria), Mr J. Garcia Ghirelli (Argentina), Mr J. Wureh (Liberia), Colonel S. Soriano (Philippines), Professor I. Blishchenko (U.S.S.R.) and Professor R. Baxter (United States of America). The Committee worked under the chairmanship of Professor Baxter, and was open to any members of Commission II who wished to participate.

#### CHAPTER I

##### General provisions (Draft Protocol II)

2.3 The Chairman opened the general discussion by proposing a provisional agenda designed to make the best possible use of the Commission's time. He hoped that the Commission would rapidly achieve some practical results and so help the International Committee of the Red Cross to sum up the work of the Conference and to submit its conclusions to a subsequent diplomatic conference.

2.4 The expert of the International Committee of the Red Cross introduced the subject under discussion. When drawing up the present Draft Additional Protocol to Article 3, common to the four Geneva Conventions of 1949, the ICRC had taken into account the opinions expressed by experts at the first session of the Conference. The Draft was based essentially on the document CE/Plen/2bis submitted to that session. Since the first sessions all the experts consulted by the ICRC, including the non-governmental organizations and the National Red Cross Societies, had approved the idea of introducing a Draft Additional Protocol to common Article 3. The International Committee of the Red Cross had felt it desirable to maintain the distinction, already contained in existing law, between international armed conflicts and armed conflicts not of an international character. At the previous session the ma-

jority of the experts of Commission II had supported this view; at this year's session the idea of drawing up two separate draft Protocols had again met with the approval of a large number of the experts present. Some experts, however, had proposed that a single Protocol, equally applicable to both types of conflict should be drafted. In fact, the aim of this Commission was to determine the development of international humanitarian law to be applied in non-international conflicts. It was the duty of the Conference, meeting in plenary session, to decide on the form this development was to take.

2.5 The ICRC expert then defined the field of application of the Protocol. It was applicable in all the armed conflicts referred to in Article 3, which this instrument is designed to elaborate and supplement. Hence it did not apply in cases of internal disturbances or tension. In her opinion, the draft attempted to meet two requirements and the reconciliation of these two aims called for both a realistic approach and a bold policy. These two objectives were:

1. the greatest possible protection of the human person;
2. the security of the State.

2.6 Recalling the great number of proposals submitted at the first session, the ICRC expert pointed out that the provisions of the present draft were of two types:

1. provisions based on those which already appeared in the Conventions, but whose principles were not embodied in Article 3 (such as the draft articles relating to the protection of wounded, sick and shipwrecked persons);
2. new articles (such as the draft articles relating to combatants and to the civilian population).

2.7 The ICRC expert pointed out that this had led to the identical articles in the two Protocols. The ICRC was aware of this and so had not in every case repeated in Draft Protocol II rules which appeared in Draft Protocol I. Since brevity and simplicity were the secret of success, Draft Protocol II had been limited to some forty articles, whereas in international armed conflicts the four Geneva Conventions and other international instruments applied. Moreover, she continued, where the subject matter to be discussed was common to the two Draft Protocols, it was necessary to refer to the work of the other Commissions.

2.8 The ICRC expert then referred to the articles annexed to the Draft Protocol under the title: "*Regulations concerning special cases of armed conflicts not of an international character*". It was admitted that a better title might have been chosen for this annex since these were not regulations in the legal sense. The purpose of this annex was to grant greater protection in certain cases, while in no way

implying any desire to internationalize certain armed conflicts.

2.9 As an introduction to the general debate on the definition of non-international armed conflict, the ICRC expert went on to give some further explanations with regard to Article I of the draft Protocol recalling the definition proposed in Document V submitted by the ICRC at the 1971 session and mentioning the definitions included in Document CE/Plen/2bis (1971) which had been supported by those experts who favoured a more flexible formula, the proposals of the Drafting Committee contained in Document CE/COM II/13 (1971) and the desire expressed by Commission II in 1971 that, as no agreement has been reached, the ICRC should continue its work in this field. The object of the draft definition set out in Article 1 was to determine the scope of Protocol II, which should be the same as that of the common Article 3. The draft gave a flexible formula which set out the material elements involved: the Protocol was to apply when "hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority" within the territory of a High Contracting Party. The words "and, in particular" ("notamment" in the French version) indicated that the formula was indeed flexible and general and contained all the material elements referred to in the Commentaries. As it stood, Article 1 employed a single formula to cover both the cases envisaged by the International Committee of the Red Cross at the first session, namely:

1. hostile action between rebel armed forces and the armed forces of the authorities in power, and
2. hostile action between various factions which did not entail the intervention of the armed forces of the authorities in power.

This distinction had not appeared to be of value in defining non-international armed conflict. The speaker went on to remind the Commission that at the first session, some experts had raised the question of the duration of the conflict: this criterion seemed to her to be too vague, and even dangerous, inasmuch as it might postpone the application of the Protocol, leaving the victims of the conflict without protection until the Protocol came into force. Present-day conflicts were often brief and murderous. What was more, the introduction of the criterion of duration would raise the question of who was to be the judge of the duration of the conflict. Other experts had suggested, as a necessary condition for the finding of the existence of a non-international armed conflict and, consequently, for the application of the present Protocol, the existence of some form of *internal discipline* ensuring that members of armed forces respected the rules of this Protocol. In the speaker's opinion, this condition should indeed be applied to ensure that combatants received humane treatment but it should not be taken as a material requirement of the definition for the finding of the existence of a non-international armed conflict and,



consequently, should not be a condition for the application of the Protocol provisions in favour of conflict victims.

2.10 The speaker then referred to the "*Declaration of Fundamental Rights of the Individual in Time of Internal Disturbances or Public Emergency*". This question had been held over from the first session and the text of the Declaration appeared in Document V submitted to the 1971 Conference by the ICRC. It had not been possible to examine this matter at that year's session, and the ICRC would be pleased to have the experts' opinion on this subject. The speaker promised to describe and comment on any new factors which had arisen since the proposed texts had been drafted and ended her introduction by giving a list of the relevant documents.

2.11 After several experts had expressed their admiration for the work carried out by the ICRC, the general discussion on the subject of the Draft Additional Protocol to Article 3 began, its main themes being debates in the following order :

- I. The degree of similarity in the protection of victims of both types of conflict and hence the question of whether one or two protocols are needed ;
- II. The general presentation of the provisions to be included in Protocol II ;
- III. The legal status of wars of liberation and of struggles for self-determination ;
- IV. Effectiveness of relief operations and supervision ;
- V. The Declaration of Fundamental Rights.

\* \* \*

*I. The degree of similarity in the protection of victims of both types of conflict and hence the question of whether one or two protocols are needed*

2.12 Although it was the task of the Conference meeting in Plenary Session to decide this question, one expert wished to make his position in the matter quite clear ; he was in favour of drafting a *single protocol applicable to both types of armed conflict*. He was at pains to point out that, although the two types of conflict differed in character, the rights of wounded, sick and shipwrecked persons and of the civilian population to protection were identical and that, consequently, the content and, if possible, the wording of the rules applicable to them should be the same. This also applied to the means of combat : napalm and phosphorus burns were just as painful in one type of conflict as in the other. From this point of view the protection granted to the victims of non-international armed conflicts by the ICRC Draft was insufficient. It was necessary, of course, to draw a dividing line between the areas covered by national penal legislation and the provisions to be included in the Protocol, but it was to be hoped that it would be possible to decide on this point in the course of the work of the Commission and to

do so in such a way as to grant prisoner-of-war status to combatants as soon as the hostilities had reached a sufficient degree of intensity. After all, while the political aspects of the two types of conflict might differ, the humanitarian aspects were identical : the same humanitarian protection should be granted in both cases.

2.13 Another expert endorsed these views and the idea of a single Protocol with different rules of application, and suggested that the rules applicable to both types of conflict should as far as possible be identical — particularly the rules relating to the protection of guerrilleros and to the definition of objects of a civilian character. He reminded the Commission that the greater the similarity between the two Protocols, the less important it was to reach agreement on their nature, whether similar or not.

2.14 Many experts felt, however, that two separate international instruments should be drawn up to cover the two types of conflict. They recognized the need to take into account the work of the other Commissions and to examine as soon as possible the proposals of Commissions I and III relating to Protocol I the basic principles of which could also be adapted, or purely and simply adopted, in Protocol II. They felt, however, that the political aspects of the two types of conflict were fundamentally different and that, for this reason, it was necessary to have two separate Protocols. Several experts agreed that it was necessary to have two Protocols, not only because the political aspects of the conflicts were not the same, but also because the conditions affecting the implementation of the two Protocols differed, the application of Protocol II being governed by the principle of non-interference in the domestic affairs of States.

2.15 Two experts added that although the drawing up of two separate instruments would inevitably lead to some repetition, this might even be an advantage, since the texts would have to be applied by non-jurists, by soldiers or even by private individuals. There would then be no need for them to consult the other Protocol.

2.16 One expert, however, was of the opinion that, before taking any decision, the Commission should study the other provisions of the draft Protocol, since the position taken by States at the Diplomatic Conference would depend on the proposals for the protection of victims.

2.17 Another expert stated that, while he had no firm opinion on the desirability or not of having two Protocols, too much emphasis should not be given to distinctions of a legal character. Abusive action on the part of government caused victims in both types of conflict and there was obviously a risk that governments might try to evade their responsibilities as set out in Article 1.

2.18 One expert drew the Commission's attention to the fact that the real problem lay in the treatment

to be accorded to combatants. No one could conceivably advocate granting lesser protection to the victims of non-international armed conflicts than that available to the victims of international conflicts.

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## II. *General presentation of the provisions to be included in Protocol II*

2.19 One expert, who considered that it would be wise to draw up two distinct Protocols, gave his opinion as to the purpose and content of Protocol II, as drafted by the ICRC on the basis of his 1971 proposal (CE/Plen/2bis). The purpose of this instrument was to ensure the application of humanitarian law to non-international armed conflicts in order to reduce suffering. In theory, it was possible to draw a distinction between: (1) the type of conflict which was considered to be of an international character because several States were involved; (2) the conflicts covered by common Article 3; and (3) internal disturbances in which only the authorities in power had a regular army. The difficulty of such distinctions was that, in practice, States refused to recognize that conflicts taking place on their territories fell within categories 1 or 2, considering them rather as belonging to the third category and, therefore, refusing to apply humanitarian law. This attitude was closely related to the question of the treatment to be given to rebel combatants. In the opinion of the expert, the only way of approaching this question would be to consider that humanitarian law should be applied whenever the State resorted to the use of its armed forces against any persons, regardless of the way in which those persons behaved, whether or not they wore uniform, and whether or not they were members of an organization. This last question, concerning the treatment to be given to combatants captured by the adverse party, should be dealt with separately, assuming the unlikely hypothesis that the State would grant prisoner-of-war status, and therefore immunity, to rebel combatants. The question should not be seen as a prior condition to the application of the Protocol, which provided for the protection of the population as a whole. In the opinion of the expert, the only indispensable condition was that laid down in Article 1, namely, the active use of the armed forces against persons. But, this condition having been stated, the provisions should not permit any interference in the internal affairs of a State; if they did, States would find it impossible in future to apply the provisions of humanitarian law in all types of non-international armed conflict.

2.20 Several experts considered that the draft Protocol involved establishing a very delicate balance between the requirements of humanitarian law and the imperatives of State security.

2.21 Certain experts were of the opinion that the ideas embodied in the Protocol by the ICRC repre-

sented an improvement on common Article 3, which itself had introduced important new ideas in 1949.

2.22 One expert considered that the extension of humanitarian law to non-international armed conflicts implied that these were defined in relation to two extremes, on the one hand, that of riots or internal disturbances and, on the other hand, that of international armed conflicts, it being understood that the question under discussion was not the principle of the application of humanitarian law to non-international armed conflicts, but the methods of application and the scope of the rules.

2.23 Another expert, following a similar line of thought, considered that internal tensions should be categorically excluded and, at the same time, that, in the case of a civil war, if the state of belligerency was recognized, the rules of international armed conflict should be applied, each type of conflict implying corresponding rights and advantages. This expert was therefore of the opinion that the expression "all conflicts", used in Article 1, was too general and the words "in particular" (in the French version "notamment") ambiguous. Furthermore, the ICRC draft failed to introduce the idea of reciprocity suggested in common Article 3 by the reference to special agreements.

2.24 In the opinion of one expert, Article 1, as worded in the Protocol, needed to be completed by the addition of the regulations presented in the Annex.

2.25 Another expert thought that, in order to solve the problem of the definition they were trying to establish, the essential thing was to define the rights and duties of the combatants involved in a non-international conflict; once this was done, it would be possible to find a definition adequately circumscribing the situations to be envisaged.

2.26 One expert thought it important to emphasize that no State could transfer to others the right to maintain order on its territory. This was true, he said, whatever the name given to the conflict, whether it was, for example, a war of liberation and independence, or a war resulting from internal disagreements and leading to territorial divisions, or a conflict which, under the guise of a war of liberation, aimed simply at the subjection of the State. This meant, in the opinion of the expert, that, whatever the efforts made to alleviate the suffering caused by the conflict, by means which would cause prejudice neither to the authorities in power nor to the rebel positions, it was not possible to treat rebels as prisoners of war or to exempt them from punishment.

2.27 Putting forward a similar point of view, another expert reminded the Commission that each State had its own internal laws for dealing humanely with those brought before its courts, including all those accused of political offences such as rebellion. To institute, in respect of non-international armed

conflicts, a combatant status which would be incompatible with the provisions of national legislation and the definitions of the concept contained in international public law, would be to go beyond the objectives the Commission had set itself; such an attempt would be incompatible with the principle of non-interference.

2.28 An expert stressed the fact that the developing countries were among those most directly interested in the extension of the application of common Article 3, since they had frequently suffered from conflicts of the type under consideration. While he appreciated the ICRC's efforts to define more clearly the concept of a non-international armed conflict, and accepted Article 1 as a basis for discussion, he wished to emphasize that, in seeking to achieve a balance between the concern of the world community for the respect of humanitarian principles and the concern of States for the respect of their own sovereignty, preponderance should be given to the latter and to the principle of non-interference in the internal affairs of other States.

2.29 One expert expressed the opinion that, in the event of non-international armed conflict, it was incumbent on each State to promulgate its own internal humanitarian law and lay down the conditions for the application of that law, which would combine the moral principles adopted by that country with the requirements of national security. This being understood, he considered that it was important to distinguish between strictly internal armed conflicts and those which were considered to be of an international character. In the case of an internal conflict between a government and a fraction of its population (in particular, civil wars and the action of armed bands), there should be no question of international humanitarian law; the problem was a purely domestic matter to be settled by legislative procedures adapted to the institutions of the country concerned, in accordance with the principles of respect for national sovereignty and of non-interference. On the other hand, in the case of armed conflicts considered as being of an international character (struggles for self-determination) a widening of the scope of common Article 3 would be desirable.

2.30 A number of experts attached special importance to the principles of the sovereignty of States and of non-interference, the second of these principles, in the opinion of one of the experts, ensuring respect for the first. They were particularly concerned to show that the task entrusted to the Commission opened up avenues which had been, until now, but little explored, namely the quest, in order to promote the application of humanitarian law, for a balance between the inalienable rights of a State and a number of international standards which, although they might differ from their legislation, traditions and ways of life, States should respect within their own frontiers. Clearly, added one expert, non-international

armed conflicts existed, and might constitute a threat to international peace and order or even plunge the whole world into total war. While there were innumerable reasons for civil wars, in some cases conflict was the outcome of the revolt of the population of a State against racism, tyranny and dictatorship, in the name of democracy. Such struggles deserved support and their combatants should be protected. But, because of the complex nature of the whole group of situations under consideration, we should be extremely careful to avoid anything which could so aggravate internal tensions as to lead to a threat to world peace. This meant, as a first imperative, the total exclusion of internal disturbances from the situations to be considered, since they fell strictly within the national jurisdiction of the State concerned. Moreover, the prerequisite for the satisfactory implementation of Protocol II should be the non-intervention of any State in the affairs of another, since the sovereignty of that State must be respected, it being understood that in the event of an internal conflict it was the internal legislation which must be respected in the first place. It therefore followed, bearing in mind that international instruments created obligations not only for governments but also for the peoples living on the territories of those governments, that the draft Protocol to be drawn up should at all cost avoid divergences between the international instrument which, once signed and ratified by the State, became an integral part of the legal system of that State, and its own internal legislation. A sound balance between national legislation and the international instruments was essential.

2.31 One expert, also stressing the principle of non-interference, said that each State had both the right to build up its own political and cultural system and the right to defend that system in the event of a conflict arising between the authorities and insurgents. Questioning the validity of a formula such as a compromise between State security and humanitarian law, he stated that national security constituted an inalienable attribute of a State, since it guaranteed the security of the individual and respect for human rights. He wished to make it clear that sovereignty had to be mentioned because differing interpretations as to the material field of application of the Protocol might offer pretexts for the possible intervention of other States in the internal affairs of the State concerned, the motives in an internal conflict often being of foreign inspiration. Finally, the expert expressed the view that, in order to avoid such interference, a State on whose territory certain events were taking place should recognize the existence of an armed conflict.

2.32 Another expert pointed out that the principle of non-interference was generally accepted in international law and therefore need not be discussed, but that a distinction must be made between humanitarian laws and the machinery for their implementation. In his opinion, arguments concerning non-inter-

ference had no bearing on the drafting of the new rules : they were related only to the implementation.

2.33 The opinion was expressed that, if a State could accept the rules concerning human rights, it was difficult to understand why it should not accept the unrestricted application of humanitarian law in all cases of non-international armed conflict.

2.34 Certain experts further pointed out that the signing of an international convention implied the abdication of a certain part of national sovereignty. They added, with regard to the main subject of discussion, that no limits should be set to international humanitarian law, even in relation to the principle of sovereignty.

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### III. *The legal status of wars of liberation and of struggles for self-determination*

2.35 A number of experts stressed the importance of this question. One stated, at the outset of the general discussion, that he was in total sympathy with all liberation movements, their armed revolutionary struggle being an expression of the right of all peoples to self-determination, and that a denial of the essential nature of these just wars was a denial of human rights, of the French Revolution, of the Philadelphia Declaration and of the October Revolution. He went on to express his opinion that national liberation movements should be granted legal recognition in order to enable them to defend their legitimate cause against oligarchic and tyrannous governments, and he considered it inadmissible that a conference should lay down rules intended to restrict the legitimacy of something which, by its very nature, was legitimate. On the question of guerrilla warfare, he stressed the absolute need to extend the scope of the Geneva Conventions to cover guerrilla fighters who, confronting adversaries armed with napalm and phosphorus bombs, were driven to resort to violent methods, being ill-armed but supported by the populations for which they were fighting. Attacks were launched indiscriminately against the guerrilla fighters and the population, a method whose grim logic led to innumerable war crimes and acts of destruction, without even bringing victory to those who perpetrated them. The proposals for the use of a distinctive sign for guerrilla fighters should therefore be rejected. The expert concluded by stating that he found the proposed provisions concerning internal conflicts unacceptable, pointing out moreover that the parties most directly concerned were not present.

2.36 Other speakers were opposed to the view that wars of independence against colonialism or neo-colonialism or for self-determination were internal conflicts. They believed that from the point of view of international law and in accordance with resolutions adopted by the United Nations General Assembly since 1960, not to mention other texts, wars for

the independence of colonized States and movements for liberation and self-determination were international in nature. It was therefore necessary, in their opinion, formally to exclude such conflicts from Draft Protocol II and to include them in an explicit provision in Protocol I, applicable to international armed conflicts.

2.37 Among the experts who did not share the views expressed, one drew attention to a degree of contradiction in the fact that some experts, while speaking of struggles for self-determination or against racialism, nevertheless showed the utmost caution in any matter relating to sovereignty or non-interference ; furthermore, such conflicts could not be taken into account in determining the precise manner in which humanitarian law should be applied. Another expert objected, saying that political regimes should be prevented from favouring tyranny, dictatorship or racialism and that it was particularly important to take account of international law as it stood, for it prohibited the setting up of such regimes as being contrary to human rights (Convention on Genocide, etc.) ; since humanitarian law formed an integral part of international law it could not diverge from it.

2.38 A number of experts expressed the view that it was inappropriate to devote special attention to wars of national liberation or similar conflicts. It was quite wrong to attempt to make protection for war victims conditional on the motives which had caused the conflict. As had been pointed out at Vienna, there was no definition of wars of national liberation. Moreover, struggles against colonialism and for self-determination could not be international conflicts if they took place entirely within the territory of a High Contracting Party, even if that territory was not self-governing. Such struggles became international only if another High Contracting Party got involved in the conflict.

2.39 Some experts felt that a distinction should be made between wars of national liberation and wars of secession or territorial dismemberment, and that only the former could be considered equivalent to international armed conflicts. They also felt that a distinction should be made between genuine liberation movements supported by the population against a foreign power or an oppressive regime, and movements provoked from outside and merely claiming to be supported by the population.

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### IV. *Effectiveness of relief operations and supervision*

2.40 An expert expressed the view that the provisions proposed by the ICRC with respect to the effectiveness of relief operations and supervision of observance of the Protocol were rather inadequate, and that the ICRC was the body best fitted to carry out those tasks ; he reserved his right to revert to that matter through the submission of an amendment.

2.41 Speaking on the same subject, an expert suggested that it would be appropriate to make provision for the ICRC to have the right to take initiative in those matters.

2.42 One expert said that, in addition to the basic regulations, provision should be made for a system of impartial supervision in order to ensure genuine observance of those regulations, for, if a State accepted a system of international regulations it must also accept an effective system of supervision at the international level; in that respect, he felt that draft Article 37 was inadequate.

2.43 Another expert agreed that if a country accepted humanitarian regulations it must also accept the principle of supervision of the observance of those regulations. That was not impossible — after all, in the Nuclear Weapon Non-Proliferation Treaty the «super-powers» had themselves accepted the principle of supervision in matters which were essentially within their sovereignty.

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#### V. *Declaration of Fundamental Human Rights during Internal Disturbances or Public Emergency*

2.44 An expert said that he was opposed to such a declaration since it was purely literary in nature and had no binding force like rules of law. Since the Conference had been convened to draft rules of law, the most that it could do was perhaps to incorporate some of the principles set forth in the Declaration, as legal provisions.

## CHAPTER II

### Material field of application

(DRAFT PROTOCOL II, CHAPTER I)

#### Article 1

##### ICRC DRAFT

#### *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.

2.45 On considering the text proposed by the ICRC, a number of experts held that the use of the term “in particular” laid much of the field of application of the definition open and might also result in a

limitation with regard to common Article 3 by offering States the possibility of side-stepping the Protocol. Similarly, the term “hostilities of a collective nature” gave cause for criticism due to the qualification thereby placed on the hostilities. The ICRC defended the term, holding that it referred to the behaviour of fairly large groups of persons which were sufficiently well organized to indulge in concerted acts of hostility, as opposed to single or isolated acts.

2.46 One speaker held that the ICRC proposal did not specify whether Article 1 involved the principle of reciprocity, and he asked whether, in the event of one of the Parties to the conflict — the rebel Party — not being a Party to the Conventions, not applying the provisions, the opposing Party was exempted from applying them.

2.47 The objective characteristics mentioned by the ICRC having been discussed, i.e., (1) common Article 3, (2) hostilities of a collective nature, (3) organized armed forces and (4) responsible authority, a number of experts wondered whether it might not be as well to add other characteristics.

2.48 Of the efforts made to add to the elements mentioned by the ICRC, reference should be made to the proposal (CE/COM II/4) involving recognition by the State of an armed internal conflict, its character and its constituent elements. The author of that proposal justified it by referring to the fact that the obligations assumed by a State in pursuance of the Protocol were unilateral as the opposing Party accepted no obligation. That situation could not be corrected, in view *inter alia* of the ever-possible divergence of interpretations conducive to foreign interference, unless the Protocol itself conferred a power of interpretation on the State.

2.49 Referring to the criteria to be included in the definition, an expert proposed the ideas of intensity and prolonged duration and strictly excluded the application of the Protocol to riots, banditry, etc. (CE/COM II/3).

2.50 One expert considered it also advisable to add a further element to the definition, applicable to armed forces, to the effect that they bear an *immediately recognizable emblem* (CE/COM II/16).

2.51 Another proposal was submitted concerning the idea of duration, in which the notion of territory was more heavily stressed than it had been in the ICRC proposal; the proposal stated moreover that *external aid to the Parties to the conflict did not change the nature thereof* (CE/COM II/6).

2.52 Recalling that the introductory paragraph to common Article 3 stipulated that “each Party to the conflict shall be bound to apply, as a minimum, the following provisions”, one of the experts submitted an amendment, incorporating into the definition, the condition that the Parties to the conflict should *have the material means of observing and*

*ensuring the observance of the obligations of common Article 3 and of this Protocol (CE/COM II/14).*

2.53 Another expert submitted a proposal qualifying the term "responsible body" with the words "*with effective authority ensuring its desire and ability to ensure observation of the rules of humanitarian law in force*" (CE/COM II/18). He felt, however, that his proposed wording should be considered flexible although he did reserve the right to revise or add to it at the time when the regulations concerning special cases of armed conflict, not of an international character (Art. 1) submitted as annex to ICRC Draft Protocol II, were to be examined.

2.54 An expert raised doubts about the efforts to define more closely the text proposed by the ICRC. Article 1 contained a number of objective elements, the purpose of which was to make the definition of non-international armed conflicts independent of the individual appreciation of any given State, and the "in particular" made it possible to recognize objective situations that no State could deny. He feared that in amendment CE/COM II/3 the word "unquestionable", characterizing the intensity of the conflict, might allow the State to deny the very existence of the conflict, and that the idea of a "prolonged period" would simply mean the postponement of the application of humanitarian law at the expense of the victims.

2.55 Moreover, the condition for the recognition of a situation of internal conflict by a State, such as it appeared in proposal CE/COM II/4, would result in giving the power to decide whether such a conflict existed directly to the State on whose territory it was taking place, thereby, as one expert remarked, making it judge in its own cause.

2.56 These criticisms were echoed by other experts, one of whom said that he, too, had proposed criteria of intensity and duration at the 1971 session but that he had refrained from following them up owing to their subjective nature.

2.57 It was widely felt that the ICRC document provided a good starting point despite the amendments that, some experts considered, needed to be made.

2.58 Explaining his proposal, CE/COM II/2, that the Protocol be given the same application as common Article 3 of the Geneva Conventions, the author thereof said that such intent was clear from paragraph 1 of the proposal. He then went on to mention the same situation as that described by the ICRC after the term "in particular", the basic protection of the Protocol not requiring any more detailed definition. The purpose of paragraph 3 of the proposal was to grant the ICRC the right to take initiative in the same way as did Article 9 (9/9/10) of the Geneva Conventions, which in no way trespassed on the principle of the sovereignty of States, as the proposal required the consent of the Parties

involved in order to be implemented. An expert raised an objection to the paragraph 3 under discussion, to the effect that the point involved should be removed from Article 1 and considered in connection with the question of supervision.

2.59 One of the experts pointed out that all definitions contained ambiguities; the more they were defined and reaffirmed the more difficult it would become to have the Protocol applied and the easier it would become to avoid applying it. He therefore felt that a formula offering the least number of difficulties, rather than an ideal solution, should be sought. Criticizing certain incongruities in the ICRC definition, including the use of the term "in particular" which, by its very nature, was likely to water down the conflicts mentioned in common Article 3, the expert submitted a proposal of his own (CE/COM II/1). This proposal suggested that the definition be separated from Article 3, common to the four Conventions, and that the Protocol should become complete unto itself and should apply to all armed conflicts to which Article 2 was not applicable. The wording of the proposal was shown to be very close to that of the ICRC text, except however for the removal of the term "of a collective nature" which, in the basic draft, qualified hostilities. Paragraph 2 of the proposal explicitly excluded isolated incidents or situations of internal disturbance or tension, thus meeting with the arguments of the partisans of the idea of duration. Moreover, by not detracting from the application of common Article 3, the draft was attempting to put the Protocol on the same footing as the 1949 Conventions. The fourth paragraph of the proposal stipulated that the application of the Protocol would not affect the legal status of the Parties to the conflict. Finally, a new provision, to be included in Chapter I, stressed the mutual obligations of Contracting Parties to respect the Protocol and the obligation of all Parties to an armed conflict, to which the Protocol would be applicable, to ensure that the conditions thereof were respected. Referring to Article 2 on the personal field of application as drafted by the ICRC, he drew attention to the question of the territorial scope of application of the Protocol and considered it inconceivable that, in the case of a disturbance in one specific part of a territory (in a town, for instance) the whole territory of the State should be subjected to the application of the Protocol.

2.60 Another expert was clearly in favour of the suggestion that the Protocol be dissociated from common Article 3, for he felt that it would be preferable to let Article 3 continue to exist in its own right as specified in the 1949 Conventions. Article 3, which imposed a minimum of humanity, should be applicable even in cases of riots and domestic tension. Moreover, the separation of the Protocol from Article 3 would make it possible to avoid weakening the scope of Article 3 when laying down precise rules on conflicts.

2.61 The question was raised as to whether it might not be as well to reconsider the title of the Protocol and to treat it as a Fifth Geneva Convention.

2.62 Some experts felt that the field of application of the Protocol was based on common Article 3 which it simply supplemented, and that it was inadmissible that the field of application of the two instruments should be separated.

2.63 The author of proposal CE/COM II/5 recalled that the purpose of Article 1 of the ICRC text was to elaborate and supplement the application of common Article 3 and not to restrict the application of the Protocol to the conflicts to which that Article was applicable. The purpose of the Conference was, in fact, "to reaffirm and develop humanitarian law applicable in armed conflicts" and, although reaffirmation might prove somewhat difficult in certain matters relating to the law of The Hague, it was essential where the law of Geneva, applicable to armed conflicts not international in character, was concerned. The concept of sovereignty and non-interference, a quite legitimate notion, had frequently hindered the specific application of common Article 3. On those grounds, he asked that the term "in particular" be struck out. Furthermore, he struck out of his own proposal the territorial reference, envisaging the application of the instrument even on the high seas, and the idea of hostilities "of a collective nature" which might prevent the application of the Protocol to serious though sporadic cases of hostilities. However, he did maintain, as a necessary condition for the application of the Protocol, the idea of organized armed forces under the command of a responsible authority, in the hope that such an idea would not be interpreted too narrowly. He considered, moreover, that it would not be wise to include an explicit provision in Article 1 of Protocol II, to the effect that the Protocol should not be applied to isolated incidents and situations of internal tension as, there again, he feared that Governments might find a loophole to limit the application of the Protocol. His proposal was aimed at creating a protocol with a broad scope, applicable to all types of *hostilities* — the latter term not being defined — between organized armed forces commanded by responsible authorities (international law not being applicable); such a proposal, implying a very wide application of the Protocol, would have to be very limited in its strictly legal content and should contain only humanitarian provisions.

2.64 The various proposals and the contradictory comments evoked thereby created a general feeling that the final decisions to be taken depended on two basic hypotheses. Either the definition chosen could allow for a wide field of application, in which case the rules for protection would no doubt be more limited, or the definition could be narrower, in which case greater latitude might be allowed in applying the protection.

2.65 By way of answer to the latter option, the explicit omission of internal disturbances, the need for a clearly-defined territorial limitation and the reduction of the concept to the notion of civil war definitely expressed in terms of intensity and duration met with the favour of some experts.

2.66 Others, however, favoured a broader definition, but one which would cover only provisions of humanitarian law.

2.67 One of the experts pointed out that while it was undoubtedly important to formulate the basic rules, no less effort should be attached to evolving an efficacious application procedure which could later develop under its own steam and prove to be most useful, as had been the case with the bodies set up by the European Convention on Human Rights.

2.68 One of the experts suggested improving the ICRC version by introducing changes in the Preamble to the Protocol so that, first, it repeated the provisions of Article 3 in the form of a reminder and, secondly, it mentioned Article 4A(2) of the Third Convention. He then read out the ICRC proposal, omitting the words "referred to in common Article 3" (which were now superfluous), followed by a subsidiary, more limiting proposal, in which the term "in particular" was replaced by the words "and which create a situation, where" in the event of the proposal being adopted by the Commission. He also added two supplementary paragraphs for the Preamble, one indicating that the Red Cross could offer its services to Parties to the conflict, the other, that the application of the provisions of the Protocol would have no effect on the legal status of the Parties to the conflict (CE/COM II/19).

2.69 The representative of the United Nations Secretary-General pointed out that the application of the draft Protocol seemed to raise the general problem of the relationship between the Protocol itself and the principles and rules contained in those instruments relating to human rights adopted by the United Nations, especially in the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights and the International Convention on the Elimination of all Forms of Racial Discrimination. At the first session of the present Conference, many government experts had referred to the fact that those rules were applicable not only in peace time but also in periods of armed conflict and especially in those cases of armed conflict not of an international character. Having mentioned that the matter had been amply dealt with in the second report of the Secretary-General on respect for human rights in armed conflicts (UN Doc. A/8082, paras 151 to 156 and Annex I), the representative of the Secretary-General concluded that it might be as well to include in the Protocol some explicit reference to the fact that the Protocol was to apply notwithstanding the principles and rules embodied in United Nations documents relating to human rights.



2.70 Explaining proposal CE/COM II/17 which defined the material field of application of the Protocol in the following terms :

“ 1. the present Protocol which lays down minimum standards applicable in all armed conflicts shall apply to all conflicts referred to in common Article 2 and 3 common to the Four Geneva Conventions of August 12, 1949, for the Protection of Victims of War ;

2. the rules laid down in ... apply only in the situations provided for in Article 2 common to these Conventions ” ;

one of the co-authors said that the aim of his proposal was to take account of the pressing need to define the field of application of the rules in a precise manner and, the *desiderata* of United Nations General Assembly resolutions apart, in accordance with the basic idea that, while the rules submitted by the ICRC were minimum rules to be applied in all armed conflicts, they should also allow for a scaling of the legal machinery applicable to such armed conflicts, and, furthermore, as compared with the other proposals submitted, for the establishment of a higher level of application than that of common Article 3. As a result, the provisions protecting basic human rights would fit three levels of protection in the following ascending order :

(1) level I : no armed conflict but domestic troubles — application of basic human rights ;

(2) level II : rules appropriate to armed conflicts such as concern the present Conference ;

(3) level III (upper) : rules appropriate to international armed conflict which bring into play the rules of Protocol I applied to Article 2 of the four Conventions and to wars of national liberation.

#### DRAFTING COMMITTEE

##### *Article 1. — Material field of application*

2.71 The formulations of Article 1 take into account the following proposals : CE/COM II/1, 2, 3, 4, 5, 6, 7, 13, 14, 16, 17, 18 and 19.

Presented below are six options for paragraph 1 of Article 1. Their purpose is to set forth in a logical way the various types of armed conflicts to which the Protocol would be applicable. The texts upon which each option is based are identified at the beginning of the option.

After the options appear possible additional numbered paragraphs of this article.

*A. On the assumption that the Protocol is to be applicable to both international and non-international armed conflicts.*

##### *OPTION I (based on CE/COM II/17) :*

*1. The present Protocol, which lays down minimum standards applicable in all armed conflicts, shall*

*apply to all conflicts referred to in Articles 2 and 3, common to the four Geneva Conventions of 1949, for the Protection of War Victims (hereinafter referred to as the Conventions).*

*2. The rules laid down in ... apply only in the cases provided for in Article 2 common to the Conventions.*

*B. On the assumption that the Protocol is to be applicable only to non-international armed conflicts (Options II to V deal with the objective elements. Option VI deals with a subjective element.) :*

##### *OPTION II (based on CE/COM II/13) :*

*The present Protocol, which [reaffirms,] elaborates and supplements Article 3, common to the four Geneva Conventions of August 12, 1949 [the four Geneva Conventions of August 12, 1949, and in particular Article 3, common to the four Conventions] (hereinafter referred to as Article 3) shall apply to all cases of armed conflict referred to in Article 3 [not of an international character] occurring in the territory of a High Contracting Party.*

##### *OPTION III (based on CE/COM II/2 and 19) :*

*The present Protocol, which [reaffirms,] elaborates and supplements Article 3, common to the four Geneva Conventions of August 12, 1949 [the four Geneva Conventions of August 12, 1949, and in particular Article 3, common to the four Conventions] (hereinafter referred to as Article 3) shall apply to all cases of armed conflict referred to in Article 3 [not of an international character] occurring in the territory of a High Contracting Party, and in particular to those situations in which hostilities [of a collective nature] take place in the territory of a High Contracting Party between organized armed forces, each of which is under a responsible commander [authority].*

##### *OPTION IV (based on CE/COM II/1 and 5) :*

*The present Protocol, which [reaffirms,] elaborates and supplements Article 3, common to the four Geneva Conventions of August 12, 1949 [the four Geneva Conventions of August 12, 1949, and in particular Article 3, common to the four Conventions] (hereinafter referred to as Article 3), shall apply whenever in the territory of a High Contracting Party,*  
*a. hostilities [of a collective nature] take place between organized armed forces, each of which is under a responsible commander [authority], and*  
*b. Article 2, common to the four Geneva Conventions of 1949, is not applicable.*

##### *OPTION V (based on CE/COM II/3, 6, 14, 16 and 18) :*

*The present Protocol, which [reaffirms,] elaborates and supplements Article 3, common to the four Geneva Conventions of August 12, 1949 [the four Geneva Conventions of August 12, 1949, and in*



particular Article 3, common to the four Conventions] (hereinafter referred to as Article 3) shall apply to all cases of armed conflict referred to in Article 3 [not of an international character] occurring in the territory of a High Contracting Party and in which

- a. organized armed forces engage in hostile acts against the authorities in power and the authorities in power employ their own armed forces against such persons ;
- b. the hostilities take place over a prolonged period ;
- c. the conflict is of clear intensity ;
- d. the organized armed forces engaging in hostile acts against the authorities in power occupy a part of the territory of the High Contracting Party ;
- e. the Parties to the conflict have the material means of observing and ensuring the observance of the obligations of common Article 3 and of this Protocol ;
- f. the organized armed forces engaging in hostile acts against the authorities in power are identifiable by an immediately recognizable emblem ;
- g. the organised armed forces are under the command of a responsible authority ensuring its desire and ability to ensure observation of the rules of Humanitarian Law in force.

(The conditions listed in the above option might be taken conjunctively or disjunctively and in any desired combination.)

**OPTION VI (based on CE/COM II/4 and 16) :**

2. The existence of an armed conflict and of its constituent elements referred to in paragraph 1 must be recognized by the High Contracting Party in the territory of which the conflict takes place.

C. Additional paragraphs that might be added to paragraph 1 as qualifications or additions

**Possibility 1 (based on CE/COM II/1 and 3) :**

The present Protocol shall not apply to riots, banditry, isolated acts of violence, offences against penal law, or other acts of a similar nature [or to situations of internal disturbance or tension].

**Possibility 2 (based on CE/COM II/1 and 18) :**

The application of this Protocol shall not affect the international legal status of the Parties to the conflict.

**Possibility 3 (based on CE/COM II/6) :**

Neither external assistance provided to a Party to the conflict nor the presence of foreign elements within the armed forces of a Party to the conflict alters the character of a non-international armed conflict as defined in paragraph 1.

**Possibility 4 (based on CE/COM II/7)**

Notwithstanding the provisions of paragraph 1, the Regulations concerning Special Cases of Armed Conflicts not of an International Character, appearing in the Annex, shall apply to armed conflicts which

arise from the struggle of peoples under alien domination for liberation and self-determination.

2.72 The Chairman of the Drafting Committee pointed out that the six options on this subject, which reduced to systematic form the thirteen amendments introduced, attempted to present the issues in a logical way.

2.73 There were two possible assumptions about the nature of Protocol II. In the view of some experts the instruments should apply to both international and to non-international armed conflicts. This was the view expressed in Option I. The other view held that the Protocol should apply only to non-international armed conflicts. Options II to VI proceeded on the latter assumption. It was pointed out to the Drafting Committee that the various definitions presented contained both objective and subjective elements. The latter would leave it to each Contracting Party to determine when the conditions for the application of the Protocol existed.

2.74 Options II to V dealt with the objective elements. In effect, these options dealt with four levels of internal armed conflicts. The nature of the four options could be summed up in the following way :

2.75 Options II defined the material scope of application exclusively in terms of Article 3, common to the four Conventions of 1949. If Article 3 of the Geneva Conventions were to be applicable, so would this Protocol.

2.76 Option III defined the material scope of application again in terms of Article 3, common to the Geneva Conventions of 1949, but also specified those situation in which, *in particular*, a non-international armed conflict calling for the application of the Protocol existed.

2.77 Option IV did not attempt to equate the material scope of application with common Article 3 but defined this matter by reference to several criteria of a non-international armed conflict. The conflicts covered were lower intensity ones. Option V would also give the Protocol application to a narrower range of conflicts than common Article 3. These might be thought of as higher intensity internal conflicts. Within this Option were listed a number of criteria that had been suggested for inclusion in this Option. These criteria might be included conjunctively or disjunctively and in any combination.

2.78 The subjective element of a definition was reflected in Option VI, which would allow a State to judge whether the conditions for application of the Protocol had been satisfied. This criterion could operate independently or could be coupled with a definition containing an objective definition.

2.79 The six main options were followed by four paragraphs (Possibilities 1 to 4) which could be added to the definition to extend it or to give a particular emphasis.

2.80 All the experts who spoke on the subject of this article congratulated the Drafting Committee on the work accomplished.

2.81 Another speaker indicated that he could not accept Option V, but that the ICRC should bear in mind sub-paragraph (c) of this option.

2.82 One of the experts indicated his preference for Option VI, while feeling that Option V also set useful objective criteria. He also said that he could imagine a new option which would merge objective and subjective elements.

2.83 Another expert showed a preference for Option IV because, in his opinion, humanitarian law would be better applied if embodied in a definition covering lower intensity conflicts.

2.84 One expert indicated his preference for the text proposed by the ICRC and, if need be, for Option III; Possibility 1 seemed to him to be unnecessary, and Possibility 2, like Possibilities 3 and 4, unacceptable, since he had declared himself to be in favour of the annexed Regulations and Article 35.

2.85 Another expert proposed to introduce, as Option VII, the ICRC's original proposal.

2.86 An expert preferred Option V, sub-paragraphs (a) and (e).

2.87 One expert chose Option IV.

2.88 Yet another chose Option V, pointing out that one or two paragraphs could be merged or deleted.

2.89 One expert stated that he could not accept Options I, II, and VI; he was concerned about the term "in particular" used in Option III; he thought that Option IV should be supplemented and that Option V was worthy of interest; in his opinion, sub-paragraphs (a), (b), (c), and (d) should be incorporated in (e): on the other hand, sub-paragraph (g) should be retained.

2.90 An expert was in favour of the ICRC text; he thought that in Option V sub-paragraphs (b) and (c) were not satisfactory and that Option VI was not acceptable either.

2.100 One expert stated that these different options showed what the basic problems were; in his opinion, it was a question of choosing between a narrow definition (Options IV and V), supplemented by complex regulations on non-international armed conflicts, and a broad definition, or no definition at all, accompanied by scanty regulations. This speaker added that he would be in favour of the ICRC text, to which one could add certain additional paragraphs, such as those contained in Possibility 1 and Possibility 3.

2.101 Another expert chose Option V, but proposed that the sub-paragraphs be merged or simplified.

2.102 One speaker feared creating additional categories of non-international armed conflicts, in defining them by means of numerous objective criteria; one would then have, on the one hand, the conflicts covered by common Article 3 and, on the other, those to which Protocol II would apply and, finally, international armed conflicts; that was why he opted for Options II or III and Possibility 2.

2.203 An expert voiced his doubts on the ICRC draft and noted that the amendments provided no guarantee that false interpretations would be avoided; on the contrary, some amendments aggravated the situation, for example, those that referred to a "legitimate government"; finally, the speaker had a general reservation with regard to all options.

2.104 One expert felt that an effort should be made to combine objective and subjective elements.

2.105 One expert chose the ICRC text.

2.106 One expert, while favouring Option V, thought that the expression "*hostilities of a collective nature*", which appeared in the ICRC text, should be added. He also proposed:

(1) that the word "*all*" in the introductory paragraph should be deleted;

(2) that reference should be made to the fact that the Parties must recognize the legal obligation to observe the provisions of common Article 3 and of the additional Protocol;

(3) that paragraph (h) should be added, stating the obligation to carry arms openly;

(4) that the conditions laid down in paragraphs (a) and (g) should be cumulative.

### CHAPTER III

#### General protection of the population

#### (DRAFT PROTOCOL II, CHAPTER II)

2.107 An expert of the ICRC, opening the discussion, said that Chapter II was devoted to the general protection of the population in the territory of a State where an armed conflict not of an international character was taking place. He mentioned that the obligation to grant humane treatment to individuals was a main theme in the four Geneva Conventions and that, when those Conventions were drawn up, that general obligation had been specified by the prohibition of certain acts such as torture or looting. In some cases, the Conventions were intended to cause States not merely to refrain from such acts but to take measures to prevent them. Yet common Article 3 did not comprise all acts prohibited in armed conflicts of an international character; for that reason the ICRC, in order to strengthen protection for human beings during non-

international armed conflicts, had made provision, in Chapter II of Draft Protocol II, for the interdiction of acts already prohibited in international armed conflicts and not mentioned in Article 3 common to the four Conventions. The subject of the chapter, therefore, was not the protection of the civilian population as such — that being covered in Chapter IV — but the prohibition, in relation to the general population, of certain cases of ill-treatment already forbidden by the four Geneva Conventions. The provisions of Chapter II did not, therefore, concern only the civilian population in the strict sense of the term but also captured combatants and internees.

2.108 Moreover, the ICRC thought it useful to repeat the prohibition of acts of torture in this Chapter II, even though that prohibition already appeared in common Article 3, in order to reinforce it by stipulating the obligation to take action to deter and prevent acts of torture.

2.109 The ICRC expert pointed out that the Geneva Conventions contained several provisions on the protection of children, fixing various age limits; it was the Commission's responsibility to make a decision on the age limit that should be set. Concerning the evacuation of children, the ICRC stressed the fact that such an operation should be carried out only in the territory in which the children lived: the evacuation of children to other States could be justified only in very exceptional circumstances, and should never be final: if the Commission wished to provide for temporary evacuation to another State, it could refer to the provisions on repatriation under Article 61 of Draft Protocol I. This point of view was shared by the International Union for Child Welfare, which had stated that the consent of the parents or guardians of the child should be obtained in the event of the child's evacuation outside his country.

2.110 A general discussion then took place on Chapter II of Draft Protocol II. One expert, supported by another, reminded the meeting of the principle that the protection of the civilian population should be identical in international and non-international armed conflicts, so that the same rules ought to apply for both types of conflict. He emphasized that this conception did not imply interference in the internal affairs of States, but that Governments should exercise their sovereignty in conformity with humanitarian law standards. In general, he thought that the provisions of Chapter II were insufficient.

2.111 Several experts thought that Chapters II and IV were closely linked and one of them said that it would be desirable to place Chapter IV immediately after Chapter II.

2.112 The view was also expressed that it was necessary to define the essential terms used in this chapter, in particular "civilian population" as opposed to the military or para-military population.

2.113 The drafting of an introduction to Chapter II, reaffirming the principle that the civilian population should be treated with humanity in all circumstances was also proposed.

#### Article 4

#### ICRC DRAFT

#### *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.

2.114 An expert reminded the meeting of his proposal to insert, at the beginning of the Protocol, a provision stating that the High Contracting Parties had a general obligation to apply the Protocol and to ensure its application by their nationals; this general provision would permit Article 4 to be deleted, since the latter referred only to more limited obligations. He proposed replacing Article 4 as proposed by the ICRC by a provision relating to the protection of non-combatants, and of combatants *hors de combat* (CE/COM II/15). He stressed that the version of Article 4 which he had proposed was detailed because he considered that Protocol II ought to be a complete document in itself, explicitly repeating the provisions of Article 3, common to the four Geneva Conventions. It would, in fact, be preferable for the armed forces to be provided with a single document, without the need to refer to other texts.

2.115 One of the experts, while agreeing that the text of CE/COM II/15 contained a more specific and extensive prohibition of ill-treatment, could not give it his support, since it omitted the obligation laid on the Parties to the conflict to take all measures necessary to prevent those offences being committed. Finally, in agreement with other experts, including the author of proposal CE/COM II/8, he stated that the wording of CE/COM II/15 was unacceptable, inasmuch as it was limited to non-combatants, and to combatants *hors de combat*, and thus deprived combatants of the right to protection.

2.116 It was considered necessary to define the term "torture" within the meaning of proposals CE/COM II/8 and CE/COM II/15. One expert pointed out that there were great difficulties in the way of defining "torture" and it was probably best not to attempt to do so.

2.117 With regard to the text of Article 4 proposed by the ICRC, one expert stated that it ought to contain a general prohibition of any act which was, directly or indirectly, an outrage against human dignity.

2.118 A formal proposal (CE/COM II/21) was made to add to this article a general prohibition of acts which, under the law of the State in whose territory the armed conflict was taking place, constituted offences against the person. This reference to national law did not have the effect of forbidding armed conflict, as one expert objected, since it was the civilian population who were the object of the protection, and not the combatants.

#### DRAFTING COMMITTEE

##### *Article 4. — Torture and ill-treatment*

2.119 The formulations of Article 4 take into account the following proposals: CE/COM II/1, 8, 15 and 21.

Option I incorporates in one article the two ideas of (a) the duty of the Parties to the conflict in terms of the types of measures that they should take and (b) the duty of the Parties to the conflict in terms of the crimes committed by their agents, forces, etc. which should be prevented by those measures. Option II looks to a new article making Duty (a) applicable to all provisions of the Protocol.

##### *OPTION I:*

1. *The Parties to the conflict shall take all necessary measures to ensure that military and civilian personnel under their control do not commit, or issue orders to commit, or condone the following acts against 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:*

- a. *violence to life and person, in particular all acts of murder, mutilation and cruel treatment, and torture,*
- b. *outrages upon personal dignity, in particular humiliating and degrading treatment,*
- c. *threats of the foregoing action, and*
- d. *[any other acts which, under the law of the State on whose territory the armed conflict takes place, constitute offences against the person.]*

2. *The persons referred to in paragraph 1 are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.*

##### *OPTION II:*

*New Article (at the beginning of the draft Protocol):*

1. *The High Contracting Parties undertake to respect and to ensure respect for the present Protocol in all circumstances.*
2. *Each Party to an armed conflict to which this Protocol applies is responsible for ensuring compli-*

*ance with this Protocol by [members of its armed forces and other] persons in its service or subject to its control.*

#### Article 4

*Non-combatants and combatants rendered hors de combat are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated and shall be especially protected against the following acts:*

- a. *violence to life and person, in particular all acts of murder, mutilation and cruel treatment, and torture,*
- b. *outrages upon personal dignity, in particular humiliating and degrading treatment,*
- c. *threats of the foregoing action, and*
- d. *[any other acts which, under the law of the State on whose territory the armed conflict takes place, constitute offences against the person.]*

2.120 The Chairman of the Drafting Committee pointed out that the two options proposed were not essentially different. In fact, Option I concerned the obligation of the Parties to ensure that the persons placed under their jurisdiction observed that particular provision, while Option II concerned the obligation of the High Contracting Parties to ensure that the persons placed under their jurisdiction observed the provisions of the Protocol in general.

2.121 One expert agreed with Option I, including paragraphs (a), (b) and (c), but excluding (d). He wished the provision to be quite general in character.

2.122 It was pointed out by an expert that the two options contained a prohibition of acts contrary to personal dignity which was why they both struck him as acceptable.

2.123 Another expert preferred Option II without paragraph (d).

#### Article 5

##### ICRC DRAFT

##### *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.*

### Paragraph 1

2.124 An expert thought that the ICRC text appeared to cover protection of combatants against reprisals measures; such protection, however, was impossible. On this point he was in agreement with the proposal CE/COM II/15. Another expert considered that the term "reprisals" was too wide in scope.

2.125 Several experts stressed the need to protect property indispensable for the survival of persons, a form of protection to which proposal CE/COM II/15 made no further allusion; one of them considered that it was necessary to replace the term "indispensable" by "necessary", in order to make Article 5, paragraph 1, more effective (CE/COM II/22).

2.126 It was pointed out that the concept of property indispensable to the civilian population would have to be defined.

2.127 The word "terrorism" used in paragraph 1, was considered ambiguous by one expert, who thought that it should be defined, since it did not have the same meaning everywhere. The definition proposed by the expert of the ICRC, and repeated by another expert, stated that terrorism covered acts of violence deliberately directed against the population and indiscriminate in their effects, while in some parts of the world it was used to describe any opposition to the existing situation, for example, action by workers demanding wage increases or by students demanding the reform of institutions, in other words, simple opposition which was not necessarily violent.

2.128 One expert said that Article 5, paragraph 1, should have an additional sentence stating that terrorism was forbidden for both Parties to an armed conflict. Several experts agreed that it was essential to define the term terrorism.

2.129 An additional paragraph was proposed for this article, establishing a general prohibition of all offences against the person, in order to avoid giving an exhaustive list (CE/COM II/21).

### Paragraph 2

2.130 One expert thought that there should be a definition of the word "pillage", taking national legislation into account.

### Paragraph 3

2.131 While approving the ICRC proposal, an expert added that nevertheless the prohibition in this paragraph ought to be confirmed and reinforced in conformity with the amendment which he had proposed on the subject (CE/COM II/8).

2.132 It was suggested by several experts that the reference to children be deleted in this paragraph and inserted in Article 6, which dealt with children.

2.133 One expert proposed framing paragraph 3 of Article 5 as a separate article, as given in his amendment, CE/COM II/30.

2.134 Considering that Protocol II should constitute an autonomous legal instrument, one expert proposed the inclusion in Article 5 of a prohibition on the taking of hostages, already contained in common Article 3 (CE/COM II/15).

2.135 Another expert proposed to add a paragraph forbidding public executions, but it was suggested that this should be dealt with in the chapter on penal prosecutions.

## DRAFTING COMMITTEE

### Article 5. — Terrorism, reprisals, pillage

2.136 The formulation of Article 5 takes into account the following proposals: CE/COM II/8, 15, 21, 22 and 30.

The protection of women has been made the subject of a new Article 5 A.

### Article 5

*The following acts are prohibited:*

- a. *the taking of hostages;*
- b. *acts of terrorism, consisting of acts of violence directed intentionally and indiscriminately against civilians taking no active part in the hostilities;*
- c. *reprisals against persons [non-combatants and combatants rendered hors de combat] and objects indispensable to their survival;*
- d. *pillage;*
- e. *[all other offences against the person.]*

### Article 5 A

*Women shall be especially respected and protected, in particular against rape and any form of indecent assault.*

2.137 The Chairman of the Drafting Committee said that the text had been almost unanimously accepted, the main point at issue being merely the use of the word "persons" or the phrase "non-combatants and combatants placed hors de combat" in paragraph (c). He mentioned Article 5 A concerning only women.

2.138 Three experts expressed preference for the expression "non-combatants and combatants placed hors de combat" in paragraph (c) and one of them proposed deleting paragraph (e).

2.139 One expert preferred the word "persons" in paragraph (c) and suggested deleting paragraph (e).

Article 6  
ICRC DRAFT

*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.

2.140 The *Title* was considered inappropriate, as the article was not concerned solely with children.

*Paragraph 1*

2.141 Several experts argued, on the lines of amendment CE/COM II/26, that there should be an exact definition of the "special protection" to be afforded to children, particularly the care and aid necessitated by their age and their situation. One proposed the expression "privileged treatment".

*Paragraph 2 (a)*

2.142 Several experts stressed the difficulty that there would be in ensuring the identification of children.

*Paragraph 2 (d)*

2.143 An expert expressed surprise that the ICRC should have set the age-limit at fifteen years, which was much too low, although the International Union for Child Welfare accepted the same limit.

2.144 The age limit of 18 years was thought to be more appropriate.

2.145 The expert of the ICRC stated that the age limit of 15 years was a minimum limit and that he would accept any proposal to raise it.

2.146 One expert stressed the necessity to specify, in the Protocol, the fact that this paragraph did not mean, *a contrario*, that carrying arms would be lawful for persons over 15 years of age.

2.147 A new wording was proposed for this paragraph, to reinforce the obligation contained in it : some experts wished to replace the beginning of the sentence by the words "The Parties to the conflict shall take the measures necessary to ..." (CE/COM II/9), others suggested that the verb should be "shall ensure that...". One expert held that it would be preferable to state that the Parties to a conflict should not recruit children under 15 nor accept their voluntary enrolment.

*Paragraph 3*

2.148 Some experts wished to see a statement in the text to the effect that the death penalty should not be passed "for offences committed in relation with the hostilities" (see, in particular, CE/COM II/9). However, one of the experts feared that this might provide loopholes for escaping just punishment.

2.149 Concerning the prohibition of the death penalty for civilians under the age of 18, it was proposed by several to replace the word "civilians" by "persons" (CE/COM II/9 and 26). In opposition, one expert argued that the word "civilian" could be retained, in view of the fact that all person taking a direct part in hostilities became combatants by doing so, and would lose their immunity. Another proposed that the age limit of 18 should be changed to "fifteen years at the time the offence was committed" (CE/COM II/26).

2.150 Since Article 6, paragraph 3, provided that the death penalty shall not be passed on civilians below eighteen years, on mothers of infants or on women responsible for their care and that pregnant women shall not be executed, one expert suggested that all such persons should enjoy the same protection : the death sentence should not be passed on them (CE/COM II/9). Several experts agreed, including the ICRC expert, who stated that this paragraph was intended to protect children. Another expert, while favourable to identical treatment for all the persons mentioned in paragraph 3, proposed that the treatment should apply, not to the sentence, but to its execution. It was also stressed that forbidding the death penalty might cause difficulties in those States where this penalty was provided for in the penal legislation.

2.151 A request was made for a definition of the phrase, "women responsible for their care"; another expert wished to substitute the wording. "persons responsible for the care of children".

2.152 Finally, one expert, supported by another, asked why a civilian of nineteen years should be punished by death for an act in relation to the hos-

ilities if combatants were not sentenced to the same penalty. This shocking difference in treatment called for a close study of the question of the death penalty passed on civilians.

#### DRAFTING COMMITTEE

##### *Article 6. — Measures in favour of children*

2.153 The formulation of Article 6 takes into account the following proposals: CE/COM II/8, 9, 26 and 41.

1. *Children shall be the object of special protection, and 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 shall in particular:*

a. *endeavour to ensure the identification of children in the area of armed conflict;*

b. *take care that children who are orphaned or separated from their families as a result of the conflict are not left abandoned;*

c. *endeavour to conclude local agreements for the removal of children from combat zones, and see to it that such children are accompanied by persons responsible for ensuring their safety;*

d. *take all necessary steps to facilitate the reunion of families temporarily separated; and*

e. *refrain from recruiting and from accepting the voluntary enrolment in armed forces of children under fifteen years of age and take measures to ensure that children under fifteen years of age do not take any part in hostilities.*

3. *The death penalty for an offence committed in connection with the hostilities shall not be pronounced on a person below fifteen [eighteen] years of age at the time when the offence was committed. The death penalty shall not be carried out on pregnant women, on mothers of infants, or on women who are legally responsible for the care of infants, whether by reason of guardianship or otherwise.*

2.154 The Chairman of the Drafting Committee mentioned that that article had been approved by his entire Committee; the only point remaining undecided was that of the age limit for the death penalty.

2.155 One expert proposed changing the first sentence of paragraph 2 of the French text by replacing the verb "s'engagent" by "devront". Furthermore, he insisted that the age limit for the death penalty should be 18, for, if such a penalty was to be applied it was necessary to be certain that the person to be tried was of an age to appreciate what he had done, which could hardly be the case with a 15-year old boy. Two other experts supported an 18-year age limit. One of them expressed preference for the text proposed by the ICRC while pointing out,

however, that he found the text of paragraph (d) better. The other expert said that the two sentences of paragraph 3 needed bringing into line; in both cases, it should be stated that the death penalty shall not be pronounced. He further proposed that, in the French text, the term "garde légale" be replaced by "garde de fait".

2.156 Another expert, who agreed with the age limit set by the Drafting Committee, said that it would be impossible to forbid States to make provision in their Penal Codes for the application of the death penalty for given offences, so he suggested that the wording of paragraph 3 be changed to read "the death penalty shall not be carried out".

#### CHAPTER IV

##### **Persons whose liberty has been restricted**

##### **(DRAFT PROTOCOL II, CHAPTER VI)**

2.157 The expert of the ICRC opened the discussion. The two articles in question applied to persons whose liberty had been restricted because of acts committed in connection with a non-international armed conflict. They were: (1) combatants who had fallen into the power of the adversary; (2) civilians who had been deprived of liberty. Common Article 3 did not confer any immunity on captured combatants nor did it accord them any special treatment. The ICRC had therefore proposed, in Article 25 of Draft Protocol II, that a *treatment similar* to that provided for prisoners of war (in cases of international conflict) should be afforded to members of regular armed forces and also to members of those armed forces which fulfilled the conditions stipulated in Article 4 A (2). The object of the provision was to ensure fair treatment for all combatants, whether loyalist or insurgent, in order to avoid a spiral of reprisals. Furthermore, such treatment was not tantamount to the granting of prisoner-of-war status: it applied only during the period of captivity and did not necessarily confer immunity, the subject of penal prosecutions being dealt with in another article, Article 28. In addition to Article 25 which was designed to provide for the treatment of combatants, fulfilling certain conditions, who had fallen into the power of the adversary, the ICRC had prepared Article 26, setting forth the treatment to be accorded to persons not fulfilling the conditions mentioned in Article 25. The text of the article was based on the Third and Fourth Conventions and on a draft submitted by an expert in 1971 (Document CE/Plen/2 bis). It sought to provide a protection so basic that it could be applied to any person who had committed an offence in connection with an armed conflict; in fact no condition was laid down. the definition in paragraph 1 of Article 26 being entirely general in scope. If Articles 26 and 28 were taken together, it was clear that the ICRC draft endeavoured to

guarantee captured guerrilla fighters decent conditions of detention and to save them from being sentenced to death if they met certain conditions.

2.158 The expert of the ICRC concluded his introduction, stressing the close connection of the articles under discussion with Article 38 of Draft Protocol I which had been examined by Commission III in the context of international armed conflict. Another ICRC expert, who had been following the work of Commission III, then explained to the Commission the progress of deliberations on Article 38. After reviewing the background to the subject, and in particular the fact that at the Conference of Red Cross Experts held in Vienna an expert had proposed that Article 25 of Draft Protocol II and Article 38 of Draft Protocol I should be brought into line — a proposal that had now been put before the present Commission by one of its experts — he said that Commission III had treated Article 38 as a basis of discussion, some experts wanting to go even further than the ICRC, while others had adopted a more conservative attitude. However, almost all the experts in that Commission had felt that guerrilla fighters should be taken out of their present juridical and humanitarian no-man's land, and that a solution should be found on the lines of the treatment afforded to prisoners of war. Article 25 spoke of "similar" treatment and was more flexible than Article 38, but both articles were based on the experience of many armed conflicts and merely gave legal form to the practice of States in that matter.

#### Article 25

#### ICRC DRAFT

*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.

(a) 2.159 A number of experts expressed their acceptance in principle of the ICRC's general approach to the question of the captured combatant in cases of non-international armed conflict. Within the general frame of reference of Articles 25 and 26, they considered that approach realistic and sensible.

2.160 One expert, referring to the general framework, welcomed Chapter VI as a success to the credit of the ICRC.

2.161 Another expert pointed out that Article 25 offered the same treatment to captured combatants belonging to regular as those belonging to irregular

armed forces, and that deletion of the article would reduce the level of protection provided for regular armed forces in the event of their capture by the rebels; its retention was therefore a matter of interest to all parties.

2.162 With regard to the actual substance of Article 25 as proposed by the ICRC, some speakers, while not rejecting the *ratio* of the article, observed that the condition laid down in Article 4 A (2) was that combatants should belong to a Party to the conflict; that was perfectly normal in the case of international armed conflicts, but could not be fulfilled or required in a protocol applicable to non-international conflicts.

2.163 Other objections were voiced with respect to the fact that, although acceptable in itself, Article 25 as at present drafted did not cover all captured combatants. In that connection a number of experts referred to the terms of Article 38 of Draft Protocol I, that was before Commission III.

2.164 A proposal had been submitted by an expert with a view specifically to the adoption of the same form of wording in Article 25 of Draft Protocol II as for Article 28 of Draft Protocol I, in a text very close to that of the ICRC's draft of the latter article without, however, any explicit reference to Article 38.

