INTERNATIONAL COMMITTEE OF THE RED CROSS

# Draft Additional Protocols to the Geneva Conventions of August 12, 1949

## COMMENTARY

GENEVA

October 1973

# Colonel Howard S. Levie Collection


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INTERNATIONAL COMMITTEE OF THE RED CROSS

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SECTION II



PART VI



ANNEX

**II. DRAFT PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS**



PART I



PART II



PART III



PART IV



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## NOTES

*Original version*: In the event of differing interpretations, the French text of this *Commentary* will take precedence over the English and Spanish texts, which are translations.

*References*: As a general rule, the ICRC has introduced—immediately following the text of the draft Protocols, which are reproduced in full, article by article—a reference to volume I of the *Report on the Work of the Conference of Government Experts*, second session (Geneva, 3 May-3 June 1972). It considered this single reference adequate. Further references will be found in the text of the commentary on each article. Moreover, fuller references appear in the *Commentary*, parts one and two, which the ICRC established in January 1972 for the second session of the Conference of Government Experts.

*Paragraphs and sub-paragraphs not commented on*: Where no comment is made on a paragraph or sub-paragraph, this implies that the text calls for no special remark.

*Footnotes*: In the commentary on Draft Protocol I, there is a separate consecutive numbering for the Preamble and each of the Parts, while in that on Draft Protocol II the consecutive numbering is for the whole text.

*Quoting of articles common to the Geneva Conventions of 1949*: Where the number of a common article is not the same in all four Conventions, the number of each is shown, separated by a stroke. Thus, the article on dissemination, which in the First Convention is Article 47, in the Second Convention Article 48, in the Third Convention Article 127, and in the Fourth Convention Article 144, is shown as Art. 47/48/127/144.

## ABBREVIATIONS

| | |
|---|---|
| Art. | Article (s) |
| Chap. | Chapter |
| Com. | Commission |
| *Commentary*, Geneva Conv. 1949 | International Committee of the Red Cross, The Geneva Conventions of August 1949, *Commentary*, published under the general editorship of Jean Pictet, 4 vols., Geneva, 1952-1960 |
| *Commentary*, First Geneva Conv. 1949 | *Commentary I*, *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 1952 |
| *Commentary*, Second Geneva Conv. 1949 | *Commentary II*, *The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, 1960 |
| *Commentary*, Third Geneva Conv. 1949 | *Commentary III*, *The Geneva Convention relative to the Treatment of Prisoners of War*, Geneva, 1960 |
| *Commentary*, Fourth Geneva Conv. 1949 | *Commentary IV*, *The Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958 |
| common Art. 3 | Article 3 common to the four Geneva Conventions of August 12, 1949 |
| Conv. | Convention |
| Declaration of St. Petersburg of 1868 | Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, signed at St. Petersburg, November 29-December 11, 1868 |
| Draft Protocol I | Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 20 February-29 March 1974. Documents submitted by the ICRC, draft Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts |
| Draft Protocol II | Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 20 February-29 March 1974. Documents submitted by the ICRC, draft Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of non-international armed conflicts |
| First Geneva Conv. 1949 or First Convention | Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, of August 12, 1949 |
| Fourth Geneva Conv. 1949 or Fourth Convention | Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949 |
| Geneva Conv. 1906 | Geneva Convention of July 6, 1906, for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (*Handbook of the International Red Cross*, Tenth Edition, Geneva, 1953) |
| Geneva Conv. 1949 | The four Geneva Conventions of August 12, 1949 for the Protection of War Victims (UN, *Treaty Series*, vol. 75, 1950, Nos. 970 to 973) |

| | |
|---|---|
| Geneva Protocol, 1925 | Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed at Geneva, June 17, 1925 (League of Nations, *Treaty Series*, vol. XCIV, 1929, No. 2138) |
| Hague Convention No. IV of 1907 | Convention No. IV concerning the Laws and Customs of War on Land, signed at The Hague on 18 October 1907 (Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915) |
| Hague Convention No. V of 1907 | Convention No. V respecting the Rights and Duties of Neutral Powers and Persons in War on Land, signed at The Hague on 18 October 1907 (Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915) |
| Hague Convention No. IX of 1907 | Convention No. IX respecting Bombardment by Naval Forces in Time of War (Carnegie Endowment for International Peace, signed at the Hague on 18 October 1907, *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915) |
| Hague Convention of 1954 | The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (UN, *Treaty Series*, Vol. 249, 1956, No. 3511) |
| Hague Regulations of 1907 | Regulations respecting the Laws and Customs of War on Land. Annex to the Hague Convention No. IV of 1907 (Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915) |
| ICAO | International Civil Aviation Organization |
| ICRC | International Committee of the Red Cross |
| ICRC, Conf. Gvt. Experts, Commentary, part one, 1972 | International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972, second session. Documentary material submitted by the ICRC, vol. II, part one, *Commentary* on the draft Additional Protocol to the four Geneva Conventions of August 12, 1949, Geneva, January 1972 |
| ICRC, Conf. Gvt. Experts, Commentary, part two, 1972 | International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972, second session. Documentary material submitted by the ICRC, vol. II, part two, *Commentary* on the draft Additional Protocol to Article 3 common to the four Geneva Conventions of August 12, 1949, Geneva, January 1972 |
| ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971 | International Committee of the Red Cross, documents submitted to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, first session, Documents I to VIII, Geneva, January 1971 |
| ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/3b | Document III, CE/3b, *Protection of the Civilian Population against Dangers of Hostilities* |
| ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/5b | Document V, CE/5b, *Protection of Victims of Non-International Armed Conflicts* |
| ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/7b | Document VII, CE/7b, *Protection of the Wounded and Sick* |
| ICRC, Conf. Gvt. Experts, Geneva, 1971, Report | International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, first session, *Report on the Work of the Conference*, Geneva, August 1971 |

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| ICRC, Draft Protocol I, 1972 | International Committee of the Red Cross Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972, second session, documentary material submitted by the ICRC, vol. I, *Basic Texts*, I, Draft Additional Protocol to the four Geneva Conventions of August 12, 1949, Geneva, January 1972 |
| ICRC, Draft Protocol II, 1972 | International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972, second session, documentary material submitted by the ICRC, vol. I, *Basic Texts*, II, Draft Additional Protocol to Article 3 common to the four Geneva Conventions of August 12, 1949, Geneva, January 1972 |
| ICRC, Draft Rules, 1956 | International Committee of the Red Cross, XIXth International Conference of the Red Cross, New Delhi, 1957, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, Draft submitted by the ICRC, Geneva, September 1956 |
| XXth Internat. Conf. Red Cross, Res. VIII, Vienna, 1965 | XXth International Conference of the Red Cross, Vienna, October 1965, Resolution VIII, " Proclamation of the Fundamental Principles of the Red Cross " |
| XXth Internat. Conf. Red Cross, Res. XXI, Vienna, 1965 | XXth International Conference of the Red Cross, Vienna, October 1965, Resolution XXI, " Implementation and Dissemination of the Geneva Conventions " |
| XXth Internat. Conf. Red Cross, Res. XXVI, Vienna, 1965 | XXth International Conference of the Red Cross, Vienna, October 1965, Resolution XXVI, " Repression of Violations of the Geneva Conventions " |
| XXth Internat. Conf. Red Cross, Res. XXVIII, Vienna, 1965 | XXth International Conference of the Red Cross, Vienna, October 1965, Resolution XXVIII, " Protection of Civilian Populations against the Dangers of Indiscriminate Warfare " |
| XXIst Internat. Conf. Red Cross, Res. IX, Istanbul, 1969 | XXIst International Conference of the Red Cross, Istanbul, September 1969, Resolution IX, " Dissemination of the Geneva Conventions " |
| International Covenant on Civil and Political Rights | International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 |
| p. (pp.) | page (pages) |
| para. (paras.) | paragraph (paragraphs) |
| 1972 Report, vols. I and II | International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May-3 June 1972, second session, *Report on the Work of the Conference*, vols. I and II, Geneva, July 1972 |
| Second Geneva Conv. 1949 or Second Convention | Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949 |
| Third Geneva Conv. 1949 or Third Convention | Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949 |
| UN | United Nations |
| Unesco | United Nations Educational, Scientific and Cultural Organization |
| UN, res. 3 (I) | United Nations, General Assembly resolution 3 (I) of 13 February 1946, " Extradition and Punishment of War Criminals " |
| UN, res. 95 (I) | United Nations, General Assembly resolution 95 (I) of 11 December 1946, " Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal " |
| UN, res. 2444 (XXIII) | United Nations, General Assembly resolution 2444 (XXIII) of 19 December 1958, " Respect for human rights in armed conflicts " |

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|---|---|
| UN, res. 2625 (XXV) | United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, " Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations " |
| UN, res. 2675 (XXV) | United Nations, General Assembly resolution 2675 (XXV) of 9 December 1970, " Basic principles for the protection of civilian populations in armed conflicts " |
| UN, res. 2852 (XXVI) | United Nations, General Assembly resolution 2852 (XXVI) of 20 December 1971, " Respect for human rights in armed conflicts " |
| UN, res. 3032 (XXVII) | United Nations, General Assembly resolution 3032 (XXVII) of 18 December 1972, " Respect for human rights in armed conflicts " |
| Vienna Convention of 1969<br>or<br>Vienna Conv. 1969 | Vienna Convention on the Law of Treaties of May 23, 1969 (in *United Nations Conference on the Law of Treaties*, first and second sessions, *Official Records*, New York, 1971, Sales No. F.70.V.5) |

The abbreviations employed in the commentary on the Annex to Draft Protocol I are listed in the introduction to that commentary.

# INTRODUCTION

The introduction, which appears in the beginning of the two draft Additional Protocols to the Geneva Conventions of 12 August 1949, published by the International Committee of the Red Cross (ICRC) in June 1973 and sent by the Swiss Government to the States parties to those Conventions and to Member States of the United Nations, in view of the Diplomatic Conference convened by the Swiss Government scheduled to open in Geneva on 20 February 1974, summarizes as follows the work undertaken for the reaffirmation and development of international humanitarian law applicable in armed conflicts:

" In September 1969, the XXIst International Conference of the Red Cross, at Istanbul, unanimously adopted Resolution XIII requesting the ICRC actively to pursue its efforts with a view to drafting as soon as possible concrete rules which would supplement existing international humanitarian law, and to invite government experts to meet for consultations with the ICRC on such proposals.

On the basis of that Resolution, the ICRC convened for 24 May 1971 the ' Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ', to which it invited some forty governments to delegate experts. As it was unable to cover all its agenda, the meeting requested the convening of a second session open to all States parties to the 1949 Geneva Conventions. This second session took place in Geneva from 3 May to 3 June 1972 and was attended by more than four hundred experts delegated by seventy-seven governments. This large attendance, the sustained work carried out in several commissions, and the constructive atmosphere which prevailed throughout the proceedings gave a decisive impetus to the undertaking.

With those meetings in mind, the ICRC had drawn up a series of volumes on the matters to be discussed. Those volumes, with the reports on the two sessions of the Conference of Government Experts, still constitute the basic documentary material.

In addition to the two sessions of the Conference, the ICRC arranged a number of consultative meetings with individuals and groups. In particular, in March 1971 at The Hague and in March 1972 at Vienna, it submitted its drafts to Red Cross experts in order to have their opinions. Similarly, in November 1971, it consulted the representatives of non-governmental organizations.

The ICRC also remained in close liaison with the United Nations and followed attentively the work of the General Assembly in this field. In each of its sessions, since 1968, the General Assembly has adopted resolutions on ' respect for human rights in armed conflicts '. This was a powerful encouragement to the ICRC to continue its work.

Each time, the United Nations Secretary-General had submitted to the Assembly very detailed reports containing useful suggestions. In addition, representatives of the United Nations Secretary-General actively participated in the two sessions of the Conference of Government Experts convened by the ICRC.

Today the ICRC is able to present the result of several years' joint effort, in the form of two draft Additional Protocols to the 1949 Geneva Conventions; these drafts are given in the pages which follow. Their sole aim is to provide an adequate basis for discussion at the forthcoming Diplomatic Conference convened by the Swiss Federal Council, the Government of the State depositary of the Geneva Conventions. They will also be submitted to the XXIInd International Conference of the Red Cross which will meet in Teheran in November 1973. "

To ease the task of those who are to study the aforementioned draft Protocols, the ICRC has thought it useful to establish a *Commentary*, which it herewith takes pleasure in submitting. Being succinct, they do not embody prefatory remarks, nor do they claim to interpret the texts To be fully conversant with the subject, reference will need to be made to the two *Reports on the Work of the Conference of Government Experts*, which contain, *inter alia*, the various proposals put forward by the experts; reference should also be made to the eight volumes of basic documents established by the ICRC in 1971.

The *Commentary* contains what seemed essential to an understanding of the provisions submitted. It is, above all, a statement of reasons. As a general rule, it also indicates the source

of the article or paragraph concerned. Where appropriate, it shows in what manner they differ from the previous texts.

Some experts having expressed the wish that a more thorough study of the relation between the draft Protocols and other instruments of positive law be made, we would point out that the matter of the relation of the draft Protocols to the 1949 Conventions is dealt with in the Preamble and in Article 1 of both draft Protocols, and suggest that reference should be made to the commentary thereon. The relation to the Hague Conventions and to customary international law is explained in the introduction to Part VI of Draft Protocol I, and in the commentary on Articles 2 (*c*) and (*d*), 32 (4), 33 to 53, 64, 66, 70 and 77 of that draft.

As regards the field of application of the two drafts, it is laid down in Article 1 of Draft Protocol I and Articles 1 and 2 of Draft Protocol II. Broadly speaking, the substance of Draft Protocol II consists in provisions which have been drawn from the Conventions and from Draft Protocol I, but adapted to the specific conditions of non-international armed conflicts, and hence in most cases simplified.

It should be recalled that, apart from some provisions of a general nature, the ICRC has not included in its drafts any rules governing atomic, bacteriological and chemical weapons. These weapons have either been the subject of international agreements such as the Geneva Protocol of 1925 or of discussions within intergovernmental organizations. This, however, does not imply that the ICRC or the Red Cross as a whole is not interested in a problem whose humanitarian aspects are of paramount importance.

Also, the so-called conventional weapons, which may nevertheless cause unnecessary suffering or have indiscriminate effects, are still not covered by the draft Protocols. Yet they are also a matter of concern for the ICRC, which, with the co-operation of some experts, has carried out a study in which such weapons and their effects are described. A detailed report on the subject has recently been sent to all Governements, which will need to decide on the action that should be taken and can refer it to any bodies they may consider appropriate. The ICRC considers that, should Governments wish to bring up at the Diplomatic Conference the question of the restriction or even prohibition of some of these weapons, the Conference could devote a general discussion to that question. A working group could then be set up which would submit to the Conference its findings and a plan on the procedure for further study and the handling of the problem.

The ICRC trusts that the present *Commentary* may prove helpful to all those attending the Diplomatic Conference and to some extent ease the difficult yet vital task that lies before them.

# Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts

# COMMENTARY

*The High Contracting Parties,*

*Proclaiming* **their earnest wish to see peace prevail among peoples,**

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

*Recalling* **that, in cases not covered by conventional or customary international law, civilian population and the combatants remain under the protection of the principles of humanity and the dictates of the public conscience,**

*Have agreed* **on the following:**

*Ref.*: 1972 Report, vol. I, paras. 4.204, 4.212 to 4.216, and 4.219.

The draft Preamble submitted by the ICRC to the second session of the Conference of Government Experts [1] gave rise to numerous objections. It was said that it was impossible to decide on such a draft at a time when the provisions of the Protocol were not fully known; it was recalled that the Conventions did not contain a real Preamble owing to the total absence of a consensus, at the Diplomatic Conference of 1949, on the text contemplated, and it was pointed out that the same difficulties were bound to arise over the draft Preamble to the Protocol. Some experts favoured a far more complete Preamble supported by various Recommendations, while others thought that the Preamble should be brief, simple and to the point. The ICRC endorsed the latter suggestion.

*Second paragraph*

This is the only paragraph of the Preamble submitted in 1972 [2] that encountered no objection.

The experts considered it essential, while stressing the need to reaffirm and develop the rules protecting victims of armed conflicts, to indicate the vital need to strengthen measures intended to ensure a better application of those rules.

*Third paragraph*

As the commentary on Article 87 indicates, several experts would have liked to see this provision supplemented by the insertion, as was done in paragraph 4 of the common denunciatory article in the Conventions, of a clause similar to the so-called Martens clause, which appears in the Preamble to the Hague Convention No. IV of 1907.[3] The ICRC considered, as did a number of experts, that the right place for such a clause would be in the Preamble. It therefore did not embody it in an article of the Protocol, as had been done in the case of the 1972 draft.[4]

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[1] ICRC, Draft Protocol I, 1972, Preamble.

[2] ICRC, Draft Protocol I, 1972 Preamble, sixth paragraph.

[3] Hague Convention No. IV of 1907, Preamble, eighth paragraph.

[4] See ICRC, Draft Protocol I, 1972, Art. 30 (3) and Art. 85 (3).

## PART I

## GENERAL PROVISIONS

### Article 1.—Scope of the present Protocol

**The present Protocol, which supplements the Geneva Conventions of August 12, 1949, for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions.**

*Ref.*: 1972 Report, vol. I, paras. 4.20 to 4.33, 4.215 and 4.217 to 4.224.

This article defines the scope of the Protocol. It follows from it that the Protocol in no respect opens the way to a revision of the Conventions, but seeks to supplement them where the lessons drawn from contemporary armed conflicts show that the Conventions have proved to be inadequate before the requirements of humanity. This article should be read in conjunction with Article 84, entitled *Treaty relations upon entry into force of the present Protocol.*

The situations referred to in Article 2 common to the Conventions, relating to the application of the Conventions, are the following: (1) all cases of declared war or of any other armed conflict which may arise between two or more of the Contracting Parties, even if the state of war is not recognized by one of them; (2) all cases of partial or total occupation of the territory of a Contracting Party, even if that occupation meets with no armed resistance.

The present draft was approved by the experts by a large majority.

Several experts—considering that wars of national liberation are, by virtue of the Charter of the United Nations and a number of resolutions adopted by the General Assembly, international armed conflicts within the meaning of Article 2 common to the Conventions and should consequently be included in the field of application of Protocol I—wished to introduce a second paragraph stipulating that the situations referred to in the said common Article 2 include armed struggles waged by peoples for the exercice of their right of self-determination. Although some experts considered such an idea with interest, a majority, putting forward a variety of conflicting reasons, did not concur:

— many experts thought that it was not in line with the system adopted in the Conventions and that provided for in the present draft Protocol to qualify particular conflicts, some of whom took the view that there was no need to include a specific provision concerning such struggles in Protocol I, since they would be covered, in the majority of cases, by Article 3 common to the Conventions or by Protocol II;

— other experts, who wished to insert this question into Protocol I, proposed alternative solutions: either to declare in the Preamble that these armed struggles were international in character, or to mention the members of movements of armed struggles for self-determination in the article concerning a new category of prisoners of war.

Even the actual definition of armed struggles for self-determination gave rise to disagreement.

After having examined these various viewpoints, the ICRC judged it more advisable, at this present stage, to submit the question to the Diplomatic Conference by the introduction of a note in respect of a paragraph 3 possibly to be added to Article 42, entitled *New category of prisoners of war.*

**Article 2.—Definitions**

**For the purposes of the present Protocol:**

*(a)* **" the Conventions " means the four Geneva Conventions of August 12, 1949, for the Protection of War Victims;**

*(b)* **" First Convention ", " Second Convention ", " Third Convention " and " Fourth Convention " mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 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)* **" protected persons " and " protected objects " means persons and objects on whom or on which protection is conferred by the Articles, Chapters or Sections which concern them in Parts II, III and IV;**

*(d)* **" Protecting Power " means a State not engaged in the conflict, which, designated by a Party to the conflict and accepted by the adverse Party, is prepared to carry out the functions assigned to a Protecting Power under the Conventions and the present Protocol;**

*(e)* **" substitute " means an organization acting in place of a Protecting Power for the discharge of all or part of its functions.**

*Ref.*: 1972 Report, vol. I, paras. 4.34 to 4.42.

Definitions of other terms, of a less general nature, are to be found in Articles 8, 21, 35, 44(2), 45, 47(1) and 54.

*Sub-paragraph (c)*

The title of the present draft Protocol gives a general indication of the persons it is intended to cover. But several experts wished that the different categories of protected persons should be specifically determined, as is done in the Conventions; [1] they also thought that the various categories of protected objects should be specified.

As this draft Protocol is intended to supplement the Conventions, it covers, obviously, the persons and objects protected by the Conventions; moreover, by the very fact that it reaffirms and elaborates certain rules that appeared until now outside the framework of the Conventions,[2] in particular in the Hague Regulations of 1907 and in customary international law, its protection is thus extended to new categories of persons and objects. The present definition consequently explains that this draft Protocol covers categories of persons and objects entitled to protection conferred upon them in various respects by the articles, Chapters or Sections which concern them. It indicates the meanings with which the terms " protected persons " and " protected objects " (that is, protected by the Protocol) are used in certain articles (Art. 11 and 74).

[1] See First Convention, Art. 13; Second Convention, Art. 13; Third Convention, Art. 4; Fourth Convention, Art. 4 and 13.

[2] See, below, Part VI, note 4.

*Sub-paragraph (d)*

Most of the experts were in favour of including in this article a definition of the Protecting Powers, for the purposes of the Convention and of the present draft Protocol. The following wording had been suggested:

> " " Protecting Power " means a State which is not engaged in the conflict, has diplomatic representation in the States in conflict, and which, designated and accepted as Protecting Power, is able and willing to carry out the functions assigned to a Protecting Power under the Conventions and the present Protocol. "

This definition, although approved by a large number of experts, gave rise all the same to sharp criticism. It was observed that it should not be essential that there should be diplomatic representation to the Parties to the conflict and that this should not be a condition *a priori* for a Protecting Power mandate. Objections were made to the word " able ", for it was not clear which body would judge this faculty, and to the word " willing ", as it was obvious that the designation of a Protecting Power could not take place save with the consent of the State designated to that function. Some experts thought that, before giving a definition of a Protecting Power, it would be advisable to specify its exact functions; they said that there was still the question whether and in what measure the Protecting Powers would be assigned functions as regards the provisions in the present draft relating to the conduct of hostilities.

The ICRC would like to point out that a list of the articles of the Conventions referring to the functions of the Protecting Powers is given in the *Commentary* on each of the Conventions.[3] Some of the articles, which are common to the four Conventions, contain provisions of a general nature: co-operation in the application; scrutiny of the application; offers of good offices in the event of disagreements as to the interpretation or application; forwarding of translations of the Conventions during hostilities; substitutes. In addition, each Convention confers specific tasks on the Protecting Powers.

These articles of the Conventions will determine the functions of the Protecting Powers for the purposes of the Protocol, since it is additional to the Conventions. Therefore, the Protecting Powers will have, in the first place, to co-operate in the application of the Protocol's provisions and to ensure its scrutiny. As regards the present draft:

(1) the Protecting Powers are expressly mentioned in Articles 5, 6 (1), 52 (4), 53 (2), 62 (4), 69 (1) and 73, which lay down various new functions for them;

(2) apart from the above-mentioned functions and those they will exercice for the purposes of the application of the Protocol in accordance with the provisions of the Conventions, the Protecting Powers might perhaps be called upon to perform also the following specific tasks:

— to serve as intermediary between belligerents wishing to make known, to each other or unilaterally, the location of fixed medical units (Art. 12), or wishing to conclude agreements with a view to strengthening the protection of means of medical transport (Art. 30), or wishing to notify any characteristics facilitating the identification of means of medical transport (Art. 25);

— to confirm the civilian nature of works and installations containing dangerous forces (Art. 49 (1)) and notify the location and means of identification of such works and installations (Art. 49 (3));

— to notify the location of civilian bodies established in zones of military operations and, as the case may be, the period during which they will operate (Art. 55 (1)), as well as the location of buildings, matériel and means of transport used by civil defence bodies (Art. 55 (3));

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[3] See *Commentary*, Geneva Conv. 1949, Art. 8/8/8/9. A full list is also to be found in F. SIORDET, " The Geneva Conventions of 1949: the question of scrutiny " (Annex), Geneva, 1953, extract from the *Revue Internationale de la Croix-Rouge* (September 1951, February and November 1952).

— to enquire into the situation regarding supplies available to the civilian population, in particular, foodstuffs, clothing, medical and hospital stores and means of shelter (Art. 62 (1)).

With regard to the issue whether, and in what measure, Protecting Powers will have possibly to exercise any functions within the combat zone, as, for example, the supervision of the application of Part III, Section I *(Methods and Means of Combat)*, and of Part IV, Section I *(General Protection against Effects of Hostilities)* might imply, the ICRC wishes to point out that the First and Second Conventions, as well as Part II of the Fourth Convention, which apply mainly to the battlefield or its immediate surroundings, determine the role which the Protecting Powers are called upon to play in this field; that role will be similar with respect to the provisions in question in the present draft. The Conventions did not go further than to reaffirm tasks that were traditionally conferred upon the Protecting Powers by customary international law and did not provide for their presence in relation to the actual fighting.

As the ICRC has already stated on several occasions,[4] the mandate of a Protecting Power for the purposes of the application of the Conventions and Protocol does not include enquiries into violations of those instruments, the findings of which would be made the subject of a public report which would be submitted to the attention of intergovernmental organizations. Besides, by laying down in a separate article (Art. 52/53/132/149) a special procedure for enquiries into violations, the Conventions clearly show that the supervision exercised by the Protecting Powers does not extend to such cases.

*Sub-paragraph (e)*

In common Article 10 (Art. 11 of the Fourth Convention), concerning substitutes for Protecting Powers, the Conventions mention organizations to whom might be entrusted the duties incumbent on the Protecting Powers instead of the latter. The experts were of the view that the term " substitute " should appear in the body of the present draft and that a definition of that term should be provided.

The ICRC shares the view of those who wished to specify that the substitute might be called upon to exercice, in certain cases, only a part of these functions: such a case might arise if, in accordance with the wish of the Protecting Power that has been designated and with the consent of the Parties to the conflict, the duties in question were shared by the said Power and the substitute; such would also be the case if the substitute, in agreement with the Parties to the conflict, intended to assume only a part of those tasks.

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

**1. In addition to the provisions applicable in peacetime, the present Protocol shall apply from the beginning of any situation referred to in Article 2 common to the Conventions.**

**2. In the territory of Parties to the conflict, the application of the present Protocol shall cease on the general close of military operations.**

**3. In the case of occupied territory, the application of the present Protocol shall cease on the termination of the occupation.**

*Ref.*: 1972 Report, vol. I, paras. 4.52 to 4.55.

The purpose of this article is to establish from which moment and till when the provisions of the Protocol will be applicable.

[4] See, in particular, 1972 Report, vol. I, para. 4.71.

Some experts considered that the relevant provisions in the Conventions [5] would be sufficient and would allow the beginning and end of the application of this additional Protocol to be clearly determined. In their view, if the formulation of an article was all the same decided upon, it should then be restricted to a reference to the corresponding provisions in the Conventions.[6]

*Paragraph 1*

The provisions applicable in peacetime are Articles 6, 7, 18, 34, 41, 59 and 70 to 74, and, of course, the final provisions.

*Paragraph 2*

What should be understood by the words " general close of military operations "? In this connection, the *Commentary* on the Fourth Convention [7] says that when the struggle takes place between two States, the date of the close of hostilities is fairly easy to decide: it will depend either on an armistice, a capitulation, or simply on *debellatio*. On the other hand, when there are several States on one of the sides or on both, the question is harder to settle. It must be agreed that in most cases the general close of military operations will be the total end of all fighting between all those concerned.

" Military operations " may be succinctly defined as offensive and defensive movements by armed forces in action.

*Paragraph 3*

Following the wish of a majority of the experts, the text of this paragraph as regards the time-limit differs from that of Article 6 (3) of the Fourth Convention, relating to the end of the application of the Convention in occupied territory.[8]

Several experts were in favour of adding a paragraph 4, worded as follows:

" 4. Protected persons, within the meaning of Article 2 (*c*), whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Protocol."

The ICRC does not have any objection to this provision, although the position of the persons concerned is already covered by Article 65 (5).

**Article 4.—Legal status of the Parties to the conflict**

**The application of the Conventions and of the present Protocol, as well as the conclusion of the agreements therein provided, shall not affect the legal status of the Parties to the conflict or that of the territories over which they exercise authority.**

*Ref.*: 1972 Report, vol. I, paras. 4.43 to 4.50.

The object of this provision is to ensure better the fulfilment of the humanitarian aims of the Conventions and Protocol. The Parties to the conflict might fear, unjustifiably, that the application of those instruments might bring in its wake political or legal consequences affecting their reciprocal status; it is advisable therefore to remove all doubts in this regard.

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[5] First Convention, Art. 5; Third Convention, Art. 5; Fourth Convention, Art. 6.

[6] See 1972 Report, vol. I, para. 4.54, Proposal 1.

[7] See *Commentary*, Fourth Geneva Conv. 1949, Art. 6, para. 2.

[8] Art. 6 (3) of the Fourth Convention says:

" In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. "

The words " agreements therein provided " mean the agreements expressly provided for by certain articles in the Conventions and the present draft.

Agreements are expressly provided for in Article 5, entitled *Appointment of Protecting Powers and of their substitute*, in Article 6 (4) relating to the qualified personnel which a Contracting Party might make available for service outside its own territory, in provisions relating to medical air transport (Art. 27, 28 and 29) and in the Chapter entitled *Localities under special protection* (Art. 52 and 53).

The general rule in the present article is reaffirmed in Article 5 (4), relating to the effects of designation and acceptance of Protecting Powers or their substitute.

**Article 5.—Appointment of Protecting Powers and of their substitute**

**1. From the beginning of a situation referred to in Article 2 common to the Conventions, each Party to the conflict, which has not already entrusted the protection of its interests and those of its nationals to a third State, shall without delay designate a Protecting Power for the sole purpose of applying the Conventions and the present Protocol and shall without delay and for the same purpose permit the activities of a Protecting Power designated by the adverse Party and accepted as such.**

**2. In the event of disagreement or unjustified delay in the designation and acceptance of Protecting Powers, the International Committee of the Red Cross shall offer its good offices with a view to the designation of Protecting Powers acceptable to both Parties to the conflict. For that purpose, it may, *inter alia*, ask each of the Parties to provide it with a list of at least five States which they consider acceptable in that respect; these lists shall be communicated to it within ten days; it shall compare them and seek the agreement of any proposed State named on both lists.**

**3.** *Proposal I*

**If, despite the foregoing, no Protecting Power is appointed, the International Committee of the Red Cross may assume the functions of a substitute within the meaning of Article 2 *(e)*, provided the Parties to the conflict agree and insofar as those functions are compatible with its own activities.**

*Proposal II*

**If, despite the foregoing, no Protecting Power is appointed, the Parties to the conflict shall accept the offer made by the International Committee of the Red Cross, if it deems it necessary, to act as a substitute within the meaning of Article 2 *(e)*.**

**4. The designation and acceptance of Protecting Powers for the sole purpose of applying the Conventions and the present Protocol shall not affect the legal status of the Parties to the conflict or that of the territories over which they exercise authority.**

**5. The maintenance of diplomatic relations between the Parties to the conflict does not constitute an obstacle to the appointment of Protecting Powers for the sole purpose of applying the Conventions and the present Protocol.**

**6. Whenever in the present Protocol mention is made of a Protecting Power, such mention also implies the substitute within the meaning of Article 2 *(e)*.**

*Ref.*: 1972 Report, vol. I. paras. 4.11 to 4.16, 4,56 to 4.87, 4.115 to 4.117, 5.24 and 5.46.

The purpose of this article is to strengthen the system of Protecting Powers and their substitute [9] set up by the Conventions in order to guarantee the impartial supervision of their application and facilitate that application.

The deliberations of the Conference of Government Experts and the replies of governments to a questionnaire sent to them by the ICRC [10] indicate particularly clearly that there is full

[9] The words " Protecting Power " and " substitute " are defined above under Article 2 *(d)* and 2 *(e)*.

[10] ICRC, *Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, supervision and penalties, Replies sent by Governments*, Geneva, 1973.

agreement in favour of keeping, and at the same time improving this system; no proposal was submitted for its abolition. For its part, the General Assembly of the United Nations, in operative paragraph 3 (*a*) of its resolution 2852 (XXVI), had invited the ICRC to devote special attention, among the questions to be taken up, to the need " for strengthening the system of protecting Powers " contained in the Conventions; and it also considered, in its resolution 3032 (XXVII), that substantial progress on fundamental issues such as the methods to ensure a better application of existing rules relating to armed conflicts was indispensable.

The functions incumbent on the Protecting Powers or their substitute by virtue of the Conventions and the present draft Protocol are examined in the commentary on Article 2 (*d*), relating to the definition of Protecting Powers.

*Paragraph 1*

The obligation incumbent on every Party to the conflict, by virtue of the Conventions (common Art. 8/8/8/9 of the Conventions), to designate a Protecting Power within the meaning of Article 2 (*d*), is reaffirmed here.

If diplomatic relations are broken off between the Parties to the conflict, then the mandate of Protecting Power under the Conventions and the Protocol is automatically by law vested in the third State, acceptable to the receiving State, which may already have been entrusted by the sending State — in accordance with customary international law or with Article 45 of the Vienna Convention on Diplomatic Relations of 1961 [11] — with the protection of its interests and those of its nationals and which has been accepted by the receiving State. A Party to the conflict wishing to entrust to two different third States the " Vienna mandate " and the " Geneva mandate " should therefore make known expressly and immediately its position.

The experts deliberated at length whether the designation and acceptance of a Protecting Power could be an automatic process, not depending on the consent of the Parties to the conflict. A large majority of experts considered that a three-sided agreement between the Parties concerned (the two Parties to the conflict and the third State designated) constituted a basic condition for this system.

A number of proposals contained fixed time limits for the designation of a Protecting Power and for the acceptance or rejection of such designation. Other proposals favoured more flexible indications, such as " from the beginning of any conflict " or " without delay ". The ICRC, from its experience of contemporary armed conflicts, and judging it difficult to propose fixing a precise time limit, considers that the designation and acceptance of Protecting Powers should be effected without delay from the beginning of a situation referred to in Article 2 common to the Conventions. On the other hand, a precise time limit is proposed in paragraph 2.

*Paragraph 2*

A number of experts sought to meet the difficulties which the designation and acceptance of Protecting Powers had encountered in the past by putting forward various proposals for procedures to be set up, some of which were worked out in considerable detail, to seek remedies. Certain proposals, entrusting the ICRC with the task of the administration of such procedures and dealing with the necessary notifications, were approved by a majority of the experts. The ICRC would therefore be prepared to agree to carry out this task.

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[11] United Nations *Treaty Series*, Vol. 213, 1964, No. 7310. This article says:

" Article 45.—If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

*(a)* The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

*(b)* The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

*(c)* The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State. "

*Paragraph 3*

This provision deals with the role which the ICRC would accept to assume, in its capacity as a substitute, appearing as a last resort, within the meaning of Article 2 (*e*), in case the Protecting Powers system, provided for in the Conventions and reaffirmed in paragraphs 1 and 2 of the present article, failed to operate.

A large majority of the experts, as well as some governments in their replies to the above-mentioned questionnaire, considered that the procedure set up for the appointment of the ICRC as a substitute for the Protecting Powers should be reinforced.

In this connection, the President of the ICRC stated at the final plenary meeting of the Conference of Government Experts: [12]

> " 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. "

Pursuant to specific provisions in the Conventions, the ICRC performs a certain number of tasks in aid of the victims of armed conflicts. In addition, when there are no Protecting Powers, the ICRC is given the task of performing on a pragmatic basis a number of the functions incumbent on the Protecting Powers. As indicated in Proposals I and II of this paragraph, the ICRC would only become a substitute if this did not hinder its own traditional activities.

Certain experts, who favoured the idea of an automatic " fall-back " institution and who had deduced from the answers given them by the representatives of the ICRC that the latter did not intend to play the role of such an institution, had proposed to establish, in the framework of Article 10—which had been left blank—of the 1972 draft, a permanent supervisory body to be set up or designated to that end by the United Nations. Such a body, in their view, would meet the wish of those who thought that the Parties to the conflict should be offered the largest choice possible of appropriate machinery and procedures, in order to have always at hand international assistance in respect of measures of supervision. A proposal on this subject was put forward [13] by the experts, who thought it might be an acceptable alternative solution, but a majority of the experts were against including an article dealing with the establishment of such an organ. This confirmed the rather negative attitude of governments reflected in their replies to the questionnaire already referred to earlier.

*Paragraph 4*

This provision should be read in conjunction with Article 4, entitled *Legal status of the Parties to the conflict*, and is a reaffirmation, deemed to be necessary in this context, of that article. Certain Parties to the conflict might be led to refrain from designating or accepting a Protecting Power, in the fear that that might entail consequences of a political or legal nature and might be interpreted, in particular, as a recognition of the adverse Party as a State. It is precisely the purpose of this article to avoid such interpretation being made.

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[12] See 1972 Report, vol. I, para. 5.46.

[13] See 1972 Report, vol. I, para. 4.116.

*Paragraph 5*

A large majority of the experts, as well as the governments in their replies to the above-mentioned questionnaire, were in favour of introducing this provision. In their view, the existence of diplomatic missions that have remained on the spot should not constitute a pretext for evading all real supervision. Some experts would even have liked in such a case to see the designation of Protecting Powers made compulsory.

**Article 6.—Qualified persons**

**1. In peacetime 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 lies 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.**

*Ref.*: 1972 Report, vol. I, paras. 4.88 to 4.97.

This article finds its place in the context of measures intended to reinforce the implementation of the Conventions. The experts, as well as governments in their replies to an ICRC questionnaire,[14] were very much in favour of introducing such an article.

Under this article, teams (to include, in particular, jurists, doctors and military personnel) would be set up on a national basis with a view to ensuring, in peacetime and in time of armed conflict, the full implementation of the Conventions and the Protocol.

This article should be read in conjunction with Article 71, relating to the employment of qualified legal advisers in the armed forces, and with Article 72, entitled *Dissemination.*

*Paragraph 1*

In peacetime, those qualified persons would be called upon to act, in particular, in matters of dissemination and instruction. In time of armed conflict, their functions would vary depending upon whether or not the State to which they belonged took part in the conflict. Their task would be, *inter alia*, to facilitate the activities of the Protecting Powers, and this could take place in different ways: (a) the State to which this qualified personnel belongs would no doubt accept more readily the tasks of Protecting Power if it were sure that there would be a sufficient number of experts available; (b) this provision would facilitate the procedure provided for in the first paragraph of Article 8 common to the Conventions (Art. 9 (1) of the Fourth Convention), relating to Protecting Powers, by virtue of which " the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers "; (c) if it were a Party to the conflict, the State to which these qualified persons belong would find it easier to fulfil the obligations incumbent upon them under the Conventions and the Protocol. Some experts spoke in this connection of the resolution entitled *Personnel for the Control of the Application of the Geneva Conventions* (Res. XXII), adopted by the XXth International Conference of the Red Cross [15] which had stressed the need to make

[14] See, above, note 10.

[15] See *International Red Cross Handbook*, 11th edition, Geneva, 1971.

available to the Protecting Powers " a sufficient number of persons capable of carrying out the scrutiny impartially " and had invited the Parties to the Conventions to set up to that end groups of competent persons. A large number of governments and experts expressed the wish that the ICRC might contribute to the training of these persons, in response to which the ICRC stated on several occasions that it would be fully prepared to do so.

*Paragraph 3*

The ICRC, which is closely following the implementation and dissemination of the Conventions, would find it most useful if it were provided with lists of this qualified personnel. Further, under Article 5 (2), the ICRC could be entrusted with the administration of the procedure for the designation and acceptance of Protecting Powers: it would therefore be most appropriate that it should have available the names of persons liable to be called upon to act within the framework of the international supervisory machinery provided by the Conventions and the present draft.

*Paragraph 4*

It was the general view of the experts that the question of the employment of these persons outside the national territory as well as that of the status to which they would be entitled should form, for each case, the subject of an *ad hoc* agreement concluded by the Parties concerned.

**Article 7.—Meetings**

**The depositary of the Conventions shall convene a meeting of the High Contracting Parties, at the request of two-thirds of them, to study general problems concerning the application of the present Protocol; it may convene such a meeting at the request, also, of the International Committee of the Red Cross.**

*Ref.*: 1972 Report, vol. I, paras. 4.109 to 4.114.

This article proposes a procedure which, in the opinion of many experts, would ensure a better application of the Protocol.

In its 1972 draft,[16] the ICRC, drawing upon Article 27 of the Hague Convention of 1954, had included the provision that meetings would take place " to study 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 ". Some experts rightly observed that the Contracting Parties, that is the Parties to the Protocol, should decide only upon problems concerning the application of the Protocol or upon a proposal for amending the Protocol. They also observed that the procedure concerning amendments raised highly complex problems which an article as brief as the one originally drafted could not easily solve.

The ICRC, falling in with this opinion, believes it is necessary to limit the purposes of such meetings to the consideration of general problems concerning the application of the Protocol, while the procedure for amendments to the Protocol is included, in accordance with the experts' wishes, in the final clauses of the present draft (Art. 86).

As indicated in Article 81, the Swiss Confederation is the depositary of the Conventions. A majority of the experts, judging that it should not be made too easy to have such meetings convened, considered that this should only take place at the request of at least two thirds of the Contracting Parties. It was pointed out, however, that it was necessary to determine at what

[16] ICRC, Draft Protocol I, 1972, Art. 9.

moment the figure of two thirds would be taken into consideration, and a proposal was submitted to the effect that no such meetings could be convened until at least one half of the Parties to the Conventions had become parties to the Protocol. None of the suggestions put forward in this respect was approved by a majority of the experts.

Several experts said that it should be expressly stated that it was only *general* problems concerning the application of the Protocol that would be studied, so that no specific concrete cases should be discussed. A large number of experts expressed the wish that meetings might be convened by the depositary of the Conventions at the request of the ICRC, as the latter followed closely the application of the Geneva Conventions.

While some experts would have wished this article to state expressly that one of the purposes of such meetings would be to consider measures for the application of the Conventions and the Protocol, the majority thought it was understood that the procedure to be followed would be decided upon from case to case.

There was still the question whether it would be desirable to associate with the Contracting Parties all those who are entitled, in accordance with Articles 80 and 82, to become Parties to the Protocol, that is all the Parties to the Conventions, in the study of the problems in question. This would have the advantage of encouraging the widest possible participation in the Protocol, but, as several experts pointed out, it would raise complex problems of procedure.

## PART II

## WOUNDED, SICK AND SHIPWRECKED PERSONS

The purpose of this Part is to supplement the provisions of the Conventions relating to respect for and protection of the wounded, the sick, the shipwrecked, medical units, means of medical transport and medical personnel. These provisions have been developed and extended to civilians.

### SECTION I

### GENERAL PROTECTION

**Article 8. — Definitions**

**For the purposes of the present Part:**

*(a)* **" the wounded and the sick " means persons, whether military or civilian, who are in need of medical assistance and care and who refrain from any act of hostility. The term includes *inter alia*: the wounded, the sick, the shipwrecked, the infirm, as well as expectant mothers, maternity cases and new-born babies;**

*(b)* **" shipwrecked persons " means persons, whether military or civilian, who are in peril at sea as a result of the destruction, loss or disablement of the vessel or aircraft in which they were travelling and who refrain from any act of hostility;**

*(c)* **" medical unit " means medical establishments and units, whether military or civilian, especially all installations of a medical nature, such as hospitals, blood transfusion centres and their medical and pharmaceutical stores. Medical units may be fixed or mobile, permanent or temporary. Permanent units are those assigned exclusively and for an indeterminate period to medical purposes. Temporary medical units are those assigned exclusively but for one or more limited periods to medical purposes;**

*(d)* **" medical personnel " means:**

**i. military medical personnel as defined in the First and Second Conventions, including medical transport crews;**

**ii. civilian medical personnel, including members of the crews of means of medical transports, whether permanent or temporary, duly recognized or authorized by the State and engaged exclusively in the operation or administration of medical units and means of medical transport, that is to say personnel assigned to the search for, removal, treatment or transport of the wounded and the sick;**

**iii. the medical personnel of civil defence organizations referred to in Article 54, and the medical personnel of the National Red Cross (Red Crescent, Red Lion and Sun) Societies;**

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

*(f)* **" distinctive signal " means any signalling and identification system for medical units and means of transport as envisaged in Chapter III of the Annex.**

*Ref.*: 1972 Report, vol. I, paras. 1.9 to 1.12.

*Sub-paragraph (a)*

This provision supplements the Conventions (Art. 12 of the First and Second Conventions, Art. 16 of the Fourth Convention) by laying down the conditions under which the wounded and the sick come under the present Part, namely that they must be in need of medical assistance and care, and refrain from any act of hostility.

The definition includes a list of persons entitled to the same protection as the wounded and the sick, and hence counted as such. This list would avoid tedious enumeration or reference to another article, in all instances where these protected persons are referred to.

It will be noted that the definition does not contain the words " non-combatants or combatants rendered *hors de combat* ", since it covers all categories of wounded and sick provided they fulfil the two above-mentioned conditions.

*Sub-paragraph (b)*

This provision also supplements the Conventions by defining " shipwrecked ". Shipwrecked persons are on the same footing as wounded and sick persons. This provision thus supplements subparagraph (*a*).

*Sub-paragraph (c)*

The First Convention (see first paragraph of Art. 19) contains the unduly long and vague term of " fixed establishments and mobile medical units ", but does not define it. The term " medical unit ", by which it is replaced, is broader and therefore to be preferred. The proposed definition shows that the medical and pharmaceutical stores of mobile medical units are protected in the same way as those of fixed establishments, which was not evident from the draft prepared by the experts. In addition, it seemed advisable to include in this definition the distinctions existing between fixed and mobile—whether permanent or temporary—medical units.

*Sub-paragraph (d)*

Since it is one of the aims of the present Part to afford civilian medical personnel the same protection as military medical personnel, it appeared useful to refer in this provision to the different categories of medical personnel mentioned in the Conventions and in the present draft Protocol.

*Sub-paragraph (d) (ii)*

This definition makes a distinction between permanent and temporary civilian medical personnel and mentions the need for that personnel to be recognized or authorized by the State. When military medical personnel were first granted treaty protection, they formed a limited and strictly hierarchical class of persons subject to military discipline. In 1949, the plenipotentiaries hesitated to extend treaty protection and the use of the distinctive emblem to all civilian medical personnel, as these categories were often ill-defined and not regularly registered or subject to proper supervision. It was therefore proposed to extend protection only to civilian medical personnel under State supervision (see Art. 15). The proposed definition does not enumerate the categories of civilian medical personnel. Such a list would not be of the same value in the different countries, as the skills, functions and very existence of those categories vary from one State to another. It will therefore be for each State to draw up a list of the persons whom it recognizes as being entitled to the special protection provided under this Part, as members of the medical and para-medical profession.

Moreover, it seemed advisable to specify that medical personnel included the crews of means of medical transport.

*Sub-paragraph (d) (iii)*

In the case of the medical personnel of National Red Cross Societies, a distinction should be made between Red Cross personnel assigned to army medical services, who are protected under Articles 24 and 26 of the First Convention, and personnel assigned to the civilian medical service protected by the draft Protocol so long as it fulfils the conditions laid down in sub-paragraph (*d*) (ii) (see Art. 24 of the First Convention).

*Sub-paragraph (f)*

In accordance with the wish of the experts, the draft Protocol is supplemented by *Regulations concerning the Identification and Marking of Medical Personnel, Units and Means of Transport, and Civil Defence Personnel, Equipment and Means of Transport*, hereinafter referred to as " Annex ", Chapter III of which contains all provisions relating to the use of distinctive signals.

**Article 9. — Field of application**

**1. The present Part shall apply, without distinction on grounds of nationality, to all the wounded, the sick and the shipwrecked of the armed forces and of the civilian population on the territory of the Parties to the conflict and to all military and civilian medical personnel, units and means of transport on such territory.**

**2. The provisions of Article 27 of the First Convention apply to permanent medical units and means of transport and their medical personnel lent for humanitarian purposes to a Party to a conflict by a State which is not a Party to the conflict or by a society recognized by such a State.**

**3. The provisions of Article 27 of the First Convention also apply to medical units and means of transport and their medical personnel lent for humanitarian purposes by an organization of an international character, provided the said organization fulfils the requirements imposed on the government of a State which is not a party to the conflict under the terms of the aforesaid Article 27.**

*Ref.*: 1972 Report, vol. I, para. 1.103.

*Paragraph 1*

The term " civilian population " is here used in the broader meaning as given in Article 13 of the Fourth Convention: " ... the whole of the populations of the countries in conflict, without any adverse distinction ... " and in Article 45, the commentary on which should be referred to Articles 13, 14, 15 and 17 however, relate only to civilians or to civilian medical units.

*Paragraphs 2 and 3*

These provisions extend to other bodies the right of recognized Societies of " neutral countries " to lend the assistance of their medical personnel and units, as laid down in Article 27 of the First Convention. That right will henceforth be vested in:

a) States not parties to the conflict;

b) recognized Societies of those States;

c) any international organization which fulfils the obligations stated in the aforementioned Article 27.

Reference should be made to the commentary on Article 19 regarding the term " a State which is not a party to the conflict ".

It will be noted, in the French text, that the term "*formations sanitaires* ", employed in Article 27 of the First Convention, is here replaced by " *unités sanitaires* " as defined in Article 8(*c*).

For the sake of completeness, reference is also made to medical means of transport which, although not specifically included in the aforementioned Article 27, are nevertheless covered by it.

**Article 10. — Protection and care**

**1. The wounded and the sick shall be respected and protected.**

**2. In all circumstances they shall be treated humanely and shall receive with the least possible delay and without any adverse distinction the medical care necessitated by their condition.**

*Ref.*: 1972 Report, vol. I, paras, 1.13 to 1.15.

*Paragraph 1*

It appeared necessary to restate the principle of respect for and protection of the wounded, the sick and the shipwrecked already embodied in the Conventions (Art. 12 of the First and Second Conventions, and in the first paragraph of Art. 16 of the Fourth Convention), on the one hand to indicate that this principle is the dominant factor justifying the principle of the protection of medical personnel and, on the other hand, to respect the inner logic and balanced layout of the present draft Protocol. The principle of immunity for the wounded and the sick underlies all other obligations laid down in this Part. This provision applies to all the wounded and the sick as defined in Article 8 (*a*). The duty of respect and protection applies not lonly to members of the armed forces but also to the civilian population (Art. 17 (1)).

*Paragraph 2*

This provision is based on the second paragraph of Article 12 of the First and Second Conventions and makes their principle applicable to wounded or sick civilians. To the duty of respect and protection for the wounded and the sick is added the obligation to take effective measures to ensure that they receive the medical care required by their state of health. It was not thought necessary to repeat the enumeration contained in Article 12 of the First and Second Conventions, which was understood to be implicit in the present provision.

**Article 11. — Protection of persons**

**1. All unjustified acts or omissions, harmful to the health or to the physical or mental well-being of the persons protected by the Conventions or by the present Protocol pursuant to Article 2 (*c*), and especially of persons who have fallen into the hands of the adverse Party, or who are interned, detained or deprived of liberty as a result of hostilities, shall be prohibited. This prohibition applies even if the individual in question gives his consent to such act.**

**2. It accordingly is prohibited to carry out on such persons physical mutilations or medical or scientific experiments, including grafts and organ transplants, which are not justified by the medical, dental or hospital treatment of the persons concerned and are not in their interest.**

*Ref.*: 1972 Report, vol. I, paras. 1.16 to 1.19.