2.165 This attempt at improving and extending Article 25 (CE/COM II/25), while being endorsed by some experts sympathetic to the general idea behind Articles 25 and 26, was criticized by one expert who favoured Article 25 as drafted by the ICRC. However, he doubted the applicability to non-international armed conflicts of such provisions as "that of carrying arms openly".

2.166 Another proposal, putting Article 4 A (2) and Article 38 of Draft Protocol I on an equal footing, asked that all combatants, including guerrilla fighters, should be accorded a treatment similar to that provided under the Third Convention (CE/COM II/36).

2.167 Some experts thought that the expression "treatment similar to..." used by the ICRC was vague and ambiguous, and that the possibility of defining it should be examined. Among them, certain experts spoke in favour of another extensive proposal (CE/COM II/23) placing Article 4 A (2) of the Third Convention and Article 38, paragraph 1, of Draft Protocol I on an equal footing, and granting prisoner-of-war treatment.

2.168 An expert welcomed those attempts to extend application along the lines proposed in Article 38, reminding the Commission that guerrilla warfare was now a very common method of combat in both types of conflict and that this method demanded an adaptation of the traditional rules regarding the fixed distinctive sign and the carrying of arms openly. He also expressed the opinion that the refusal to accord a status to irregular armed forces could not but sharpen the conflict, making combat unrelenting.



Hence the need to bring guerrilla warfare into the sphere governed by humanitarian law. The expert therefore considered that humanitarian law, as thus extended, should apply to non-international armed conflicts, but only from the moment when the internal situation in a State had deteriorated to such an extent as to meet the definition of a non-international armed conflict. The latter point, underlining the link between Articles 1 and 25 of the Protocol, had already been made by another expert who had felt that the distribution of the subject-matter, as submitted by the ICRC, had not been the most appropriate one. The existence of a fundamental link between the article devoted to a definition, whose terms were still unknown, and the application of Article 25 was subsequently reaffirmed by several other experts who, while being generally in favour of Article 25, nevertheless felt that in view of the close connection between that article and draft Article 1 some caution should be observed.

2.169 Further, it became apparent that, whereas a number of experts had been referring to Article 38 (Protocol I) as submitted by the ICRC, in a desire to extend to the maximum the solution proposed in Article 25, nevertheless there were still some unknown factors relating to the substance of Article 38 as eventually adopted by Commission III. The Commission's greater or smaller liberality, especially with regard to the distinctive sign, might cause a change of position on the part of some experts who were, in principle, in favour of Article 25.

2.170 An expert made the possibility of such a change of position very clear by pointing out that Article 38 did not afford the combatants the same level of protection and rejected the element of reciprocity. He asked that the proposal he had submitted to Commission III on Article 38 should be placed before the Drafting Committee. He added that if a restrictive approach were to prevail in the relevant context with respect to the article, such that, instead of reciprocity, different treatment was provided for the Parties to the conflict, he would change his position of principle and ask for the deletion of Article 25.

2.171 Finally, in a completely different connection, one expert proposed basic changes in Article 25, suggesting that the reference to armed forces which have fulfilled the conditions stipulated in Article 4 A(2) of the Third Geneva Convention be deleted in paragraph 1, and adding that persons who had taken up arms against the regular armed forces should be treated humanely "in accordance with the law". He justified his proposal on the grounds that it followed from the principle of respect for territorial sovereignty and from a desire to preserve this sovereignty from any outside interference during an armed conflict. This proposal (CE/COM II/35) was complementary to the proposal (CE/COM II/4) in which the expert asked that Article 1 should include reference to the recognition of the existence

of armed conflict by the State on whose territory it occurred. The same expert stressed the fact that the chapter under discussion made no mention of liberation or self-determination movements which were, in his opinion, international armed conflicts, nor did it include guerrilleros established on occupied territories, who considered themselves as part of the population.

(b) 2.172 In contrast to this trend of opinion, which was favourable to the retention of Article 25 either as it stood or in an amended version, another group of experts clearly expressed disapproval of this article and asked that it should be deleted or replaced by a different one. Some experts contested the very principle of placing captured combatants in non-international conflicts on an equal footing with prisoners of war captured in international conflicts, since these combatants had broken the laws of allegiance by committing the crime of rebellion, which was condemned by every penal code in the world.

2.173 Other experts were at pains to show that, moreover, the notion of similar treatment was vague not only on paper but also in reality. First of all, this treatment would then be applicable to even small groups of persons and for an indeterminate period; secondly, while in international armed conflicts the end of hostilities brought the liberation of the prisoners of war, an obligation to liberate all prisoners rapidly, inspired by the notion of "similar treatment", might thwart the intentions of the authorities in power or be a threat to security. Furthermore, it was the opinion of these experts that innumerable unanswered questions would arise when, under the terms of Article 25, the time came to place these combatants on an equal footing with those covered by the Third Convention. What would be the position with regard to breaches of Article 25 in its present imprecise form? to the prisoner's immunity from prosecution for all acts committed by him before his captivity? to the duty of a Detaining Power not to return prisoners of war to civilian status before their final release and repatriation at the end of hostilities? to respect for rank as laid down in the Third Convention? to the responsibilities of the Protecting Power as set out in the same Convention? In short, where would the dividing line be drawn between those provisions of the Third Convention to be applied under the heading "similar treatment" and those which would remain peculiar to the said Convention? The drawing up of an exhaustive list of all the provisions of the Third Convention which lent themselves to application in the present context would be a major undertaking comparable with that of drawing up a new Convention. Moreover, those experts who were opposed to Article 25 pointed out the connection between this article and Article 1, which had still not been given its final form.

2.174 One expert pointed out the similarity between Article 25 of the ICRC draft and Article 1 of the Regulations annexed to it.

2.175 This trend in favour of simply deleting Article 25 was, however, accompanied by efforts on the part of certain experts to alleviate the disadvantages which might result therefrom by proposing appropriate amendments to other articles.

1. One expert proposed that paragraph 1 of Article 26 should stipulate that "all persons who fell into the hands of an adversary or who were interned or detained or whose liberty had been in any way restricted for any reason related to the hostilities should in all circumstances be respected and treated humanely" (CE/COM II/38).

2. Two other experts made a joint proposal (CE/COM II/37) covering all the problems raised by Articles 25 and 26 and by Article 28 which referred to penal prosecutions. This proposal was for the deletion of Articles 25 and 28 and the drafting of a new Article 25 according to the following principles :

(a) The general treatment applicable to persons whose liberty had been restricted (see Article 26) should be applied to all combatants who had fallen into the hands of the adversary, including those covered by Article 38 (Protocol I) ;

(b) The death penalty should not be imposed on those who had become the object of penal proceedings solely on account of their participation in the conflict or of their having been members of the armed forces ;

(c) There should be a provision covering all other persons and granting them the minimum treatment guaranteed in common Article 3.

2.176 The Chairman of Commission II made a provisional summing up of the discussion, giving a broad outline of the divergences : retention of Article 25 as it stood or in an amended form, or its deletion ; indication of a clear relationship between Article 25 and Article 1, which was aimed at defining the character of the conflict and that of the combatants involved ; likewise, demonstration of the connection between Article 25 and Article 38 as drafted by the ICRC and as it would emerge from the work of Commission III ; and finally, a reference to the criterion of municipal law.

#### DRAFTING COMMITTEE

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

2.177 The formulations of Article 25 take into account the following proposals : CE/COM II/23, 25, 35, 36, 37, 38 and 55.

The Options are arranged in descending order of protection for armed forces and guerrilla fighters, ranging from full prisoner-of-war status to treating both categories according to the provisions of Article 26.

#### OPTION I (based on CE/COM II/23 and 25) :

*Members of armed forces, whether regular or irregular, taking part in armed conflict, who have fallen into the power of the adversary, shall receive the treatment provided for prisoners of war in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, provided that such armed forces fulfil the following conditions :*

(a) *that of conducting their operations in accordance with the principles of the law of armed conflicts and the rules laid down in the present Protocol ;*

(b) *that of distinguishing themselves in their operations from the civilian population, whether by carrying arms openly, by wearing a distinctive sign, or by any other means ; and*

(c) *that of being organized and commanded by a person responsible for his subordinates.*

[The text of this Option (as well as of other Options containing like language) should probably be revised to make it conform to whatever wording is ultimately decided upon for Article 38 of Protocol I.]

#### OPTION II (based on CE/COM II/25 and 36) :

*Same as Option I, but with "receive treatment similar to that provided for" substituted for "receive the treatment provided for".*

#### OPTION II A (based on CE/COM II/37) :

[Envisaging a merger of Articles 25 and 28]

*Same as Option I, but with "shall be treated in accordance with the principles laid down in Article 26 of the present Protocol" substituted for "shall receive the treatment provided for prisoners of war in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949".*

[And add one or two of the following paragraphs :]

[2. *In the event of such persons becoming the object of penal proceedings solely on account of their participation in such conflict or on account of their membership in such armed forces, a sentence of death shall not be imposed.*]

[3. *Persons who participate in the conflict but who do not fall within paragraph 1 of this Article shall be treated as required in Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.*]

#### OPTION III (based on CE/COM II/35) :

1. *Members of the regular armed forces of the authorities in power shall receive, after having fallen into the hands of the adversary, a treatment similar to that provided for prisoners of war in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.*

2. *Persons who take part in an armed conflict not of an international character within the meaning of*

*Article 1 of the present Protocol and who have taken up arms against the regular armed forces of the authorities in power shall under all circumstances be respected and treated humanely in accordance with law.*

**OPTION IV (based on CE/COM II/38 and 55):**

*Delete draft Article 25.*

2.178 The Chairman of the Drafting Committee pointed out that, according to Option I, persons meeting the three conditions mentioned in that provision should receive prisoner-of-war treatment, while according to Option II, they could receive similar treatment, exceptions being possible; according to Option II A, which combined Articles 25 and 28, they would be treated in accordance with Article 26 of Protocol II; according to Option III, only members of the regular armed forces of the authorities in power would receive treatment similar to that of prisoners of war while persons who had taken up arms against the regular forces would have to be treated humanely, in accordance with the law; and finally, according to Option IV, the article was to be deleted.

2.179 Three experts chose Option IV, i.e., the deletion of Article 25, although two of them said that Option II A would be acceptable provided that paragraph 3 were deleted. They considered that all persons in the territory of a State should be protected by Article 26 even if they did not meet the requirements of that Option. One of them added that paragraph 2 also ought to be deleted. Another expert pointed out that the conditions in question concerned only members of armed forces and, referring to Option I, that persons not receiving prisoner-of-war treatment would be treated in accordance with Article 26 of Protocol II; he added that he preferred Option I.

2.180 One expert was in favour of Option II.

2.181 Two experts pointed out that the words, "by any other means", in Options I and II, referred to Article 38 of Protocol I, the content of which had not yet been decided.

2.182 One expert preferred the ICRC draft.

**Article 26**

**ICRC DRAFT**

*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.

2.183 The comments made during the discussion on Article 26 were less contradictory. First, there were the two proposals mentioned above, to the effect that Article 25 be removed and Article 26 strengthened so that captured rebel fighters might not enjoy special treatment under Article 25, but rather a treatment which was nonetheless in accordance with the requirements of humanitarian law and was, furthermore, common to all persons whose liberty had been restricted in connection with an armed conflict not international in character (CE/COM II/37 and CE/COM II/38).

2.184 Other formal proposals to improve the wording of Article 26 were submitted or suggested, in connection with the said basic option relating to Article 25 and involving a rewording of Article 26, paragraph 1.

2.185 Replying to a question on Article 26, paragraph 1, the ICRC expert said that his intention had been to enable the persons concerned to benefit from that protection from the moment that their liberty was restricted and that he would make, to that end, the necessary changes in the texts.

2.186 Another expert, referring to the same paragraph, thought that it should be extended by the words "in accordance with the law" (CE/COM II/35).

2.187 A third expert asked that the words "without any adverse distinction" be struck out of paragraph 1 (CE/COM II/29).

2.188 The term "unjustified" in paragraph 2, applying to "acts... of commission or omission", also gave rise to criticism, especially with regard to the mental health of the persons concerned. Proposal CE/COM II/37, mentioned earlier, also contained a different wording on this matter.

2.189 Proposal CE/COM II/29 offered, in respect of paragraph 3, a more detailed description of the upkeep of persons, making mention of their accommodation in suitable buildings or quarters and their provision with drinking water, food rations and clothing. Some experts raised doubts as to the applicability of such liberal conditions in an armed conflict not of an international character. One expert, furthermore, considered that the assistance offered under the terms of paragraph 3 should be granted in compliance with municipal law in so far as it provided for the organization of such assistance.

2.190 Another expert considered that the text should be flexible enough to enable certain rebel parties conducting guerrilla warfare to supply similar and equivalent guarantees. He further pointed out that Article 26 or a similar provision could be inserted in Protocol I, as Powers occasionally knowingly limited the freedom of action of their own citizens, taking them to be potential enemy agents. He invited the Chairman to contact Commission III on the matter and suggested that a liaison group be set up for the purpose of helping to draft a text common to the two Protocols.

2.191 Article 26, paragraph 4, too, gave rise to a number of comments. Although proposal CE/COM II/35 recommended that it be deleted, one expert requested that it be supplemented as follows: "The persons referred to in paragraph 1 shall be entitled to receive visits from such humanitarian bodies which, in turn, shall be entitled to interview such persons without witness and, if necessary, through an interpreter". Another expert asked that the introductory words "Subject to temporary and exceptional measures" be struck out.

#### DRAFTING COMMITTEE

*Article 26. — Treatment of persons whose liberty has been restricted*

2.192 The formulations of Article 26 take into account the following proposals: CE/COM II/29, 35, 37 and 38.

#### Paragraph 1

*OPTION I (assuming the maintenance of draft Article 25):*

*Subject to Article 25 of the present Protocol, all other persons whose liberty has been restricted, whether by way of internment, detention, or otherwise, 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] [in accordance with law].*

*OPTION II (assuming the deletion of Article 25):*

*All persons who fall into the hands of the adversary or who are interned or detained or whose liberty has in any way been restricted for any reason related to the hostilities shall in all circumstances be respected and treated humanely [without any adverse distinction] [in accordance with law].*

#### Paragraph 2

*All unjustified acts, whether of commission or omission [All unjustified acts or wilful omissions] that endanger their person or their physical or mental health are prohibited.*

*(The wording of paragraph 2 should be brought into conformity with that employed in respect to the wounded, sick and shipwrecked in Protocols I and II.)*

#### Paragraph 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 the state of health of the persons referred to in paragraph 1 above requires.*

*[(b) The persons referred to in paragraph 1 above shall be accommodated in buildings or quarters which afford reasonable safeguards as regards hygiene and health and provide efficient protection against the rigours of the climate and the effects of the conflict.]*

*[(c) The persons referred to in paragraph 1 above shall be provided with adequate supplies of water and with food rations sufficient to keep them in a good state of health. They shall be permitted to secure adequate clothing or be provided with such clothing.]*

*(d) 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].*

*(e) 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.*

(f) *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.*

(g) *The persons referred to in paragraph 1 above shall be allowed to receive individual or collective relief [in accordance with law].*

#### Paragraph 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.*

2.193 The Chairman of the Drafting Committee pointed out that the two options proposed for paragraph 1 corresponded to purely technical differences.

2.194 One expert preferred Option I for paragraph 1 although he thought that the two parentheses in paragraph 1 and the first parenthesis in paragraph 4 should be deleted.

2.195 Another expert preferred the ICRC draft.

2.196 Yet another expert suggested keeping paragraph 4 of the ICRC draft.

2.197 An expert pointed out that paragraph 2 was similar to Article 13 of Protocol I and that the adjective "unjustified" had caused many differences of opinion, and he asked that the ICRC should endeavour to bring the two texts into line.

## CHAPTER V

### Penal prosecutions

#### (DRAFT PROTOCOL II, CHAPTER VII)

2.198 The expert of the ICRC opened the discussion by pointing out that the purpose of Article 27 was to call to the attention of all the Parties to the conflict a basic principle of municipal law, according to which penal responsibility was personal in nature. This principle had been supplemented by the prohibition of collective punishment, that is, by the prohibition of penalties of any kind inflicted on persons or groups of persons for acts they had not committed.

2.199 Article 28 dealt with penal prosecutions against combatants. Common Article 3 forbade only summary justice but did not confer any immunity. This applied both to rebel combatants who had fallen into the hands of the authorities in power and to the combatants of the authorities in power who had fallen into the hands of the enemy and who might be liable to severe penalties or even the death pen-

alty merely for having taken part in the hostilities. The situation of the combatant in non-international armed conflicts was thus diametrically opposed to that of the combatant in international armed conflicts on whom customary law conferred immunity for the sole fact of having taken part in the hostilities.

2.200 While it was fully aware of the difficulty of this problem, the ICRC was making an appeal that the death penalty should no longer be applied to a combatant who had fought according to the laws of armed conflict. In the view of the expert of the ICRC, this proposal was in line with the fairly widespread tendency towards less frequent application of the death penalty. It also aimed, in addition to ensuring respect for the human person as such, at preventing, in the interests of both Parties to the conflict, an endless spiral of retaliation. Indeed, to outlaw the rebels would by no means encourage them to respect the rights of the combatants captured by them.

2.201 Moreover, the ICRC proposal only held good for the *death penalty* and did not prohibit other penalties pronounced by a regular constituted court affording all the judicial guarantees generally recognized as indispensable. Furthermore, this provision applied only to the sole fact of having taken part in the hostilities; it did not apply in the case of grave breaches of the laws of armed conflicts.

2.202 Well aware of the difficulties, the ICRC, in its Commentary, had given two alternative proposals:

1. the first was an appeal to the judge, and asked that combatants who became the object of penal prosecutions only by reason of having taken part in the hostilities should be entitled to plead attenuating circumstances and that this should suffice to preclude the death sentence;

2. the second simply provided for deferment of the execution of the sentence until the end of hostilities.

#### Article 27

##### ICRC DRAFT

#### *Article 27. — Individual responsibility*

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

2.203 No expert contested the pertinence of this article, which reflected one of the general principles of penal law. One expert, however, felt that as this principle was accepted in all municipal legislations, it was not necessary to mention it here; he proposed that Article 27 be deleted. Another expert submitted a proposal (CE/COM II/56) aimed at restricting the application of this principle in cases where municipal law provided otherwise with regard to conspirators or their accomplices.

2.204 Several experts submitted proposals for amendments, with a view to supplementing and extending Article 27. These included :

(1) a proposal (CE/COM II/31) suggesting that no person might be punished for an offence that he or she had not ordered to be committed or personally committed. This proposal received the support of numerous experts, one of whom submitted proposal CE/COM II/48.

(2) a proposal (CE/COM II/50) recommending that no person might be punished for an act or an omission which was not an offence at the time it was committed. Some experts supported this proposal, invoking the principle of penal law "*nulla poena sine lege*";

(3) a proposal (CE/COM II/53) establishing the responsibility of a person in charge who had not himself committed an offence but who, being aware of the intentions of a subordinate, had not prevented these intentions from being carried out.

(4) a proposal (CE/COM II/52) providing for judicial guarantees as regards to penalties, stipulating that penal provisions should not be retroactive and calling for the prohibition of collective measures against the persons and objects protected by the Protocol.

2.205 Certain experts, however, wondered whether the word "personally" was the appropriate term; one expressed the opinion that the wording of the ICRC proposal had the merit of being clear and that it was not necessary to discuss complex questions of penal law, that was to say, municipal law, relating to complicity in an offence and attempted offences.

#### DRAFTING COMMITTEE

##### *Article 27. — Individual responsibility*

2.206 The formulation of Article 27 takes into account the following proposals: CE/COM II/31, 48, 50, 52, 53 and 56.

*No person may be punished for an offence which he or she has not personally committed [or] [for an act or omission which was not an offence at the time when it was committed]. Collective penalties are prohibited.*

2.207 The Chairman of the Drafting Committee recalled that many suggestions had been made on various forms of participation in crime (ordering, condonation, complicity, etc.) in connection with this article; he said that the Committee had preferred to stand by the standard 1949 wording in order to avoid difficulties of interpretation.

2.208 An expert proposed the wording "neither for commission nor omission which...".

#### Article 28

#### ICRC DRAFT

##### *Article 28. — Penal prosecutions against 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 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.

2.209 This article raised a certain number of questions, and divergent views were expressed not only on the principle of the abolition of the death penalty, but also on its application to combatants who had fought fairly, and finally on the conditions to be fulfilled by such combatants in order to escape the death penalty.

2.210 The very principle of an article relating to the non-application of the death penalty was opposed by some experts. One expert who shared this position submitted a proposal for the deletion of Article 28 (CE/COM II/45) on the grounds that it concerned a matter falling within the jurisdiction of the State.

2.211 Another expert, who doubted whether a State would agree, in accordance with the terms of the Protocol to be drawn up, to grant such immunity to its nationals in the event of an armed rebellion, approved this proposal; the same expert had proposed the deletion of Article 27; his suggestion therefore bore on the deletion of the whole of Chapter VII.

2.212 Another expert submitted a proposal to the effect that no one should incur the death penalty solely for having taken part in hostilities or having been a member of armed forces, unless imperative security requirements made this necessary (CE/COM II/39).

2.213 Several experts expressed their appreciation of the generous intentions of the ICRC on the question of the abolition, at least in the case of combatants who had fought fairly, of the death penalty.

2.214 Some experts saw this as an encouragement of the trend, becoming increasingly widespread, in favour of the abolition of the death penalty for political offences. One expert underlined the fact that the scope of the proposed measure was such as to afford protection also to legal armed forces.

2.215 Some experts commented on the limitation of immunity solely to combatants who had respected the rules of combat. One expert observed that Article 28 favoured those combatants, including rebels, who had fought fairly. The same expert wondered about the position of those who had not respected the rules of combat, as also that of civilians who had not taken up arms but had been interned because of their activities during the conflict. The fact that they would be protected by the provisions of Article 26 only during the period of their detention — and could, accordingly, be executed at the end of that period — would surely encourage such civilians to defend their cause with arms and fight according to the laws of war so that, in the event of defeat, they would escape capital punishment.

2.216 Another expert pointed out that Article 28 was designed for the benefit only of those who had taken an active part in hostilities; the conditions for the application of the article remained to be determined in the provisions of the Protocol. But many States retained the death penalty for the crime of insurrection. The deeper significance of Article 28, then, was the restriction of the discretionary power of the State. In order to avoid flagrant discrimination, the best solution, he believed, would be to abolish the death penalty altogether.

2.217 The discussion further bore upon the question of the conditions that should be met by combatants who would benefit under Article 28 — the problem, that is, of the precise specification of those conditions in the context of the definition of the non-international armed conflict itself. A proposal submitted by an expert (CE/COM II/24) and supported by a number of speakers replaced the reference to Article 4 A (2) in the present text by a reference to Article 25 of Protocol II. Another proposal, already referred to (CE/COM II/39), also retained the conditions stipulated in Article 25 and, failing that, of the conditions that combatants should have distinguished themselves from the civilian population by some distinctive sign or by any other means and that they should have complied with the provisions of the Protocol to be established; the proposal was to apply to persons who had taken part in hostilities or had been members of armed forces.

2.218 On the other hand, the very principle of the existence of Article 25 was questioned by some experts while those who were in favour of it could not, at the stage the discussion had reached, specify the exact content of the article or, indeed, the concept of non-international armed conflict itself (Article 1). The conflicting views regarding the inclusion or not of Article 25 (see preceding chapter) gave rise to similar arguments concerning the real extent of the benefits accorded to combatants under Article 28. This led certain experts to reconsider the question using a different approach:

2.219 A first proposal had been put forward by two

experts (CE/COM II/37), suggesting, precisely, in a new Article 25:

(1) that combatants who fell into the hands of the adverse Party, including those defined in Article 38 of Protocol I, should be accorded the general treatment provided for persons deprived of their liberty (that of Article 26);

(2) that the death penalty should not be imposed solely on account of participation in such conflict or membership of such armed forces;

(3) that combatants not falling within paragraph 1 should, as a minimum, be treated in accordance with common Article 3.

This proposal, in the sense intended by the experts concerned, entailed the combination of Chapters VI and VII into a single chapter.

2.220 A second proposal (CE/COM II/49) was put forward by an expert on the basis of his view that Article 28, either as it has been drafted by the ICRC or as it might emerge from the work of the Commission, would create insoluble problems both of a legal and of a practical kind, necessitating a lengthy procedure to determine the category of combatant that had been captured: one covered by Article 4 of the Third Convention, one covered by Article 38 of Protocol I, one covered by Article 25 of Protocol II, one covered by Article 5 of the Third Convention, one covered by Article 5 of the Fourth Convention. Believing that the insertion of references merely complicated the matter, the expert put forward a proposal embodying four points:

(1) the granting of fundamental judicial guarantees;

(2) the right of appeal or petition from any sentence;

(3) the deferment of execution of any death sentence imposed solely for participation in the hostilities until the cessation of the hostilities;

(4) a proposal that at the conclusion of hostilities the Parties to the conflict should grant amnesty as widely as possible.

2.221 Some experts criticized that proposal for not abolishing the death penalty itself; in that respect it represented a step backward in comparison with the ICRC proposal, for it relied solely on judicial procedure and the suspended sentence. The idea of the suspension of execution of a sentence until the end of hostilities was also the subject of comment. Some saw in it an additional cruelty and pointed to the difficulty in determining when hostilities came to an end, particularly in situations where the intensity of the conflict fluctuated. Others endorsed the idea, recalling that pardons were often decreed at the conclusion of conflicts. The saying that «while there is life there is hope» was also quoted.

2.222 One expert nevertheless considered it unlikely that any government would decide to comply with the Protocol and, if necessary, to introduce changes in its own legislation to that end, when it was caught



up in a civil war and could use the death penalty as a means of repression.

2.223 Another expert strongly endorsed this view, recalling that it was precisely the possibility of a state of emergency arising, as in the event of a non-international armed conflict, that persuaded some States to retain the death sentence as a deterrent.

2.224 A third proposal (CE/COM II/54) endeavoured, like the one just mentioned, to overcome the obstacle of references, but, by contrast with the preceding proposal, it proposed the deletion of all references so that the benefits of Article 28 might be applied to *all* combatants prosecuted solely because of their participation in the conflict or their membership of armed forces. The author of the proposal defended it on the grounds that Article 28, even in the text put forward by the ICRC, did not cover all guerrilla fighters, for the bearing of a distinctive sign was in contradiction with the very logic of guerrilla warfare. This position coincided with the general attitude of the experts of the same nationality as the author of the proposal, an attitude reflected in a number of proposals submitted during the consideration of Articles 38 and 31 by Commission III.

2.225 Certain other ideas, relevant to the above arguments and proposals that formed the core of the discussion on Articles 27 and 28, were put forward.

2.226 One expert wondered whether it would not be appropriate, in order to provide greater protection than that afforded by Article 28, to consider, not only the abolition of the death sentence, but also the first of the proposals indicated by the ICRC in volume II of its Commentary, using it as an additional guarantee rather than an alternative. He also stressed that it would be possible to make allowance for circumstances which completely eliminated responsibility, such as, for example, the young age of the person concerned.

2.227 A number of experts were of the opinion that the articles should contain references to the provisions applicable to war crimes, by means of an additional paragraph in Article 28 stating that violations of the law of armed conflict and more particularly the violations mentioned in the Charter of the Nuremberg Tribunal, as they were defined by the International Law Commission, could always be subject to the penalties provided. It was stated that all these principles had been adopted by the United Nations General Assembly as principles of international law. It was pointed out, however, that the question of war crimes arose only in international conflicts and that any attempt to refer to war crimes in Protocol II would open the way to interference in the domestic affairs of States.

#### DRAFTING COMMITTEE

*Article 28. — Penal prosecutions against combatants*

2.228 The formulations of Article 28 take into ac-

count the following proposals : CE/COM II/24, 37, 39, 45, 49 and 54.

The proposals on this article seem to fall into two groups — those relating to the position of combatants (particularly as regards the death sentence) and the others relating to penal proceedings generally. The two groups are not mutually exclusive, and if the decision were made to include provisions of both types, they might very well be placed in separate articles.

So far as combatants are concerned, there are two major questions to be decided :

(a) Who should be protected ?

(b) Against what — imposition of the death sentence or execution of the death sentence ?

*Proposals relating to combatants (with particular regard to the death sentence) :*

#### OPTION I :

*After having fallen into the power of the adversary, combatants who have fulfilled the conditions stipulated in Article 25 of the present Protocol, as well as those combatants who, without having fulfilled these conditions, 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 have complied with the provisions of the present Protocol, shall not be punishable by a sentence of death if they become the object of penal prosecution only by reason of their having taken part in hostilities or having been members of armed forces.*

#### OPTION II :

*After having fallen into the power of the adversary, combatants who have fulfilled the conditions stipulated in Article 25 of the present Protocol, as well as those combatants who, without having fulfilled these conditions, have at least distinguished themselves from the civilian population by some distinctive sign or by any other means and who have complied with the provisions of the present Protocol, shall not be punishable solely for having taken part in hostilities or having been members of armed forces.*

*[Options III or IV could stand independently of either Option I or II above or could be combined with them.]*

#### OPTION III :

*No [other] person [combatant] shall incur the death sentence solely for having taken part in the hostilities or for having been a member of armed forces [unless imperative security requirements make this necessary].*

#### OPTION IV :

*A death sentence imposed on any person whose guilt arises only by reason of his having taken part in the hostilities or for having been a member of armed*



*forces shall not be carried out until the hostilities have ceased.*

#### **OPTION V :**

*Delete the entire text of this article.*

*Proposals relating to penal proceedings generally which might be added :*

*1. No sentence shall be passed or execution carried out against a person who has committed an offence related to the conflict without previous judgment pronounced by a regularly constituted court affording [all] the judicial guarantees which are generally recognized [as indispensable] by the principal legal systems of the world.*

*2. A person convicted of such an offence shall be entitled, in accordance with the laws in force, to avail himself of the right of appeal or petition from any sentence pronounced upon him. He shall be fully informed of his right of appeal or petition.*

*3. At the conclusion of the hostilities, the Parties to the conflict should endeavour to grant amnesty to as many as possible of those who have participated in the conflict or have been convicted of offences or deprived of liberty in connection with the conflict.*

*4. War crimes are prohibited. Penalties for war crimes shall be imposed and carried out in accordance with law.*

*5. No execution shall take place in public.*

2.229 The Chairman of the Drafting Committee stressed that, as the article in question was related to Article 25, the two provisions should be brought into line. He said that, according to Option I, combatants meeting the conditions of Article 25 and those who had distinguished themselves from civilians would not be subject to the death penalty only by reason of having participated in the hostilities and for having belonged to armed forces. He pointed out that Option II simply stipulated that they could not be sentenced, but made no mention of the death penalty. As for Options III and IV, he said that they could stand independently of either Option I or II or in combination with them. He pointed out that Option III made an exception for security reasons while Option IV made no such exception. Finally, Option V envisaged deleting the ICRC text. Referring to proposals on penal action in general, he said that they concerned the problem of guaranteeing legal proceedings; the first dealing with the regularity of proceedings, the second with the possibility of lodging an appeal, the third with amnesty, the fourth with the prohibition of war crimes and the fifth stipulating that there should be no public executions.

2.230 One expert chose Option I.

2.231 Another expert thought that, in relation to Options I and II, there should be exact details of the conditions to be fulfilled for a person to be considered as a combatant.

2.232 Two experts were in favour of Option III, one suggesting the deletion of the last words between square brackets.

2.233 Two experts supported Option IV; one of them proposed that Option III, requiring changes in certain legislations, should be referred to the Diplomatic Conference.

2.234 One expert chose Option V, and added that if Article 28 was not deleted, Option IV should be adopted, with the addition of the third proposal relating to penal prosecutions in general.

2.235 One expert considered that whichever Option was adopted, the fifth proposal should be retained.

## **CHAPTER VI**

### **Relief**

#### **(DRAFT PROTOCOL II, CHAPTER VIII)**

2.236 The expert of the ICRC opened the discussion by explaining how the chapter had originated, by recalling that common Article 3 contained no provision on relief for the victims of non-international armed conflicts and that that shortcoming had been sorely felt during the armed conflicts which had taken place since 1949. That was why, in 1957, the XIXth International Conference of the Red Cross had adopted a resolution on "relief in cases of internal conflicts". In 1969, the XXIIth International Conference of the Red Cross had adopted Resolution XXVI entitled "Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations". The United Nations General Assembly Resolution 2675 (XXV) stated that Istanbul Resolution XXVI was applicable in cases of armed conflict.

2.237 This problem had been raised also by government experts at the first session of the Conference, and Draft Protocol CE/Plen 2bis of 1971 contained several provisions, relating both to relief and medical assistance supplied by other States. Two other proposals had been put forward by the experts: one concerned "rules for international humanitarian relief to the civilian population in disaster situations created by armed conflicts"; the other contained "basic principles and rules for the protection of civilian populations in all armed conflicts".

2.238 In general, the experts emphasized the significance of this chapter and they pointed out that while the general purpose of the additional Protocol was to provide help for victims, the specific purpose of this chapter was to prevent needless suffering and to make it possible to help and protect individuals

against the effects of armed conflicts. The ICRC draft was considered to provide an excellent working basis for such a purpose. Nevertheless, the experts were aware that, where this matter was concerned, a balance had to be struck between the security requirements of the Parties in conflict and humanitarian requirements. With that in mind, some experts pointed out that it would be necessary to further reinforce the obligations contained in the Protocol and that, consequently, the reservations limiting the scope of its provisions would have to be deleted. Some experts stated that it would, at times, be hard to strike a satisfactory balance between humanitarian needs and military necessities. Some governments might be apprehensive that relief might help insurgent activity and so prolong the armed conflict, especially in those cases where the rebel Party resorted to guerrilla methods. Moreover, those experts stressed the fact that the sending of relief supplies should in no way encourage the interference of other States and that steps should be taken against such a danger.

## Article 29

### ICRC DRAFT

#### *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.

2.239 Some experts made the point that the discharge of the obligation incumbent on Parties to the conflict to provide supplies for civilians depended largely on the material resources available to the Parties. One expert, who feared that such an obligation might prove too much for the Parties to the conflict, especially for the rebels, proposed that Article 29 be deleted and that Article 30 on humanitarian assistance be reinforced (CE/COM II/57). Others, who did not wish to see Article 29 deleted, nevertheless felt that it was necessary to limit the scope of the provision by replacing the word "population" by the phrase "civilians who take no active part in the hostilities" (CE/COM II/51). Furthermore, the author of that proposal suggested that Article 29 be inserted in Chapter IV on "Civilian population".

2.240 An expert proposed adding to this article a phrase stating: "The State on whose territory the conflict is taking place has the right to assist the population in the zone occupied by the adverse Party, which must allow this assistance to be given" (CE/COM II/45).

2.241 Another expert proposed replacing the expression "without any adverse distinction" by "without discrimination".

## DRAFTING COMMITTEE

#### *Article 29. — Relief for the population*

2.242 The formulations of Article 29 take into account the following proposals: CE/COM II/46, 51 and 57.

#### *OPTION I:*

1. *The Parties to the conflict shall ensure, to the [fullest possible] 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 [for civilians who take no active part in the hostilities] in the territory under their control.*

*[The proposal was also made that this article should be moved to Chapter IV - Civilian Population.]*

#### *OPTION II:*

1. *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.*

2. *The State on whose territory the conflict is taking place has the right to assist the population in the zone occupied by the adverse Party, which must allow this assistance to be given.*

#### *OPTION III:*

*Delete the draft article.*

2.243 The Chairman of the Drafting Committee pointed out that the options dealt with the question of finding out to what extent it was possible to provide relief, whether for the civilian population as a whole, or for civilians taking no part in hostilities, and wounded, sick and shipwrecked persons.

2.244 The three experts who spoke were in favour of Option I; one of them, however, emphasized that the expression "without any adverse distinction" was not clear, and proposed the inclusion in this Option of paragraph 2 of Option II.

## Article 30

### ICRC DRAFT

#### *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.

2.245 As in the case of Article 29, an expert wanted relief to be supplied solely to "those who take no active part in hostilities" (CE/COM II/51). This proposal met with support. Furthermore, it was felt that the ICRC should be able to determine when civilians were running short of supplies, account being taken of their normal standard of living (CE/COM II/57). However, one expert said that the ICRC should not be given the role of a policeman. The expert of the ICRC said that that organization did not want to act as a fact-finding body as it wished at all times to be as flexible and discreet as its work demanded.

2.246 Several experts wanted the expression "such as the International Committee of the Red Cross and National Red Cross Societies" replaced by the more general expression "International Red Cross bodies" which would give the Parties to the conflict the possibility of turning to a body of their choice. He further stressed the important role that could be played by the National Society.

2.247 In proposal CE/COM II/51, it was suggested that "the distribution to the persons to be benefited... (be) made under the supervision of an organ or agency of the United Nations"; another expert feared that the acts of such a body might constitute interference even if it were stipulated that their acts would not constitute interference, for such bodies might offer no guarantee of the necessary impartiality.

2.248 Referring to Article 30, paragraph 3, the same expert recalled that assistance had to be founded on the principle of non-interference which could not be authorized even where humanitarian assistance was concerned, in order to avoid any abuse which might be committed under cover thereof. Several experts shared this viewpoint.

2.249 Another expert suggested that that third paragraph be removed, as it was up to the Government to appreciate and state whether, at any time, assistance constituted interference.

2.250 An expert suggested that the words "to the fullest possible extent" be deleted from Article 30, paragraph 1, as another expert had considered them too extensive and thought that they should even be added to paragraph 2.

2.251 One expert reminded the Commission of his position of principle that every effort should be made

to standardize the texts of the two draft Protocols; accordingly, he said, the wording of Article 30 in Draft Protocol II should be as similar as possible to Article 64 in Draft Protocol I.

2.252 One expert felt that the words "inadequately supplied in foodstuffs, clothing, medical and..." and the words "need medical assistance", in Article 30, paragraph 1, were an example of tautology.

2.253 An expert preferred the word "grant" rather than "agree to and facilitate" in Article 30, paragraph 1, to show that the obligation as here expressed devolved directly from the Protocol and not from individual agreements between the Parties.

## Article 31

### ICRC DRAFT

#### *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.

2.254 Some experts thought that it was perhaps inappropriate to mention specifically the ideas of "blockade or siege", and expressed a preference for a general form of wording such as "The Parties to the conflict or any other High Contracting Party concerned shall allow the free passage of all consignments..." (CE/COM II/51 and 57).

2.255 Other experts also wished to see Articles 30 and 31 merged into a single provision, as in their opinion the two articles overlapped.

2.256 On the subject of blockade, one expert thought that although a blockade could be a justified means of waging war, the use of starvation as a mean of war should be forbidden; he therefore proposed that the word "civilian" should be deleted in the title of this article, and that paragraphs 1 and 3 should be amended accordingly (CE/COM II/58).

2.257 Opposing this view, one expert considered that blockade was a method of war which could not be compared to genocide, and that the free passage of relief supplies could lead to prolongation of the armed conflict.

2.258 One expert, in stating his support of Article 31, said that it appeared desirable to insert the words "as far as possible", in order to take into account the obligations upon governments.

2.259 Another proposal was that, by analogy with Article 30, paragraph 3, there should be a further provision stating that the authorization of free passage should not be considered as interference in the conflict.

2.260 In paragraphs 2 and 3 of Article 31, one expert thought it would be useful to state: "The Parties to the conflict as well as any High Contracting Party", since these were not alternatives: all the Parties might be concerned.

#### DRAFTING COMMITTEE

*Articles 30. — Humanitarian assistance, and 31. — Consignment of essential supplies for the civilian population*

2.261 The formulation of this article takes into account the following proposals: CE/COM II/12, 46, 51, 57 and 58.

The text that follows involves a merger of the existing draft Articles 30 and 31.

1. *The Parties to the conflict and any High Contracting Party through the territory of which supplies must pass shall allow the free passage of all consignments of essential foodstuffs, clothing, medical and hospital stores and indispensable shelter facilities [intended only for civilians] [who take no active part in the hostilities] [and for the wounded, sick and shipwrecked, both military and civilian].*

2. *If [, in the opinion of the International Committee of the Red Cross,] the [civilian] population is [, having regard to their normal standard of living,] inadequately supplied in foodstuffs, clothing, medical and hospital stores and shelter facilities, the Parties to the conflict shall [, to the fullest possible extent,] [agree to and] facilitate impartial relief activities undertaken by international humanitarian organizations, such as a body or agency of the United Nations or of the International Red Cross [on behalf of civilians] [taking no active part in the hostilities] [and for the wounded, sick and shipwrecked, both military and civilian].*

3. *The Parties to the conflict and any High Contracting Party through the territory of which relief supplies must pass shall have the right to prescribe the technical arrangements under which the passage of relief supplies is to be allowed. They shall in no way whatsoever divert relief consignments from the purpose for which they were intended or delay the forwarding of such consignments.*

4. *The Parties to the conflict or any High Contracting Party through the territory of which relief supplies must pass may make the passage of relief supplies conditional on the distribution to the persons to be benefited being made under the supervision of an organization of the nature referred to in paragraph 2.*

[[5. *In no circumstances shall an offer or granting of this assistance, passage of relief supplies, or distribution thereof be considered as interference in the conflict.*] [Such activities shall be carried on with due regard for the principle of non-intervention in the domestic affairs of States.]]

2.262 The Chairman of the Drafting Committee pointed out that, as these two articles overlapped, the Committee had merged them.

2.263 One expert explicitly stated his agreement with the unified text and suggested deletion of the first sentence in brackets in paragraph 5, but retention of the second sentence.

2.264 Another suggestion was to delete the first sentence between brackets in paragraph 2 and to retain the whole of paragraph 5.

2.265 A view expressed by two experts was that the two sentences in brackets in paragraph 5 were contradictory, and that the effect of the second was to nullify the whole article and should therefore be deleted.

2.266 One expert stated his preference for the ICRC draft, provided that the word "population" was replaced by the words "civilian population".

#### Article 32

#### ICRC DRAFT

*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.

2.267 A few experts asked whether the Parties to a conflict were obliged to accept the ICRC proposals.

2.268 An expert pointed out that, since the Protocol was an international instrument, it could not place obligations on non-governmental organizations. The wording of this article should, therefore, be amended to read "may propose"; in addition, the information bureaux might sometimes be organized by the Parties to the conflict, possibly with the help of the National Societies, and perhaps through the League; this burden should not be placed solely on the ICRC.

2.269 Another proposal was to add to paragraph 1 of this article a statement to the effect that the State in whose territory the conflict was taking place should decide on this proposal and on the cessation of operations by the bureaux (CE/COM II/46).

#### DRAFTING COMMITTEE

##### *Article 32. — Recording and information*

2.270 The formulation of Article 32 takes into account the following proposals: CE/COM II/12 and 46.

1. *The Parties to the conflict shall, when either they or the International Committee of the Red Cross deem it necessary, [The Parties to the conflict may, upon the proposal of the International Committee of the Red Cross,] organize information bureaux to which they shall communicate all relevant information on victims of events who may be in their power. The dead shall also be recorded. [The State on whose territory the conflict is taking place shall determine whether and when such bureaux shall be established and terminated.]*

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, [unless the transmission of information or the searches might be detrimental to the victims of the events or to their relatives.]*

*[This amended text contains no fundamental change.]*

2.271 The Chairman of the Drafting Committee pointed out that, in paragraph 1, the text as proposed, without the proposals in square brackets, was imperative in character, while the proposals between square brackets left the decision to the Parties.

2.272 One expert said that he preferred the ICRC draft.

#### Article 33

#### ICRC DRAFT

##### *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.

2.173 One expert stated that, in an armed conflict not of an international character, the National Red Cross Society might find itself behind the lines of one of the Parties; he therefore proposed adding to paragraph 1 the words "operating, where necessary, independently" and "in the interests of the population as a whole", to ensure that both Parties had the benefit of the assistance; he also proposed deletion of the reference to other relief societies (CE/COM II/57).

2.274 A request was made by an expert for a statement in this article that the activities of the National Red Cross Societies should be based not only on the Red Cross statutes but also on the national legislation.

#### DRAFTING COMMITTEE

##### *Article 33. — National Red Cross and other relief societies*

2.275 The formulations of Article 33 take into account the following proposal: CE/COM II/51.

##### *OPTION 1:*

1. *[Subject to the 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, acting of necessity independently, shall be able to pursue their activities [for the benefit of the whole civilian population] [provided that they act] in accordance with the rules of the Red Cross as stated by the International Red Cross Conferences [and in conformity with law]. [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 provided that they act in accordance with the principles of humanity, impartiality and neutrality.*

3. *[Maintain the existing text drafted by the ICRC.]*

#### OPTION II:

*Same as above but delete paragraph 2.*

2.276 The Chairman of the Drafting Committee stressed that this article raised the question as to who should be responsible for humanitarian operations and what might be the activities of relief organizations other than the Red Cross Societies.

2.277 Three experts supported Option I; one of them proposed the deletion of the first proposal between brackets; another insisted on retention of the wording "and in conformity with the law"; the third proposed the deletion of everything between brackets in the first paragraph.

2.278 Three experts stated their preference for the ICRC draft; one of them added that he would accept Option I provided that the first phrase between brackets in paragraph 1 was deleted.

## CHAPTER VII

### Executory provisions

#### (DRAFT PROTOCOL II, CHAPTER IX)

2.279 The expert of the ICRC opened the discussion by making an introductory statement. He explained that the provisions in this chapter were of two types: (1) some contained new obligations not contained in common Article 3, such as those embodied by Article 37 on co-operation in the observance of the present Protocol and Article 39 on dissemination of the present Protocol; (2) the purpose of other provisions was to reaffirm the provisions existing in common Article 3; these included Article 36 on special agreements and Article 38 on the legal status of the Parties to the conflict.

2.280 Going into greater detail, the expert of the ICRC showed that the provisions contained in Article 36 took up common Article 3, paragraph 3, and adapted it to the new situation which would result from the adoption of an additional Protocol to the Conventions. The said paragraph of common Article 3 encouraged Parties to the conflict to implement all or part of the provisions of the four Geneva Conventions. Last year, some experts had recalled the importance of such special agreements which, with the help of the ICRC, and possibly on the

basis of model agreements prepared by the ICRC, would enable Parties to the conflict to extend the application of humanitarian law. However, faced with the difficulty of reaching an agreement between Parties to the conflict at the time when hostilities had reached certain proportions, the ICRC wished to leave to the Parties to the conflict the possibility of undertaking unilaterally to apply all or part of the four Conventions in accordance with the terms of a unilateral declaration addressed to the ICRC.

2.281 Speaking of Article 37, the ICRC expert showed that it had been inspired by the consideration that, in view of the nature of the conflict, its possible proportions and the conditions in which it would occur, the Parties to the conflict would not always be able to supervise observance of the law alone, as common Article 3 nevertheless envisaged. The ICRC consequently considered it necessary to encourage the Parties to the conflict to call on a body of their own choosing which would offer every guarantee of impartiality and efficacy. Article 37, he said, had merely been drawn up on a preliminary basis, pending answers from governments to the "Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions", Question 14 of which dealt with this matter.

2.282 Certain experts expressed their general feelings on the approach to the matters in question.

2.283 One expert, while recalling that there was a need to have identical rules for international and non-international armed conflicts, pointed out that when it came to implementing the two Protocols currently being prepared, there were, in his opinion, two types of situation calling for two distinct types of regulations. Nevertheless, in view of the complexity of the rules to be formulated and taught — especially in military academies — the task of dissemination would be made easier if the rules were identical. Having said that, the expert paid tribute to the ICRC for the excellent work it had done in drafting these articles. That tribute was echoed during statements on the various articles made by other experts. The same expert continued by mentioning the importance of the contributions made by the United Nations in the field of human rights, certain provisions of which were to be applied in time of both peace and war and could not, consequently, be ignored when discussing the subject before the Conference.

2.284 Another expert recalled that Commission IV was currently deliberating on the application of Protocol I. Although not convinced that many of the provisions relating to that Protocol could be applied to non-international armed conflicts, he nevertheless felt that some of them could be taken up within the context of Chapter IX, in which instructions to be given to armed forces should be accorded an important role.

2.285 Referring to the allusion made by the first expert to human rights, and recalling his position that the main point was to strike a balance between sovereignty and non-interference and assistance to the victims of internal armed conflicts, another expert considered that many international instruments contained rules applicable in all circumstances and consequently to the case before Commission II. He further recalled that nowadays it was recognized that, if human rights were systematically violated on the territory of a given State, the United Nations would have to take up the matter and that its attempts to put an end to such violation was not considered to be interference. He went on to recall the Convention on the Prevention and Punishment of the Crime of Genocide, which stipulated that whenever a threat of genocide existed in the territory of a member State the international community was bound to do everything possible to prevent and punish such international crimes. Although the principle of non-interference in the internal affairs of a State naturally had to be respected, no less stress should be laid on the need to keep a balance between the sovereign power of the State in cases of armed conflict and the need to implement the provisions of international law so as not to create obstacles to the implementation of future provisions.

2.286 One expert pointed out that the Convention on Genocide did not include any real machinery for implementation and that, on the other hand, the reason why the Conventions on Human Rights were not yet in force was that States had made a number of reservations where they were concerned. He expressed the hope that the same would not be true of the present Protocol.

#### Article 36

##### ICRC DRAFT

#### *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.

2.287 One expert considered Article 36 a practical solution, provided that it in no way compromised the general system set up in 1949 and provided, in particular, that it retained the distinction made between Articles 2 and 3 of those Conventions.

2.288 In the same spirit, another expert said that it would be as well to say explicitly "other appropriate provisions of the four Geneva Convention" in view of the fact, for example, that prisoner-of-war status could not be granted *ipso facto* to all captured combatants (CE/COM II/66).

2.289 By way of amendment to these provisions, another expert proposed adding the words "not already made applicable" (CE/COM II/67).

2.290 Yet another expert considered that although the structure of Article 36 was admissible, it was nevertheless desirable to be even more explicit by referring not only to "the Additional Protocol to the said Conventions" but to "Protocol I".

##### DRAFTING COMMITTEE

#### *Article 36. — Special agreements*

2.291 The formulation of Article 36 takes into account the following proposals: CE/COM II/66 and 67.

*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 [or to the Depositary State], all or part of the other [appropriate] provisions of the four Geneva Conventions of August 12, 1949, and of the Additional Protocol to the said Convention [not already made applicable].*

#### Article 37

##### ICRC DRAFT

#### *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.

2.292 Many statements, some backed by formal amendments, were made on Article 37. Some were very broad and referred to recourse to organized bodies with a view to implementing this co-operation: others were more restrictive.

2.293 One expert submitted a formal proposal containing an Article 36 A which amended Article 37 and introduced an additional paragraph (CE/COM II/61). He considered draft Article 37 to be insufficient for a matter of such vital importance, in that it left impartial supervision to the whim of the Parties to the conflict whereas all the humanitarian rules in the Protocol demanded that a supervisory body be created. He therefore felt bound to suggest the insertion of an Article 36 A which, in view of the general character of the definition of armed conflicts not of an international character, would leave open the possibility of having an impartial moral authority — the ICRC — to determine the

existence of such objective elements as would constitute such a conflict. The expert was of the opinion that the possibility that the ICRC might express an opinion on the subject should prevent the States from arbitrarily denying the existence of such a conflict on their territory in order to avoid being bound by the obligations embodied in Protocol I.

2.294 However, in view of the essentially moral character of the authority of the ICRC, the expert wished to make it clear that the opinion of the ICRC as to the existence of a conflict as defined by Article 1 of Protocol II would not have any compulsory value.

2.295 Apart from inserting an Article 36 A, the proposal also amended Article 37 by establishing the principle that the Parties were formally obliged to call on the co-operation of an impartial body — such as the ICRC — and that their power of discretion should be limited to the choice of the body which they preferred.

2.296 Lastly, having established the formal obligation to seek the co-operation of such a body, the expert backed up his proposal by suggesting yet a further guarantee in a second paragraph to Article 37 which would expressly stipulate that, if after a reasonable period of time, the Parties to the conflict had not made the choice specified in paragraph 1, the ICRC would be fully entitled to perform the humanitarian tasks in question.

2.297 In concluding the commentary on his proposal, the expert said he would forestall the reproaches which would undoubtedly be levelled at him concerning the principle of non-interference. He explained that his proposal concerned a purely humanitarian activity, carried out for humanitarian purposes, by a humanitarian body and that, furthermore, interference would not be possible if only States would show by their ratification that they were willing to accept such machinery.

2.298 Two other experts introduced another proposal (CE/COM II/62) which involved :

- (1) both the co-operation and the *supervision* of an impartial and effective body such as the ICRC ;
- (2) the obligation to appoint as quickly as possible such a body, the competence of which would extend throughout the territory of the High Contracting Party where the conflict was taking place ; and
- (3) that until such a body had been appointed, the ICRC would be accepted by the Parties as a substitute.

2.299 It would appear from that proposal that, although the choice of a co-operative and supervisory body was to be left to the Parties, there should be, in any case, a body of this kind for the whole territory of the State in conflict and that furthermore, should such a body be lacking, the ICRC should act as compulsory substitute.

2.300 Another expert suggested in his proposal (CE/COM II/67) which has already been quoted, that each party to the conflict should be bound to call on the ICRC to supervise as widely as possible the implementation and observance of the rules of the present Protocol and the appropriate provisions of the Conventions and of the additional Protocol made applicable by the present Protocol. This proposal, while specifically mentioning the ICRC, omitted any reference to other international bodies. Another expert, too, wished to see specific reference made to the ICRC in Article 37.

2.301 One expert regretted that Article 37, as drafted by the ICRC, contained the mandatory future rather than the conditional: the use of the conditional would have been more conducive to rallying governments to the article in question.

2.302 That idea was reiterated by another expert who considered that the conditional or the word “may” should be used and that, above all, the bodies should not be listed within Article 37 but that the possibility of turning to any impartial body should be left open ; such body could even be a National Red Cross Society.

2.303 One expert suggested in his proposal (CE/COM II/59) that in order for Article 37 to work, the agreement of the legitimate government would have to be sought, as international law should not try to weaken the powers of sovereign States in situations which were actually threatening their very sovereignty and existence.

2.304 Yet another expert considered that there were the rebel Party on which could be required to give its consent to the appointment of an impartial body.

2.305 One expert, while paying tribute to the flexibility of the ICRC draft of Article 37, said that he was not able to give his view before being informed on the work of Commission IV and, especially, of the progress made by the Drafting Committee.

2.306 Another expert wondered whether there might not be conflict between Article 37 of the present Protocol and Article 8 of the Conventions.

2.307 It was asked by an expert why it was necessary to have, in Article 37, a reference to the other provisions of the Conventions and the additional Protocol and not merely a reference to common Article 3.

#### DRAFTING COMMITTEE

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

2.308 The formulations of Articles 36 A and 37 take into account the following proposals : CE/COM II/59, 60, 61, 62 and 67.



## Article 36 A

(Proposal for a new article, submitted in CE/COM II/61.)

*The International Committee of the Red Cross may determine the existence of a conflict which is not of an international character within the meaning of Article 1 of the present Protocol, by means of a notification of a non-binding nature.*

## Article 37

### OPTION I:

1. *The present Protocol and any 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 shall be applied with the co-operation and under the scrutiny of an organization offering all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross.*

2. *The Parties to the conflict shall, as soon as possible after the armed conflict begins, appoint such an organization, the competence of which shall extend throughout the territory of the High Contracting Party in the territory of which the conflict takes place.*

3. *Until such an organization has been appointed in accordance with paragraph 2, the Parties to the conflict shall accept the International Committee of the Red Cross as the organization provided for under paragraph 1.*

4. *The provisions of the present Protocol shall not hinder any humanitarian activities undertaken by the International Committee of the Red Cross or any other impartial humanitarian body with the agreement of the Parties concerned, in the case of armed conflicts not of an international character [and also in the case in particular of internal disturbances and tensions].*

### OPTION II:

1. *The present Protocol and any 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 may [, with the consent of the authorities in power,] be applied with the co-operation and under the scrutiny of an organization offering all guarantees of impartiality and efficacy, such as the International Committee of the Red Cross.*

2. *The Parties to the conflict may, as soon as possible after the armed conflict begins, appoint such an organization, the competence of which shall extend throughout the territory of the High Contracting Party in the territory of which the conflict takes place.*

2.309 The Chairman of the Drafting Committee said that Option I was mandatory, and he empha-

sized the reference to internal disturbances and tensions in paragraph 4.

2.310 Two experts spoke in favour of Option I but one of them felt that paragraph 4 had no place in Article 37 as it referred to humanitarian activities carried out with the agreement of the Parties concerned, while paragraphs 1 and 3 made no reference to any such agreement; he had come to the conclusion that paragraph 4 should not form part of Article 37. The other speaker underlined the importance of paragraph 3, adding that the other paragraphs might be included in it.

2.311 Another expert proposed that paragraph 4 should mention *other* humanitarian activities and that the text in brackets should be deleted.

2.312 Two experts proposed that the text of the ICRC draft should be adopted; one of them felt that where the text referred to a "body which offers all guarantees of impartiality and efficacy", express mention should be made of the ICRC.

## Article 38

### ICRC DRAFT

*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.

2.313 One expert thought that this article should be worded as follows: "The legal status of the Parties to the conflict shall not be affected by the application of the provisions of the present Protocol" (CE/COM II/59).

2.314 A proposal was made (CE/COM II/66) to add the words "envisaged in or by the said Conventions and Protocols" at the end of the article.

2.315 Considering that the legal status of the Parties could be regarded either from the viewpoint of international law or from that of municipal law, one of the experts stated that he could not accept any provision which might, by means of Article 38, change the internal status of one of the Parties, i.e., its state of rebellion; consequently, he submitted a proposal that neither international nor internal legal status should be affected by the application of the provisions in question or by the conclusion of any other agreement (CE/COM II/67).

2.316 Another expert considered that, instead of a reference to the other provisions of the Conventions,

there should have been a reference to common Article 3, and that the legal status of the Parties to the conflict ought not to be brought into question: the Government retained by law its jurisdiction over persons of the other Party. It would have been desirable to indicate that a State in whose territory an armed conflict of a non-international character had broken out was competent, by virtue of its own national legislation, to deal with persons who had infringed the legislation.

#### DRAFTING COMMITTEE

*Article 38. — Legal status of the Parties to the conflict*

2.317 The formulation of Article 38 takes into account the following proposals: CE/COM II/59, 66 and 67.

*The legal status of the Parties to the conflict [under international and municipal law] shall not be affected by the application of the provisions of the present Protocol [or 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, or by the conclusion of any other agreement [envisaged in or by the said Conventions and Protocol]].*

2.318 One speaker wished to keep the bracketed words "under international and municipal law".

2.319 Another expert proposed to delete the last part of the sentence, namely the words in brackets.

#### Article 39 and 40

##### ICRC DRAFT

*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.

*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.

2.320 By and large the experts supported the provisions contained in these articles.

2.321 One expert considered that the wording of Article 76 of Protocol I would be as acceptable as that of Article 39, the drafting of a similar text being desirable in any case.

2.322 One expert had submitted a written proposal requesting that these two articles be deleted from the provisions of the Protocol and that their content be introduced as part of the Preamble to Protocol II (CE/COM II/47). The proposal was contested by another expert.

2.323 An expert considered that the provisions of Article 39 did not carry enough force; he referred to the proposal CE/COM II/67 to explain that it obliged the Contracting Parties to report to the Depositary State and to the ICRC on measures taken to implement this article.

2.324 Several experts pointed out that, in their opinion, the rebel party in a case of non-international armed conflict would not be strictly bound from a legal point of view if it were not for the fact that its members formed part of the population of the State. The experts could not see how this weakness could be overcome.

2.325 Another expert stated that he feared that the dissemination of the present Protocol might help increase the possibilities of rebellion, as the rebels would be able to find all information relating to their treatment in the text of the Protocol. He reserved his opinion on this matter.

#### DRAFTING COMMITTEE

*Article 39. — Dissemination of the present Protocol*

2.326 The formulations of this article take into account the following proposals: CE/COM II/47 and 67.

##### OPTION I:

*Maintain the existing text of paragraphs 1 and 2, as drafted by the International Committee of the Red Cross.*

3. *[Each High Contracting Party shall report to the Depositary Power and to the International Committee of the Red Cross on the measures which it has taken to implement this Article one year after the deposit of its instrument of ratification of the present Protocol and thereafter at intervals to be agreed with the Depositary Power and the International Committee of the Red Cross.]*

##### OPTION II:

*Delete the draft article entirely.*

2.327 The Chairman of the Drafting Committee pointed out that Option I proposed an additional

paragraph to the article while Option II proposed that the article be deleted entirely.

2.328 No opinions were expressed on the subject.

#### DRAFTING COMMITTEE

##### *Article 40. — Rules of application*

2.329 The formulation of this article takes into account the following proposal: CE/COM II/47.

##### *OPTION I:*

*Maintain the existing text as drafted by the International Committee of the Red Cross.*

##### *OPTION II:*

*Delete the article entirely.*

*[When the text of the Articles in Protocol I corresponding to the above Articles 39 and 40 has been agreed upon, then the wording of this Protocol should be amended to conform to that of Protocol I.]*

2.330 The Chairman of the Drafting Committee remarked that Option I proposed to maintain the ICRC draft and that Option II proposed the deletion of the whole article.

2.331 One expert was in favour of Option I.

## CHAPTER VIII

### **Article 35 and the Regulations concerning special cases of armed conflicts not of an international character**

#### ICRC DRAFT

##### *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.

#### **Regulations concerning special cases of armed conflicts not of an international character**

##### *Article 1. — 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.

##### *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.

2.332 At the very beginning of the discussion on Article 1 of the Protocol, one expert had brought up the question of Article 35 and the Regulations annexed thereto; this had led the ICRC expert to explain the significance of Article 35, the only purpose of which was to establish the legal link between the provisions of the Draft Protocol and the Regulations.

2.333 The ICRC expert pointed out that the Regulations applied only to special cases of non-international armed conflicts; they did not question the concept itself but dealt with cases which, if the proposals of the ICRC were not accepted, would normally come within the compass of Article 1 of the Protocol. What was more, the Regulations did not make any changes in the principles of existing international public law. Indeed, (1) they did not ask on what grounds a foreign State might offer the assistance of its armed forces and (2) they did not propose changing the legal characterization of the conflicts envisaged therein.

2.334 In the first hypothesis — that of balance between "legal" and "rebel" forces — the ICRC

expert recalled that, although not completely rejecting the proposal, some experts at the 1971 session had found it to be not entirely satisfactory; on the other hand, one expert, who considered that the situation could not be allowed to remain *extra muros*, had submitted a proposal very similar to that of the ICRC.

2.335 Referring to the second hypothesis, the expert of the ICRC recalled the numerous objections expressed at the 1971 session on the subject of the relations between the insurgent Party and the authorities in power and the relations between that Party and the foreign State providing the assistance. He considered, however, that where the authorities in power asked for or accepted the aid of foreign States, or where the authorities in power and the insurgents alike benefited by the assistance of other States, it would be of advantage to all the Parties to grant prisoner-of-war treatment to captured combatants.

#### *I. Article 1: Effective organization of the Party opposing the authorities in power*

2.336 The main objection raised by many experts was that States could not be expected to sign an instrument whereby they would be obliged, as soon as certain conditions implying a high degree of intensity of the struggle had been met, automatically to grant the rebels the benefit of the four Geneva Conventions, in particular prisoner-of-war status to captured combatants, as in a conflict between States.

2.337 One expert declared that, in his opinion, such automatic and complete application of the Conventions was not even technically conceivable and that in the absence of a reciprocity clause it was highly unlikely that the Parties to a conflict would willingly agree to the implementation of that provision. Furthermore, he added, it was inconceivable that the effective occupation of a region, of a village by, say, some two hundred armed men, levying taxes and recruiting, should suffice to bring about the application, over the entire territory, of all the provisions of the four Conventions.

2.338 Yet other experts opposed Article 1 of the Regulations, claiming that it amounted to creating a special category of non-international armed conflict and that, on the contrary, the definition should include this case in Article 1 of the Protocol.

2.339 Two experts felt that, in the case in question, the problem should be solved by means of special agreements (see Article 36) and not by a general treaty provision.