This article supplements and specifies the relevant provisions of the Conventions, *inter alia* the prohibition of unlawful medical experiments (see Art. 12, second paragraph, of the First and Second Conventions; Art. 13, first paragraph, of the Third Convention, and Art. 32 of the Fourth Convention). In view of the scope of the present provision, it was considered necessary to extend its application to all persons protected in the meaning of Article 2 (*c*).[1]

*Paragraph 1*

As the experts did not reach agreement regarding the definition of prohibited " acts or omissions ", they instructed the ICRC itself to make a choice among three options:

a) not to define " acts or omissions ";
b) to use the term " unlawful acts or omissions ";
c) to use the term " unjustified acts or omissions ".

The first option was rejected since there were acts, such as surgical operations, which, while they endangered the physical or mental well-being of persons, were medically warranted.

As regards the second option, the prohibition of " unlawful " acts was redundant. It seemed advisable to use the term " unjustified " as being the more appropriate.

Moreover, in the French text the experts had used the term " *bien-être physique et mental* ", equivalent to " physical or mental well-being " in English; it seemed more appropriate to use the term " *intégrité physique ou mentale* ", which is correct and to be preferred from a linguistic standpoint. The protection which the present article confers on the physical or mental well-being of protected persons is regarded as an inalienable right. The fact that they might consent owing to fatigue, ignorance, the attractive prospect of improving their lot, or even because their mind might be unbalanced, would in no way release the Parties to the conflict from the obligation to refrain from any of the acts referred to in the present article.

*Paragraph 2*

The reference to " grafts and organ transplants " is new as compared with the aforementioned provisions of the Conventions. The advances of medical technique now allow surgery which was not possible in 1949. The aim of this provision is to protect the wounded and the sick from fresh dangers produced by the development of science and technology.

**Article 12. — Medical units**

**1. Permanent medical units shall at all times be respected and protected; they shall never be the object of attack. Temporary medical units shall be respected and protected during their assignment to medical duties.**

**2. In order to benefit from the special protection provided for in paragraph 1 above, civilian medical units shall either belong to the State or be recognized or authorized by the competent authority thereof.**

**3. The Parties to the conflict are urged to make known to each other the location of fixed medical units.**

**4. The Parties to the conflict shall ensure that medical units, insofar as is possible, are situated in such a manner that attacks against military objectives cannot imperil their safety. Under no circumstances shall they be used in an attempt to protect military objectives from attack.**

*Ref.*: 1972 Report, vol. I, paras. 1.20 to 1.27.

[1] See Art. 65 and the commentary thereon.

Article 19 of the First Convention protects " fixed establishments and mobile medical units " of the military medical service. On the other hand, Article 18 of the Fourth Convention protects " civilian hospital " alone. The purpose of the present provision is therefore to extend that protection to all civilian installations of a medical nature, whether fixed or mobile. In the case of an armed conflict, most States have arranged for supervision, exercised by themselves, of civilian medical services and even for the merging of civilian and military medical services. Civilian medical services must therefore be afforded the same protection as military medical services.

To simplify the articles of the present Part, all provisions relating to the identification of medical units have been concentrated in Article 18, *Identification*, the provisions of which apply to military or civilian medical units, means of medical transport and medical personnel.

*Paragraph 1*

It must be pointed out that temporary medical units are entitled to protection so long as they answer the definition given in Article 8 (*c*). They are entitled to that protection even if no wounded or sick person has as yet been admitted by them or if, at a given time, they no longer hold any such person. What is important is that they are used solely for medical purposes throughout the period of their assignment.

*Paragraph 2*

The extending of protection to civilian medical units, which can henceforth use the protective sign, involves some supervision by the State to which they belong. That supervision will be enforced if the units belong to the State or are authorized or recognized by the competent authority thereof. Military medical units are a part of the army and hence subject to military discipline and hierarchy.

*Paragraph 3*

This provision is intended to strengthen the security of fixed medical units belonging to the Parties to the conflict.

*Paragraph 4*

The present provision extends the application of the second paragraph of Article 19 of the First Convention to civilian medical units. The last sentence, however, is new (see Art. 46 (5) and the fifth paragraph of Art. 18 of the Fourth Convention).

**Article 13. — Discontinuance of protection of civilian medical units**

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

**2. The following shall not be considered as harmful acts:**

**(*a*) the fact that members of the armed forces are receiving medical treatment in such medical units;**

**(*b*) the presence in the medical unit of small arms and ammunition which have been taken from the sick and the wounded and not yet handed over to the competent services;**

**(*c*) the fact that the medical unit is guarded by an armed picket, sentries, or escort responsible for keeping order.**

*Ref.*: 1972 Report, vol. I, para. 1.28.

The present article is based on Article 21 of the First Convention, with a few changes owing to the fact that civilian medical units are involved. It fixes the limits of the medical units' entitlement to respect and protection.

*Paragraph 2*

In view of the conditions at present surrounding armed conflicts, military and civilian wounded are often mixed and therefore collected by the same medical units. This should not be a reason to deprive civilian medical units of protection.

Sub-paragraph (*c*) was added by the ICRC on the advice of some of the experts. Indeed, it is hardly realistic to leave a civilian medical unit in a danger zone without any means of defence whatsoever against possible attack by uncontrolled individuals or criminals. Civilian medical units must therefore be guarded by armed sentries. Some experts, in fact, were of the opinion that, in such circumstances, civilian medical personnel should themselves be provided with defensive weapons in the same way as military medical personnel, in the interest of the wounded and the sick.

**Article 14. — Requisition**

**1. An Occupying Power may requisition civilian medical units, their equipment, their material and the services of their personnel only temporarily and in case of urgent necessity, and solely for the purpose of providing medical care for sick and wounded members of the armed forces and of the occupation administration.**

**2. The Occupying Power shall ensure that arrangements are made for the care and treatment of the civilian patients of these units and shall take into account the civilian population's need for medical treatment.**

*Ref.*: 1972 Report, vol. I, paras. 1.32 to 1.36.

This article extends the application of Article 57 of the Fourth Convention regarding the requisitioning of civilian hospitals to civilian medical units.

**Article 15. — Civilian medical and religious personnel**

**1. Civilian medical personnel shall be respected and protected.**

**2. Temporary civilian medical personnel shall be respected and protected for the duration of their medical mission.**

**3. All possible help shall be afforded medical personnel in the combat zone.**

**4. The Occupying Power shall afford civilian medical personnel in the occupied territories every assistance to enable such personnel to perform their medical functions to the best of their ability. The Occupying Power may not require that in the performance of those functions such personnel give priority to the treatment of nationals of that Power. Under no circumstances shall such personnel be compelled to carry out tasks unrelated to their mission.**

**5. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the Party to the conflict may judge necessary.**

**6. Chaplains and other persons performing similar functions who are permanently attached to civilian medical units shall be respected and protected. The provisions of the Conventions and of the present Protocol concerning the protection and identification of permanent medical personnel shall apply equally to such persons.**

*Ref.*: 1972 Report, vol. I, paras. 1.37 to 1.45.

*Paragraph 1*

The present provision extends to all civilian medical personnel as defined in Article 8 (*d*), and also to civilian religious personnel under State supervision, the respect and protection which the Conventions lay down for military medical and religious personnel and for the medical personnel of civilian hospitals (see Art. 24 to 26 of the First Convention and Art. 20 of the Fourth Convention). An enquiry made by the ICRC revealed the need for such a provision since most of the States replied that, in case of armed conflict, they would provide for the merging or at least co-ordination of military and civilian medical services.[2] Moreover, according to the majority of those States, in circumstances such as these, civilian medical personnel would be organized or supervised by the State. Obviously civilian medical personnel would be entitled to the respect and protection provided for in this article only so long as they did not commit any hostile acts during the period of their assignment.

*Paragraph 2*

By duration of the medical mission is meant the period during which medical personnel are assigned to medical duties, even if for a time they do not carry out those functions.

*Paragraphs 3, 4 and 5*

Here a distinction is made between the combat zone in which, bearing in mind the special situation prevailing in that zone, the Parties to the conflict undertake to afford civilian medical personnel all *possible* help, and occupied territories where, the military situation being normally calm, the Parties to the conflict are obliged to afford that personnel all *necessary* assistance. Assistance may take different forms: providing premises, means of transport, medicaments, or an escort. Moreover, medical personnel should be able to move freely wherever their presence is necessary.

*Paragraph 6*

The words " other persons performing similar functions " are meant to extend the term " chaplain ". The protection afforded chaplains shall therefore be extended to all persons performing the same functions, whatever may be the religion to which they belong and by whatever term they are described. Like civilian medical personnel, civilian religious personnel will be entitled to such protection, so long as they are under State supervision.

**Article 16. — General protection of medical duties**

**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. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to rules of professional ethics or to abstain from acts required by such rules.**

**3. No person engaged in medical activities may be compelled to give to any authority of the adverse Party information concerning the sick and the wounded under his care should such information be likely to prove harmful to the persons concerned or to their families. Compulsory medical regulations for the notification of communicable diseases shall however be respected.**

[2] See ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/7b, p. 27.

*Ref.*: 1972 Report, vol. I, paras. 1.46 to 1.56.

*Paragraphs 1 and 2*

This rule is the corollary of the principle whereby the wounded and the sick shall, without distinction as to nationality, be entitled to medical treatment (see Art. 10). It concerns any person exercising a medical activity, whether doctor, dentist, nurse or stretcher-bearer; whether a member of the medical personnel fulfilling the conditions laid down in Article 8 (*d*) or a person exercising such an activity, although not attached to a medical unit or not under State supervision.

Paragraphs 1 and 2 of the present article relate to professional ethics, which are generally defined by the medical profession in each State. At international level, the World Medical Association adopted a code of ethics and the " Rules of Medical Ethics in Wartime " (see ICRC Circular No. 425, 6 February 1959).

*Paragraph 2*

Under this provision, the Parties to the conflict cannot oblige persons exercising a medical activity to conduct pseudo-medical research or take part in the manufacture of weapons or other means of destruction. Nor can those persons be compelled to administer drugs to prisoners for the purpose of eliciting information.

*Paragraph 3*

This is a new paragraph. It attempts to solve a delicate problem, namely non-denunciation, during a period of armed conflict, by medical personnel of the wounded and the sick in their care.

This problem mainly stemmed from experiments carried out during the second world war, when occupying authorities ordered inhabitants including doctors, under threat of the most stringent sanctions, to denounce the presence of any presumed enemy.

The question was discussed at the 1949 Diplomatic Conference, which finally adopted no provisions in the matter, and since that time it has been carefully studied by medical circles, particularly at meetings of the International Law Association. Those medical circles advocated non-denunciation, on the grounds that the wounded and the sick would otherwise not take the risk of going to seek medical attention or of calling a doctor.

They also considered that medical assistance never implied interference in a conflict, and that to make direct or indirect use of medical personnel for a military operation, capture for instance, which was a matter for combatant forces alone, would be in contradiction with the neutrality of medical personnel.

The solution adopted here gives more latitude than that advocated by the medical profession; it allows the medical personnel discretion.

This article does not, of course, refer to the wounded and the sick who have fallen into the power of the adverse authority or who are in official military or civilian establishments for, in such cases, the question of denunciation does not arise.

In this context, it should be pointed out that the term " adverse Party " used in this paragraph refers to the side opposed to that to which the wounded and the sick belong.

The present provision was first meant to apply to occupied territories in which civilian doctors might be called upon to care for resistant fellow-countrymen, of resistance movements soldiers on an assignment in enemy-occupied territory, " *collaborateurs* ", deserters, and so forth. Actually this provision will be most frequently applied in occupied territory. The Conference of Government Experts nevertheless decided that the next should be of a more general nature. It also holds good for non-occupied territory. While the initial proposal mentioned only doctors, it now covers all persons engaged in medical activities.

Allowance is of course made for the dictates of hygiene in the general interest. When these apply, the authorities may, and possibly must, make notification of communicable diseases an obligation. In the case of occupied territories, Article 56 of the Fourth Convention shall be borne in mind, under which the Occupying Power is responsible for public health and hygiene.

**Article 17. — Role of the civilian population**

**1. The civilian population shall respect the wounded and the sick, even if they belong to the adverse Party, and shall commit no act of violence against them.**

**2. Relief societies and the civilian population shall be permitted, even in invaded or occupied areas, spontaneously to offer shelter, care and assistance to such wounded and such sick persons.**

**3. No one shall be molested, prosecuted or convicted for having given shelter, care or assistance to sick or wounded persons, even if they belong to the adverse Party.**

**4. The Parties to the conflict may appeal to the charity of the civilian population or of relief societies to offer, under their supervision, voluntary shelter, care and assistance to the sick and the wounded and shall, in such case, grant protection and the necessary facilities to those who respond to their appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities.**

**5. Parties to the conflict may appeal to the charity of commanders of civilian ships and craft to take aboard and care for the wounded, the sick and the shipwrecked, and to collect the dead. Ships and craft responding to such appeals and those spontaneously giving shelter to such casualties shall be granted special protection and facilities for the discharge of their mission of assistance.**

*Ref.*: 1972 Report, vol. I, paras. 1.57 to 1.59.

The present article extends the provisions of Article 18 of the First Convention to wounded and sick civilians.

*Paragraph 1*

This provision lays down that the principle of immunity for the wounded and the sick, as stated in Article 10 (1), must be respected not only by members of the armed forces, but also by the civilian population.

*Paragraph 2*

To allow application of the principle mentioned in paragraph 1, relief societies and the civilian population shall be permitted to provide care for the wounded and the sick. The relief societies referred to in this paragraph are defined in Article 26 of the First Convention: these are mainly National Red Cross Societies and " other Voluntary Aid Societies, duly recognized and authorized by their Governments ". Civilians may, of course, work not only under the supervision of the aforementioned relief societies, but also under that of the civilian and military medical services, in order to provide the best possible care for the wounded and the sick.

*Paragraph 3*

This rule is the corollary of that laid down in the preceding paragraph. Assistance by the civilian population may sometimes take place apart from the action which medical services take on behalf of victims. Such humanitarian action can never give rise to prosecution against the authors.

*Paragraph 4*

This provision lays down that the military authority may appeal to the charity not only of the civilian population but also of relief societies. This was not stated in the Conventions (e.g. first paragraph of Art. 18 of the First Convention).

The absence of the necessary protection and facilities referred to here would render the task of the civilian population or relief societies difficult, if not impossible. The appraisal of that necessity is naturally left, in the first place, to the military authority; yet the civilian population and relief societies should be able to state their needs, which should as far as possible be considered. Such protection and facilities will mainly depend on the circumstances. This protection, however, does not entail the right to affix the red cross emblem on a house sheltering a wounded person—unless it has become a temporary medical unit in the meaning of Article 8 (*c*)— or on an armlet worn by the civilian rendering help—unless that person has become a member of the temporary civilian medical personnel in the meaning of Article 8 (*d*) (iii).

*Paragraph 5*

The present provision extends to all civilian vessels and craft—whether they belong to the Parties to the conflict or to a State not party to the conflict—the provisions of Article 21 of the Second Convention, which refers only to " neutral merchant vessels, yachts or other craft ". Moreover, it also extends the provisions of the aforementioned Article 21 to all civilian wounded, sick or shipwrecked persons as well as to dead civilians.

The question even arises, although for military reasons this may seem difficult, whether the warships of the Parties to the conflict or those belonging to States not party to the conflict might in such circumstances, benefit from the special protection and the facilities referred to here. Indeed, only too often have warships refrained from coming to the aid of the shipwrecked because of the risk of attack. In the matter of assisting the wounded, the sick or the shipwrecked, who moreover are civilians, any military or civilian vessel or other craft should be able to come to their aid and enjoy such special protection and facilities.

Special protection and facilities, which would depend essentially on circumstances, would consist in providing the ships and craft with a safe conduct or special means of identification that would enable them to pursue their mission of assistance. In no case would that protection entail the right to use the red cross emblem.

**Article 18. — Identification**

**1. Each Party to the conflict shall endeavour to ensure the identification of medical personnel, units and means of transport.**

**2. The High Contracting Parties shall provide civilian medical personnel, units and permanent means of transport with a document attesting to their medical nature.**

**3. With the assent of the competent authority, medical personnel, units and means of transport shall be marked by the distinctive emblem.**

**4. Besides the distinctive emblem, the Parties to the conflict may authorize the use of distinctive signals to signalize medical units and means of transport. In case of an emergency, temporary means of medical transport may be signalized by such signals without being marked with the distinctive emblem.**

**5. The application of the provisions of paragraphs 2 to 4 of the present article is governed by Chapters I to III of the Annex. The signals mentioned in Chapter III of this Annex shall be used solely to identify medical units and means of transport and shall in no case be used for purposes other than those envisaged by the present Protocol.**

**6. The provisions of the Conventions relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.**

*Ref.*: 1972 Report, vol. I, paras. 1.25, 1.26 and 1.45.

To avoid repetition, it seemed advisable to concentrate all provisions relating to the marking and identification of medical units, means of medical transport and medical personnel in one single article, which incidentally would connect this Part and the Annex.

*Paragraph 2*

The Conventions do not require a document of *military* medical units or means of medical transport, including medical aircraft. Such a document is required only in the case of members of military medical and religious personnel (see Arts. 40 and 41 of the First Convention, Art. 42 of the Second Convention). It therefore seemed desirable to maintain that principle, contrary to the opinion of the experts. The fact is that military means of medical transport are, as a rule, very effectively supervised by the Parties to the conflict, which is not always the case with civilian means of medical transport, in regard to which it is better to avoid any misuse by laying down that they shall be provided with a document for the purpose of identification. Only *temporary* civilian means of medical transport are exempted from this requirement. To oblige these means of transport to carry such a document would, in fact, amount to preventing them from taking improvised action in emergencies.

*Paragraph 3*

The present provision entitles civilian medical personnel, units and means of medical transport to bear the protective emblem, under the supervision of the competent Authority.

*Paragraph 4*

The distinctive signals the use of which is provided for here are described in detail in Chapter III of the Annex. These distinctive signals have the same legal value as the distinctive emblem. They will allow medical units and means of medical transport to be easily identified as such, at a distance, at night or where there is poor visibility.

*Paragraphs 5 and 6*

These provisions should be read in relation to Articles 35, 36 and 75.

**Article 19. — States not parties to a conflict**

**States not parties to a conflict shall by analogy apply the provisions of the present Protocol to the wounded, the sick and the shipwrecked and to civilian medical and religious personnel belonging to the Parties to the conflict who may be received or interned on their territory and to any dead collected.**

*Ref.*: 1972 Report, vol. I, paras. 1.64 and 1.65.

The present article extends to civilian wounded, sick and shipwrecked and to civilian medical and religious personnel the provisions of the Conventions that relate to the application of such instruments by neutral Powers (Art. 4 of the First Convention; Art. 5 of the Second Convention). The experts preferred the term " State not party to a conflict " as being broader than " neutral Power ".

**Article 20. — Prohibition of reprisals**

**Measures of reprisals against the wounded, the sick and the shipwrecked, as well as against the medical personnel, units or means of transport mentioned in this Part, are prohibited.**

*Ref.*: 1972 Report, vol. I, paras. 4.134 to 4.142.

As indicated in the introduction to the commentary on Part V, the ICRC refrained from introducing into the present draft Protocol a general provision on the prohibition of reprisals against persons and objects protected by the Conventions and the Protocol in the meaning of Article 2 (*c*). On the other hand, such a prohibition is contained in the Parts covering new categories of protected persons and objects. While it reaffirms a provision of the First and Second Conventions regarding the prohibition of reprisals against protected persons and objects, the present article extends that protection to persons and objects protected by the present Part.

## SECTION II

## MEDICAL TRANSPORTS

### Chapter I

### JOINT PROVISIONS

The experts had drawn up an article relating to civilian medical transports, on land or on waterways, contained in the previous draft [3] and on a Chapter relating to military and civilian medical aircraft. Bearing in mind the wish expressed by several experts that the provisions of the Second Convention on maritime medical transports should also be developed, the ICRC completed them to a certain extent. [4] It therefore appeared preferable to establish the present Section containing all the new provisions relating to military or civilian means of medical transport.

**Article 21. — Definitions**

**For the purposes of this Part:**

(*a*) **" medical transport " means the transport by land, sea or air of the wounded, the sick and the shipwrecked and of the medical personnel and equipment protected by the Conventions and the present Protocol;**

(*b*) **" means of medical transport " means any means of transport, be it military or civilian, permanent or temporary, assigned exclusively to medical transport, under the control of a competent authority of a Party to the conflict. Permanent means of medical transport are those which are assigned for an indeterminate period to medical transport. Temporary means of medical transport are those which are assigned to one or more medical transport operations and shall be considered as such throughout the said assignment;**

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[3] ICRC, draft Protocol I, Part II, Section I, Art. 16.

[4] See ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, paras. 31, 32 and 90, and 1972 Report, vol. I, paras. 1.11 and 5.48.

(*c*) **" medical ships and craft " means any means of medical transport by sea, including hospital ships, lifeboats of all kinds and small medical service craft, whether civilian or military;**

(*d*) **" medical vehicle " means any means of medical transport by land;**

(*e*) **" medical aircraft " means any means of medical transport by air .**

*Ref.*: 1972 Report, vol. I, paras. 1.12 and 1.76.

*Sub-paragraph (a)*

In the draft prepared by the experts, the present definition appeared among the general provisions of the present Part and did not apply to medical aircraft.

The term " medical transport " takes the place of " medical air mission " which had been used by the experts in the definition of " medical aircraft " and which was considered too broad.

*Sub-paragraph (b)*

The term " means of transport " is, for the needs of this Section, distinguished from " transport ". Permanent means of medical transport should be assigned to medical transports for an indeterminate period, which means that the assignment must be complete and prolonged, and that during that period it will not be possible to change the assignment of those means of transport. As a rule, such an assignment covers the duration of the conflict. In this context, it will be recalled that pursuant to Article 33 of the Second Convention: " Merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities ". Temporary means of medical transport are entitled to protection so long as they fulfil the conditions laid down in the first sentence of the present definition, even when stationary or empty.

*Sub-paragraph (c)*

The term " ships and craft " covers any means of medical transport able to float and move on the sea. This provision is important inasmuch as it makes it possible to extend the special protection provided in the present draft Protocol to all " medical ships and craft " not covered by the Second Convention. Thus even warship or merchant vessel lifeboats will henceforth benefit from that protection by virtue of a specific provision, provided, however, that they fulfil the conditions laid down in sub-paragraph (*b*) of the present article. They cannot therefore be entitled to respect and protection unless they are sailed separately from the warships or merchant vessels to which they belong.

*Sub-paragraph (e)*

The term " aircraft " comprises planes, helicopters, seaplanes, dirigibles and any other flying machine, present or future, The main thing is that the machine should be able to move in the air and carry persons or material. In this regard, it will be recalled that ICAO provided a definition of aircraft in the Annex to the 1944 Chicago Convention. [5]

**Article 22. — Search for wounded**

**Subject to Article 29, means of medical transport may be used to search for and evacuate the wounded, the sick and the shipwrecked.**

*Ref.*: 1972 Report, vol. I, paras. 1.74 and 1.86.

[5] See Annex to the *Chicago Convention on International Civil Aviation* of 7 December 1944, entitled " Procedures for Air Navigation Services-Rules of the Air and Air Traffic Services ", (Doc. 4444-RAC/501/10).

There are two concepts in this article, namely search and evacuation. " Search " entails combing a land or sea area in order to find the wounded, the sick and the shipwrecked that heed to be rescued. " Evacuation ", on the other hand, takes place when medical personnel or combatants inform a medical unit of the existence, in a certain place, of a casualty post containing wounded or sick and when a means of medical transport proceeds as a result to that place in order to evacuate them. In general, means of medical transport may be used simultaneously for search and evacuation. In some cases, however, search is subject to adverse Party's agreement. For instance, for reasons of military security, a medical aircraft may not, without such agreement, search for wounded or sick persons in land or sea areas where enemy armed forces are in contact or in areas controlled by enemy forces (see Arts. 27, 28 and 29).

**Article 23. — Application**

**1. Subject to paragraph 4, military and civilian medical ships and craft on sea routes are protected by the Second Geneva Convention and by the relevant provisions of the present Protocol.**

**2. Subject to paragraph 4, military and civilian medical ships and craft on inland waterways are protected by the First and Fourth Geneva Conventions and by the relevant provisions of the present Protocol.**

**3. Amphibious means of medical transport are subject to the provisions relating to their use at a given time.**

**4. Articles 22, 24 and 25 of the Second Geneva Convention apply exclusively to civilian and military hospital ships.**

*Paragraph 1*

This provision makes it unnecessary to reiterate in the present draft Protocol the articles of the Second Convention applicable to medical ships and craft as defined in Article 21 (*c*) (see Arts. 31, 32, 33 and 35 of the Second Convention). It does, however, specify that the provisions of the Second Convention on hospital ships alone do not apply to them (see commentary on paragraph 4 below).

*Paragraph 2*

This provision supplements the First and Second Conventions, of which the *ratione loci* application is not defined with sufficient precision. The applicability of the First or the Second Convention to means of medical transport on large lakes is uncertain, although the title and several provisions fo the Second Convention are clear on this subject (arts. 12 and 13 of the Second Convention).

*Paragraph 3*

This provision takes into account present and future means of medical transport by land, air or water (seaplanes, helicopters, etc.). Its purpose is to make clear what rules are applicable to such means of medical transport. Some experts suggested that the provisions applying to amphibious vehicles should be those relating to the vehicle's *main use*, on the grounds that in general such means of transport are designed for travel mainly in one of these elements. Such a proposal seemed fraught with danger. It might well be that future amphibians will be designed for travel equally well in various elements.

*Paragraph 4*

The Conventions give hospital ships special status: they and their religious, medical and hospital personnel are immune from capture (see Arts. 22 and 36 of the Second Conventions). On the other hand, their right to immunity is dependent on notification of their characteristics

by the Party to the conflict to which they belong to all other Parties to the conflict ten days before their entry into service (see Arts. 22, 24 and 25 of the Second Convention). Such conditions, justifiable for hospital ship, would be too much to ask in respect of other medical ships and craft. That is why this paragraph states that the provisons of the Second Convention relative to hospital ships apply solely to hospital ships.

As, according to Article 27 of the Second Convention, coastal rescue craft are entitled to almost the same protection as hospital ships, it would have been preferable to specify that the above mentioned Article 27 is applicable solely to coastal rescue craft.

**Article 24. — Protection**

**1. Means of medical transport, whether alone or in convoy, shall be respected and protected.**

**2. Articles 12 and 13 apply, by analogy, to means of medical transport, subject, in the case of medical aircraft, to Articles 27, 28, 29 and 32.**

**3. The following acts shall not be considered as harmful:**

**(*a*) the carrying on board military or civilian means of medical transport of equipment to be used solely for such transmissions as may be necessary to movement or navigation;**

**(*b*) the carrying on board military means of medical transport of armed military medical personnel who use such arms for their own protection and for that of the wounded and the sick being conveyed.**

*Ref.*: 1972 Report, vol. I, paras. 1.29 to 1.31.

*Paragraph 1*

The purpose of this provision is to issue a reminder of the general principle of respect and protection for means of medical transport and to supplement the Fourth Convention, which protects civilian means of medical transport on land only in convoy (see Art. 21 of the Fourth Convention), whereas in fact they should be protected even when proceeding alone. Some experts considered that convoys of means of medical transport could claim respect and protection only if the whole convoy were composed of such means of medical transport. The ICRC did not share that opinion, for it undermined the principle that a mean of medical transport complying with the Conventions and the Protocol should be respected and protected. Obviously, its proximity to military objectives jeopardizes its chances of receiving that respect and protection.

*Paragraph 2*

The present paragraph lays down the conditions for the protection due to means of medical transport. In order to avoid repetition, it refers to articles relating to medical units, thereby implying that means of medical transport are entitled to respect and protection even if they do not belong to a medical unit. This solution was adopted by the ICRC to take into account the different systems to which States resort or will resort for the organization of their medical services. Moreover that is the solution enshrined in the Conventions (see Art. 35 of the First Convention). However, and this is an essential condition, such means of transport must be under the control of a competent authority (see Art. 21 (*b*)).

This provision is subject to Articles 27, 28, 29 and 32 relating to medical air transport, for in certain circumstances such means of transport can be effectively protected only under the conditions described further.

Some experts wished to have the following article inserted in the Chapter on " Medical Air Transport ".

" *Article... — Protection of Medical Aircraft*

1. Subject to the conditions provided in this article and Articles 27, 28 and 32, medical aircraft shall benefit from the protection provided in Article 24 of the present Protocol.
2. The Parties to a conflict are prohibited from using their medical aircraft in order to acquire any military advantage over another Party to the conflict. The presence of medical aircraft shall not be so used as to render military objectives immune from attack.
3. Medical aircraft shall not carry any equipment for the collection of intelligence data, nor shall they carry intelligence personnel, except those who are wounded and sick. They are prohibited from carrying persons or equipment not included within the definition of medical transport.
4. Medical aircraft shall not carry any armament other than small arms and ammunition belonging to wounded and sick persons and not yet handed over to the proper authorities, and such small arms as may be necessary to enable the medical personnel to defend the wounded and sick persons. "

As the great majority of these conditions are already contained in the present article and in Article 29, the ICRC did not deem it expedient to repeat them in Chapter II entitled *medical Air Transport*. Paragraph 1 of the above draft article is included in paragraph 2 of the present article.

The acts mentioned in paragraphs 2, 3 and 4 of the aforesaid draft article are harmful acts, within the meaning of Article 13. The exceptions provided in paragraph 4 of the draft article are mentioned in Article 13 (2) and in paragraph 3 of the present article.

The prohibition on the transport of equipment for the gathering of intelligence data is contained in Article 29.

*Paragraph 3*

The present provision supplements paragraph 2, which provides that Article 13 shall apply to means of medical transport. It adds, however, two acts, which are not considered as harmful, to those mentioned in Article 13 (2).

*Sub-paragraph (a)*

Obviously belligerents must have every guarantee that a means of medical transport will not be used for intelligence purposes, which would be a serious harmful act. But air and sea means of transport cannot operate without " equipment to be used solely for such transmissions as may be necessary to movement or navigation ". It was therefore necessary to specify here that the use of such equipment was not to be considered as a harmful act.

*Sub-paragraph (b)*

Afticle 13, which refers to civilian medical units, does not provide for the arming of civilian medical personnel. On the other hand, under the First Convention (Article 22 (1)), military medical personnel may be armed; the present clause is a reminder of that posibility.

**Article 25. — Notification**

**1. Parties to the conflict utilizing means of medical transport may give due notification to adverse Parties of characteristics facilitating the identification of these means. Such notification, for which no particular form is specified, shall indicate, *inter alia*, the means of identification to be used. The adverse Party shall acknowledge receipt of that information.**

**2. Notification of hospital ships shall be made in conformity with Article 22 of the Second Convention.**

The purpose of the present provision is to ensure more effective respect and protection for means of medical transport and to enable the adverse Party to communicate in advance to its own troops the characteristics of enemy means of medical transport. There is a similar provision in respect of hospital ships (Art. 22 of the Second Convention). Notification, which is optional, may be made through diplomatic channels in peacetime, through Protecting Powers in wartime, and by any means of communication. It may, moreover, be made by governments or, in the field, by the local appropriate authorities.

## Chapter II

## Medical air transport

By making operations by the medical aircraft of a Party to a conflict conditional upon the enemy's agreement, the Conventions grounded protected medical aircraft (Art. 36 of the First Convention; Art. 39 of the Second Convention; Art. 22 of the Fourth Convention). The 1949 Diplomatic Conference took the view that the distinctive emblem and the colour alone, as provided for in the 1929 Convention, could not protect medical aircraft as airplanes could be fired upon before they came in sight. Aviation has developed enormously, however, since 1949, and its services to the wounded and the sick are of capital importance. In addition, recent developments having made it possible for light aircraft to pick up wounded even from land and sea battle areas for quick removal to medical centres, open up important new prospects.

Expert opinion today is that technology has made it possible to identify medical aircraft by appropriate signalling systems. The ICRC therefore suggests new rules for medical air transport and, in the Regulations annexed to the present draft new signalling and identification systems for use not only by medical aircraft but by other means of medical transport as well.

However, such systems, no matter how sophisticated, cannot entirely guarantee protection for a medical aircraft. In the first place, any technical system is liable to break-down and to jamming by an adversary. Secondly, there are tactical priorities which may delay transmission. Moreover, although a medical aircraft may be entitled to the protection of the Conventions, its presence alone cannot bring fighting to a stop; it is in danger from projectiles which have been released and of which the trajectory crosses the aircraft's flight-path.

Where the danger is especially great for medical aircraft, extra precautions must be taken, so that it was deemed necessary to provide for the compulsory or optional agreement of the adverse Party or for mere notification, as the case might be.

Three sectors are taken into consideration in the draft Protocol:

(a) sectors controlled by national and allied forces, i.e. by friendly forces (Art. 26); no restriction is placed on the movements of medical aircraft belonging to friendly parties but, for greater safety, the adverse party may be given notification of flights;

(b) sectors controlled by enemy forces (Art. 28): prior agreement is essential;

(c) contact zones (Art. 27): this is the intermediate sector where the adversaries are at grips; a compromise is proposed: flight over a contact zone is in principle unrestricted, but an agreement is advisable to ensure the safety of medical aircraft (see below table of regulations for flight over various sectors).

## REGULATIONS FOR FLIGHT OVER VARIOUS SECTORS

<table>
<tr><td colspan="2" rowspan="2">Sector</td><td colspan="2">Conditions for flight by medical aircraft</td></tr>
<tr><td>Right of Party " A "</td><td>Right of Party " B "</td></tr>
<tr><td colspan="2">Sector controlled by forces of Party " A "</td><td>Article 26<br>— unrestricted<br>— option of notifying adversary for greater safety</td><td rowspan="2">Article 28<br>— subject to prior agreement</td></tr>
<tr><td rowspan="3">contact zone</td><td>controlled by Party " A "</td><td rowspan="2">Article 27<br>— unrestricted in principle<br>— agreement between local military authorities recommended to ensure greater safety</td></tr>
<tr><td>control not definite</td><td rowspan="2">Article 27<br>— unrestricted in principle<br>— agreement between local military authorities recommended to ensure greater safety</td></tr>
<tr><td>controlled by Party " B "</td><td rowspan="2">Article 28<br>— subject to prior agreement</td></tr>
<tr><td colspan="2">Sector controlled by forces of Party " B "</td><td>Article 26<br>— unrestricted<br>— option of notifying adversary for greater safety</td></tr>
</table>

It will be noticed that the expression " sector " controlled by a Party to the conflict has been used rather than " territory ", the word territory having a definite meaning in international law. But we are not dealing here with State sovereignty; the factor involved is the domination over a given area, and this during armed conflict may be due exclusively to military supremacy. At sea, too, " sector " is not a legal concept like " high seas " and " territorial waters ". A " sector ", then, is merely an area of land or of water. It may even be an area comprising both land and water. Its size may vary. The question of air space sector is not dealth with in this chapter, as the wounded, the sick and the shipwrecked cannot be elsewhere than on land or sea.

### Article 26. — Sectors controlled by national and allied forces

**Subject to Article 27, the medical aircraft of a Party to the conflict may fly over areas of land or sea controlled by itself or by its allies, without the prior agreement of the adverse Party. However, for greater safety, a Party to the conflict so using its medical aircraft may inform the adverse Party or its allies of such flights.**

The Conventions lay down that the Party to the conflict using a medical aircraft shall notify the adverse Party even if the aircraft flies over a sector under its own control or under that of its allies.

The development of signalling systems would seem to render such a requirement unnecessary. However, the Parties to the conflict naturally have the option of making such notification to ensure greater safety for their aircraft.

Competence for notification is vested in the government using the aircraft or in the local military authority. When that notification is addressed to the adverse Party by the government, it may send it direct to the government of the said Party or through the Protecting Powers or any other qualified body.

The notification may be made in any form: in writing or verbally, by means of radio-communication or any other means of communication. An acknowledgement is not necessary.

**Article 27. — Contact zone**

**1. In any parts of a land or sea contact zone effectively controlled by national or allied troops, and in those areas the control of which is not clearly established, the only guarantee of protection for medical aircraft is an agreement reached between the local military authorities of the Parties to the conflict. No particular form of such agreement is prescribed.**

**2. In the absence of such an agreement, the Parties to the conflict shall respect medical aircraft as soon as they have been identified.**

*Ref.*: 1972 Report, vol. I, paras. 1.80 to 1.85.

The purpose of the present article is to ensure the best possible protection for medical aircraft in the " contact zone " which, as its name indicates, is the sector where opposing land or naval forces are in contact. This was why some of the experts opted for the term " contact zone " rather than " battle area ".

The use of the term " contact zone " in the strict sense ascribed to it here renders it unnecessary to make a distinction between " forward part " and " rear part ", which was essential when using the term " battle area ".

*Paragraph 1*

Nowadays there is no straight continuous frontline formed of combatants or vessels facing each other, either on land or at sea.

On land, the extent of the contact zone depends on the range of the weapons employed and the configuration of the terrain. The first infantry and possibly armoured units may be found there. On either side there may be fortified positions, pockets of resistance and patrol activities. Moreover, there are often portions of terrain where the opposing forces overlap and the position may be confused owing to a series of attacks and ripostes. Such portions of terrain are regarded as parts of the contact zone where control " is not clearly established " in contrast to other parts under the actual control of only one Party to the conflict.

At sea, the extent of the contact zone is also linked to the means of combat engaged. These may be purely maritime means or a combination of the navy and the fleet air arm. In coastal areas, marines may also be used.

When enemy forces are in close proximity and the different parts of the contact zone overlap, medical aircraft everywhere in the zone are liable to be hit. At first sight, therefore, it seems essential to give medical aircraft uniform treatment over the entire contact zone; but this would amount to ignoring the special dangers to which a medical aircraft is exposed when flying over those parts of the contact zone actually under enemy control. Greater protection is essential. That protection is afforded under Article 28 relating to sectors controlled by enemy forces.

Thus Article 27 is confined to those parts of the contact zone under friendly control or where control is not clearly established. The article provides a compromise between freedom of movement (over friendly sectors) and the requirement of prior agreement (over enemy sectors): the right to protection is not questioned, but the immunity of medical aircraft can be guaranteed only where prior agreement exists between the local military authorities.

Although this provision states that the local military authorities would alone be competent to conclude such an agreement, from case to case, obviously the Parties to the conflict may conclude a general agreement which is valid throughout the duration of the conflict, either direct between the governments concerned or through the Protecting Powers. That agreement can be in any form whatsoever. It may be concluded in writing or verbally through radio-communication or some other appropriate means of communication, although local military authorities may be assigned the duty of taking steps essential to the implementation of the agreement.

*Paragraph 2*

To conclude an agreement may not always be possible or desirable. It must therefore be recalled that medical aircraft must be respected when recognized as such in the contact zone.

**Article 28. — Sectors controlled by enemy forces**

**The medical aircraft of a Party to the conflict shall continue to benefit from protection while flying over land or sea areas effectively controlled by an opposing Party or its allies provided that it has previously obtained agreement to such flights from the competent authority of the adverse Party concerned.**

*Ref.*: 1972 Report, vol. I, paras. 1.87 to 1.89.

Under the Conventions, the Parties to the conflict are *forbidden*, unless agreed otherwise, to use medical aircraft for flights over enemy territory (see third paragraph of Art. 36 of the First Convention; third paragraph of Art. 39 of the Second Convention; third paragraph of Art. 22 of the Fourth Convention).

The wording of the present article is more positive: instead of saying that flights over such sectors are *prohibited* "unless agreed otherwise", it says that they are *allowed* provided that previous agreement is obtained. An aircraft flying over those sectors without previously obtaining the agreement of the adverse Party would certainly be at risk. Yet the military authority responsible for the sector over which the flight is made must respect an aircraft whose medical character is recognized. The military authority must take all requisite security measures (summons to land, inspection, etc.) before having recourse to any extreme measures.

The agreement referred to may either be concluded direct between the Governments of the Parties to the conflict concerned, or through the Protecting Powers. It may be concluded in any form whatsoever: in writing or verbally, by means of radio-communication or any other appropriate means of communication.

**Article 29. — Restrictions**

**When carrying out the flights referred to in Articles 27 and 28, medical aircraft may not, unless previously so agreed with the adverse Party or its allies, be used to explore areas of land and sea in order to search for the wounded and the sick. Furthermore, they may carry no photographic equipment.**

*Ref.*: 1972 Report, vol. I, paras. 1.74 and 1.79.

We have seen, with regard to Articles 27 and 28, that the flight of medical aircraft of a Party to the conflict over a " contact zone " or " areas effectively controlled by an opposing Party " gives rise to justified security objections. " Search ", which consists in exploratory flying over a

sea or land sector to find any wounded, sick or shipwrecked persons that need to be rescued, involving as it does flying low over land or water, is therefore prohibited in those areas. Search may be made only with the previous agreement of the Party to the conflict which is in effective control of those same areas. Again for reasons of military security, medical aircraft flying over the aforementioned areas are forbidden to carry cameras or any other intelligence equipment.

Violation of either of these prohibitions will, in addition to the loss of medical aircraft's entitlement to immunity, involve the international responsibility of the Party to the conflict under whose authority the breach was committed.

**Article 30. — Agreements and notifications**

**The agreements and notifications provided for in Articles 26, 27, 28 and 29 shall make specific mention of the number of medical aircraft, their flight altitude and the means of identification that they will be using.**

*Ref.*: 1972 Report, vol. I, para. 1.88.

This article enumetates some points on which agreements and notifications may focus, but the list is not exhaustive.

**Article 31. — Landing**

**1. Medical aircraft flying over land and water under the control of an adverse Party, may be ordered to land, or alight on water, as appropriate, 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 an alighting, on land or water, ordered, forced or resulting from fortuitous circumstances, an aircraft may be subject to inspection to determine whether it is a medical aircraft within the meaning of Article 21. If inspection discloses that it is not a medical aircraft within the meaning of the said article, if it is in violation of the conditions prescribed in Article 24 or if it has flown without prior agreement, it may be seized; the medical personnel and the passengers shall be treated in conformity with the Conventions and this Protocol. Such seized aircraft as are designed to serve as permanent medical aircraft may be used thereafter only as medical aircraft.**

**3. If the inspection discloses that the aircraft is a medical aircraft within the meaning of Article 21 (*e*), the aircraft and its occupants shall be authorized to continue their flight.**

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

*Ref.*: 1972 Report, vol. I, paras. 1.95 to 1.97.

The aim of the present article is to extend to civilian medical aircraft the provisions of the Conventions relating to landing in a sector controlled by the enemy (Art. 36 of the First Convention; Art. 39 of the Second Convention; Art. 22 of the Fourth Convention).

While the Conventions provide for different treatment for medical aircraft according to whether they make an involuntary landing or obey a summons by the enemy, the present article envisages the same consequences for a landing whatever the reason.

*Paragraph 1*

The summons to land is the adversary's safeguard, his real means of defence against deceit.

*Remark*

The first sentence should read thus: " Medical aircraft flying over land and water under the control of an adverse Party, may be ordered by it to land, or alight on water, as appropriate, *in order that it may inspect and verify the character of the aircraft.* "

*Paragraph 2*

Fortuitous circumstances are those which compel a pilot to land owing to damage sustained by the aircraft, poor atmospheric conditions or any other causes beyond the control of the Parties to the conflict. Should the aircraft be seized by the enemy, the military medical material which it carries will become subject to Article 33 of the First Convention, even though the present article does not specify this. Articles 33 and 34 of the same Convention should, by analogy, be appplied to civilian medical material.

*Paragraph 3*

The requirement that the medical aircraft be allowed to continue its flight does not apply to cases in which the conditions laid down in Article 24 have not been respected, or in which the flight is made without previous agreement (see paragraph 2 above).

**Article 32. — 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. However, with such an agreement they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water as appropriate.**

**2. Should a medical aircraft, in the absence of an agreement, be forced because of urgent necessity to fly over or alight on land or water in 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, so far as possible, respect such aircraft.**

**3. In the event of alighting 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.**

**4. The wounded and the sick 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 that State and the Parties to the conflict, be detained by that 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 those persons belong.**

**5. 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.**

*Ref.*: 1972 Report, vol. I, paras. 1.101 and 1.102.

The purpose of the present article is to extend the provisions of the Conventions regarding flights over " neutral countries " (Art. 37 of the First Convention; Art. 40 of the Second Convention) to civilian medical aircraft. The wording of these rules has been simplified.

*Heading*

The experts preferred the term " States not parties to the conflict ", which is broader, to " neutral Powers ", which is to be found in the aforementioned Convention articles.

*Paragraph 1*

In accordance with the Conventions, military medical aircraft may, in principle, fly over the territory of a " neutral Power " only by prior agreement. That privilege, however, is attended by such conditions that they amount to the actual requirement of an agreement.

To favour immunity for medical aircraft, it seemed advisable to establish the principle that medical aircraft may fly over the territory of a State not party to the conflict only with its prior agreement.

*Paragraph 2*

The case referred to in this paragraph is that of a medical aircraft which, owing to damage, bad atmospheric conditions or any other cause beyond the control of the pilot or of the Party to the conflict to which he belongs, is obliged to fly over the territory of a State not party to the conflict without obtaining its prior agreement. Such a situation nevertheless does not entitle that State to attack the medical aircraft. Here it did not seem possible to formulate imperative rules. The aircraft " shall make every effort " to identify itself and " the State not party to the conflict shall, so far as possible, respect such aircraft ". A State not party to the conflict is, in fact, required to ensure respect for its air space and to oppose its use by the contending adversaries. Above all, a problem of identification arises here.

*Paragraph 3*

The present paragraph determines the treatment of all medical aircraft, whatever the circumstances in which they fly over the territory of a State not party to the conflict: with or without prior agreement or because of necessity. It also applies regardless of the circumstances of the landing, whether in compliance with a summons or because of necessity. Obviously this provision applies only to medical aircraft fulfilling the conditions laid down in Article 21 (*a*) and (*b*).

*Paragraph 4*

The present paragraph determines the treatment of the wounded and the sick entrusted to the care of a State not party to the conflict, unless there is a contrary agreement between the Parties to the conflict and the State not party to the conflict. The reference in this paragraph to international law was necessary, mainly to take into account the Hague Convention No. V of 1907, in which the matter is made the subject of general regulations.

# PART III

# METHODS AND MEANS OF COMBAT
# PRISONER-OF-WAR STATUS

## SECTION I

## METHODS AND MEANS OF COMBAT

### Article 33. — Prohibition of unnecessary injury

**1. The right of Parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited.**

**2. It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances.**

*Ref.*: 1972 Report, vol. I, paras. 3.14 to 3.23, particularly para. 3.22.

This article restates and reaffirms Article 22 [1] and 23 (*e*) [2] of the Hague Regulations of 1907 and as regards paragraph 2, the fourth paragraph of the Declaration of St. Petersburg of 1868.[3]

*Paragraph 1*

This is a basic rule; the other provisions of the present draft relating to the conduct of hostilities are specific of this principle. On the other hand, it may be mentioned that Articles 10 (1), 12 (1), 15 (1) and (2), 20 and 24, *inter alia*, are instances of the application of the present provision, inasmuch as they limit the choice of the methods and means of injuring the enemy.

*Paragraph 2*

This provision is based on the principles set out in the Declaration of St. Petersburg of 1868 that " the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy " and " that for this purpose it is sufficient to disable the greatest possible number of men ". Injury and suffering in excess of that which must be

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[1] Article 22 of the Hague Regulations of 1907 states:
" The right of belligerents to adopt means of injuring the enemy is not unlimited ".

[2] Article 23 of the Hague Regulations of 1907 states:
" In addition to the prohibitions provided by special Conventions, it is especially forbidden:
...
*e)* To employ arms, projectiles, or material calculated to cause unnecessary suffering.
... ".

[3] The Declaration of St. Petersburg of 1868 states in paragraph 2 of the preamble " That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ", while paragraph 4 adds " That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable ".

employed to place a combatant *hors de combat* are therefore considered unnecessary. This rule, then, precludes the infliction of suffering for its own sake, as a means of compulsion or intimidation for instance, or as an act of revenge, or mere indulgence in cruelty.

### Article 34. — New weapons

**In the study and development of new weapons or methods of warfare, the High Contracting Parties shall determine whether their use will cause unnecessary injury.**

*Ref.*: 1972 Report, vol. I, paras. 3.21 and 3.22.

This provision, which is included in the internal ordinances of some States,[4] is something new in international treaty law. In this connection too, reference should be made to the last paragraph in the Declaration of St. Petersburg of 1868: " The Contracting or Acceding Partie reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity ".

### Article 35. — Prohibition of perfidy

**1. It is forbidden to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of the adversary with intent to betray that confidence are deemed to constitute perfidy. Such acts, when carried out in order to commit or resume hostilities, include the following:**

*(a)* **the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign;**

*(b)* **the feigning of a cease-fire, of a humanitarian negociation or of a surrender;**

*(c)* **the disguising of combatants in civilian clothing.**

**2. On the other hand, those acts which, without inviting the confidence of the adversary, are intended to mislead him or to induce him to act recklessly, such as camouflage, traps, mock operations and misinformation, are ruses of war and are lawful.**

*Ref.*: 1972 Report, vol. I, paras. 3.24 to 3.30.

This provision is based on Articles 23 (*b*) [5] and 24 [6] of the Hague Regulations of 1907. A large majority of the experts were in favour of a general definition of perfidy; despite the difficulty of doing so, they felt a single definition for both Protocols, i.e. valid in international and

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[4] For instance, the *Allgemeine Bestimmungen des Kriegsführungsrechts und Landkriegsrechts* (General Legal Provisions relating to the Conduct of Hostilities and War on Land), March 1961, of the Federal Republic of Germany contain in their Article 86 the following: " When new weapons are developed, their use shall be preceded by tests to determine whether they infringe any express prohibition or general principles. Should there be no such infringement, the use of such weapons shall be admissible. " (Free translation).

[5] Article 23 of the Hague Regulations of 1907 states:
" In addition to the prohibitions provided by special Conventions, it is especially forbidden:
...
*b)* To kill or wound treacherously individuals belonging to the hostile nation or army;
...".

[6] Article 24 of the Hague Regulations of 1907 states:
" Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. "

non-international conflicts alike, was absolutely necessary. The list of examples did not give rise to the same difficulties. It appeared necessary to insist upon the prohibition of perfidy in order to strengthen the trust which combatants should have in the law of armed conflicts and in the word given by the enemy. In the French version, the expression " bonne foi " was considered to be preferable to " confiance ".

Like ruses, perfidy involves simulation; but in addition it aims at creating falsely a situation in which the adversary feels obliged by a legal or moral rule to abstain from any hostile act or to neglect to take precautions which would be in fact necessary, thereby putting himself at a disadvantage. Some experts had suggested to define perfidy as acts which appeal to the confidence of the adversary and are designed to mislead him into the belief that protection under international law will be granted, but with the intention of committing or resuming hostilities.