2.340 Two experts saw in the ICRC proposal an attempt to revive the idea of *recognition of a belligerent party* which had now fallen into oblivion. One of them, while admitting that it was unrealistic automatically to grant the adverse Party the right to belligerent status, took up the cudgels on behalf of Article 1. He was not in favour of deleting the article, for it constituted a step forward, from a

humanitarian point of view, but preferred to wait for the results of the work of the Drafting Committee on the definition to be given in Article 1 of the Protocol. However, if Article 1 of the Regulations were to be retained, the word "government" in the third line should be replaced by the word "authorities", which was a more neutral term.

2.341 Another expert, also mindful of the humanitarian intent of the article, felt that it was closely bound up with Article 1 of the Protocol which would contain a definition. He considered that it would perhaps be appropriate to include it in that article and so to establish two levels in the definition of non-international armed conflicts. He reserved his position until fuller information was available on the work of the Drafting Committee on the definition.

#### *II. Article 2: Outside aid*

2.342 Some experts expressed formal objections to the principle of adopting such an article which, in their opinion, might constitute an indirect form of justification or legalization of interference by a foreign State in the affairs of another State where a non-international armed conflict was being waged. The acceptance of such an article would amount to sanctioning a violation of existing international law and a violation of all future instruments of international law.

2.343 Other experts, examining the methods of application as contained in the article, tried to show that they were both questionable and impracticable.

2.344 One of them, speaking in favour of the deletion of the article, and after dealing one after another with the cases provided for in Article 2 of the Regulations, concluded that problems of such a far-reaching nature could not be considered in the abstract without also taking into account the timing and intensity of the foreign intervention; that intervention might be on such a scale, compared with the internal forces involved, as to reduce the internal conflict to the status of a subsidiary action in relation to the international conflict to which it had given rise.

2.345 Other experts, moreover, emphasized the fact that, in the situations under consideration, the relations between the States involved in the conflict were adequately covered by common Article 2, while the rebels were invariably covered by common Article 3. Whereas, on the question of principle, there seemed to be no reason why, because there had been foreign intervention, a government should be bound to grant prisoner-of-war status to rebels, it was pointed out that the adoption of such a provision would place the authorities in power in a difficult position whenever they felt obliged to seek foreign aid, since such intervention would entail treating their rebels as prisoners of war. The authorities would thus be faced with an intolerable dilemma: either to continue

unaided their efforts to quell the rebellion, or to accept foreign aid and therefore treat their rebels as prisoners of war. On the other hand, the system proposed in Article 2 of the Regulations could be seen as a barely disguised invitation to the rebels to seek the intervention of foreign States for the sole reason that it would afford them more favourable measures of protection.

2.346 These remarks, which were approved by numerous experts, were followed by others relating to the wording of Article 2 of the Annex, the provisions of which, according to a number of experts, were superfluous.

2.347 All these remarks led to the same conclusion : that Article 2 of the Regulations contained in the Annex should simply be deleted. At most, in the opinion of one expert, if the inclusion of the article were really considered necessary, only paragraph 1 (a) and the first sentence of 1 (b) should be retained. The other provisions of the article were unacceptable to governments, which must continue to base their policy on the following principles : if a foreign government rendered assistance to the authorities in power, the party opposing those authorities continued to be covered exclusively by common Article 3 relating to non-international armed conflicts and Protocol II which remained to be established ; if a foreign government supported the rebel Party, the relations between the States thus opposed were governed by the provisions applicable in cases of international armed conflict, and those between the authorities in power and the Parties opposing them by common Article 3 and Protocol II to be established ; finally, if both the authorities in power and the Parties opposing them were receiving assistance from foreign States, the two systems were applied concurrently.

2.348 On a matter not directly related to the discussion of Articles 1 and 2 of the Regulations, one experts called attention to the confusion which could result from a non-international armed conflict occurring within the territory of a State divided between different ethnic groups which extended beyond the borders of that State.

2.349 Another expert had submitted a formal proposal for the addition to Article 1 of the draft Protocol of a paragraph providing that the Regulations contained in the Annex should apply to armed conflicts which arose from the struggle of people under alien domination for liberation and self-determination (CE/COM II/7). After the discussion which took place on Articles 1 and 35 of the Protocol, as well as on the Regulations, he announced his intention of submitting a new amendment in which he would agree to the deletion of Article 35 but would re-introduce Article 1 of the Regulations under a new heading and in a new chapter, entitled "Special cases", and dealing particularly with wars of liberation, struggles for self-determination and "internal conflicts which, in the view of the United

Nation, threaten international peace and security . . ." (CE/COM II/70).

2.350 Another expert, speaking on similar lines, had in fact already asked during the deliberations of the Commission whether, since wars of liberation could not be treated as mere insurrections, it would not be useful to consider how far the provisions of the Regulations might be invoked to obtain for combatants engaged in such conflicts the widest possible protection under international law.

#### DRAFTING COMMITTEE

*Article 35. — Regulations concerning special cases of armed conflicts not of an international character*

2.351 The formulations of this article take into account the following proposals : CE/COM II/59, 70 and 79.

##### OPTION I :

*Maintain the text of Article 35 and the Regulations as drafted by the International Committee of the Red Cross.*

##### OPTION II :

*Maintain the texts of Article 35 and Article 1 of the Regulations but delete Article 2 of the Regulations.*

##### OPTION III :

*Maintain the texts of Article 35 and Article 2 of the Regulations but delete Article 1 of the Regulations.*

##### OPTION IV :

*Maintain the texts of Article 35 and of Articles 1 and 2 of the Regulations up to the word "Moreover" in paragraph (b).*

##### OPTION V :

*Delete Article 35 and the Regulations entirely.*

##### OPTION VI :

*Delete Article 35 and the Regulations and substitute therefor a new Chapter entitled "Special Cases", which would contain the following Articles :*

##### *Article 1*

*The Parties to the conflict shall, in special cases when hostilities have reached a level as to make it necessary, accord the combatants after having fallen into the power of the adversary, a treatment similar to that provided for prisoners of war in the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. They shall also apply to the civilian population the Geneva Convention relative*

*to the Protection of Civilian Persons in Time of War of August 12, 1949.*

#### Article 2

*Liberation and self-determination movements, as well as internal conflicts which, in the view of the United Nations, threaten international peace and security shall always be considered special cases within the meaning of Article ... of the present Protocol.*

#### Article 3

*The application of Articles ... and ... of the present Protocol does not dispense the Parties to the conflict from recognizing the application of all the Geneva Conventions of August 12, 1949, to such conflicts when circumstances warrant it.*

*Note:* There are a number of places at which the expressions "this Protocol" or "this Protocol and its Regulations" appear. If the Regulations were to be deleted, then the references to the Regulations should likewise be dropped. If all or part of the Regulations should be maintained, then the ways in which the Protocol and the Regulations are referred to should be harmonized.

2.352 Eight experts supported Option V, i.e., for the deletion of Article 35 and the annexed Regulations.

2.353 Two experts favoured Option IV, one preferred Option I.

## CHAPTER IX

### Protection of the wounded, sick and shipwrecked

#### (DRAFT PROTOCOL II, CHAPTER III)

2.354 The ICRC expert opened the discussion. He recalled that common Article 3, paragraph 1 (2) merely stipulated that "the wounded and sick shall be collected and cared for", without specifying the protection to be afforded to doctors and other medical personnel, medical establishments and transports, or the respect due to the sign of the red cross. He reminded the Commission that, in preparation for the first session of the Conference of Government Experts, the ICRC had prepared a six-article draft aimed at filling in the gaps. On the basis of the ICRC proposals, Commission I had adopted a completely rewritten text which broadly corresponded to Chapter III of the Draft Protocol, the slight changes introduced being due in the main to the rearrangement of certain subjects in other chapters.

2.355 So as to keep Commission II informed of the work of Commission I on the points common to both Commissions, another ICRC expert who had

taken part in the work of Commission I gave an account of the main provisions adopted in Part II of Draft Protocol I.

2.356 A general discussion followed on the question of whether the two Protocols should or should not contain identical provisions. In any case it was important that the same wording be used for such provisions as appeared in the two Protocols. Since the provisions of this chapter referred to purely humanitarian aspects, in contrast to other provisions — such as those relating to combatants —, one expert felt that there was no reason to envisage different provisions for the two Protocols.

2.357 Other experts supported this view. One of them stressed that it was important that definitions of terms employed should agree and submitted a formal proposal for a definition of "shipwrecked persons" to be inserted in Protocol II (CE/COM II/82).

2.358 Another expert, who also felt that the texts in question should correspond as closely as possible and that identical provisions should be adopted for all armed conflicts, told the Commission that he was submitting a formal proposal enumerating the articles to be comprised in the present chapter III (CE/COM II/75).

2.359 Two experts, however, pointed out that situations in non-international armed conflicts differed widely from those in international armed conflicts, particularly with regard to the state and role of the civilian population, and drew the conclusion that, notwithstanding the links between the two Protocols, there was no need to insist on having the same articles in the two texts, as the ICRC draft for Protocol II provided a good working basis.

2.360 The ICRC representative took part in this preliminary debate and remarked that, although the respective chapters of two Protocols should clearly be as similar as possible, it was not possible to include in Protocol II all the detailed rules drawn up in the context of Protocol I, since conditions regarding organization and struggles were different in each type of conflict. The speaker recalled that, in the case of non-international armed conflicts, the secret of success was to aim at a simple draft. Since the Drafting Committee was unlikely to have sufficient time at its disposal to ensure the required harmonization, the ICRC could, if necessary, take up the matter after the end of the Conference.

#### Article 7

#### ICRC DRAFT

#### 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.

2.361 Several experts compared this article with Articles 12 and 13 of draft Protocol I, particularly with paragraph 2 of Article 13, which prohibits the subjection of protected persons to any physical mutilation or any medical or scientific experiment, including the removal or transplant of organs. One expert thought that this prohibition should also be included in Protocol II, lest the absence of a reference to the question in Article 7 be interpreted as a tacit permission. A proposal which was supported by several experts (CE/COM II/27) asked, in fact, that the text of Article 13, paragraph 2, of draft Protocol I be added as paragraph 4 to the present Article 7, while another expert proposed (CE/COM II/75) that the full text of Articles 12 and 13 be included.

2.362 One expert stated that, in his opinion, the amendment proposed in CE/COM II/27 should have included, in addition to the references to mutilations and the transplant of organs, an explicit prohibition of the use of psychological pressure and coercion.

2.363 The use of the word "unjustified" in Article 7, paragraph 3, was also criticized. One expert, recalling the discussion concerning the use of this word in Article 26 of draft Protocol II thought that "unlawful" would be preferable.

2.364 Another considered that the word should be deleted, in order to avoid any contradiction with certain national legislations.

2.365 Yet another expert suggested that the word be replaced by "inhumane".

#### DRAFTING COMMITTEE

##### *Article 7. — Protection and care*

2.366 The formulation of article 7 takes into account the following proposals: CE/COM II/27, 75 and 82.

##### Paragraph 1 :

*All wounded and sick persons, whether non-combatants or combatants rendered hors de combat, and other persons who are or may be in serious need of medical attention such as maternity cases and new-born infants together with shipwrecked persons at sea, infirm persons and expectant mothers shall be the object of particular protection and respect.*

##### Paragraph 1 A :

*[The term "shipwrecked person" means any person who is in peril at sea as a result of the destruc-*

*tion, loss, or disablement of the vessel or aircraft in which he was travelling, and who is in need of humanitarian assistance and care, and who refrains from any hostile act.]*

##### Paragraph 2 :

*In all circumstances these persons shall be treated humanely and shall receive the medical care and attention necessitated by their condition with the least possible delay, and without any adverse distinction or discrimination founded on race, colour, caste, nationality, religion, political opinion, sex, birth, wealth or any other similar criteria.*

##### Paragraph 3 :

*All [unlawful] [inhumane] [unjustified] [wrongful] acts or omissions that endanger the health or the physical or mental well-being of the persons listed in paragraph 1 of this Article are prohibited.*

##### Paragraph 4 :

*[Accordingly it is prohibited to subject the persons listed in paragraph 1 of this Article to physical mutilation or to medical or scientific experiments of any kind, including the removal or transplant of organs, [and pharmacological or psychological coercive techniques] which are not justified by the medical, dental or hospital treatment of the person concerned and carried out in his interest. This prohibition applies even in cases where the protected person gives his assent.]*

*[Paragraphs 3 and 4 might be incorporated in a separate Article 7 A, to be inserted after Article 7.]*

#### Article 8

#### ICRC DRAFT

##### *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.

This article gave rise to no comments.

#### DRAFTING COMMITTEE

##### *Article 8. — Search*

2.367 The formulations of Article 8 take into account the following proposal: CE/COM II/80.

##### OPTION I :

*Maintain the text as drafted by the ICRC.*

##### OPTION II :

*Maintain the text as drafted by the ICRC as paragraph 1 and add a new paragraph 2 as follows :*

2. Unless information bureaux are established pursuant to Article 32 of the present Protocol, the Parties to the conflict shall communicate to each other or, when this is not possible, publish all details of wounded, sick and shipwrecked and dead of the adverse Party in their hands.

[Option II could be dropped if in Article 32 the establishment of information bureaux, upon the proposal of the ICRC, were to be made mandatory.]

## Article 9

### ICRC DRAFT

#### *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.

2.368 No expert questioned the validity of this article. One did, however, express the opinion that the provisions of paragraph 1 should apply to the whole population and that the adjective "civilian" should therefore be deleted.

2.369 One expert emphasized the fact that, according to Article 9 as at present drafted and as it applied in the context of non-international armed conflict, the obligations laid down in paragraph 1 were imposed not on States but on the civilian population. In this respect there was a difference between the executory provisions of draft Protocol I (Article 73) and Protocol II. Furthermore, in the field of international armed conflict there were provisions under which States were bound to ensure respect for such rules. He referred in this connection to Article 1 common to the four Conventions and to Articles 45 and 46 of Conventions I and II. In order to ensure that States would guarantee respect of the wounded and sick, by the civilian population the expert proposed an addition to Article 9 to the effect that "the Parties to the conflict shall, by legislative or other means, take all appropriate measures to ensure that the civilian population fulfils the obligations imposed on it by the present article", a proposal submitted at the Conference of Red Cross Expert held at Vienna and reproduced in the report on the work of that Conference.

2.370 Another expert, however, thought that Article 9, paragraph 1, placed an obligation on the civilian population which might be difficult to respect and which, in an extreme case, might be used as a pretext for reprisals in the event of its violation. He said that, in these conditions, it would be preferable to include this principle in the Preamble.

2.371 One expert, who agreed with the ICRC proposal as it appeared in the Commentary, submitted it

as a written proposal (CE/COM II/10); it was suggested that the wording be made imperative by expressing it thus: "The Parties to the conflict shall call on the civilian population to give shelter to... etc.". The author of document CE/COM II/10 also proposed, in the same document, that anyone who had tended the wounded, sick and shipwrecked could not be forced to divulge their identity or their whereabouts.

2.372 Finally, one expert proposed, in place of the existing wording of Article 9, the wording of paragraph 1 (first sentence) and paragraph 2 of Article 20 of Draft Protocol I (CE/COM II/75).

### DRAFTING COMMITTEE

#### *Article 9. — Role of the population*

2.373 The formulations of Article 9 take into account the following proposals: CE/COM II/10, 42 and 75.

#### *New paragraph*

[Insert a new paragraph before the existing paragraph 1:]

[The Parties to the conflict may call upon the civilian population to give shelter to and tend the wounded, sick, and shipwrecked; the civilian population shall likewise be permitted spontaneously to give shelter to and tend the wounded, sick and shipwrecked.]

#### *Paragraph 1:*

##### *OPTION I:*

*The [civilian] population shall respect the persons listed in Article 7 of the present Protocol even if they belong to the adverse Party, and shall refrain from committing acts of violence against them.*

##### *OPTION II:*

*Delete the paragraph and insert a corresponding new provision between the second and third paragraphs of the Preamble.*

#### *Paragraph 2:*

*No one shall be molested or convicted for having sheltered or tended wounded, sick and shipwrecked persons, even if they belong to the adverse Party [nor shall anyone be compelled to reveal the identity or location of such persons.]*

## Article 10

### ICRC DRAFT

#### *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.

2.374 An expert considered that the link between medical personnel and the distinctive emblem ought to be clearly established, as it had been in Protocol I as a result of the work of Commission I. He referred to a proposal to add two paragraphs to Article 10 (CE/COM II/64).

2.375 Another expert proposed replacing the words "granted all facilities", in Article 10, by the words "accorded every assistance" (CE/COM II/82).

#### DRAFTING COMMITTEE

##### *Article 10. — Medical and religious personnel*

2.376 The formulations of Articles 10 and 10 A take into account the following proposals: CE/COM II/64, 75 and 82.

##### Article 10

##### *OPTION I:*

*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 [accorded every assistance] necessary for the discharge of their functions and shall not be compelled to carry out tasks unrelated to their mission.*

##### *OPTION II:*

*Same text as in Option I, with the addition of two further paragraphs:*

*2. Medical personnel may be authorized by a Party to the conflict to wear the distinctive emblem of the red cross (red crescent, red lion and sun) on a white background.*

*3. A person authorized under paragraph 2 shall wear the emblem on the armband affixed to the left arm and shall carry an appropriate identity card indicating in what capacity he is entitled to wear the emblem.*

##### Article 10 A

*[1. In no circumstance shall any person be punished for carrying out medical activities compatible with professional ethics regardless of the person benefiting therefrom.*

*2. In no circumstance shall any person engaged on medical activities be compelled by any authority*

*to violate any provision of Article 3 common to the four Conventions or of the present Protocol.*

*3. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to professional rules designed for the benefit of persons listed in Article 7 of the present Protocol or to abstain from acts demanded by such rules.*

*4. Any person engaged in medical activities shall not be compelled to inform an adverse Party of the wounded, sick and shipwrecked under his care. An exception shall be made in the case of compulsory medical regulations for the notification of communicable diseases.]*

#### Article 11

#### ICRC DRAFT

##### *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.

2.377 It was proposed to insert, after the words "Fixed establishments", the words "including blood-transfusion centers", and also to add a paragraph 3, stating that, with the authorization of one of the Parties to the conflict, fixed establishments and mobile medical units could be marked by the distinctive emblem (CE/COM II/64).

#### DRAFTING COMMITTEE

##### *Article 11. — Medical establishments and transports*

2.378 The formulations of Article 11 takes into account the following proposals: CE/COM II/64, 75 and 80.

*1. Hospitals and other fixed medical establishments, medical and pharmaceutical stores of such establishments, mobile medical units, blood transfusion centres and other installations used for medical purposes, whether permanent or temporary, shall in no circumstance be the object of attack. They shall at all times be respected and protected by the Parties to a conflict.*

*2. Transports of the persons listed in paragraph 1 of Article 7 or of medical personnel or equipment shall be respected and protected in the same way. [However, temporary transports shall be respected and protected in the same way only while in the performance of their humanitarian mission.]*

[3. *With authorization from a Party to the conflict, fixed and mobile medical establishments and units they are used to commit outside their humanitarian mission acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, setting, wherever appropriate, a reasonable time limit and after such warning has remained unheeded.*]

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

[5. *The fact that members of [organized] armed forces are in such medical establishments and units for medical treatment shall not be deemed to be an act harmful to the enemy; nor shall the presence of small arms and ammunition taken from such combatants and not yet handed over to the proper service.*]

#### Article 12

#### ICRC DRAFT

##### *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.

2.379 It was proposed that, in conformity with Article 6, paragraph 2 (d), of draft Protocol II, the words "and children under fifteen" should be added to the list in Article 12. One expert questioned the relevance of this addition (CE/COM II/64).

#### DRAFTING COMMITTEE

##### *Article 12. — Evacuation*

2.380 The formulation of Article 12 takes into account the following proposals: CE/COM II/64 and 75.

*The Parties to the conflict shall endeavour to conclude local agreements for [allow the] removal from areas where hostilities occur of the persons referred to in Article 7 of the present Protocol.*

#### Article 13

#### ICRC DRAFT

##### *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.

2.381 One expert wished to remind the Commission of his remarks on the subject of the emblem to Commission I and at the first session of the Conference.

2.382 Another stated that the question of the distinctive emblem had been settled.

#### DRAFTING COMMITTEE

##### *Article 13. — The distinctive emblem*

2.383 The formulation of Article 13 takes into account the following proposal: CE/COM II/75.

*Maintain the text as drafted by the ICRC.*

#### CHAPTER X

#### Combatants

#### (DRAFT PROTOCOL II, CHAPTER V)

2.384 The discussion was opened by an ICRC expert who had taken part in the work of Commission III. He began by pointing out that Articles 18 to 24 of draft Protocol II were virtually identical with Articles 30 to 39 of draft Protocol I apart from Article 38. The ICRC was anxious to maintain the same kind of arrangements with respect to international and to non-international armed conflicts, the latter being understood as covering the following situations:

- regular army against guerrilla fighters;
- regular forces against other regular forces;
- guerrilla fighters against other guerrilla fighters;
- regular army conducting guerrilla warfare against guerrilla fighters.

2.385 Usually one of the Parties to such conflicts was equipped with conventional means and observed the conventional rules of warfare whereas the other, lacking equivalent technological facilities, found it necessary to make up for that weakness by greater mobility, whence the problem, for guerrilla fighters, first, of not making any sacrifice to the basic principles for the protection of civilians, and secondly, of not jeopardizing their means of combat. The difficulty was to know how far it was possible to go in making concessions to the forces in the weaker position. However, that problem was not the crucial one in the chapter under discussion, which set forth some basic principles. As was clear from paragraph 1 of Article 18, the main question was one of setting limits.

2.386 Articles 19 to 21 contributed to the protection of civilians by making it possible to distinguish between combatants and non-combatants. Articles 22 and 23, concerning the safeguard of an enemy *hors de combat*, embodied a fundamental principle of the Red Cross, about which there could be no discussion.

2.387 Finally, owing to a technical error, Article 39 of Draft Protocol I had not been reproduced in Draft Protocol II as had been requested by the government experts at the first session of the Conference; it would therefore be necessary to insert it in that chapter.

2.388 The ICRC expert then summarized the work of Commission III. In connection with the most important article, Article 30 of Draft Protocol I (Article 18 of Draft Protocol II), the discussion had centred mainly on paragraph 3. A number of experts had asked that the paragraph should be placed elsewhere, either in Article 1, or in the Preamble or, again, in Part V. With regard to the text of paragraph 3, among those experts who had suggested that it should be amended, several different lines of thought had emerged:

- the outright prohibition of the use of nuclear weapons;
- no explicit reference to nuclear weapons but a prohibition of the use of weapons that could not be controlled and that constituted a danger to environment;
- the prohibition of new, so-called neo-conventional means of combat, and an invitation to the ICRC to convene a meeting of medical and military experts with a view to drawing up a technical inventory in that sphere.

2.389 With regard to paragraph 2 of the article, a proposal had been made that the expression “particularly cruel methods” should be deleted.

2.390 With respect to paragraph 1, the re-introduction of the Hague Convention formula, “The right of belligerents to adopt means of injuring the enemy is not unlimited”, had been contemplated.

2.391 A more concise form of wording had been proposed for Article 31 of Draft Protocol I, eliminating the examples and providing for the prohibition of all abuses of a situation protected by humanitarian law.

2.392 With regard to Article 32 of Draft Protocol I (Article 20 of Draft Protocol II) the classic Hague Convention wording had been disputed, experts asserting that it had permitted many abuses. They had accordingly proposed that the article should provide for the prohibition of the use of the recognized signs for purposes other than those specified in the international conventions that had created them. There had also been proposals for the inclusion of an express reference to the United Nations.

2.393 With respect to Article 33 of Draft Protocol I (Article 21 of Draft Protocol II), it had been decided to delete the word “improper”, thus leaving the text as an outright prohibition of the use of the insignia and uniforms of the enemy whenever such use was designed to facilitate combat operations.

2.394 Articles 34 and 35 of Draft Protocol I (Articles 22 and 23 of Draft Protocol II) had been amalgamated in a text that prohibited the killing or wounding of an enemy *hors de combat* and specifying the conditions in which that prohibition should apply. One expert, however, had proposed that the two separate articles should be maintained, but in the reverse order from the ICRC draft, so that a definition of persons placed *hors de combat* would come first, to be followed by a description of the consequences thereof.

2.395 Article 36 of Draft Protocol I (Article 24 of Draft Protocol II) had given rise to a lengthy discussion, due to the difficulty of determining the conditions in which the rule would take effect. One expert had suggested including a provision that the occupants of an aircraft in distress should use orange parachutes to indicate their intention to surrender.

2.396 After these remarks by the ICRC expert, a member of the Commission, supported by several others, proposed that the discussion be divided into two parts. He suggested that it would be logical to consider, in the first place, whether the relevant provisions from Part III of Draft Protocol I could be embodied in Chapter V, in which case a detailed discussion would be unnecessary; if, on the other hand, this procedure could not be adopted, then the second part of the discussion would be concerned with the various provisions of Chapter V.

2.397 One expert, while proposing to take into account the work done by Commission III, stressed the need to consider Chapter V as constituting a distinct whole, including Article 39 of Draft Protocol I. He reminded the Commission that Draft Protocol II was not concerned with the same situations as Draft Protocol I, and stressed the fact that, in studying Chapter V, it would be necessary to take into account the special situations arising in cases of non-international armed conflict.

2.398 Several experts recognized that it would be wise to give careful attention to the findings of Commission III, in view of the close connection existing between the corresponding articles in the two Protocols.

2.399 In the opinion of many of the experts, it would be desirable that the provisions of Chapter V of Draft Protocol II and those of Part III of Draft Protocol I be as nearly as possible identical, which would facilitate the application of the texts by avoiding problems of interpretation. Supporting this idea, one expert stated his conviction that what was needed was to establish a framework of basic human rights

which were the same in both international and non-international armed conflicts, so that combatants could act in both situations in accordance with the same moral principles; the difference in the nature of the conflicts should not affect the nature of fundamental human rights. This opinion was shared by another expert who stressed the fact that, from the technical point of view, military operations were the same in international and in non-international armed conflicts; consequently, the rules as to means and methods of combat should be the same for the two types of conflict.

## Article 18

### ICRC DRAFT

#### *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.

2.400 It was pointed out that this article, and more particularly its third paragraph which was the same as Article 30 in Part III of Draft Protocol I, had been discussed at great length by Commission III.

2.401 Attention was called by an expert to the amendment which had been submitted jointly by seven members of Commission III (CE/COM III/C 33) proposing that the title be changed to "Means and methods of combat" and that Article 30 contain a specific prohibition of the use of certain weapons and methods of warfare in international armed conflicts. He considered that it was of fundamental interest and that it should be made applicable to non-international armed conflicts; he therefore asked that the amendment, which had not met with general approval in Commission III, be re-examined by Commission II during its discussion on Article 18. One of the co-authors of the proposal urged, however, that the word "means" should be deleted from paragraph 2 of the ICRC draft of Article 18.

2.402 Five other experts submitted an amendment (CE/COM II/72) which would give added force to the prohibitions foreseen in paragraph 2 of Article 18. Without going so far as to forbid the weapons named, the effect of the amendment would be to prohibit, on the one hand, the use of "means and methods which affect military objectives and protected persons or civilian objects indiscriminately"

and, on the other hand, the use of "means and methods which destroy the natural human environmental conditions".

2.403 Proposals made by other experts included either retaining Article 18 unchanged or deleting paragraph 3, which would then be replaced by a new article stipulating that: "In cases not included in the present Protocol or other applicable convention, civilians and combatants remain under the protection and rule of the principles of international law, as they result from the principles of humanity and the dictates of the public conscience" (CE/COM II/63).

2.404 At this point in the discussion one expert, on the principle that "half a loaf is better than no bread", gave his opinion that the ICRC draft constituted an acceptable solution. He agreed that it would perhaps be good to insist on the prohibition of weapons of mass destruction, but he did not feel that he could endorse the proposals contained in CE/COM III/C 33. It should be noted that the use of weapons of mass destruction was already contrary to the international law in force, and in particular to the 1925 Geneva Protocol. These instruments establishing general principles should be supported, but it was not possible to enumerate all these weapons as such an enumeration would inevitably lead to irreconcilable divergences of views; it would therefore be wiser to await the results of the work of the Disarmament Commission. Further, the expert could not agree either with amendment CE/COM II/63, which could have the effect of considerably complicating the application of the provisions of Chapter V; the task of the Commission was not to raise more and more obstacles to the implementation of Chapter V and of Protocol II as a whole. He approved however of document CE/COM II/72 which, he thought, taken in conjunction with the ICRC text, offered a satisfactory solution.

2.405 A certain number of modifications to Article 18 were proposed. One of these was that the word "combatants" be replaced by Parties to the conflict, in order to avoid suggesting that it was the soldiers in the field who chose the means of combat. With regard to paragraph 2, the same speaker proposed the deletion of the words "particularly cruel methods and means" (CE/COM II/77).

2.406 Another expert proposed that paragraph 3 be inserted elsewhere in the Protocol, for instance in Article 1, the wording of the Martens clause, as it appeared in the Hague Convention No IV of 1907, remaining unchanged (CE/COM II/74).

2.407 In the opinion of yet another expert, paragraph 3 of the ICRC draft was out of date and not sufficiently strongly worded; it should be strengthened by adding a specific reference to the principles of international law as they resulted from the dictates of the public conscience. He therefore supported the amendment contained in CE/COM II/63.

## DRAFTING COMMITTEE

### Article 18. — Means of combat

2.408 The formulations of Article 18 take into account the following proposals: CE/COM II/63, 72, 74, 77 and CE/COM III/C 33.

Paragraph 1 (Means of injuring the enemy):

#### OPTION I:

*The right of the Parties to the conflict to adopt means of injuring the enemy is not unlimited.*

#### OPTION II:

*The choice of means and methods of combat by the Parties to the conflict is not unlimited.*

Paragraph 2 (Weapons causing unnecessary suffering):

#### OPTION I:

*It is forbidden to use weapons, projectiles, substances, or methods calculated to cause unnecessary suffering.*

#### OPTION II:

*It is forbidden to use means and methods of combat which cause unnecessary suffering or other particularly cruel means and methods.*

Possible additional paragraphs (which might be taken conjunctively or disjunctively):

3. *It is forbidden to use means [weapons] and methods of warfare which [are likely to] affect military objectives [combatants] and protected persons or civilian objects [civilians] indiscriminately.*

4. *It is forbidden to use means and methods of warfare which destroy natural human environmental conditions.*

5. *Delayed-action weapons, the dangerous and pernicious effects of which are likely to be indiscriminate and to cause suffering to the civilian population, are prohibited.*

6. *Incendiary weapons, containing napalm or phosphorus, are prohibited.*

7. *Bombs which for their effect depend upon fragmentation into great numbers of small-calibre pieces or the release of great numbers of small-calibre pellets are prohibited.*

8. *The constant development of new weapons and methods of warfare places an obligation upon States to determine individually — in cases in which they do not conclude international agreements — whether the use of particular new weapons or methods of warfare is compatible with the principles contained in this Article.*

9. *The prohibitions contained in this Article are without prejudice to any prohibitions of weapons and methods of warfare which are found in other Articles of the present Protocol or in other instruments.*

## Martens clause:

*[Until a more complete code of the laws of war has been established] in cases not included in the present Protocol [or other applicable conventions], civilians [the inhabitants] [the population] and combatants [the belligerents] remain under the protection and rule of the principles of international law [the laws of nations] [, as they result from the usages established amongst civilized peoples] from the laws of humanity and from the dictates of the public conscience.*

*[The proposal was made that the Martens clause, in its original form, should not appear here but should be made the subject of a separate article at the beginning of the Protocol].*

2.409 The Chairman of the Drafting Committee stated that it had been necessary to separate the various elements of this article, the basic principle being enunciated in paragraph 1.

2.410 One expert said he was in favour of the Martens clause, provided that the reference to the domestic rights of States were deleted, as otherwise it would deprive the clause of any substance.

## Article 19

### ICRC DRAFT

#### 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.

2.411 One expert pointed out that the distinction between ruses and perfidy given in the Hague Regulations of 1907 was one of those that had least well withstood the test of war. He felt that if it were to be retained, a list of perfidious, and therefore unlawful, means ought at least to be drawn up.

2.412 Another expert proposed, without comment, adopting amendment CE/COM III/C 55, submitted to Commission III, for this article.

2.413 An amendment to this article was also proposed without comment (CE/COM II/63).

## DRAFTING COMMITTEE

#### Article 19. — Prohibition of perfidy

2.414 The formulations of Article 19 take into account the following proposals: CE/COM II/63 and CE/COM III/C 55.

Paragraph 1:

All formulations submitted employ the first sentence: It is forbidden to kill or injure the enemy by resort to perfidy.

The options relate to the following sentence(s) :

**OPTION I :**

*Maintain the existing text of the second sentence, as drafted by the ICRC.*

**OPTION II :**

*Acts betraying an enemy's confidence, such as the abuse of an international convention, truce or humanitarian negotiation, the misuse of internationally recognized protective signs, the feigning of surrender, the use in combat of the enemy's distinctive emblems, and the creation, prior to attack, of an impression with the enemy of being a non-combatant, are deemed to constitute perfidy.*

**OPTION III :**

*Acts designed to mislead the adversary into the belief that protection under international law will be granted constitute perfidy. Such acts, inter alia, include the following examples when carried out with the intention of committing or resuming hostilities :*

- a. the feigning of a situation of distress, notably through the misuse of internationally recognized protection signs ;*
- b. the feigning of cease-fire, of a humanitarian negotiation or of surrender ;*
- c. the disguising of combatants as civilians.*

Paragraph 2 :

**OPTION I :**

*Maintain the existing text as drafted by the ICRC.*

**OPTION II :**

*Maintain the existing text but add the following :*

*Ruses of war are those acts, such as the use of camouflage, traps, mock operations, and misinformation, which, while infringing no recognized rule, are intended to mislead the adversary or to induce him to act recklessly.*

Paragraph 3 [possible addition] :

*[Attacks from ambush, even if carried out in civilian clothing, are not prohibited].*

2.415 The Chairman of the Drafting Committee stated that the experts had agreed on the necessity of prohibiting the use of perfidy, but that the actual definition of perfidy had given rise to controversy.

2.416 None of the experts took a stand on any of the options proposed.

**Article 20**

**ICRC DRAFT**

**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.

2.417 Regarding the expression "other protective signs specified in international conventions", one expert felt it was doubtful whether States could be asked to commit themselves to a vague general undertaking to respect any existing or future protective signs.

2.418 The representative of the Secretary-General of the United Nations said it would be desirable to include in this article a formula that would cover the use of the United Nations flag, bearing in mind that the United Nations could offer technical assistance or relief not only in international, but also in non-international conflicts. Article 20 of this draft Protocol merely reproduced Article 32 of Draft Protocol I. Three experts submitted a proposal for this last article (CE/COM III/C 38) to include a formula that would cover the use of the United Nations flag. This proposal would also hold good for Article 20 of Draft Protocol II since, as was generally apparent in the discussions, the similar wording adopted by the ICRC for provisions concerning combatants in both categories of armed conflicts should be retained.

**DRAFTING COMMITTEE**

**Article 20. — Recognized signs**

2.419 The formulations of Article 20 take into account the following proposal : CE/COM II/63.

**OPTION I :**

*[Maintain the existing text as drafted by the ICRC.]*

**OPTION II :**

*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).*

2.420 None of the experts stated an opinion on draft Article 20 as rewritten by the Drafting Committee.

**Article 21**

**ICRC DRAFT**

**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.

2.421 One expert submitted, without comment, an amendment deleting the second sentence of this article (CE/COM II/28).

2.422 Another expert, also without comment, submitted an amendment to this article (CE/COM II/63).

## DRAFTING COMMITTEE

### *Article 21. — Emblems of nationality*

2.423 The formulations of Article 21 take into account the following proposals: CE/COM II/28 and 63.

#### OPTION I:

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

#### OPTION II:

*It is forbidden to make use of an adversary's flags, distinctive emblems, military insignia or uniforms with the intention of directly facilitating acts of combat.*

2.424 None of the experts spoke on the subject of Article 21 as redrafted by the Drafting Committee.

## Articles 22 and 23

### ICRC DRAFT

#### *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.

### ICRC DRAFT

#### *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.

2.425 One of the experts said it would be preferable to reverse the order of these articles so as to lay down the conditions determining the state of *hors de combat* before the safeguard of the enemy *hors de combat*; this formed the content of his proposal, already mentioned, CE/COM II/77.

2.426 One expert thought that a connection should be established between Articles 23 and 25; these

two articles affected the status of persons deprived of freedom.

2.427 An amendment was submitted to merge Articles 22 and 23 into a single article (CE/COM II/63).

2.428 An expert supported this amendment; he added, however, that should the ICRC text be retained, in Article 3, paragraph 1, "combatant" should be replaced by "person".

## DRAFTING COMMITTEE

### *Article 22. — Safeguard of an enemy hors de combat*

2.429 The formulations of Article 22 take into account the following proposals: CE/COM II/63 and 77.

#### OPTION I:

*Maintain the existing text as drafted by the ICRC.*

#### OPTION II:

*Delete the existing Article and substitute the following therefor:*

#### *Article 22. — Conditions to qualify as hors de combat*

*The following shall be considered to be hors de combat:*

- (a) *a wounded enemy who ceases to fight,*
- (b) *an enemy captured by force or by surprise during the fighting,*
- (c) *an enemy who has surrendered.*

2.430 None of the experts gave an opinion on Article 22 as reworded by the Drafting Committee.

## DRAFTING COMMITTEE

### *Article 23. — Conditions of capture and surrender*

2.431 The formulations of Article 23 take into account the following proposals: CE/COM II/63 and 77.

#### OPTION I:

*1. Even before the enemy has become hors de combat it is forbidden to declare that enemy survivors will be killed or that no prisoners will be taken, to so threaten the enemy and to conduct the fight accordingly.*

*2. It is forbidden in all cases to kill, wound or mistreat an enemy who is hors de combat.*

*3. An enemy who is hors de combat shall be treated humanely; as far as possible, care should be provided for those in need of it.*

*4. The authorities of the Party into whose hands the enemies have fallen shall provide for them even if they decide to release them.*

#### OPTION II:

*Combine the existing Articles 22 and 23 as one article, to read as follows:*

1. *It is forbidden to kill or to wound an adversary who is unconscious or who, having laid down his arms or no longer having means of defence,*

(a) *has surrendered or has clearly expressed an intention to surrender and to abstain from any hostile act, and*

(b) *is not attempting to escape.*

2. *It is forbidden to order that there shall be no survivors, or to threaten an adversary therewith, or to conduct the hostilities on such basis.*

2.432 No opinions were expressed by the experts on Article 23 as proposed by the Drafting Committee.

#### Article 24

##### ICRC DRAFT

##### *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.

2.433 One expert submitted, without comment, amendment CE/COM II/28.

2.434 A proposal was made to adopt amendment CE/COM III/C 35 submitted to Commission III, worded as follows: "The use of misleading signals and messages by aircraft occupants is forbidden".

2.435 One expert proposed deleting this article which, in his opinion, concerned only international armed conflicts. For the case where this suggestion was not acceptable, he proposed an amendment, without comment (CE/COM II/71).

2.436 Another expert submitted an amendment on this subject, but without comment (CE/COM II/34).

##### DRAFTING COMMITTEE

##### *Article 24. — Aircraft occupants*

2.437 The formulations of Article 24 take into account the following proposals: CE/COM II/28, 34, 63, 71 and 73.

The article deals basically with two matters: A. the persons protected, and B. the conditions of their not being attacked.

##### *A. Persons protected:*

##### *OPTION I:*

*The occupants of aircraft in distress who parachute to save their lives...*

##### *OPTION II:*

*The occupants of aircraft in distress who parachute to save their lives or who are compelled to make a forced landing...*

##### *OPTION III:*

*The occupants of aircraft in distress who parachute in the territory of the adversary...*

##### *OPTION IV:*

*None of the above, i.e. delete the article completely.*

##### *B. Conditions of their not being attacked:*

##### *OPTION I:*

*... unless their attitude is hostile.*

##### *OPTION II:*

*... unless they make gestures or act in such a way as to denote hostility, or try to avoid capture.*

##### *OPTION III:*

*... provided that their having been placed hors de combat is evident.*

##### *OPTION IV:*

*None of the above, i.e., delete the article completely.*

Possible additional paragraphs:

1. *[Addition to existing text, not in the form of a separate article.] They shall, if they have landed in an area controlled by the adversary and are not in a hostile attitude, be afforded a reasonable opportunity to surrender.*

2. *The misleading use of signals and messages of distress by aircraft occupants is forbidden.*

None of the experts expressed an opinion on Article 24 as redrafted.

#### Article 39

*Inclusion of Article 39 of Draft Protocol I in Chapter V of Draft Protocol II*

##### ICRC DRAFT

##### *Article 39. — Organization and discipline*

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

2.438 Some experts approved the ICRC proposal to include this article in Protocol II.

2.439 Doubt was expressed, however, as to the possibility of including the article as it stood, because it would raise serious difficulties for the party opposed to the legal government; in any case, if the members were in favour, then the article should appear in



Chapter IX under the section concerning executory provisions. Several experts shared this view.

2.440 Another expert said he could only give an opinion on the ICRC's proposal to include Article 39 in Chapter V after having seen the text adopted on the definition of non-international armed conflicts. This view was also shared by several other experts.

#### *Guerrilla fighters*

2.441 The question of guerrilla fighters was also raised in the context of Chapter V.

2.442 One expert felt that provisions relating to guerrilla fighters might have been included in this chapter, since this problem arose mainly in non-international armed conflicts.

2.443 It was pointed out that, just by transferring Article 38 as it was from Draft Protocol I to II, even the slightest disturbances would be covered, which would be unacceptable; in his opinion, therefore, the texts of Commission III should not be reproduced without having been examined. He pointed out, too, that amendment CE/COM II/18 concerning Article 1 had the advantage of defining combatants and said it would be impossible to discuss Chapter V as long as agreement had not been reached on the definition of combatants.

2.444 It was proposed, without comment, to include amendment CE/COM III/C 15, submitted to Commission III, in Chapter V.

2.445 One expert noted in this respect that anti-colonial armed struggles or struggles for national liberation were international armed conflicts.

2.446 Another expert supported this point of view, stressing moreover that it was quite out of the question, in his opinion, to transfer the provisions on guerrilla fighters contained in Protocol I to Protocol II.

2.447 It was said that, as a link with Article 38 of Protocol I, it would be useful to have a proposal, similar to amendment CE/COM II/25, proposed for Article 25 of Protocol II, since this amendment took into account the special character of non-international armed conflicts.

2.448 Another expert said that in non-international armed conflicts certain methods such as torture and the taking of hostages were frequently used; he concluded that, in this type of conflict, the problem of methods of combat was much more important than that of arms. He added that a guarantee of reciprocity should be laid down in Chapter V or in Article 25, so as to limit the action of insurgents, while Articles 4, 5 and 6 of Chapter II should be reproduced either in a separate article of Chapter V to be entitled "Methods used in guerrilla warfare", or in Article 25.

## CHAPTER XI

### Civilian population

#### (DRAFT PROTOCOL II, CHAPTER IV)

2.449 The ICRC expert introduced the subject by comparing Draft Protocols I and II, submitted by the ICRC, and by summing up the work done by Commission III. The general discussions in that Commission had shown that a great many experts favoured a separation of the two Protocols on the subject of the civilian population. Chapter IV of Protocol II corresponded to Part IV of Protocol I. Its purpose was to strengthen the protection of civilians against the dangers resulting from hostilities. The ICRC expert further made it clear that the Red Cross would gladly welcome any idea which might further increase the protection of civilians in the two types of conflict, and pointed out that several experts in Commission III had expressed the hope that very broad rules be made applicable to both types of conflict as civilians were exposed as much, if not more, in non-international armed conflict than in the other, and that the same instructions would be given to the armed forces in both cases. The ICRC expert also referred to the proposals made by the International Union for Child Welfare that many experts had endorsed in amendments to the original draft.

2.450 The ICRC expert went on to show the relationship between Article 14 of Draft Protocol II and Article 41 of Draft Protocol I. All the experts who had discussed that article in Commission III had been in favour of a negative definition but had met with no little difficulty in deciding on the references, as they feared that a definition such as that given in Article 41 might exclude an intermediate class of persons whose status would be ambiguous. Some of the experts in Commission III had then wondered whether the civilian population constituted an entity or whether reference should be made to civilian persons. The ICRC had considered that both problems should be tackled. Article 41 of Draft Protocol I envisaged extending Part II of the Fourth Convention to cover the population as an entity in the same way as individual civilians, this being the same attitude as is expressed in Article 14, paragraphs 1 and 2. The only noticeable difference between Article 14 and Article 41 was that Article 41 contained a clause giving civilians the benefit of the doubt, an idea that met with a mixed reception in Commission III.

2.451 Referring to Article 15, the ICRC expert showed its close relationship with Articles 45 and 46 of Draft Protocol I; it repeated all the principles of the two latter articles in order to cover the prohibition of direct acts, whether deliberate or fraudulent, perpetrated against civilians individually or in mass. However, while not wishing to give ground on principles, they wished to show that there were civilians

within military target areas who would run the risk of any attack launched on that target area. Most of the experts in Commission III thought a provision of that type unsuitable. In addition, when discussing Article 17 they had wanted to limit, as far as possible, the danger, in the event of attack, to civilians in the vicinity of a military target area.

2.452 Furthermore, Article 46 of Protocol I forbade the use of civilians as a shield for military personnel, that idea having been taken from Article 15, paragraph 4, of Protocol II.

2.453 Article 16 of Draft Protocol II corresponded to Articles 47 and 48 of Draft Protocol I. The experts in Commission III considered it necessary to define objects indispensable to the survival of the civilian population, and to add a list of such objects, by way of example. Such objects might be neither attacked nor used to cover attacks, nor destroyed, according to proposals I and II which constituted draft Article 16. Among the objects indispensable to civilians, many of the experts in Commission III felt it necessary to mention works containing dangerous forces, water reservoirs and water desalinating plants.

2.454 The ICRC expert showed that Article 17 repeated the ideas expressed in Article 49 of Draft Protocol I, the purpose of which was to cover the situation of civilians in the vicinity of military target areas. In Protocol I, two situations were envisaged: that relating to the precautions to be taken, by a person launching an attack, at two points in time — when deciding on the attack and when launching it (Articles 49 and 50) — and that relating to the precautions to be taken by the Party being attacked (Article 51). Article 17 approached the matter as follows: in paragraph (a) an attempt was made to lay down an absolute rule requiring those launching an attack to ensure that the targets were of a military nature and stipulating “if this precaution cannot be taken, they shall *refrain* from launching the attack”. Whereas, in its 1956 Draft Rules, the ICRC had asked for an *interruption* of the attack, the article under discussion required cancellation of the decision to attack; it made no provision for an attack, once started, to be called off. Furthermore, Article 17 (b) was reminiscent of the Hague Regulations on warning (which many writers claimed had fallen into disuse except in a few specific cases embodied in the Conventions and in other international instruments). Furthermore, its scope was attenuated by the words “whenever circumstances permit”. The ICRC expert concluded her introductory statement by mentioning the proposals made by Commission III both to tone down paragraph (a) and to reinforce paragraph (b) of Article 49.

2.455 Aware of the work done by Commission III on Part IV of Draft Protocol I, and generally agreeing on the need to ensure that civilians were pro-

tected on the basis of the ideas prepared by the ICRC, the experts then began the study of Chapter IV of Draft Protocol II.

2.456 The possibility of drawing on Protocol I and on the work of Commission III, for insertion in Protocol II, was considered.

2.457 One expert, recalling his previous statements, stressed the claim of civilians to the same protection regardless of the legal status of the conflict. He went on to say that the rules in Chapter IV ought to be applied on battlefields and should therefore be worded in such a way that the regular soldier could abide by them. To have two different sets of rules, applicable to different types of conflict, would run counter to the result sought; their smooth application would be hindered.

2.458 Other experts nevertheless considered that the provisions of Draft Protocol II should not necessarily be cast in the same language as the corresponding provisions of Draft Protocol I, as the situation in non-international armed conflicts was infinitely more complicated and confused.

2.459 To illustrate that submission, some experts stressed that internal armed conflicts were particularly intense, involving both combatants and non-combatants, both full- and part-time, to such a degree that it was extremely difficult to distinguish civilians not taking part in hostilities from those who were taking part, the more so as the techniques of some combatants involved making the distinction between combatants and civilians as vague as possible.

2.460 One expert wished that an effort had been made to differentiate as clearly as possible between civilians and combatants. Another referred, in that connection, to a proposal made elsewhere that could be reproduced in the article under discussion.

2.461 Replying to the idea that the protection afforded by the two Protocols should be identical, the ICRC pointed out that the subject covered by Part IV of Draft Protocol I was very vast, comprising some thirty articles, and that, if the ideas were transposed, it would be extremely difficult to set an order of priorities. Some proposals had already been discussed in Commission III under the heading of international armed conflict and had met with a mixed reception.

2.462 One expert, while agreeing with the principle of separate proposals for the two Protocols and with the basic approach of the ICRC, had some doubts as to the suitability of having two special chapters in Protocol II, namely, Chapter II, of which Articles 5 and 6 concerned civilians, and Chapter IV. He wondered whether the two chapters should not be combined.

## Article 14

### ICRC DRAFT

#### *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.

2.463 The very principle of defining civilian population was discussed.

2.464 A number of experts, supporting proposal CE/COM II/43, felt that no attempt should be made at such a definition and asked that Article 14 be deleted as such a definition would have two disadvantages:

(1) the risk of doing ineffectively a pointless task in default of any clarification as to which authority would be competent to assess the degree to which the activities of the persons in question enabled them to qualify or not, under the definition decided on;

(2) the risk of restricting the application of the principle that the protection of all persons was guaranteed — that of combatants by the Third Convention and of civilians by the Fourth — and thereby creating a void in which some persons were protected neither by one of the Conventions nor by the definition.

2.465 Other experts approved the idea of a definition. One of them considered that a broad definition of the civilian population, as given by the ICRC, was practical and applicable but that, if the specific category of civilians were to be examined, they would have to be fully defined in accordance with the Conventions. To that end, he compared Article 4 of the Fourth Convention, which defined what was to be understood by civilians, and Article 4 of the Third Convention, paragraphs 4 and 5 in particular, which referred to civilians having close links with the armed forces. The ICRC expert objected to this view on the grounds that the definition of civilians given in Article 4 of the Fourth Convention was not adapted to the problem before the Commission, but rather related to the nationality of a person or of classes of persons in the power of the adverse Party in the event of occupation.

2.466 A number of experts supported the definitions proposed by the ICRC in Article 14, paragraphs 1

and 2, and one of them argued that if the words “*a direct part*” were deleted, the civilian population would be endangered in view of the difficulty of assessing indirect participation.

2.467 One expert (CE/COM II/65) suggested that the three paragraphs of Article 14 be deleted and that the definition of civilian population be replaced by a definition of civilian, which struck him as being much simpler.

2.468 This proposal received support from a few experts, one of whom stressed that it eliminated references to “armed forces”, to “does not take a direct part in hostilities”, the assessment of which was difficult, especially in total war. One expert, however, thought this proposal a dangerous one.

2.469 It was suggested that the word “direct” in paragraph 1 should be replaced by the phrase “taking an active part”. The alternative Proposals I and II for paragraph 3 of Article 14 were also commented on, with preference for Proposal I; though some experts considered that the term “individual” should be deleted.

2.470 One view was that these two proposals were unnecessary, since each of them encouraged the intermingling of combatants and civilians.

2.471 One expert wondered whether it would not be desirable to add to Article 14 a fourth paragraph introducing the “doubt” clause contained in Article 41, paragraph 4, of Draft Protocol I or in paragraph 5 of the proposal CE/COM III/PC 78.

### DRAFTING COMMITTEE

#### *Article 14. — Definition of the civilian population*

2.472 The formulations of Article 14 take into account the following proposals: CE/COM II/43, 44, 65, 76 and 81.

#### *OPTION I:*

1. *Any person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities [takes no active part in hostilities] is considered to be a civilian.*

2. *[Maintain the text as drafted by the ICRC].*

3. *Proposals I and II [Maintain the texts as drafted by the ICRC].*

4. *In case of doubt concerning their characterization as civilians, the persons referred to in paragraph 1 shall be presumed to belong to the civilian population].*

#### *OPTION II:*

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

2. *A person shall not be considered to have taken a direct part in hostilities and thereby to have lost his quality as a civilian merely by reason of his having been required to provide food, shelter, or services to the armed forces.*

3 *Proposals I and II [Maintain the texts as drafted by the ICRC].*

**OPTION III :**

*Delete the article as written and substitute the following therefor ;*

*Any person who is not a member of military forces engaged in the hostilities is a civilian.*

**OPTION IV :**

*Delete the entire article.*

2.473 The Chairman of the Drafting Committee stressed that, according to Option II, the fact of having been required to provide food, shelter or services to the armed forces did not entail the loss of a person's quality as a civilian ; Option III gave a definition of a civilian, and Option IV proposed deletion of the article.

2.474 One expert supported Option I, while proposing that paragraph 2 of Option II should be added, in paragraph 1, by way of explanation.

**Article 15**

**ICRC DRAFT**

*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.

2.475 Paragraph I, under which "the civilian population as such, as well as individual civilians, shall never be made the object of attack" was the subject of an amendment (CE/COM II/65), submitted with the intention of avoiding the permanent loss of protection for civilians who took part sporadically in hostilities, as often happened in armed conflict of a non-international character. Under the terms of amendment CE/COM II/65, civilians would not lose

their right to immunity in the event of an attack unless they took part in hostilities.

2.476 One suggestion was the addition, after the final word "attack", in paragraph 1 of Article 15, of the words "by the two Parties to the conflict" (CE/COM II/43).

2.477 Paragraph 2 of the same article, with the following wording : "In particular, terrorization attacks shall be prohibited", was the subject of an amendment proposing its deletion (CE/COM II/11). The author of the amendment thought that the paragraph as it stood was likely to weaken the force of the general rule contained in the first paragraph, without prejudice to the prohibition of terrorism already contained in the provisions of Article 5, paragraph 1. A few experts were in agreement with this view, while another stated that he could not agree to it.

2.48 Objection was made in CE/COM II/43 to the wording "terrorization attacks" used in this article. The following wording was considered preferable : "... attacks with the sole object of spreading terror". Some experts were in agreement ; another, in reply, thought that it would be better to say too much rather than too little, and declared that he supported the text submitted by the ICRC.

2.479 Concerning article 15, paragraph 3, forbidding indiscriminate attacks on civilians and military objectives alike, several experts held the view that the sentence reading "Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective" should be deleted, since, according to some of them, this proposal could be interpreted as a restriction of the protection, while others thought it served no useful purpose. A written proposal had been drafted to that effect (CE/COM II/32).

2.480 A slightly different suggestion was that the second sentence of paragraph 3 should be replaced by the following : "In the event of an attack against military objectives which was likely to harm the civilian population, the Party launching the attack shall take all necessary precautions to spare the civilian population as much as possible" (CE/COM II/84).

2.481 Finally, the reference to military objectives in Article 15, paragraphs 3 and 4, and in Article 17, led some experts to raise the question of the definition of these *military objectives*. One of them, at this point, mentioned the definition which he had submitted to Commission III, the tenor of which he communicated to the members of Commission II through proposal CE/COM II/76. Another expert referred to the very detailed proposal on this subject which five experts had submitted to Commission III (CE/COM III/PC 64). Other proposals had been submitted to Commission III to the same effect ; although they were intended to apply to international

armed conflict, they could equally be applied to non-international armed conflict.

2.482 Looking at the overall problem dealt with in Articles 15 and 16, one expert thought that these two articles should be merged, and that the following words should be added to Article 15, paragraph 1: "The civilian population as such and objects indispensable to its survival shall never be made the object of attack".

2.483 Another expert thought that Article 15, paragraph 3, and Article 17 should be re-examined by military experts, called together, if necessary, by the ICRC.

#### DRAFTING COMMITTEE

*Article 15. — Respect for and safeguarding of the civilian population*

2.484 The formulations of Article 15 take into account the following proposals: CE/COM II/11, 32, 43, 65, 76, 81 and 84.

*Paragraph 1:*

**OPTION I:**

*Maintain the existing text as drafted by the ICRC.*

**OPTION II:**

*Civilians shall not be made the object of attack. However, a civilian who takes part in the hostilities loses his right of immunity from attack.*

**OPTION III:**

*Military actions shall be carried out with a constant concern to spare the civilian population, bearing in mind the nature and power of the weapons used.*

**OPTION IV:**

*The civilian population and objects necessary to their survival shall not be the object of attack.*

*Paragraph 2:*

**OPTION I:**

*Maintain the existing text as drafted by the ICRC.*

**OPTION II:**

*In particular, attacks intended [solely] to terrorize the civilian population shall be prohibited.*

**OPTION III:**

*Delete the paragraph as written.*

*Paragraph 3:*

**OPTION I:**

*Attacks which [, by their nature,] are launched against civilians and military objectives indiscriminately are prohibited. [Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.]*

**OPTION II:**

*In the case of attacks against military objectives carried out in such a way as to be liable to harm the civilian population, the Party which launches the attack shall, to the best of its capacity, take all necessary precautions to spare the civilian population.*

**OPTION III:**

*Delete the paragraph as written.*

*Paragraph 4:*

**OPTION I:**

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

**OPTION II:**

*Delete the paragraph as written.*

2.485 The Chairman of the Drafting Committee pointed out that the matter under discussion was a series of principles. The experts had wished to give exact wording to these general obligations.

2.486 None of the experts expressed an opinion on the options proposed.

#### Article 16

#### ICRC DRAFT

*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.

2.487 This article contained two alternative proposals for the wording of paragraph 2; a number of experts expressed their preference for Proposal II, a formal motion to that effect having been submitted in CE/COM II/44.

2.488 The preference for Proposal II had been stated because of a phrase under letter (b) of Proposal I, namely: "except in cases of unavoidable military necessity and only for such time as that necessity remains". This was regarded by some experts as an unjustified restriction or as providing the possibility of subjective appraisal.

2.489 An amendment already mentioned (CE/COM II/32), whose aim was precisely to eliminate this restriction following the words "destroying them", enabled some of the experts to agree to Proposal I, if thus modified.

2.490 It was pointed out by one expert that the discrimination referred to in Article 16 with regard to objects was very difficult to practise in specific cases, since certain indispensable objects might serve military as well as civilian purposes. He considered it would be more realistic to replace Article 16 by a simple prohibition covering not only indispensable objects but *all* objects, the wording to read as follows: "Property shall not be destroyed, except in cases of unavoidable military necessity".

2.491 Another opinion was that, here again, reference should be made to proposal CE/COM III/PC 64 submitted to Commission III.

2.492 It was asked whether the proposals adopted by the Institute of International Law at its Edinburgh meeting on the subject of the definition of non-military objects could be of use in examining the chapter under review.

2.493 One expert who favoured Proposal I nevertheless wished to see a list of the indispensable objects; he thought that the States which signed the Protocol ought to be trusted. However, another expert, although supporting Proposal I, considered it inadequate, since combatants should be encouraged to make themselves distinguishable from, and to keep away from the civilian population.

#### DRAFTING COMMITTEE

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

2.494 The formulations of Article 16 take into account the following proposals: CE/COM II/32, 33, 44 and 81.

Options I and II envisage the maintenance of either Proposal I or Proposal II of the ICRC text. Options III to V contemplate the substitution of a new text in place of Proposals I and II.

#### OPTION I :

##### *Proposal I :*

1. [Maintain the existing text as drafted by the ICRC].

2. *The Parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed, shall [should] 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 [except where unavoidable military necessity requires them to be put out of action, and provided that this continues only for such times as that necessity remains].*

#### OPTION II :

*Proposal II : [Maintain the existing text as drafted by the ICRC].*

#### OPTION III :

*Delete the existing article and substitute therefor the statement used in the Resolution adopted by the Institut de Droit International at its Session at Edinburgh (4-13 September 1969) :*

*Neither the civilian population nor any of the objectives expressly protected by conventions or agreements can be considered as military objectives, nor yet*

(a) *under whatsoever circumstances the means indispensable for the survival of the civilian population.*

(b) *those objects which, by their nature and use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs.*

#### OPTION IV :

*Delete the existing article and substitute therefor: Property shall not be destroyed, except in cases of unavoidable military necessity.*

#### OPTION V :

*Delete the existing article and substitute therefor the following text :*

A. *Objects which are, in view of their essential characteristics, generally recognized to be of military importance and whose total or partial destruction, in the circumstances ruling at the time, offers a military advantage, constitute military objectives.*

*Objects not falling within this category are non-military and may not be the subject of direct attack.*

B. *Houses, dwellings, installations or means of transport which are used by the civilian population must not be the object of attacks directly launched against them, unless they are used mainly in support of the military effort.*

C. *Objects which are indispensable to the survival of the civilian population, such as foodstuffs and food-producing areas, crops, cattle, water resources and constructions designed for the regulation of such resources must never be subjected to attacks directly launched against them, nor be attacked by way of reprisals.*

*D. Objects which, by their nature or use, serve primarily humanitarian or peaceful purposes, such as medical, religious, educational or cultural institutions, enjoy the protection expressly accorded to them under applicable rules of international law. They must not be made the object of reprisals.*

**OPTION VI :**

*Delete the article as written.*

2.495 The Chairman of the Drafting Committee emphasized that the examination of the options proposed presented certain difficulties, because the options were linked to "proposals".

2.496 None of the experts spoke on the subject.

**Article 17**

**ICRC DRAFT**

*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.

2.497 The wording of Article 17 was considered by several experts to form a sound working basis. Criticism, however, was voiced regarding the application of such an article, which appeared to some to lay on the combatants, through the double obligation contained in it, an excessive responsibility concerning precautions when attacking.

2.498 A less restrictive version of the article was proposed (CE/COM II/81).

2.499 Another proposal (CE/COM II/43) also contained a text worded differently to the one presented by the ICRC.

2.500 One expert thought that, as objects of a civilian character were protected, Article 17 should be amended.

2.501 A further suggestion was the rewording of Article 17 with reference to Article 26 of the Regulations annexed to the Fourth Hague Convention ; the author of this amendment proposed a different version of Article 17 (b) (CE/COM II/86).

2.502 In the opinion of one expert the misuse of civilian clothing should be condemned.

*Proposals for additional provisions*

2.503 During the discussion on Article 17, one expert said that there was an argument for adopting a provision on forced displacement of civilians, in order to help to solve the problem of refugees, a problem familiar to the ICRC for many years. He suggested the insertion of such a provision in Chapter II (CE/COM II/85).

2.504 Another suggestion was that, in addition to the precautions mentioned in Article 17, it would be desirable to insert a provision concerning the *principle of proportionality*, already contained as Article 50 in Draft Protocol I. The expert felt that it could also be included in the context of a non-international armed conflict.

**DRAFTING COMMITTEE**

*Article 17. — Precautions when attacking*

2.505 The formulations of Article 17 take into account the following proposals : CE/COM II/43, 76, 81 and 86.

*Introductory sentence :*

**OPTION I :**

*So that the civilian population, as well as objects indispensable to its survival [objects of a civilian character] be spared, those who order or launch an attack shall, when planning and carrying out the attack, take the following precautions :*

**OPTION II :**

*Those who order or carry out an attack ...*

**OPTION III :**

*When ordering or carrying out an attack the Parties to the conflict and those who plan or order military operations ...*

*Sub-Paragraph (a) :*

**OPTION I :**

*Maintain the existing text as drafted by the ICRC.*

**OPTION II :**

*... shall ensure that the objectives to be attacked are in fact military objectives, namely, objectives the total or partial destruction or the seizure or neutralization of which would confer a definite military advantage.*

**OPTION III :**

*... shall take a reasonable steps so to confine the attack so that it does not extend to the civilian*

population and civilian objects in the vicinity of the military objective.

*Sub-Paragraph (b):*

**OPTION I:**

*They shall, whenever the circumstances permit, [and sufficiently in advance,] warn the civilians threatened [the civilian population in the vicinity of a military objective], so that they may take shelter.*

**OPTION II:**

*They shall do everything within their power to warn the civilians threatened by the attack.*

**OPTION III:**

*For that purpose advance warning shall be given whenever possible.*

**Draft Article 17 A**

There were two proposals to add an additional article to this Chapter.

The formulations of this additional article take into account the following proposal: CE/COM II/85.

#### I

*[Incorporate the text of Article 50 of Protocol I, as drafted by the ICRC, with any amendments which might be agreed upon.]*

#### II

*1. The displacement of civilians shall not be ordered or compelled except in cases where the safety of the civilians involved or imperative military reasons so demand.*

*2. Civilians, other than aliens subject to deportation, shall not under any circumstances be ordered or compelled to leave the territory of the State within which the armed conflict is taking place.*

2.506 The Chairman of the Drafting Committee stated that the aim of the first sentence in draft Article 17 was to define the persons subject to the obligations enumerated in the article.