Articles 12 (4), 36, 37, 39 (2), 45, 46 (5), 49 (2) and 51 (2) can be considered as instances of the application of the general rule of Article 35. It should be pointed out that under Article 75 the perfidious use of the protective signs constitutes a grave breach of the Conventions.

### Article 36. — Recognized signs

**1. It is forbidden to make use of the protective sign of the red cross (red crescent, red lion and sun) and of the protective emblem of cultural property in cases other than those provided for in international agreements establishing those signs and in the present Protocol. The same prohibition applies to the use of oblique red bands on a white ground and of the international distinctive sign of Civil Defence referred to in Part IV, as well as to that of protective signals referred to in Article 18.**

**2. It is forbidden to make improper use of the flag of truce.**

**3. It is forbidden to make use of the distinctive sign of the United Nations except as authorized by that Organization.**

*Ref.*: 1972 Report, vol. I, paras. 3.31 and 3.32.

*Paragraph 1*

The prohibition of the abuse of recognized signs is derived from Article 23 (*f*) of the Hague Regulations of 1907,[7] and is extended by the present provision to the emblem provided for in the Hague Convention of 1954 and to the sign of two oblique red banks on a white ground, provided for in the present draft for works and installations containing dangerous forces (Art. 49 (3)) and for localities under special protection (Art. 52 (6) and 53 (5)), and in the Fourth Convention for hospital and safety zones and localities (Art. 14 and Art. 6 of Annex I thereto). The prohibition is extended also to the abuse of the international distinctive sign of civil defence, provided for in Article 59 (4).

*Paragraph 2*

It is forbidden to make improper use of the flag of truce, that is to say to use it otherwise than as provided for in treaty and customary law.

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[7] Article 23 of the Hague Regulations of 1907 stipulates:
" In addition to the prohibitions provided by special Conventions, it is especially forbidden:
. . .
*f)* To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the Geneva Convention.
. . . ".

*Paragraph 3*

This rule was worded in accordance with the wish of the United Nations representative at the Conference of Government Experts.

**Article 37. — Emblems of nationality**

**It is forbidden to make use of the enemy or neutral flags, military insignia and uniforms in order to shield, favour or impede military operations.**

*Ref.*: 1972 Report, vol. I, paras. 3.33 and 3.34.

This prohibition is derived from Article 23 (*f*) of the Hague Regulations of 1907,[8] and is an instance of the application of Article 35. The Parties to the conflict derive a reciprocal military advantage from this rule.

**Article 38. — Safeguard of an enemy *hors de combat* and giving quarter**

**1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:**

**(*a*) is unable to express himself, or**

**(*b*) has surrendered or has clearly expressed an intention to surrender**

**(*c*) and abstains from any hostile act and does not attempt to escape.**

**2. Any Party to the conflict is free to send back to the adverse Party those combatants it does not wish to hold as prisoners, after ensuring that they are in a fit state to make the journey without any danger to their safety.**

**3. It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.**

*Ref.*: 1972 Report, vol. I, paras. 3.35 to 3.42.

*Paragraph 1*

This cardinal rule is based on Article 23 (*c*) of the Hague Regulations of 1907, which forbids to " kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion ". Its underlying principle is that violence is permissible only to the extent strictly necessary to weaken the enemy's military resistance (see Art. 43), that is, to the extent necessary to place an adversary *hors de combat* and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting, or when a serious casualty is incapable of expressing himself.

*Paragraph 2*

This clause is based on the fourth paragraph of Article 2 of the Geneva Convention of 1906 which states that belligerents shall be free " to send back to their country, after rendering them fit to travel or after their recovery, the wounded or sick whom they do not wish to retain as prisoners

[8] The text of this provision is given above, in note 7.

of war ". From this article stems the present provision, which gives the Parties to the conflict the faculty — which they sometimes exercise in conventional armed conflicts as well as in guerrilla warfare — of releasing on the spot prisoners who had fallen into their power. Such release should not be detrimental to the safeguards to which they are entitled under the Third Convention.

*Paragraph 3*

This prohibition is drawn from Article 23 (*d*) of the Hague Regulations of 1907 which states that it is forbidden " To declare that no quarter will be given ", i.e. to refuse to spare the life of an enemy who surrenders or is captured, to decide on his extermination or to threaten to exterminate him in order to hasten his surrender. A demand by a Party to the conflict for unconditional surrender by its adversary in no way relieves that Party from the obligation to give quarter to surrendering enemies. This provision is more explicit than the Hague rule, the fundamental idea of which is retained while its content is made more precise.

**Article 39. — Aircraft occupants**

**1. The occupants of aircraft in distress shall never be attacked when they are obviously *hors de combat*, whether or not they have abandoned the aircraft in distress. An aircraft is not considered to be in distress solely on account of the fact that its means of combat are out of commission.**

**2. The use of misleading signals and messages of distress is forbidden.**

*Ref.*: 1972 Report, vol. I, paras. 3.43 to 3.46.

The Hague Regulations of 1907, drawn up at a time when air warfare was unknown, do not of course deal with this problem. Apart from its direct humanitarian interest for the crew of the aircraft in distress, this rule is of very great importance in view of the major role of aviation in most modern armed conflicts. It might well be that the more likely they are to meet death when their aircraft is in distress, the more will pilots and crews hesitate to take the risks involved in restricting their attacks to the assigned military targets, which are often heavily defended. That being so, there will be a general and reciprocal humanitarian interest in complying with modern military manuals,[9] which, confirming the customary law rule, forbid attack against the occupants of disabled aircraft, whether they remain aboard or attempt to save their lives by descending by parachute or in any other manner. According to these military manuals, prohibition of attack also applies when the pilot and his companions escape capture by landing on territory controlled by their own armed forces. This rule does not of course forbid shooting paratroops on an airborne operation. A military aircraft which can be flown is, on the other hand, always considered as a military objective, whether or not it has spent its means of defence or attack. On the ground, if air crew members resist capture or try to destroy the remains of their aircraft, they may of course be put *hors de combat*. Upon capture, they must be treated as prisoners of war, as they are entitled to be under the Third Convention, even if they are captured by local authorities, or by civilians who happen to be on the spot.

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[9] USA, FM 27-10, Department of the Army, *Field Manual*, Ch. 30:

" The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon. "

France, *Règlement de discipline générale dans les armées*, Article 34 (2): " De plus, il leur (il s'agit des militaires au combat) est interdit: de tirer sur l'équipage et les passagers d'avions civils ou militaires sautant en parachute d'avions en détresse, sauf lorsqu'ils participent à une opération aéroportée ".

*Paragraph 2*

Signalling system developments (see Annex) have created this new possibility for abuse which the present provision is designed to forbid. This is a particular case of Article 35 on the prohibition of perfidy.

**Article 40. — Independent missions**

**1. Members of armed forces in uniform and other combatants referred to in Article 4 of the Third Convention, as well as those combatants referred to in Article 42 who, in their operations, distinguish themselves from the civilian population and who, having entered enemy-controlled territory or having remained therein, gather or attempt to gather military information for further transmission shall not be considered as spies.**

**2. Members of armed forces in uniform and other combatants referred to in Article 4 of the Third Convention, as well as those combatants referred to in Article 42 who, in their operations, distinguish themselves from the civilian population and who, having entered enemy-controlled territory or having remained therein, destroy or attempt to destroy military objectives shall not be considered as saboteurs.**

**3. In the event of their capture, the persons referred to in paragraphs 1 and 2 above shall be prisoners of war.**

*Ref.*: 1972 Report, vol. I, paras. 3.47 to 3.52.

Spying and sabotage being liable to penal prosecution and often draconian penalties, it appeared desirable to introduce some delimitation of those two concepts.

*Paragraph 1*

This rule supplements the second paragraph of Article 29 of the Hague Regulations of 1907.[10] What distinguishes espionage from the legitimate quest for military information is its clandestine nature. The quest for military information is, it is true, always concealed, as far as possible, from the enemy: reconnaissance parties, observers, and so forth will always try not to reveal their presence to an enemy, as this is a prerequisite of success, except in the case of a raid by a strong reconnaissance force; however, the standing of such persons should be unmistakably recognizable from their uniforms. This provision, therefore, permits a distinction to be drawn between a spy and another enemy person who, whilst attempting to obtain information, is not a spy.

*Paragraph 2*

This provision does not purport to give a legal definition of sabotage, but intends to preclude the prosecution as saboteurs of combatants who carry out legitimate acts of destruction. Sabotage

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[10] Article 29 of the Hague Regulations of 1907 states:

" A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory. "

is defined in a general way as an act calculated to prevent the normal operation of a service or an undertaking, or to put out of action a machine or a plant. Article 47 (1) defines military objectives. The Hague Regulations of 1907 did not deal with the problem of sabotage.

**Article 41. — Organization and discipline**

**Armed forces, including the armed forces of resistance movements covered by Article 42, shall be organized and subject to an appropriate internal disciplinary system. Such disciplinary system shall enforce respect for the present rules and for the other rules of international law applicable in armed conflicts.**

*Ref.*: 1972 Report, vol. I, paras. 3.70 to 3.72.

The purpose of this provision is to extend in respect of all armed forces and with regard to the present Protocol the obligation stipulated in Article 1 of the Hague Convention No. IV of 1907,[11] which provides that armed land forces shall receive instructions consistent with the Regulations annexed to this Convention. The requirements of organization and discipline are intrinsic features of an army and, consequently, of any armed force claiming the status of an army and intending to abide by the law of armed conflicts. A particularly close connection should be made between the present article and Section I of Part V relating to the teaching, dissemination and execution of the Conventions and the Protocol. The expression " the other rules of international law applicable in armed conflicts " means rules of bothtreaty and customary law. The treaty law implied by this article includes, *inter alia*, the Hague Conventions of 1907, the Geneva Protocol of 1925, the Geneva Conventions of 1949 and the Hague Conventions of 1954.

## SECTION II

## PRISONER-OF-WAR STATUS

**Article 42. — New category of prisoners of war**

**1. In addition to the persons mentioned in Article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfil the following conditions:**

*(a)* **that they are under a command responsible to a Party to the conflict for its subordinates;**

*(b)* **that they distinguish themselves from the civilian population in military operations;**

*(c)* **that they conduct their military operations in accordance with the Conventions and the present Protocol.**

**2. Non-fulfilment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by the Third Convention and, even if sentenced, retain the status of prisoners of war. ***

* *Note*

**If, as many Governments wished, the Diplomatic Conference should decide to mention in the present Protocol members of movements of armed struggle for self-determination, a solution would be to include in this Article a third paragraph worded as follows:**

**" 3. In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the " Declaration on Principles of International**

[11] Article 1 of the Hague Convention No. IV of 1907 states:

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

**Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ", members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war as long as they are detained ".**

*Ref.*: 1972 Report, vol. I, paras. 3.53 to 3.69.

As its present title indicates,[12] the purpose of this article is to extend the category of persons who, in the event of capture, are entitled to benefit from prisoner-of-war status as laid down in the Third Convention; these persons are at present those mentioned in Article 4 of the Third Convention.[13] This article of the Protocol relates to the category of combatants described in Art. 4 (A) (2) as " members of other [14] militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict "; Article 1 of the Hague Regulations of 1907 describes the same category as " militia and volunteer corps "; in every case they are groups of volunteer fighters not enlisted in the regular armed forces but fighting for a Party to the conflict, along with the regular armed forces should there by any. As regards the relations which should exist between such combatants and a Party to the conflict, see commentary on paragraph 1 below.

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[12] The relevant provision (Art. 38) submitted by the ICRC to the second session of the Conference of Government Experts was entitled " Guerrilla fighters ". In the light of the remarks made by the experts, the ICRC opted for the present title.

[13] Article 4 of the Third Convention states:

" A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

*(a)* that of being commanded by a person responsible for his subordinates;
*(b)* that of having a fixed distinctive sign recognizable at a distance;
*(c)* that of carrying arms openly;
*(d)* that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a gouvernment or an authority not recognised by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

[14] Other than those belonging to the armed forces of a Party to the conflict, that is, other than those enlisted in the regular army.

*Paragraph 1*

This provision establishes a new category of prisoners of war and lays down the conditions with which " organized resistance movements " must comply in order that those of their members who have fallen into the power of the enemy may be entitled to prisoner-of-war status. It will be noted that the present provision maintains a number of conditions stated in Article 4 (A) (2) of the Third Convention, even though sometimes worded differently.

The question arose whether a complete departure from the system adopted by existing law [15] might not be possible and desirable; yet to abandon all conditions which groups of combatants should fulfil cumulatively would put an end to any distinction between the civilian population and combatants and run counter to the essential provisions of the present draft Protocol, particularly those relating to the protection of the civilian population; this could lead to any civilian detained to be considered as a prisoner of war. For these reasons, the ICRC, in its 1972 draft,[16] had opted for a solution stemming from existing law, but flexible enough to allow the protection afforded by the Third Convention to be extended to a category of combatants hitherto lacking such protection although they often constitute today an important section of the forces of a Party to the conflict.

From the discussion which took place among the experts, the ICRC concludes it may assume its approach to the problem to have been basically correct, even though some of the details might be improved upon. Indeed one of the experts proposed the relinquishing of all conditions and the discussion centred on the conditions to be retained and their formulation. The views expressed on the first question, besides, differed considerably, ranging from a single condition (e.g. organization) to the full maintenance of Article 4 (A) (2), that is, to the rejection of any change brought into the existing law. The proposal put forward by the ICRC nevertheless received wide enough support for the ICRC to feel justified in submitting once again a text along similar lines.

Among the conditions thus maintained, a distinction should be made between those which can only be fulfilled by the movement itself and those which should be respected by the movement and its individual members alike.

1) The three conditions which the movement alone can fulfil are:
— its organized character;
— that it should belong to a Party to the conflict;
— the presence of a command responsible for its subordinates.

These conditions are closely interconnected and relate to what may be broadly termed *international responsibility*. Their purpose, on the one hand, is to submit all members of resistance movements to a system of discipline which will ensure respect for humanitarian law—in the meaning of the Protocol—, and, on the other hand, to guarantee the operation of international responsibility for all acts that members of resistance movements carry out vis-à-vis the opposing Party or third States, whether in accordance with, or contrary to, international law. In the last analysis, the conditions are consonant with the principle according to which private war is forbidden, a principle which is at the very root of the law of armed conflicts.

Most experts considered the condition regarding the movement's *organization* as essential, a standpoint which the ICRC endorses. This condition implies, more particularly, that the resistance movement itself should be structured, endowed with appropriate organs and hence equipped with a mechanism of competencies and responsibility. Besides, this requirement also derives

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[15] This refers to two sets of identical conditions, namely Art. 1 of the Hague Regulations of 1907 and Art. 4 (A), sub-paras. (2) *(a) (d)* of the Third Convention, which are identical as regards the conditions laid down under sub-paragraphs *(a)* to *(d)*. Art. 4 (A) (2) appears to establish two additional conditions regarding resistance movements, that of being " organized " and of " belonging to a Party to the conflict "; but those conditions may be regarded as implicit in the Hague Regulations of 1907 and concern all cases in which " militia " or " volunteer corps " are involved. Moreover, these rules may be considered to be customary law.

[16] ICRC, Draft Protocol I, 1972, Art. 38.

from Article 41 relating to the system of internal discipline in the armed forces with which resistance movements must comply.

The condition of *belonging to a Party to the conflict*, which is borrowed from Article 4 (A) (2) of the Third Convention, is essential to the interplay of international responsibility, for alone the fact of belonging to a Party to the conflict creates the link whereby a subject of international law can be held internationally responsible for acts carried out by the members of resistance movements. Failing that these acts involve at best the individual responsibility of the authors.

This requirement has been eased by extending to resistance movements a possibility which Article 4 of the Third Convention provides only in the case of regular armed forces: [17] i.e. that the Party to the conflict to which the movement belongs may be " represented by a government or an authority not recognized by the Detaining Power ". Here it should be pointed out that, as the term " represented " implies, this provision in no way abolishes the distinction between international and non-international conflicts. The non-recognized government or authority must represent, or must claim to represent, a subject of international law recognized as such by the other Party to the conflict; as a rule, the subject of law will have existed prior to the conflict, which will therefore from the outset be of an international character; exceptionally, however, it may also be established in the course of the conflict, either because of its recognition as a State by the other Party to the conflict or because of its recognition as a belligerent, whereby the other Party to the conflict confers upon the recognized subject a certain limited and provisional international personality. In any case, the mere existence of a government or resistance movement is not sufficient evidence of the international character of the conflict, not does it establish that character and hence render the application of the present Protocol mandatory.

On the other hand, it has not been deemed necessary to repeat here the statement contained in Article 4 (A) (2) to the effect that it is immaterial whether the movements operate in or outside their own territory, " even if this territory is occupied "; that rule is now undisputed and may be taken for granted; yet if any doubt should subsist, it might be advisable to reconsider the matter.

The condition of the existence of a *responsible command* embodied in the present Article 42 (1) (*a*) corresponds to the provision in Article 4 (A) (2) (*a*) of the Third Convention, which in turn faithfully reproduces the first condition listed in Article 1 of the Hague Regulations of 1907. It has, however, been reworded and clarified, to take account, on the one hand, of the fact that in resistance movements the command is frequently of a collective nature and, on the other hand, of the fact that responsibility for the acts of subordinates means that the command is answerable for them to the Party to the conflict which bears the responsibility on an international plane. Here again we find the same concern to ensure individual and collective responsibility for all acts carried out in the course of an armed conflict.

2) The conditions which must be fulfilled by the movements and every one of its members are stated in sub-paragraphs 1 (*b*) and (*c*) of the present provision.

Sub-paragraph 1 (*b*), which may be said to embody a condition concerning *visibility*, contains the essential elements of Article 4 (A) (2) (*b*) and (*c*) of the Third Convention and Article 1 (2) and (3) of the Hague Regulations of 1907. Indeed, when one of these two conditions is fulfilled, the other may be regarded as redundant. What is essential in both conditions is the distinction between combatant and civilian, and this for two reasons: to protect the civilian population from attack and to ensure fairness in fighting.

The proposed article does not lay down the manner in which the distinction should be made (open carrying of arms, distinctive emblem, uniform or part of uniform, etc.). It need only be noted here that it does not prohibit camouflage such as practised by the regular armed forces, or require members of resistance movements to carry their arms otherwise than members of the regular armed forces carry theirs. What it does prohibit is camouflage by means of civilian dis-

[17] See Article 4 (A) (3) in note 2 above.

guise, and in this respect members of resistance movements are not treated differently from soldiers in the regular armed forces (see Article 35 (1) (*c*)).[18]

The obligation for members of resistance movements to distinguish themselves from the civilian population holds good only during military operations, which in the commentary on Article 3 (2) are defined as " offensive and defensive movements by armed forces in action ". A member of a resistance movement who at the end of an operation resumes his civilian garb and is arrested by the adverse party, cannot be sentenced for having taken part in military operations if, during those operations, he fulfilled the condition of visibility and if he belongs to a movement which abides by all the conditions (cf. below under paragraph 2); in that case he will be entitled to prisoner-of-war status. It will be recalled that members of the regular armed forces who have been demobilized or are on leave may be interned as prisoners of war if they fall into the power of the enemy (see Article 4 (B) (1) of the Third Convention).

The last condition, as stated in sub-paragraph 1 (*c*) of the present provision, relates to compliance with the *Conventions and the present Protocol.*

While Article 4 (A) (2) (*d*) of the Third Convention and Article 1 (4) of the Hague Regulations of 1907 both lay down the obligation to abide by " the laws and customs of war ", the present Article 42 mentions only " the Conventions and the present Protocol ". This undoubtedly eases the conditions under which prisoner-of-war status may be claimed; however, it should be noted that the Conventions and the present Protocol embody the greater part of the laws and customs of war and that, moreover, the mention of specific instruments takes the place of a reference to somewhat imprecise and not strictly defined rules.

The term " military operations " should not give grounds for evading the application of part of the provisions of the Conventions and the Protocol, particularly of those relating to the care of the wounded and the sick and the treatment of prisoners of war, all of which must be respected.

*Paragraph 2*

The conditions referred to in the preceding paragraph should all be fulfilled by the resistance movements themselves. Members of a resistance movement which abides by those conditions need not prove that they fulfil them individually. On the other hand, members of a resistance movement which does not comply with the aforementioned conditions are in no case entitled to prisoner-of-war treatment, even if, taken individually, they fulfil such conditions as they are able.

Although, as already mentioned, the conditions must all be fulfilled by the resistance movement, and certain conditions can be fulfilled only by the movement—organization, belonging to a Party to the conflict, and responsible command—, some of the conditions can and should also be fulfilled by the members themselves. These are " visibility ", under paragraph 1 (*b*), and respect for the Conventions and the Protocol as required under paragraph 1 (*c*). The purpose of the present paragraph is to regulate the situation which arises where there are contradictions between the resistance movement and its members in this regard. The solution considered in this paragraph consist in assimilating members of resistance movements as far as possible with members of the regular armed forces.

The first sentence lays down that individual non-fulfilment of the conditions shall not in principle have a privative effect on the resistance movement itself or on other members. However, since a resistance movement cannot be regarded as complying with conditions unless its members in general also respect them, it was necessary to specify that non-fulfilment of the conditions by members should be an incidental event, which is implied by the words " non-fulfilment... by individual members ".

The second sentence in the paragraph refers to members of resistance movements who have, or are accused of having, violated the Conventions and the Protocol. A combatant who is a member of a resistance movement and who is accused of war crimes shall be entitled to the judicial guarantees provided for prisoners of war and shall, in accordance with Article 85 of the

[18] This rules was implicit in the Hague law; cf. Article 29 (2) of the Hague Regulations of 1907.

Third Convention,[19] retain that status, even if sentenced. It was necessary to make this clear, because compliance with the Conventions and the Protocol in military operations is one of the conditions that must be fulfilled by the resistance movement and individual members alike, in order to secure prisoner-of-war status, and it might have been wrongly concluded therefrom that the member of a resistance movement accused or convicted of a violation of the provisions of the Conventions or of the present Protocol would in all cases lose his claim to prisoner-of-war status. A distinction should be made between the following two situations: the condition mentioned in paragraph 1 (*c*) refers to the customary observance, in military operations, of the law of armed conflict as embodied in the Conventions and the present Protocol, whereas the second sentence of paragraph 2 relates to the committing of penal breaches of the Conventions and the Protocol, namely the committing of war crimes, whether in military operations or not. It is true that the fact that a member of a resistance movement should persistently and deliberately violate rules of the Conventions and the Protocol applicable to military operations may be interpreted as meaning that he fails to ulfil one of the conditions to qualify for prisoner-of-war status; but wherever the violation is incidental or not committed in the course of military operations, the second sentence of the paragraph shall apply.

Members of a resistance movement who are not entitled to prisoner-of-war status because the movement to which they belong does not fulfil or because they themselves do not fulfil the conditions laid down, as well as other persons having taken part individually in hostilities, shall be regarded as civilians; this follows from the definition contained in Article 45 (1) and from the general system of the Conventions and the Protocol. Accordingly, they shall be treated as civilians who have committed hostile acts. In other words, while liable to penal prosecution for having committed acts of violence, they shall not be placed at the discretion of their captors but shall be entitled to the guarantees of the Fourth Convention as supplemented by Article 65 below.

*Note (possible paragraph 3)*

Some experts expressed the wish that liberation movements be mentioned in the present draft. A possible solution would consist in mentioning them in a third paragraph to be added to the present article (see " Note " to the article); this provision would have the effect of extending the benefit of prisoner-of-war treatment to members of liberation movements who complied with the conditions laid down in paragraph 1; its purpose would not be to characterize specific conflicts, which would be contrary to the system of the Conventions and of the present Protocol. It will be noted that the reference made to the conditions contained in paragraph 1 is in accordance with United Nations resolutions recommending the application of the Third Convention, for such application would presuppose fulfilment of the conditions laid down in Article 4. Regarding the principle of the self-determination of people, reference has been made in addition to the Charter of the United Nations, to the " Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations " because that Declaration [20] provides the most general, precise and recent expression of the principle.

It should be pointed out that, according to the present provision, the persons protected would benefit from the *treatment* and not from the *status* of prisoner-of-war; the words " for as long as they are detained " purport to encourage the release of prisoners during the hostilities and it was felt that reference to prisoner-of-war status might prompt States to keep them in captivity until the end of hostilities, which, in the case of the conflicts considered, might sometimes take years. Moreover, as the United Nations had repeatedly asked that prisoner-of-war " treatment " be applied in the case of such combatants, it seemed feasible to adopt that formula here, especially as it means that the Third Convention as a whole should be applied to them.

[19] Article 85 states: " Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention. "

[20] Unanimously adopted by the General Assembly at its twenty-fifth session (UN, res 2625 (XXV)).

# PART IV

# CIVILIAN POPULATION

## SECTION I

## GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

### Chapter I

### Basic rule and field of application

**Article 43. — Basic rule**

**In order to ensure respect for the civilian population, the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.**

In its first part, this article contains in substance what was already stated in the second preambular paragraph of the Declaration of St. Petersburg of 1868, " That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the anemy ".

This rule, which appeared only in the fourth preambular paragraph of the 1972 draft, constitutes one of the foundations of international humanitarian law applicable in armed conflicts. In one way or another, nearly all the provisions in the present Section are derived from this rule. It is, in particular, by virtue of " the distinction between the civilian population and combatants, and between civilian objects and military objectives " that the Parties to the conflict shall refrain from attacking the civilian population as such and shall abstain from using civilians in attempts to shield military objectives.[1] The rule on distinction, which is well established in customary international law, is to be found in military manuals [2] and is referred to in resolutions adopted by the United Nations [3] and by International Conferences of the Red Cross.[4]

Although the present Section and Section I of Part III, entitled *Methods and Means of Combat* have each their own purpose, they should be constantly related to each other, since they both refer to the conduct of hostilities. Some of their provisions, as for instance Article 33,

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[1] See Art. 46 (1) and (5).

[2] See the examples quoted in: International Institute of Humanitarian Law, Seminar on the teaching of humanitarian law in military institutions, Documentary Annex, Chapter IV, *Instructions militaires sur les règles internationales applicables dans les conflits armés*, San Remo, July 1972. (France: Décret No. 66-749, du 1er octobre 1966, portant règlement de discipline générale dans les forces armées, chap. 4, art. 34, chap. 2, art. 5; Great Britain: " The Law of War on Land ", Part III, Chap. 4, Art. 86 of the *Manual of Military Law*, 1958.)

[3] In particular, UN, res. 2444 (XXIII), operative paragraph 1 *(c)*; res. 2675 (XXV), operative paragraph 2.

[4] In particular, XXth Internat. Conf. Red Cross, Res. XXVIII, Vienna, 1965, third principle.

entitled *Prohibition of unnecessary injury*, and the present article, could even appear under the same heading. Article 33 is not restricted to the suffering caused to combatants: " injury " caused to the civilian population is equally " unnecessary ", by the very fact that it goes beyond the lawful purpose of the hostilities, which is to place enemy armed forces *hors de combat* and to put out of action enemy military objectives. Just as the scope of Article 33 is not restricted to the combatants alone, Article 43 is not confined to the protection of the civilian population when it says that " the Parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary ": for example, the rule laid down in the present article is also violated when combatants stoop to the use of perfidious means (see Art. 35) or do not safeguard an enemy *hors de combat* (see Art. 38), for such acts go beyond what is necessary for the enemy's " military resources " to be affected.

**Article 44. — Field of application**

**1. The provisions contained in the present Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land.**

**2. These provisions apply to acts of violence committed against the adversary, whether in defence or offence. Such acts are referred to hereafter as " attacks ".**

**3. These provisions are complementary to such other international rules relating to the protection of civilians and civilian objects against effects resulting from hostilities as may be binding upon the High Contracting Parties, in particular to Part II of the Fourth Convention.**

*Paragraph 1*

The obligations contained in this Section are binding on members of armed forces on land, at sea or in the air. As before [5] " military operations " may be briefly defined as offensive or defensive movements by armed forces in action.

It should be recalled that Section I of Part III, entitled *Methods and Means of Combat*, which refers mainly to the behaviour of combatants towards each other, extends its scope to military operations as a whole carried out within the general framework of land, air or sea warfare. The same cannot be said of the present Section, the scope of which has been circumscribed. The phrase, " which may affect the civilian population . . . on land ", means that only military operations liable to cause effects on land are the object of this Section; as these operations could obviously be directed from the air or the sea as well as from points on land, it was thought necessary to qualify them accordingly.

As regards civilians at sea and in the air (in aircraft, balloons and other objects in flight), they are not deprived of all protection, since other norms of international law, principally customary law, are applicable to them.[6]

*Paragraph 2*

The definition of " attacks " [7] specifies the purely technical nature of this notion. Every time the term " attack " is employed, it is related to only one specific military operation, limited in space and time. Care should therefore be taken not to confuse the author of an attack, within the meaning of the present Protocol, with an aggressor, that is to say, the party that starts the armed conflict itself. The author of an attack is he who, whatever his position may be at the outbreak of hostilities, starts a military operation involving the use of arms.

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[5] See commentary on Art. 3 (2).

[6] See preamble, para. 3.

[7] See 1972 Report, vol. I, paras. 3.146 to 3.149.

*Paragraph 3*

As it follows from Article 1 and from the draft of this paragraph, the purpose of Article 44 is not to revise but to supplement the existing law in force, in particular, the Fourth Convention. With regard to the Fourth Convention, the intention is to reaffirm and develop its Part II, entitled *General Protection of Population against Certain Consequences of War.*

The other norms of international law are essentially those of customary law, or are to be found in other conventions, such as the Hague Convention No. IV of 1907 and the Regulations annexed thereto, the Hague Convention No. IX of 1907 and the Hague Convention of 1954.

## Chapter II

## Civilians and civilian population

### Article 45. — Definition of civilians and civilian population

**1. Any person who does not belong to one of the categories of armed forces referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 42 is considered to be a civilian.**

**2. The civilian population comprises all persons who are civilians.**

**3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.**

**4. In case of doubt as to whether any person is a civilian, he or she shall be presumed to be so.**

*Ref.*: 1972 Report, vol. I, paras. 3.114 to 3.125.

*Paragraphs 1 and 2*

Within the framework of this Section, all human beings who are on the territory of the Parties to the conflict and who do not form part of the armed forces referred to in the articles mentioned in this provision are considered to be civilians. These persons are the same as those mentioned in Article 13 of the Fourth Convention [8] which the present article aims to make more explicit.

This large category of persons does not correspond to that more restricted category mentioned in Article 4 of the Fourth Convention, which defines the persons protected by it on the basis of their nationality. This Convention in Parts I and III offers protection against arbitrary authority of the Parties to the conflict [9] and not, as here, against the effects of hostilities. The category of persons referred to in Article 4 of the Fourth Convention is not the same as that which must be protected against attacks; as wide as possible a definition of the latter is justified by the purpose intended, namely, general protection against effects of hostilities.[10]

It is also necessary to define civilian persons not only as individual persons, but also taken collectively, i.e. the *civilian population*, a term which is often used in the present draft. This definition is based on that of the civilian person.

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[8] Article 13 of the Fourth Convention says:

" The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war ". See also, *Commentary*, Fourth Geneva Conv. 1949, Art. 13.

[9] See Section III of the present Part.

[10] The same applies to Section II of the present Part, *Relief in Favour of the Civilian Population*, which has the same personal field of application.

As will be seen below under Article 46 (2), entitled *Protection of the civilian population*, it is not enough to be a civilian in order to enjoy complete immunity; such persons must also abstain from committing acts of hostility.

*Paragraph 3*

Whereas the civilian population comprises all persons who are civilians, it often happens that certain persons who do not fall within the definition given in paragraph 1 (i.e. members of the armed forces) are present together with civilians. It might well be questioned whether, in such a case, the population would cease to answer to the definition in paragraph 2, and hence be no longer protected against attacks. It was considered that in an armed conflict it was inevitable that there would be at times some members of the armed forces mingling with the civilian population. Unless the definition of the civilian population were to lose all substance and the protection to which it was entitled were to be invalidated, it must be recognized that the presence of single individuals not answering to the definition of civilians should not in any way modify the civilian character of a population.

On the other hand, if whole contingents of troops moved among a peaceful population, the Parties to the conflict involved would avoid total war only by applying the precautionary measures in attack laid down in Article 50.

*Paragraph 4*

Under the present Section, the civilian status of a person should ensure that person to be kept out of hostilities and, consequently, to be safe from attack. In order to ensure effective protection for all persons who do not appear to be combatants, it is necessary that they should be considered, at first sight, as civilians. This presumption is not incontrovertible, but as long as it exists, it involves specific obligations: the person or persons in respect of whom there is a doubt must be treated as civilians, that is to say, they must not be considered as a target for attacks.

The presumption is however valid only in so far as the appearance and behaviour of the civilians are such as might be generally expected of persons claiming to be civilians.

This rule implies another, which supplements it and which appears in Article 50 (1) (*a*), entitled *Precautions in attack*: the Parties to the conflict must ensure, in one way or another, that the objectives to be attacked are duly " identified " as military objectives.

Of course, when the combatants of one of the Parties to the conflict put on civilian clothing " in order to commit or resume hostilities " [see Art. 35 (1) (*c*)] or do not " distinguish themselves from the civilian population in military operations " [see Art. 42 (1) (*b*)], they give cause thereby to their adversaries to ignore straight away the presumption. The effect of such behaviour is to invalidate the aforesaid principle of identification and, especially, to undermine the general protection of the civilian population, which is the principal purpose of this draft Protocol.

**Article 46. — Protection of the civilian population**

**1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. In particular, methods intended to spread terror among the civilian population are prohibited.**

**2. Civilians shall enjoy the protection afforded by this Article unless and for such time they take a direct part in hostilities.**

**3. The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants or civilian objects and military objectives, are prohibited. In particular it is forbidden:**

*(a)* **to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas, and are at some distance from each other;**

*(b)* **to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.**

**4. Attacks against the civilian population or civilians by way of reprisals are prohibited.**

**5. The presence or movements of the civilian population or individual civilians shall not be used for military purposes, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. If a Party to the conflict, in violation of the foregoing provision, uses civilians with the aim of shielding military objectives from attack, the other Party to the conflict shall take the precautionary measures provided for in Article 50.**

*Ref.*: 1972 Report, vol. I, paras. 3.152 to 3.169.

The rule well established in customary international law, relating to the immunity of the civilian population, appears in military manuals [11] and is referred to in United Nations resolutions.[12]

*Paragraph 1*

This rule, by reaffirming the immunity of the whole of the civilian population, covers civilians, whether they are taken singly, in groups or as a whole. Although the protection to be granted to civilians does not depend on their number, attacks against the civilian population as such have assumed such proportions in contemporary conflicts that it was necessary to stress this aspect in particular. Such acts, which are already prohibited under customary international law, are usually committed with the object of compelling the population to support or to abstain from supporting one or the other of the Parties to the conflict.

None the less, civilians who are within or in the immediate vicinity of military objectives [13] run the risk of " incidental " effects as a result of attacks launched against those objectives. In such cases other provisions of the draft would be applicable (see para. 3 *(b)* of the present article and Art. 50 (1) *(a)* and *(b)* concerning proportionality).

In the second sentence, the term " methods " has been used in order to include all possible cases that might arise.

In the general context of this article, many experts raised objections to the notion of intention. However, by way of exception, it was retained here (in the expression " methods *intended* "), as any attack, even if it were of strictly limited to a specific military objective, would by its very *nature* " spread terror " among the neighbouring civilian population. The omission of any mention regarding intention in this case would have meant that any attack which only had a psychological effect on the civilian population would be *a posteriori* unlawful.

On the other hand, the element of intention is generally held to be one of those constituting a penal breach. It therefore seemed that it was more appropriate to consider this problem in the context of the Section of Part V relating to repression of breaches of the Conventions and of the Protocol.

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[11] See the examples quoted in: International Institute of Humanitarian Law, Seminar on the teaching of humanitarian law in military institutions, Documentary Annex, Chapter IV, *Instructions militaires sur les règles internationales applicables dans les conflits armés*, San Remo, July 1972. (France: *Décret No. 66-749* du 1er octobre 1966, portant règlement de discipline générale dans les forces armées, chap. 4, art. 34, chap. 2, art. 11; Great Britain: " The Law of War on Land ", Part III, Chap. 4, Art. 88 of the *Manual of Military Law*, 1958; Suisse: *Manuel des lois et coutumes de la guerre*, art. 25, al. 2, Doc. 51.7 du 4 juillet 1963.).

[12] In particular, UN, res. 2444 (XXIII), operative paragraph 1 *(b)*; res. 2675 (XXV), operative paragraph 4.

[13] The mention of a situation *of fact* of this kind in the earlier draft had led to considerable discussion (see ICRC, Draft Protocol I, 1972, Art. 45 (5)).

*Paragraph 2*

The immunity of civilians is subject to a very strict condition: they must not take a direct part in hostilities, which means they must not become combatants. What should be understood by *direct part in hostilities?* The expression covers acts of war intended by their nature or purpose to strike at the personnel and matériel of enemy armed forces. Thus, a civilian taking part in fighting, whether singly or in a group, becomes *ipso facto* a lawful target for such time when he takes a direct part in hostilities.

What is the position of such a civilian when he ceases to fight? There are two possibilities:

(1) he may fall into the adversary's power, or

(2) he may not fall into his power.

(1) Although the problem of treatment in the event of capture lies outside the frame of the present Section, it is necessary to consider here what would happen to a civilian *who did fall into the adversary's power*, by capture during combat or if he were subsequently taken into custody. He would not be allowed to claim prisoner-of-war status if the conditions of Article 4 of the Third Convention or of Article 42 were not fulfilled. In such a case, he could not expect to be entitled to the privileges conferred by the Third Convention and would thus run the risk of being prosecuted and sentenced for the sole reason of having taken a direct part in the hostilities. However, this would not mean that such a person would be bereft of all protection: being a civilian, he would still be entitled to the relevant provisions laid down in the Fourth Convention [14] or the fundamental guarantees enumerated in Article 65.

(2) *If he does not fall into the adversary's power*, a civilian who has taken part in hostilities is no longer a lawful target from the moment he ceases to do so. It is essential to have such a regulation if the population as a whole is to be afforded effective protection.

The direct part which civilians might take in hostilities should be distinguished from the part in the *war effort* which they are called upon to carry out at highly different levels. To identify these activities would be tantamount to the nullification of all the efforts undertaken to reaffirm and develop international humanitarian law, for, in modern warfare, all the nation's activities contribute in some way or other, to the pursuit of hostilities, and even the people's morale plays its part in this context.

*Paragraph 3*

This provision flows directly from the *Basic rule* (Art. 43). The expression " means of combat " covers mainly weapons, while the word " methods " covers the use that is made of those weapons.

To supplement the notion of the verb *strike*, which refers more particularly to the means of combat, the verb *affect*, which refers rather to the methods, was added, so as to cover all cases that might arise. It is to be noted, too, that this article, like Article 50 (2), entitled *Precautions in attack*, does not in itself imply any prohibition of a specific weapon.

*Sub-paragraph (a)*

The intention of this provision is to prohibit target area bombing, also called " carpet bombing ". This method of waging total warfare, whether it is carried out from land, sea or air (as indicated by the words " by bombardment or any other method "), causes very heavy losses among the population and rouses civilians to take counteraction by taking a direct part in the hostilities.

This practice has been resorted to in order to spread terror among the population as well as to hit a few military objectives suspected to lie *somewhere or other* within an area that might be very extensive and densely populated.

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[14] Already now, a civilian committing hostile acts and fulfilling the conditions enumerated in Article 4 of the Fourth Convention concerning the definition of protected persons would qualify for the protection of this Convention.

There seem to be some technical difficulties in laying down precise measurements for the term " at some distance ", because of the variety of factors involved (position of persons in relation to the terrain, meteorological conditions, etc.).[15]

Besides, these area bombardments are not only expressly prohibited by the present provision, but also implicitly forbidden by other provisions, for example, Article 50 (1) *(a)* concerning the identification of military objectives. Given the importance of this question, there is good cause for drawing up a distinct and explicit provision concerning it.

*Sub-paragraph (b)*

This provision is intended, as may be seen from the word " incidental ", to urge the author of an attack to consider the probable or possible errors or inaccuracies that he might commit due to a certain number of factors,[16] and the consequences that would have to be borne by the civilian population. This rule of proportionality, which is to be found also in Article 50 (1) *(a)* and *(b)*, entitled *Precautions in attack*, would be valid, in particular, for persons and objects that might be within or near military objectives. Although these persons and objects are theoretically protected, yet they are liable to suffer the *incidental* effects of those attacks by reason of their situation.[17]

*Paragraph 4*

As indicated in the introduction to the commentary on Part V, the ICRC refrained from introducing into the present draft Protocol a general provision on the prohibition of reprisals against protected persons and objects. On the other hand, such a prohibition is contained in the Parts covering new categories of protected persons and objects.

The Fourth Convention, in Article 33,[18] already prohibits reprisals against protected persons.[19] Nevertheless, as the essential purpose of Article 33 is to protect civilians from belligerents in whose power they might be, it was necessary, on the one hand, to extend this rule to the field of hostilities and, on the other hand, to specify that it would apply to the civilian population as a whole. At the same time, the category of persons entitled to protection is widened, in accordance with the definition of civilians contained in Article 45.

*Paragraph 5*

In its Article 28,[20] the Fourth Convention already prohibits that civilians be used to shield military objectives or operations. However, it was necessary to reaffirm and develop this rules so as to extend it to the field of hostilities and to specify that it would apply to the civilian population as a whole, within the meaning of Article 45.

The word " movements " was added to the word " presence " in order to cover all the cases that have arisen in modern conflicts.

There are two consequences of the violation mentioned in the final sentence: first, the civilians in question will not *in fact* enjoy real immunity, and secondly, the precautionary measures specified in Article 50 must be taken.

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[15] For more details, see Art. 50 (1).

[16] For more details, see Art. 50 (1).

[17] See, in this connection, Article 51.

[18] Art. 33 (3) of the Fourth Convention says:
" Reprisals against protected persons and their property are prohibited. "

[19] Within the meaning of Art. 4 of the Fourth Convention.

[20] Art. 28 of the Fourth Convention says:
" The presence of a protected person may not be used to render certain points or areas immune from military operations."

## Chapter III

## Civilian objects

### Article 47. — General protection of civilian objects

**1. Attacks shall be strictly limited to military objectives, namely, to those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.**

**2. Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort.**

*Ref.*: 1972 Report, vol. I, paras. 3.126 to 3.145 and 3.170 to 3.174.

The present wording of this article is based on a number of drafts — mentioned below — relating either to civilian objects or to military objectives, particularly on a proposal,[21] submitted by some experts, which rightly links these two interdependent concepts in a single provision.

The point at issue so far has been whether, in the interest of the victims, it would be preferable to define only military objectives or only civilian objects, or to maintain both concepts. In its preliminary draft, the ICRC adopted the latter solution (Draft Protocol I, 1972, Art. 42).

One might first be inclined to regard the definition of civilian objects as being more in line with the Red Cross outlook: to specify what should be spared — this was in fact advocated by some experts, particularly those of the National Red Cross Societies. Unfortunately, an abstract definition would give rise to difficulties while a listing of objects would entail risks: the list would always be incomplete and might be restrictively interpreted. By strictly limiting lawful targets by means of a definition of military objectives, the result achieved is the reverse: the category of protected objects is extended to anything that is not military, and the combatant is provided with information enabling him to identify his targets and to be aware of the limits to his action.

The solution selected here consists in a somewhat strict definition of military objectives (par. 1) and in a more flexible definition of civilian objects (par. 2), while linking the two concepts. By means of an *a contrario* interpretation and with the aid of a list of civilian objects given purely as an example, the solution proposed makes it possible to avoid the disadvantages of separate general definitions.

*Paragraph 1*

Among examples of general definition, reference may be made to Article 7 of the 1956 Draft Rules [22] and Article 2 of Resolution 1 adopted by the Institute of International Law at Edinburgh.[23]

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[21] See 1972 Report, vol. II, CE/COM III/PC 64.

[22] See ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/3b, Annex No. XIX. Article 7 of the 1956 Draft Rules lays down the following:

> " In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.
>
> Only objectives belonging to the categories of objectives which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules.
>
> However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage."

[23] See ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/3b, Annex No. XXIV. See also Proceedings of the Institute of International Law relating to the problem posed by the existence of weapons of massive destruction and the distinction between military objectives and non-military objects in general, as outlined in the *Annuaire* 1969, Vol. II, pp. 49 to 126 of the French text.
The definition of military objectives as adopted by the Institute at its Edinburgh session, in September 1969 (Resolution 1, Art. 2), reads:

> " 2. There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them. "

While they establish no general definition, several international conventions list some examples of military objectives, as in the case of Article 2 (1) of the Hague Convention No. IX of 1907 and Article 8 (1) of the Hague Convention of 1954.[24] Similar enumerations also appear in the 1923 Draft Rules of Air Warfare (Art. 24,a/2) and in the ICRC's 1956 Draft Rules (list annexed to Art. 7). Such a list is useful as a guide. Most experts, however, preferred an abstract definition. Some of them expressed the wish that a list of civilian objects be added.

The present paragraph comprises a rule and a definition. The rule complements Article 46 and following articles, and the underlying reason is already stated in Article 43: " to ensure respect for the civilian population ".

The definition of military objectives comprises three elements which are cumulative:

(1) military nature, purpose or use;

(2) generally recognized military interest;

(3) direct and substantial military advantage of destruction.

(1) *Nature, purpose or use.*

The intrinsic military nature or character of an objective is expressed in its specific value to the armed forces. Thus a tank or howitzer is of value only to combatants. But a difficulty arises in the case of civilian objects, most of which are *convertible* into military objectives: a school, for instance, can be converted into a barracks. The reverse also applies at times. An alternative criterion should therefore be adopted: that of the *function* of the objects, whether it be the future function (" purpose ") or the present function (" use "). An object may be of value either to the civilian population or to the armed forces, or to both simultaneously (in such cases, one speaks of combined objects or objectives). In determining the purpose or use of an object, therefore, the time and place of the attack must be taken into consideration.

2) *Generally recognized military interest.*

Although apparently of an objective nature because it refers to a " generally recognized " interest, this element is worth illustrating with some examples. That is why the ICRC still thinks it would be useful to include some examples of this kind in an annex or in some other suitable form.

(3) *Direct and substantial military advantage of destruction.*

" Direct " refers to the link which, on the one hand, should exist between the destruction of, or damage to, a military objective and on the other current military operations, depending on whether those operations may or may not be affected by such destruction or damage. Should such a relationship be non-existent, the attack should not take place.

" Substantial " refers to the degree to which the destruction of, or damage to, a military objective may affect current military operations. Should the effect not be significant, the attack should not take place.

*Paragraph* 2

This paragraph does not actually contain any definition of civilian objects — such a definition may be deduced from the preceding paragraph — but a list of some examples of objects considered as such.

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[24] Article 8 (1) of the Hague Convention of 1954 lays down the following:

" There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they:

*(a)* are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;

*(b)* are not used for military purposes."

It will be noted that the conversion of such objects into military objectives presupposes their use " mainly in support of the military effort ". This statement constitutes one of the elements to be borne in mind when applying paragraph 1.

**Article 48. — Objects indispensable to the survival of the civilian population**

**It is forbidden to attack or destroy objects indispensable to the survival of the civilian population, namely, foodstuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether it is to starve out civilians, to cause them to move away or for any other reason. These objects shall not be made the object of reprisals.**

*Ref.:* 1972 Report, vol. I, paras. 3.175 to 3.183

The aim of this provision emerges at the end of the first sentence: it is to ensure the civilian population's survival and avoid the creation of movements of refugees. The words " or for any other reason " were added to cover whatever situation might arise.

In the context of the present Section and as the verbs " to attack or destroy " indicate, this provision is addressed to the Party to the conflict not in possession of the indispensable objects, which are therefore not in its control.[25]

Examples are given of some objects which should be regarded as indispensable. An exhaustive list would have involved the risk of an oversight or arbitrary selection. In the matter of food, for instance, customs and needs differ widely from one region to another.

It is obvious that in requesting special protection for objects of this nature, the ICRC has no intention of diminishing general protection for other civilian objects. In the case of indispensable objects, it has been considered judicious to increase the *degree* of protection, one aspect of which is the prohibition of reprisals.

Contrary to the preceding article which provides for cases where civilian objects are converted into military objectives because they are " used mainly in support of the military effort " (Art. 47 (2), *in fine*), the indispensable objects referred to in the present article can in no circumstances be regarded as lawful targets. Only " foodstuffs and food-producing areas " might possibly acquire a military character *once they were specifically assigned for consumption by the armed forces*.

**Article 49. — Works and installations containing dangerous forces**

**1. It is forbidden to attack or destroy works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations. These objects shall not be made the object of reprisals.**

**2. The Parties to the conflict shall endeavour to avoid locating any military objectives in the immediate vicinity of the objects mentioned in paragraph 1.**

**3. In order to facilitate their identification, the Parties to the conflict may mark works and installations containing dangerous forces with a special sign consisting of two oblique red bands on a white ground. Absence of such marking in no way relieves a Party from its obligations under paragraphs 1 and 2 of this Article.**

*Ref.*: 1972 Report, vol. I, paras. 3.136 and 3.137; 3.224 to 3.227.

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[25] In Section III, which is entitled *Treatment of Persons in the Power of a Party to the Conflict*, Article 66 bears the same title as the present article and pursues the same purpose, but it concerns the belligerent in whose power the objects are.

The purpose of this provision is to spare the civilian population the disastrous effects of destruction of, or damage to, works containing dangerous forces, through the release of natural or artificial elements.

The experts showed two trends: a large number of experts considered that all such objects should enjoy absolute and automatic immunity, while others regarded the prohibition to attack or destroy those objects as utterly impracticable owing to the fact that some would be used in the war effort.

The compromise solution here consists in adopting the principle of absolute and automatic immunity (including the prohibition of reprisals), yet confining that prohibition to certain objects specified in an exhaustive list.

*Paragraph 1*

In view of the immense dangers which the destruction of certain works would entail for the population, the ICRC considers that the nature of those works—military, combined or civilian—would no longer be determinant.

The considerations which have prompted the ICRC to propose the prohibition of any attack on " dams, dykes and nuclear generating stations " hold good for reprisals. The latter prohibition usefully supplements Article 46 (4).

*Paragraph 2*

This paragraph is intended to facilitate application of the rule contained in paragraph 1. It would be an anomaly if the immunity granted to dams, dykes and nuclear generating stations were to be extended to military objectives. Should one of the Parties to the conflict place in the vicinity of protected works military objectives in order to shield the latter from attack, the opponent shall take the precautionary measures laid down in Article 50.[26]

A related problem was raised by some experts who wished to see the draft completed. Belligerents might be apprehensive of relying entirely on the prohibition contained in paragraph 1 for the protection of their works containing dangerous forces; to spare the population the extremely serious consequences of any attack carried out in error or in violation of the rule, they might, for instance, decide to set up anti-aircraft artillery solely for the purpose of defence. Those experts consider therefore that the article should permit the setting up of a defensive system. In the ICRC's opinion, the difficulty here lies in the fact that the *intention* of the Parties to the conflict could not be determined objectively, particularly the intention of the Party adopting such " defensive " measures.

*Paragraph 3*

This article, like those relating to localities under special protection (see Art. 52 (6) and Art. 53 (5)), provides for a sign consisting of two oblique red bands on a white ground [27] the use of which here is optional.