2.507 None of the experts spoke on the subject.

## CHAPTER XII

### Civil Defence Organizations

(DRAFT PROTOCOL II, CHAPTER VIII, ARTICLE 34)

#### ICRC DRAFT

*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.

2.508 Introducing the article, an ICRC expert stated that the Sub-Commission responsible for the study of civil defence organizations in relation to Protocol I had decided that the provisions on this matter should be included as an integral part of that Protocol. Two trends of thought had emerged during the discussion, largely because of the different types of civil defence organization adopted by different States. The first trend, favouring the adoption of a very simple form of rules, had led a number of experts to submit document CE/COM III/OPC 1. The second was closer to the position of the ICRC and advocated more detailed rules.

2.509 Faced with these two positions, diametrically opposed on certain points, the Sub-Commission had tried to reach a compromise.

2.510 The majority of its members being of the opinion that the important factor was the nature of the tasks to be accomplished, and that the question of who carried them out was secondary, the Sub-Commission had finally drafted a definition of civil defence based exclusively on the tasks to be carried out.

2.511 Another point which had been discussed at considerable length by the Sub-Commission was that of the participation of military personnel in civil defence activities.

2.512 The ICRC expert ended his introduction by saying that several members of the Sub-Commission had been strongly in favour of the inclusion in Protocol II of more detailed rules on civil defence organizations than those presented in the ICRC draft, which had only one article on this subject. With regard to the distinctive emblem, he said it had been suggested that the same emblem should be used in cases of both international and non-international conflicts.

2.513 Opening the general discussion on civil defence organizations, one expert stressed the need to establish precise rules concerning the special protection to be granted to civil defence organizations in the event of armed conflicts of a non-international character, recalling that such protection should be analogous with that granted to medical personnel. In this opinion the provisions of Article 34 were inadequate; they should be given added precision and should be supplemented. He favoured the inclusion in Protocol II of the three essential elements of protection appearing in Article 68 of Protocol I (as amended by the Sub-Commission), namely: members of civil defence organizations should not be hindered in the accomplishment of their tasks; they should not be the subject of deliberate attack; and buildings, equipment and means of transport



used for civil defence activities should not be deliberately attacked or destroyed.

2.514 On the question of markings, the same expert also pointed out that there was no mention of this subject in Article 34. He added that the emblem used by civil defence organizations should be the same in time of international as in non-international armed conflict, as was the case for medical personnel.

2.515 With regard to paragraph 2 of Article 34, he found the ICRC drafting entirely satisfactory. Other experts proposed an amended version (CE/COM II/51).

2.516 Another expert drew attention to the fact that, as regards the protection to be afforded to civil defence organizations, there was in fact a difference according to whether the situation were one of international or of non-international conflict: while, in the first case, the protection was granted by the occupying power, in the second there was no occupied territory in the strict sense of the term; if one Party to the conflict gained control over the territory of the other, it could still claim that this was in fact its own territory. This led the expert to the conclusion that special protection should not be granted to civil defence organizations in the case of non-international armed conflicts, and he proposed that paragraph 1 of Article 34 be deleted (see CE/COM II/89).

2.517 Referring to Article 67 of Protocol I and the non-military character of civil defence organizations as defined in that article, the same expert argued in favour of freedom in the organization of civil defence services, which should be left to the discretion of each State.

2.518 Another expert stressed the need to grant special protection to civil defence organizations in all circumstances, and proposed that Article 34 of Protocol II be re-drafted on the lines of Articles 67, 68 and 69 of Protocol I. On the subject of Article 67, concerning the persons to whom the special protection should apply, he thought the ICRC might follow Article 18 of the First Convention.

2.519 The need to bring the provisions of Protocol II (Article 34) more closely in line with those of Protocol I (Articles 67 to 72) was also stressed by another expert who thought Article 34 was too succinct.

2.520 Finally, it was proposed that the reservations contained in Article 34, paragraph 1, be deleted (CE/COM II/12).

#### DRAFTING COMMITTEE

##### *Article 34. — Civil Defence Organizations*

2.521 The formulations of Article 34 take into account the following proposals: CE/COM II/12, 51 and 89.

#### OPTION I:

1. [Subject to temporary and exceptional measures taken by the Parties to the conflict to guarantee their security] civil defence organizations [personnel] 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 humanitarian civil defence activities [the humanitarian activities of such organizations] be considered to be punishable.

#### OPTION II:

Delete paragraph 1 as written by the ICRC and amend paragraph 2 as follows:

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

#### OPTION III:

A number of experts recommended that various provisions from Articles 67 to 71 of Protocol I should be incorporated in Article 34 of the present Protocol, but no formal proposals to that effect were made in writing.

## CHAPTER XIII

### Miscellaneous

#### I. Preamble

2.522 The ICRC expert, introducing the topic, pointed out that the Preamble was drafted as a foreword to an Additional Protocol to common Article 3. Seen in this light, it had to be based on two fundamental ideas.

2.523 First, it should *reaffirm* the full purport of the parent provision, common Article 3, which remained the basis of humanitarian protection for victims of non-international armed conflicts.

Secondly, it should *stress* the need to develop common Article 3 with a view to improving and strengthening the protection of such victims.

2.524 This debate was partly based on remarks made in Commission IV on the usefulness and possible content of a preamble.

2.525 Some experts felt that there was no need for a preamble in the future Additional Protocol. They pointed out that the 1949 Conventions did not have a preamble and that, in general, such an introduction added nothing to the provisions of a legal instrument; the existence of the controversies over many articles and even paragraphs of the draft Preamble drawn up by the ICRC only served to confirm that point of view.

2.526 Other experts, however, said that although the provisions of a preamble were not binding on

States, they nevertheless postulated certain fundamental considerations on how the regulations should be interpreted and explained the reasons underlying them. The fact that there was no preamble to the 1949 Conventions was not in their opinion, a cogent argument against one for the Protocol. Such a preamble would set out the significance of the instrument and clearly establish it as an extension of common Article 3. One of the advocates of this view asked whether the content of a preamble could usefully be discussed when no agreement had been reached on Article 1.

2.527 The draft Preamble drawn up by the ICRC was examined and approved by some experts ; others raised objections.

2.528 One expert, referring to the expression " the humanitarian principles enshrined in Article 3 ", felt that this opened up possibilities for discussion on the legal effect of the future instrument, by giving the impression that Protocol II was in some measure declaratory of the content of common Article 3, and that even States not Parties to Protocol II might therefore be considered bound by some, at least, of the provisions of that Protocol. It was this consideration which led the expert to oppose the Preamble.

2.529 Another expert felt that the phrase " rules implicit in Article 3 " was not an accurate rendering, since clearly the Protocol was laying down new provisions. Without declaring against a preamble, he felt that the draft should be reworded.

2.530 Another expert also had doubts as to the exact meaning of the allusion to Article 3, and wondered whether it would not be more appropriate to include the text of the Preamble under Article 1 in Chapter I of the Protocol, should the final version of this article no longer be related to Article 3.

2.531 One expert mentioned his previous statement according to which Article 9, paragraph 1, would be better placed in the Preamble than in the body of the text.

2.532 Other experts wanted to make substantial changes in the Preamble.

2.533 One expert proposed (CE/COM II/69) that the Preamble should specify that the nature of non-international armed conflicts should be recognized by the State in the territory of which such a conflict took place.

2.534 Two other experts proposed (CE/COM II/87) adding the following text between paragraphs 2 and 3: " being aware however of the need for respecting the sovereignty of the High Contracting Parties "; and then to add the following words after the last paragraph: " within the limits of the principle of non-interference ".

2.535 Several experts particularly in favour of the ICRC draft disagreed with these two amendments, which the authors of the above-mentioned second proposal tried to justify on the grounds of the two principles of sovereignty and non-interference.

2.536 One of the experts, turning to a different subject, mentioned a proposal (CE/COM II/83) linking humanitarian law and human rights ; namely, the International Covenant on Civil and Political Rights and other instruments, of which the derogatory clauses did not permit States to derogate from fundamental human rights even in time of a public emergency which threatened the life of the nation.

2.537 The representative of the Secretary-General of the United Nations said it would be useful to note the general instruments already concluded on Human Rights under the auspices of the United Nations. These were the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of all forms of Racial Discrimination, and the International Covenant on Civil and Political Rights, Article 4 of which, specifically mentioned in amendment CE/COM II/83, permitted derogations from certain articles through a laborious notification procedure, while this Covenant contained articles from which no derogations could be made even in time of a public emergency.

2.538 Some experts approved the inclusion of proposal CE/COM II/83 in the text of the Preamble ; one of them, while not raising any substantive objection, had reservations as to the wording of the proposal referring in particular to rights enshrined in the European Convention on Human Rights.

2.539 Some experts, without actually submitting a formal proposal, agreed, regarding the content of the Preamble :

(1) that the primary condition to be stressed for the application of all provisions was the principle of sovereignty and non-intervention in the internal affairs of another State ; and that this should be stated in the Preamble to the Protocol so that the way in which the instrument was to be applied should be quite clear, on the basis of the balance to be struck between sovereignty and humanitarian provisions ;

(2) that reference should be made to human rights in the Preamble, as those instruments could not be ignored in the application of international law. Such reference should not be restricted to the mere mention of human rights but should explicitly refer to the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of all forms of Racial Discrimination since these instruments were often put forward in the context of non-international armed conflict.

## DRAFTING COMMITTEE

### Preamble

2.540 The formulations of the Preamble take into account the following proposals: CE/COM II/13, 19, 42, 47, 69, 83 and 87.

*Retain the Preamble, but with modifications of or additions to the text prepared by the ICRC. These possible modifications and additions are shown below:*

#### *The High Contracting Parties,*

*Recalling that the human person remains at all times under the protection of the principles of humanity and the dictates of the public conscience,*

*Emphasizing that the humanitarian principles enshrined in Article 3 common to the four Geneva Conventions of August 12, 1949, constitute the foundation of respect for the human person [the safeguards for ensuring the basic humanitarian protection of all persons, combatants or non-combatants,] in cases of armed conflict not of an international character,*

Conscious...

#### OPTION I:

*Conscious of the need [to reaffirm and] to develop the rule [implicit in Article 3 common to the four Geneva Conventions of August 12, 1949, and] applicable in armed conflicts not of an international character with a view to ensuring the basic humanitarian protection of all persons, whether combatants or non-combatants, [character as derived from common Article 3] [within the limits of the principle of non-interference],*

#### OPTION II:

*Conscious of the need to ensure the basic humanitarian protection of all persons, whether combatants or non-combatants, and to develop, to that end, the rules implicit in Article 3 common to the four Geneva Conventions of August 12, 1949, and applicable in armed conflicts not of an international character, the existence, the nature, and the constituent elements of which are recognized by the States on whose territory these conflicts occur,*

*Agree on the following:*

Proposals for possible additional paragraphs in the Preamble (to be inserted between the existing paragraphs 1 and 2)

a. *Firmly undertake to ensure that the civilian population respects the wounded, sick and shipwrecked and refrains from committing acts of violence against them,*

b. *Recalling furthermore the derogations provisions contained in the International Covenant on Civil and Political Rights and other international human rights instruments, according to which fundamental*

*rights, such as the right to life, right to humane treatment, freedom from slavery, freedom of thought, conscience, and religion, and the prohibition of retroactive criminal legislation, can never be derogated from even in time of a public emergency which threatens the life of the nation,*

c. *Emphasizing that international instruments concerning human rights must be applied as a basic humanitarian protection in the case of non-international armed conflicts,*

d. *Being aware, however, of the need to respect the sovereignty of the High Contracting Parties,*

[The experts of Romania expressed the view (CE/COM II/47) that the ideas incorporated in Articles 39 and 40 should be introduced in the Preamble.]

#### OPTION III:

*Delete the Preamble; the Protocol should not have a preamble. [This option would not necessarily exclude a very short and terse preamble.]*

## II. Articles 2 and 3 of Draft Protocol II

2.541 The ICRC expert made an introductory statement on the content of Articles 2 and 3 of Chapter I of Draft Protocol II. The personal field of application of the Protocol was specified in Article 2, applied to all persons who were in the territory of one of the High Contracting Parties where an armed conflict within the meaning of Article I of the present Protocol was occurring. This provision seemed necessary since the future Protocol had to contain provisions relating to combatants. The ICRC expert then pointed out that Article 3 defined the field of application of the Protocol as regards time. Article 3 had to be applied without delay as soon as the definition to be embodied in Article 1 had been found to be applicable. But Article 3 had another aim: after the end of hostilities, it was possible that the victorious Party might not immediately free interned persons; it could even make mass arrests; since persons could thus be deprived of the liberty over a long period, it was essential to afford them some protection; this was provided by Article 26 which laid down the minimum treatment that every detainee was entitled to in all circumstances. In the case where interned combatants, protected by Article 25 of this draft, were not freed by the end of hostilities, prisoner-of-war treatment had to be afforded them throughout captivity. In this connection, the ICRC had included an alternative proposal in the Commentary.

### Article 2

#### ICRC DRAFT

#### *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.

2.542 One expert said, with reference to Article 2, that once in force, an instrument of international law did not only bind States and their governments, but also all persons in the territory of the Contracting Party. By the process of promulgation, instruments of international law became an integral part of national legislation. He also said that if foreign armed forces were in such territory, without taking part in the hostilities, they would not be covered by the terms of the Protocol.

2.543 Another expert felt that the scope of Article 2 was too wide and submitted an amendment (CE/COM II/68) to limit it. Thus, "The benefits and obligations of the present Protocol shall apply without any adverse distinction to all persons taking no active part in the hostilities..." and "These provisions shall also apply to persons who accompany these armed forces without actually being members thereof as defined in Article 4 A (4) of the Third Geneva Convention..."

#### DRAFTING COMMITTEE

##### *Article 2. — Material field of application*

2.544 The formulations of Article 2 take into account the following proposal: CE/COM II/68.

##### *OPTION I:*

*Maintain the existing text as drafted by the ICRC.*

##### *OPTION II:*

*Maintain the existing text as drafted by the ICRC as paragraph 1 and add the following two new paragraphs:*

2. *Members of the armed forces of another State who are in the territory of the High Contracting Party referred to in paragraph 1 of this Article, as well as members of militias or volunteer corps forming part of such armed forces, shall never be the subject of attack provided they do not take part in the conflict.*

3. *These provisions shall also apply to persons who accompany these armed forces without actually being members thereof as defined in Article 4 A (4) of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, provided that they are not nationals of the High Contracting Party referred to in paragraph 1 of this Article.*

2.545 The Chairman of the Drafting Committee stressed that Option I provides for the retention of the ICRC draft.

2.546 The three experts who spoke on the subject preferred Option I.

#### Article 3

#### ICRC DRAFT

##### *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.

2.547 One expert considered Article 3 important in that it specified precisely the moment at which Protocol II took effect and the duration of its application, which was linked with the period of active hostilities.

2.548 Another expert, however, thought it unrealistic to try to define the moment at which a non-international armed conflict began, in view of the varying degrees of intensity of hostilities at the start of an armed conflict. He submitted an amendment for the deletion of the words "Beginning and" from the title and of the words "The present Protocol shall apply from the time when the armed conflict begins until the end of hostilities. However, ..." from the body of the text (CE/COM II/68).

2.549 A number of experts expressed agreement with the second part of Article 3, concerning the protection to be given to persons who were not released or who were arrested after the end of hostilities. Some favoured the ICRC's alternative proposal which would provide similar protection for captured combatants who were not released at the end of hostilities.

2.550 However, one expert considered the article inadequate because assistance to wounded, sick and shipwrecked persons could not be stopped immediately after hostilities had ceased. He noted that Article 5 of the First and Third Geneva Conventions provided that those Conventions should apply until the final repatriation of the protected persons.

2.551 One expert did not agree and proposed the deletion of the second sentence in Article 3 (CE/COM II/88).

2.552 At the conclusion of this brief discussion one expert stressed the importance of the question and expressed the fear that if it were not satisfactorily resolved some victims would remain unprotected.

## DRAFTING COMMITTEE

### *Article 3. — Beginning and end of application*

2.553 The formulations of Article 3 take into account the following proposals: CE/COM II/20, 68 and 88.

#### *A. Options relating to the first sentence of Article 3*

##### *OPTION I:*

*Maintain the existing text as drafted by the International Committee of the Red Cross.*

##### *OPTION II:*

*The provisions of the present Protocol, other than those which shall be implemented in peacetime, shall apply from the outbreak of an armed conflict not of an international character, as defined in Article 1, until the end of hostilities or until such time as the conflict ceases to possess the characteristics referred to in Article 1.*

##### *OPTION III:*

*Delete the existing text (and the word "However" in the next sentence).*

#### *B. Options relating to the second sentence of Article 3*

##### *OPTION I:*

*Maintain the existing text as drafted by the ICRC.*

*OPTION II (based on the ICRC Commentary, Part Two, p. 9):*

*However, after the end of hostilities, all persons whose liberty has been restricted, whether by way of internment, detention, or otherwise, in respect of an act committed in relation to the armed conflict, and who have not been released, shall enjoy the protection of Articles 25 and 26 of the present Protocol as long as their liberty is restricted.*

*[The above text may have to be modified in the light of the ultimate disposition of Articles 25 and 26. Should the first sentence of this article be deleted, it might be desirable to move the second sentence to Article 26.]*

##### *OPTION III:*

*Delete the existing text.*

2.554 This article, said the Chairman of the Drafting Committee, was concerned with the beginning and the end of application of the Protocol, and Option II, relating to the first sentence of Article 3, made allowance for the fact that some of the Protocol's provisions were applicable in time of peace; Option II, relating to the second sentence of Article 3, made allowance for the fact that the persons enjoying the protection accorded under the terms of Articles 25 and 26 would continue to do so as long as their liberty was restricted.

2.555 Two experts expressed their preference for Option I which repeated the ICRC draft.

2.556 One expert favoured Option II relating to the first sentence of Article 3 and Option I on the second sentence of Article 3.

2.557 Another, while favourable to Option II on the second sentence of Article 3, also proposed placing this article after Articles 25 and 26, to avoid the provision on the termination of protection having negative effects concerning the protection of wounded, sick and shipwrecked persons and the protection of the civilian population.

## *III. Final provisions*

### *(DRAFT PROTOCOL II, CHAPTER X)*

#### *ICRC DRAFT*

### *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.

#### *ICRC DRAFT*

### *Article 42. — Ratification*

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

#### *ICRC DRAFT*

### *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.

#### *ICRC DRAFT*

### *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.

ICRC DRAFT

*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.

ICRC DRAFT

*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.

ICRC DRAFT

*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.

ICRC DRAFT

*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.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Protocol.

DONE AT ..., this ... day of ..., 197... .

2.558 Some experts asked to be allowed to make some observations on Chapter X, entitled "Final provisions", although as was generally recognized, the chapter consisted of formal provisions, which were essentially within the competence of a Diplomatic Conference.

2.559 With respect to Article 48 one expert, whose request was supported by another expert, asked that the texts should be established in the same languages as those used in the United Nations.

2.560 When one expert asked whether the Depositary State could really provide official translations of the texts, the expert from that State said that he would reply to that question later.

2.561 One expert was of the opinion that the final provisions should include an article prohibiting any reservations with respect to Protocol II on the grounds that it would establish a minimal protection that was to be given in all circumstances and to all persons who fell victim to an armed conflict.

2.562 An expert who held a similar view, nevertheless agreed that an article could be included, containing an exhaustive list of permissible reservations.

2.563 An expert raised the question of reciprocity in the observance of the provisions of the Protocol, and expressed the fear that an insurgent party would not feel bound by them.

CHAPTER XIV

**Declaration of fundamental rights  
of the individual in time of internal disturbances  
or public emergency**

(Document V, Protection of victims of non-international armed conflicts, Geneva, January, 1971.)

2.564 At the first session, Commission II had had no time to consider the draft Declaration of fundamental rights of the individual in time of internal disturbances or public emergency. The ICRC did not prepare any new proposals on that subject for the second session, but it placed the draft Declaration on the agenda of the 1972 Conference.

2.565 The ICRC expert presented this draft, pointing out that internal disturbances were becoming more and more frequent, and were responsible for large numbers of victims. He pointed out that such situations had to be dealt with at a humanitarian level. Since Protocol II applied only to non-international armed conflicts and not to internal disturbances or public emergency, the ICRC had prepared the draft Declaration, taking as a basis certain fundamental principles of international humanitarian law and the relevant provisions of the International Covenant on Civil and Political Rights, which were among those from which no derogation could be allowed, even in a time of exceptional public emergency.

2.566 An expert reminded the Commission that even in 1971 very many experts had acknowledged that the question of internal disturbances was a

separate one, which did not fall within the scope of the Geneva Conventions; internal disturbances could not be placed in the same category as non-international armed conflicts. He believed that the question of internal disturbances was very closely linked to the protection of human rights, and when the International Covenants on Human Rights entered into force, there would be no need for any other international legal instrument. Several experts held the same view.

2.567 Another expert considered that the Commission ought not to discuss the draft Declaration for two reasons, one relating to substance and the other relating to procedure. As regards the substance of the matter, he suggested that the Conference should confine itself to international and non-international armed conflicts; if it tackled the question of internal disturbances, it might come up against insuperable difficulties since that was a matter which lay clearly within the sovereignty of States. With respect to procedure, he thought that the Declaration could be

examined by a future Diplomatic Conference, as suggested, incidentally, in the ICRC Commentary.

2.568 One expert said that the adoption of resolutions on subjects inappropriate for inclusion in a draft international convention or of only marginal interest was a well-established practice of diplomatic conferences.

2.569 An expert said that he could not support the ICRC's draft Declaration because he was very doubtful as to the legal value of such a text. In similar vein, another expert declared that international law could not be established by means of a declaration.

2.570 One of the experts nevertheless expressed the hope that the ICRC would not drop the question of internal disturbances which he considered a very important one. In this context, another expert said that the ICRC ought not to conclude from the lack of discussion on the question that it did not hold any interest for the Commission, or that it was not of any relevance.

## REPORT OF COMMISSION III

*Rapporteur: Maître G. ASMAR (Lebanon)*

### INTRODUCTION

3.1 As provided in the agenda drawn up by the ICRC, Commission III studied the following problems :

- (a) Combatants (Part III of Protocol I, Articles 30-39).
- (b) Protection of journalists engaged in dangerous missions.
- (c) The civilian population (Part IV of Protocol I, Articles 40-72).

3.2 During the first session, the Commission elected its officers. Dr. S. Dabrowa (Poland) was elected Chairman, Profesor H. Sultan (Egypt) and Dr. Hans Blix (Sweden) were elected Vice-Chairmen. Maître Georges Asmar was elected Rapporteur. Mrs. D. Bindschedler-Robert and Mr. R.-J. Wilhelm, ICRC representatives, Mr. G. Malinverni, Mr. J. Mirimanoff-Chilikine, Mr. J. de Preux and Mr. M. Veuthey, legal advisers of the ICRC, introduced and commented on the matters dealt with by the Commission. The duties of secretary were carried out by Mr. B. Hediger and Mr. G. Malinverni (ICRC).

3.3 In this report, names of countries and of experts are not mentioned. They will be found in the written proposals submitted to the Commission which are issued separately and in the list of experts who took part in the Commission's work.

3.4 In accordance with the Conference programme, the Commission set up a Sub-Commission to examine articles relating to civil defence bodies (Articles 67-72 of Protocol I).

3.5 In the course of the work and in view of the large number of amendments submitted, a co-ordinating committee was set up, to help their authors to reconcile, where possible, their different points of view in order to reduce the number of amendments. The co-ordinating committee consisted of experts from the following countries : Byelorussia, Czechoslovakia, Egypt, France, Hungary, Indonesia, Lebanon, Mexico, Netherlands, Nigeria, Sweden, Union of Socialist Soviet Republics, United Kingdom and United States of America.

The Committee reviewed the various amendments concerning combatants and Articles 40 and 41. Its work led to new proposals, in which several others were merged, being submitted. Several experts, independently of the co-ordinating committee, and with a similar end in view, worked together to merge several amendments into new common amendments. It will be clear from a special reference in the report that these amendments were submitted after the debate on the articles mentioned.

3.6 The Chairman of the Commission described the programme before the Commission. It devoted ten sessions to the study of the first part of its programme (Combatants), two sessions to the protection of journalists engaged in dangerous mission, thirteen sessions to Part IV of the Protocol (Civilian population) and three sessions to the examination of the report on the work as a whole. With regard to the method to be adopted for studying and discussing the various subjects, the Chairman suggested to proceed by way of article-by-article discussion of the draft articles, this being a method that had proved its worth.

### PART ONE

#### Combatants

(PART III OF THE PROTOCOL, ARTICLES 30-39)

#### General discussion

3.7 The examination of Articles 30-39 was preceded by a general discussion on the whole of Part III, which took up the last part of the first meeting and the whole of the second. It was introduced by an ICRC representative who gave a brief outline of the arrangement of this Part and the main ideas underlying the ICRC proposals. First, with respect to several articles, the ICRC wished to reproduce the Hague Rules with very few changes : this reaffirmation of the law could be most useful, particularly to many countries which had not participated in the preparation of the Hague Conventions. Secondly, the Part under examination also contributed to the



development of the law, either by modernizing the wording of certain basic rules, or by introducing stipulations such as Articles 34, 35, 36 and 38. Many experts expressed the view that the ICRC draft could serve as a basis for future work on the development of humanitarian law.

3.8 The majority of experts who took part in the general discussion commented on Article 30, considered as being a key provision, not only of this Part, but also of the additional Protocols as a whole. Their comments on this point are summarized below, in that part of the present report devoted specially to Article 30.

3.9 Some experts, supporting the ICRC representative's suggestion, proposed that the Commission should also give its views, when discussing Article 30, on the Draft Resolution on Disarmament and Peace, submitted by the ICRC, since certain parts of the text concerned problems closely linked to those of Article 30.

3.10 Three experts again referred to the question raised by the Conference plenary meeting, namely the separation of the subject-matter into two Protocols. In their opinion, regulations as fundamental as those of Part III should be applied to all cases of armed conflict, international or internal, and this idea required that an attempt be made to establish a single instrument. Several experts, however, expressed their agreement with the existing division of the subject-matter into two Protocols. The Chairman pointed out that the problem of non-international conflicts was being dealt with by Commission II which would bear in mind, when examining the rules relating to combatants, the proceedings of Commission III on that subject, but that it was for the Conference in plenary session, after the Commission's work had been completed, to give its views on the idea put forward by the experts.

3.11 Independently of these comments relating to Article 30, or to the methods of the Conference, several experts made observations of a general nature on Part III and particularly on the spirit in which the rules in this Part should be drafted. Reminding the Commission of the rapid changes taking place in methods of warfare and types of armed conflict, one expert stressed the need, in drawing up the rules under consideration, to pay greater attention to the changes of status which might occur in the case of the persons dealt with in those rules, and to the time factor affecting those changes. He also pointed out that a new wording of the old rules might involve a change as to their substance.

3.12 Another expert pointed out that, to achieve a maximum of efficacy, the humanitarian law to be drawn up must be *credible*, and therefore must take realities fully into account.

3.13 Finally, reminding his hearers how well the Hague Regulations, which had become customary

law, had borne the test of time, one expert expressed the hope that there would be a clarification of the relationship between those rules and the Protocol that was being drafted. He also emphasized the importance of succeeding in laying down, on all the various subjects, rules which were clear, precise, and easily understood and applicable by combatants and by civilians alike. Many experts pointed out that the draft articles prepared by the ICRC should contain a clear indication of the corresponding articles of the Hague Regulations and the Geneva Conventions to which they referred.

## Article 30

### ICRC DRAFT

#### *Article 30. — Means of combat*

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

3.14 The following written amendments to Article 30 were submitted to the Commission : CE/COM III/C 2, 3, 5, 6, 13, 14, 17, 18, 22, 26, 27, 33 and 33 add. 1, 56, 57, 58 corr. 1, 59, 68, 69 ; amendments C 56 and C 59 replaced amendments C 3, 18, 22, 27 ; amendment C 68 replaced the amendments C 2 and 6 ; amendment C 44 was later withdrawn. After stressing the fact that the ICRC was fully conscious of the importance of the question of arms for the protection of human beings in the event of armed conflict — an importance which was brought out by the draft Resolution concerning disarmament and peace — a representative of the ICRC stated the basic reasons which had led the ICRC to limit Article 30 to general principles, without including specific prohibitions of particular weapons. First, the question of arms and their prohibition was dealt with by other organizations, such as the United Nations and the CCD, at least as far as atomic, bacteriological and chemical weapons were concerned. Consistent with the spirit of the Declaration of St. Petersburg, those bodies normally should have to deal also with the "conventional" weapons about which public opinion and the ICRC as well were deeply concerned ; the ICRC therefore welcomed the fact that the Secretary-General of the United Nations had been requested to prepare a special study on incendiary weapons and napalm. If it really turned out that no consideration was being given by any other body to certain other

weapons whose use was claimed to be contrary to the principles laid down in Article 30, the ICRC would then be prepared to consider how it could contribute to the studies to be carried out. Secondly, the representative of the ICRC added, the prohibition of specific weapons had always been the subject of legal instruments separate from the Geneva Conventions — a separation which was also explained by the fact that the rules in the Conventions were of an absolute nature, whereas the prohibition of weapons was subject to reprisals or even to reciprocity. The effect of the Geneva Conventions and the Additional Protocols under consideration was to limit or indirectly prohibit the use of arms by imposing greater respect for certain categories of persons and objects. If, however, it were to appear that the prohibition of specific weapons were necessary, it would be preferable to include them in a separate instrument, for instance, in a Declaration of a binding character, which would supplement the Geneva Conventions and the Additional Protocols thereto.

3.15 During the general discussion on Article 30, many experts expressed the wish that the draft rules submitted by the International Committee of the Red Cross should be given a more precise character. Many experts, again, were strongly in favour of removing the *Martens clause* from the third paragraph of Article 30 and including it elsewhere; a number of these experts proposed that the clause should be replaced in Article 30 by a provision dealing with the limitation or prohibition of certain weapons. Doubts were also expressed with regard to the general scope of Article 30 as presented in the draft, some experts holding the view that the title *Means of combat* seemed to exclude combatants (who have no choice of weapons) from the provision, while others thought it would be important to mention them because it was they who, in fact, used the means of combat. Other experts who accepted the title of Article 30 suggested that the title of the chapter should be *Means and methods of combat* rather than *Combatants* in order to cover the substance contained in the Chapter.

3.16 In spite of these reservations, a considerable number of experts approved the substance of the proposals concerning Article 30 of the Draft Protocol, but thought they might still be improved and supplemented. The main arguments put forward in favour of the article were the timeliness of a reaffirmation of the Hague principles, the sound balance of its provisions, the need for genuine international negotiations to establish more specific rules, the importance of a prior agreement on the basic principles involved, the validity of customary law, and the existence of other competent bodies who might be expected to prepare more specific rules. Amendments to Article 30 proposed by those who were basically in agreement with the article as drafted by the ICRC were the following: to delete the word *combatants* from paragraph 1 and to insert *Parties*

to the conflict; simply to insert *Parties to the conflict* in paragraph 1 without deleting *combatants*; to delete from paragraph 2 the reference to *cruel methods*, which some experts considered too subjective; to delete the word *particularly*; to move the *Martens clause* either to Article 1 of the Protocol or the Preamble, and to word it more strongly.

3.17 The proposals of those experts who wished, on the contrary, to broaden the scope of Article 30 may be grouped as follows:

- (a) the inclusion of a general prohibition of weapons which are likely to affect combatants and civilians indiscriminately;
- (b) the inclusion of an express prohibition of nuclear, bacteriological and chemical weapons;
- (c) the inclusion of the prohibition of weapons and methods which destroy the environment;
- (d) the inclusion of the prohibition of specific types of conventional weapons likely to cause unnecessary suffering to the civilian population and to combatants.

3.18 The proposed amendment CE/COM III/C 17 expressly prohibited the use of nuclear and thermonuclear weapons and referred to resolution 1653 (XVI) of the United Nations General Assembly. Amendment CE/COM III/C 44 also called for the prohibition of the use of nuclear weapons as well as that of biological, bacteriological and chemical weapons (this amendment was later withdrawn by its author in favour of amendment CE/COM III/C 33). This amendment, like the preceding one, also stressed the importance of distinguishing between combatants and civilians. Those who expressed themselves in favour of the prohibition of nuclear weapons considered that this prohibition should apply not only to the use, but also to the manufacture and possession of such weapons. In connection with this discussion, two experts recalled the proposals to convene a conference of five Powers possessing nuclear weapons, and a world conference on disarmament.

3.19 A group of experts submitted an amendment CE/COM III/C 6 to insert a new paragraph 3 in Article 30 of the Draft Protocol forbidding weapons which cannot be controlled and which do not discriminate between military and non-military objectives, a new paragraph 4 forbidding arms which are harmful to the environment (a concept also included in the previous amendment) and a new paragraph 5 reaffirming the *Martens clause*. Other experts submitted an amendment CE/COM III/C 2, also referring to the environment. The authors of amendment C 6 said that they were not, at this stage, considering a formal ban on nuclear arms. But, in their opinion, the use of nuclear weapons was already prohibited by international law. Their amendment was similar to the resolution adopted by the Institute of International Law (Edinburgh meeting, September 1969). Those opposed to these amendments and to the amendments relating to nuclear weapons pointed out that there was a con-

tradition between the deterrent role of these weapons and the condemnation of this deterrent. The authors of amendment C 6 considered that their text was similar in substance, if not in form, to amendment C 33 discussed below. Later, the authors of amendment C 6, joined by other experts, submitted amendment CE/COM III/C 68 along the same lines as the previous one.

3.20 Amendment CE/COM III/C 33 submitted by a number of experts proposed the substitution of the *Martens clause* in Article 30 (3) of the Draft Protocol by a clause forbidding indiscriminate delayed-action incendiary weapons containing napalm or phosphorus, and fragmentation weapons, without excluding any new inventions and other prohibitions already formulated in the Draft Protocol. Another amendment, CE/COM III/C 57 Corr. 1, included the same prohibitions, but added a prohibition of weapons referred to in the Draft Resolution on Disarmament and Peace together with a ban on all weapons already prohibited by customary and treaty law; another, CE/COM III/C 26, proposed adding a new Part III A, between Parts III and IV of the Draft Protocol, in order to insert provisions forbidding the use of methods and means of combat under conditions that would imperil the civilian population. In support of their proposal, the authors of amendment C 33 objected to the view that prohibition of specific weapons could be made only in disarmament conferences. In the latter, they pointed out, not all States were participants; nor were the limitations contained in C 33 necessarily taken into account in such negotiations. They also claimed that disarmament negotiations were based primarily on strategic considerations, while the present ICRC conference started out from humanitarian concerns. Disarmament talks — which, they thought, had often not led to any results — sought the reduction or elimination of stockpiles of weapons while maintaining a balance between the main opponents; at this conference, the authors of C 33 found it fully justified to seek the prohibition of the use of weapons which were blind and cruel. The resolution proposed by the International Committee of the Red Cross was considered inadequate. A limitation on the use of new types of weapons was the only practical means to protect both civilians and combatants.

Several experts said that they agreed in principle with amendment C 33, although they were not among its co-authors. One of the co-authors, admitting that further expert opinion and discussion might be found to be necessary to consider the question of the prohibition of specific types of weapons, said he would like the International Committee of the Red Cross to call a meeting, in the near future, of a group of legal, military and medical experts to examine the problem, possibly in liaison with the United Nations. Amendment C 33 made no mention of nuclear weapons. Further, amendment C 33 did not cover all incendiary weapons, but only those using napalm and phosphorus, and the legality of other incendiary weapons

was to be assessed in the light of the general principles forbidding needlessly cruel weapons. One of the co-authors pointed out that napalm might be an effective weapon against tanks invading a country, but it was necessary to refrain from using it against individuals or in circumstances where the civilian population was likely to suffer. Reference was made to the request submitted to the United Nations Secretary-General, in resolution A/2852 (XXVI), for a study to be carried out on incendiary weapons.

3.21 The experts opposed to amendment C 33 argued that its scope extended beyond the Conference terms of reference and might prejudice the development of work in progress, and one of them said that it was no solution to draw up a list. He noted there were many other means of combat whose effects were quite as indiscriminate as those mentioned on the list. A list of prohibited weapons was bound to be incomplete and provisional. He said the Conventions were jeopardized when restraints were placed on certain weapons and not on others for reasons that were not readily apparent to the combatants and that had the effect of disturbing the relative position or influence of the combatants. He added that possible approaches to limitations on conventional weapons were already under discussions at CCD where they could be dealt with most effectively. It was the experience of his government that effective, widely acceptable arms limitations could not be accomplished except on the basis of an agreement on underlying principles entered into by at least some of the major powers, in conjunction with lengthy study and consultations among allies and non-aligned nations.

Several experts supported a provision in Article 30 designed to ensure that weapons were developed, compatibly with the requirement in the Hague Regulations whereby methods and means of armed conflict were not to be employed in a manner calculated to cause unnecessary suffering. (CE/COM III/C 56).

Others, while approving the spirit of this amendment, expressed doubts as to the suitability of the prohibitions contained in it; they considered that the role of the Conference was to state general principles which would lead to specific weapons being declared illegal.

3.22 Subsequently several experts submitted, in place of amendments CE/COM III/C 3, 13, 18 and 22, another amendment (CE/COM III/C 59), in which a number of observations made earlier were merged. This amendment took up (in the first paragraph of Article 30 of the Draft Protocol) the classic formula of the Hague Convention on the limitation of choice of means of injuring the enemy. It deleted any allusion to cruel weapons from paragraph 2 and, in paragraph 3, laid an obligation on States to determine whether any new weapon invented were of such a nature as to cause unnecessary suffering, without prejudice to the *Martens clause*. These experts thought that the allusion to cruel means (in paragraph 2 of Article 30) was a repetition of the notion of *unnecessary* and did not increase the clarity of

the provision. On the other hand, they said they were prepared to include a provision prohibiting torture (see amendment CE/COM III/C 67, referring to Article 34). Finally, this amendment deleted any mention of combatants and replaced the term *belligerents*, used in the Hague Convention, by the term *Parties to the conflict*.

3.23 Several experts proposed the substitution of the *Martens clause* in place of the third paragraph of Article 30 of the International Committee of the Red Cross draft. (See amendments CE/COM III/C 58, CE/COM III/C 13 and CE/COM III/C 5 and 68.) These amendments, in their opinion, were closer to the original *Martens clause*. This clause, one expert emphasized, would retain its validity for a long time to come, and its embodiment in the Protocol would represent an advance.

## Article 31

### ICRC DRAFT

#### *Article 31. — Prohibition of perfidy*

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

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

3.24 The following written amendments to this article were submitted to the Commission : CE/COM III/C 1, 4, 9, 14, 16, 45, 55, 70 ; amendments C 1 Corr. 1, 9, 14 and 45 were replaced by amendment C 70. Amendment CE/COM III/C 9 was intended chiefly to introduce a general clause prohibiting perfidy, with the idea that any act of perfidy was forbidden. The author of the amendment thought that the list of examples given in Article 31 (1) should be preceded by a clause providing for application of the general principle. This amendment was later withdrawn in favour of amendment CE/COM II/C 70, submitted by other experts.

3.25 The deletion of the word *unlawful* in the second sentence of Article 31 (1) was proposed (CE/COM III/C 14) and supported by several experts.

3.26 Three amendments (CE/COM III/C 1, C 4 and C 5) were submitted changing the definition of *perfidy* as given in the Draft Protocol. They stressed that perfidy consisted in abuse of a situation which was protected under international law, in particular

with the intention of resuming hostilities under cover of this protection. One expert proposed that the first sentence in paragraph 1 should be worded : *It is forbidden to attack ... instead of It is forbidden to kill or injure ...*

3.27 The list contained in the second sentence of Article 31 (1) was the subject of proposals from some of the experts : amendment CE/COM III/C 16 proposed deleting the phrase *the use in combat of the enemy's distinctive emblems*. Amendment CE/COM III/C 55 proposed to add the phrase *giving the impression, before attacking the enemy, that they are non-combatants* as an example of perfidy. The amendment also contained a new draft paragraph 3 : *Attacks from ambush, even if carried out in civilian clothing, are not prohibited*. CE/COM III/C 55 was closely related to the amendment of the same delegation in CE/COM III/C 15 on guerrilla fighters ; another amendment CE/COM III/C 45 purported to forbid combatants to disguise themselves as civilians. One expert proposed a list of examples different from that contained in the draft text of Article 31.

3.28 Several experts approved amendment CE/COM III/C 9 ; some wished to delete the list of examples in the second sentence of Article 31 (1) ; others supported the proposal to supplement it as suggested above or else to insert the phrase *without prejudice to other cases which might arise*.

3.29 One expert raised the subject of maritime warfare which presented special problems and several experts called for a clear solution of this question. Many experts recommended that a detailed list of possible cases of perfidy be drawn up, while another requested that the question be carefully studied. Other experts voiced their disagreement with these recommendations.

3.30 One view was that it was extremely difficult to distinguish between ruse and perfidy, and that the provision should be limited to a statement of what was forbidden for humanitarian reasons.

## Article 32

### ICRC DRAFT

#### *Article 32. — Recognized signs*

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

3.31 The amendments relating to Article 32 were contained in CE/COM III/C 7, 8, 38, 60 and 73 ; amendment C 60 replaced amendment C 7 and amendment C 73 replaced amendments C 38 and 60. Amendment CE/COM III/C 60 proposed deleting

from this draft article the word *improper*, and forbidding the use of recognized signs for purposes other than those laid down in the relevant Conventions. It also left open the possibility that the Protocol under discussion might establish additional protective signs, e.g., for civil defence workers; the abuse of such signs would also be punishable.

3.32 Other experts asked that the words *and other international instruments, in particular those of the United Nations* be added at the end of Article 32 (CE/COM III/C 38). Although it was pointed out that the United Nations flag did not always afford protection, the acceptance of the mention of the United Nations was, in principle, well received.

## Article 33

### ICRC DRAFT

#### *Article 33. — Emblems of nationality*

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

3.33 The written amendments to Article 33 were — CE/COM III/C 1, 23, 25, 31, 38 and 71; amendment C 71 replaced amendments C 1 and 31 (on Article 33). It was proposed that the title of the article be changed and replaced by *Emblems of nationality and of international forces* (CE/COM III/C 38) or by *Enemy and neutral emblems* (CE/COM III/C 71).

3.34 Some of the experts proposed making the prohibition of the use of enemy emblems absolute (CE/COM III/C 1, 23 and 71). These proposals were seconded by other experts on the grounds that the Hague wording had given rise to too much abuse. Such absolute prohibition would apply to any misuse of enemy emblems which might facilitate acts of combat; it would therefore in no way prejudice the provisions of the Third Geneva Convention relative to the Treatment of Prisoners of War nor affect situations which might arise in occupied territories.

## Article 34

### ICRC DRAFT

#### *Article 34. — Safeguard of an enemy hors de combat*

1. It is forbidden to kill or wound an enemy who, having laid down his arms, or no longer having any means of defence, has surrendered at discretion.
2. It is forbidden to decide to leave no survivors and take no prisoners, to so threaten an enemy and

to conduct the fight in accordance with such a decision.

3. A captor shall provide for persons falling into his power even if he decides to release them.

4. Nevertheless, sentences may subsequently be passed for infringements of the law of armed conflict, consistent with the procedure recognized in international law.

3.35 The written amendments to Article 34 were — CE/COM III/C 11, 14, 31, 46, 61, 65 and 67; amendments C 70 and C 71 (see Articles 31 and 33) replaced amendments C 14 and C 31; amendment C 61 replaced amendments C 11, 29 and 46. A proposal was submitted by some experts to substitute a new article for Articles 34 and 35 of Draft Protocol I, with the added mention that the co-sponsors intended to submit a further proposal containing the principle set forth in Article 34 (3) of the ICRC draft (CE/COM III/C 61). That proposal submitted in C 61 concentrated into a single article the prohibition to kill or to wound, the definition of the situations in which such prohibition would take effect, and the rule prohibiting refusal to give quarter.

3.36 Another proposal reversed the order of the subjects listed in Articles 34 and 35 of Draft Protocol I. Article 34 was devoted to the definition of persons *hors de combat*, and Article 35 to their safeguard, which included the prohibition of refusal to give quarter, the prohibition to kill, wound or ill-treat, and the giving of humane treatment and care, including the application of the Third Convention. (CE/COM III/C 65).

3.37 The first paragraph of Article 34 did not give rise to much discussion. It was suggested that the words *at discretion* be replaced by *unconditionally*; it was further suggested that they be replaced by *without offering resistance*. One expert preferred the word *attack to kill or wound*.

3.38 There was some discussion, on paragraph 2, as to the true meaning of the Hague rule forbidding *to declare* that no quarter would be given. One expert considered it meant that it was forbidden to *order*, and not to *decide*, as the Draft Protocol proposed. Paragraph 3, too, gave rise to some discussion as some experts read it as an obligation to capture which they found unacceptable. Paragraph 4 was, in principle, broadly accepted, but some participants wished it to be couched in clearer terms, others wanted to see it inserted elsewhere and yet others would have had it removed. (CE/COM III/C 31).

3.39 A new paragraph 2, as proposed (CE/COM III/C 14) to prohibit the taking and execution of hostages while another proposal (CE/COM III/C 67) contained an amendment forbidding the use of torture. Other experts were in favour of an amendment prohibiting the torture of an enemy *hors de combat*.

## Article 35

### ICRC DRAFT

#### *Article 35. — Conditions of capture and surrender*

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

3.40 The written amendments to Article 35 were CE/COM III/C 11, 14, 28, 29 and 65; amendments C 70 and 71 (see Articles 31 and 33) replaced amendment C 14; amendment C 61 replaced amendments C 11 and 29. Some experts were in favour of removing Article 35 of the Draft Protocol, either by deleting it altogether or by merging its provisions with those of Article 34. One expert proposed putting Article 35, on persons *hors de combat*, before Article 34, on safeguard.

3.41 One expert wished to see the expression *territory taken by an enemy*, which appeared in Article 35 (2) (a), replaced by *territory under the control of the enemy* (CE/COM III/C 28).

3.42 One expert proposed to insert in Article 35, as new paragraphs 3 and 4, paragraphs 3 and 4 of Articles 34 of the Draft Protocol.

## Article 36

### ICRC DRAFT

#### *Article 36. — Aircraft occupants*

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

3.43 Amendments relating to Article 36 were the following: CE/COM III/C 8 Corr. 1, 10, 24, 25, 30, 31, 35, 49 and 69. One expert proposed the deletion of Article 36 of the Draft Protocol (CE/COM III/C 49).

Several experts expressed misgivings about this article: in their opinion, it was impossible to determine whether the future attitude of a parachutist would be hostile or not and, consequently, it was impossible to know whether or not flyers should be afforded protection during descent by parachute or, in the case of a forced landing, at the moment when their plane landed. In this connection, an expert

stressed that a flyer in distress could, sometimes, guide his parachute so as to reach the territory controlled by his own forces and that, in this case, by virtue of international law, he could be attacked like an enemy who was not yet really *hors de combat* and who attempted to elude capture. Another expert said that, in seeking a solution, humanitarian and military considerations should be balanced against each other.

3.44 An expert request a clear definition of the expressions *in distress*, *parachute* and *hostile attitude* (CE/COM III/C 31). Another expert proposed to limit application of the rule to cases where a state of being *hors de combat* was obvious (CE/COM III/C 30); this proposal was supported by several experts who had, up to that point, expressed doubt about the suitability of Article 36. Yet another expert proposed that any reference to a forced landing should be deleted (CE/COM III/C 25).

3.45 Several experts made comments on technical points. One expert felt that the term *parachute* was not broad enough and did not cover future means of evacuation from an aircraft in distress. Another speaker wished to introduce the mention *without having received sufficient advance warning* before the word *landing* which appeared at the end of the sentence (CE/COM III/C 24). Another speaker proposed the use of orange-coloured parachutes designed to indicate the intention to surrender (CE/COM III/C 8); this same proposal also provided for a withdrawal of protection when landing on or near a military objective.

3.46 Some experts proposed the wording of Article 36 should be retained as it appeared in the draft, but that a second sentence should be added providing flyers in distress, who were not in a hostile attitude, to be afforded an opportunity to surrender by their enemy (CE/COM III/C 10). This proposal was supported by several experts. Another expert declared that the safeguarding of flyers in distress was in conformity with the law in force and proposed the insertion in Article 36 of a new paragraph stipulating that the misleading use of distress signals was forbidden (CE/COM III/C 35).

## Article 37

### ICRC DRAFT

#### *Article 37. — Independent missions*

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

or with the enemy armed forces shall not be considered as spies.

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

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

3.47 The written amendments relating to Article 37 were : CE/COM III/C 20, 32, 34, 36, 37, 47, 49 and 62 ; amendment C 62 replaced amendments 20 and 47. A proposal was put forward for Article 37 of the draft to be amended so as to eliminate any reference to members of the armed forces as contained in Article 4 of the Third Geneva Convention of 1949, as well as any reference to military and non-military personnel who openly carried out liaison or communication missions, and to insert a reference to persons complying with the conditions laid down in Article 38 of the draft (CE/COM III/C 62 in replacement of CE/COM III/C 20 and 47).

3.48 Several experts recommended the retention of Article 37 of the draft, but that the words *wearing their uniform* should follow the phrase *members of the armed forces*. (CE/COM III/C 36, CE/COM III/C 49).

3.49 Others wanted the words *military targets* or *of a military nature* to be inserted at the end of paragraph 2 of Article 37 (CE/COM III/C 32, CE/COM III/C 37). These proposals were seconded. Another suggestion was that a reference to the persons mentioned in Article 38 should be added to Article 37 of the draft.

3.50 It was also proposed to add, after the word *enter*, in the third line of paragraph 1 of Article 37 of the draft, the words *or who remain*.

3.51 An additional paragraph was proposed providing that spies should not be condemned without trial. This proposal was supported by another expert (CE/COM III/C 34).

3.52 Some experts thought that paragraph 3 of Article 37 of the draft was superfluous and that it should be deleted. An expert wished Article 37 to be sub-divided into three sections, the first referring to regular forces, the second to combatants described in Article 38 and the third to irregular forces, and that each category should be adequately dealt with. One expert thought that only confusion would be likely to result if such different notions as methods of combat on territory controlled by the enemy, the status of those involved in such combat and their motivations were all dealt with in the same context.

## Article 38

### ICRC DRAFT

#### Article 38. — Guerrilla fighters

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

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

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

(c) that they are organized and under the order of a commander responsible for his subordinates.

2. Individual infringements of the foregoing conditions shall not entail forfeiture of prisoner-of-war treatment for the other members of the organization who have observed those conditions.

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

3.53 The following written amendments were submitted to the Commission for examination : CE/COM III/C 12, 15, 17, 39, 40, 41, 42, 43, 48, 49, 50, 51, 53, 54, 63, 66, 72.

3.54 A representative of the International Committee of the Red Cross introduced the subject and said that the provisions of Article 38 were the outcome of International Committee of the Red Cross proposals submitted in its Document VI (" Rules Applicable in Guerrilla Warfare ") to the Conference of Government Experts, at its first session, in 1971, and modified to take account of the first session's discussions as well as of the work of the United Nations in this field.

3.55 Some experts pointed out that guerrilla warfare, which was perhaps as old as mankind itself, had acquired a fresh topicality and that it posed one of the most complex problems that existed for humanitarian law. A dual need, humanitarian and political, demanded the examination of this form of warfare which sometimes presupposed the violation of the rules of war in its traditional concept and hence the need to establish new rules acceptable



to, and applicable by, everyone. It was not possible for young countries, which had to combine human, geographical and nationalist factors in order to compensate for their inferiority in armament, to act without using guerrilla techniques. Two experts stressed that it was not possible to dissociate guerrilla from anti-guerrilla warfare, and that the latter took on the character of technical warfare.

3.56 One expert regretted the absence of many Asian and African countries, whose arguments would have to be heard before any decisions could be taken on the question, whereas another speaker, supported by several others, expressed his regret that there were no representatives of those guerrilla movements at present carrying on a struggle, who could have attended the Conference at least in an informative capacity, and who would undoubtedly have been those primarily concerned in this problem.

3.57 Two experts mentioned that the object of regulations should be to contain escalation and the aggravation of violence, of which the first victims were the civilian population, by conferring prisoner-of-war status upon captured guerrilleros. Other experts, on the other hand, thought that too broad a protection afforded to captured guerrilleros would jeopardize the protection of the civilian population.

3.58 A number of experts felt that the conditions contained in Article 4 A (2) of the Third Convention, patterned on Article 1 of the Hague Regulations, were too rigid and did not correspond to the real situation in existing conflicts: by making guerrilla fighters subject to capital punishment or other severe punishments, said another expert, one would hardly be encouraging them to observe humanitarian rules on their side. In the past, another expert pointed out, it had not been possible to stop guerrilla warfare by refusing prisoner-of-war status to guerrilla fighters; moreover, the motivations behind guerrilla warfare went far deeper and, according to several experts, formed part of the struggle against aggression and oppression and against foreign or colonial domination. Therefore, it was no longer desirable to treat guerrilleros as outlaws, but rather, at least, to grant them quarter, whatever their status might be, as well as protection against torture.

3.59 Several experts considered that it was necessary to devote greater attention to the problem of guerrilla warfare, while taking account of present-day realities, to refrain from adopting final resolutions hastily before all the facts were known, and to study the problem more in depth, as the development of the law in this field was still in its early stages.

3.60 The majority of the experts felt that Article 38 proposed by the International Committee of the Red Cross constituted a reasonable and humanitarian basis for an approach to the problem. The following special comments were expressed:

3.61 One of the experts speaking on the *position of Article 38* in the Draft Protocol proposed that it should constitute one of the paragraphs of Article 35 ("Conditions of capture and surrender").

3.62 The title of the Article 35 ("Guerrilla fighters"), which was a purely descriptive title regarding a method of combat, was criticized by several experts, who suggested as alternatives "irregular forces" or "combatants not belonging to regular armed forces"; but another expert was opposed to changing the title as the proposed alternatives were no less loaded with subjective meaning than the word "guerrilla". It was also noted by some experts that the Draft Protocol was intended to apply to international conflicts and thus the persons referred to in Article 38 would belong to one of the Parties to the conflict.

3.63 The *body of Article 38 (1)* was considered by one of the expert to be somewhat heavy in style and in need of a simpler presentation. Several experts proposed granting not only prisoner-of-war treatment but also prisoner-of-war *status* to captured guerrilla fighters. Several experts expressed the wish to strike out mention of "independence movements", arguing that this introduced a criterion or motive foreign to the spirit of the Conventions. Another proposed removing the phrase "even in the case of a government or of an authority not recognized by the Detaining Power" (see CE/COM III/C 48, Commentary) and yet another, the words "militias or volunteer corps". However, several experts felt that paragraph (1), as proposed by the International Committee of the Red Cross, be retained. An expert proposed that it be made clear that the persons referred to in Article 38 were those who were struggling for self-determination by waging anti-colonial wars and that persons assisting such movements be mentioned; several others seconded this proposal. One expert wanted to add "or the Parties themselves" after "a Party to the conflict" and "or movement" after "authority". He then drew attention to the faulty English version of the French word "autodétermination" which could not be translated by the word "independence". Two experts asked that the phrase "belonging to" a Party to the conflict, and the terms "militia" and "resistance movement" be more clearly defined. It was also proposed to insert a phrase "and operating in or outside their own territory, even if this territory is occupied".

3.64 Many comments were made on sub-paragraph 1 (a) of Article 38. One expert wanted it struck out while another wanted the stipulation to be conditional upon the possibilities available to guerrilla fighters. Other experts proposed returning to the wording used at The Hague and in the 1949 Geneva Conventions, calling for respect for the laws and customs of war, while another expert simply suggested removing the word "principles", only to be contested by yet another who stressed the material limitations of guerrilla fighters. Finally, a



number of experts related this provision to Article 31 ("Prohibition of perfidy") and the need to redefine the notion of perfidy in the context of guerrilla warfare.

3.65 *Sub-paragraph 1 (b) of Article 38* was vigorously opposed by several experts who demanded, either by written amendments or in the course of discussion, that it be removed, while others called for a more flexible wording, better suited to the special circumstances of the struggle. Other experts, on the contrary, proposed a reinforcement of the requirement that guerrilla fighters distinguish themselves from civilians, and referred back to the terms used at The Hague and Geneva in 1949 which stipulated both the carrying of arms openly and the wearing of a distinctive sign. Yet others agreed with the ICRC text, which required only one or the other of those conditions to be fulfilled, but proposed striking out the words "or by any other means" as too vague. All three schools of thought were concerned with the effectiveness of such requirements for protecting civilians against the dangers of hostilities.

3.66 *Sub-paragraph 1 (c) of Article 38* was opposed by two experts who proposed that it be removed *in toto*, while another expert simply wanted to remove the words "that they are organized". Others suggested making it quite clear that what was meant was a commander responsible for the conduct of his subordinates in the eyes of a Party to the conflict; two experts wanted to replace "commander" by "person" and another asked that "according to appropriate rules of discipline" be added after "that they are organized". One expert also stressed that, in order to qualify for the privilege of prisoner-of-war treatment, even a guerrilla fighter must comply with the stipulations in sub-paragraphs (a), (b) and (c) of Article 38 (1).

3.67 *Paragraph 2 of Article 38* gave rise to two written amendments; one proposed that individual infringements should not entail forfeiture of prisoner-of-war treatment for the author of the infringement of for the other members of the organization, subject to reservations regarding prosecutions for war crimes. The other, supported by a number of experts, distinguished between, on the one hand, infringements of the conditions contained in sub-paragraphs (1) (a) and (b) by individuals, which would not entail loss of POW status for the rest of the group (provided they had generally observed them) but only for those individuals, and, on the other hand, infringements of the conditions contained in (1) (c), which would entail loss of POW status for the whole group; in the latter case, the matter was one of collective responsibility, and the fulfilment or infringement by individuals of the stipulations laid down were not to be considered. One expert asked for a clarification of the term "individual", another wished to refer to the "non-fulfilment" of the conditions rather than "infringements" thereof.

3.68 *Paragraph 3 of Article 38* gave rise to two main observations. One was aimed at bringing the reference to Article 3 common to the four Geneva Conventions into line with the proposals in Protocol II and the other, presented by several experts jointly (CE/COM III/C 63), called for the removal of the entire paragraph and the insertion of a new text in another article in Part I of Protocol I. Such an article was to stipulate that anyone, not entitled to more favourable treatment, would be afforded the guarantees offered by common Article 3.

3.69 Two proposals for additions to be brought to Article 38, as discussed above, were made. The first suggested that members of regular armed forces involved in guerrilla operations be brought within the scope of this article; the second took up the principles of Article 5 of the Third Geneva Convention, according to which the protective provisions relating to prisoners of war should apply, even if there were any doubt regarding the status of a captured person, until that status were determined by some procedure, which, according to the expert in question, should be subject to international scrutiny to ensure its objectivity.

## Article 39

### ICRC DRAFT

#### *Article 39. — Organization and discipline*

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

3.70 The written amendments to Article 39 were CE/COM III/C 17, 19, 21 and 64; amendment 64 replaced amendment 21.

3.71 Several experts asked that the words of *international law* be inserted in the second sentence of this article after the words *and of the other rules* (CE/COM III/C 19, 64). They further asked that the reference to irregular forces in Article 38 be here inserted after *Armed forces*.

3.72 While concurring with the tenor of Article 39, some experts were doubtful as to the place it should occupy in the Draft Protocol and they proposed that it be inserted either in Part V or in Article 1. However, one expert did observe that to move the article would change its content as its scope would then differ. One expert proposed that the Parties to the Protocol should undertake to sanction, in their internal legislation, observance of the rules contained in the Protocol and other rules applicable to armed conflicts (CE/COM III/C 17).

## PART TWO

### Protection of journalists engaged in dangerous professional missions in areas of armed conflict

In connection with this item on the agenda, the ICRC, at the beginning of the second session, circulated to the experts the documentation received on the subject from the Secretary-General of the United Nations. This comprised an extract from the report (draft text) of the twenty-eighth session of the Commission on Human Rights and the following 14 documents of that Commission: E/CN.4 (XXVIII)/CRP.5/Add.1, E/CN.4/L.1198, E/CN.4/L.1198/Rev.1, E/CN.4/L.1199, E/CN.4/L.1199/Corr.1 and E/CN.4/L.1202 to E/CN.4/L.1210.

The document E/CN.4(XXVIII) CRP.5/Add.1 contained the text of resolution No. 6 (XXVIII) adopted by the Commission on Human Rights on 31 March 1972, an extract from which is given below so that the comprehension of the report of Commission III on this question may be more fully clarified.

*"6 (XXVIII). Protection of journalists engaged in dangerous professional missions in areas of armed conflict*

#### *The Commission on Human Rights*

*Noting* General Assembly resolution 2854 (XXVI) and the documents related thereto, particularly document A/C.3/L.1902 and A/C.3/2.1903,

*Noting* the General Assembly's request that the draft convention contained in Economic and Social Council resolution 1597 (L) should be considered as a matter of priority,

1. *Approves* as the basis for further work the draft articles of the International Convention on the Protection of Journalists Engaged in Dangerous Professional Missions annexed hereto;

2. *Decides* to transmit the present resolution and the draft articles of the International Convention, as well as all other relevant documents containing drafts or amendments that were submitted during its twenty-eighth session, to the next session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened by the International Committee of the Red Cross, in order that they may be brought to the notice of that Conference for its observations;

3. *Recommends* that the Economic and Social Council should adopt the following draft resolution:

## DRAFT ARTICLES OF THE INTERNATIONAL CONVENTION ON THE PROTECTION OF JOURNALISTS ENGAGED IN DANGEROUS PROFESSIONAL MISSIONS IN AREAS OF ARMED CONFLICT

### Article 1

*The provisions of this Convention shall extend to journalists who hold the card provided for in article 6 below and subsequent articles while engaged in dangerous professional missions.*

### Article 2

*For the purposes of the application of this Convention, the word "journalist" shall mean any correspondent, reporter, photographer, film cameraman or press technician who is ordinarily engaged in any of these activities as his principal occupation and who, in countries where such activities are assigned their particular status by virtue of laws or regulations, have that status (by virtue of the said laws or regulations).*

*The words "dangerous professional missions" shall cover any professional activity exercised by a journalist carried out in an area where there is armed conflict, whether or not of an international character, for the purpose of collecting information, photographs, films, sound recordings or any other material and disseminating them through media of public information.*

*The term "armed conflict", whether or not international, refers to the conflict defined in the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and in all Protocols to that Convention ratified by States Parties to this Convention.*

### Article 3

*There shall be established an International Professional Committee composed of nine members appointed by the Secretary-General of the United Nations in consultation with the Chairman of the Commission on Human Rights, with due regard for the principle of equitable geographical distribution and with the establishment of an equitable balance among the various information media. The Secretary-General shall be represented in that Committee.*

*The Secretary-General shall invite the ICRC to participate in the work of the Committee as an observer.*

### Article 4

*The International Professional Committee shall make regulations prescribing the form, contents and conditions for the issuance and the withdrawal of the card.*

*A journalist who is engaged in a dangerous mission may hold the above-mentioned card.*

*The Committee shall inform all States Parties to the Convention of the form, contents and conditions for the issuance and the withdrawal of the card and an exact description of the distinguishing mark provided for in article 9.*

#### Article 5

*The card shall certify the status of the journalist and shall indicate the occupation that gives him to that status within the meaning of article 2 above. It shall also state his name, date and place of birth, habitual residence and nationality, and shall bear his photograph, his signature and the distinguishing mark provided for in article 9.*

*The card shall be issued for the execution of a dangerous professional mission in a specified geographical area where there is an armed conflict and shall be valid for a period of 12 months from the date of issue. It may be renewed on the same terms provided its holder retains the status of a journalist.*

*The authorities responsible for the issuance of the card shall communicate without delay to the International Professional Committee the names and all other relevant personal data of journalists to whom cards have been issued. In the case of withdrawal of a card from a journalist, such withdrawal shall also be communicated immediately to the International Professional Committee. The latter shall establish and maintain an up-to-date register of journalists who hold cards.*

#### Article 6

*The competent authorities of the States Parties to this Convention shall be responsible for the issuance, renewal and, where necessary, withdrawal and authentication of the card.*

*The card may be issued only to a journalist who is a national of the State Party to this Convention that issued the card or who is under its jurisdiction.*

#### Article 7

*The States Parties to this Convention and, as far as possible, all parties to an armed conflict in the territory of a State Party to the Convention shall recognize a duly authenticated and current card and the distinguishing emblem provided for in article 9, and they shall give effect to them as required by this Convention.*

*States Parties to this Convention shall give wide circulation to the model of the card and to the distinguishing emblem provided for in article 9.*

#### Article 8

*A journalist who holds a card and who is engaged in a dangerous professional mission shall produce the card when necessary to secure the protection of this Convention.*

*A journalist who holds a card may wear the distinguishing emblem described in article 9.*

#### Article 9

*There shall be a distinguishing emblem, which shall consist of the letter J in black on a gold circular background. The emblem shall be displayed on the left upper arm in such a way that it shall be clearly visible at a distance.*

#### Article 10

*The States Parties to this Convention and, as far as possible, all the parties to the conflict in the territories of a State Party to the Convention having identified a journalist as one who holds a card, shall :*

- (a) Do all that is necessary to protect him from the danger of death or injury or from any other danger inherent in the conflict and in the conduct of all parties to the said conflict ;*
- (b) Inform him to the extent compatible with military requirements of the areas and circumstances in which he may be exposed to danger ;*
- (c) Recognize, in case of internment, that the regulations for the treatment of internees set forth in articles 79 to 135 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, shall apply ;*
- (d) Ensure that, if a journalist who holds a card is killed or injured, falls seriously ill, is reported missing or is arrested or imprisoned, the information concerning the said journalist is communicated forthwith to his next of kin or to the State Party that issued the card, or ensure that the said information is made public. This information may be communicated through all appropriate media, in the quickest and most effective manner and, preferably, through the ICRC or the Secretary-General of the United Nations, in order that the International Professional Committee may be informed without delay.*

*When undertaking dangerous professional missions in an area where there is a conflict within the meaning of article 2, journalists have the right to protection from an immediate danger resulting from hostilities only to the extent that they shall not expose themselves to danger without needing to do so for professional reasons.*

#### Article 11

*Each State Party to this Convention shall use its best endeavours to ensure that the provisions of this Convention are observed.*

#### Article 12

*The application of this Convention shall have no legal effect under international law on the situation of the parties to a conflict.*

## Article 13

*This Convention shall not affect the sovereignty of States in so far as concerns national laws with respect to the crossing of frontiers or the movement or residence of aliens.*

*Possession of a card shall not confer on a journalist any right or privilege save and except as prescribed by this Convention. It implies that the journalist to whom the card is issued shall undertake to use it only for his personal safety and therefore not to interfere in the domestic affairs of States to which he proceeds, and not to engage in any activities which may involve a direct or indirect participation in the conduct of hostilities in the area where the dangerous mission is being undertaken.*

## Article 14

*None of the provisions of this Convention shall affect the provisions of the Geneva Conventions of 12 August 1949, or any Protocols to those Conventions."*

3.73 The Commission devoted two meetings (its 9th and 10th meetings on Friday, 12 May) to examining the question of the protection of journalists engaged in dangerous missions. The matter had already occupied two meetings at the first session of the Conference of Government Experts (see Report on the first session, paras. 507-515).

3.74 In resolution 2854 (XXVI), adopted in December 1971, the United Nations General Assembly made a special request to the Commission on Human Rights to transmit its report on that matter to the second session of the Conference of Government Experts so that the International Committee of the Red Cross might be able to submit the observations of the Conference to the twenty-seventh session of the United Nations General Assembly. In compliance with that request, the International Committee of the Red Cross placed that item on the agenda of the second session and, at the beginning of the Conference, the experts had received the relevant documentation produced by the United Nations (see above) which included, in particular, an extract from the report of the twenty-eighth session of the Commission on Human Rights (March, 1972) and resolution 6 (XXVIII) to which are annexed the draft articles of the "International Convention on the Protection of Journalists Engaged in Dangerous Professional Missions in Areas of Armed Conflicts" (hereinafter abbreviated to "Draft International Convention").

3.75 The matter was introduced by the representative of the United Nations Secretary-General who spoke first of the progress made in the work carried out on the subject in United Nations bodies finally leading to the formulation of draft articles of the International Convention, approved by the Commission on Human Rights as a basis for further work.

He then briefly outlined the various aspects of the Draft International Convention which had been submitted, together with other documents, to the scrutiny of experts, and showed on what points this draft varied from the texts submitted to the government experts at the first session.

3.76 In the discussion after this introduction, some experts expressed doubts as to the necessity of granting special protection to journalists engaged in dangerous missions. In their opinion, the granting of special protection to an increasing number of categories weakened the general protection due to the civilian population from which journalists also benefited, unless they were war correspondents within the meaning of the Third Geneva Convention of 1949. What was needed to improve the situation was a stricter application of the existing law. Later, perhaps, steps might be taken to devise provisions relating to war correspondents or to insert appropriate clauses in the Draft Additional Protocol to the Geneva Conventions. One expert made the further point that journalists ran risks voluntarily and that their situation was therefore very different from that of persons protected by the Geneva Conventions, who were involuntary victims of circumstances beyond their control.

3.77 Those experts added that, if a majority of States were nevertheless in favour of granting special protection to journalists, their own governments would collaborate in drawing up a suitable convention, provided the latter was appropriate and that it could in fact be applied, which they felt could not be said at the moment of the draft articles proposed by the Commission on Human Rights. In this connection, they made a number of critical comments summed up below together with the comments of other experts on the various articles of the draft.

3.78 Of the experts who spoke on this subject, the majority were, however, in favour of granting special protection to journalists engaged in dangerous missions and thought that this should be done by means of a special Convention. They put forward two arguments in support of this opinion: in the first place, it was in the interest of world public opinion that the events connected with armed conflicts should be the subject of the widest possible news dissemination and reporting; and, secondly, that the spread of information and the presence of journalists on the spot could contribute to a more effective implementation of humanitarian law in armed conflicts. It was therefore in the interest of the international community that journalists should run risks and, if certain measures such as the granting of an identity card or of a distinctive emblem could lessen those risks and diminish the number of victims among the profession, then it would be unfitting to neglect this opportunity to offer them added safeguards. Those experts did not see how this could constitute a weakening of the general protection afforded to the civilian population.

3.79 One expert proposed an alternative approach, which was contained in United Nations document E/CN. 4/L.1199 and L.1199/Corr.1 referred to in Commission on Human Rights resolution 6 (XXVIII).

3.80 An ICRC representative stated it was in this spirit that his organization, although opposed to the proliferation of special cases for protection, had collaborated and continued to collaborate in the United Nations studies carried out in this field. Because of the complex nature of the problem, it seemed preferable to draw up a special convention rather than try to deal with the question in the Draft Additional Protocol to the Geneva Conventions. It would however be desirable that the relationship between this special instrument and the Geneva Conventions and the Draft Additional Protocols be clearly established, and on this point the draft produced by the Commission on Human Rights might be improved upon.

3.81 Apart from the opinions expressed concerning the actual principle of granting special protection to journalists engaged in dangerous missions, some experts made a number of comments on the substance of the Draft International Convention. Several of them stressed the fact that their remarks were, however, of a general nature, as they had had little time to study the relevant documents; moreover, some of them considered that this question was primarily one for the United Nations bodies. That was why all comments were made verbally and no written amendments were submitted. In this connection, one expert suggested that the considerations on which the United Nations studies on protection for journalists were based (the right to information contained in Article 19 of the Universal Declaration of Human Rights) were very different from the basic concern (humanitarian law) of the present Conference of Experts; the only element the two had in common was that embodied in Article 10 of the Draft International Convention, and it was on this article that it would be particularly useful to have the opinion of the Conference of Experts.

3.82 In connection with *Article 2* of the Draft International Convention, some experts asked that paragraph 3 should refer not only to the Geneva Convention relative to the Protection of Civilian Persons but also to all four Geneva Conventions of 1949. One expert pointed out that the said article referred to the Geneva Conventions as a whole and not only to the Fourth Convention.

3.83 With reference to *Articles 3 and 4* of the Draft International Convention, which dealt with the International Professional Committee, some experts pointed out that the functions of this Committee had been considerably restricted as compared with those defined in an earlier text, so much so indeed that it might be asked whether such a body was still essential or whether it might not be preferable to lay down rules in the Convention itself or in an

annex for the model identity card and the procedures to be adopted in issuing it. In this regard, two experts suggested deleting all provisions concerning the International Professional Committee. It was also pointed out that there was no reference concerning the financing of the Committee and that this should not be the responsibility of the United Nations. Finally, in the opinion of two experts, the powers of the Committee should not constitute a threat to the freedom of the press as understood in their own country.

3.84 On *Article 5*, three experts considered that the suggestion made in paragraph 2 to issue an identity card for a specific geographical area where an armed conflict was taking place had disadvantages: it could lead to some authorities being required to make a statement regarding the existence of an armed conflict, and in many cases they might refuse to do so. Moreover, what would happen if the conflict were to spread beyond the geographical area for which the card was valid? It would be preferable to find a more general formula. The validity period of 12 months for the identity card was also the subject of comment: provision would have to be made, if necessary, for withdrawal of the card before expiry of this period or, in other cases, for extension of its validity beyond the stated period.

3.85 On *Article 6*, it was proposed that, to avoid "cards of complaisance" being granted, it should be stipulated that journalists should be habitually domiciled in the State whose authorities issued the card.

3.86 On *Article 8*, it was suggested that carrying the card should be made compulsory and not merely optional, as stated in the Draft International Convention.

3.87 Most of the discussion was centered on *Article 10*. Some experts thought it too detailed, difficult of application for the military authorities concerned, and presenting a logical contradiction between sub-paragraph 1 (a) and the last paragraph. Some experts preferred, as a definition of the protection to which journalists were entitled, the solutions contained in the amendments submitted to the Commission on Human Rights by the United Kingdom (E/CN.4/L.1203) or by the United States (E/CN.4/L.1205). Another proposal for the simplification of this article was to take as a model, *mutatis mutandis*, the provisions of Article 68 of Draft Protocol I, relating to civil defence personnel, which showed more clearly the two principal aspects of the protection to be granted. Sub-paragraph (c) of Article 10 (application of Articles 79 to 135 of the Fourth Geneva Convention to interned journalists) also gave rise to comments: the application of these articles seemed impossible to some experts in the event of non-international conflict; even in international conflicts, the application of certain articles

(especially those relating to the Protecting Power) gave insufficient consideration to the fact that some of the journalists in question would belong to co-belligerent or neutral countries.

3.88 *Article 11* was considered superfluous by some experts.

3.89 Referring to *Article 13*, two experts stressed that the Draft International Convention should define better the obligation on journalists to conform to the instructions of the military authorities, on the lines of the amendment submitted to the Commission on Human Rights by the USSR (Document E/CN.4/L.1208).

3.90 On the same subject, one expert stated that the Draft International Convention should place more emphasis not only on the rights of journalists, but also on their duties where the objectivity of their reports was concerned. Regarding the duties of journalists, a representative of the International Committee of the Red Cross drew attention to the fact that, in conformity with the Geneva Conventions, the human dignity of victims of conflicts should be respected and screened from public curiosity and that this aspect should also be incorporated in the International Convention.

3.91 Finally, some experts raised points which they considered should be added to the Draft International Convention. This, in fact, made no mention of sanctions to be imposed on journalists in the event of violations of the provisions of the Convention. Another expert and the ICRC representative thought that the Draft International Convention should more clearly delineate the reservations applying to war correspondents already covered by the Third Geneva Convention, in order to avoid any ambiguity between the two instruments, and the Draft Convention should also specify that it did not in any way diminish the protection to which journalists without identity cards were entitled by virtue of the general rules of humanitarian law concerning the protection of civilians.

3.92 Replying to some of the criticisms made above, an expert stressed that the Draft International Convention struck a balance between the undisputable interests of journalists and the requirements of the sovereignty of States. Those requirements were specifically mentioned in *Articles 6, 11 and 13* of the Draft. Several experts said they agreed with the Draft International Convention.

3.93 Summing up the discussion, the representatives of the United Nations Secretary-General said that, while he did not wish to appear to defend the Draft International Convention, the idea had been approved by the majority of members of the United Nations and that it met a precise humanitarian need. Although some journalists were prepared to run risks in all circumstances, even without availing themselves of the guarantees envisaged in the Draft International

Convention, others considered that their work would be facilitated if they had some adequate form of identity card and an appropriate distinctive sign. At any rate, he considered that the debate within Commission III had provided a body of commentary which would be very useful for the subsequent work of the United Nations bodies and for the improvements that many experts wished to see made in the Draft International Convention.

## PART THREE

### Civilian population

(DRAFT PROTOCOL I, PART IV, ARTICLES 40 TO 72)

#### General Discussion

3.94 The general discussion began on the morning of Tuesday, 16 May. It covered all the problems relating to the protection of the civilian population in time of armed conflict. The following documentary material was submitted to Commission III for study :

- (1) Volume I, ICRC "Basic Texts", *Article 40-72* of Draft Protocol I (ICRC, Geneva, January 1972) ;
- (2) Volume II, ICRC "Commentary", *Articles 40-72* of Draft Protocol I (ICRC, Geneva, January 1972) ;
- (3) the Report on the Work of the Conference of Red Cross Experts (second session), *Section D, Parts V and VI* (ICRC, Vienna, April 1972) ;
- (4) the Report on the Work of the Meeting of Non-Governmental Organizations, *Chapter III* (ICRC, Geneva, November 1971) ;
- (5) the Report of the International Union for Child Welfare (IUCW, Geneva, April 1972) ;
- (6) the documentary material from the latest session of the Commission on the Status of Women (transmitted by the Secretariat of the United Nations, E/5109 ; E/CN.6/568).

Most of the amendments were submitted in the course of discussions, but some at the end. In the case of those latter amendments, it was not possible to take them into account in this report, and only their reference number is mentioned after the ICRC draft article.

3.95 In his introductory remarks, the ICRC expert pointed out that the draft of Part IV relating to the civilian population reaffirmed and developed norms contained in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949 in the case of international armed conflict. The provisions of the written law should be elaborated and supplemented, above all in the field of the protection of the civilian population against dangers resulting from hostilities. The new forms and situations of present-day conflicts threatened to weaken international

humanitarian law: independently of the measures to be taken to reinforce its application, formal uniformity of the law and no longer simply substantial uniformity might provide one remedy, particularly as far as the civilian population was concerned. In its proposals under Part IV, the ICRC intended to elaborate and make more precise Part II of the Fourth Convention relating to general protection of populations against certain consequences of war, without touching upon that section of Part III of the Fourth Convention dealing with occupied territories.

3.96 The representative of the Secretary-General of the United Nations stressed the fundamental importance which the Teheran Conference in 1968 and the General Assembly, in its successive resolutions, attached to the protection of the civilian population in time of armed conflict. These international bodies recognized that at the present time, under the impact of various factors, such as the use of weapons of mass destruction and certain other means of combat, the sufferings of the civilian population were without doubt greater and more widespread than at any time in the history of armed conflict. In his two reports, and more particularly in the second (A/8052, paragraphs 30-87) the Secretary-General had examined these problems in detail and had made suggestions concerning, more particularly, standard minimum rules for the protection of civilians and the establishment of refuges and sanctuaries. The Secretary-General had been gratified to find that these suggestions had been taken into account by the General Assembly, particularly in its resolution 2675 (XXV), and that they had also been taken up in the Draft Protocols of the International Committee of the Red Cross. Without for all that in any way neglecting the protection of civilians in general, the competent organs of the United Nations had paid special attention to the specific problems posed by the protection of women and children in times of emergency and of armed struggles for peace, national liberation and independence. The representative of the Secretary-General then read out the draft resolution XII adopted at the twenty-fourth session of the Commission on the Status of Women, held in February 1972, in which the Economic and Social Council noted with satisfaction the work of the ICRC Conference of Experts with regard to the protection of women and children and in which the Secretary-General was requested to convey the Commission's view on this subject to the Conference. The representative of the Secretary-General passed in review the work carried out with regard to this problem by the Commission on the Status of Women and by the Economic and Social Council and the reports prepared by the Secretary-General on this subject.

3.97 Generally speaking, those experts who spoke at the discussion felt that the draft provisions of Part IV provided a good working basis for discussion. Several experts noted that these provisions

had taken into account the proposals made at the first session, in particular those contained in document CE/COM III/44 (1971). One expert regretted that the ICRC draft fell short of the Draft Rules of 1956 and Resolution 1 of the Institute of International Law (hereafter IIL, Edinburgh, September 1969), while another felt that the present ICRC text maintained a good balance between the dictates of humanitarian and military necessity. The ICRC text was, however, strongly criticized by one expert, who was of the opinion that it did not take sufficient account of the work of the United Nations and that it made too many concessions to "military necessity". These concessions, he thought, should only be made at the Diplomatic Conference. This view was opposed by one of his colleagues. Other experts felt strongly that the rules for protection should be widened still further. According to several experts, the experiences of recent armed conflicts had demonstrated the urgent necessity of examining the question of the protection of the civilian population against dangers resulting from such conflicts.

3.98 Some speakers maintained that the civilian population ought to be protected in identical fashion in all armed conflicts, whether international or internal. One expert said that paragraphs 485 and 522 of the Report on the work of the first session showed that most experts were in favour of applying the provisions on combatants and the civilian population to all types of armed conflict, adding that there was no reason not to do so and that it seemed impossible to give members of the armed forces two different sets of instructions on their duties towards the civilian population. Another recalled his country's proposal that there should be a single protocol — a proposal that he was to amplify at the final plenary meetings. If the two Protocols were to be retained, then their provisions relating to the civilian population should be identical.

3.99 Several experts suggested rearranging Part IV. In an amendment (CE/COM III/PC 52), one proposed the following redistribution:  
Section I. General provisions: unchanged  
Section II (new) would combine the present Sections II and III:

- (a) Articles 45 and 46 (Civilians, Section I, Chapter I),
- (b) Articles 57 to 62 (Measures in favour of children, Section III, Chapter I),
- (c) Articles 63 to 66 (Relief, Section III, Chapter II),
- (d) Objects of civilian character, Articles 47 and 48 (Section II, Chapter II),
- (e) Articles 49 to 52 (Precautionary measures, Section II, Chapter III),
- (f) Articles 53 to 56 (Localities and objects under special protection, Section II, Chapter IV).

Section III (new): the former Section IV, unchanged.



Others felt that the provisions relating to persons should be grouped together (definition, general protection, specific protection), then those relating to property, and that the provisions relating to precautionary measures should be put either with those on methods and means of combat or with those on standards of protection.

3.100 Some experts expressed a preference for the term civilians rather than the civilian population: if all civilians were protected, the civilian population was covered. Others, however, urged that the entity (civilian population) should be protected as such — a view that was supported by the ICRC expert, who referred to Part II of the Fourth Convention.

3.101 One expert considered it essential to stipulate that fundamental human rights continued to apply in all situations of armed conflicts; he later submitted an amendment to that effect (see below, Article 40, CE/COM III/PC 37). Another expert pointed out that both the International Covenants on Human Rights and the European Convention expressly provided that, with certain exceptions, the rights in question were suspended during times of armed conflict. He noted that it was lawful to kill an enemy soldier, which was contrary to the right to life. On the other hand, mention could be made of those principles that were valid in times of war.

3.102 One expert thought it extremely difficult, in practice, to distinguish between civilians and combatants. Others believed that it was essential to increase the protection afforded the civilian population as a whole in view of the large numbers of civilians killed, particularly in recent armed conflicts.

3.103 One expert thought it important not to lose sight of the fact that the Geneva Conventions were still entirely valid and said that ensuring strict observance of the Conventions was the best means of strengthening the protection of the civilian population. The reaffirmation and development of those protective rules, he added, would help to prevent wars of aggression and indiscriminate wars.

3.104 Two experts broached the question of the equality of the parties in a conflict. The first considered it inadmissible to establish rules having the same force both for the aggressor and for the victim of an aggression. Speaking two days later, the second expert declared that the notions of aggressor and aggression had no place in the context of the present Conference. The Conference was concerned with international humanitarian law applicable in armed conflicts, i.e., with *jus in bello* and not *jus ad* or *contra bellum*, whereas the idea of aggression related solely to *jus ad bellum*. It was, therefore, in his opinion, of little importance in the consideration of the ICRC's proposals whether a party to the conflict was defending itself against aggression or launching an aggression: in any event, in the context under discussion the obligations of the parties were equal.

## SECTION I

### GENERAL PROVISIONS

3.105 The ICRC expert pointed out the usefulness of definitions to Parties in conflict and to combatants. He recalled that the Geneva Conventions contained several definitions, some of them very precise. He mentioned the amendments made by the Red Cross Experts at the Vienna Conference. According to one expert, Section I should contain only Articles 41 to 44, and should be entitled: *Definitions*. Two other experts felt that the presentation of this Section should remain unchanged, while yet others were of the opinion that each definition should precede the rule for protection to which it referred.

#### Article 40

#### ICRC DRAFT

*Article 40. — General protection of the civilian population*

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

3.106 The following amendments to this article were submitted for discussion by the Commission: CE/COM III/PC 2, 21, 22, 24, 29, 37, 42, 62 and 93. In addition, many opinions were expressed orally.

3.107 Some experts considered that Article 40 should be incorporated in Section II (Protection of the civilian population against dangers resulting from hostilities), either before Article 45 (Respect for the civilian population) or combined with it. One expert proposed an amendment (CE/COM III/PC 29) which should establish more clearly the relationship of this article to the whole of Part IV, others, that Articles 40 and 41 could simply be transposed (CE/COM III/PC 24), or that the text of Article 40 could be transferred to the beginning of Article 45 (CE/COM III/PC 62). A change in the wording of the article was proposed (CE/COM III/PC 21).

3.108 Several opinions were expressed with regard to this article. Some were in favour of deleting it, others in favour of toning it down and yet others in favour of strengthening it.

3.109 One expert maintained that in the context of Article 40 objects should be defined according to their purpose and that, therefore, the article should say "objects intended for the civilian population" instead of "objects of a civilian character".

3.110 Two experts agreed that the article should be deleted, but for different reasons. One felt that the positive obligations it imposed on the parties to the conflict were too broad and ill-defined (CE/COM



III/PC 22), the other that Article 47 made Article 40 superfluous, unless it were re-formulated to conform with the Declaration of St. Petersburg. This Declaration prescribed that the Parties to the conflict should limit their operations to the destruction or annihilation of the enemy's military strength (see also CE/COM III/44, Article 1, 1971). The same expert would also have preferred that civilians and civilian objects be treated separately. Both felt that Article 40 led to ambiguity, as compared with Articles 45 and 47.

3.111 The article would be acceptable, said one expert, if it were toned down as follows :

“The parties to a conflict shall, to the maximum extent feasible, endeavour to protect civilians and non-military objects against the dangers resulting from hostilities.” (CE/COM III/PC 2).

3.112 Two proposed amendments expressed the opposite view — that the rule should be strengthened. One maintained that fundamental human rights continued to apply in all situations of armed conflicts and combined the ideas relating to precautionary measures, the improper use of the civilian population, reprisals, forcible transfer, the protection of property and the provision of humanitarian relief (CE/COM III/PC 37, see also CE/COM III/19, 1971). The second amendment widened the scope of Article 40, proposing that :

“The civilian population shall always be afforded effective and complete protection against the dangers resulting from military operations and must never be the object of such operations. Persons who are members of the civilian population, their dwellings and property, and all non-military installations shall never in any circumstances be the object of military operations, and shall be spared the ravages of war” (CE/COM III/PC 42).

3.113 Finally, one expert defined the scope of this article by adding the words “as provided in Section II of this Part of the present Protocol” (CE/COM III/PC 29). Some experts were opposed to such a restricted interpretation of the principle laid down in the ICRC draft.

## Article 41

### ICRC DRAFT

#### *Article 41. — Definition of the civilian population*

1. Any person who is not a member of the armed forces and who, moreover, does not take a direct part in hostilities is considered to be a civilian.
2. The civilian population comprises all civilians fulfilling the conditions stipulated in the foregoing paragraph.
3. Proposal I: The presence, within the civilian population, of individuals who do not conform to

the definition given in paragraph 1, does not prevent the civilian population from being considered as such, reservation being made for Articles 45 paragraph 5, 49, 50 and 51 of the present Protocol.

Proposal II: The presence, within the civilian population, of individual combatants, does not prevent the civilian population from being considered as such, reservation being made for Articles 45 paragraph 5, 49, 50 and 51 of the present Protocol.

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

3.114 The following amendments to this article were submitted to the Commission for discussion : CE/COM III/PC 3, 21, 22, 24, 29, 35, 36, 43, 49, 51, 62, 63, 67, 68, 78 and 103 ; in addition, many ideas were expressed orally.

3.115 Varying and sometimes contradictory suggestions were made, either in support of the article, with some changes in the wording, or in favour of widening or narrowing its scope or of deleting it.

3.116 All the experts who were in favour of the idea of a definition advocated a negative formula, the civilian population being defined as those persons who did not take part in hostilities. One expert felt that the original proposal met the criterion of precision, both in its form and in its substance, and that it clearly reflected the notion of sufficient causality set out in the ICRC Commentary. In the opinion of this expert, the expression “take a direct part in hostilities” was adequate, but it should perhaps be illustrated by some example : spying, recruitment, propaganda, the transport of arms and of military personnel. The expression “take part in the fighting or in military operations” was too narrow and the formula “participate in the military effort” too broad. The criterion to be used should also be applicable in guerrilla warfare, it being understood that the civilian population might play an indirect role by providing aid, medical care or food supplies to protected persons, as allowed under the law in force and as provided for in Article 20 of Draft Protocol I.

3.117 While they approved the article as a whole, some experts wished to draft it differently. For example, it was considered that the references given in paragraph 3 were superfluous and should be deleted (CE/COM III/PC 35 and 62). Paragraph 1 in its present form was criticized by several experts, who felt that there was a danger that it might create a new category of persons, somewhere between combatants and civilians. It was their opinion that either the words “and who, moreover, do not take part in hostilities” should be deleted (CE/COM III/PC 22) or express reference should be made to Article 4 of the Third Convention and Article 38 of Draft Protocol I (CE/COM III/PC 29, 36 and 78); one expert referred only to Article 4 of the Third Convention (CE/COM III/PC 68).

3.118 One expert felt that the concept of the *civilian population* should be defined, not in the abstract, as in Article 41, but with reference to particular groups of people. The nature of these groups could be characterized simply as consisting of those persons who were not members of the armed forces and who did not take a direct part in hostilities. He added that the concept of *civilian* should be the first provision of Chapter I in Section II (CE/COM III/PC 49 and 67).

3.119 The ICRC expert drew attention to the limitations of Article 4 of the Fourth Convention and referred to footnote 14 of the Commentary on Part IV of Draft Protocol I (pp. 83-94).

3.120 The question of persons connected with the military effort gave rise to divergent views. Some were in no doubt that such persons formed part of the civilian population (as the ICRC had always maintained) and one of them submitted an amendment designed to make Article 41(1) more precise and comprehensive, by the addition of the sentence: "Persons whose activities could contribute directly to the military effort do not thereby lose their status as civilians." (CE/COM III/PC 43). Another expert, on the contrary, thought that such persons should be excluded (CE/COM III/PC 68). A further expert offered a compromise solution, suggesting that civilians linked with the military effort might be *temporarily* deprived of protection but should not lose their status. He also suggested defining civilians in relation to various groups of persons: members of the armed forces, persons taking a direct part in hostilities, those contributing temporarily to the military effort and those employed by the Ministry of Defence (CE/COM III/PC 21).

3.121 The criterion of temporary participation could even be extended to include persons who normally pursued their own occupations far from the front, in factories or fields, but who were required to take up arms in certain situations: enemy aircraft flying overhead, landing by helicopter, the approach of the combat area, and so forth. In those situations such persons would be combatants within the meaning of Articles 4 of the Third Convention and 38 of Draft Protocol I, but otherwise, they would be civilians (CE/COM III/PC 63).

3.122 The view was expressed orally in the course of discussions that civilians could be defined, but not the civilian population. The speaker preferred the word "active" to a "direct" part in hostilities (CE/COM III/PC 3). He finally gave his support to a form of wording close to that of the text originally proposed (CE/COM III/PC 78). So, too, did another expert who had also rejected the ideas expressed in paragraphs 2 to 4 of the original text (CE/COM III/PC 29).

3.123 A number of experts combined their proposals into a single joint text:

"1. Civilians are all persons who do not fall within one of the categories enumerated in Article 4A, subparagraphs (1), (2), (3) and (6) of the Third Convention or in Article 38 of the present Protocol.

2. Civilians as defined in paragraph 1 shall enjoy the protections set out in Part IV of the present Protocol unless and for such time as they take a direct and immediate part in hostilities.

3. The civilian population comprises all civilians fulfilling the conditions stipulated in paragraph 1.

4. 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.

5. In case of doubt as to their civilian character, the persons mentioned in paragraph 1 shall be presumed to be part of the civilian population (CE/COM III/PC 78).

3.124 One expert proposed the deletion of the article because he feared that a definition would raise doubts. There would be little point in defining the civilian population if it were not known what authority would be competent to decide whether or not a person met the conditions of the definition, and there was the risk of restricting the principle that all persons who were not protected by Conventions I to III were covered by the Fourth Convention. The ICRC expert recalled that the Fourth Convention offered the civilian population only partial and inadequate protection against dangers resulting from hostilities, but dealt extensively with the matter of occupation.

3.125 The representative of the Secretary-General, in giving the opinion of the High Commissioner for Refugees, and after referring to the Convention of 28 July 1951 relating to the status of refugees and the Protocol of 13 January 1967 on the same subject, understood that Article 41 of the Draft Protocol I covered refugees. He observed, however, on the basis of footnote 14 of the Commentary on Part IV, that the Fourth Convention was not adequate with respect to their rights, for it was open to question whether its Article 4 provided for all the refugees to whom the Conventions he had mentioned applied. Neither Article 44 (which dealt with a particular situation arising out of the second world war) nor the second paragraph of Article 70 (confined to offences committed before occupation) was adequate. He asked the ICRC to examine those situations and to make such proposals as it deemed appropriate. He expressed the hope that the Conference would consider the possibility of including a draft article stipulating that refugees and stateless persons would be considered as protected persons under the terms of Article 4 of the Fourth Geneva Convention. His plea was supported by an expert who, recognizing that, in that respect, the Fourth Convention was lacking, submitted an amendment (CE/COM III/PC 103).

*Article 42. — Definition of objects of a civilian character*

1. Objects which, by their nature or use, answer the needs of the civilian population, are considered as objects of a civilian character.
2. Objects of a civilian character comprise, in particular, objects which are indispensable to the survival of the civilian population, as well as those serving mainly pacific or helpful purposes.
3. In case of doubts as to the nature and destination of objects mentioned in paragraph 1, crops, provisions and other foodstuffs, drinking water reserve supplies and dwellings and buildings designed for the shelter of the civilian population, or which the latter habitually uses, shall be presumed to be objects of a civilian character.

3.126 The following amendments to Article 42 were submitted to the Commission for consideration: CE/COM III/PC 4, 22, 23, 29, 34, 40, 44, 51, 62, 64, 66, 69 and 93. Various other ideas were voiced. Proposals CE/COM III/PC 104 and 115 were submitted at the end of the discussion.

3.127 The suggestions relating to objects of a civilian character and to military objectives might be divided into three groups. Many experts criticized the juxtaposition, in the present text, of those two contradictory ideas, for there was a risk that some objects would be placed in some blurred intermediary category, thus leading to ambiguous situations. One of the definitions ought therefore to be deleted, some favouring the deletion of that concerning objects of a civilian character while others favoured the deletion of the definition of military objectives. In either case, whatever was not included in one of the categories automatically fell within the other. Two experts, however, maintained that both ideas should be defined on the basis that two definitions were better than one.

3.128 Three experts proposed simply the deletion of the article on objects of a civilian character (CE/COM III/PC 22, 29 and 51) since, in their view, the concept of such objects flowed indirectly from that of military objectives (see below, Article 43). They declared that that course would be more favourable to the civilian population, for a positive definition of objects of a civilian character ran the risk of being either incomplete or open to a restrictive interpretation. Another expert put forward the idea of an expressly negative definition of objects of a civilian character as follows:

“All objects which do not directly produce weapons, military equipment or means of combat, or are not directly and immediately employed by the armed

forces are considered to be non-military objects” (CE/COM III/PC 44).

3.129 Others felt that it would be preferable to strengthen the definition of objects of a civilian character since only that aspect was relevant to the purpose and context of the Conference. In order to restrict the list of military objectives, what was necessary, they believed, was to make the list in the present text of Article 42 as exhaustive as possible; at present it was purely illustrative. The criteria of nature and use were generally considered to be appropriate. An amendment was submitted expanding the ICRC draft as follows:

“Objects which by their nature and use are indispensable for the survival of the civilian population comprise, for example, crops, provisions and foodstuffs, as well as facilities and installations for their production and storage, drinking water reserve supplies, dwellings, buildings and objects designed for the shelter of the civilian population, for cultural purposes, for education or social and health services” (CE/COM III/PC 34).

An amendment not enumerating such objects was also submitted:

“Objects reputed to be non-military are those necessarily or essentially designed for and used predominantly by civilians” (CE/COM III/PC 4).

3.130 Some came to an agreement on an intermediate solution consisting of defining military objectives and only those objects essential to the survival of the civilian population. These amendments, CE/COM III/PC 64, which drew closer together the ideas in Article 42 on the one hand and Articles 47 and 48 on the other, provided as follows:

(a) Article 42 would define military objectives (see below), specifying that objects not belonging to this category were non-military and might not be made the object of direct attack.

(b) A new Article 43 would state: “Houses, dwellings or means of transport which are used by the civilian population must not be the object of attacks directly launched against them, unless they are used mainly in support of the military effort”.

(c) An Article 43A would state: “Objects which are indispensable to the survival of the civilian population, such as foodstuffs and food-producing areas, crops, cattle, water resources and constructions designed for the regulation of such resources, must never be subjected to attacks directly launched against them, nor be attacked by way of reprisals”.

(d) An Article 43 B would refer to the objects intended for humanitarian or peaceful purposes, repeating the prohibition on reprisals.

3.131 Two experts felt that the two definitions in Articles 42 and 43 could, in practice, be used together. This solution was already countenanced by the Hague Regulations of 1907 and by IIL Resolution No. 1 (Edinburgh, September 1969).

3.132 Regarding the very concept of objects of a civilian character, several experts, as mentioned above, proposed integrating the definitions into the rules of protection. To make it absolutely clear, one expert proposed the following definition in this respect :

“ 1. Objects which are designed for and are used predominantly by civilians are considered as civilian objects.

2. Civilians objects comprise, in particular, objects which are indispensable to the survival of the civilian population.

3. Once they are occupied by military personnel or used predominantly for military purposes, they shall be considered as non-civilian objects (CE/COM III/PC 40).

4. In case of doubts as to their civilian character the objects mentioned in paragraph 1 shall be presumed as being civilian objects”.

3.133 Many proposals stressed the relation between objects and the civilian population. As the criterion of use is fundamental, the title of the article should be changed, according to one of them, to “objects intended for the civilian population”. According to the use to which such objects were put, varying in extent and necessity, the experts did not always agree on the scope of protection to be afforded ; see, for example, amendments CE/COM III/PC 4, 40, 44 and 69.

3.134 It was also felt that protection might cease according to the use of the objects. “Once they are occupied by military personnel or used for military purposes, they then become military objects” CE/COM III/PC 4 ; see also CE/COM III/PC 40 (3) referred to above ; the most limiting proposal provided that such objects lost their civilian character if they were used to support the war effort, or if they were occupied by one of the Parties to the conflict (CE/COM III/PC 69 ; see also CE/COM III/PC 93). The totally hypothetical possibility of a future change in the character of civilian objects would not alter or weaken their protection, according to one expert, who wrote that the object was regarded as non-military “even if, at a later date, as a result of a change in their utilization,” it were “subsequently to assume a predominantly military character” (CE/COM III/PC 44).

3.135 Some experts were not agreed on the idea that, in case of doubt as to the civilian character of a given object, there should be a presumption that it was so, as was stipulated in Article 41 (4), (CE/COM III/PC 4). Others wanted to extend it to all objects of a civilian character (CE/COM III/PC 34 and 40), for example, by re-writing paragraphs 2 and 3, such that a descriptive definition of objects of a civilian character could be in paragraph 2, and an absolute ban on attacking such objects in case of doubt as to their character in paragraph 3 (CE/COM III/PC 62).

3.136 Some experts said that the examples given in Article 42 (3) were unsatisfactory with regard to the civilian population, since water reserve supplies would soon be exhausted. Consequently, all water sources should be included, together with the facilities required to exploit them, such as for example dams, dykes and installations for de-salting seawater. In their opinion, there was no military advantage in destroying the above-mentioned objects since by so doing the military power of the adversary would not be weakened. The same experts regarded as unacceptable targets those objects whose destruction would spread terror among the civilian population and cause the death of thousands of innocent people.

3.137 Similarly, so as to afford absolute and automatic immunity to works and installations containing dangerous forces (this would not be based on a model agreement), some experts proposed deleting Article 55 and adding a new Article 48(A), with the same heading but with a different content :

“ 1. In order to spare the civilian population and objects of a civilian character from dangers which may result from the destruction of, or damage to, works and installations — such as hydro-electric dams, dykes and sources of power — through the release of natural or artificial forces, the Parties to the conflict shall refrain, in all circumstances, from launching attacks against these works and installations.

2. Furthermore, the Parties to the conflict shall not locate military objectives in the immediate vicinity of works and installations containing dangerous forces.

3. In order to facilitate their identification, the Parties to the conflict may mark works and installations containing dangerous forces with the special sign consisting of oblique red bands on a white ground. The fact of not marking these works and installations in no way dispenses the Parties to the conflict from their obligation to respect in their entirety the provisions of the first two paragraphs” (CE/COM III/PC 104).

## Article 43

### ICRC DRAFT

#### *Article 43. — Definition of military objectives*

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

3.138 The following amendments concerning this article were submitted to the Commission for examination : CE/COM III/PC 4, 29, 34, 40, 45, 48,

51, 62, 64, 66 and 93; many other ideas were put forward orally. Proposal CE/COM III/PC 115 was submitted at the end of the discussion.

3.139 In discussing the previous article, opinions were expressed on the need for, or on the futility of, retaining a definition of military objectives. Several experts were opposed to this article (CE/COM III/PC 4, 34, 40 and 66), either because it was difficult or impossible to arrive at a consensus, given the different schools of strategy and tactics, or because the Conference was not empowered to decide what were legitimate objectives; the prohibition on the use of violence should be taken into account and this field left possibly to the CCD. One expert thought that the presumption in favour of objects of a civilian character, laid down in paragraph 3 of Article 42, constituted an adequate guarantee.

3.140 Several experts spoke in favour of a definition of military objectives as providing the solution most favourable to the civilian population. In the opinion of one of those experts, this definition should be supplemented by a list presented in the form of an annex (CE/COM III/PC 48). The list could be based on the annex to the IXth Hague Convention of 1907, on Article 24 of the 1923 draft of the rules for aerial warfare, which listed a certain number of examples, and on Article 7 of the ICRC 1956 Draft Rules, also completed by an annex. Certain modifications might be introduced in this latter list: under paragraph I/6, military means of communication might be more fully dealt with, for example, strategic railway stations; I/8 should include fuel-producing industries; part II/2 dealing with exceptions, should be re-examined or deleted. This amendment would involve, in the opinion of its authors, the introduction in Section II, Chapter III, of an additional passage stating:

"The military objectives defined in Article 43 may not be attacked if their total or partial destruction, in a given situation, does not further in any way the military operations" (CE/COM III/PC 48). Another expert seconded the proposal that the definition should be accompanied by a list. Another suggestion combined the two conflicting definitions in the following way:

"Objectives which are, in view of their essential characteristics, generally recognized to be of military importance and whose total or partial destructions, in the circumstances ruling at the time, offers a military advantage, constitute military objectives.

Objects not falling within this category are non-military and may not be subject of direct attack" (CE/COM III/PC 64).

3.141 Other amendments tended to adopt a broader conception of military objectives:

"Any objective, the total or partial destruction, capture or neutralization of which would offer a

definite military advantage, shall be considered a military objective" (CE/COM III/PC 51),

and: "An objective is to be considered as a military objective only if its complete or partial destruction, capture or neutralization would, in the opinion of the operational commander in the light of the information available to him at the time, confer a distinct military advantage" (CE/COM III/PC 29).

The author of this last amendment thought that the terms used in the present text, "contribute effectively and directly to the military effort", were too restrictive for the military. Criteria of place and time had also to be taken into account; in the opinion of the same expert, the proposed amendment made it possible to confer on operational commanders at all levels the responsibility for deciding what was or was not a licit objective. Another expert, strongly opposing the idea that a military commander should fix his own criteria, considered that this concept would have the effect of completely destroying the notion of civilian objects and of their protection laid down in the ICRC draft; the commander could well argue that the destruction even of purely civilian objects, in particular circumstances, could give him a distinct military advantage; what was necessary was rather to establish, in a legal instrument, objective criteria to which the military commander would, in practice, refer. The fears expressed above were shared by others.

3.142 Another amendment proposed the following definition: "Any objective directly and immediately producing weapons, military equipment and combat material, or directly and immediately used by the armed forces is considered as a military objective" (CE/COM III/PC 45).

3.143 Finally, the concept of "military effort" seemed too vague to one expert, while another found the expression "of a generally recognized military interest" not sufficiently precise (CE/COM III/PC 62); they asked that one or other of these expressions be deleted.

3.144 Furthermore, one expert pointed out that the Nuremberg Tribunal had rejected the plea that the fact of having received orders absolved a subordinate from responsibility. In order that subordinates should understand what were their duties, they should know what constituted a military objective. One expert considered that it would be better to speak of "objects other than civilian objects" (CE/COM III/PC 40).

3.145 A substantial change in the wording of this article was presented jointly by several experts (CE/COM III/PC 115).

## Article 44

### ICRC DRAFT

#### *Article 44. — Definition of attacks*

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

3.146 The following amendments concerning this article were submitted to the Commission : CE/COM III/PC 5, 22, 29, 51, 93 ; in addition, some experts stated their views verbally. Proposal CE/COM III/PC 105 was submitted at the end of the discussion.

3.147 In presenting the subject, the ICRC expert specified that the concept of attack should be understood here in a military and technical sense and not in a politico-legal sense ; he referred to the ICRC commentary on this article.

3.148 All the proposals, except one (CE/COM III/PC 93), retained the article, to which they brought slight amendments, some of them substantive and others in the wording. In order to lay greater stress on its scope, an expert added to the ICRC text the words : "for the purposes of this Protocol" (CE/COM III/PC 5).

3.149 Two suggestions extended the notion of attack. One was to substitute the words "any means" for the words "means of weapons" in the original text (CE/COM III/PC 22), and the other to include the following : "Any acts of violence committed against the adversary in the course of hostilities shall be considered attacks" (CE/COM III/PC 51). Another expert put forward a compromise solution, whereby the word "means of weapons" of the ICRC text were replaced by "means of combat".

## SECTION II

### *PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS RESULTING FROM HOSTILITIES*

3.150 The ICRC expert said that the purpose of Chapters I and II was to forbid direct attacks on the civilian population and on objects of a civilian character as such, and that the rule, taken from customary law, was in the opinion of the ICRC, of an absolute character. On the other hand, it was necessary to examine the situations where civilians were indirectly exposed to danger, for example, when they were in proximity to military objectives. It was in order to restrict such indirect risks as far as possible that Chapters III and IV had been drafted. He mentioned the amendments proposed by Red Cross experts at the Vienna Conference.

3.151 The proposals made for regrouping the provisions relating to the definition and the protection

of persons, on the one hand, and of civilian objects, on the other, and for placing Article 40 before Article 45, have already been dealt with earlier in the present report.

## CHAPTER I

### Civilians

#### Article 45

### ICRC DRAFT

#### *Article 45. — Respect for the civilian population*

1. The civilian population as such, as well as individual civilians, shall never be made the object of attack.

2. In particular, terrorization attacks shall be prohibited.

3. Attacks which, by their nature, are launched against civilians and military objectives indiscriminately, shall be prohibited.

4. Attacks directed against the civilian population or individual civilians by way of reprisals shall be prohibited.

5. Nevertheless, civilians who are within a military objective run the risks consequent upon any attack launched against this objective.

3.152 The following amendments relating to this article were submitted to the Commission for examination : CE/COM III/PC 6, 20, 22, 25, 29, 33, 39, 46, 50, 51, 61, 65, 67, 70, 75 and 93 ; in addition, many ideas were presented orally. Proposals CE/COM III/PC 106 and 110 were submitted at the end of the discussion.

3.153 One expert proposed that Section I of this Chapter should begin with a definition of *civilian*, and that such a definition should reproduce the final paragraph of Article 4 of the Fourth Geneva Convention (CE/COM III/PC 67). The ICRC expert pointed out that the limitations of the said Article 4 were referred to in footnote 14 of the Commentary in Part IV.

3.154 The suggestions made in relation to Article 45 might be grouped into three categories : the first concerned the actual concept of the article ; the second contained two sets of proposals with regard to paragraphs 2, 3 and 4, to widen their scope, or, on the contrary, to narrow it or delete the paragraphs ; the third category referred to paragraph 5, proposing its deletion (this seemed to be the dominant view), its insertion elsewhere, or its retention.

3.155 A few experts thought that the principle contained in paragraph 1 would be sufficient and that the explicit prohibitions in paragraphs 2, 3 and 4 should be deleted (CE/COM III/PC 6 and 29) or,

in the case of two experts, that paragraph 3 at least be omitted (CE/COM III/PC 50), as this paragraph aimed ultimately to forbid, indirectly, weapons the study of which was not within the Commissions's competence.

3.156 Other experts proposed strengthening paragraphs 2, 3 and 4 (which should have been sub-paragraphs of paragraph 1), for example, by adding in paragraph 3 a prohibition on the bombardment of zones (CE/COM III/PC 37), an idea contained in Article 50(2) of Draft Protocol I (the same experts considered that the rest of this Article 50 should be omitted, in the case of paragraph 1, or completely redrafted, in the case of paragraph 3). Two further notions were put forward for strengthening this provision. One was to forbid attacks of a character which would destroy or disturb the natural human environment, the other, to extend the prohibition contained in the existing regulations (Article 49 of the Fourth Geneva Convention) concerning the evacuation or forced removal of the civilian population (CE/COM III/PC 33).

3.157 It was proposed to replace Articles 45 and 47 by a single succinct provision forbidding "attacks not directed against military objectives" (CE/COM III/PC 29), to which objections were raised.

3.158 It would be better to combine the first four paragraphs on the prohibition of direct attacks on the civilian population and individual civilians into a single provision, according to a number of experts (CE/COM III/PC 67), one of whom added the idea of giving warning, already included in Article 49 (CE/COM III/PC 46). Two amendments (CE/COM III/PC 50 and 51) made general mention of precautionary measures at this juncture. The first of these confirmed the principle that the civilian population should in any case be afforded the widest possible protection. One expert proposed merging paragraphs 3 and 5 (CE/COM III/PC 67).

3.159 It would be more proper to replace the term "terrorization attacks" by the expression "attacks the sole purpose of which is to spread terror" (CE/COM III/PC 51) in the second paragraph. Another similar proposal referred to attacks "whose sole purpose was to terrorize civilians". (CE/COM III/PC 93).

3.160 The criterion of deliberate intention, defining — or limiting — the provision, was proposed also for the following paragraph by an expert who maintained that attacks launched intentionally and indiscriminately against civilians were forbidden. (CE/COM III/PC 39). Another expert, however, maintained the objective criterion in an amendment the application of which he extended to civilian property (CE/COM III/PC 75).

3.161 The subject of reprisals evoked a variety of opinions, although many experts approved and supported paragraph 3. Most speakers thought that the

point was to reaffirm the principle of international customary law or to develop Article 33 of the Fourth Convention. Others, however, considered that only Commission IV was competent to deal with that matter, and yet another pointed out that reprisals might be taken "in response to deliberate attacks on the civilian population or individual civilians" (CE/COM III/PC 29). One expert strongly objected to that suggestion on the grounds that even if a Power, contrary to the law in force, attacked the civilian population, that did not give the opposing Party the right to carry out reprisals against the civilian population, since the rule of reciprocity did not apply in that case.

3.162 Most of the experts called, verbally or in writing (CE/COM III/PC 33, 50, 61 and 75) for the removal of paragraph 5 on civilians within a military objective. This paragraph concerned a statement of fact which, in the opinion of one expert, should appear in the Commentary. Some of those supporting its being left intact, suggested that it be put either at the end of paragraph 3, or in Article 46, or simply that it be left where it was. A compromise solution was found which would preserve the idea of the risk run by civilians within a military objective when such persons ignored a prior warning (CE/COM III/PC 46). Another expert replaced the words "within a military objective" by "in the vicinity of a military objective" (CE/COM III/PC 6) and yet others supported both wordings (CE/COM III/PC 20, 29 and 70).

3.163 Here again, some experts suggested avoiding the use of the term "civilian population" as an entity and using the word "civilians" (CE/COM III/PC 6 and 22), and another wanted paragraph 4 to end after the word "civilians" (CE/COM III/PC 93).

3.164 Several experts thought that women should be granted greater protection, by expanding Article 27 of the Fourth Convention (CE/COM III/PC 65).

3.165 Several other experts submitted a joint proposal advocating substantial changes in certain provisions of this article (CE/COM III/PC 106).

## Article 46

### ICRC DRAFT

#### *Article 46. — Safeguarding of the civilian population*

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

3.166 The following amendments concerning this article were submitted to the Commission : CE/COM III/PC 7, 22, 29, 51, 65, 67, 71, 79 ; many other ideas were expressed verbally.



3.167 Wrongful use of the civilian population should be examined from all angles, in both its passive and active forms; this was the opinion of some experts, according to whom Article 46 covered only the latter case. These speakers, who submitted the following amendment, considered that to put the population to work on road-blocks or on attempts to slow down or re-route military convoys could have for it serious consequences:

“The physical presence or physical movements of the civilians population shall never be used for tactical or strategic purposes. In particular, the civilian population or individual civilians shall never be used to shield, by their presence, military objectives from attack, nor to shield, protect, or impede military operations.” (CE/COM III/PC 79).

3.168 One expert considered it would be even be wrongful to compel the civilian population to undertake “work of a military nature”; for example, to dig trenches or repair aerodromes (CE/COM III/PC 71). In the consideration on Article 41 above, the opinions of experts were given on civilians involved in the military effort.

3.169 Two experts preferred to keep to the ICRC text. One of them felt that amendment CE/COM III/PC 79 laid too many obligations on the party likely to be attacked, and that the ICRC text was more balanced, while the other proposed combining the text of Article 46 of Draft Protocol I with Article 28 of the Fourth Geneva Convention.

## CHAPTER II

### Objects of a civilian character

#### Article 47

#### ICRC DRAFT

*Article 47. — Respect for objects of a civilian character*

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

3.170 The following amendments concerning this article were submitted to the Commission for examination: CE/COM III/PC 8, 29, 32, 38, 41, 47, 64, 72, 76 and 93; many other ideas were expressed verbally. Proposal CE/COM III/PC 116 was submitted at the end of the discussion on this article.

3.171 Several experts, who fell into three groups, felt that this article should be merged with others: the first group thought that this article should be combined with Article 42 on the definition of objects of a civilian character (CE/COM III/PC 64), the second with Article 45 on respect for the civilian

population (CE/COM III/PC 29), the third with the article on objects indispensable to survival and with the article on works and installations containing dangerous forces (CE/COM III/PC 32). These several proposals would have made the provision more precise, or would have strengthened or limited it.

3.172 Several experts proposed, orally and in writing (CE/COM III/PC 38 and 76), that the condition at the end of Article 47 should be deleted, so as not to limit the scope of the provision. One expert offered the alternative of prohibiting the misuse of all non-military objects: “Non-military objects which are accorded protection shall not be used by their presence to shield military objectives from attack.” (CE/COM III/PC 93).

3.173 Some experts felt that the prohibition on attacks on civilian property should be absolute, covering reprisals as well, and *vis-à-vis* all objects of a civilian character including works and installations containing dangerous forces (CE/COM III/PC 32). A compromise solution was put forward, according to which the prohibition on attacking, destroying and damaging, even by way of reprisals, would hold good for all objects of a civilian character “provided that they are not used directly and immediately in the conduct of military operations” (CE/COM III/PC 47).

3.174 Non-military objects should be protected “unless they” were “used mainly in support of the military effort” (CE/COM III/PC 8) or “provided they are not used to support the war effort of a Party to the conflict” (CE/COM III/PC 72), said two experts, in order to develop the condition at the end of the present Article 47, while another felt that the phrase “used in the fighting” was more appropriate (CE/COM III/PC 41).

#### Article 48

#### ICRC DRAFT

*Article 48. — Respect for and safeguarding of objects indispensable to the survival of the civilian population*

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

2. The Parties to the conflict under whose control objects indispensable to the survival of the civilian population are placed, shall refrain from:

(a) using them in an attempt to shield military objectives from attack;

(b) destroying them, except in cases of unavoidable military necessity and only for such time as that necessity remains.

3.175 The following amendments to this article were submitted to the Commission: CE/COM III/PC 29,



31, 53, 64, 77, 93 and 104. Many other ideas were voiced.

3.176 Nearly all speakers approved the ideas contained in this article and made several amendments to strengthen it, although a few did ask that it be struck out (CE/COM III/PC 93). Some of them felt that it should have been combined with both Article 42 on the definition of objects of a civilian character and Article 47 on the respect for such objects (CE/COM III/PC 64).

3.177 For opposite reasons, many experts made verbal or written statements (CE/COM III/PC 29, 31, 53 and 77) to have the reference to reprisals removed from the first paragraph. Some thought that the matter should have been examined elsewhere — by Commission IV when dealing with Article 74 — while others felt that the present wording weakened the rule, or that it would become superfluous as soon as public international law proscribed reprisals in general.

3.178 The ICRC expert explained that Article 47 left open questions relating to reprisals and the abusive use of objects of a civilian character in general, while Article 48 expressly prohibited them. The prohibition on launching attacks was covered by Article 47. The ICRC expert appreciated the suggestion of one speaker that a prohibition on attacks “even by way of reprisal” be inserted in Article 48. He considered that Article 45(4) and Article 48(1) ran along the same lines, both of them expressly prohibiting reprisals. Theoretically, Article 74(1) would make these provisions superfluous, but the ICRC preferred, by this repetition, to stress the importance that it laid on this problem.

3.179 Many experts proposed, verbally or in writing (CE/COM III/PC 29, 31 and 77), that sub-paragraph 2 (b) be reduced to the words “destroying them”, and one expert wanted to have sub-paragraphs (a) and (b) transposed (CE/COM III/PC 29).

3.180 One expert mentioned “attacks launched against objects of a civilian character and against military objectives indiscriminately” in his amendment (CE/COM III/PC 31) in order to strengthen the present ICRC text.

3.181 According to amendment CE/COM III/PC 77, the present text could be simplified and paragraph 2 concentrated as follows: “The opposing Parties who are in control of objects essential for the survival of the civilian population shall refrain from destroying them or using them to try and shield military objectives from attack.”

3.182 Another very full and detailed text took the ideas expressed in the present text and enlarged on them as follows:

“Objects indispensable to the survival of the civilian population, dams, dykes, sources of power, economic objectives of national interest designed for

peaceful purposes, and works and installations shall be protected and spared and particular care shall be taken by the combatants in order that the civilian population may be safeguarded against the dangers consequent on the destruction of these non-military objects.

The Parties to the conflict under whose authorities these objects are held, shall refrain from using them in order to shield military objectives from attack or destruction.

It is prohibited to attack these objects, in any circumstances, unless they are used directly and immediately for military purposes.” (CE/COM III/PC 53).

3.183 Speaking for his delegation, one expert deplored the statements made, both here and elsewhere, to restrict the ICRC Draft by the introduction of expressions such as “insofar as possible”, or “the Parties shall try to” or “whensoever circumstances permit”. The expert was firmly opposed to such expressions, for the ICRC proposals were already a compromise. Direct attacks should be absolutely and unconditionally prohibited, be they consciously or even fraudulently launched, as the ICRC expert had shown the previous day. Militarily speaking, Articles 45 and 47 would cover, in particular, short-range shelling, and Articles 49 and 55 other cases, including long-range shelling, where precautionary measures were concerned.

## CHAPTER III

### Precautionary measures

3.184 There were differing views on this chapter as a whole. Some experts considered that the two previous chapters made it superfluous, while others regarded it as a key chapter on the implementation of which the protection of the civilian population largely depended. One expert thought it indispensable to analyse both situations: that of the Party launching the attack and that of the Party under attack, so that Articles 49 and 50 would run along similar lines to Article 51.

#### Article 49

#### ICRC DRAFT

##### *Article 49. — Precautions when attacking*

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

(a) they shall ensure that the objectives to be attacked are not civilians, nor objects of a civilian

character, but are identified as military objectives ; if this precaution cannot be taken, they shall refrain from launching the attack ;

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

3.185 The following written proposals on this article were submitted to the Conference : CE/COM III/PC 9, 29, 30, 54, 59, 60, 73, 89 and 93 ; proposal CE/COM III/PC 107 was submitted at the end of the discussion on this article ; many ideas were also expressed orally.

3.186 As before, several experts spoke in favour of stronger wording or additional provisions, while others advocated less categorical terms.

3.187 Several of them stated that the obligations contained in this article would be, from a military point of view, too absolute, and thus impracticable. They pointed out that an attack once begun, could not be halted ; they suggested more flexible wording asking the Parties to take reasonable precautions to ensure that an attack against military objectives would not unnecessarily endanger the civilian population and objects of a civilian character (CE/COM III/PC 29) or, alternatively, to do all in their power not to harm them (CE/COM III/PC 93). One expert proposed the following wording, on the same lines :

“Those who order or carry out an attack shall ensure that the objectives to be attacked are in fact military objectives as defined in Article 43 above. Whenever circumstances permit, they shall warn the civilian population in the vicinity of a military objective so that they may take shelter” (CE/COM III/PC 73).

This wording at the same time eliminated the contradiction between the first sentence, referring to civilians in the proximity of an objective, and sub-paragraph (a), under which identification should be established in all situations. For the same reason, some experts suggested deleting the terms “who might be in proximity to a military objective” in the first sentence of the present text (CE/COM III/PC 50). One amendment retained the precautions only for civilians and not for objects of a civilian character (CE/COM III/PC 59).

3.188 Mentioning how the civilian population, especially in North Africa, suffered from mines after the Second World War, some experts proposed additional precautionary measures relating to “blind” and uncontrollable weapons :

“49A If the Parties to a conflict make use of mines, they are bound, without prejudice to the stipulations of the VIIIth Hague Convention of 1907, to chart minefields. The charts shall be handed over, at the close of active hostilities, to the adverse Party, and also to all other authorities responsible for the safety of the population.

49B Weapons capable of causing serious damage to the civilian population shall so far as possible

be equipped with a safety device which renders them harmless when they escape from the control of those who employ them.” (CE/COM III/PC 59).

3.189 In their oral or written proposals (CE/COM III/PC 9, 29, 73 and 93) many experts wished to delete the obligation to refrain from launching the attack (at the end of sub-paragraph (a)) — which was too rigorous from the military viewpoint — whereas others thought this stipulation superfluous, in view of the provisions of Article 47 (CE/COM III/PC 89).

3.190 The humanitarian trend was, on the contrary, for the strengthening of sub-paragraph (b), the weakest provision in the article, by removing the words “whenever circumstances permit” (CE/COM III/PC 54 and 89) thereby making the obligation on the Parties to the conflict absolute. Having said that the present text of sub-paragraph (b) weakened Article 26 of the Hague Regulations of 1907, other experts found a compromise wording whereby whoever ordered or launched an attack would do all in their power to warn the civilians at risk (CE/COM III/PC 30). Other experts pointed out that a prohibition of surprise attacks, the effects or consequences of which were frequently more advantageous to civilians, should be avoided. The way in which the provisions of sub-paragraphs (a) and (b) were interrelated and complementary was shown by the following clarification : “Such warnings must never, however, discharge the persons responsible for the attack from the duty of observing the preceding provisions of this article.” (CE/COM III/PC 60).

3.191 Summarizing the discussion of this matter, an expert said that, as currently worded, the ICRC proposal presented great difficulties and he wondered whether enough account had been taken of the realities of armed conflicts. Sub-paragraph (a) went very far in asking a Party to refrain from attacking and would be unacceptable militarily, while sub-paragraph (b) made to the latter a concession which ran counter to humanitarian trends. Another expert was hard put to it to reconcile the tendency to meet the requirements of humanity and that of safeguarding military strategy ; however, insofar as the present Conference was concerned, the accent had to be laid on the protection of civilians. Other experts supported that point of view.

3.192 Having, with satisfaction, noted amendments CE/COM III/PC 59 and 60 which improved the existing text, the ICRC expert explained the differences between Articles 8 and 9 of the 1956 ICRC Draft Rules and the text under review which had already taken the military point of view into account. The ICRC had, in fact, consulted military experts who had fought in the Second World War, questioning them privately on these various problems. Two different situations could be envisaged where sub-paragraph (a) was concerned : first, the moment when the decision to attack was taken, covered by sub-

paragraph (a), which required that if the condition of identification could not be met, a Party to the conflict would *refrain* from attacking the adverse Party; secondly, once the attack had already been decided upon and was being carried through, the necessary conditions might have ceased to exist. Sub-paragraph (a) of the ICRC proposal did not consider this latter situation because the military experts had pointed out that it would then be militarily impossible to *call off* an attack once launched. So, in the present text, as compared with the 1956 Draft Rules, the ICRC had taken into account the objections previously made by certain military experts. So far as sub-paragraph (b) was concerned, on the other hand, the military experts had considered that the warning principle was almost totally out of date and that it would be acceptable only if accompanied by a reservation leaving a degree of latitude to the military personnel involved. The ICRC had therefore already tempered the provisions at that early stage by making (a) more absolute than (b), but still practicable at the moment of planning and of deciding on the attack.

## Article 50

### ICRC DRAFT

#### *Article 50. — Principle of proportionality*

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

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

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

3.193 The following amendments to this article were submitted to the Commission: CE/COM III/PC 11, 29, 33, 68, 74, 80, 90 and 93. Proposal CE/COM III/PC 108 was submitted at the end of the discussion on this article; many other ideas were voiced.

3.194 Many experts were opposed to, or had reservations about, the principle of proportionality as set forth in Article 50(1); others wished to retain it provided that it was explained and clarified. Paragraphs 2, especially, and 3, to a lesser degree were more favourably received. There were many proposals for dealing with the three paragraphs independently of one another and in different ways.

3.195 Various reasons, sometimes on opposing grounds, were advanced by the opponents to the

first paragraph to have it deleted. Some experts, who based their arguments on the Commentary, said it made the protection afforded by Part IV illusory as it was a derogation from Articles 45 and 47, or because it set the seal of approval on an idea which would necessarily benefit an aggressor. For others, it did not make it clear whether it covered relations between combatants and civilians, between combatants and opposing combatants, or both situations at the same time. Some experts thought that the idea could well be retained but in a better form (CE/COM III/PC 74, 80, 90 and 93). The following amendment was proposed also to that effect:

“Those who plan military operations shall take into consideration the extent of destruction and probable casualties which will result and, to the extent consistent with the necessities of the military situation, seek to avoid such casualties or destruction.” (CE/COM III/PC 11).

Another amendment was clearer about the strict intention to limit yet further the indirect risks without detracting from the standards of protection:

“Those who order or launch an attack shall refrain from doing so when the risks involved for the civilian population and objects of a civilian character are disproportionate to the military advantage sought.” (CE/COM III/PC 80).

3.196 Two amendments (CE/COM III/PC 29 and 33) proposed that paragraph 1 be deleted, either on the grounds that the rule had already appeared in Article 45 (3), or to strengthen Article 45.

3.197 For reasons that were also sometimes on opposing grounds, the experts asked both verbally and in writing (CE/COM III/PC 11, 29, 74 and 90) that the second paragraph be deleted. Some of them wanted it moved from Article 50 to the end of Article 45 (3) (CE/COM III/PC 33). There was one amendment to soften it (CE/COM III/PC 93).