In order not to have an unduly large number of international protective signs—which would thereby diminish the chances of their being understood and assimilated by the troops—an existing sign of neutralization was chosen.

As indicated in the commentary on Article 2 (*d*), the Protecting Powers could possibly be called upon to notify the location and means of identification of such works and installations.

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[26] See Art. 46 (5) which mentions a similar case.

[27] See, *inter alia*, Fourth Convention, Annex I, Art. 6. At present the Geneva Conventions limit this sign to hospital and safety zones reserved for certain persons.

## Chapter IV

## Precautionary measures

**Article 50. — Precautions in attack**

**1. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. In the planning, deciding or launching of an attack the following precautions shall be taken:**

*(a)* **Proposal I**

**those who plan or decide upon an attack shall ensure that the objectives to be attacked are duly identified as military objectives within the meaning of paragraph 1 of Article 47 and may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated;**

**Proposal II**

**those who plan or decide upon an attack shall take all reasonable steps to ensure...**

*(b)* **those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated;**

*(c)* **whenever circumstances so permit, advance warning shall be given of attacks which may affect the civilian population. Such warnings do not, however, in any way limit the scope of the obligations laid down in the preceding paragraphs.**

**2. All necessary precautions shall be taken in the choice of weapons and methods of attack so as not to cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked.**

**3. When a choice is possible between several objectives, for obtaining a similar military advantage, the objective to be selected shall be that which will occasion the least danger to civilian lives and to civilian objects.**

*Ref.*: 1972 Report, vol. I, paras. 3.185 to 3.198.

Precautionary measures shall in no case limit the scope of the preceding rules. On the contrary, they are meant to facilitate the application of those rules. This applies both to the obligation to identify, which supplements the principle regarding the " distinction between the civilian population and combatants, and between civilian objects and military objectives " (Art. 43), and to other measures designed to eliminate or limit as far as possible the *incidental* effects of attacks.

It has in fact been observed, during military operations, that even attacks on clearly determined military objectives are very often liable to have accidental effects on civilians and their property.

These provisions are meant for all members of the armed forces planning, deciding or launching an attack,[28] whatever the level of the command.

[28] See Art. 44 (2), which defines attacks.

*Paragraph 1*

The first sentence lays down the general rule governing the behaviour of combatants with regard to the risks which military operations, and especially attacks, involve for protected persons and objects. The wording is partly based on a proposal submitted by some experts.[29]

Three precautionary measures stemming from the aforementioned general rule are underlined in this paragraph: identification [sub-paragraphs (*a*) and (*b*)], proportionality [sub-paragraphs (*a*) and (*b*)] and warning [sub-paragraph (*c*)].

*Sub-paragraphs (a) and (b)*

These two sub-paragraphs, which deal with identification and proportionality, cover situations at different times: sub-paragraph (*a*) relates to planning and deciding while sub-paragraph (*b*) relates to launching. It was necessary to prescribe the obligations of " those who launch an attack ", essentially for the following two reasons:

(1) earlier observations, at the time of planning and deciding, may be partly erroneous;
(2) the circumstances which prevailed at the time of planning and deciding may have undergone a profound change.

It will be noted that, in sub-paragraph (*a*), Proposal II allows the military command greater scope.

To ensure the *identification* of military objectives, recourse may be had to various methods: land or aerial reconnaissance, by one's own troops or allied troops, by human (scouts or intelligence officers) or technical means (radar, television, satellites, infra-red rays, etc.).

The Parties to the conflict should, in a given case, refrain from planning, deciding or launching an attack in the absence of any information about the existence or whereabouts of a military objective, [30] as it is idle to claim that the civilian population is spared when non-directed or random shooting is taking place.

*Proportionality* covers the *accidental* effects of attacks on protected persons and objects, as the word " incidental " indicates. The dangers to civilian population and civilian objects arise from widely differing factors, such as the *location of the persons and objects concerned* (in the immediate vicinity of a military objective), the *configuration of the terrain* (danger of landslide, of ricochetting, etc.), the *accuracy of the weapons used* (relative dispersion according to trajectory; firing range, ammunition used, etc.), *meteorological conditions* (visibility, effect of wind, etc.), *specific nature of the military objectives* (ammunition stores, fuel tanks, army nuclear stations, etc.), [31] and *combatants' mastery of techniques.*

All these various factors with their probable or possible effects on protected civilians and civilian objects [32] must therefore be borne in mind when planning, deciding (sub-paragraph (*a*)) and launching (sub-paragraph (*b*)) the attack.

*Sub-paragraph (c)*

The warning rule is already applicable under treaty law or customary international law in certain situations. It is expressed in more or less peremptory terms according to whether it refers to the general protection for persons and objects or to the special protection granted to specific categories of persons and objects.

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[29] See 1972 Report, vol. II, CE/COM. III/PC 51, which states *inter alia* (draft Article 45 (1)):
" Constant care shall be taken, when conducting military operations, to spare civilians to the greatest extent possible commensurate with the character and power of the weapons used ".

[30] The 1972 draft specifically mentions this idea. See ICRC, Draft Protocol I, Art. 49 *(b)*.

[31] See Art. 49.

[32] Not only within the meaning of Art. 47 (2), but any object protected under existing treaty law or customary international law (civilian and military hospitals, cultural objects, hospital and safety zones, etc.).

In the case of general protection, for instance in Article 26 of the Hague Regulations of 1907 [33] and Article 6 of the Hague Convention No. IX of 1907,[34] the rule is expressed rather flexibly for the military command, since it applies to all persons and objects protected.

In the case of special protection such as that to which hospitals are entitled (Fourth Convention, Art. 19 (1)), the rule is more strictly expressed with regard to a military command which would have noted that those objects have been diverted from their peaceful uses, for it should not be easily acknowledged that special protection has ceased; it ceases only after a *warning*, which is then mandatory and which names a reasonable time limit, has remained unheeded.[35]

Within the scope of this Chapter, precautionary measures are meant to strengthen the protection of all persons and objects protected. As in the case of the aforementioned rules on warning for general protection, the military command is allowed some latitude. This is implied by the words " whenever circumstances so permit."

*Paragraph 2*

The rule asserting that attacks shall be strictly limited to military objectives (Art. 47), and the rule on proportionality (Art. 46 (3) (*b*) and para. (1) of the present article) already imply, among other rules, that the Parties to the conflict have a choice as to means and methods of combat.

It has nevertheless not seemed superfluous to restate specifically the idea of choice of means and methods of combat from the standpoint of the precautions to be taken by members of the armed forces involved in planning, deciding and launching an attack.

The rule itself implies no specific prohibition. It only orders the Parties to the conflict contemplating the use of a given weapon or method to consider and weigh its probable or possible effects on the civilian population, bearing in mind the factors mentioned in the commentary on paragraph 1.

Two specific cases were mentioned.[36] Some experts proposed that the Parties to the conflict be required to chart *minefields* if they used mines, in order that at the close of hostilities the charts might be handed over to any authorities responsible for the safety of the population. They also proposed that the Parties to the conflict should equip weapons capable of causing serious damage to the civilian population with a *safety device* which would render them harmless should they escape from the control of those who employed them. The use of some conventional weapons that may cause unnecessary suffering or have indiscriminate effects was studied at a meeting held this year, as a result of which a documentary report was issued by the ICRC.

**Article 51. — Precautions against the effects of attacks**

**1. The Parties to the conflict shall, to the maximum extent feasible, take the necessary precautions to protect the civilian population, individual civilians and civilian objects under their authority against the dangers resulting from military operations.**

**2. They shall endeavour to remove them from the proximity of military objectives, subject to Article 49 of the Fourth Convention, or to avoid that any military objectives be kept within or near densely populated areas.**

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[33] Article 26 of the Hague Regulations of 1907 lays down the following:
" The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities."

[34] Article 6 of the Hague Convention No. IX of 1907 reads thus:
" If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."

[35] See Art. 58 (1). A procedure of this kind might be contemplated in Articles 48, 49, 52 and 53.

[36] See 1972 Report, vol. II, CE/COM III/PC 59.

*Ref.*: 1972 Report, vol. I, paras. 3.199 to 3.201.

While the preceding article lays obligations upon the author of an attack (within the meaning of Article 44 (2)), the present article is meant for the Party attacked or liable to be attacked.

That Party can contribute to the safeguard of protected persons and objects in its power, and some measures which can be taken are therefore singled out for its benefit. Bearing in mind any material obstacles, however, the rule is less mandatory on that Party, as indicated by the terms " to the maximum extent feasible " (paragraph 1) and " they shall endeavour " (paragraph 2).

As indicated in paragraph 2, by making it subject to Article 49 of the Fourth Convention, the Parties to the conflict cannot use this provision as a pretext for the forcible removal or transfer of the civilian population.

## Chapter V

## Localities under special protection

### Article 52. — Non-defended localities

**1. It is forbidden for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.**

**2. To facilitate the observance of this rule, the Parties to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact. Armed forces and all other combatants as well as mobile weapons and mobile military equipment, must have been evacuated from that locality; no hostile use shall be made of fixed military installations or establishments; no acts of warfare shall be committed by the authorities or the population.**

**3. Except where a Party to the conflict replies to such a declaration addressed to it by an express refusal, it is presumed as having accepted to abide by it.**

**4. The Parties to the conflict may also agree on the creation of non-defended localities. Such an agreement may be concluded either directly, or through a Protecting Power or any impartial humanitarian body. The agreement shall demarcate the non-defended locality and, should the need arise, lay down the methods of supervision.**

**5. The presence, in these localities, of military medical personnel, civil defence personnel, civilian police forces, wounded and sick military personnel, as well as military chaplains, is not contrary to the conditions stipulated in paragraph 2.**

**6. The Party in whose power these localities lie shall mark them, so far as possible, by means of signs consisting of two oblique red bands on a white ground displayed where they are clearly visible, especially on their perimeter and on highways.**

**7. A locality will lose its status of non-defended locality if it no longer fulfils the conditions stipulated in paragraph 2 or when it is occupied militarily.**

### Article 53. — Neutralized localities

**1. It is forbidden for the Parties to the conflict to extend their military operations to localities on which they have conferred by agreement the status of neutralized localities.**

**2. This shall be an express agreement, which may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian body, and may consist of reciprocal and concordant declarations. It shall demarcate the neutralized locality and lay down the methods of supervision.**

**3. The subject of such an agreement may be any inhabited place situated outside a zone where armed forces are in contact. Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated from that locality; no hostile use shall be made of fixed military installations or establishments; no acts of warfare shall be committed by the authorities or the population; any activity linked to the military effort must have ceased.**

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

**5. The Party in whose power these localities lie shall mark them by means of signs consisting of two oblique red bands on a white ground displayed where they are clearly visible, especially on their perimeter and on highways.**

**6. If the fighting draws nearer to a neutralized locality, none of the Parties to the conflict may effect a military occupation of such a locality or unilaterally repeal its status.**

**7. If one of the Parties to the conflict commits a violation of the provisions of paragraphs 3 or 6, the other Party shall be released from the obligations incumbent upon it under the agreement conferring upon a place the status of a neutralized locality.**

*Ref.*: Article 52: 1972 Report, vol. I, paras, 3.204 to 3.216;
Article 53: 1972 Report, vol. I, paras. 3.217 to 3.223.

*Introduction*

Despite some differences as regards the nature of, and the conditions surrounding these two articles, they have many points in common, which warrants a joint study.

Both have the same purpose: on the one hand, to provide genuine immunity for the population, which would remain in the place where it lives and would no longer have reason to fear the risks or the *incidental* effects of attacks (absolutely forbidden against those localities); and, on the other hand, to preserve the localities themselves owing to the values they represent (economic, cultural, scientific, etc.).

In comparison with hospital and safety zones (Fourth Convention, Art. 14) and neutralized zones (Fourth Convention, Art. 15), which are reserved for certain privileged categories, these localities have the following features: on the one hand, they are reserved for the civilian population *as a whole* (in the meaning of Art. 45) and, on the other hand, they strengthen the protection of the population *on the spot*, by precluding their transfer or removal, which is always harmful for civilians.

Obviously, the conclusion of agreements on specific inhabited places by no means implies that the Contracting Parties would be released from other obligations arising from this Section or Parts II and III of the present draft, in these localities or elsewhere.

*Status of such localities*

Legally, the main difference between these two categories of locality lies in the manner in which their respective status has to be established.

By virtue of customary international law, *non-defended localities* are protected once their specific *de facto* " non-defence " situation is established. Moreover, international treaty law has reaffirmed the immunity of non-defended localities; reference may be made to Article 25

of the Hague Regulations of 1907 [37] and Article 1 of the Hague Convention No. IX of 1907.[38] Thus any subsequent agreement concluded by the Parties to the conflict is of a purely *declaratory* nature and can only strengthen the protection already due. This is implied by the wording " to facilitate the observance of this rule " (Art. 52 (2)).

The status of non-defended localities may be confirmed in an unopposed unilateral declaration (Art. 52 (2) and (3)) or in a special agreement (Art. 52 (4)).

Where the conditions for non-defence (Art. 52 (2)) have not been, or are no longer, fulfilled — which is what the article implies —, the Party to the conflict to which a declaration is addressed may refuse to accept it. That Party is, however, required to state its refusal in an explicit manner, in order that the legal status of the locality concerned may be clearly determined.

*Neutralized localities*, on the other hand, acquire their status by virtue of specific agreements, which are constitutive for the special protection.[39] The requirement of express agreements within the meaning of Article 53 (2) is based on the following three reasons:

(1) neutralization is intended to be an enduring status;

(2) such status lays on the Party in control of the locality the obligation to ensure that any activity connected with the military effort shall cease (Art. 53 (3));

(3) the status requires a system of supervision, the details of which should be arranged by the Parties to the conflict.

For both categories of localities, the agreement shall contain details as to the extent of the area concerned (Art. 52 (4) and Art. 53 (2)). The Contracting Parties shall, if possible, supply one another with a map or a plan of demarcation.

In either case, the agreement, whether written or verbal (by loudspeaker, radio, etc.), " shall not affect the legal status of the Parties to the conflict or that of the territories over which they exercise authority " (Art. 4); in particular those agreements should not imply renunciation of sovereignty.

*Nature of such localities*

The two categories of localities differ as regards site, purpose and duration.

In the matter of *site*, non-defended localities shall be " near or in a zone where armed forces are in contact " (Art. 52 (2)), while neutralized localities shall generally be *outside* such a zone (Art. 53 (3)). In both cases the indication refers to a fact and not to a condition.

The institution of non-defended localities tends to protect them from tactical bombing or shelling, while that of neutralized localities tends to protect them against strategic bombing or shelling.

As regards *duration*, non-defended localities would lose their status immediately upon military occupation (Art. 52 (7)), whether or not there was an agreement. It is obvious that in most cases non-defence would be of a *transitory* nature. In the case of non-defended localities which are the subject of an agreement, however, a question which arises is what will happen to them when they lie far from the " zone where armed forces are in contact ", *but without their being militarily occupied.* In the opinion of the ICRC, those localities would retain their status. On the other hand, the establishment of neutralized localities would amount to a permanent demili-

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[37] Article 25 of the Hague Regulations of 1907 reads thus:

" The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

[38] Article 1 of the Hague Convention No. IX of 1907 lays down the following:

" The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine mines are anchored off the harbor."

[39] Where the localities already fulfil non-defence conditions, they are of course protected as such by customary law.

tarization of an inhabited place by providing it with *lasting* safeguards against attack, even " if the fighting draws nearer " (Art. 53 (6)).

*Conditions which the localities must fulfil*

In the two articles, an attempt has been made to define and clarify the nature of *non-defence* and of *neutralization.* A comparison of the basic conditions which the two categories must meet (Art. 52 (2), and Art. 53 (3)), shows that there is only one difference, but one which is important: in neutralized localities, any activity linked to the military effort must have ceased. The Party to the conflict which is prepared to agree to the neutralization of a locality in the adversary's power will not want the latter to derive further benefit therefrom for its military effort (e.g., the activities of arms factories or the production of supplies for the armed forces will have to be interrupted). This condition has not appeared necessary in the case of non-defended localities, for the adverse Party may, on occupying the locality, put an end to that activity or divert it to its own purposes (unless otherwise specified in a special agreement).

There are three basic conditions common to the two categories:

(1) the evacuation of armed forces and any other combatants, and of *mobile* weapons and military supplies;

(2) *no hostile* [40] *use* of *fixed* military installations (including weapons) or establishments (fortresses, barracks, etc.);

(3) *the absence of any act of war* by anyone whatsoever (members of resistance movements, francs-tireurs, etc.).

The extinction or violation of any of these conditions (plus the condition regarding the military effort in the case of neutralized localities) puts an end to the status (Art. 52 (7) and Art. 53 (7)). This could be perhaps attenuated by the following provision: " Protection shall cease only after due warning has been given, specifying in the appropriate cases a reasonable time limit, and after such warning has remained unheeded ".

*Supervision*

Supervision, which is optional for *non-defended localities* (Art. 52 (4)) and mandatory for *neutralized localities* (Art. 53 (2)), is meant to assist the Parties to the conflict in fulfilling the conditions laid down.

Supervision is optional in non-defended localities because, as experience has shown, in the contact zone it may sometimes be impossible to set the system in operation; in addition the changing military situation could well involve danger for the lives of the members of the supervisory body.

Supervision is mandatory in neutralized localities, for the Party to the conflict which does not exercise its authority over the locality will constantly fear that its opponent may take undue advantage of neutralization. Supervision lacks any constitutive effect. Yet serious obstacles to the activities of the supervisory body, the cessation of its functions or of its existence might, as the case may be, be considered as reasons for denunciation of the agreement.

On the other hand, reference should be made to the commentary on Article 2 (*d*), where the functions which Protecting Powers might be called upon to exercise for the purpose of the application of the Protocol are considered.

*Marking*

The reason for the choice of the sign is given above (see Art. 49 (3)). Owing to essentially practical considerations (improvised status, very short time available, shortage of staff or material), marking is optional for non-defended localities (Art. 52 (6)), while neutralized localities, lying

[40] The word " hostile " seems useful in view of the combined nature of some objects (even an evacuated barracks can be converted into a hospital).

outside the zone of contact, intended to last a long time, and always with a supervisory body, must be marked (Art. 53 (5)).

Article 36, entitled *Recognized signs*, lays down strict limits governing the use of the sign.

Yet even in neutralized localities marking lacks any constitutive effect. In both cases, the absence of any marking will therefore not prevent the existence of the status, but the Party to the conflict in control of the locality shall bear responsibility for the risks arising from the lack of such marking.

*Problems of defensive measures*

As regards the question of whether purely defensive military measures are or are not compatible with the nature of neutralized or non-defended locality, reference should be made to the commentary on Article 49 (2).

## Chapter VI

## Civil Defence

### Article 54. — Definition

**Civil defence, for the purpose of the present Chapter, covers humanitarian tasks intended to safeguard the civilian population against the effects arising from hostilities or disasters, to ensure its survival and to provide the conditions necessary for its existence. Civil defence includes, *inter alia*:**

*(a)* **rescue, first-aid, conveyance of wounded, fire-fighting;**

*(b)* **safeguard of objects indispensable to the survival of the civilian population;**

*(c)* **provision of emergency material and social assistance to the civilian population;**

*(d)* **emergency repair of public services indispensable to the civilian population;**

*(e)* **maintenance of public order in disaster areas;**

*(f)* **preventive measures, such as warning the civilian population, evacuation, provision of shelters;**

*(g)* **detection and marking of danger areas.**

*Ref.*: 1972 Report, vol. I, paras. 3.293 to 3.313.

This article provides a definition of civil defence based on the criterion of the functions exercised. According to this concept, civil defence must not be a monopoly of specialised bodies, as was proposed in Article 67 of the 1972 draft, but must be based on the possible participation of any civilian in the tasks of civil defence. The regulations in the present Section are aimed at making it possible for certain civilians — those who afford assistance to the victims of armed conflicts — to perform their humanitarian tasks, and to give them special protection to this effect. Such civilians are distinct from the others in view of the tasks they perform. Consequently, the function is the determining criterion.

This article is based on the draft drawn up by the experts at the second session of the Conference of government experts. The only changes made relate to style.

The definition specifies that the purpose of civil defence is to safeguard the civilian population not only against the dangers arising from hostilities but also against those of natural disasters occurring during a period or armed conflict. This provision indicates implicitly the *ratio legis* for this Chapter: to make it easier for civil defence to perform its humanitarian tasks.

*Sub-paragraph (a)*

It is clear that, in the context of this definition, fire-fighting should provide assistance in rescuing or protecting only civilians and military personnel *hors de combat*, and preventing damage to civilian objects.[41]

*Sub-paragraph (b)*

For the concept of " objects indispensable to the survival of the civilian population " reference should be made to Articles 48 and 66.

**Article 55. — Zones of military operations**

**1. In zones of military operations, the civilian bodies which are established or recognized by their governments and are assigned to the discharge of the tasks mentioned in Article 54 shall be respected and protected. Their personnel shall not be intentionally attacked. Except in case of imperative military necessity, Parties to a conflict shall permit them freely to discharge their tasks.**

**2. Civilians who, although not members of the civil defence bodies mentioned in paragraph 1, respond to an appeal from the authorities and carry out civil defence tasks under the control of those authorities shall likewise be respected and protected during the performance of those tasks.***

**3. Buildings, materiel and means of transport used by the civil defence shall not be intentionally attacked or destroyed.**

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* *Note*

Some experts consulted by the ICRC recommended adding here the following paragraph:

**" Personnel of military units assigned exclusively to civil defence tasks shall not be intentionally attacked provided they display the international distinctive sign of civil defence specified in Article 59 below, and bear only small-arms. If they fall into the power of the enemy they shall be considered to be prisoners of war."**

This provision covers all situations involving military operations including the combat zone, with the exception of occupied territories. The latter situation is dealt with under a separate article (see Art. 56).

*Paragraph 1*

The first sentence is of a very general scope, and constitutes only one particular instance of the application of Article 46. The purpose is to protect the civil defence bodies. The 1972 draft (Part IV, Section IV) revolved around the notion of body, since only those civilian defence bodies which were established or recognized by their governments were entitled to protection. Although this view has been abandoned in favour of a definition of civil defence based on the functions exercised, it is nevertheless natural that protection should be afforded in the first place to those bodies which are specialized in the tasks of civil defence, because, in the majority of countries, they are the bodies upon whom such tasks devolve. To prevent any abuse, it has been envisaged that only those bodies which are of an official nature, i.e. established or recognized by their governments, will enjoy protection. In accordance with the wish of a very large majority of experts, this article stipulates that the bodies must be of a civilian nature.

*Paragraph 2*

Whereas the first paragraph grants special protection to civil defence bodies and their staff, the present provision also extends it to civilians who, although not members of such bodies, perform civil defence tasks. This extension of the category of persons to whom protection is

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[41] See 1972 Report, vol. II, CE/COM. III/OPC 8.

afforded is in line with the wish expressed by several experts that such protection should not be restricted to the staff of civil defence bodies; [42] it also takes account of the situation which prevails in quite a number of countries where civil defence tasks are not placed in the hands of specialized bodies, but may be given to any civilian under the supervision of the competent authorities.

This paragraph is based on Article 25 of the First Convention relating to temporary medical personnel. To prevent any abuse, it is envisaged that those persons performing civil defence tasks shall be afforded protection only when the civil or military authority requests their assistance and supervises their activities.

Furthermore, reference should be made to Article 2 *(d)* concerning the functions which the Protecting Powers may be called upon, *inter alia*, to exercise for the purpose of the application of the present Protocol.

*Note concerning the paragraph which might be added*:

Some experts have expressed the wish for this provision, which would be inserted between the second and last paragraph of this article. According to several experts, it should be accepted that the civil defence should benefit from the assistance, in certain circumstances, of military units. Others have pointed out that in their country there is a close inter-relationship between national defence and civil defence, and that in cases of need civil defence personnel may be asked to contribute in military activities and vice-versa. In a written proposal, some have pointed out that in their country some reservists receive training in civil defence under special schemes; in cases of need, these reservists, who belong to the army, are placed at the disposal of the civilian authorities. Although their status is that of military personnel on active service, they then become responsible to the civilian authorities. In the opinion of these experts, such military personnel should then become entitled to the protection afforded to civil defence personnel.

This paragraph is based on Articles 25 and 29 of the First Convention relating to the protection and treatment of temporary personnel. It also takes into account the situation prevailing in several countries, namely the developing countries, which quite frequently do not yet possess any specialized bodies and where the civil defence tasks are therefore discharged by the army. However, in view of the difficult problems which would be created by this provision, and the opposition of other experts, the ICRC felt preferable at this stage not to include this provision in the article itself.

**Article 56. — Occupied territories**

**1. In occupied territories, the civilian bodies assigned to the discharge of the tasks mentioned in Article 54 shall receive every facility from the authorities for the discharge thereof. In no circumstance shall their personnel be compelled to perform activities unconnected with their functions. The Occupying Power shall not change the structure or personnel of such bodies in any way which might jeopardize the efficient discharge of their mission. It shall not demand that the civil defence bodies give the nationals of the Occupying Power priority.**

**2. The Occupying Power shall not divert buildings, materiel and means of transport belonging to civil defence bodies from their assignment.**

*Ref.:* 1972 Report, Vol. I, paras. 3.320 to 3.324

This article reaffirms and supplements Article 63 of the Fourth Convention relating to National Red Cross and other relief societies. An article dealing specifically with occupied territories is particularly justifiable in view of the fact that the civil defence service is in constant

[42] See Art. 54.

contact with the Occupying Power, and that as a result its protection and status must be reinforced on the international plane.

*Paragraph 1*

The first sentence is of a very general scope, and the following sentences are only instances of application of the first sentence. Even in occupied territory, this personnel is still necessary because military operations, with all their concomitant dangers, may still continue there.