3.198 Two amendments (CE/COM III/PC 11 and 93) proposed clauses to allow for military necessity in paragraph 3. One expert thought that that paragraph should form a distinct article combining Articles 52 and 73, and stipulating particularly that no military advantage should enable the Parties to the conflict to transgress the provisions of the Geneva Conventions and of the Additional Protocol to the Conventions.

## Article 51

### ICRC DRAFT

#### *Article 51. — Precautions against the effects of attacks*

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

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

3.199 The following amendments to this article were submitted to the Commission : CE/COM III/PC 10, 29 and 55. Proposal CE/COM III/PC 109 was submitted at the end of the discussion on this article. Some experts voiced their views on this matter.

3.200 Some experts wondered whether paragraph 1 was limited to cases of occupation, in which case that should be made clear, or whether it also referred to relations between a State and its own nationals, in which case an absolute obligation was out of the question. As a recommendation it would be better rendered by the words "insofar as possible" (CE/COM III/PC 10 and 96); the former of these amendments, incidentally, referred solely to civilians. The ICRC expert pointed out several times that Part IV of the present Draft Protocol was designed to amplify Part II and not Part III of the Fourth Convention, as the question of occupation was adequately covered in the latter Part III.

3.201 Several experts called for the deletion of the second paragraph (CE/COM III/PC 10, 29 and 55), while another amendment would have made the article applicable solely in case of occupation (CE/COM III/PC 96).

## Article 52

### ICRC DRAFT

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

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

3.202 One amendment was submitted to the Conference (CE/COM III/PC 29); several experts took the floor in the discussion, some for retaining the article, and some for deleting it.

3.203 Most agreed with the ICRC expert that it should be retained especially for reasons of legal security. One maintained that the article was necessary to prevent protective measures from having a negative influence on the rest of the Protocol, that is to say, to ensure that such measures were not interpreted restrictively or wrongly. The same expert would have preferred to have included these provisions in earlier chapters in which case Article 52 would automatically have disappeared. As it stated the obvious, according to another of the experts, it was superfluous (CE/COM III/PC 29).

## CHAPTER IV

### Localities and objects under special protection

3.204 In view of the connection between the situations in Articles 53 and 54, the ICRC expert introduced the two articles together.

3.205 In general, the experts thought that the idea on which this chapter was based was extremely important and stated that they were in agreement with the ICRC's intention to develop humanitarian law on this point. They considered that this chapter substantially improved the law in force. Some of them, however, voiced grave reservations on the suitability of incorporating such provisions in the Draft Protocol, since they thought their effect might be to weaken the general protection to be extended to the civilian population and to objects of a civilian character.

3.206 Some experts thought that the difference between Articles 53 and 54 was not sufficiently marked. They held the view that these two provisions should not be differentiated solely by the fact that undefended localities were within combat zones, while neutralized localities were outside such zones. The ICRC expert replied that there was a further difference : Article 54, unlike Article 53, laid down that in neutralized localities all activities linked to the military effort should cease.

## Article 53

### ICRC DRAFT

*Article 53. — Non-defended localities (" open cities ")*

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

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

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

4. The presence, in these localities, of military medical personnel, civil defence organizations, police

forces, wounded and sick military personnel, as well as military chaplains, is not contrary to the conditions stipulated in paragraph 3 of the present Article.

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

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

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

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

3.207 On this article, the following amendments were submitted to the Commission: CE/COM III/PC 1 and 87. Proposal CE/COM III/PC 113 was submitted at the end of the discussion on this article. Other amendments were made orally.

3.208 One expert maintained that an *open city* was not simply one that surrendered but that it was to remain outside the hostilities throughout the armed conflict. Such a situation, that might cover any locality, presupposed a formal agreement drawn up beforehand by the opposing Parties. Occupation was to be confined to the presence of forces necessary for the maintenance of law and order and for the administration of public services.

3.209 Comparing this article with Article 25 of the Hague Regulations, some experts pointed out that the protection laid down by the latter was wider. The Hague Regulations stipulated protection for all localities, whereas Article 53 seemed to apply only to inhabited places. Moreover, Article 53 made protection consequent on an agreement, while under Article 25 of the Hague Regulations the right to special protection was conferred merely by the existence of a specific condition, namely, that of being undefended. In this connection, the same experts emphasized that when certain conditions were present certain localities must never be the object of attack, even if there was no agreement on the subject.

3.210 With regard to the agreement, one expert thought that the article was restrictive in comparison with the proposals contained in the reports of the United Nations Secretary-General, wherein the possibility of agreements being made in peace time had been considered. He pointed out that to insist on an agreement might give rise to grave difficulties in the event of multilateral armed conflicts, even more so than in those of a bilateral nature.

3.211 Article 25 of the Hague Regulations, it was stated, had not been applied during the First World War, mainly because of aerial warfare. Air attacks had been made against military objectives in localities which were not defended, as well as those which were.

3.212 Summing up the opinions of his colleagues, one expert thought that it was possible to distinguish three categories of rules. First, there were rules of the type laid down in Article 25 of the Hague Regulations governing *de facto* situations, without any agreements or declarations being necessary. In such cases, it was the adversary's responsibility to establish or find out whether there was a state of defence or not. Another possibility was that of a unilateral declaration. In the absence of a reply from the attacking Party, the effect of such a declaration would be that the attacking Party could not claim ignorance of the non-defended state of the city in question. This hypothesis, which transferred the onus of proof, established a presumption of no defence in favour of a specific locality. Finally, it was possible to envisage protection granted by agreement; by declarations followed by replies; event by tacit agreement. The ICRC regulations should allow for all three of these hypotheses.

3.213 Some experts proposed that the last part of the sentence in paragraph 1 ("... and which, consequently, no longer constitute an obstacle to the advance of the enemy") should be deleted as unnecessary. Other experts thought that this last provision, if interpreted *a contrario*, could be taken as meaning that attack on a locality was permitted in certain cases.

3.214 Paragraph 2, some persons thought, could be improved. In fact, the conclusion of an agreement might be facilitated through the medium of a Protecting Power or its substitute. The adverse Party would be expected to give a reply to such proposals by an intermediary. Another expert proposed that the hypothesis of a tacit agreement should not be taken into consideration.

3.215 It was suggested that it would be useful to clarify paragraph 3, taking into account the provisions in Article 16 of the 1956 Draft Regulations. Other proposals were the insertion in Article 53 of the condition of cessation of any activity linked to the military effort, laid down in Article 54; and a rewording of paragraph 3 (CE/COM III/PC 87).

3.216 Concerning paragraph 7, it was considered by some experts that the possibility of denouncing the agreement should be deleted, since it gave an advantage to the aggressor. Other experts, comparing this paragraph with paragraph 4 of the model agreement attached to the Draft Protocol, thought that the conditions for denunciation should be inserted in paragraph 7. Other proposals were to delete both paragraph 7 and paragraph 8 (CE/COM III/PC 87).

*Article 54. — Neutralized localities*

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

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

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

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

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

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

3.217 An amendment (CE/COM III/PC 114) was submitted at the end of the discussion on this article. While several experts agreed with the content of Article 54, others thought it too restrictive, and considered that the protection should not be limited to localities but should extend to larger zones.

3.218 A wish was expressed for the conditions in paragraph 3 to be made more rigorous, especially in comparison with those laid down in Article 53. It was doubtful if it was possible to use the Hague Convention of 1954 as a model for the protection to be accorded.

3.219 An expert wondered that was the meaning of the expression "military operations" contained in paragraph 1. The ICRC expert replied that this article related to the conduct of hostilities, but did not deal with the case of occupation, and that the expression "military operations" did not cover the military administration of a territory.

3.220 One expert wished for the last phrase in the sentence in paragraph 1 to be deleted as, in his opinion, it weakened its scope.

3.221 On the supervision mentioned in paragraph 2, one expert remarked that there should be a more precise definition of the functions of the supervisory body.

3.222 With regard to marking (paragraph 5), one expert, while agreeing with the ICRC proposal of oblique red bands on a white ground, said that this emblem could also be used for undefended localities. He opposed the use of the red cross emblem in these cases.

3.223 Several speakers protested against the possibility given to denounce the agreement, as provided for in paragraph 6, as they had done in the case of the corresponding provision in Article 53.

## Article 55

## ICRC DRAFT

*Article 55. — Works and installations containing dangerous forces*

1. Without prejudice to other provisions of the present Protocol and so as to spare the civilian population and objects of a civilian character from dangers which may result from the destruction of, or damage to, works and installations — such as dykes, hydroelectric dams and sources of power — through the release of natural or artificial forces, the High Contracting Parties concerned are invited :  
(a) to agree, in peace time, on a procedure which would allow, in all circumstances, special protection to be given to those works which are designed for essentially peaceful purposes ;

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

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

3.224 The following amendments concerning this article were submitted for examination by the Commission: CE/COM III/PC 32, 56, 66, 86 and 104; other ideas were expressed orally.

3.225 All the experts who spoke thought that the provision was too weak and/or misplaced. It would be more appropriate to mention these objects in Article 42 (3), in Article 47, or in Article 48, and to use a different formulation. In view of the importance of these objects for the civilian population, and the disasters that would be caused by their destruction, they should enjoy absolute and unconditional immunity (see 3.135 to 3.137 above).

3.226 An amendment was submitted to replace the terms "used for a military purpose" in paragraphs 1 (b) and 2 by the words "used for military operations" (CE/COM III/PC 86).

3.227 The ICRC expert noted these suggestions; the article would be made stronger and would probably follow Article 42 or Article 48.

#### Article 56

#### ICRC DRAFT

*Article 56. — Relationship of this Chapter to the other provisions of the present Protocol*

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

3.228 No written amendment were submitted. The expert referred to their remarks on Article 52, which was of a similar character. Some experts thought that its retention would ensure that special agreements would not be allowed to depart from it. According to one of them, it would even be necessary to stipulate expressly that in no case could such agreements reduce the protection afforded by the present Protocol.

### SECTION III

#### ASSISTANCE TO THE CIVILIAN POPULATION

#### CHAPTER I

##### Measures en faveur of children

3.229 The ICRC expert, in his introduction, referred to the report of the International Union for Child Welfare (hereinafter called IUCW) which was a

valuable contribution to the study of problems on the protection of children during armed conflicts. This report, which made comments on the relevant articles in Part IV of Draft Protocol I (and on Article 6 of Draft Protocol II) also included several amendments. It is reproduced unabridged as an annex to this report (CE/COM III/PC 117).

3.230 Generally speaking, the experts approved the ICRC's intention to strengthen the protection of children and expressed their appreciation of the IUCW report; some of them incorporated amendments to certain articles, and others even all the amendments suggested in that report, into their own proposals.

3.231 Several experts referring to the work undertaken by the United Nations General Assembly, ECOSOC, the Commission on the Status of Women (in particular, document E/5109, circulated during the Conference) and UNICEF, said that armed conflicts showed the need for better protection to be granted to women and children. One amendment, relating to women (CE/COM III/PC 65), for an article to be included in the previous section, was submitted; another broadened the personal field of application, in relation to the aged, wounded, sick and infirm (CE/COM III/PC 57). The ICRC expert had, in this connection, mentioned provisions concerning those same categories of persons in the other parts of Draft Protocol I, more particularly in Article 12 that referred to "wounded, sick and shipwrecked persons, as well as infirm persons, expectant mothers and maternity cases".

3.232 Several speakers stressed the importance of the Declaration of the Rights of the Child, principle 8 of which laid down that children must be the first to receive protection and relief.

3.233 One expert, supported by several others, requested special protection for members of police forces (CE/COM III/PC 19) while recognizing that the status of members of police forces varied according to the State concerned, and that they were sometimes involved in armed conflicts. He hoped that it would be taken into account that in many countries police officers were not members of the armed forces. The main reason was that in times of occupation police officers should be allowed to remain in occupied territory and not be made prisoners of war, in order to protect the civilian population against the forces of occupation. That was why special protection for the police could be considered here, in this part of the Draft Protocol. A solution might be found similar to that in the Fourth Geneva Convention or in the Hague Regulations of 1907 relating to authorities. One expert disagreed with these views on the ground that a multiplicity of categories of civilians entitled to special protection should be, if possible, avoided and that there was no compelling reason for the police to be excepted.

## Article 57

### ICRC DRAFT

#### *Article 57. — Protection of children*

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

3.234 The following amendments concerning this article were submitted to the Commission for examination: CE/COM III/PC 12, 20, 26, 57 and 99; many other ideas were put forward in discussion.

3.235 Several experts specified orally or in writing (CE/COM III/PC 20 and 99) that the age of fifteen should also be mentioned here. The ICRC expert feared that to lay down norms regarding age might weaken the provisions of the article, pointing out that one of the main organizations was concerned with boys up to the age of fifteen, and girls up to the age of eighteen. One expert proposed another formula, according to which children, at least until the age of fifteen, would enjoy special treatment.

3.236 One expert proposed to substitute "should" for "shall" in the first sentence and to add the phrase "as far as possible" (amendment CE/COM III/PC 26), while another, noting that children were sometimes involved in hostilities added "in particular" in the second line (CE/COM III/PC 12).

3.237 Some experts thought that special protection should be afforded to all buildings housing children, such as day-nurseries, kindergartens and schools, pointing out that it was already prohibited by the law in force to attack establishments of this kind. In this respect, there was a relationship with Articles 42 or 48, according to one speaker, who requested that immunity granted to property of this kind should be reinforced. A suitable protective emblem, in the view of one expert, should be adopted for schools and school vehicles (CE/COM III/PC 84).

3.238 Another expert felt there was a need to be more specific and to draw up provisions encouraging the mental and physical development of children on the one hand, and laying down rules in the event of their internment, on the other hand.

## Article 58

### ICRC DRAFT

#### *Article 58. — Safeguarding of children*

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

Proposal II: The Parties to the conflict shall not recruit children of under fifteen years for service

in their armed forces, nor accept their voluntary enrolment.

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

3.239 The following amendments concerning this article were submitted to the Commission for examination: CE/COM III/PC 13, 27, 84, 92, 99, 100 and 101; many other ideas were put forward orally.

3.240 In submitting three different proposals for this article, the ICRC expert said that Proposals I and III covered as broadly as possible the situations on which experts had been invited to comment, while Proposal II covered only children's participation as members of regular, or irregular, armed forces.

3.241 Proposal I had the best reception, followed by Proposal III. Several experts proposed merging these two texts. Other amendments supplemented the ICRC text on several points (CE/COM III/PC 92 and 99).

3.242 In Proposal I, some experts suggested deleting "a direct" (CE/COM III/PC 13); this met with opposition from several experts, orally and in writing (CE/COM III/PC 101), since that would be to the children's disadvantage.

3.243 In Proposal III, the words "armed forces" should be more clearly defined, and one expert submitted the following amendment:

"1. The Parties to the conflict shall not recruit children of under fifteen years for service in their regular or other armed forces, nor accept their voluntary enrolment.

2. Children of under fifteen years shall not be authorized to take any part whatsoever in hostilities." (CE/COM III/PC 100).

3.244 In order to restrict getting children to take part in hostilities, it was thought that a better definition of auxiliaries should be found. The examples given at the end of Proposal III could be interpreted literally and, according to some experts, it would be better to point them out in the Commentary.

3.245 Several experts suggested combining Proposals I and III as follows:

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

(a) the Parties to the conflict shall not recruit children of under fifteen years for service in their armed forces, nor accept their voluntary enrolment.

(b) Children of under fifteen years shall not be used as auxiliaries of armed forces."



2 Some experts were opposed to this text which would be too restrictive or liable to misinterpretation.

3.246 Several experts considered that children should not be held responsible for having taken part in hostilities, and one amendment proposed supplementing Article 58 as follows :

“Children under fifteen years who take part in hostilities and are captured may not be considered responsible. They shall not be sentenced to any penalty. They shall be the object of protective measures (placed in a re-training or rehabilitation institute). In all cases, they must be treated humanely.” (CE/COM III/PC 99).

3.247 Another amendment concerning the position of children in occupied territory proposed two possible versions :

“Proposal IV :

Where the territory of one of the Parties to the conflict is occupied by the other Party, the occupying Party shall refrain from applying coercive measures upon children of under fifteen years of age, subjecting them to torture, sending them to prisoner-of-war camps, concentration camps or prisons, inflicting the death penalty upon them or employing them for activities which are liable to be in the service of the armed forces.

Proposal V :

Where all the territory of one of the Parties to the conflict is occupied by the other Party and where the occupied Party continues to resist, the occupying Party shall refrain from applying the coercive measures mentioned in Proposal IV with regard to children of under fifteen years of age.” (CE/COM III/PC 92).

3.248 One expert feared that, when a State was fighting for survival, it would call upon children of thirteen or fourteen years of age ; it might perhaps be necessary to raise in the United Nations the question of arms issued to young children.

Articles 59 and 60

ICRC DRAFT

*Article 59. — Mothers of infants*

The death penalty shall not be pronounced on mothers of infants or on women responsible for their care.

ICRC DRAFT

*Article 60. — Death penalty*

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

3.249 The following amendments concerning these articles were submitted to the Commission for examination : CE/COM III/PC 14, 28, 94, 95 and 111 ; many other ideas were put forward in discussion.

3.250 Although, generally speaking, the experts were favourable to the ideas in these articles, they criticized the drafting. These two articles should be brought into line ; for example, the second phrase of Article 60 should take the freer form of Article 59. Situations should be defined and headings changed accordingly.

3.251 One amendment suggested according greater protection to “persons who are under fifteen years” (without specifying their civilian status) and for pregnant women and mothers of infants (CE/COM III/PC 14). Some experts considered that it was preferable that the death penalty should not be pronounced on children under eighteen years of age (CE/COM III/PC 111).

3.252 These articles could be combined ; showing a more liberal trend, the death penalty would not be pronounced against any of these persons (CE/COM III/PC 94), while another amendment did not take up this idea in favour of pregnant women (CE/COM III/PC 26). Several experts suggested that the execution of pregnant women should be prohibited (CE/COM III/PC 111).

3.253 One expert said that the provision in Article 59 must in principle exclude penal law offences and should be applied only to those cases where the offence or the severity of the sentence related to the armed conflict. When the death penalty was pronounced because of the hostilities, the case would fall within the provision, even in the case of a penal law offence (CE/COM III/PC 95).

3.254 Several questions were raised. Which children were infants ? Some experts proposed protecting mothers of children under fifteen years of age. What women were considered to be responsible for the care of an infant ? The ICRC expert replied that the women concerned could be mothers, foster mothers, or even relatives or neighbours who might have taken a child into their home, but with no legal commitment. Was the article restricted to the case of occupation, in which case it would have to be specified, or did it apply also to civilians *vis-à-vis* their own governments ? The ICRC expert said that, on the basis of the spirit and the letter of the Covenant on Civil and Political Rights (Article 6 (5)) the ICRC had proposed as general a rule as possible, valid in all, including the last-mentioned, situations. In the context of this chapter, the intention of the ICRC had been to protect children in all circumstances, through the mother. He went on to point out that, in respect of the first sentence of Article 60 of the Draft Protocol, he had also extended the scope of Article 68 of the Fourth Convention to all situations, as Part IV of the Draft Protocol in no way changed Part III of the Fourth Convention but especially enlarged on Part II of the latter.

*Article 61. — Repatriation*

1. So as to permit and facilitate the return, to their families and country, of children cared for or received abroad, the authorities of the receiving country shall establish for each child a card, with photographs, which they shall communicate to the Central Tracing Agency.

2. In so far as it is possible each card will contain the following minimum information :

- (a) surname of the child ;
- (b) the child's first name ;
- (c) the place and date of birth (failing this, the approximate age) ;
- (d) the father's first name ;
- (e) the mother's first name and her maiden name ;
- (f) the child's nationality ;
- (g) the address of the child's family ;
- (h) the date at which and the place where the child was found ;
- (i) the date at which and the place from where the child left his country ;
- (j) the child's blood group ;
- (k) any distinguishing features ;
- (l) the child's present address.

3.255 Two amendments were submitted for examination by the Commission : CE/COM III/PC 9 and 102 ; several experts spoke on this article during the discussions.

3.256 In his statement, the ICRC expert explained that the article covered an exceptional situation, as a stay away from home was often harmful to children. Many experts felt that that fact should be expressly mentioned as children should not be removed from their habitual surroundings.

3.257 The references to evacuation made by the IUCW report were frequently quoted and approved and a few supplementary suggestions were made setting the conditions to be observed and obligations incumbent on Parties during evacuation (CE/COM III/PC 91).

3.258 Both in general, and in this particular context, the IUCW amendment on the cultural rights of the child was much appreciated (see annexed report), owing to the immaturity and educational requirements of children.

3.259 One expert proposed that the verb " permit " be removed from Article 61 (1) ; another clarified the English text by replacing " abroad " by " in a third country ". He also considered that the second paragraph was the proper place for mention of photographs of the child.

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

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

3.260 Two amendments were submitted to the Commission : CE/COM III/PC 15 and 20 ; several experts spoke on this article during the discussions.

3.261 Opinion was divided between the removal of an article considered to be superfluous and the retention of an article for reasons of legal security. Some considered it necessary to mention the articles of the Fourth Convention by way of example and that Article 23 should be added to the list (CE/COM III/PC 20), while others considered that articles of an optional nature, such as Article 14, should not, in any case, be listed.

3.262 One amendment suggested changing the wording of this article (CE/COM III/PC 15).

## CHAPTER II

## Relief

3.263 The ICRC expert introduced Chapter II by saying that Articles 63 to 65 of the Draft Protocol were a development on Article 23 of the Fourth Convention. The object was to *extend the range of beneficiaries* mentioned in Article 23 (1) of the Convention to cover all civilians and to *allow the passage of all relief* and not just those goods mentioned specifically by that article. The first two articles concerned all Parties to the conflict while the third referred to other High Contracting Parties not engaged in the hostilities. Without detracting from the principle of Article 23 of Part II of the Convention, or interfering with the rules of Part III on occupation, which are sufficient (as Article 66 of the Draft Protocol stated, moreover), this chapter would guarantee increased protection for civilians in accordance with resolution XXVI of the XX1st Conference of the Red Cross (Istanbul, 1969) and United Nations resolution 2675 (XXV).

3.264 Famine must be forbidden as a means of waging war, although it was not always used deliberately, according to one speaker who pointed out that the GNP of some countries was at times very low. The inhabitants of such countries were particularly vulnerable to epidemics or famines resulting from economic dislocation. If relief was to be effective and acceptable, donors should refrain from

tying offers to requirements or conditions, should have a modern organization and competent staff and should take account of the local activities and resources of the country. Quoting several examples from history, the expert showed that wars were not won by starving the populace. He thought that it would be wise to convene a group of experts on relief which could examine all the medical, logistic, economic and legal problems involved. The ICRC was requested to take the initiative in convening a conference of this kind, in collaboration with the League of Red Cross Societies and with the Secretary-General of the United Nations. A proposal to this effect was submitted (CE/COM III/PC 112).

3.265 One expert considered that it would be as well to define or list the forms of relief in this chapter, for which reason the situations covered should also be better defined.

## Article 63

### ICRC DRAFT

#### *Article 63. — Supplies*

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

3.266 One amendment was submitted: CE/COM III/PC 58; several experts spoke on this article during the discussions.

3.267 Several experts proposed strengthening the provision by removing the words "to the fullest extent of their capacity". Some of them thought that the last sentence could be either removed or changed, thereby strengthening the obligation (CE/COM III/PC 58).

## Article 64

### ICRC DRAFT

#### *Article 64. — Humanitarian assistance*

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

2. The offer of relief, whether emanating from a State, a National Red Cross Society, or any other recognized relief society, or from the International Committee of the Red Cross, or from any other

impartial body, in favour of the inadequately supplied civilian population, should not be regarded as an unfriendly act.

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

3.268 The following amendments on this article were submitted to the Commission: CE/COM III/PC 16, 81, 82, 85, 88 and 97; furthermore, several other ideas were voiced.

3.269 In general, the amendments submitted by the experts tried to strengthen the provision, or make it more precise.

3.270 Several experts would have liked the words "to the fullest extent possible" deleted from paragraph 1 (CE/COM III/PC 81), others wanted to remove the words "exclusively" in both the first and third paragraphs and in the next article (CE/COM III/PC 81 and 97), while yet others wished the reference to be merely to the population and not to the civilian population. Some, who thought that this paragraph reiterated law already in force, found it superfluous. One expert asked that the words "under their control, in law or in fact" be clarified.

3.271 Many experts considered (CE/COM III/PC 82 and 85) that the United Nations and its Specialized Agencies should also be mentioned in the second paragraph. It was the view of many experts that the idea expressed in the preceding article, namely, that relief should be provided without discrimination, should be retained in the paragraph under consideration and in the article following it (CE/COM III/PC 81 and 82).

3.272 Some experts asked that the reference to States be deleted, while others strongly opposed the idea as there were situations in which only a State could effectively assist another State. The neutral State, in particular, would remain within the bounds of its neutrality.

3.273 In the opinion of some experts, the wording of this second paragraph should not give the impression that humanitarian bodies were bound to offer assistance, or that States were to accept it. It was also suggested that paragraph 2 should be redrafted on the lines of the wording of paragraph 2 of Article 59 of the Fourth Convention.

3.274 One amendment was intended to confirm the presumed humanitarian character of offers of assistance made by Red Cross bodies and stressed the

priority to be granted to the offer of assistance (CE/COM III/PC 64).

3.275 One expert proposed that the last phrase of paragraph 3 be deleted (CE/COM III/PC 82) and several others wanted to improve the existing text to make it more humanitarian (CE/COM III/PC 81, 82 and 88). One expert thought that the connection between this paragraph and the preceding one was none too clear owing to the fact that the Protecting Powers were mentioned. The ICRC expert replied that, in the case of a blockade, the blockading Power could demand, in exchange for allowing relief supplies to pass through to the adversary, that a Protecting Power should ensure that such supplies were in fact distributed to civilians. An amendment made the idea expressed in the last sentence of paragraph 3 more specific by making it a separate paragraph :

“The Protecting Power or its substitute, as the case may be, shall notify the Parties to the conflict that the relief consignments shall be exclusively used for the use of the needy civilian population.” (CE/COM III/PC 88).

#### Article 65

##### ICRC DRAFT

##### *Article 65. — Transit*

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

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

3.276 Three amendments were proposed : CE/COM III/PC 17, 83 and 98 ; several experts spoke on this article during the discussions.

3.277 These written amendments contained the same ideas as had previously been expressed : the deletion of the word “exclusively” (CE/COM III/PC 83 and 98) and of the last sentence of paragraph 2 (CE/COM III/PC 83) ; the same reservations were made with regard to the second paragraph as had been made on the foregoing article.

3.278 One amendment elaborated on the possibility of supervision by mentioning “any organ or specialized agency of the United Nations” (CE/COM III/PC 17). It was proposed to reword paragraph 3

bearing in mind the conditions laid down in paragraph 2 of Article 23 of the Fourth Convention.

#### Article 66

##### ICRC DRAFT

##### *Article 66. — Relationship of this Chapter to the Fourth Convention*

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

2. Article 10 of the Fourth Convention is reserved.

3.279 One amendment to this article was submitted (CE/COM III/PC 18), and caused no comment in the discussions. It asked that the words “in all circumstances” be deleted and that a second paragraph be added to read :

“The provisions of this Chapter are without prejudice to the rights of the International Committee of the Red Cross or any other impartial humanitarian organization under Article 10 of the Fourth Convention”.

##### *Remarks on amendments submitted after the discussions*

3.280 Annexed to this report are amendments on Part IV : CE/COM III/PC 1 to 117 ; amendments PC 87 to 116 were submitted after the Commission had risen, and could not be discussed ; they are nevertheless included in the present report.

#### PART IV

##### **Sub-commission on civil defence organizations**

*Rapporteur* : M<sup>e</sup> Joseph MARTIN (Switzerland)

##### *Introduction*

3.281 The Sub-Commission held six meetings between 17 and 24 May 1972. Dr. Gerardo Majella Dantas Barretto (Brazil) was elected to the Chair of the Sub-Commission, and M<sup>e</sup> Joseph Martin (Switzerland) was elected Rapporteur. At its first meeting, the Sub-Commission elected Col. Samuel Soriano (Philippines) as Vice-Chairman. Mr. R.-J. Wilhelm, ICRC representative, and Mr. G. Malinverni, ICRC legal expert, introduced and commented on the subjects to be dealt with by the Sub-Commission.

3.282 The Sub-Commission set up a working group to examine the problem of the marking of civil defence organizations. The working group, comprising experts from Denmark, France, Norway and Sweden, sub-

mitted to the Sub-Commission a report on the result of its work (cf doc. CE/COM III/OPC 16).

3.283 The Sub-Commission also set up a Drafting Committee under the chairmanship of M<sup>e</sup> J. Martin (Rapporteur) assisted by Miss G. Jolly. The members of the Committee were Mr. Pierre Lebrun and Mr. Jean Kremer (Belgium), Mr. Erik Schultz (Denmark), Mr J. V. Dance (United Kingdom), Mr. Chas. Manning (United States), Mr. M. Mordecai R. Kidron (Israel) and Mr. G. Malinverni (ICRC). Originally entrusted with drafting Article 67, this Committee, which was open to all members of the Sub-Commission, also examined, with the agreement of the Sub-Commission, Articles 68 and 69.

3.284 The texts drawn up by the Drafting Committee on the basis of the ICRC drafts were submitted to the Sub-Commission which examined them during its two meetings on 23 and 24 May 1972 and adopted them with certain amendments. The texts, on which a fairly large measure of approval was obtained, are annexed to this report.

#### *General discussion*

3.285 The Sub-Commission was of the opinion that the provisions which it had to consider should be included as an integral part of the Protocol, as recommended by the ICRC. One of the reasons for preferring this solution, rather than that of an optional annex to the Protocol, was that it would make the rules binding on all the States Parties to the latter. In this connection, some experts pointed out that, since the rules concerning medical personnel were binding, the same result should be achieved with regard to civil defence personnel, as the two problems were somewhat similar.

3.286 On the subject of the special protection to be granted to civil defence organizations, two general trends emerged during the discussions of the Sub-Commission, mainly because of differing notions of civil defence structures in different States.

3.287 The first trend was based on the following assumptions :

- (a) that civil defence was not strictly limited to civil defence organizations but that it rested on the possible participation of all civilians in civil defence duties ;
- (b) that civil defence was not to be conceived as a purely humanitarian task, but as one linked with national defence ;
- (c) that civil defence embraced certain humanitarian tasks which were multivalent, that could also serve military ends, and that the converse was also true ;
- (d) that civil defence might, under certain conditions, benefit from support provided by military units. The considerations led certain delegations to propose a very simple rule, which was embodied in document CE/COM III/OPC 1. The experts sharing this first point of view raised no objection to the opening of a general discussion on the ICRC draft.

3.288 Those holding the second view, which approached that of the ICRC, were in favour of drawing up detailed rules, accepting the ICRC draft as a working basis. Their position was based on the following assumptions :

- (a) that civil defence tasks should be performed exclusively by bodies set up and recognized by the State ;
- (b) that these tasks should preferably be entrusted to civilian personnel, while the principle of the involvement of military personnel should be thoroughly discussed. If the principle were accepted, it would still be necessary to discuss the status of military personnel while engaged on such civil defence tasks.

3.289 A certain number of experts also underlined the fact that detailed rules drawn up at international level would lead to greater uniformity between the civil defence services of the different countries. With this in view, these experts expressed the hope that a single distinctive civil defence emblem might be internationally recognized.

3.290 Some experts expressed a fear that increased protection to a large numbers of civil defence personnel might weaken the general protection afforded to the civilian population. The same experts considered that, in practice, the proposed provisions would prove difficult to apply. Others disagreed, saying that in their opinion the special protection granted to civil defence personnel, i.e. authorization to discharge their duties, could in no case weaken the general protection afforded to the civilian population.

3.291 In view of the relationship existing between Articles 67 to 72 of Protocol I and Article 34 of Protocol II relating to armed conflicts not of an international character, a certain number of persons thought that it would be good to know the opinion of the experts on the content of this article. It was pointed out, *inter alia*, that the article did not mention the distinctive emblem. The Sub-Commission did not however go into a more detailed discussion of this article, partly for lack of time, partly because this question fell within the terms of reference of Commission II.

3.292 Because the Sub-Commission had only a very limited time at its disposal to hear and compare different points of view on very wide and complex subjects, it did not aim at producing definitive draftings of legal texts. It did however endeavour to examine even the smallest details relating to civil defence. The Sub-Commission therefore believed that the ideas expressed in the rules it produced, in accordance with its terms of reference, could be considered as a valid contribution to the future work of the ICRC in view of a possible Diplomatic Conference. In its work, the ICRC will undoubtedly have to take into account the fundamental opinions and reservations which emerged in the course of the general discussion.

## Discussion of the articles

### Article 67

#### ICRC DRAFT

##### Article 67. — Definition

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

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

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

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

3.293 The following written proposals were submitted to the Sub-Commission : CE/COM III/OPC 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 19 and 20.

3.294 In the general discussion, the experts were of diverse opinions on the content of this article. Those varying points of view led to their proposing different approaches to and systems for defining civil defence.

3.295 Some experts were of the opinion that the aim of the regulations in the Draft Protocol was to enable civil defence staff to carry out humanitarian tasks and to give them special, greater protection for that purpose. The experts laid stress on the character of the tasks, finding the problem as to who

performed them secondary. They then, logically, proposed a definition of civil defence which, contrary to that in Article 67 of the ICRC Draft, took no account of whether the staff belonged to any particular organization but which was based solely on the tasks accomplished.

3.296 That attitude was strongly supported by experts from countries in which civil defence tasks were not entrusted to specific bodies but could be entrusted to any civilians under the supervision of the competent authorities. According to those experts, protection in such countries should be extended, not only to personnel of organizations, but to all civilians called on to perform civil defence tasks.

3.297 Other experts went on to say that under such conditions civil defence personnel could not be expected to perform solely humanitarian tasks. It had also to be admitted that they might be called on to perform other tasks, too. While agreeing that civil defence personnel should not be granted special protection except when they were carrying out humanitarian tasks, some experts advocated that, contrary to Article 67 of the ICRC Draft, they should be granted such protection even if not all the tasks entrusted to them were humanitarian.

3.298 In that connection, the experts went on to point out that certain tasks, generally recognized as civil defence, such as fire-fighting, administration of essential public utility services and air-raid warning, could not be considered as purely humanitarian. These were polyvalent activities, in that, although they were meant mainly to safeguard human life, they could indirectly serve military purposes. For that reason the adjective "exclusive", which appeared in the ICRC Draft, could not in their opinion be retained.

3.299 One expert pointed out that in cases of total warfare, defence, too, had to be total. He stressed that in his country, as in others, there was a close interdependence between national defence and civil defence functions and that, in cases of need, civil defence personnel could be called on to help in the national defence effort. Another expert gave the example of the worker in a munitions factory. Although he contributed to the war effort, he was nevertheless considered as a civilian. The same should hold true for civil defence personnel. In his view, the distinction between civil defence and military personnel should be the same as between civilians and combatants and it had to be admitted that civil defence personnel participated, albeit indirectly, in the war effort. For that reason, he too asked that the word "exclusive" be deleted.

3.300 However, other experts felt that in order to avoid any abuse it would be better to grant special protection only to personnel performing strictly humanitarian tasks. They, therefore, advocated retaining the word "exclusive".

3.301 Another expert proposed replacing the term "exclusive" by the word "mainly" (CE/COM III/OPC 7).

3.302 In an effort to reach a compromise, one expert proposed an amendment in which he tried to reconcile the various tendencies (CE/COM III/OPC 19).

3.303 After a long discussion of the various principles submitted by the experts, the most important of which may be found in proposals CE/COM III/OPC 19 and 20, the Drafting Committee proposed to the Sub-Commission that it endorse the following ideas for drafting Article 67:

#### *Paragraph 1*

##### *First sentence*

Once civil protection tasks were defined in order to obtain special protection for the personnel performing them, the tasks had to be purely humanitarian. Consequently, as the purpose of this article was to stipulate what those tasks were, with a view to protecting those who discharge them, the word "exclusive" became superfluous. The Drafting Committee therefore suggested that it be deleted. As, in many countries, civil defence personnel were also called on to perform tasks of a non-humanitarian nature, it would be advisable to admit the need for special protection for civil defence personnel even if the tasks with which they are entrusted were not always humanitarian. Consequently, the Drafting Committee proposed to the Sub-Commission that it accept the text of the first sentence as it stood in proposal CE/COM III/OPC 19.

##### *Second sentence*

The Drafting Committee proposed to the Sub-Commission that:

— for sub-paragraph (a) it accept the text as worded in proposal CE/COM III/OPC 19 and that it leave the Commentary to explain exactly what was to be understood by fire-fighting (see CE/COM III/OPC 8);

— for sub-paragraph (b) it accept the text of proposal CE/COM III/OPC 19;

— for sub-paragraph (c) it accept the text of proposal CE/COM III/OPC 19;

— for sub-paragraph (d) it replace the text of proposal CE/COM III/OPC 19 by that of proposal CE/COM III/OPC 9. It pointed out that the functions of the police could not, as such, be considered a part of civil defence. It also drew the attention of the members of the Sub-Commission to the fact that the protection of the police had been covered by proposal CE/COM III/PC 19 submitted to Commission III. It added that the police could be afforded the special protection envisaged in the present article only when they were performing the tasks listed therein (e.g., administering first aid). Likewise, civil defence personnel enjoyed special pro-

tection when performing police functions on the site of an accident (e.g. cordoning off an area, etc.); — for sub-paragraph (e) it made a terminological change affecting only the French and Spanish texts and in no way changing the English;

— it add a sub-paragraph (f) to document CE/COM III/OPC 19, the tenor of which would be "preparing reports and marking for identification". It was, in fact, widely agreed that this was a civil defence task (report or marking by detection squads, etc.). The Sub-Commission considered that special mention of protection against the effects of atomic and chemical weapons was not necessary.

3.304 After a lively discussion on the proposals made by the Drafting Committee, the majority of the Sub-Commission gave its approval to the following text:

#### SUB-COMMISSION'S DRAFT

##### *Article 67 (1)*

*1. Civil defence, for the purpose of this Protocol, covers humanitarian tasks to save human lives, relieve suffering and ensure the survival of and provide the means of subsistence for civilians exposed to dangers resulting from hostilities or disasters. These tasks, which should be discharged without any discrimination whatsoever, are mainly the following:*

- (a) *rescue, first aid, transport of wounded and fire-fighting;*
- (b) *provision of emergency material and social relief to the civilian population;*
- (c) *emergency repair of public utilities indispensable to the civilian population;*
- (d) *policing accident sites;*
- (e) *preventive measures, such as warning the population, evacuation, and providing shelters;*
- (f) *detection of the effects of weapons, reporting, emergency information services, including communications necessary for that purpose.*

##### *Paragraph 2*

3.305 In drafting paragraph 2, the Drafting Committee based its ideas on paragraphs 4 and 5 of proposal CE/COM III/OPC 19, which was itself largely based on the ICRC texts.

3.306 One expert proposed deleting the second part of the second sentence of paragraph 4 of proposal CE/COM III/OPC 19 which was taken from Article 67 (2) of the ICRC Draft (see CE/COM III/OPC 20). However, it appeared that civil defence in some countries came within the purview of the military authorities, so that that part of the sentence had to be retained in order that persons doing civil defence work might enjoy the special protection regardless of the national authority to which they were responsible.

3.307 The first sentence of paragraph 5 of proposal CE/COM III/OPC 19 was also approved by the Drafting Committee which agreed that it was, in general terms, realistic. The Committee therefore expressed the wish that it be retained.

3.308 The second sentence of paragraph 5 of proposal CE/COM III/OPC 19 was vigorously opposed by some experts. They admitted that this highly delicate point deserved to be studied in depth. The participation of military personnel in civil defence, as many experts pointed out, posed the problem of the status of such persons in case of capture, whether they should be prisoners of war or whether it would be better to grant them a status similar to that envisaged in Article 28 of the First Geneva Convention. In the former case, as had been shown, such personnel would not be able to carry out these tasks. In view of the complexity of the problem, the Sub-Commission decided, at the suggestion of the Drafting Committee, to leave the matter in abeyance for the time being. Several experts nevertheless hoped that the ICRC would, at some later date, study the problem in greater detail.

3.309 The Sub-Commission, having discussed paragraph 6 of proposal CE/COM III/OPC 19, decided not to incorporate such a provision in the draft Protocol. It proposed that the ICRC should mention in its Commentary that participation by the personnel of civil defence organizations in their country's war effort, like that of any other civilians, should not affect their civilian status as governed by the Fourth Geneva Convention.

3.310 On the proposal of the Drafting Committee, the Sub-Commission, by a large majority, accepted the following text :

#### SUB-COMMISSION'S DRAFT

*2. Civil defence bodies have no combat mission but may nevertheless be organized along military lines and may be responsible to military authorities. Service in civil defence may be made compulsory. Civil defence bodies may co-operate with military personnel in the performance of their tasks.*

#### *Paragraph 3*

3.311 The Drafting Committee based its version of paragraph 3 on paragraph 7 of proposal CE/COM III/OPC 19, which was itself based on Article 67 (3) of the ICRC Draft Protocol.

3.312 There was little discussion on this provision. Some experts proposed that it be deleted, considering it dangerous (CE/COM III/OPC 29) while others, on the contrary, favoured retaining it to avoid any confusion and in view of the similar situation existing where medical personnel were concerned. There was finally a large majority in favour of its retention.

3.313 The text proposed by the majority of experts of the Sub-Commission does not differ from the ICRC text, and reads as follows :

#### SUB-COMMISSION'S DRAFT

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

*Draft Article 67 (A). — Organizations and persons benefiting from protection*

3.314 Having terminated its work on the definition of civil defence, the Drafting Committee turned to the problem of the special protection which it was appropriate to grant to civil defence organizations. In view of the type of definition given in Article 67, it was thought necessary to insert a new provision defining those eligible for such protection. The Drafting Committee therefore proposed to the Sub-Commission a new provision, Article 67 (A).

3.315 This article, derived from paragraph 3 of document CE/COM III/OPC 19, was intended to determine who should benefit from the special protection, i.e., all those who, while not belonging to civil defence bodies, carried out civil defence duties. As approved by the majority of members of the Sub-Commission, it read as follows :

#### SUB-COMMISSION'S DRAFT

*The protection shall apply to all organizations concerned with the tasks mentioned in paragraph 1 of Article 67 provided they are set up or recognized by their Government as well as to persons who, without belonging to such organizations, perform those tasks under arrangements organized by their Government.*

#### Article 68

#### ICRC DRAFT

#### *Article 68. — General protection*

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

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

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

3.316 The following written proposals on this article were submitted for the attention of members of the Sub-Commission : CE/COM III/OPC 3, 6, 7, 15 and 17.



3.317 Article 69 was entitled "Protection in occupied territories"; some experts proposed amendment of the title of Article 68 to cover the situation in combat zones. The suggested title was "Protection in zones of military operations". This proposal was accepted by the Sub-Commission.

3.318 Some experts felt that the ICRC text would be difficult to apply in practice, especially in zones of military operations, and therefore preferred the text of proposal CE/COM III/OPC 6. They emphasized, with particular reference to attacks to which civil defence personnel should not be subjected, that these should be deliberate attacks. The first part of paragraph 1 of CE/COM III/OPC 6 was not retained by the Sub-Commission, the reason being that it was already contained implicitly in the second phrase of the sentence, which had been retained.

3.319 The text, as favoured by the majority of the Sub-Commission, was as follows:

#### SUB-COMMISSION'S DRAFT

1. *Except in the case of imperative military necessity, the Parties to the conflict shall refrain from hindering the civil defence personnel in the accomplishment of their tasks.*
2. *Personnel discharging civil defence functions shall not be the object of deliberate attacks.*
3. *Buildings, equipment and means of transport being used for the purpose of discharging civil defence functions shall not be deliberately attacked or destroyed during such time as they are being used to discharge civil defence functions.*

One expert proposed that paragraphs 2 and 3 should be worded as follows:

2. *Personnel discharging civil defence functions shall in no circumstances be the object of attack.*
3. *Buildings, equipment and means of transport being used for the purpose of discharging civil defence functions shall in no circumstances be attacked or destroyed during such time as they are being used to discharge civil defence functions.*

#### Article 69

#### ICRC DRAFT

##### *Article 69. — Protection in occupied territories*

1. In occupied territories, civil defence organizations shall receive every facility from the responsible authorities for accomplishing their tasks, subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power. The latter shall not be permitted to introduce in the management or personnel of these organizations any changes which could jeopardize the efficacious dis-

charge of their tasks; it shall not be also permitted to demand that these organizations should discharge their tasks by giving priority to victims belonging to the said Power.

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

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

3.320 For this article, the following written proposals were submitted for the attention of the Sub-Commission: CE/COM III/OPC 3, 12, 17 and 18.

3.321 This article was favourably received by several experts, since they considered that it constituted an important development and improvement of Article 63, paragraph 2, of the Fourth Convention.

3.322 The second paragraph of Article 69 was the only one to be the object of amendments. One expert proposed deletion of the first sentence, as it dealt with the protection of civilians, and thus had no purpose. This proposal was voted on and accepted.

3.323 In the second sentence of this paragraph, it was proposed to delete the adjective "permanent" as applied to the personnel. This amendment was suggested by experts from those countries which entrusted civil defence duties chiefly to temporary workers. Acceptance of the proposals by the majority of members of the Sub-Commission resulted logically in the omission of the last sentence of the same paragraph.

3.324 Thus, Article 69, in the formulation favoured by the majority of the experts was as follows:

#### SUB-COMMISSION'S DRAFT

1. *In occupied territory, civil defence organizations shall receive every facilities from the responsible authorities for accomplishing their tasks, subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power. The latter shall not be permitted to introduce in the management or personnel of these organizations any change which could jeopardize the efficacious discharge of their tasks; nor shall it be permitted to demand that these organizations should discharge*

*their tasks by giving priority to victims belonging to the said Power.*

*2. The Occupying Power may not compel civil defence personnel to undertake activities other than those stipulated in Article 67 of the present Protocol, nor oblige them to serve outside occupied territories ;*

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

## Article 70

### ICRC DRAFT

#### *Article 70. — Organizations of neutral States*

1. The protection conferred by the present Protocol shall also be granted to personnel and equipment belonging to those civil defence organizations of neutral States which, with the approval of their own governments and after having notified the opposing Party accordingly, were to offer their assistance to the civil defence organizations of a Party to the conflict, with the latter's agreement and under its authority.

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

3.325 For this article, the following written proposals were submitted for the attention of members of the Sub-Commission : CE/COM III/OPC 3, 14 and 17.

3.326 It was the title of this article which chiefly gave rise to discussion. In the opinion of certain experts, the expression "neutral States" was not sufficiently clear. One expert pointed out that it did not appear precisely enough from the title of this article that the neutrality in question was not exclusively permanent neutrality, but also occasional neutrality.

3.327 For other experts, the expression "neutral States" was too restrictive. In particular, they pointed out, it did not authorize a belligerent State which was an ally to offer assistance to the civil defence organizations of one of the Parties to the conflict.

3.328 Various proposals were therefore made for the amendment of the title. The expression "States not Parties to the conflict" and "States not involved in the conflict" were suggested. Finally, the expression "other States" was retained. This would permit allied States to offer assistance to one of the Parties to the conflict.

3.329 Certain experts thought that, if a State wished to offer assistance to a Party to the conflict, it should obtain the previous consent, not only of the Party receiving such assistance but also of the enemy. The majority of the Sub-Commission accepted this supplementary condition.

3.330 One expert pointed out that Article 70, as worded, allowed States not involved in the conflict to offer assistance to the civil defence organizations of a Party to the conflict. This text presupposed that the State receiving this assistance already had civil defence organizations. In his opinion, provision should also be made for countries which did not possess such organizations.

3.331 In paragraph 2, an expert proposed to replace the expression "interference in the conflict" by "hostile act" (CE/COM III/OPC 14). However, this point was not discussed.

3.332 The text of this article, as finally adopted by the Sub-Commission, was as follows :

### SUB-COMMISSION'S DRAFT

1. *The protection conferred by the present Protocol shall also be granted to personnel and equipment belonging to those civil defence organizations of other States which, with the approval of their own Governments, after having notified the opposing Party accordingly and received its consent, were to offer their assistance to the civil defence organizations of a Party to the conflict, with its consent and under its authority.*

2. *In no circumstance shall this assistance be considered as interference in the conflict.*

## Article 71

### ICRC DRAFT

#### *Article 71. — Markings*

1. The distinctive emblem of civil defence organizations consists in . . . The personnel of civil defence organizations shall be recognizable by an identity card attesting to the capacity of the holder, bearing his photograph, and embossed with the stamp of the responsible authority ; while on duty, they shall wear on the left arm a stamped armlet bearing the distinctive emblem, issued by the State to which they belong.

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

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

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

3.333 For this article, the following written proposals were submitted for the attention of members of the Sub-Commission : CE/COM III/OPC 3, 14 and 16.

3.334 An *ad hoc* working party was asked to study the question of the distinctive emblem for civil defence. The results of its deliberations were presented in a paper, annexed to this report as document CE/COM III/OPC 16.

3.335 The Sub-Commission expressed the hope that, on the basis of suggestions contained in the above-mentioned document, the ICRC would carry out the necessary studies with a view to proposing an appropriate distinctive emblem for civil defence organizations.

3.336 An expert pointed out that it was desirable to make provision for the same distinctive emblem in armed conflicts not of an international character and in international conflicts.

3.337 Other experts spoke of the difficulties which might arise if identity cards were issued to civil defence personnel in countries where all civilians were liable to be called upon to perform civil defence duties. With the aim of finding a solution to this difficulty, one expert proposed to make the identity card compulsory only for permanent civil defence personnel. In fact, temporary personnel were not, under paragraph 3 of Article 71, obliged to carry identity cards. This proposal was accepted by all members of the Sub-Commission.

3.338 One expert proposed that in paragraphs 2 and 3 the adjective "civilian" be inserted before the words "personnel" and "buildings, equipment and medical transports". This proposal was accepted by the majority of the members of the Sub-Commission. One expert, however, expressed reservations, because of the nature of the civil defence organization of his country.

3.339 With regard to paragraph 4, some experts proposed the deletion of the words "From the outbreak of hostilities" on the grounds that, if such measures were to be effective, they must have been taken in peace time. They made the same criticism in relation to Article 21 of the Draft Protocol. This proposal was accepted.

3.340 The text finally adopted by the Sub-Commission was as follows :

#### SUB-COMMISSION'S DRAFT

1. *The distinctive emblem of civil defence organizations consists of... The permanent personnel of civil defence organizations shall be recognizable by*

*an identity card attesting to the capacity of the holder, bearing his photograph, and embossed with the stamp of the responsible authority; while on duty, they shall wear on the left arm a stamped armband bearing the distinctive emblem, issued by the State to which they belong.*

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

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

4. *The High Contracting Parties shall adopt special measures for supervising the use of the distinctive emblem and for the prevention and repression of any misuse of the emblem.*

#### Article 72

#### ICRC DRAFT

#### Article 72. — Notification

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

3.341 In connection with this article, one written proposal (CE/COM III/OPC 14) was submitted for consideration by the members of the Sub-Commission.

3.342 A first informal vote showed that the majority of the experts preferred that the notification be sent to the Depositary State.

3.343 After one expert had expressed his views, however, two trends of opinion emerged. The first trend was favourable to the maintenance of the principle of notification, on the grounds that it permitted a sufficiently accurate definition of the group of persons entitled to the special protection provided for under the present section of the Protocol. Those following the other trend, on the contrary, had doubts as to the expediency of introducing a provision of this kind into the rules. They pointed out that States are often reticent with regard to their civil defence arrangements. The same experts also suggested that Article 72 cut both ways, since it might be thought, *a contrario*, that organizations which had not been notified should not enjoy the protection provided for under the present Draft Protocol. Finally, some experts emphasized the difficulty, especially in countries having no regularly constituted organization, of formulating the notification in such a way as

to cover all the persons who should enjoy the protection.

3.344 An informal vote showed that most members of the Sub-Commission were in favour of the deletion of this article.

3.345 When examination of all articles was completed, some of the experts made recommendations to the ICRC on continuing this work. In particular, they would like to see the texts re-written to include among protected persons not only those belonging to civil defence organizations, but also those who, while not belonging, did perform the humanitarian tasks listed in Article 67. One expert even asked whether it might not be preferable to specify who was to benefit from the protection mentioned in Article 67, when giving the definition.

3.346 Another expert hoped that, in preparing its text, the ICRC would insert a provision on the cessation of protection as envisaged in Article 15 of the Draft Protocol. Such a provision, he felt, would make it possible to avoid abusive use of the protection and it would also make it absolutely clear under what conditions the protected person might be considered to have lost his right to protection.

3.347 Finally, in order to draw the attention of the ICRC to certain questions concerning the distinction between tasks with a purely humanitarian purpose, those which also were of use for national defence, and those of a solely military character, one expert submitted a document (CE/COM III/OPC 13), posing five questions. This document was intended to facilitate the future work of the ICRC.

**ANNEX**  
**to the Report of the Sub-Commission on Civil Defense Organizations**  
(DRAFT PROTOCOL I, PART IV, SECTION IV)

*Draft Article 67 : Definition*

1. Civil defence, for the purpose of this Protocol, covers humanitarian tasks to save human lives, relieve suffering, ensure the survival of and provide means of subsistence for civilians exposed to dangers resulting from hostilities or disasters. These tasks, which should be discharged without any discrimination whatsoever, are mainly the following :

- (a) rescue, first aid, transport of wounded, and fire-fighting ;
- (b) provision of emergency material and social relief to civilians ;
- (c) emergency repair of public utilities indispensable to civilians ;
- (d) policing accident sites ;
- (e) preventive measures, such as warning the population, evacuation, and providing shelters ;
- (f) preparing reports and setting out markings.

2. Civil defence bodies have no combat mission but may nevertheless be organized along military lines and may be responsible to military authorities. Service in civil defence may be made compulsory. Civil defence bodies may co-operate with military personnel in the performance of their tasks.

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

*Draft Article 67 A : Organizations and persons entitled to protection*

The protection shall apply to all organizations concerned with the tasks mentioned in paragraph 1 of Article 67, provided they are set up or recognized by their Government, as well as to persons who, without belonging to such organizations, perform those tasks under arrangements organized by their Government.

*Draft Article 68 : Protection in areas of military operations*

1. Except in the case of imperative military necessity, the Parties to the conflict shall refrain from hindering civil defence personnel in the accomplishment of their tasks.

2. Personnel discharging civil defence functions shall not be the object of deliberate attacks.

3. Buildings, equipment and means of transport being used for the purpose of discharging civil defence functions shall not be deliberately attacked or destroyed during such time as they are being used to discharge civil defence functions.

*Alternative*

- 1. (No change)
- 2. Personnel discharging civil defence functions shall in no circumstances be the object of attack.
- 3. Buildings, equipment and means of transport being used for the purpose of discharging civil defence functions shall in no circumstances be attacked or destroyed during such time as they are being used to discharge civil defence functions.

*Draft Article 69 : Protection in occupied territories*

1. In occupied territories civil defence organizations shall receive every facility from the responsible authorities for accomplishing their tasks, subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power. The latter shall not be permitted to introduce in the management or personnel of these organizations any change which could jeopardize the efficacious discharge of their tasks ; nor shall it be permitted to demand that these organizations should discharge their tasks by giving priority to victims belonging to the said Power.

2. The Occupying Power may not compel civil defence personnel to undertake activities other than those stipulated in Article 67 of the present Protocol, nor oblige them to serve outside occupied territories.

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

*Draft Article 70 : Organizations of other States*

1. The protection conferred by the present Protocol shall also be granted to personnel and equipment belonging to those civil defence organizations of other States which, with the approval of their Governments, after having notified the opposing Party accordingly and received its consent, were to offer their assistance to the civil defence organizations of a Party to the conflict, with its consent and under its authority.

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

*Draft Article 71 : Markings*

1. The distinctive emblem of civil defence organizations consists of... The permanent personnel of civil defence organizations shall be recognizable by an identity card attesting to the capacity of the holder, bearing his photograph, and embossed with the stamp of the responsible authority; while on duty, they shall wear on the left arm a stamped armlet bearing the distinctive emblem, issued by the State to which they belong.

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

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

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

*Draft Article 72 : Notification*

(deleted)

## REPORT OF COMMISSION IV

(Original: English)

*Rapporteur:* Dr. F. KALSHOVEN (Netherlands)

### INTRODUCTION

4.1 Commission IV began its work on Friday 5 May 1972 and completed it on 30 May 1972.

4.2 The Commission elected as its Chairman Dr. E. Kussbach (Austria), and as Vice-Chairmen Sir Harold Beeley (United Kingdom) and Prof. Boutros Boutros Ghali (Egypt). It appointed as its Rapporteur Dr. F. Kalshoven (Netherlands). Mr. C. Pilloud, representative of the ICRC, and Mr. A. Martin, legal expert of the ICRC, introduced and commented upon the subjects dealt with by the Commission. Mr. J. L. Cayla and Mr. H. P. Gasser, jurists of the ICRC, acted as secretaries.

4.3 The task of the Commission was to discuss the Preamble and Parts I ("General Provisions"), V ("Execution of the Conventions and of the present Protocol") and VI ("Final Provisions") of the Draft Additional Protocol to the Four Geneva Conventions of August 12, 1949 (hereinafter referred to as Draft Protocol I), as well as the Preliminary Draft Declaration on the Application of International Humanitarian Law in Armed Struggles for Self-Determination and the Draft Resolution concerning Disarmament and Peace.

4.4 The Commission decided to consider the subjects before it in the following order: Parts I, V, VI and Preamble of Draft Protocol I, Preliminary Draft Declaration and Draft Resolution.

4.5 At an early stage of its discussions the Commission set up a Drafting Committee, composed as follows:

Prof. Boutros Boutros Ghali (Vice-Chairman of the Commission),  
Dr. F. Kalshoven (Rapporteur of the Commission),  
Mr. A. Alexander (Belgium), whose place was later taken by Mr. H. Bosly (Belgium),  
Colonel G.I.A.D. Draper (United Kingdom),  
Prof. B. Graefrath (German Democratic Republic),  
Mrs. Marie-Reine d'Haussey (France), as from the meeting of 20 May,  
Mr. F. J. Mahony (Australia), and  
Mr. A. Martin (ICRC).  
The Committee elected Mr. Mahony as its Chairman.

4.6 The terms of reference of the Drafting Committee were that it should go over the wording and order of the draft articles transmitted to it after the Commission's deliberations. The Drafting Committee was not to propose changes of a substantive nature, unless it were to receive an express mandate to enter into the substance of specific draft articles, and only to the extent stated therein. Such a specific mandate was later given to the Drafting Committee in respect of draft Articles 7 to 9 and to the whole of Parts V (including the question of penal sanctions) and VI.

4.7 In the course of its deliberations, the Commission set up working groups for Article 5 (blank) and for draft Article 6, paragraph 1, in connection with Article 10 (blank). The results the working groups arrived at are mentioned in the paragraphs of this report dealing with the articles in question.

4.8 The report is organized along the following lines: Chapters I, II and III are devoted to Parts I, V and VI respectively of Draft Protocol I. The discussions on the Preamble to the Draft Protocol are recorded in Chapter IV. The discussions regarding the Preliminary Draft Declaration on the Application of International Humanitarian Law in Armed Struggles for Self-Determination and the Draft Resolution concerning Disarmament and Peace are given in Chapters V and VI.

4.9 The report does not rigidly follow the chronological order in which the discussions took place nor does it claim to give a summary record of all the events. Rather, it aims to bring out the main lines of the debate on the various proposed texts, and at the same time to record as faithfully as possible all specific proposals put forward, either orally or in writing, during the Commission's deliberations.

4.10 *ICRC note.* The report gives the following for each of the articles under Parts I, V and VI of Draft Protocol I:

- (a) the draft articles prepared by the ICRC;
- (b) the proceedings of Commission IV concerning those draft articles;
- (c) the result of the work of the Drafting Committee or of the working groups;
- (d) the main lines of thought of the experts who spoke in the course of considerations of the texts presented by the

Drafting Committee or the working groups. (These passages were written by the ICRC after the Conference).

In the reports of the Drafting Committee or the working groups, texts have been placed in square brackets when no general consensus was reached on a specific single proposal.

## CHAPTER I

### General provisions

#### (DRAFT PROTOCOL I, PART I)

4.11 The Commission started its discussion of Part I with a general debate, during which emphasis was laid by many experts on the importance of this Part and on the necessity of improving the implementation mechanism. The replies by Governments to the questionnaire sent out by the ICRC<sup>1</sup> were encouraging in this respect.

4.12 One expert pointed out that the approach taken in 1949 to the system of Protecting Powers was conservative in that it had left the existing customary law undisturbed. It was now necessary to go a step further and create new rules. In so doing, it would be wrong to concentrate on only one mechanism of implementation.

4.13 Another expert considered that the Protocol should make it explicit that all the tasks of Protecting Powers under the Geneva Conventions and the Protocol were humanitarian, and that Protecting Powers as well as substitute organizations represented not only the Party giving the mandate but the whole of the Signatory States.

4.14 It was pointed out by various experts that the appointment of Protecting Powers or of a substitute organization required the consent of both Parties concerned. An attempt therefore had to be made to find procedures that would facilitate obtaining this consent.

4.15 Moreover, a solution had to be found for situations where no agreement had been obtained. In the view of several experts, provision should be made for a "fall-back institution" which in such a situation would step in automatically. In this respect, one expert doubted whether such an institution could be a permanent body specially set up for that purpose, a solution for which Article 10 (blank) of Draft Protocol I left room. On the other hand, he requested the ICRC to declare formally whether it was ready to take up automatically all the functions of a substitute

<sup>1</sup> Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, Replies sent by governments, Geneva, April 1972. Doc. D-O-1252/b/e and Add. 1-3.

organization. A reply to this question was given by the representative of the ICRC only at a later stage of the discussions (see hereafter, paragraph 4.68).

4.16 Several experts pointed out in this connection that reservations formulated with respect to the provisions dealing with the implementation machinery should not be permitted.

4.17 According to one expert the Protocol should include penal sanctions both against individuals and States. Violations should be investigated by an international supervisory body, and the perpetrators should then be tried before a domestic court. An international court would have to be set up for cases where States failed to prosecute such individuals, as well as for the trial of States. Another expert, while admitting that the rules on enforcement as laid down in the Conventions had to be improved as well, emphasized that the better were the rules on implementation the less would use have to be made of enforcement procedures.

4.18 One expert considered it desirable that a definition of "humanitarian law" be included in draft Article 2, as this term was now for the first time used in an international instrument. It seemed to him particularly important to clarify the relationship between "human rights" and "humanitarian law". This view was supported by another expert. Yet another expert pointed out that the present Conference was concerned only with the humanitarian part of the law of warfare on land, and then only with treaty law. These limitations should constantly be kept in mind.

4.19 Another expert, interpreting the notion of humanitarian law as the law concerning the victims of warfare, emphasized that the development of this law should be discussed regardless of the causes of war. The confusion of *jus in bello* with *jus ad bellum* ought to be avoided.

#### Article 1

#### ICRC DRAFT

##### *Article 1.—Scope of the present Protocol*

1. *The present Protocol elaborates and supplements the provisions of the four Geneva Conventions of August 12, 1949, for the Protection of Victims of War.*
2. *It is applicable in the situations provided for in Article 2, common to these Conventions.*

4.20 The legal expert of the ICRC, introducing draft Article 1, emphasized that no revision of the Conventions was envisaged.

4.21 It seemed important to some experts to bring out this intention by inserting in the first paragraph



the word "reaffirms". A written proposal to that effect was introduced <sup>2</sup>.

4.22 Some other experts even feared that the text as proposed by the ICRC might lead to an interpretation to the effect that the Conventions were modified in their entirety. One expert therefore suggested that the text should be made to read "... elaborates and supplements *certain provisions of*...", while another expert suggested that the provisions in question be enumerated in draft Article 1.

4.23 The first paragraph moreover gave rise to a discussion about the meaning of the terms "elaborates and supplements". This did not seem to be the most apposite translation of "*précise et complète*". Various other translations were proposed, such as "makes more precise and comprehensive", and "is complementary to". One expert suggested the formula "is additional to", which would be by far the most neutral. The matter was finally referred to the Drafting Committee.

4.24 In connection with paragraph 2 of the proposed article, a discussion arose concerning the relationship between the Protocol and the Conventions. Several experts wanted to know whether the applicability of the Protocol would be limited to the situations mentioned in Article 2, common to the Conventions. One expert asked in particular whether in the view of the ICRC that article was limited to States. The legal expert of the ICRC answered that it was indeed intended that common Article 2 would govern the applicability of the Protocol. This did not, however, imply a limitation to States. The expert who had put the latter question concluded that the Protocol would be applicable to the same entities, no more and no less, as those envisaged by common Article 2.

4.25 Certain other experts held that Article 2, common to the Conventions, and Article 1 of Draft Protocol I made these instruments applicable to armed conflicts involving on one side not a State but another subject of international law, such as a movement fighting for self-determination. According to these experts the international status of such movements had repeatedly been confirmed by the United Nations, e.g. in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations <sup>3</sup>. Several experts considered that the Protocol should apply only to armed conflicts between States.

4.26 Another expert, however, who also thought that freedom fighters should be protected by the aforementioned instruments, felt that this precisely showed that a revision of the Conventions was necessary.

4.27 Other experts raised the question of the relation between Draft Protocol I and Article 3, common to

the Conventions. One expert asked, in this connection, whether the Annex to Draft Protocol II, entitled "Regulations concerning special cases of armed conflicts not of an international character", must be regarded as an interpretation of Article 2, common to the Conventions. While the legal expert of the ICRC did not give an express answer to this question, he stated that Draft Protocol I according to the text of draft Article 1 was intended to be applicable only to international armed conflicts.

4.28 One expert, contrary to the general opinion, inferred, from the reference, in the first paragraph of Article 1, to "the Conventions" without exclusion of common Article 3, that Draft Protocol I would be applicable both in international and in non-international armed conflicts. He proposed an amendment bringing out his interpretation <sup>4</sup>.

4.29 Some experts felt that the third paragraph of Article 2, common to the Conventions, ought to be repeated in the present Draft Protocol I. A written proposal to that effect was introduced by one expert <sup>5</sup>.

4.30 One expert suggested that the opening words of paragraph 2 should read "It applies" rather than "It is applicable", so as to give it a more clearly obligatory character.

4.31 Another expert repeatedly requested a formal guarantee that the Drafting Committee would not give any definitive form to paragraph 2 of draft Article 1, as this would prejudice the question, raised by this delegation both on earlier occasions and in the general debate of the present Conference, whether there should be one or more Protocols. This guarantee was given him by the Chairman of the Commission.

#### DRAFTING COMMITTEE

##### *Article 1.—Scope of the present Protocol*

4.32 1. *The present Protocol, which*  
[supplements]  
[is additional to]

*the four Geneva Conventions of August 12, 1949, for the protection of victims of war, shall apply in the situations provided for in Article 2, common to these Conventions.*

[2. *The situations referred to in the preceding paragraph include armed struggles waged by peoples for the exercise of their right of self-determination within the meaning of the definition of that right in Article I, common to the International Covenants on Human Rights, adopted by the United Nations General Assembly on December 16, 1966.*]

4.33 Views of experts who spoke on the drafts  
Paragraph 1: *A large majority of the experts were in*

<sup>2</sup> CE/COM IV/6.

<sup>3</sup> GA Res. 2625 (XXV).

<sup>4</sup> CE/COM IV/7.

<sup>5</sup> CE/COM IV/6.

*favour of the wording of this paragraph with the expression "which supplements..."*.

*Paragraph 2: A majority of the experts were opposed to this paragraph, but a substantial minority all the same expressed their support in favour.*

## Article 2

### ICRC DRAFT

#### *Article 2. — Terminology*

*For the purposes of the present Protocol:*

(a) *"the Conventions" means the four Geneva Conventions of August 12, 1949, for the Protection of Victims of War;*

(b) *"First Convention", "Second Convention", "Third Convention", "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949; the Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949;*

(c) *"substitute" means an organization replacing a Protecting Power under the Conventions.*

4.34 The legal expert of the ICRC, introducing the draft Article, explained its purpose, which was to define certain terms that were repeatedly used and that appeared in more than one Part of the Draft Protocol. Other definitions, of terms used in one Part only, were to be found in Articles 11, 41 to 44 and 67.

4.35 Most attention was paid to the proposed definition of a "substitute" for Protecting Powers and, in that connection, to the absence of any definition of Protecting Powers. No decision was taken at first to include a definition of the latter notion, but, at a later stage, the working group on Article 6, paragraph 1, and Article 10 came to the conclusion that a definition of Protecting Powers would be particularly useful, and a draft text was presented to the Commission<sup>6</sup>.

<sup>6</sup> CE/COM IV/RGT/3:

*"Article 2. — Terminology*

*...*

c) *"Protecting Power" means a State which is not engaged in the conflict, has normal diplomatic representation in the two States in conflict, and is able and willing to carry out, on behalf of one of them, the functions assigned to a Protecting Power under the Conventions and the present Protocol.*

*...*

See, too, the amendment proposed by one expert after the debate had been closed, in CE/COM IV/68.

4.36 This text gave rise to a number of critical remarks. It was pointed out by some experts that the definition, instead of describing Protecting Powers as an actuality, merely gave the qualifications for becoming a Protecting Power; they therefore proposed to add the phrase "and recognized as such" to the draft text before the Commission. Other proposals were to delete certain words which were unclear in themselves and which, in any event, might have an unnecessarily restrictive effect on the possibilities of selecting a Protecting Power ("normal", "able" and "on behalf of one of them"), and to read "in two of the States in conflict". The term "non impliqué" in the French text seemed ill-chosen to certain experts; they preferred "non engagé", which had a completely different connotation.

4.37 The most far-reaching proposal with respect to the draft definition of Protecting Powers was to delete it completely, on the ground that any definition, no matter how it was phrased, would have an unwanted restrictive effect. In the same line of thought it had already been suggested at an earlier stage of the discussions that the definition of a "substitute" could be suppressed as well, as the term was self-explanatory and any definition of the notion could only create confusion.

4.38 One expert, who had raised this point already in the general debate on Part I (see above, paragraph 4.18), considered that the term "humanitarian rules", used in the Preamble, ought to be defined; Article 60 of the Vienna Convention on the Law of Treaties could stand as an example<sup>7</sup>. The legal expert of the ICRC pointed out that the term was used only once, and then only in the Preamble. A definition did not seem necessary.

4.39 Other experts mentioned other terms that could be defined in Article 2. One expert considered it useful to include a general formula, to the effect that "all terms used in the Protocol have the same meaning as in the Conventions, except where the context requires another meaning".

4.40 The Commission finally referred the matter of the possible contents of Article 2 to the Drafting Committee.

### DRAFTING COMMITTEE

#### *Article 2.—Definitions*

4.41 *For the purpose of the present Protocol:*

(a) *"the Conventions" means the four Geneva Conventions of August 12, 1949, for the Protection of Victims of War;*

<sup>7</sup> Paragraph 5 of that Article refers to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

(b) "First Convention", "Second Convention", "Third Convention", "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949; the Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949;

(c) "Protecting Power" means a State which is not engaged in the conflict, has diplomatic representation in two States in conflict, and is able and willing to carry out the functions assigned to a Protecting Power under the Conventions and the present Protocol;

(d) "substitute" means an organization acting in place of a Protecting Power under the Conventions.

#### 4.42 Views of experts who spoke on this draft

*There was general agreement on sub-paragraphs (a), (b) and (d) of this draft article. Most of the experts were in favour of sub-paragraph (c), while a small minority were against.*

### Article 3

#### ICRC DRAFT

#### Article 3.—Legal status of the Parties

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

4.43 The Commission decided to discuss draft Article 3 jointly with draft Article 6, paragraph 2. This discussion, which took place only towards the end of the debate on the latter article, is reported here in view of the more general character of draft Article 3.

4.44 The inclusion of express provisions to the effect that application of the Conventions and the Protocol would not affect the legal status of the Parties to the conflict was welcomed by a majority of the experts. In the words of one of the experts, provisions of this purport were necessary in order to dissipate the doubts that Governments might otherwise entertain.

4.45 The wording of the proposed provisions met, however, with criticism from some of these experts, one of whom pointed out that the mere application of the Conventions and the Protocol of necessity entailed certain legal effects. He therefore proposed to insert in both draft articles the word "further" between "no" and "effect". This expert also proposed to delete the closing words "and, in particular, involves no recogni-

tion of the adverse Party as a State", as they seemed redundant and as, moreover, other forms of recognition, besides recognition as a State, might be at issue <sup>8</sup>.

4.46 Some other experts entertained serious misgivings as to the desirability of including the proposed principle. One expert feared that this might well amount to an attempt to achieve the legally impossible. He asked in particular whether it could really be maintained that the conclusion on a bilateral basis of special agreements, as provided in the Conventions and the Protocol, would not affect the legal status of the belligerent Parties concerned. Another expert formally proposed the deletion of Article 6, paragraph 2<sup>9</sup>. He also supported the proposal to delete the closing words of draft Article 3 (see paragraph 4.45). In this connection, he referred to the modern tendencies in international law which had found expression in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and which not merely required a State to recognize other States but, as a minimum, to respect their personality and sovereign equality. Some experts were in favour of Article 3 and Article 6, paragraph 2, as proposed by the ICRC.

4.47 The representative of the ICRC observed that draft Article 6, paragraph 2, was just a special instance of the general principle laid down in draft Article 3. He asked whether, in the view of the experts, these two provisions could be merged into one.

4.48 Such a merger seemed an excellent suggestion to some experts. Other experts, however, pointed out that, while draft Article 3 gave expression to a general principle, draft Article 6, paragraph 2, expressly reaffirmed this principle for the situation where, as experience showed, its denial was apt to give rise to the greatest difficulties in practice, i.e., in connection with the designation and acceptance of Protecting Powers. They therefore advocated the maintenance of both proposed articles.

#### DRAFTING COMMITTEE

#### Article 3.—Legal Status of the Parties to the conflict

4.49 Proposal 1: [*The application of the Conventions and of the present Protocol, as well as the conclusion of the annexed model agreements or of special agreements, shall not affect the legal status of the Parties to the conflict.*]

Proposal 2: [*The application of the Conventions and of the present Protocol, as well as the conclusion of the annexed model agreements or of special agreements, has no effect on the legal status of the Parties to the conflict and, in particular, involves no recognition of the adverse Party as a State.*]

<sup>8</sup> CE/COM IV/4.

<sup>9</sup> CE/COM IV/9.

#### 4.50 Views of experts who spoke on the drafts

*There was a distinct preference on the part of a majority of the experts for proposal 1.*

#### Article 4

##### ICRC DRAFT

#### *Article 4.—Provisional application*



4.51 The Commission, considering that the question of provisional application of the Protocol was more particularly connected with its entry into force and ought therefore to find a place in Part VI rather than in Part I, decided to postpone the discussion of this question until the time when draft Article 83 would be considered (see below, paragraphs 4.188 to 4.195).

#### Article 5

##### ICRC DRAFT

#### *Article 5.—Beginning and end of application*



4.52 As the ICRC had not formulated any concrete proposals concerning the beginning and end of application of the Draft Protocol, and as it appeared impossible to discuss fruitfully the various complicated aspects of this question without a written text, the Commission decided that a working group should be entrusted with the task of drawing up such a text. This group was composed of the experts of Bulgaria, the Arab Republic of Egypt, France, Jordan<sup>10</sup> and Pakistan, of the representative of the ICRC and of

<sup>10</sup> The experts of Jordan proposed a text for this article, see CE/COM IV/8.

Mr. Gasser as secretary. The expert of France accepted to take the chair of this working group.

4.53 The working group, while agreeing on the principle that a provision should be made in the Draft Protocol for the beginning and end of its application, did not achieve consensus on presenting one single solution. Its deliberations resulted in the drawing up of two proposals, one merely containing a reference to the relevant provisions of the Conventions, while the other elaborated new rules which would even modify certain provisions of the Conventions, in particular the one-year limit in Article 6, paragraph 3, of the Fourth Convention.

#### WORKING GROUP

#### *Article 5.—Beginning and end of application*

4.54 Proposal 1: [*The duration of the application of the provisions of the present Protocol corresponding respectively to the First Convention, the Third Convention and the Fourth Convention is determined by Articles 5, 5 and 6 of the said Conventions.*]

Proposal 2: [*1. In addition to the provisions which shall be implemented in peacetime, the present Protocol and the Conventions shall apply from the beginning of any armed conflict within the meaning of common Article 2.*

*2. The present Protocol and the Conventions shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*

*3. On the territories of the Parties to the conflict the application of the present Protocol and the Conventions shall cease on the general close of military operations.*

*4. In the case of occupied territories, the application of the present Protocol and the Conventions shall cease on the termination of the occupation.*

*5. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Protocol and the Conventions.*]

4.55 Views of experts who spoke on the drafts

*A majority was in favour of proposal 2.*

#### Article 6

##### ICRC DRAFT

#### *Article 6.—Appointment of Protecting Powers and of their substitute*

*1. For the sole purposes of applying the Conventions and the present Protocol, each of the Parties to the conflict has the obligation to appoint a Protecting Power from the beginning of the hostilities, and must accept the activities on its territory of a Protecting*

*Power appointed by the adverse Party. If, despite the foregoing, the appointment of a Protecting Power is not made, the Parties to the conflict shall accept, as substitute, the International Committee of the Red Cross or any other impartial humanitarian organization.*

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

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

#### 4.56 Article 6, paragraph 1

By far the most important question before the Commission was how to improve the implementation of the Conventions. In this connection, the ICRC had formulated a draft article concerning the designation and acceptance of Protecting Powers and their substitute (Article 6), and it had left room for provisions to be made concerning a permanent body (blank Article 10). The Commission decided to discuss these two articles together.

4.57 As the legal expert of the ICRC pointed out in his introductory remarks, the answers of Governments to the questionnaire sent out by the ICRC had brought out three tendencies in this respect: to maintain the existing system without change, to supplement it with an improved procedure as to designation of Protecting Powers, and to add new supervisory bodies, e.g. in the framework of the United Nations. The second of these tendencies was supported in a majority of the answers received. There was moreover a general tendency to reinforce the rôle of the ICRC, and there was support for the view, urged already at the first session of the Conference of Government Experts (1971), that Parties to a conflict must be provided with a broad choice of possible alternatives.

4.58 The ensuing debate confirmed the tendencies outlined in the preceding paragraph. The need for a better implementation of the Conventions and, in that connection, for a more satisfactory functioning of the supervisory mechanisms provided in the Conventions was emphasized from all sides. For certain experts this did not, however, imply the necessity of adding any new rules. They declared themselves satisfied with the existing rules, which, according to one of them, struck the right balance between sovereignty and the humanitarian interests involved. In the view of these experts, the existing rules merely needed to be applied in good faith by the respective Parties, a factor which had been lacking only too often in the past. One expert therefore proposed to lay down the requirement of good faith in a separate provision.

4.59 One expert expressed as his opinion that the co-operation of Protecting Powers or of a substitute organization need not be necessary in all cases. He

therefore proposed to reduce paragraph 1 of draft Article 6 to the statement that any Party to the conflict can appoint a Protecting Power or substitute organization if it considered this useful. This extreme view was not supported by other experts. Certain other experts referred to in the previous paragraph did, however, lay stress on the prime responsibility of the Parties to the conflict for the correct application of the Conventions.

4.60 The main tendency among the experts was to urge the need for additional rules which would strengthen the existing implementation machinery of the Conventions. The ideas expressed in this respect were both of a fundamental and of a practical nature.

4.61 A first such fundamental idea, expressed already in draft Article 6 and supported by an overwhelming majority of the experts, was that Parties to a conflict were under an obligation to seek the co-operation of Protecting Powers or of a substitute organization. This obligation was brought out in a number of the written proposals relative to draft Article 6<sup>11</sup>.

4.62 An issue of fundamental importance here was whether the appointment of Protecting Powers or of a substitute organization could be an automatic affair, not depending on the express consent of the Parties to the conflict actually concerned. A number of experts held that a rule laying down such automatism was perfectly possible and even desirable. It was, however, widely recognized that this automatic procedure would not apply to the designation and acceptance of Protecting Powers themselves and that consent would be an indispensable requirement here, as no State could be expected to accept the activities on its territory of any Protecting Power its adversary might choose to designate. Only one written proposal clearly dispensed with this element of consent<sup>12</sup>.

4.63 For most of the experts advocating an automatic solution, this automatism would operate in the appointment of a substitute organization, after attempts to designate a Protecting Power would have failed<sup>13</sup>. Another form of automatism, equally favoured by a number of experts, consisted in the automatic functioning of the ICRC at the outset of any conflict until such time as Protecting Powers would effectively perform their functions<sup>14</sup>.

4.64 Any such automatism and denial of the requirement of consent *ad hoc* were denounced by a number of experts as incompatible with the realities of present-day international relations, the concept of sovereignty and the fundamental principles of international law, such as the principle of sovereign equality and self-determination of States, as expressed in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations

<sup>11</sup> See in particular CE/COM IV/1-2-3-4-9-11-20-21-26.

<sup>12</sup> CE/COM IV/26.

<sup>13</sup> CE/COM IV/1-2-3-5-11-26.

<sup>14</sup> CE/COM IV/10-15-21-22-26.

and Co-operation among States in Accordance with the Charter of the United Nations.

4.65 Other experts held that sovereignty was not, and had never been an absolute concept. Moreover, it was within the sovereign rights of States to agree on the creation of machinery which would operate automatically once the circumstances foreseen in the agreement would have occurred. The element of consent necessary for the operation of the machinery thus created would therefore already have been expressed in the previously concluded agreement.

4.66 Another aspect of any such automatic solution was the existence of organs able and willing to act as automatic substitutes. Among existing institutions, the ICRC was widely regarded as the body most suited to take on this rôle, both in the event of failure to designate Protecting Powers and as an intermediate substitute at the outset of the armed conflict. Some experts, who did not consider the ICRC such a suitable substitute for Protecting Powers, proposed that a new permanent body, to be created, be entrusted with this task <sup>15</sup>.

4.67 Those experts who considered the ICRC to be the most suitable automatic substitute asked whether, in fact, it was willing to undertake these functions. It was only after the Commission had debated draft Articles 6 and 10 and the working group entrusted with the examination of those articles had begun its work (see below, paragraphs 4.78 ff.) that this question was answered: it had necessitated discussion within the International Committee itself. The matter is referred to at this stage because of its importance.

4.68 As expressed by its representative, the position of the ICRC amounted to a willingness to assume the functions of Protecting Powers at any time when it considered this to be necessary and feasible. The ICRC did not, however, wish that there should be a legal obligation, by virtue of an international instrument, for it to act as an automatic substitute; it preferred to retain its liberty to offer its services to Parties to a conflict. It would make such an offer only under the conditions that its services were acceptable to both Parties and that it would have at its disposal the financial means and manpower required for the task. In other words, while it could not accept a formula to the effect that it would be obliged in certain circumstances automatically to act as substitute, it did not object to a provision urging the Parties to the conflict to accept in such circumstances an offer on its part to act as such. Especially with regard to its functioning as a temporary substitute at the outset of an armed conflict, the representative of the ICRC moreover voiced his serious misgivings, as such a practice might easily result in Parties to the conflict losing all interest in the designation of Protecting Powers. The ICRC would certainly not do anything that might diminish their active interest in this regard.

<sup>15</sup> CE/COM IV/3 and 48.

4.69 Another matter of major interest in this connection was the nature of the functions of Protecting Powers. A number of experts emphasized that Protecting Powers or their substitutes should perform their functions not only in the interests of the respective Parties to the conflict but also as the agents of the international community or of the collectivity of the High Contracting Parties. One expert made this view the subject of a written proposal <sup>16</sup>. Several experts urged in this connection that the functions of a Protecting Power under the Conventions and the Draft Protocol be clearly separated from the diplomatic and political functions performed by a Power safeguarding the interests of a Party to the conflict. It was on the other hand recognized that a Power safeguarding the interests of a Party to the conflict would have to perform the functions of a Protecting Power under the Conventions and the Protocol as well.

4.70 As for the precise scope of the functions of Protecting Powers and substitute organizations, some experts, unlike those mentioned in the preceding paragraph, held that a Protecting Power, by definition, performed tasks that blended together diplomatic, political and humanitarian tasks, and that, hence, a humanitarian organization such as the ICRC could never assume all the tasks of a Protecting Power without changing its character. Other experts held that the functions of a Protecting Power included the investigation and publication of violations of the Conventions and of the Protocol <sup>17</sup> and they pointed out that the ICRC, whose traditional task was to provide humanitarian relief, had constantly refused to perform this function of investigation and publication of violations.

4.71 The representative of the ICRC pointed out that where a State carried out the functions of a Protecting Power safeguarding the interests of a Party to the conflict and of a Protecting Power under the Conventions it was perfectly possible to distinguish the two functions. All the functions of Protecting Powers under the Convention were humanitarian in nature and, as it had been stated at the time of the first session of the Conference of Government Experts (1971), the ICRC was ready to take on those functions whenever necessary and possible. While it was not right to say that the traditional tasks of the ICRC had been limited to relief, and while in the performance of its supervisory functions it had always reported its findings to the interested Parties, it was not a public organ of enquiry publishing the result of its investigation and reporting on cases of violations. Neither did this belong to the traditional tasks of Protecting Powers. Indeed, each of the Conventions contained an identical article providing for enquiries into alleged violations being instituted "in a manner to be decided between the interested Parties" <sup>18</sup>. Even this method had never been applied in practice.

<sup>16</sup> CE/COM IV/1.

<sup>17</sup> Most explicitly: CE/COM IV/26.

<sup>18</sup> Conv. I/52, II/53, III/132, IV/149.

4.72 Certain experts, who favoured the idea of an automatic "fall-back" institution for all cases and who had deduced from the answers given by the representative of the ICRC that this organization did not intend to have itself converted into such an institution, were now, even more strongly than before, convinced of the necessity of creating a permanent supervisory body under Article 10 of the Draft Protocol. A text for that article was proposed<sup>19</sup>. Other proposals, while not intended to fill the blank space left for that article, likewise referred to the functioning of a permanent body, whether as an automatic "fall-back" organization<sup>20</sup> or as one among other possible substitutes<sup>21</sup>. These proposals drew the support of some experts, who referred to such examples as the High Commissioner for Refugees. One expert urged in this connection the establishment of a High Commissioner for Human Rights. A number of experts, on the other hand, declared themselves firmly opposed to the idea of creating any new supervisory body besides the existing machinery. One expert pointed in particular to the financial consequences of such a step, and he stated that his Government would certainly not be in a position to take on any additional burdens.

4.73 One feature of the debate on the fundamental aspects of the implementation system which emerged with particular clarity was the absence of any suggestion to abolish the system of Protecting Powers as such. Indeed, most of the comments and proposals that were made aimed precisely at maintaining and improving that system.

4.74 As for the practical side of the matter, the text proposed by the ICRC was criticized from many sides as being ambiguous; for, while its first sentence suggested that it did away with the element of consent, its second sentence seemed to reintroduce this element in that it evidently presupposed the possibility for Parties to a conflict not to accept a certain State as Protecting Power. It was later explained by the representative of the ICRC that it had never been the intention to discard the element of consent and that the designation and acceptance of a Protecting Power had always been regarded as a triangular relationship.

4.75 In order to meet the difficulties which the designation and acceptance of Protecting Powers had encountered in the past, a number of proposals were made. It was suggested that Parties to a conflict should draw up lists of possible Protecting Powers and communicate these lists to their adversary, *e.g.* through the ICRC<sup>22</sup>. An amendment to this idea was that such lists should be drawn up already in time of peace by all States Parties to the Conventions and the Protocol, and that they should be deposited with the Depositary Government<sup>23</sup>. Another proposal was that

notifications of all steps concerning the designation of Protecting Powers be addressed to the ICRC<sup>24</sup>. In the same connection, a suggestion was put forward that negotiations concerning the designation of Protecting Powers be conducted under the auspices of, or via, the ICRC or the United Nations<sup>25</sup>. An idea expressed in the course of the debate was that, in the event of failure on the part of the Parties to the conflict to agree on the designation of Protecting Powers or of a substitute organization, the United Nations should have power to appoint such Powers or a substitute organization. The written proposal concerning this idea, however, merely suggested that the United Nations could in that event designate Protecting Powers or a substitute which then would have to be accepted by the Parties to the conflict<sup>26</sup>. A number of proposals contained fixed time limits for the designation of a Protecting Power, the acceptance or refusal of such designation, and the designation or automatic operation of a substitute organization<sup>27</sup>. Other proposals favoured more flexible indications, such as "without delay" or "within a reasonable time"<sup>28</sup>. An idea of a slightly more general nature was that a Party to the conflict, when declining the proposals made by its adversary concerning the designation of a Protecting Power, should accompany its answer with such suggestions as might permit the adversary to make a new proposal<sup>29</sup>. Finally, one expert introduced a proposal spelling out that a Party to the conflict might appoint as Protecting Power any impartial State not openly hostile to the adversary<sup>30</sup>.

4.76 One expert, referring to the Draft Regulations for the execution of the Geneva Conventions of 12 August 1949 proposed by the Government of Monaco<sup>31</sup>, pointed out that several of the proposals appearing in the amendments suggested by the experts were similar to those included in the Monaco Draft Regulations.

4.77 The representative of the Secretary-General of the United Nations noted that there seemed to be agreement on the necessity of making the system of Protecting Powers as effective as possible, in particular by preparing its functioning in time of peace. He also underlined the utility of temporary measures which would be taken at the outset of a conflict, pending the putting into effect of the system of Protecting Powers. As to the designation of Protecting Powers or their substitutes, he considered that there would be a better chance of their rôle as provided in the Conventions being accepted if the interested Parties were left with a freedom of choice and if they were offered a wide range of possibilities: the greatest possible number of States willing to fulfil these delicate functions, and, in

<sup>19</sup> CE/COM IV/48.

<sup>20</sup> CE/COM IV/3.

<sup>21</sup> CE/COM IV/20.

<sup>22</sup> CE/COM IV/5.

<sup>23</sup> CE/COM IV/11.

<sup>24</sup> CE/COM IV/2.

<sup>25</sup> CE/COM IV/5 and 21.

<sup>26</sup> CE/COM IV/9.

<sup>27</sup> CE/COM IV/1-2-3-4-5-20.

<sup>28</sup> CE/COM IV/21-26-28.

<sup>29</sup> CE/COM IV/2.

<sup>30</sup> CE/COM IV/25.

<sup>31</sup> Attached as an Annex to ICRC Document D-0-1252/b/e.



the event that this might fail, the ICRC, or other impartial and humanitarian organizations which might be acceptable to the Parties. In this respect, he recalled the views expressed by the Secretary-General in his second report on respect for human rights in armed conflicts (Doc. A/8052, Chapter XI), and in particular the possibility of *ad hoc* arrangements on the model of the UNESCO Convention concerning the protection of cultural property. In reply to certain remarks made in the course of the debate, the representative of the Secretary-General recalled that the Draft Protocol under consideration could never have the effect of limiting the scope of action of the United Nations bodies in conformity with the Charter; by virtue of its very text the Charter would prevail over any other international agreement.

4.78 After the representative of the ICRC had thanked the Governments which had sent in their answers to the questionnaire and the experts for having taken part in the discussion and submitted proposals, the Commission decided to refer the further examination of the various proposals to a working group composed of the experts of Austria, Belgium, the Arab Republic of Egypt, the Federal Republic of Germany, the German Democratic Republic, Italy, Pakistan, Romania, Spain, the United Kingdom, and the United States of America, of the Rapporteur, of the representative and of the legal expert of the ICRC, and of Mr. Cayla who would act as secretary. The expert of Italy accepted to take the chair of this working group.

4.79 The working group gave careful consideration to the proposals and suggestions made. It selected certain main tendencies which it laid down in a number of alternative proposals<sup>32</sup>. It considered that its proposals provided the variety of choice and flexibility desired by the Commission. The working group did not retain any of the proposed detailed procedures for the designation and acceptance of Protecting Powers or a substitute organization, as it understood that it was not a lack of procedure which in practice had led to the defective functioning of the implementation system envisaged in the Conventions. Nor did it include any provision defining the functions of Protecting Powers; it did, however, note that the question of a possible function of Protecting Powers with respect to Parts III ("Combatants") and IV ("Civilian Population") remained to be studied in the light of the texts that were to be drafted for these two Parts.

#### WORKING GROUP

##### 4.80 Article 6, paragraph 1

*ICRC note.* The working group submitted a draft consisting of seven paragraphs, to take the place of paragraph 1 of Article 6 of the ICRC draft.

1. From the beginning of a situation provided for in

<sup>32</sup> See hereafter paragraph 4.80.

*Article 2, common to the Conventions, each Party to the conflict, in the absence of a Power whose duty it is to safeguard its interests, shall designate, for the sole purposes of applying the Conventions and the present Protocol, a Protecting Power and shall permit the activities of a Protecting Power designated by the adverse Party and accepted as such.*

2. Proposal 1: [*At any time when persons protected by the Conventions and by the present Protocol do not benefit or cease to benefit, no matter for what reason, by the activities of a Protecting Power, the Parties to the conflict shall endeavour to act promptly to designate and accept Protecting Powers to carry out such activities.*]

Proposal 2: [*The Parties to the conflict shall endeavour to ensure as soon as possible the co-operation and scrutiny of Protecting Powers.*]

[3. *Where a Party to the conflict refuses to accept a designation of a Protecting Power, it shall offer suggestions which will permit the designating Party to make another choice and will communicate these suggestions to the designating Party.*]

[4. *In the situations covered by paragraph 2, if a Protecting Power has not been designated and accepted within fifteen days, the International Committee of the Red Cross shall request each of the Parties concerned to submit a list of at least . . . possible Protecting Powers acceptable to it for that purpose. These lists shall be submitted within ten days to the International Committee of the Red Cross, which shall compare the lists and seek the agreement of any proposed Protecting Powers named on both lists.*]

5. Proposal 1: [*If, despite the foregoing, persons protected by the Conventions and by the present Protocol continue not to benefit, no matter for what reason, by the activities of a Protecting Power, the International Committee of the Red Cross shall be accepted as a substitute for the Protecting Power.*]

Proposal 2: [*If, despite the foregoing, persons protected by the Conventions and by the present Protocol continue not to benefit, no matter for what reason, by the activities of a Protecting Power, a humanitarian body, such as the International Committee of the Red Cross, if acceptable to both Parties to the conflict, shall be accepted as a substitute for the Protecting Power.*]

Proposal 3: [*If, despite the foregoing, the appointment of a Protecting Power is not made, the Parties to the conflict shall accept, on the territories under their control, the activities of a humanitarian body, such as the International Committee of the Red Cross appointed by the adverse Party and recognized by both Parties, or, in the last resort, proposed by the United Nations Organization and recognized by the Parties.*]

[6. *From the beginning of any situation provided for in Article 2, common to the Conventions, each of the Parties to the conflict shall accept the offer of the International Committee of the Red Cross to perform the activities of a Protecting Power under the Conventions and this Protocol unless, or until, one or more*



*Protecting Powers are effectively carrying out such activities.]*

7. *Whenever in the present Protocol mention is made of a Protecting Power, such mention also applies to substitute organizations in the sense of Article 2 of the present Protocol.*

#### 4.81 Views of experts who spoke on the drafts

A majority of the experts were in favour of the seven paragraphs submitted by the working group, and expressed their preference for proposal 1 in paragraph 2 and proposal 1 in paragraph 5.

#### 4.82 Article 6, paragraph 2

For the discussion on Article 6, paragraph 2, see above under Article 3, paras 4.43 to 4.48.

### DRAFTING COMMITTEE

#### 4.83 Article 6, paragraph 2

*ICRC note.* Paragraph 2 of the ICRC draft Article 6 would be renumbered paragraph 8, if the seven paragraphs submitted by the working group—see above, paras 4.80 and 4.81—were included.

*[8. The appointment and the acceptance of a Protecting Power, or of its substitute, for the sole purposes of applying the Conventions and the present Protocol, shall not affect the legal status of the Parties to the conflict.]*

#### 4.84 Views of experts who spoke on this draft

A majority of the experts were in favour of this wording, but several experts said they preferred the ICRC version.

#### 4.85 Article 6, paragraph 3

A number of experts expressed as their view that, in the light of past experience, the rule proposed in Article 6, paragraph 3, was sufficiently valuable to be retained in the Draft Protocol. One expert introduced an amendment to the effect that the maintenance of diplomatic relations would not constitute an obstacle to the humanitarian activities of the ICRC<sup>33</sup>. Two other proposals simply called for the deletion of the paragraph<sup>34</sup> on the ground that when diplomatic relations were maintained between the Parties to the conflict, sufficient protection would thereby be provided. These proposals did not, however, draw any widespread support.

### DRAFTING COMMITTEE

#### 4.86 Article 6, paragraph 3

*ICRC note.* Paragraph 3 of the ICRC draft Article 6 would be renumbered paragraph 9, if the seven paragraphs submitted by the working group—see above, paras 4.80 and 4.81—were included.

*[9. The maintenance of diplomatic relations between the Parties to the conflict does not constitute an obstacle to the appointment of Protecting Powers.]*

#### 4.87 Views of experts who spoke on this draft

A large majority of the experts said they were in favour of this text.

### Article 7

#### ICRC DRAFT

#### Article 7.—Qualified persons

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

4.88 The legal expert of the ICRC explained, in his introductory remarks, that this draft article as well as draft Articles 8 and 9 had their basis in common Article 1 of the Conventions. Common Article 1, as several experts had stated, gave the signatory States a mandate for collective supervision of the application of the law of Geneva. In drawing up these draft articles, the ICRC had moreover taken into account Resolution XXIII of the Teheran Conference on Human Rights.

4.89 As to draft Article 7 in particular, the legal expert mentioned that several Governments had suggested in their replies to the ICRC questionnaire that the ICRC should take a part in the training of qualified personnel. The ICRC was ready to do this.

4.90 The idea that States should train personnel with a view to facilitating the system of Protecting Powers and substitute organizations being put into practice met with general approval. The precise function of this personnel within the framework of the implementation machinery of the Conventions and Draft Protocol I was a matter of some dispute between two experts; while one proposed a formula to the effect that their function would include assistance to a Protecting Power or substitute organization<sup>35</sup>, the other expert held that their function would be limited to acting as delegates of a Protecting Power as provided in Article 8 of the Conventions (Article 9 of the Fourth Convention). Another expert, too, emphasized that draft Article 7 would be governed by this article of the Conventions.

4.91 Another matter was whether the personnel envisaged in draft Article 7 would function only within the framework of the said implementation

<sup>33</sup> CE/COM IV/21.

<sup>34</sup> CE/COM IV/9 and 20.

<sup>35</sup> CE/COM IV/14; see also CE/COM IV/30.

machinery, or would also have peacetime functions, in particular in the field of dissemination and instruction. One proposal advocating the latter idea <sup>36</sup> was supported by an expert who emphasized the overriding importance of dissemination of the law of Geneva among the civilian population, the police and the armed forces. Careful instruction in this law might even deprive the defence of superior orders of much of its importance. Other experts, however, pointed out that dissemination and instruction properly came within the purview of draft Article 76 <sup>37</sup>.

4.92 While there was much support for the suggestion that the ICRC should contribute in one way or other to the training of the personnel, the phrase in draft Article 7 that training would be "on a national basis" gave rise to some differences of opinion. One expert proposed to read this as "on a national or regional basis". Other experts reacted to this suggestion by stating that the recruitment and training of the personnel would lie solely within the national competence of each State <sup>38</sup>. One expert urged that, no matter where the competence lay, the generally recognized principles of the Red Cross should underlie any such training.

4.93 The formulation in draft Article 7 that "the High Contracting Parties shall endeavour to train..." was already too strong an obligation in the eyes of one expert, who proposed to read this as "are invited to". Other proposals, on the contrary, were to the effect that Parties to the Protocol would be obliged to train the personnel in question <sup>39</sup>.

4.94 A number of experts entered into the question of the status of such personnel when carrying out their tasks in the context of the system of Protecting Powers. Some experts urged that they be given diplomatic status <sup>40</sup> or, at least, be excluded from the local criminal jurisdiction <sup>41</sup>. According to other experts, there was no need to make any general provision for their status, this in conformity with Article 8 of the Conventions (9 of the Fourth Convention) which did not provide any special status for delegates of a Protecting Power not belonging to its diplomatic or consular staff. The general feeling was that the question of status had better be left to *ad hoc* agreements between the interested Parties <sup>42</sup>.

4.95 One expert introduced an elaborate proposal spelling out the domestic and international functions of implementation teams and the details of their utilization <sup>43</sup>. It was thought by a number of experts that such detailed regulations should not be included in the body of the Protocol but might be annexed to it as a Model Agreement.

<sup>36</sup> CE/COM IV/14.

<sup>37</sup> CE/COM IV/30-33-35.

<sup>38</sup> Thus, explicitly, CE/COM IV/33; see also CE/COM IV/35.

<sup>39</sup> CE/COM IV/14-30-31-35.

<sup>40</sup> CE/COM IV/31.

<sup>41</sup> CE/COM IV/13.

<sup>42</sup> See CE/COM IV/14 and 33.

<sup>43</sup> CE/COM IV/14.

## DRAFTING COMMITTEE

### 4.96 Article 7.—*Qualified persons*

1. *The High Contracting Parties shall endeavour to train qualified personnel to facilitate the application of the Conventions and of the present Protocol and in particular the activities of the Protecting Powers.*

2. *The recruitment and training of such personnel shall lie within the national competence.*

3. *Each High Contracting Party shall establish a list of persons so trained and shall transmit it to the International Committee of the Red Cross.*

4. *The conditions governing the employment of these persons outside the national territory shall, in each case, form the subject of special agreements.*

### 4.97 Views of experts who spoke on this draft

The experts strongly approved these four paragraphs.

## Article 8

### ICRC DRAFT

#### Article 8.—*Co-operation of the High Contracting Parties*

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

#### 2. *Role of the regional governmental Organizations*

4.98 The legal expert of the ICRC, introducing the draft article, mentioned three tendencies emerging from the answers of Governments to the ICRC questionnaire: one simply denying any right to collective action under common Article 1 of the Conventions, one excluding collective action in the true sense of the term but leaving room for steps to be taken singly or jointly through diplomatic channels by High Contracting Parties, and a third tendency supporting the idea of collective action, e.g., within the framework of the United Nations.

4.99 He went on to explain that the ICRC had left paragraph 2 blank. A number of replies to the ICRC questionnaire were positive as to the idea of giving a

rôle to regional organizations. There was, on the other hand, a widespread fear that this would lead to a politization of the issues. Other Governments, again, considered that it should be left to the organizations in question to make known their standpoints with respect to the utility of including in the Protocol a special provision concerning their rôle.

4.100 The first paragraph of the proposed article gave rise to a debate on the true purport of Article 1, common to the Conventions. Many experts denied that this article gave Parties to the Conventions a mandate for collective action. Such collective action, even when purportedly for humanitarian reasons, would in their eyes amount to intervention. One expert, in this connection, introduced an amendment expressly referring, *inter alia*, to the duty to respect national sovereignty of States and non-interference in the domestic affairs of other States <sup>44</sup>. It was moreover pointed out that collective action would of necessity lead to a politization of humanitarian law. Any attempt at collective supervision would risk increasing international tensions. Supervision was the responsibility of Protecting Powers or substitute organizations, and possibly of a special supervisory body, but not of the High Contracting Parties acting as a collectivity.

4.101 One expert strongly advocated the opposite view. He proposed that meetings of the High Contracting Parties be given power to deal with persistent and serious violations and to consider the joint action to be taken in such cases <sup>45</sup>. Another expert concluded from recent developments in the sphere of human rights that a system of collective supervision was conceivable, founded on the United Nations system <sup>46</sup>.

4.102 Some experts put forward suggestions intended to remove the interventionary aspect of the proposed article. Thus, it was suggested bringing out clearly that any collective action would only be permissible with the consent of the Parties to the conflict. Another expert introduced an amendment intended to limit co-operation in the application of the Conventions and the Protocol to Contracting Parties acting as Protecting Powers <sup>47</sup>. Yet another expert proposed a text inviting the Contracting Parties to co-operate, in particular by notifying the Parties to the conflict of their position and by supporting relief actions <sup>48</sup>.

4.103 Many experts pointed out that Parties to the Conventions and the Protocol would be entitled, in conformity with general international law, to urge Parties to the conflict to respect these instruments; such steps, whether taken singly or jointly through diplomatic channels, did not constitute an interference in the internal affairs of the Parties in question. In this connection there was some support for a

proposal which spelt out this right of the Contracting Parties without, however, making any reference to Article 1, common to the Conventions <sup>49</sup>.

4.104 An element in the text proposed by the ICRC which drew particular criticism was the reference to relief activities. It was pointed out that this subject was treated elsewhere in the Draft Protocol, viz., in draft Article 64. Several written proposals amended the ICRC text in this respect <sup>50</sup>.

4.105 Finally, the opinion was expressed that paragraph 1 of draft Article 8 was superfluous and could be deleted because the obligation to respect and to ensure respect of the Conventions was already provided in common Article 1.

4.106 An overwhelming majority of the experts expressed themselves in favour of the suppression of blank paragraph 2. A few experts supported the idea that a rôle should be given to regional organizations; a proposal to that effect was introduced <sup>51</sup>.

#### DRAFTING COMMITTEE

4.107 *Article 8.—Co-operation of the High Contracting Parties*

Proposal 1: [*Delete the article.*]

Proposal 2: [*The High Contracting Parties, being bound by the terms of Article 1, common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of the present Protocol.*]

Proposal 3: [*The High Contracting Parties are invited to co-operate in the application of the present Protocol. This action by States not engaged in the conflict shall not be deemed an interference therein.*]

Proposal 4: [*The High Contracting Parties being bound, by the terms of Article 1, common to the Conventions, to respect and to ensure respect for these Conventions in all circumstances, are invited to co-operate in the application of these Conventions and of the present Protocol, in particular by making an approach of a humanitarian nature to the Parties to the conflict and by relief actions. Such an approach shall not be deemed to be an interference in the conflict.*]

4.108 *Views of experts who spoke on the drafts*

A definite majority of the experts were for the inclusion of a provision relating to the co-operation of the High Contracting Parties. Proposals 2 and 3 received a certain measure of support, but there was more so for proposal 4.

<sup>44</sup> CE/COM IV/16.

<sup>45</sup> CE/COM IV/34.

<sup>46</sup> In this connection, see also CE/COM IV/37.

<sup>47</sup> CE/COM IV/16.

<sup>48</sup> CE/COM IV/17.

<sup>49</sup> CE/COM IV/12; see also CE/COM IV/29.

<sup>50</sup> CE/COM IV/12-29-36-37-38.

<sup>51</sup> CE/COM IV/36.

*Article 9. — Meetings*

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

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

4.109 The legal expert of the ICRC pointed out in his introductory remarks that draft Article 9, in so far as the procedure with respect to amendments was concerned, had been inspired by Article 27 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954. In the Conference of Red Cross Experts, held in Vienna in March last, it had been observed that that article was part of a far more elaborate system of revision and that a summary provision such as the one now proposed might be inadequate.

4.110 The idea of meetings of representatives of High Contracting Parties, convened with a view to examining the development of the Conventions and the Protocol, drew the support of a number of experts. There was decidedly less support for the suggestion, contained in the second sentence of paragraph 1, that such meetings would study problems concerning the application of these instruments. In the view of several experts, this could all too easily develop into a kind of collective supervision. It was, on the other hand, suggested that precisely the consideration of measures for the application of the Conventions and the Protocol should be among the purposes of the meetings <sup>52</sup>.

4.111 Several amendments were suggested to the text proposed by the ICRC. These were connected, first of all, with the rôle attributed to the Depositary State in paragraph 1 of the draft article. Many experts felt that it would not be in conformity with customary law as expressed in Article 77 of the Vienna Convention on the Law of Treaties <sup>53</sup> to give the Depositary State power to convene a meeting whenever it would deem this expedient. There was more sympathy for the idea underlying paragraph 2 that a certain number of

High Contracting Parties could ask for a meeting. Suggestions as to the number required ranged from one-fifth (as proposed by the ICRC) to one-half or two-thirds <sup>54</sup>. One expert emphasized that it should not be made too easy to have such meetings convened; the four-yearly International Conferences of the Red Cross already provided an opportunity to discuss the problems in question. In this connection, a written amendment proposed a more elaborate procedure for obtaining the majority required to convene a meeting <sup>55</sup>.

4.112 There was some discussion as to the place to be given to the draft article. According to some experts, it ought to be placed in Part VI of the Draft Protocol as it introduced a revision procedure, which was typically a matter for the final provisions. The legal expert of the ICRC pointed out that Part VI was confined so far to provisions exclusively relating to the Protocol itself, while draft Article 9 referred to the Conventions as well. Another suggestion was to transfer the proposed article to Part V <sup>56</sup>.

## DRAFTING COMMITTEE

4.113 *Article 9.—Meetings*

1. *The Depositary State of the Conventions and of the present Protocol shall, at the request of*

[1/5]

[1/2]

[2/3]

*of the High Contracting Parties [or of the ICRC], convene a meeting of representatives of the High Contracting Parties.*

2. *Proposal 1: [The purpose of the meeting shall be to examine any amendment to these instruments proposed by a High Contracting Party.]*

*Proposal 2: [The purpose of the meeting shall be to study general problems concerning the application of the Conventions and of the present Protocol and to examine any amendment to these instruments proposed by a High Contracting Party.]*

*Proposal 3: [The purpose of the meeting shall be to study problems concerning the application of the Conventions and of the present Protocol, and to consider measures for their application. The meeting may likewise examine any amendment to these instruments proposed by a High Contracting Party, and in this respect shall decide as to measures to be taken.]*

4.114 *Views of experts who spoke on the drafts*

The introduction of such a provision was approved by a large majority.

*Paragraph 1:* a majority of the experts were in favour of having a number of two-thirds of the High

<sup>52</sup> CE/COM IV/42.

<sup>53</sup> This article reads in part: "The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular: . . .".

<sup>54</sup> CE/COM IV/10-18-40.

<sup>55</sup> CE/COM IV/10, Article viii.

<sup>56</sup> CE/COM IV/10.

Contracting Parties. The proposal for the number of one-fifth was however favoured by several experts.

Further, there was a majority who wished for the insertion of the expression "...or of the ICRC", while a fairly large minority of the experts were against.

*Paragraph 2:* opinions varied widely among the experts concerning these three proposals. A slight majority were in favour of proposal 3, but quite a large minority were against the latter, preferring either proposal 1 or 2.

## Article 10

### ICRC DRAFT

#### *Article 10. — Permanent body*



4.115 For the discussion on this article, see the part of this Chapter devoted to the first paragraph of Draft Article 6 (paragraphs 4.56 to 4.81).

### DRAFTING COMMITTEE

#### 4.116 *Article 10.—Permanent Organ*

[1. In conformity with Article 10, paragraph 1, common to the three first Conventions, and Article 11, paragraph 1, of the fourth Convention, the Parties may appoint any permanent organ established or designated by the United Nations for that purpose, to assume the duties incumbent on the Protecting Powers by virtue of the Conventions and the present Protocol.

2. In case no Protecting Power is appointed within the period of ... days from the beginning of a situation provided for in Article 2, common to the Conventions, and the ICRC has not assumed all the functions of the Protecting Power under the Conventions and the present Protocol, including the investigation and reporting on violations, the said organ will then undertake, by virtue of this Protocol, the functions of the Protecting Power or those of them not carried out by the International Committee of the Red Cross.

3. In cases where both the International Committee of the Red Cross and the said organ are assuming the functions of the Protecting Power under the Conven-

tions and the Present Protocol, they shall act in concert and coordinate their activities.]

#### 4.117 *Views of experts who spoke on this draft*

Though a majority of the experts were against including an article dealing with the establishment of such an organ, several experts, however, were in favour of such an article and expressed their support for this text.

## CHAPTER II

### Execution of the Conventions and of the present Protocol

#### (DRAFT PROTOCOL I, PART V)

#### *Penal Sanctions*

4.118 The examination of this Part began with a general debate on the question of penal sanctions. The legal expert of the ICRC, introducing the subject, referred to the answers of Governments to question 15 on the problem of penal sanctions in the ICRC's questionnaire; these answers on the whole laid stress on the necessity to reinforce the repression of infractions of the Conventions and contained numerous suggestions as to the measures most apt to complete the rules relating to penal sanctions, in the framework of both international and domestic law. The representative of the ICRC pointed out that two questions had to be considered: improvement of the system embodied in the Conventions, and rules as to the repression of infractions of the Draft Protocol (which, of course, would largely depend on the work of the other Commissions).

4.119 One expert pointed out that at present there was no satisfactory means of repressing infractions of the Conventions and thought that it would be necessary to abandon the system of repression by each State individually and to create an international tribunal for the trial of war crimes, crimes against humanity and crimes against peace. An international penal code would also have to be established <sup>57</sup>. Several experts,

<sup>57</sup> CE/COM IV/27 and 43.

*ICRC note.* The experts of the Philippines distributed a written note — CE/COM IV/27 — entitled "Penal Sanctions as a Means of Strengthening International Humanitarian Law", which they read out and on which they commented in the Commission.

This written note expressed regret that the 1949 Geneva Conventions left it to each country to enact its own penal legislation for the repression of breaches and put forward the view that it would be more practical and legitimate to adopt a standard code covering war crimes and providing for suitable penalties. Indeed, breaches of the Geneva Conventions should be considered as violations of international law since they are crimes against humanity. A uniform code would make it possible to draw up a classification of breaches and to standardize penalties.

Reviewing the four 1949 Conventions, the written note pointed out that the grave breaches enumerated in Articles 50/51/130 and 147 of the First, Second, Third and Fourth Conventions respect-

while acknowledging the great interest of these proposals, which they supported in principle, were of the opinion that such projects were premature and too ambitious, and that it would therefore be better to concentrate, for the time being, on the completion and harmonization of national legislations. It was suggested that the drafting of an international penal code could be a task for the International Law Commission of the United Nations. One expert considered that the Protocol should contain the elements for a penal code which would establish a minimum standard for all the Parties. Sanctions ought to be provided not only against individuals but against States as well. An international body could be created to investigate grave breaches of the Conventions and the Protocol. One expert discussed the establishment of a procedure of investigation and conciliation<sup>58</sup>. It was pointed out that in the absence of a competent international tribunal it would be useful to have impartial international observers attend trials before national courts.

4.120 Some experts advocated the drafting of a model law for the repression of infractions of the Conventions and the Protocol. The formulation of such a model law would be difficult in view of the considerable differences between the various national legislative systems. It was, however, felt that States which yet had to legislate might be guided by such a model.

4.121 One expert emphasized that the concept of grave breaches was at the root of the penal systems of the Conventions. It was therefore necessary to decide whether the Protocol would rest on the same basis. The Draft Protocol gave no indications, except in draft Article 75, paragraph 2. It was now the time to examine the advantages and disadvantages of the concept and to decide whether the system of penal procedure in the Conventions was the right one. Other experts, who shared this opinion, considered that it would be necessary, either to improve the definition of grave breaches, or to re-examine that concept in the framework of the Conventions which now had four different lists of grave breaches. Some experts felt that it would be useful to define grave breaches of the present Protocol, when the findings of the other Commissions were known, and to draw up a system of penal procedure for the Protocol, similar to that in the Conventions. Other experts thought it

ively are divided into five categories, namely: 1) "Wilful killing"; 2) "Torture or inhuman treatment, including biological experiments"; 3) "Wilfully causing great suffering or serious injury to body or health"; 4) "Compelling a prisoner of war to serve in the forces of the hostile Power"; and 5) "Wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention". According to this written note, the grave breaches specified in the Conventions leave too much scope for divergent interpretation by the different national legislatures, and should therefore be better defined, with penalties prescribed for each of them.

The written note concluded that the proposed code and procedures would clarify the stand on future war crimes and would strengthen the rules applicable to the conduct of war.

<sup>58</sup> CE/COM IV/10, Article vii.

would be premature to define the concept of grave breach within the framework of the Protocol, or, in general, to try to draw up provisions on penal procedure.

4.122 Certain experts urged that the question of infractions committed by omission be taken into consideration in this Part of the Draft Protocol. A written proposal concerning this matter was introduced<sup>59</sup>. Another proposal aimed at bringing out the criminal liability of those in authority for war crimes committed under their responsibility. On the international level, this concept had been brought into practice in particular by the International Military Tribunal for the Far East in Tokyo. The relevant articles of the Conventions referred only to persons alleged to have committed, or to have ordered to be committed, certain types of war crimes; this should now be supplemented with a clear rule on the responsibility of authorities at all levels for failure to prevent or repress war crimes<sup>60</sup>.

4.123 A number of experts approved the introduction of a provision on superior orders, such as proposed in draft Article 75, paragraph 2 of the ICRC text: "The High Contracting Parties shall determine the procedure to be followed for the application of the principle under which a subordinate is exempted from any duty to obey an order which would lead him to commit a grave breach of the provisions of the Conventions and of the present Protocol". The language of that paragraph did not, however, seem sufficiently clear and a number of amendments were proposed<sup>61</sup>. It was pointed out that attempts had been made in several national legislations to give a satisfactory formulation of the defence of superior orders, a concept recognized by the Charter and the Judgment of the International Military Tribunal at Nuremberg; but so far it had appeared impossible to find a formula that would really cover all situations and on which the agreement would be general. It would not be right to limit the scope of the defence to grave breaches only (as the ICRC draft did). According to one expert, it should be stipulated that the subordinate not merely had the right, but was obliged, to disobey the unlawful order. Some experts, however, were of a completely opposite view and demanded the deletion of the proposed paragraph<sup>62</sup>. They laid emphasis on the necessity to respect the exigencies of military discipline, and they pointed out that it would be difficult in time of armed conflict to permit soldiers to decide whether to obey or not. It was equally considered that the approach to this question should be far more general and that all the principles recognized by the Nuremberg Tribunal, the Draft Code of Offences against the Peace and Security of Mankind, and the relevant resolutions of the United Nations should be taken into account.

<sup>59</sup> CE/COM IV/46.

<sup>60</sup> CE/COM IV/45.

<sup>61</sup> CE/COM IV/41-46-54-56-58.

<sup>62</sup> CE/COM IV/59.

4.124 One expert was of the opinion that the Protocol ought to contain a provision relating to extradition, which could be framed on the model of the relevant provision in the Charter of the Nuremberg Tribunal.

4.125 According to some experts, a provision should be included stipulating that the penal system of the Conventions applied to the Protocol as well.

#### DRAFTING COMMITTEE

#### 4.126 *Supplementary Article 75 A.—[Penal sanctions]*

Proposal 1: *[The High Contracting Parties shall, within the framework of their penal legislation, adopt all necessary measures to punish those guilty of breaches to the present Protocol. The provisions of the Conventions relating to the punishment of breaches are equally applicable to the present Protocol.]*

Proposal 2: *[The High Contracting Parties shall take all measures necessary, through legislation and otherwise, to provide adequate sanctions for persons breaching the Conventions or this Protocol.]*

#### *Supplementary Article 75 B.—[Omissions and superior orders]*

1. *[The High Contracting Parties undertake to enact all necessary legislative measures for the repression of violations by omission of the Conventions and of this Protocol.]*

2. Proposal 1: *[The fact that a person acted pursuant to order of his Government or of a superior shall not free him from responsibility under international law; it may be considered in mitigation of punishment, if justice so requires.]*

Proposal 2: *[The fact of having acted on the orders of his government or of a superior shall not absolve from responsibility any person who has carried out an order that is manifestly illegal, if he was morally capable of making a choice.]*

Proposal 3: *[No person shall be punished for refusing to obey an order or command which, if carried out, would result in a breach of the provisions of the Conventions or of the present Protocol.]*

Proposal 4: *[The High Contracting Parties shall determine the procedure to be followed for the application of the principle under which a subordinate is exempted from any duty to obey an order which would lead him to commit a grave breach of the provisions of the Conventions and of the present Protocol.]*

Proposal 5: *[The High Contracting Parties shall provide that no person shall be punished for refusing to obey an order or command which, if carried out, would result in a breach of the provisions of the Conventions or of this Protocol.]*

#### *Supplementary Article 75 C.—[...]*

*[The High Contracting Parties shall employ in their armed forces qualified legal advisers whose task it is to advise responsible military commanders, in time of*

*peace as well as in time of armed conflict, on the application of international humanitarian law and to assist them in supervising instruction in the field of international law.]*

#### *Supplementary Article 75 D.—[Code of criminal offence, punishments thereof, and procedures for trial and execution of sentence]*

*[The High Contracting Parties shall, in collaboration with the International Committee of the Red Cross, undertake to :*

- (a) collate and consolidate the criminal offences provided for in the Conventions and in this Protocol;*
- (b) formulate and adopt a code based on the foregoing criminal offences;*
- (c) classify the criminal offences according to their nature and gravity;*
- (d) prescribe the punishments thereof;*
- (e) set the procedures for trial and the execution of sentences.]*

#### 4.127 *Views of experts who spoke on the drafts*

*Supplementary Article 75 A:* the introduction of this provision was viewed with favour, with slightly more support for proposal 2.

#### *Supplementary Article 75 B:*

*Paragraph 1:* a certain number of experts favoured a provision of this kind.

*Paragraph 2:* proposal 3 received the most support, but proposals 1, 2 and 4 were also favourably considered.

*Supplementary Article 75 C:* the text as drafted was widely supported.

*Supplementary Article 75 D:* several experts were in favour, but most expressed reservations or opposition.

## SECTION I OF PART V ("GENERAL PROVISIONS")

### Article 73

#### ICRC DRAFT

#### *Article 73.—Details of execution and unforeseen cases*

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

4.128 One expert pointed out that the proposed article was considerably wider than Article 45 of the First Convention and Article 46 of the Second Convention; those articles made mention only of the commanders-in-chief, while the proposed article

referred to the civilian and military authorities. Then, the phrase “provide for unforeseen cases, in conformity with the general principles of the Conventions and of the present Protocol” might be dangerous, in that it might be interpreted as an invitation to use the technique of reasoning by analogy in the internal legal order.

4.129 The representative of the ICRC indicated that the ICRC did not particularly insist on the article. The civilian authorities had been included in view of the fact that both the Fourth Convention and the Draft Protocol dealt with questions concerning the civilian population.

4.130 Certain experts expressed themselves in favour of maintaining the draft article. They felt that it would be a useful supplement to Article 1, common to the Conventions. Other experts considered that the draft article did not serve any useful purpose and should be dropped, notably because the obligation which it contained was already comprised in common Article 1<sup>63</sup>. It was held that Part V on execution should contain nothing but clear and specific obligations; to include general notions would only create difficulties. If draft Article 73 were to be adopted, the Contracting Parties would (in conformity with Articles 48/I, 49/II, 128/III and 145/IV of the Conventions) be obliged to communicate to each other any regulations adopted to provide for unforeseen cases, and this would constitute no small burden.

4.131 One expert suggested keeping the draft article but deleting the words “and provide for unforeseen cases”.

#### DRAFTING COMMITTEE

4.132 *Article 73.—Detailed execution [and unforeseen cases]*

Proposal 1: [*Delete the article.*]

Proposal 2: [*The High Contracting Parties, acting through their civilian and military authorities, shall ensure the detailed execution of the articles of the Conventions and of the present Protocol [and provide for unforeseen cases], in conformity with the general principles of the Conventions and of the present Protocol.*]

Proposal 3: [*The High Contracting Parties, acting through their civilian and military authorities, shall give orders and instructions to ensure observance of the Conventions and the present Protocol and shall supervise their execution; they shall also provide for the detained execution of the articles of the Conventions and the present Protocol, in conformity with the general principles of the Conventions and the present Protocol.*]

4.133 *Views of experts who spoke on the drafts*

A majority was in favour of proposal 3, but certain experts wished the article to be deleted.

<sup>63</sup> CE/COM IV/49.

#### Article 74

#### ICRC DRAFT

*Article 74.—Prohibition of reprisals and exceptional cases*

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

2. *In cases where reprisals are not yet prohibited by the law in force, if a belligerent considers that it must resort thereto, it shall observe the following minimal conditions:*

(a) *the resort to reprisals must be officially announced as such;*

(b) *only the qualified authority can decide on resort to reprisals;*

(c) *the reprisals must respond to an imperative necessity;*

(d) *the nature and scope of the reprisals shall never exceed the measure of the infraction which they seek to bring to an end;*

(e) *the belligerent resorting to reprisals must, in all cases, respect the laws of humanity and the dictates of the public conscience;*

(f) *reprisals shall be interrupted as soon as the infraction which gave rise to them has come to an end.*

4.134 In his introduction, the legal expert of the ICRC pointed out that a majority of the participants in the Red Cross Experts Vienna Conference were of the opinion that the draft article should be deleted or, at the least, completely re-examined; the reasons were that paragraph 1 merely confirmed what was already in the Conventions and in draft Articles 45 and 48 of the Protocol, and that paragraph 2 did not properly belong to the law of Geneva.

4.135 A number of experts held that the whole draft article should be deleted. A written proposal to that effect was introduced<sup>64</sup>. Many other experts thought that only paragraph 2 should be deleted.

4.136 Those who expressed themselves in favour of the complete removal of the draft article advanced the argument that recourse to reprisals including the use of force was already prohibited under general international law, and specifically by the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States According to the Charter of the United Nations. One expert contested this opinion; he pointed out that belligerent reprisals, taken in the course of hostilities, to the extent that they had not been outlawed by the Conventions in force, remained a legal device at the disposal of belligerents.

<sup>64</sup> CE/COM IV/50.



4.137 Those in favour of maintaining paragraph 1 felt that a reaffirmation of the prohibitions found elsewhere in the Conventions and the Draft Protocol might be useful. Some preferred to see the paragraph transferred to Part I<sup>65</sup>. It was proposed to insert "strictly" or "absolutely"<sup>66</sup> before "prohibited", or to make the text read "are and remain strictly prohibited". One expert pointed to the fact that where the French text spoke of "biens", the English text used the word "property"; admittedly, the same difference in terminology was to be found in the Conventions, but the French term seemed more appropriate as it was not "property" but "goods" which were protected. One expert, finally, suggested the insertion of the word "civilian" before "persons". He pointed out that the Protocol would also apply to combatants, and that consequently more precision was necessary.

4.138 While most of the experts were in favour of deleting paragraph 2, one expert suggested that a formula containing the idea of this paragraph, but adapted to the application of reprisals in the conduct of hostilities, be inserted in Part III, after draft Article 30<sup>67</sup>.

4.139 One expert proposed to replace the text of paragraph 2 with a provision to the effect that deportation of the civilian population and the removal of non-military property beyond the national frontiers of their country of origin were strictly prohibited<sup>68</sup>.

4.140 The representative of the ICRC drew the attention of the Commission to the fact that the ICRC had drafted Article 74 taking into account the observations made during the previous Conference of Government Experts. To delete paragraph 2 would certainly not solve the problem of reprisals taken in the course of combat.

#### DRAFTING COMMITTEE

4.141 *Article 74.—Prohibition of reprisals and exceptional cases*

Proposal 1: [*Delete the article.*]

Proposal 2: [*Measures of reprisal against persons and property protected by the Conventions and by the present Protocol are prohibited.*]

Proposal 3: [*Transfer the idea of paragraph 2 to Part III.*]

*Supplementary Article 74 A.—[...]*

[*Deportation of the civilian population, individually or in groups, and the removal of non-military property or installations beyond the national frontiers of their country of origin are strictly prohibited.*]

<sup>65</sup> CE/COM IV/44 and 53.

<sup>66</sup> See CE/COM IV/55.

<sup>67</sup> CE/COM IV/53.

<sup>68</sup> CE/COM IV/19.

4.142 *Views of experts who spoke on the drafts*

*Article 74:* The majority was in favour of proposal 2. Most experts thought that paragraph 2 of the ICRC draft should be deleted. There was little support for proposal 3.

*Supplementary Article 74 A:* many experts gave this text their support.

#### Article 75

#### ICRC DRAFT

*Article 75.—Orders and instructions*

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

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

*Article 75, paragraph 1*

4.143 The majority of experts supported the first paragraph.

4.144 Some among them, who considered that the effective application of international humanitarian law depended on instruction, connected this provision with draft Article 76 relating to dissemination. Two proposals were made to add a paragraph stipulating that the Parties to the Protocol employ in their armed forces qualified legal advisers whose task would be to advise military commanders on the application of international humanitarian law<sup>69</sup>.

4.145 It was suggested to read "the national authorities" instead of "the civilian and military authorities", and to delete the words "through the official channels"<sup>70</sup>.

4.146 One expert felt that the proposed article could not achieve much and was superfluous.

#### DRAFTING COMMITTEE

4.147 *Article 75, paragraph 1.—Orders and instructions*

Text introduced into draft article 73, proposal 3: see paragraph 4.132.

<sup>69</sup> CE/COM IV/10 and 23.

<sup>70</sup> CE/COM IV/59; see too CE/COM IV/54.

*Article 75, paragraph 2*

4.148 For the discussion of this paragraph, see paragraph 4.123.

Article 76

ICRC DRAFT

*Article 76.—Dissemination*

1. *The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Protocol as widely as possible, in their respective countries, and, in particular, to include the study thereof in their programmes of military and civil instruction, so that it may become known to the armed forces and to the civilian population.*

2. *The military and civilian authorities who, in time of armed conflict, assume responsibilities in respect of protected persons and property, must be fully acquainted with the provisions of the present Protocol.*

4.149 Introducing the subject, the legal expert of the ICRC underscored that the Red Cross considered dissemination of the humanitarian rules as one of the essential measures most appropriate to improve their application. He recalled the important rôle performed in this field by the National Societies of the Red Cross, the Red Crescent, and the Red Lion and Sun, as auxiliaries of the public services. He indicated that paragraph 1 of this draft article was based on, and supplemented, a common article of the Conventions. Paragraph 2 had already evoked comments on the part of experts who considered that the word “spécialement” in the French text lacked clarity and that it was not advisable here to isolate the Protocol by not referring to the Conventions.

4.150 The representative of the Secretary-General of the United Nations recalled that the General Assembly, in resolution 2853 (XXVI) of December 1971, had invited the Member States to intensify their efforts to ensure the instruction in and dissemination of international norms relating to the protection of human rights in armed conflicts; the Secretary-General had been invited to encourage these activities with the means at his disposal. As the Secretary-General had already suggested in his first report (A/7720), the Member States could in particular utilize to this end the programme of consultative services of the United Nations in the field of human rights; this allowed the exchange of concrete experiences, notably by the organization of international seminars and the grant of fellowships. The positive character of this programme was widely recognized.

4.151 The experts generally approved the draft article.

4.152 It was proposed to complete it with a third paragraph, which would stipulate that Contracting Parties must at regular intervals report to the

Depository State and the ICRC about the measures taken in conformity with the undertaking in the first paragraph<sup>71</sup>. Another proposal concerned the translation of the Conventions and the Protocol by each Contracting Party, and at its own expense, into the language of its nationals<sup>72</sup>.

4.153 To ensure effective application of this draft article, one expert put forward a number of suggestions concerning documentation, programmes of civil and military instruction, and a better knowledge of the law of armed conflicts. In this connection, he mentioned the “Plan of action for National Societies in the dissemination and development of international humanitarian law applicable in armed conflicts”, a plan which had recently been established by the ICRC. Reference was also made to an earlier suggestion to have legal advisers attached to military commanders.

4.154 It was pointed out that a close link existed between this article and draft Article 75, in that a faithful implementation of the latter article evidently presupposed wide dissemination.

4.155 It was felt that this article would constitute an excellent basis for attempts to obtain the co-operation of international public opinion. It was observed, in this connection, that it might be useful to specify in the article that dissemination ought to take place at all levels. Programmes of military instruction should be possible for privates, non-commissioned officers and commissioned officers<sup>73</sup>.

4.156 One expert pointed out that the draft article went further than the comparable articles, common to the Conventions. There was no distinction in this draft between military and civil instruction programmes. The Conventions spoke of military and “if possible” civil instruction, and this in order to take account of the difficulties of a legislative order which might exist for federal States. The legal expert of the ICRC answered that the omission of the words “if possible” had been deliberate, and was intended to strengthen the obligation of all Contracting Parties under this article.

4.157 Some remarks were made concerning the wording of paragraph 2. Instead of the phrase in the French text “devront connaître spécialement” it would be better to read “devront connaître d’une façon complète”; and it seemed preferable to refer to “the Conventions and the present Protocol” rather than to the Protocol alone.

DRAFTING COMMITTEE

4.158 *Article 76.—Dissemination*

1. *The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the*

<sup>71</sup> CE/COM IV/24 and 60.

<sup>72</sup> CE/COM IV/57.

<sup>73</sup> CE/COM IV/66.

text of the present Protocol as widely as possible, in their respective countries, and, in particular, to include the study thereof in their programmes of military and civil instruction, so that it may become known to the armed forces and to the civilian population.

2. The military and civilian authorities who, in time of armed conflict, assume responsibilities in respect of protected persons and property, must be fully acquainted with the provisions of the present Protocol.

3. Proposal 1: [*The High Contracting Parties shall, at least once every four years, forward to the International Committee of the Red Cross a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations for the dissemination of the Conventions and of the present Protocol.*]

Proposal 2: [*The High Contracting Parties shall report to the Depositary State and to the International Committee of the Red Cross at intervals of three years on the measures they have taken in accordance with their obligations under paragraph 1 of this article.*]

#### 4.159 Views of experts who spoke on the drafts

On the whole, the experts approved this draft article, but there was no clear decision in favour of either of the proposed versions of paragraph 3.

### Article 77

#### ICRC DRAFT

##### Article 77.—Rules of application

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

4.160 This draft article drew the general support of the experts. Some suggested that it could be attached to draft Article 76, as a third paragraph<sup>74</sup>. Another expert could not accept that view; he considered that draft Article 77 could on no account be regarded as an aspect of dissemination, as it dealt with the notification by States of measures taken with a view to ensuring application of the Protocol.

4.161 As to the question of what was to be understood by the "laws and regulations", the legal expert of the ICRC referred to the Commentary on the Conventions where it had already been indicated that this term should be given the widest possible interpretation; it encompassed all acts of a legislative nature, whether emanating from the executive or from the legislature, connected in any way with application.

4.162 A written proposal<sup>75</sup> gave a text for Article 77 in which the ICRC draft would merely constitute a

paragraph and which for the rest dealt with various aspects of the question of penal sanctions. This proposal was taken into account during the general debate on penal sanctions (see paragraphs 4.122 and 4.123).

#### DRAFTING COMMITTEE

##### 4.163 Article 77.—Rules of application

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

4.164 Views of experts who spoke on this draft  
Wide agreement.

### SECTION II OF PART V

#### ("Intergovernmental Organizations")

### Article 78

#### ICRC DRAFT

##### Article 78.—Accession



4.165 The legal expert of the ICRC, introducing the subject, indicated that certain circles and several experts would wish to see intergovernmental organizations, and in particular the United Nations, accede to the Conventions. He recalled the importance which the Red Cross had attributed to this question for many years.

4.166 The representative of the Secretary-General of the United Nations recalled first of all that the basic attachment of the United Nations to the promotion and protection of human rights in all circumstances, in time of peace as in time of war, had been evident since its foundation, as was shown by diverse activities (both norm-creating and in the fields of research and education) in conformity with the Charter. Since 1968, in particular, the United Nations and the Secretary-General had made every effort, in co-operation with the ICRC, to reaffirm and develop the norms of the Conventions of The Hague and Geneva. Accession to the Conventions of Geneva and the Protocol was,

<sup>74</sup> CE/COM IV/10, article vi.

<sup>75</sup> CE/COM IV/46.

however, a course which the United Nations could not take. Such accession would obviously pose problems as to the competence in general of the Organization to become a Party to a multilateral treaty, as well as with respect to the ratification procedure. But the main obstacle was the impossibility for the Organization to fulfil many of the obligations laid down in the Conventions of Geneva. One could mention, for example, many articles in the Third Convention, on prisoner-of-war camps, as well as the articles, common to the four Conventions, obligating the Parties to punish grave breaches. As for United Nations peacekeeping forces, the representative of the Secretary-General repeated the explanations furnished on several occasions before (in particular in the first report, A/7720, paragraph 114), and he emphasized that so far the questions of training and discipline of the military forming part of those forces had been considered as appertaining to the several national contingents, and not to the Organization. The United Nations, which had neither territorial authority nor criminal or disciplinary jurisdiction, was for the time being incapable of implementing the Conventions of Geneva. The accession which had been suggested would therefore only raise false hopes, and in consequence, give rise to unjustified criticism of the United Nations. The representative of the Secretary-General underscored, however, that though the United Nations might for the present lack the necessary authority to ensure respect for the Conventions of Geneva, guarantees to that effect were inscribed in the bilateral agreements concluded with the Governments furnishing troops for the United Nations forces. Those Governments (which were Parties to the Conventions of Geneva) had in particular undertaken to furnish instructed troops and to ensure that their contingents respect the international humanitarian norms.

4.167 One expert stated that, notwithstanding the negative view of the representative of the Secretary-General, the following arguments could be advanced in favour of accession by the United Nations: the need to promote dissemination of the Conventions throughout the world; the United Nations or regional organizations could take coercive measures in conformity with the Charter and this could lead to the necessity of applying the Conventions; though the disciplinary power might now belong to the States furnishing troops, this might be different in future; intergovernmental organizations had a rôle to play in the event of an armed conflict, with a view to its settlement. A written proposal was introduced for Article 78<sup>76</sup> which accentuated the possibility, rather than the duty, for international organizations to accede. This proposal drew the support of some experts.

4.168 Many experts declared themselves against the introduction of such an article. Several stressed that the United Nations were not a Party to any multilateral treaty and the capacity to become a Party to such treaties raised difficult legal problems. It would

be impossible for the United Nations to fulfil a great many of the obligations spelt out in the Conventions and the Organization was not in a position to assume responsibility for the behaviour of the contingents placed at its disposal. A proposal was introduced not to have such an article in the Protocol<sup>77</sup>.

4.169 Two experts, supported by others, though opposed to the introduction of an article on accession by organizations, wondered nevertheless whether it would not be possible to arrive at some kind of acceptance of the Conventions by intergovernmental organizations. One of them suggested the following text which could be adopted by the United Nations: "The United Nations declares that all armed forces established under its authority will be required, within the limits of the modalities available to the Organization, to observe and respect the spirit and principles of the Conventions and of this Protocol". The other expert suggested that the forthcoming Diplomatic Conference might adopt a resolution with the following text: "The intergovernmental organizations having responsibilities with respect to the employment of armed forces are invited to make every effort with a view to the application of the Conventions and the Additional Protocol".

4.170 One expert recalled that the International Law Commission was studying the question of treaty relations between States and international organizations, or between such organizations. It would therefore be premature to take a decision at present on that subject.

4.171 The representative of the ICRC stated that, without wishing to take part in the debate, he wanted to mention the concern of the ICRC in the matter. Although the arrangements with Governments providing contingents might contain the guarantee that those troops would respect the Conventions, the status of members of such forces when they fell into the hands of the adversary seemed insufficiently clear to guarantee that they would enjoy the complete protection of the Third Convention.

#### DRAFTING COMMITTEE

##### 4.172 *Article 78.—Accession*

Proposal 1: [No article.]

Proposal 2: [The United Nations [the specialized international organizations and regional intergovernmental organizations] may accede to the Geneva Conventions and to the present Protocol.]

##### 4.173 *Views of experts who spoke on the drafts*

A clear majority, considering that the Protocol should contain no provision on this subject, supported proposal 1. Some experts, however, favoured pro-

<sup>76</sup> CE/COM IV/47.

<sup>77</sup> CE/COM IV/39.

posal 2, with a preference for the wording "The specialized international organizations and regional intergovernmental organizations . . .".

*Draft supplementary article on "Implementation of essential provisions"*

4.174 An expert proposed the insertion, between draft Articles 73 and 74, of an article entitled "Implementation of essential provisions". This would guarantee the application without delay of Article 118 of the Third Convention and Articles 132 and 134 of the Fourth Convention and it would preclude any delay aiming at obtaining any political or other advantage<sup>78</sup>.

#### DRAFTING COMMITTEE

4.175 *Supplementary article 73 A.—[Implementation of essential provisions]*

[The High Contracting Parties shall not delay the implementation of Article 118 of the Third Convention and Articles 132 and 134 of the Fourth Convention and shall in no event use the question of the release and repatriation of Prisoners of War and Civil Internees to extract any political or other advantage.]

4.176 *Views of experts who spoke on this draft*

A majority displayed interest in such a provision.

### CHAPTER III

#### Final Provisions

##### (DRAFT PROTOCOL I, PART VI)

4.177 As most of the provisions in this Part concerned matters of form, the examination of which could well await a Diplomatic Conference, the Commission decided not to discuss these articles in detail, except for Articles 82, 84 and 85.

4.178 The legal expert of the ICRC explained that the articles of this Part had been inspired largely by the Geneva Conventions of 1949 and by the Vienna Convention of 1969 on the Law of Treaties. Notwithstanding suggestions to the contrary, the ICRC had preferred to retain the traditional procedure of ratification rather than having the consent to be bound expressed by a simple signature.

#### Article 79

##### ICRC DRAFT

*Article 79.—Signature*

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

<sup>78</sup> CE/COM IV/67.

4.179 One expert, anxious to see the work on the Protocol finished within the shortest possible time, introduced an amendment to the draft article, to the effect that 31 December 1973 would be the last day for signature of the Protocol<sup>79</sup>.

#### Article 80

##### ICRC DRAFT

*Article 80.—Ratification*

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

4.180 It was proposed to stress in this draft article that signatory States should ratify the Protocol as soon as possible. This would bring the article into line with the comparable articles of the Conventions (I/57, II/56, III/137, IV/152).

#### DRAFTING COMMITTEE

4.181 *Article 80.—Ratification*

*The present Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Depositary State.*

#### Article 81

##### ICRC DRAFT

*Article 81.—Accession*

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

4.182 There was no comment on this draft article.

#### Article 82

##### ICRC DRAFT

*Article 82.—Reservations*

1. *The High Contracting Parties, when signing, ratifying the present Protocol or acceding thereto, shall not formulate any reservation to Articles . . .*
2. *Further to the prohibition stipulated in the preceding paragraph, a reservation incompatible with the object and purpose of the present Protocol shall not be permitted.*

<sup>79</sup> CE/COM IV/64.

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

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

4.183 This draft article drew the comment from some experts that reservations were incompatible with the sovereign equality of States which included the equality of obligations. Several experts proposed therefore to exclude entirely the possibility of making reservations to the Protocol<sup>80</sup>.

4.184 Other experts, who did not want to exclude all reservations, pronounced themselves in favour of certain limitations. It was proposed in any event to mention in paragraph 1 of draft Article 82 the articles dealing with the implementation machinery of the Conventions and the Protocol. One expert suggested that paragraphs 1 and 3 of draft Article 82 should be retained, whereas paragraph 2 might be deleted. Another proposal was to retain only the prohibition, contained in paragraph 2, of reservations incompatible with the object and purpose of the Protocol<sup>81</sup>. In order to determine which reservations were incompatible with the said object and purpose, it was suggested that the same formula should be used here as was found in Article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, to the effect that a reservation would be held to be incompatible if more than two-thirds of the Contracting Parties objected to it. One expert, while not opposed to this idea, pointed out that the formula might lead to difficulties as long as the number of Contracting Parties was still comparatively small and, generally, in determining when to take a poll of the objecting States.

4.185 A number of experts, finally, laid stress on the sovereign right of States to make reservations. A provision excluding or limiting this right would constitute an obstacle to ratification for many States. It would moreover modify the system of the Conventions, and it might be asked what would be its effect on the reservations made to those instruments. The idea of universality of a treaty implied the possibility to make reservations, and a State could always refuse to accept a reservation made by another State and then consider itself not bound in relation to that State<sup>82</sup>. Other experts thought that at this stage it

would not be appropriate to draw up a provision on reservations, since the content of the Protocol had not been established; in any case, it would be preferable, as in the 1949 Geneva Conventions, to leave the question to the application of relevant international law. It was therefore proposed by these experts to delete the whole draft article<sup>83</sup>.

#### DRAFTING COMMITTEE

#### 4.186 Article 82.—Reservations

Proposal 1: [*Delete the article.*]

Proposal 2: [1. *The High Contracting Parties, when signing, ratifying the present Protocol or acceding thereto, shall not formulate any reservation to Articles ... [the articles relating to the supervision machinery].*

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

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

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

Proposal 3: [*A reservation incompatible with the object and purpose of the present Protocol shall not be permitted. A reservation shall be considered incompatible if at least two-thirds of the Parties to the present Protocol object to it.*]

Proposal 4: [1. *The High Contracting Parties, when signing, ratifying the present Protocol or acceding thereto, may formulate any reservation to any of the Articles therein, except that a reservation incompatible with its object and purpose shall not be permitted.*

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

Proposal 5: [*The High Contracting Parties shall not formulate any reservation to this Protocol.*]

#### 4.187 Views of experts who spoke on the drafts

The majority was in favour of proposal 2, in the version mentioning the articles relating to the supervision machinery.

itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."

<sup>83</sup> CE/COM IV/72.

<sup>80</sup> To this effect, see CE/COM IV/63.

<sup>81</sup> CE/COM IV/69.

<sup>82</sup> Article 21, paragraph 3, of the Vienna Convention on the Law of Treaties provides that "When a State objecting to a reservation has not opposed the entry into force of the treaty between

## Article 83

### ICRC DRAFT

#### *Article 83.—Entry into force*

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

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

4.188 As decided earlier (see above, paragraph 4.51), draft Article 4 was examined in connection with draft Article 83.

4.189 Draft Article 83 did not meet with any objections. It was pointed out that the smaller the number of ratifications required for its entry into force, the less the need for an article on provisional application. One expert proposed to replace the words "shall enter into force" with "shall take effect".

4.190 As for draft Article 4, the legal expert of the ICRC recalled that the purpose of the ICRC had been to make provision for the situation where an armed conflict would break out between signatory States which had not yet ratified the Protocol. The draft article admittedly was a novelty in treaty law; it had been inspired by Article 25 of the Vienna Convention on the Law of Treaties.

4.191 The proposed Article 4 drew criticism from many sides, and a formal proposal was made to delete it<sup>84</sup>. It was observed by a number of experts that an article on provisional application would place them before grave constitutional and legislative difficulties and might therefore even be an obstacle to signing the Protocol.

4.192 One expert suggested that the idea behind draft Article 4 be expressed differently, by including a provision along the lines of Article 18 of the Vienna Convention on the Law of Treaties<sup>85</sup>. This suggestion drew the support of some other experts.

4.193 One expert wanted to retain the principle of draft Article 4; he proposed a formula, to the effect that the Protocol would be provisionally applicable pending its entry into force, provided that the Parties to the conflict would be signatories or would agree on its provisional application. The latter element, that Parties to a conflict could always agree to apply the Protocol provisionally, was emphasized by several experts; this did not need to be expressly laid down in the Protocol. One expert proposed a compromise, to the effect that the principles of the Protocol, or certain named articles, would be provisionally applicable. This

drew the comment that the principles of the Protocol were the same as those of the Conventions and thus need not be applied provisionally. A final suggestion was that the Diplomatic Conference could adopt a resolution recommending States to apply the Protocol provisionally, or, alternatively, that States signing the Protocol would declare themselves ready to apply it provisionally.

### DRAFTING COMMITTEE

#### 4.194 *Article 83.—Entry into force*

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

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

#### *Article 4.—Provisional application*

No article.

#### 4.195 *Views of experts who spoke on the drafts*

Wide agreement.

## Article 84

### ICRC DRAFT

#### *Article 84.—Treaty relations upon entry into force of the present Protocol*

1. *When the Parties to the Conventions are also Parties to the present Protocol, the Conventions apply as elaborated and supplemented by the present Protocol.*

2. *As between a Party to the Conventions and to the present Protocol, and a Party solely to the Conventions, only the later apply.*

4.196 The legal expert of the ICRC recalled that at the time of discussion of draft Article 1 the question had been raised whether a provision along the lines of paragraph 3 of Article 2, common to the Conventions, should not be introduced into the Protocol (see above, paragraph 4.29).

4.197 The idea of inserting such a provision met with opposition from several experts. It was pointed out by one expert that Article 2, paragraph 3, of the Conventions was the only provision having its basis in reciprocity, and he hesitated to introduce this notion into the Protocol, the more so as this paragraph posed difficult problems of interpretation. According to other experts, such a provision would be superfluous in the Protocol, since draft Article 1 already expressly referred to common Article 2.

4.198 One expert introduced a proposal intended to simplify accession to the Conventions by providing

<sup>84</sup> CE/COM IV/73.

<sup>85</sup> This article obliges a State signatory to a treaty but which has not yet ratified it, and until it has made its intention clear not to ratify it, to refrain from acts which would defeat the object and purpose of the treaty.

that ratification of the Protocol by a State not Party to the Conventions should be interpreted as an accession to the latter<sup>86</sup>. Another expert proposed a text which in its first paragraph would include the idea that the Protocol amended the Conventions<sup>87</sup>.

#### DRAFTING COMMITTEE

##### 4.199 *Article 84.—Treaty relations upon entry into force of the present Protocol*

Proposal 1: [*Delete the article.*]

Proposal 2: [1. *When the Parties to the Conventions are also Parties to the present Protocol, the Conventions apply as supplemented by the present Protocol.*

2. *As between a Party to the Conventions and to the present Protocol, and a Party solely to the Conventions, only the latter apply.*]

Proposal 3: [1. *When the Parties to the Conventions are also Parties to the present Protocol, the Conventions apply as supplemented by the present Protocol.*

2. *Although one of the Powers in conflict may not be a party to the present Protocol, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the present Protocol in relation to the said Power, if the latter accepts and applies the provisions thereof.*]

##### 4.200 *Views of the experts who spoke on the drafts*

Clear majority in favour of proposal 3.

#### Article 85

##### ICRC DRAFT

##### *Article 85.—Denunciation*

1. *In case a High Contracting Party should denounce the present Protocol, the denunciation shall only take effect one year after the receipt of the instrument of denunciation. However, if on the expiry of that year, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities and, in any case, until the operations of release and repatriation of the persons protected by the present Protocol are completed.*

2. *The denunciation shall be notified in writing to the Depositary State, which shall transmit it to all the High Contracting Parties.*

3. *The denunciation shall have effect only in respect of the denouncing Party. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of general international law.*

<sup>86</sup> CE/COM IV/39.

<sup>87</sup> CE/COM IV/70.

4.201 The legal expert of the ICRC pointed out that this provision was a measure of precaution, which it had seemed necessary to include even though the corresponding provision in the Conventions had never been utilized.

4.202 Several experts questioned whether an article on denunciation should find a place in the Protocol. As one expert had it, to denounce an instrument of humanitarian law would be tantamount to a declaration not to be human any more. The representative of the ICRC urged, however, that the proposed article be retained, both in the light of the history of the Second World War where denunciation of the Prisoners of War Convention of 1929 was at one time seriously considered by one belligerent Party, and because it was necessary to regulate the effects of a denunciation. He was supported in his view by a number of experts.

4.203 One expert proposed that in the first paragraph, the second sentence should read as follows: "... in an armed conflict to which the Protocol applies ...".

4.204 Several experts criticized the wording of paragraph 3, and especially the reference to "general international law". This seemed hardly an adequate abbreviation of the Martens clause. If paragraph 3 were to be retained, a formula more closely resembling that clause would be needed. On the other hand, doubts were expressed whether the clause should figure in the article on denunciation. It was pointed out that similar provisions were found at various places in the Protocol, e.g. in draft Article 30. One expert drew attention to his proposal to introduce the Martens clause in the Preamble<sup>88</sup>.

#### DRAFTING COMMITTEE

##### 4.205 *Article 85.—Denunciation*

1. *In case a High Contracting Party should denounce the present Protocol, the denunciation shall only take effect one year after the receipt of the instrument of denunciation. However, if on the expiry of that year, the denouncing Party is involved in a situation to which the present Protocol applies, the denunciation shall not take effect until the end of hostilities and, in any case, until the operations of release and repatriation of the persons protected by the present Protocol are completed.*

2. *The denunciation shall be notified in writing to the Depositary State, which shall transmit it to all the High Contracting Parties.*

3. Proposal 1: [*The denunciation shall have effect only in respect of the denouncing Party. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of international law.*]

Proposal 2: [*The denunciation shall have effect only in respect of the denouncing Party. It shall in no way*

<sup>88</sup> CE/COM IV/51.



*impair the obligations which the Parties to the conflict shall remain bound to fulfil in virtue of the principles of the law of nations as they result from the usages established among nations, from the laws of humanity and from the dictates of public conscience.]*

4.206 *Views of experts who spoke on the drafts*

Agreement to the introduction of such a provision. No clear majority emerged in favour of either of the alternative proposals for paragraph 3.

Article 86

ICRC DRAFT

*Article 86.—Notifications*

*The Depositary State shall inform all the Parties to the present Protocol of the following particulars:*

- (a) *signatures affixed to the present Protocol, ratifications and accessions under Articles 80 and 81 of the present Protocol;*
- (b) *the date of entry into force of the present Protocol under its Article 83;*
- (c) *communications and declarations received under Articles 72, 77 and 82 of the present Protocol;*
- (d) *denunciations under Article 85 of the present Protocol.*

4.207 A proposal was introduced to the effect that the Depositary State should send information on the particulars enumerated in the draft article not only to States Parties to the Protocol, but to signatory States as well <sup>89</sup>.

DRAFTING COMMITTEE

4.208 *Article 86.—Notifications*

*The Depositary State shall inform [the signatory States and] the Parties to the present Protocol of the following particulars:*

- (a) *signatures affixed to the present Protocol, ratifications and accessions under Articles 80 and 81 of the present Protocol;*
- (b) *the date of entry into force of the present Protocol under its Article 83;*
- (c) *communications and declarations received under Articles 72, 77 and 82 of the present Protocol;*
- (d) *denunciations under Article 85 of the present Protocol.*

<sup>89</sup> CE/COM IV/65.

Article 87

ICRC DRAFT

*Article 87.—Registration and publication*

*After its entry into force, the present Protocol shall be transmitted by the Depositary State to the Secretariat of the United Nations Organization for registration and publication, in accordance with Article 102 of the United Nations Charter.*

4.209 It was pointed out that the Depositary State should inform the Secretary-General of the United Nations of all ratifications, accessions, declarations of continuity and denunciations. This might be the subject of a separate article.

DRAFTING COMMITTEE

4.210 *Article 87. — Registration and publication*

1. *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.*
2. *The Depositary State shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Protocol.*

Article 88

ICRC DRAFT

*Article 88. — Authentic texts and official translations*

1. *The original of the present Protocol, of which the French and English texts are equally authentic, shall be deposited with the Depositary State.*
2. *The Depositary State shall arrange for official translations of the present Protocol to be made into Arabic, Chinese, Russian and Spanish.*

4.211 There were no observations concerning this draft article.

CHAPITRE IV

Preamble of Draft Protocol I

ICRC DRAFT

*The High Contracting Parties,*

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

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

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

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

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

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

*Have agreed on the following:*

4.212 The legal expert of the ICRC, introducing the subject, pointed out that a number of data essential for a detailed examination of the Preamble were still lacking, notably the result of the work of other Commissions. This point was taken up by one expert, who mentioned that it was not even known whether the Protocol would remain as one document or be split up into several Protocols.

4.213 A number of experts wondered if it were appropriate to have any Preamble. Arguments in favour were that a preamble would bring out the principles and the spirit of the Protocol, and that it would serve the purposes of dissemination and education. Arguments against were that the Conventions had no preamble and that the Protocol, being additional to these instruments, should follow the example of 1949; and that it would be very difficult, if not impossible, to agree on principles that should be mentioned in a preamble and on the precise significance of any principle so formulated, as interpretations would tend to be influenced by ideological and political conceptions.

4.214 A number of experts were inclined to give their support in principle to the ICRC draft, if a preamble were to be attached to the Protocol at all. Other experts introduced alternative texts which presented the ideas and principles which should be expressed in the Preamble <sup>90</sup>.

4.215 Several proposals were made to amend the ICRC draft. It was pointed out from many sides that the first paragraph had to be supplemented by a reference to the Charter of the United Nations, as it now incorrectly suggested that all recourse to

force was prohibited, even in the case of self-defence <sup>91</sup>. Another proposal was to add a reference to the Universal Declaration on Human Rights. A proposal introduced in written form, which drew some considerable support, aimed at inserting the Martens clause in the Preamble <sup>92</sup>. Another suggestion, supported by a number of experts, was to insert a paragraph to the effect that wars of national liberation were international armed conflicts in the sense of the Conventions and the Protocol. It was proposed to delete the fifth paragraph <sup>93</sup>. The words "humanitarian rules" in the third paragraph should, according to one expert, be replaced by "the rules contained in the treaties of a humanitarian character and recognized by customary law" <sup>94</sup>.

4.216 *ICRC Note* The Commission did not give to the Drafting Committee a mandate to examine the draft Preamble.

## CHAPTER V

### **Preliminary draft Declaration on the application of international humanitarian law in armed struggles for self-determination**

#### ICRC DRAFT

*The undersigned plenipotentiaries, in the name of their respective governments:*

*Considering that the principle of the right of peoples to self-determination is given official sanction in, inter alia, the Charter of the United Nations, the International Covenants on Human Rights, and resolutions of the United Nations General Assembly,*

*Considering that the implementation of this principle still encounters difficulties and sometimes entails armed struggles which cause great suffering and a large number of victims,*

*Considering that it is incumbent upon the international community to endeavour to mitigate that suffering,*

*1. Declare that the Geneva Conventions of 12 August 1949, the Additional Protocol to the said Conventions, and other humanitarian rules of international law limiting the use of weapons and means of injuring the enemy should be applied in armed struggles waged by peoples for their right to self-determination within the meaning of the definition of that right in Article 1 common to the International Covenants on Human Rights, adopted by the United Nations General Assembly on 16 December 1966;*

*Proposal I: 2. Declare that, failing full application of those provisions, the Parties to such struggles shall in all circumstances observe, by analogy, at least the rules in Article 3 common to the four Geneva Con-*

<sup>90</sup> CE/COM IV/32 and 62.

<sup>91</sup> See to this effect CE/COM IV/77.

<sup>92</sup> CE/COM IV/51.

<sup>93</sup> CE/COM IV/78, which also proposed some other corrections to the text as drafted by the ICRC.

<sup>94</sup> CE/COM IV/77.

ventions of 12 August 1949, as well as those of the Additional Protocol to that article.

Proposal II: 2. *Declare that, failing full application of those provisions, the Parties to the struggles shall in all circumstances observe at least the rules appended to this Declaration.*

4.217 The legal expert of the ICRC (who, for this preliminary draft Declaration, was Mr. M. Veuthey) introduced the subject. He recalled the historical background of the document and made mention of the activities which the ICRC had undertaken in favour of civilian and military victims in recent conflicts, on the basis of the practical co-operation which it had been able to establish with the Parties to those conflicts.

4.218 The overwhelming majority of the experts pronounced themselves against having such a Declaration, their reasons being diverse and conflicting.

4.219 A number of experts considered the Declaration insufficient, since by virtue of the Charter of the United Nations and a series of resolutions of the General Assembly, struggles for self-determination constituted international armed conflicts in the sense of Article 2, common to the Conventions, and therefore fell within the scope of Draft Protocol I. Some experts therefore proposed to insert a paragraph in the Preamble which would bring this out<sup>95</sup>, while others proposed to add a paragraph of the same purport to draft Article 1<sup>96</sup>. On the other hand, one expert thought that a Declaration having the status of a recommendation might have some use, while another considered that it might be of value if the Declaration would unambiguously demand the application of the whole of the Conventions and of the future Protocol I.

4.220 Other experts felt that there was no need to draw up any special provisions, in the Protocol itself or in a Declaration, on wars of self-determination, since those conflicts came under Article 3, common to the Conventions, and Draft Protocol II.

4.221 Those experts who supported the points of view referred to in the preceding paragraph advanced the following arguments. Application of the Conventions in their entirety was limited to interstate armed conflicts. To introduce the notion of war of national liberation would be tantamount to bringing a political and discriminatory element into humanitarian law and especially into the Conventions, the essence of which was impartiality. The concept of self-determination was not clear, and could embrace anticolonial as well as secessionist and other wars; it had not been firmly established in positive international law, as followed from the "travaux préparatoires" of the Charter of the United Nations and the dubious legal force of resolutions of the General Assembly. Enunciation of the concept of war of self-determination amounted, finally, to a return to the doctrine of *bellum justum* and failed to take into

account such material and objective factors as the level of hostilities, territorial domination, degree of organization and existence of an authority capable of ensuring respect for the laws and customs of war.

4.222 Arguments advanced on the other side were that Article 2, common to the Conventions, did not refer to States but to Powers. Wars of liberation were no political slogan but a reality. In 1945, self-determination might have been an unclear and limited notion, but now the Charter had to be interpreted in the light of the developments in international society and in the public conscience which had taken place since that time, this in accordance with Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties<sup>97</sup> as well as with paragraph 53 of the Advisory Opinion of the International Court of Justice in the matter of Namibia<sup>98</sup>. In this connection, mention was made of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States where the right to self-determination was brought out with particular force; that Declaration had been adopted without opposing votes, in a session of the General Assembly where Heads of States and Governments were present.

4.223 The representative of the ICRC, thanking the experts for their interventions and suggestions, emphasized that the ICRC attached particular importance to the question of concrete measures in favour of victims of all conflicts whatsoever. As far as the applicability of any proposed rules was concerned, it was necessary to take into consideration the position of the Governments and authorities directly concerned.

4.224 *ICRC Note* The Commission did not give to the Drafting Committee a mandate to examine this preliminary draft Declaration.

## CHAPTER VI

### Draft Resolution concerning disarmament and peace to be annexed to the Final Act of the Diplomatic Conference

#### ICRC PRELIMINARY DRAFT

*The Conference,*  
*noting that the Geneva Conventions and their Additional Protocols do not contain any express provision*

<sup>97</sup> Paragraph 3 (c) of Article 31 ("General Rules of interpretation") prescribes the consideration, together with the context of the treaty, of "any relevant rules of international law applicable in the relations between the parties".

<sup>98</sup> I.C.J., Reports 1971, Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. This paragraph reads in part: "... the Court must take into consideration the changes which have occurred [since 1919], and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary

<sup>95</sup> CE/COM IV/32 and 62.

<sup>96</sup> CE/COM IV/74.

*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.*

4.225 The legal expert of the ICRC, introducing the subject, said that some proposals relating to the Draft Resolution had already been introduced in Commission III<sup>99</sup> and that one had been presented at the Vienna Red Cross Experts Conference<sup>100</sup>. A number of proposals were also submitted in Commission IV (hereafter).

4.226 Since the question of disarmament and the prohibition of arms and the use of some weapons in particular had been dealt with by Commission III during the discussion of draft Article 30, and since that Commission had already referred to the draft Resolution, the view was put forward that Commission IV should not consider that question. It was, however, agreed to abide by the decision of the Bureau of the Conference that this Commission should devote a debate to it.

4.227 It was argued by a number of experts that the matter was in reality outside the scope of the Conference, the purpose of which was to develop humanitarian law applicable in armed conflicts. It was felt, on the other hand, that a resolution urging the cause of disarmament might be of some avail and might help to mobilize world public opinion.

4.228 Any discussion of the precise wording of such a resolution seemed premature to a number of experts, as it could not now be said what stage the discussion on disarmament would have reached at the time of a future Diplomatic Conference. Neverthe-

law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".

<sup>99</sup> CE/COM III/RDP 1 and 2.

<sup>100</sup> See Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Vienna, 20-24 March 1972). *Report on the Work of the Conference*, Annex I, No. 15, p. 72.

less, a number of concrete proposals and amendments were introduced, and the text proposed by the ICRC was criticized in certain respects.

4.229 Regarding the ICRC text, some experts felt it was hardly appropriate to deal with production and stockpiling, etc., of arms all in the same breath. In their opinion, the text as it stood might be interpreted as detracting from the law in force, e.g., concerning the use of weapons of mass destruction. One written amendment was introduced<sup>101</sup>, while another proposal, intended to replace the ICRC text, was declared to be on the same lines as that text<sup>102</sup>.

4.230 Some experts emphasized that the protection of the civilian population in armed conflicts would be more effective if all obligations concerning the prohibition of weapons of mass destruction were strictly observed.

4.231 One expert introduced a draft Resolution of completely different character, in that it spelt out a great many principles and basic considerations which, to his mind, were essential in present-day international relations and international law, and should therefore figure in the text<sup>103</sup>. One paragraph in particular drew comments by several experts, who could not accept that "As wars of aggression are considered as international crimes, humanitarian law is based on the distinction between the aggressor and the victim of aggression and provides protection of the victim in the exercise of the inherent, and consequently sacred, right to self-defence" (Part I, paragraph 3). In their view, humanitarian law was not based on any such distinction and must, on the contrary, be strictly impartial. They wondered whether the reasoning in the quoted text would lead to the consequence that all soldiers of a State considered to be the aggressor by its adversary would therefore be deprived of any protection which humanitarian law might give. The expert who had introduced the proposal answered that no such generalizing conclusions should be drawn from the quoted paragraph. The idea was merely to bring out clearly to which side the humanitarian support of international society should be directed.

4.232 *ICRC note* The Commission did not to give to the Drafting Committee a mandate to examine this draft Resolution.

<sup>101</sup> CE/COM IV/75.

<sup>102</sup> CE/COM IV/76.

<sup>103</sup> CE/COM IV/71.

## REPORT ON THE FINAL PLENARY MEETINGS

### INTRODUCTION

5.1 After the work within the Commissions, the Conference held four final plenary meetings at which it studied the following points:

- I. Submission of the reports of the Commissions.
- II. Submission and discussion of some proposals made by experts.
- III. General discussion of the Protocols.
- IV. Continuation of work on the reaffirmation and development of international humanitarian law.

### I. REPORTS OF THE COMMISSIONS

5.2 The Rapporteur of each of the four Commissions introduced his report and submitted to the Conference an account of the work carried out within his Commission.

5.3 In the discussion following the submission of the reports of the Commissions, an expert stressed the importance of operations by medical aircraft belonging to international organizations or relief societies, whether in international armed conflict or armed conflict not of an international character. Another expert pointed out that the majority of the experts who had taken part in the work of Commission I had objected to the use of the term "unlawful" in the first paragraph of Article 13 of the draft Additional Protocol to the four Geneva Conventions, and that the term had nevertheless continued to appear in the text. The Rapporteur observed that the majority was in fact very small, and that in any case, if the term "unlawful" were to be deleted, it would be difficult to know what to put in its place for the Commission had not been able to find a term that satisfied the majority of the experts. It was finally decided to delete "unlawful" and submit the various alternatives agreed on by Commission I.

### II. SUBMISSION AND DISCUSSION OF SOME PROPOSALS BY EXPERTS

#### A. PROPOSAL CE/SPF/1

5.4 One expert, pointing out that one of the essential aims was to ensure the effective application of the provisions of the Conventions, thought that this could be done by widely disseminating the principles of

international humanitarian law. The dissemination could be carried out at national and international level, in universities, among the armed forces and in schools. He suggested that a charter be drawn up to ensure the better application of international humanitarian law. The ICRC might prepare a draft for submission to the Diplomatic Conference.

5.5 An expert seconded the proposal and stressed that the support of international opinion was necessary to ensure application of the provisions of the Conventions.

5.6 An ICRC representative stated that that view was shared by the ICRC which had, in fact, set up a service responsible for the dissemination of the Conventions. The ICRC negotiated with National Red Cross Societies and governments to introduce films and publications for universities, the armed forces, schools, and the general public.

5.7 Another expert endorsed the proposal but thought it essential to warn against the non-observance of the Conventions.

#### B. PROPOSAL CE/SPF/2

5.8 An expert submitted this proposal on the prohibition or limitation of use of some conventional weapons deemed to cause unnecessary suffering or to have indiscriminate effects. He said that the proposal, drawn up by the delegations of countries representing different socio-juridical systems, suggested that the ICRC should arrange a special meeting to consult legal, military and medical experts on the question. Several experts supported the proposal.

5.9 It was suggested that the group of experts should include scientists. Moreover, like the meetings held to advise the Secretary-General of the United Nations in his study on napalm and other incendiary weapons, this meeting should confine itself to establishing the facts which would serve as a basis for discussion in an appropriate gathering. Further, those experts should be assigned a mandate similar to that suggested by Sweden in its reply to the Secretary-General of the United Nations on the subject of napalm, namely:

- a) Description of various weapons according to their category and the substances used in them;
- b) Purposes for which these various weapons were intended and used;

c) Effects of these weapons (what type of injuries they caused and whether they were capable of being directed solely at military targets or were inherently indiscriminate);

d) Whether it is possible, using medical, legal and military criteria, to establish meaningful standards of "unnecessary suffering", or to develop principles prohibiting the use of such weapons, rather than prohibiting those types of weapons.

The ban on particular weapons should be left to assemblies directly concerned with disarmament. The speaker said he was nevertheless interested in the idea of convening a meeting of experts which would produce a report that might serve as a factual basis and give some guidance to those responsible for deciding how the problem was to be solved. The study on napalm by the Secretary-General of the United Nations would be completed this summer. It would probably be referred to the experts' meeting to be convened by the ICRC. The experts, who would consider the problems posed by the use of a larger number of weapons of this category, should draw inspiration from the study, which was to be made in respect of a limited category of conventional weapons.

5.10 The same expert was apprehensive lest the introduction of so controversial a question into the draft Additional Protocol to the four Geneva Conventions of 1949 might jeopardize its success. The Uruguayan expert asked that his country be added to the list of States who submitted the proposal.

5.11 The ICRC representatives, considering the proposal as a recommendation made to the ICRC, stated that it was prepared to act upon it. Moreover, the ICRC had been invited by the United Nations to take part in the work relating to napalm and other incendiary weapons.

#### C. PROPOSAL CE/SPF/3

5.12 The expert submitting this proposal drew attention to the need to formulate uniform rules which would apply both to international armed conflicts and armed conflicts not of an international character. Indeed, the combatants had to face the same situation, whatever the legal qualification of the conflict.

5.13 An ICRC representative said that, while the reasons underlying the proposal were appreciated, it must be borne in mind that at the first session the majority of the experts had advocated several Protocols; the debates at the second session revealed no fundamental change in the views held in that regard. On the other hand, it would be possible to adopt rules as similar as possible in the two draft Protocols.

#### D. PROPOSAL CE/SPF/4

5.14 The expert who submitted this proposal said that guerrilla warfare was a form of struggle frequently used in wars of liberation. Governments reacted to guerrilla warfare by counter-guerrilla. It was therefore

imperative that the Conventions regulate that form of armed conflict. He considered that the representatives of the different liberation movements should be present at the Diplomatic Conference and be allowed to express their views on the problem. Another expert endorsed this suggestion and stressed the advisability of consulting representatives of the different liberation movements before holding the Diplomatic Conference.

5.15 Yet another expert pointed out that the real problem lay in technological warfare to counter wars of liberation. It was very difficult to regulate technological warfare, which made no distinction between combatants and civilians and which "set a country ablaze".

5.16 There were some reservations regarding the wording of the proposal and the relationship which it established between guerrilla warfare, counter-guerrilla and technological and electronic warfare. The same expert said that all principles of international law were applicable to peoples fighting for their liberation.

5.17 An expert regretted that only one article, namely Article 38 of Draft Protocol I, dealt with guerrilla warfare. He stressed the importance of developing the rules relating to that form of conflict in order to prevent the escalation of suffering which it caused.

5.18 An expert recognized that guerrilla warfare and the technological warfare which opposed it were a widespread phenomenon, but expressed doubt as to the "dialectical relationship" between guerrilla and technological warfare. He considered that, whatever the form of armed conflict, there could be no question of challenging the principles under which:

- no one has an unlimited right to use means of destruction;

- the civilian population should never be the object of attack;

- minimum guarantees should be granted those combatants who respect the laws and customs of war.

According to this expert, the proposal was too far-reaching; guerrilla warfare and technological and electronic warfare were problems which should be studied elsewhere, failing which any prospect of reaching agreement at the Diplomatic Conference might be jeopardized.

5.19 An expert pointed out that there had been no consensus on the definition of the term "guerrilla". He added that during the Second World War his country's guerrilla fighters had been under responsible command but had not worn a distinctive emblem or openly carried weapons. The expert therefore suggested deleting paragraph (b) of Article 38 of Draft Protocol I.

5.20 An expert expressed the view that the regulation of this form of conflict might promote international humanitarian law or, on the contrary, make it ineffective; that a principle of equilibrium or reciprocity should not be introduced into law; and that the disparity of resources of Parties to the conflict, their

political opinions or their legal position, should not be an argument for regulating differently the use of the means of combat and the respect due to the civilian population. He also stressed that the legitimate nature of the struggle should not allow the golden rules of humanity to be ignored, the first of those rules being the need to make a distinction between civilians and combatants.

5.21 A representative of the ICRC mentioned the importance which the ICRC attached to the problem, and recalled that it had been studied by the XXist International Conference of the Red Cross and at the first session of the Conference of Government Experts. He added that Article 38 of Draft Protocol I was merely a working basis and that the ICRC had never expected that article to meet with the unanimous approval of the second session of the Conference of Government Experts. He assured the meeting that the ICRC would pursue its study of the point and invite the views of the experts.

### III. GENERAL DISCUSSION OF THE PROTOCOLS

#### A. NUMBER OF PROTOCOLS

5.22 Most of the experts were in favour of two separate Protocols, one dealing with international armed conflicts and the other with armed conflicts not international in character. Two experts suggested that the protocol relating to international armed conflicts might include provisions applicable to wars of liberation. Another expert proposed that the Preambles to the Protocols be deleted. He stated that the existing structure of the two Protocols should be entirely revised, so that the "organic links" existing between them might be strengthened. Some experts expressed the opinion that the Protocol on armed conflicts not of an international character should become a fifth Geneva Convention.

#### B. APPLICATION

5.23 Many experts welcomed the progress achieved by the Conference on measures designed to strengthen the application of the law in force. They stressed the importance of those measures and of the need to ensure observance of law. Otherwise the future of the new agreements would be seriously jeopardized. An expert suggested that accession to the Additional Protocols should automatically entail accession to the Geneva Conventions of 1949 where a State was not yet bound by those Conventions. Another expert deplored the fact that some parties to recent armed conflicts had made the application of certain important provisions of the Conventions contingent on securing advantages. He urged the need to draw up a new rule which would prohibit prisoners of war from being regarded as hostages.

#### (a) *Protecting Powers*

5.24 Several experts stressed the importance of the provisions of Article 6 of Draft Protocol I. The main views expressed were: it was necessary to strengthen the system provided by the Conventions in order to reduce the risk of situations where no control was exercised; in this context, procedures might be envisaged which, although widely varying, would not prove incompatible; the States concerned should, however, be allowed as much choice as possible; States should agree to the automatic intervention of the ICRC until such time as the Parties to the conflict reached agreement; it was necessary clearly to limit and define the role of the ICRC, which should assume the functions devolving upon a Protecting Power only in a strictly humanitarian sphere; the ICRC should act as substitute only as a last resort and subject to agreement by the two parties to the conflict; the ICRC should give the matter careful consideration before submitting a draft article to the Diplomatic Conference. Some experts considered this provision, which in their opinion provided for the automatic acceptance of the ICRC as substitute failing the appointment of a Protecting Power, was unduly imperious and undermined the principle of national sovereignty and non-interference in the affairs of a State.

#### (b) *Reservations*

5.25 Some experts distinctly advocated prohibiting any reservations to the provisions of the Draft Protocols. One expert said that the existence of reservations might discourage some countries from acceding. Another considered that to prohibit reservations was contrary to the principle of the sovereignty of States.

#### (c) *Penalties*

5.26 An expert urged that, in preparing further drafts, the ICRC should bear in mind the proposals relating to penalties for persons guilty of war crimes or crimes against humanity.

#### (d) *Dissemination*

5.27 An expert stressed the importance of developing the dissemination of international humanitarian law at national level, so as to reach all sections of the population and create a "collective state of mind". Another expert emphasized the important part which the ICRC could play in that field.

#### C. WOUNDED AND SICK

5.28 An expert criticized the attitude, which he regarded as illogical, of easing restrictions on the operations of medical aircraft and at the same time requiring strict control over doctors in the exercise of their profession in occupied territories. On the other hand, several experts expressed satisfaction with the headway which the Conference had made.

#### D. MEANS OF COMBAT

5.29 A number of experts expressed the view that the ICRC was not the right forum for a study of this question, which should be dealt with by the Disarmament Conference. Others considered that it should be studied by a Conference which would assemble the five major world powers. One expert criticized this opinion and said that the study of rules relating, not to disarmament but to the prohibition of the use of specific weapons or means of combat, was not a matter for the Disarmament Conference. Moreover, only a limited number of governments were at that Conference while the present Conference assembled virtually the whole world. On the other hand, the absence of experts capable of pronouncing on the particularly cruel or indiscriminate effects of specific weapons was a more valid argument. He therefore endorsed the proposal that a conference be convened at which such legal, military and medical experts would take part.

5.30 An expert considered that one single article could not deal with the use of specific weapons and means of combat in general. The problem should be governed by "distinct and far-reaching rules". Another expert thought it would also be necessary to prohibit such methods of warfare as blockade.

5.31 According to one expert, the present Conference had enabled the different groups of States to clarify their position and the problem had become clearer. It was to be hoped that those positions would be less uncompromising, in order that agreement might be reached in the matter. An expert said that States equipped themselves with different weapons according to their experience and geographical, industrial and other factors. While some States depended on infantry and land forces, others counted largely on their weapons and their mobility. Some countries had not lately been involved in hostilities; other countries had. All those circumstances had contributed to the forming of different opinions regarding the problems posed by restrictions on methods and means of combat.

5.32 One expert deplored the attitude of those who felt their governments could not commit themselves not to bomb urban industrial areas or attack essential communications. On the other hand, the same experts had shown greater interest in the rescue by helicopter of pilots who had baled out.

5.33 The same expert supported the proposals submitted with a view to preventing wars that caused large-scale ecological damage. He pointed out that the purpose could be achieved by reaffirming the rules prohibiting indiscriminate methods of combat and abiding by the rules which prohibited the use of biological and chemical weapons and, *inter alia*, herbicides in case of armed conflict.

5.34 He also remarked that the debates relating to the prohibition of certain weapons had progressed since the year before. Whereas the proposals which

the experts of five States had put forward at the first session had met with little response, the number of proposals at the second session had shown that the ban on certain particularly cruel or indiscriminate weapons was a matter of interest to public opinion in several States, where the problems had, incidentally, been studied. Those proposals, relating both to weapons of mass destruction and to conventional weapons which were particularly cruel or indiscriminate, had been received with a great deal of sympathy, but several experts considered that they were purely emotional and that it was not worth while losing any time over them.

5.35 An expert recommended that the suggestions made by the United Nations Secretary-General, at the request of the General Assembly, be borne in mind.

#### E. GUERRILLA FIGHTERS

5.36 An expert underlined that guerrilla warfare was a legitimate means of combat used by the national liberation movements emerging in different parts of the world, to counter a new form of imperialism which resorted to cruel and indiscriminate technological weapons and whose fighting methods tended to replace the soldier by fire-power.

5.37 An expert, who affirmed that he had a great deal of sympathy for guerrilla fighters but not for terrorists, expressed the view that the provisions of Article 4 of the Third Convention were outdated. Another expert said he thought the Conference had made little headway in the study of the problem owing to the reticence of some participants. He stressed that no account of either the atrocities committed by certain guerrilleros or of the crimes committed during the Second World War could take the place of a serious study of that method of combat. He therefore supported the proposal which called upon the ICRC and the United Nations to pursue the study of the problems related to guerrilla warfare, counter-guerrilla, and technological and electronic warfare, in order that those different methods of combat might be regulated by international humanitarian law applicable to armed conflicts.

5.38 Another expert urged the need to establish more liberal rules on the granting of prisoner-of-war status to guerrilla fighters.

#### F. RELIEF

5.39 An expert felt that the Conference had on the whole accepted the principle that using famine as a means of waging war was unlawful. Further, he noted with satisfaction that most States were prepared to accept the rule that Parties to the conflict should undertake to accept and facilitate the conveyance of relief supplies to the civilian population. Indeed, it should not be forgotten that during the past decade most of the victims in armed conflicts had been civilians, and that a great many of them had died of hunger or as a result of epidemics. The Parties to a



conflict were not always able to supply the population with the necessary food during hostilities. Fortunately, some humanitarian and intergovernmental organizations had been able to distribute relief to the civilian population during the period. Stress had been laid on the importance of developing humanitarian institutions such as the ICRC while specifying the duties which would devolve upon them. It was regrettable, however, that some organizations had acted from political motives, and that most of the relief schemes had been improvised and unco-ordinated. The same expert considered that such relief activities were of vital importance for the mitigation of human suffering. He therefore supported the Norwegian proposal (CE/COM III/PC 112) that the ICRC, the League of Red Cross Societies and the United Nations should jointly convene a Conference of experts, to study the problems posed by relief action. That Conference would draw up a relief operation code. It would study the methods of this type of operation, its organization, problems of logistics, personnel training and, above all, the principles on which such relief operation should be based; it would determine the aims pursued and the means of achieving them. It would also seek to establish equilibrium between curative and preventive action where there was any danger of epidemics, famine or malnutrition, and would ascertain how local resources could be used. Great progress had been made over the past few years in research into problems posed by famine, malnutrition and other natural disasters. It was therefore important to make full use of the results of that research. Lastly, the expert pointed out that the purpose of the Conference should be, not only to improve relief operations, but also to allay the apprehension of governments or other authorities who might in future be compelled to accept relief for the civilian population under their control.

5.40 An expert expressed the view that relief supplies in the form of medicaments or food should not be confined to the civilian population. Such a limitation might jeopardize the chances of achieving agreement on relief operations designed to prevent starvation. Nor was that limitation of any vital military importance, for soldiers would certainly be the last to lack food. The expert advocated support of the Norwegian proposal calling upon the ICRC to convene a meeting of experts to make a further study of the problem.

5.41 The representative of the United Nations Secretary-General declared that the Secretary-General hoped to continue co-operation in work designed to ensure respect for human rights in armed conflicts. He was gratified that the ICRC had borne in mind in its Draft Protocols some of the suggestions contained in the two reports (A/7720 and A/8052). He added that he was glad to note that a great many experts had emphasized the importance of taking the legal instruments of the United Nations into account when drawing up the Draft Protocols. Moreover, he expressed satisfaction at the fact that other experts had suggested mentioning the operational

activities of the United Nations in the text of Article 64 of Draft Protocol I on humanitarian assistance. He noted with interest the proposal of the Norwegian experts regarding the convening of a conference of experts on relief to the civilian population, and recalled that the Secretary-General of the United Nations had always striven to co-ordinate the operational activities of the United Nations with the activities of other organizations in the humanitarian field. He assured the meeting that the proposal would be carefully studied and that the Secretary-General was prepared to discuss it with the governments and organizations concerned, taking fully into account the provisions already laid down by the United Nations regarding "assistance in cases of natural disaster and other disaster situations" (cf. Resolution 2816 (XXVI) of the General Assembly of the United Nations). Lastly, he dwelt on the wish of the Secretary-General of the United Nations to continue that body's fruitful co-operation with the ICRC.

#### G. ARMED CONFLICTS NOT OF AN INTERNATIONAL CHARACTER

5.42 Referring to the draft Additional Protocol to Article 3 common to the four Geneva Conventions of 12 August 1949, an expert urged the need for uniform provisions in the two draft Protocols and said that the provisions of Draft Protocol II should not be unduly detailed or "academic".

5.43 Another expert drew attention to the importance of clearly distinguishing between internal disturbances and armed conflicts not of an international character. As regards the provisions governing internal disturbances, the usages and customs of the different countries should be borne in mind, and the principle of respect for national sovereignty should not be overlooked.

5.44 An expert voiced the opinion that the two Draft Protocols should be worded as closely as possible to each other. Common minimum provisions should be provided for which would be applicable even in cases where it would not yet have been possible to pronounce on the nature of the conflict.

5.45 An expert suggested that the same commissions should study parallel provisions of Protocols I and II at the Diplomatic Conference. Another expert expressed the view that the Diplomatic Conference should study the provisions of Draft Protocol II only after a general consensus was reached regarding the provisions of Draft Protocol I.

#### IV. FUTURE PROSPECTS

5.46 The President of the ICRC delivered the following address:

*"Ladies and Gentlemen,*

*As the Conference which has brought you together in Geneva for just over four weeks draws to a close, I should*

like first of all to thank each one of you for his or her contribution to the task of reaffirming and developing international humanitarian law applicable in armed conflicts. It is gratifying that so many governments have responded to the ICRC's invitation. Among the seventy-seven States represented at this second session, there are many which achieved independence and sovereignty after the adoption of the four Geneva Conventions in 1949. The desire to reaffirm international humanitarian law is clearly reflected in the presence of many States which have joined the family of nations since 1949.

To what extent has the work of the last few weeks contributed to the development of international humanitarian law? The reports of the four Commissions submitted in plenary meetings show that considerable progress has been made, and the ICRC will now apply itself to assessing its full implications. That task will require time and thought, but the ICRC can already map out the broad lines to be followed in the future.

Indeed, the results of this second session would appear to be so outstanding that the ICRC can already contemplate the convening of a Diplomatic Conference at an early date. The successive stages leading to that Conference would appear to be the following.

First, the ICRC will draw up a report on the work of this second session. The most important part of the report will be the texts submitted to you and the reports of the four Commissions. The report will be sent to all States Parties to the Geneva Conventions and, as was done last year, it will be laid before the twenty-seventh session of the General Assembly of the United Nations when that body examines the question of "Respect for Human Rights in Armed Conflicts". This brings us up to the autumn of this year. We hope that, as in the past, the General Assembly will to the fullest possible extent bear in mind the results of our work at this Conference and our future programme.

Secondly, the ICRC will draw up new texts of the Additional Protocols in the light of all the views expressed at the present session of the Conference of Government Experts.

The texts on some of the subjects have been almost entirely prepared. This applies, for instance, to the subjects dealt with by Commission I.

In the case of some of the others subjects, however, the ICRC will need to make a selection and draw up new texts. A number of questions studied in Commissions II, III and IV fall into that category. In this connection, the ICRC is considering the possibility of having, where necessary, further consultations, either by calling a small meeting of experts in Geneva or consulting some of them individually. Naturally, it will keep in close touch with the United Nations on subjects regarding which the United Nations has been asked to make special studies.

In any event, the ICRC intends to transmit the new Draft Protocols to the Swiss Government, as Depositary State of the Geneva Conventions, some time next spring, in order that they may be conveyed to the governments of the States Parties to the Conventions.

These governments will thus be able to examine them before the Diplomatic Conference meets. The Draft Protocols will also be submitted to the XXII International Conference of the Red Cross to be held in the autumn of 1973.

That is the programme which the ICRC, having regard to the work to be done and the timetable of international meetings, proposes to follow in the near future. Yet I should like to assure you that, however important the stage of the Diplomatic Conference, the ICRC will continue to work for the development of international humanitarian law wherever that is still necessary. A task such as this can never really be regarded as having been brought to a close, and the ICRC will not relax its efforts to ensure effective protection for the victims of all forms of conflict.

There is one point I would mention which was discussed by Commission IV and which has already been commented upon by the representatives of the ICRC. It is the question of Protecting Powers or their substitute. I think it is necessary to revert to this matter to confirm that the ICRC proposes to make use of the power conferred on it to assume the role of substitute for the Protecting Power whenever it considers it necessary and possible to do so. This role should not, however, be automatically imposed on the ICRC. Only when all other possibilities were exhausted would the ICRC offer its services. Any such offer would then require the agreement of the Parties concerned. To fulfil those functions the ICRC will obviously need to be supplied with adequate funds and staff. Finally, the ICRC would like to make it clear that, should it agree to act as substitute, it does not intend in any way to weaken the system of Protecting Powers provided for in the Conventions.

Before I close, it is my pleasant duty to express the ICRC's gratitude to all governments which, realizing the cost of organizing and holding a Conference such as this, have contributed or promised to contribute to meeting those costs. A note concerning the financial aspects of our work has been sent to the governments of all the States Parties to the Geneva Conventions. The note has been, or will be, communicated to you before the end of the Conference.

To conclude, I should like to tell you how greatly your presence here and your participation in the work of the Conference have encouraged the ICRC in its work, and I can confidently say that the task we have undertaken will resolutely be brought to a successful conclusion."

5.47 In the opinion of a large number of experts, work had reached a stage which warranted the convening of a diplomatic conference. In view of the fact that the countless amendments and proposals submitted to the Conference had not been discussed in sufficient detail, and that it would therefore be very difficult for the ICRC to find a common denominator, some experts felt that some further meetings of experts should be held before a diplomatic conference was convened. The opinion was voiced that a diplomatic conference should be held not later than 1974, in

order that the present impetus might not be checked and the efforts made so far not founder in indifference or oblivion. The Report on the Conference should therefore be distributed to Governments at an early date.

The Swiss expert declared that the Swiss Government was prepared to convene the Diplomatic Conference and to make preparations for that gathering.

5.48 Several experts spoke about the way in which future texts should, in their opinion, be submitted. Some of them expressed the opinion that the ICRC should draw up clear and unequivocal texts with very brief comments.

Special stress was laid on the need for precise definitions. Expressions such as "combat zone" and "military objective" should be more accurately defined. Some experts suggested that the ICRC submit various options. One expert, however, thought it preferable for the ICRC itself to make a choice, which would not necessarily be the outcome of the different opinions. Rather than a compromise solution, it should strive for a common denominator acceptable to all Parties. The Diplomatic Conference itself would seek the necessary compromise solutions. Attention was also drawn to the need to reconcile the philosophical and practical aspects of international humanitarian law applicable in armed conflicts. In this context, an expert pointed out that it would be desirable to introduce into the Draft Protocols which were to be prepared a provision based on the Martens clause. It was also necessary to bear in mind the causes underlying armed conflicts and to consider the relative application of law in some countries. An expert urged the need for the ICRC to elicit genuinely progressive elements from the Conference and to reject certain trends to the effect that in present-day armed conflicts the civilian population as such would no longer exist. The ICRC should also endeavour to overcome certain shortcomings that still existed, such as the inadequacy of the protection and marking of hospital ships, and to find flexible solutions ensuring maximum protection. Future rules should constitute neither a law for the minority nor a law for the majority, so that they might be acceptable to virtually all States. An expert pointed out that in developing international humanitarian law applicable in armed conflicts one had to bear in mind the means rather than the aims of those conflicts, and that special provisions governing armed conflicts springing from special motives would be unacceptable. It was recalled that neither the principles of reciprocity and of the balance and equality of rights and obligations nor the reasons underlying an armed conflict had any place in international humanitarian law, which had to be in force for all and to be applied without discrimination. The same expert further advised against any declarations containing general or commonplace sentiments, and therefore of no practical effect.

5.49 Several experts recommended that, in drawing up future texts, the ICRC should bear in mind the principles of respect for sovereignty and of non-

interference, while others deplored their insistence and urged that humanitarian considerations should come before respect for the sovereignty of States.

5.50 Some experts drew attention to the fact that the work of the United Nations and the ICRC was becoming increasingly interdependent; one expert said that final responsibility regarding the development of international humanitarian law applicable in armed conflicts should rest with the ICRC.

5.51 An expert expressed the wish that the goodwill which the experts had shown during the two sessions of the Conference might continue to prevail in the work which lay ahead.

5.52 Referring to the Conference generally, an expert said that his delegation had tried to show facts as they were even at the risk of being unpopular. This method served the ICRC better than the practice of making vague statements or concealing facts. According to the expert, all those taking part in the Conference pursued the same aim: that of strengthening the protection due to the victims of armed conflicts. The reason for differing opinions lay not in the objective pursued but in the different ways of achieving it. Differences arose from historical developments and the political, social, military and, above all, psychological experience of States. Thus the problem of civil protection was seen from a different standpoint according to whether or not States had recently experienced armed conflict. It was essential that an effort be made to understand the position of other States and find a solution to meet the needs of one and all.

5.53 According to another expert, the Conference had provided very useful exchanges on legal as well as military and technical problems. It had been more difficult to find a common denominator in the matter of drawing up new rules for limiting human suffering. There would always be different views on concepts such as "necessary or tolerable suffering" in armed conflict. There had been exchanges of ideas in the course of which different interests confronted each other. Some States wished to retain their freedom of action because they enjoyed a certain advantage, while others attempted to limit that freedom of action. Military interests had often clashed with humanitarian considerations, and those who upheld humanitarian interests were deemed unrealistic. The expert, however, considered that realism lay, above all, in an increased capacity to understand the sufferings of victims of armed conflicts.

5.54 A number of experts thanked the ICRC for the work it had done and expressed satisfaction at the success of the Conference, while the Chairman of the Conference, in turn, thanked the experts for their unflinching co-operation. Before closing the second session of the Conference of Government Experts, he expressed the wish that at the Diplomatic Conference States would reach agreement on most of the problems submitted to them.