*Paragraph 2*

This article, which is not so extensive as paragraph 3 of the preceding article, provides for special protection to be given only for the equipment which has been permanently assigned to civil defence bodies. The prohibition on the requisitioning of civil defence equipment, which appeared in the 1972 draft (Art. 69 (3)) has not been included here. It was considered preferable not to touch on this problem, rather than to introduce a prohibition which carried numerous reservations and exceptions that might be abused by the Occupying Power. This question will continue, therefore, to be dealt with under the rules of international law with regard to requisition.[43]

**Article 57. — Civil defence bodies of States not parties to a conflict and international bodies**

**1. The protection conferred by the present Chapter applies also to the personnel, materiel and means of transport of civil defence bodies of States not parties to a conflict and which carry out civil defence activities on the territory of, with the agreement of and under the control of a Party to the conflict after notification to the adverse Party. In no circumstance shall such activities be deemed to be interference in the conflict.**

**2. The personnel, materiel and means of transport of international civil defence bodies engaged in civil defence activities on the territory of a Party to a conflict under the conditions mentioned in the preceding paragraph shall also be respected and protected.**

*Ref.*: 1972 Report, vol. I, paras. 3.325 to 3.332.

*Paragraph 1*

This paragraph takes up, by analogy, the idea in Article 27 of the First Convention relating to the Societies of neutral countries. The assistance from civil defence bodies in neutral countries may prove useful, particularly in the case of armed conflicts on the territory of developing countries, which frequently do not have any civil defence services. In the 1972 draft, this article bore the title *Organizations of neutral States* (Art. 70). In the opinion of some experts, this expression was not clear enough. They suggested, therefore, the expression " Organizations of States not involved . . . ". However, the expression " Civil defence bodies of States not parties to a conflict " seems better.

The last sentence of this paragraph takes up the idea of paragraph 3 of Article 27 of the First Convention.

*Paragraph 2*

This is a new provision. It has been felt advisable to provide for the possibility of assistance from international civil defence bodies and to grant them appropriate protection.

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[43] See, in particular, Hague Regulations of 1907, Art. 52.

**Article 58. — Cessation of protection**

**1. The protection due to persons, buildings, materiel and means of transport engaged in civil defence tasks shall not cease unless they are used to commit, outside those duties, acts harmful to the enemy. Protection may, however, cease only after a warning, specifying in all appropriate cases a reasonable time limit, has remained unheeded.**

**2. The fact that civil defence personnel:**

*(a)* **receive instructions from military authorities,**

*(b)* **co-operate in the discharge of their tasks with military personnel,**

*(c)* **bear small-arms for the purpose of maintaining order in a stricken area or for self-defence.**

*(d)* **carry out their tasks for the benefit of military victims, shall not be considered to be harmful to the enemy.**

**3. Similarly, the organization of civil defence bodies along military lines, and compulsory service in them, shall not deprive them of the protection conferred by the present Chapter.**

*Ref.*: 1972 Report, vol. I, para. 3.346.

This is a new article which did not appear in the 1972 draft. It is based on Article 13 of the present draft Protocol and on Article 21 of the First Convention, in view of the similarity between the situations: cessation of protection.

This article prevents abuse of the protection. It also clearly specifies the circumstances in which a protected person may be considered to have forfeited his right to protection.

Acts harmful to the enemy may be defined as " acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations ".[44] The civil defence personnel shall observe, with regard to the adverse Party, the neutrality which they claim in their own favour, and which gives grounds for the protection afforded to them by the present draft.

It is specified, moreover, that protection may cease only in the event of acts committed by the civil defence personnel *outside their duties*.

An explanation has been provided, in a negative manner, of what is understood by the term " harmful act ", by means of a list of examples selected as being the most typical.

**Article 59. — Identification**

**1. Each Party to a conflict shall endeavour to ensure that personnel, buildings, materiel and means of transport engaged in civil defence tasks are identifiable.**

**2. The High Contracting Parties shall issue for permanent civil defence personnel and means of transport permanently assigned to civil defence tasks a document attesting to their character.**

**3. Personnel, buildings, materiel and means of transport engaged in civil defence tasks shall, with the consent of the competent authority, display the international distinctive sign of civil defence.**

**4. The international distinctive sign of civil defence is:**

| **Proposal I** | **Proposal II** |
|---|---|
| **An equilateral light blue triangle on a light orange background.** | **Two or, in case of need, more vertical light blue stripes on a light orange background.** |

**5. In addition to the distinctive sign, Parties to a conflict may authorize the use of distinctive signals to signalize civil defence buildings and means of transport.**

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[44] *Commentary*, First Geneva Conv. 1949, Art. 21.

**6. The implementation of the provisions of paragraphs 2 to 5 of this article is governed by Chapter IV of the Annex.**

**7. Temporary personnel, buildings, materiel and means of transport temporarily engaged in an emergency relief action may display the international distinctive sign of civil defence only for the duration of their assignment.**

**8. The identification of civil defence medical services is governed by Article 18.**

**9. The High Contracting Parties shall take the measures necessary to supervise the display of the distinctive sign and to prevent and repress abuse thereof.**

*Ref.*: 1972 Report, vol. I, paras. 3.282 and 3.333 to 3.340.

In the 1972 draft (Article 71) this article bore the title *Markings*. The experts who attended the meeting on an international distinctive sign for civil defence [45] preferred the term *Identification*. This term, which has a wider significance than the previous one, is more in keeping with the content of the article. The latter does not only contain provisions relating to marking the civil defence personnel and equipment with an emblem, but also concerns their identification by means of an identity card.

*Paragraph 1*

This is a new provision. It is based on Article 18 (1) bearing the title *Identification*.

*Paragraph 2*

This provision envisages the issue of an identity card, but solely to *permanent* personnel, in order to prevent the proliferation of such cards. Furthermore, it is stipulated that the means of transport of the civil defence must also be provided with a document; this provision might prove useful in the situations covered by Article 56, which imposes a certain number of obligations on the Occupying Power in occupied territories.

*Paragraph 3*

The competent *national authority* shall be responsible for deciding which personnel and equipment are authorized to bear the distinctive sign.

*Paragraph 4*

For this paragraph, and for the two alternative signs proposed therein, reference should be made to the Report of the meeting of experts mentioned above (in particular, paras. 25 to 44).

*Paragraph 5*

This is a new provision. It is based on paragraph 4 of Article 18. As in the case of medical units, it may, in certain circumstances, be advisable that the civil defence can be identified not only by the distinctive sign but also by distinctive *signals* (flashing luminous signals, sirens, etc.).

*Paragraph 7*

This provision is based on Article 41 of the First Convention concerning the identification of auxiliary personnel. Following the idea of the protection based on the functions exercised, it is aimed at restricting the use of the distinctive sign and thus preventing any abuse.

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[45] This meeting was held in Geneva, at the ICRC, from 22 to 26 January, 1973. See ICRC, Meeting of Experts on an International Distinctive Sign for Civil Defence Services, Report, 1973.

*Paragraph 8*

The experts expressed the unanimous opinion that it would be advisable for medical personnel — whether they belonged to the civil defence or were simply providing assistance — to be identified by a special sign, as defined in Article 8 (*e*), and as provided for in the above-mentioned Article 18.

*Paragraph 9*

This paragraph is based on the analogy of the provisions of the Conventions relating to controlling the use of the distinctive sign.[46]

## SECTION II

## RELIEF IN FAVOUR OF THE CIVILIAN POPULATION

### Article 60. — Field of application

**The provisions contained in the present Section are complementary to such international rules concerning relief as may be binding upon the High Contracting Parties, in particular to Article 23 of the Fourth Convention. They apply to the civilian population as defined in Article 45.**

Relief in cases of disaster is acquiring an increasing importance; the United Nations, like the Red Cross, have frequently discussed this matter and have passed a number of resolutions in this connection.[47] This question has been placed on the agenda of the XXIInd International Conference of the Red Cross (Teheran, November 1973).

The present Section widens the range of persons who are entitled to relief; Article 23 of the Fourth Convention restricts relief to children under fifteen, expectant mothers and maternity cases, and restricts the nature of the relief that may be provided.[48]

### Article 61. — Supplies

**To the fullest extent possible and without any adverse distinction, the Parties to the conflict shall ensure the provision of foodstuffs, clothing, medical and hospital stores and means of shelter for the civilian population.**

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[46] First Convention, Art. 38 to 44, 53, 54; Second Convention, Art. 41 to 45.

[47] See, in particular UN, res. 2675 (XXV), operative para. 8; res. 2852 (XXVI), operative para. 3 *(b)*; res. 3032 (XXVII), preambular para. 10 *(g)*; and XXIst Internat. Conf. Red Cross, Res. XXVI, Istanbul, 1969.

[48] Article 23 of the Fourth Convention relating to the consignment of medical supplies, foodstuffs and clothing specifies:

" Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians or another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

*(a)* that the consignments may be diverted from their destination,

*(b)* that the control may not be effective, or

*(c)* that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed."

*Ref.*: 1972 Report, vol. I, paras. 3.266 and 3.267.

The duties which the Occupying Power has in respect of the civilian population of occupied territories are prescribed by the Fourth Convention (Section III, Art. 55 to 62, in particular Art. 55 (1)).[49]

The present article aims to extend those duties to all Parties to the conflict who exercise power over a territory, whatever the status of the latter. Furthermore, it is the population as a whole that would benefit therefrom.

To allow for the material difficulties that may face the Parties to the conflict, who might be obliged to import foodstuffs and the other items mentioned, the words " To the fullest extent possible " have been introduced in this article.

**Article 62. — Relief actions**

**1. If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the Parties to the conflict shall agree to and facilitate those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction. Relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict.**

**2. The Parties to the conflict and any High Contracting Party through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1.**

**3. When prescribing the technical methods relating to assistance or transit, the Parties to the conflict and any High Contracting Party shall endeavour to facilitate and accelerate the entry, transport, distribution or passage of relief.**

**4. The Parties to the conflict and any High Contracting Party may set as condition that the entry, transport, distribution or passage of relief be executed under the supervision of a Protecting Power or of an impartial humanitarian body.**

**5. The Parties to the conflict and any High Contracting Party shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.**

*Ref.*: 1972 Report, vol. I, paras. 3.268 to 3.278.

The mention of Contracting Parties is meant principally to refer to neutral Powers, or Powers not engaged in the conflict.

*Paragraphs 1 and 2*

When both conditions envisaged are fulfilled, the Contracting Parties are required to agree to and facilitate the relief actions (para. 1 for the sending of relief, and para. 2 for free passage).

When assessing the situation of the civilian population, the Parties to the conflict shall refer to their own observations, taking into account the usual standard of living in the country where the conflict is taking place, and to all relevant information, for example the reports of the

[49] Art. 55 (1) of the Fourth Convention specifies:

" To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

Protecting Powers,[50] specialized agencies or charitable organizations. It is desirable that these relief actions should remain of a purely impartial and humanitarian nature, and that the offer, acceptance or refusal of a relief action should never be related to political considerations.

*Paragraph 3*

The present wording clarifies the scope of paragraph 4 of Article 23 of the Fourth Convention,[51] since the latter has occasionally been misinterpreted. The draft is based on the text of resolutions XXVI of the XXIst International Conference of the Red Cross (Istanbul, 1969) and 2675 (XXV) of the General Assembly of the United Nations.

*Paragraph 4*

The present wording is in line with paragraph 3 of Article 23 of the Fourth Convention.

## SECTION III

## TREATMENT OF PERSONS IN THE POWER OF A PARTY TO THE CONFLICT

### Chapter I

### Field of application and protection of persons and objects

**Article 63. — Field of application**

**The provisions contained in the present Section are complementary to such international rules concerning the protection of civilians and civilian objects in the power of a Party to the conflict as may be binding upon the High Contracting Parties, in particular to Parts I and III of the Fourth Convention.**

Like Parts I and III of the Fourth Convention, this Section is designed to protect persons against arbitrary authority of a Party to the conflict in whose power they happen to be. As in the Fourth Convention, the expression " in the power " is not necessarily used here in the material sense; it means that the simple fact of being on the territory of a Party to the conflict or in occupied territory implies that the person concerned is " in the power " of the authorities of the Power involved, even if this power is never exercised. This expression only means, therefore, that a protected person is in a territory over which the Power concerned exercises control.[52]

**Article 64. — Refugees and stateless persons**

**Persons who, before the beginning of hostilities, were considered as being stateless persons, or refugees under the relevant international instruments or the national legislation of the State of refuge or State of residence, shall be recognized as being protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.**

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[50] See commentary on Art. 2 *(d)*.

[51] See Art. 60, note 48.

[52] See *Commentary*, Fourth Geneva Conv. 1949, Art. 4 (1).

*Ref.*: 1972 Report, vol. I, para. 3.125.

This article *expressly* recognizes the status of a protected person in the sense of the Fourth Convention (Art. 4) granted to stateless persons and refugees.

*Stateless persons* already enjoy *implicitly* this status by virtue of the first paragraph of the above-mentioned Article.[53] It has been considered advisable to reaffim here their status in a more *explicit* and clear manner. In this respect, the law in force is improved only in form, since it already entitles stateless persons to benefit from *all* the provisions of the Fourth Convention.

As regards *refugees*, the Fourth Convention merely regulates certain relationships between them and the country of asylum, and as the case may be, between them and the Occupying Power when the latter is their country of origin (Fourth Convention, Art. 44 and second para. of Art. 70). In the opinion of the United Nations High Commissioner for Refugees — an opinion shared by the ICRC —, these two provisions of the Fourth Convention are insufficient, and refugees should be granted a status valid equally with respect to all Parties to the conflict.

However, this provision is intended to protect only refugees recognized as such on the international or on the national plane before the beginning of hostilities.

Other refugees would remain entitled to the specific and restricted provisions of the law in force (in particular Art. 44 and the second para. of Art. 70 of the Fourth Convention).

By " relevant international instruments ", the article refers first to the Convention and to the Protocol relating to the status of refugees,[54] as well as to certain resolutions adopted by a number of international organizations (it is in fact the interpretation given to the term " international instruments ", which appears in Art. 1, para F *(a)* of the above-mentioned Convention).

**Article 65. — Fundamental guarantees**

**1. Persons who would not receive more favourable treatment under the Conventions or the present Protocol, namely, nationals of States not bound by the Conventions and the Parties' own nationals shall, in all circumstances, be treated humanely by the Party in whose power they may be and without any adverse distinction. The present article also applies to persons who are in situations under Article 5 of the Fourth Convention. All these persons shall enjoy at least the provisions laid down in the following paragraphs.**

**2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or military agents:**

*(a)* **violence to the life, health and physical or mental well-being of persons, in particular murder, torture, corporal punishment and mutilation;**

*(b)* **physical or moral coercion, in particular to obtain information;**

*(c)* **medical or scientific experiments, including the removal or transplant of organs, not justified by the medical treatment and not carried out in the patients' own interest;**

*(d)* **outrages upon personal dignity, in particular humiliating and degrading treatment;**

*(e)* **taking of hostages;**

*(f)* **threats to commit any of the foregoing acts.**

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[53] The first paragraph of Article 4 of the Fourth Convention specifies:

" Persons protected by the Convention are those who ... find themselves ... in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

[54] *Convention Relating to the Status of Refugees*, of 28 July 1951. UN, *Treaty Series*, vol. 189, 1954, No. 2545; *Protocol Relating to the Status of Refugees*, of 18 December 1966.

**3. No sentence may be passed or penalty executed on a person found guilty of an offence related to a situation referred to in Article 2 common to the Conventions except in pursuance of a previous judgment pronounced by an impartial and properly constituted court, affording the following essential judicial guarantees:**

*(a)* **no person may be punished for an offence he or she has not personally committed; collective penalties are prohibited;**

*(b)* **no person may be prosecuted or punished for an offence in respect of which a final judgment has been previously passed, acquitting or convicting that person;**

*(c)* **everyone charged with an offence is presumed to be innocent until proved guilty according to law;**

*(d)* **no person may be sentenced except in pursuance of those provisions of law which were in force at the time the offence was committed, subject to later more favourable provisions.**

**4. Women whose liberty has been restricted shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. This does not apply to those cases where members of the same family are together in the same place of internment.**

**5. The persons mentioned in paragraph 1, detained by reason of a situation referred to in Article 2 common to the Conventions and who are released, repatriated or established after the general cessation of hostilities, shall enjoy, in the meantime, the protection of the present article.**

This article serves a double purpose: first, to impose a limit on the arbitrary authority of the Parties to the conflict with respect to persons not protected by the Conventions and, secondly, to specify the humane treatment which, according to the third paragraph of Article 5 of the Fourth Convention, must be given to protected persons " definitely suspected ".

The fundamental guarantees provided by this article are, in fact, almost all taken from the Fourth Convention.[55]

The purpose of this draft is to rectify an omission in the existing treaty law; on the one hand, persons who are not protected by the First, Second and Third Conventions are not necessarily always protected by the Fourth Convention, as is shown by its Article 4; [56] on the other hand,

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[55] This field, particularly para. 3, is partly covered by the International Covenant on Civil and Political Rights, of which Article 4 states:

" 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

[56] Article 4 of the Fourth Convention specifies:

" Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention."

Article 5 of the Fourth Convention relating to derogations is fairly difficult to interpret and appears to restrict unduly the rights of the persons protected.[57]

It should be pointed out that this article is self-contained and has its own field of application with regard to the persons (para. 1), material questions (paras. 2 to 4) and period of time (para. 5) to which it refers.

*Paragraph 1*

In the Fourth Convention, a number of persons are excluded from the system of protection set out in Parts III and IV, owing to the above-mentioned Article 4: [58] these are principally nationals of States not bound by the Conventions and the nationals of the Party to the conflict concerned. In future, these persons will be covered, but only under this Article 65; this is expressed in the first sentence.

The second sentence relates to Article 5 of the Fourth Convention. The purpose is to specify and supplement the guarantees contained in paragraph 3 of Article 5: [59] *humane treatment*, a notion which is developed in paragraph 2 of the present article, and the *judicial guarantees* — which are set out in paragraph 3. Persons who would have participated in the fighting without fulfilling the conditions for the status of prisoner of war would be entitled in any case to the guarantees of this article even should they not be covered by the Fourth Convention [60] in the event of capture or arrest.

*Paragraph 2*

This paragraph is in line with the ideas expressed in Articles 30 to 34 of the Fourth Convention. The extension of these provisions to a new category of persons is necessary in view of the fact that they contain guarantees which are fundamental for all human beings, as is stressed by the title of the article.

The expression " whether committed by civilian or military agents " is taken from the last sentence of Article 32 of the Fourth Convention, and is designed to cover all persons through whom the Parties to the conflict conduct their activities.[61]

*Sub-paragraphs (a) and (c)*

These proposals are based on Article 32 mentioned above, concerning the prohibition of ill-treatment and torture.[62]

*Sub-paragraph (b)*

This proposal is based on Article 31 of the Fourth Convention relating to the prohibition of coercion. The commentary to this article gives the following description:

> " The prohibition laid down in this Article is general in character and applies to both physical and moral forms of coercion. It covers all cases, whether the pressure is direct or

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[57] See *Commentary*, Fourth Geneva Conv. 1949, Art. 5.

[58] See note 56, particularly end of para. 1 and beginning of para. 2.

[59] Article 5 of the Fourth Convention specifies:

> " Where in the territory of a Party to the conflict, the latter, is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

[60] See commentary on Art. 46 (2).

[61] See *Commentary*, Fourth Geneva Conv. 1949, Art. 32.

[62] See also Article 11, para. 2.

indirect, obvious or hidden (as for example a threat to subject other persons to severe measures, deprival of ration cards or of work).

Furthermore, coercion is forbidden for any purpose or motive whatever. The authors of the Convention had mainly in mind coercion aimed at obtaining information, work or support for an ideological or political idea.
. . . ".[63]

*Sub-paragraph (d)*

This proposal is based on paragraph 1 of Article 27 of the Fourth Convention relating to the treatment of protected persons, and covers *a fortiori* the case of *slavery* and *slave-trade* which might be specifically quoted as examples.[64]

*Sub-paragraph (e)*

This draft is in line with Article 34 of the Fourth Convention concerning hostages. Hostages may be defined as persons who, of they own free will or through compulsion, are in the power of a Party to the conflict or of one of its agents, and are answerable with their freedom, their body, or their life for the execution of the orders given by the Party to the conflict in whose hands they are, or for hostile acts committed against it.

*Sub-paragraph (f)*

A threat to commit the acts mentioned would constitute a measure of intimidation or terrorization in the sense of Article 33 of the Fourth Convention.

The above list could also expressly mention the prohibition of slavery, slave-trade pillage and terrorism.

*Paragraph 3*

This paragraph reaffirms certain ideas expressed in Articles 64 to 75 of the Fourth Convention, and shall be applicable to persons guilty of an offence committed in connection with the armed conflict (the terms " related to a situation referred to in Article 2 common to the Conventions " are intended to cover all cases which might occur).

The list given in this paragraph is not exhaustive, but quotes the most important principles of penal law and penal procedure.

*Sub-paragraph (a)*

This provision is in line with the principle that penal responsibility is of a personal nature. This principle is mentioned in the first sentence of Article 33 of the Fourth Convention. It is supplemented — in the above-mentioned Article 33 as well as in the present provision — by the prohibition of collective penalties, i.e. any form of punishment inflicted on persons or groups of persons, for acts which they did not commit.[65]

*Sub-paragraph (b)*

This proposal is based on the principle *non bis in idem* which is enshrined in Article 86 of the Third Convention and is implicit in Article 67 of the Fourth Convention, which refers to " general principles of law ".[66]

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[63] See *Commentary*, Fourth Geneva Conv. 1949, Art. 31.

[64] See Draft Protocol II, Art. 6, para. 2.

[65] See *Commentary*, Fourth Geneva Conv. 1949, Art. 33, para. 1.

[66] See *Commentary*, Fourth Geneva Conv. 1949, Art. 67. See the International Covenant on Civil and Political Rights, Art. 14 (7); this last provision may, however, be subject to derogations by virtue of Art. 4 (1) mentioned under note 55.

*Sub-paragraph (c)*

This proposal enshrines the principle of the presumption of innocence, which may be considered implicit in Article 67 of the Fourth Convention, which refers to " general principles of law ".[67]

*Sub-paragraph (d)*

This proposal is in line with the principle of the non-retroactivity of penal law, already enshrined in Article 65 of the Fourth Convention.[68]

*Paragraph 4*

This paragraph summarizes the ideas expressed in articles 76 (4) and 85 (4) of the Fourth Convention concerning women whose liberty has been restricted,[69] and in Article 82 (2) of the Fourth Convention relating to the grouping of internees.

*Paragraph 5*

This provision could perhaps have been included under Article 3, *Beginning and end of application*. The solution adopted here is based on the fact that this paragraph defines the field of application in time of Article 65 as such.

As a general rule, the provisions of the Protocol cease to be applicable " on the general close of military operations " or " on the termination of the occupation ". The purpose of the particular solution proposed here is to ensure that the end of hostilities does not lead to a sudden worsening in the already minimum treatment provided for in this article.

**Article 66. — Objects indispensable to the survival of the civilian population**

**It is prohibited to destroy, render useless or remove objects indispensable to the survival of the civilian population, namely, foodstuffs, food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether to starve out civilians, cause them to move away or for any other reason. They shall not be the object of reprisals.**

*Ref.*: 1972 Report, vol. I, paras. 3.175 to 3.183.

A perusal of this article will reveal a similarity with Article 48. Like the latter, but in occupied territories, the present draft is aimed at ensuring the survival of the civilian population and to avoid causing movements of refugees.

In fact, within the context of the present Section, and as indicated by the verbs " destroy ", " render useless " and " remove ", this provision applies to the Party to the conflict in whose power these indispensable objects happen to be.

It is also necessary to point out the relationship between this article and pre-existing law in respect of destruction, requisition and reprisals.

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[67] This principle is contained in paragraph 2 of Article 14 of the International Covenant on Civil and Political Rights; the latter provision may, however, be subject to derogations by virtue of Art. 4 (1) mentioned under note 55.

[68] See *Commentary*, Fourth Geneva Conv. 1949, art. 65; see also the International Covenant on Civil and Political Rights, Art. 15; the latter provision may not, however, be subject to derogations by virtue of Art. 4 (2) mentioned under note 55.

[69] See *Commentary*, Fourth Geneva Conv. 1949, Art. 76 and 85.

(1) *Destruction*

On the one hand, Article 53 of the Fourth Convention already prohibits the destruction by the Occupying Power of all property,[70] whether indispensable or not to the civilian population; on the other hand, Article 56 of the Hague Regulations of 1907 prohibits, in particular, the " destruction or wilful damage " of institutions used for humanitarian, cultural or scientific purpose; the present draft extends the prohibition of destruction to all Parties to the conflict, and not only to the Occupying Power, and at the same time limits it to those objects which are indispensable to survival.

(2) *Requisition*

This provision also forbids depriving the civilian population of objects indispensable to its survival, by their removal in any manner whatsoever, even without destroying them.

It does not invalidate provisions relating to requisition (second paragraph of Article 55 of the Fourth Convention [71] and Article 52 of the Hague Regulations of 1907,[72] which are special rules.

Notwithstanding, this prohibition may affect these provisions as far as it prohibits any requisitioning which might in actual fact endanger the survival of the civilian population by depriving it of objects which might be indispensable to it.

(3) *Reprisals*

Whereas the third paragraph of Article 33 of the Fourth Convention specifies that " Reprisals against protected persons and their property are prohibited ", the prohibition specified here covers all indispensable objects, whether public or private, and wherever they may be.

## Chapter II

## Measures in favour of women and children

### Article 67. — Protection of women

**1. Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault.**

**2. The death penalty for an offence related to a situation referred to in Article 2 common to the Conventions shall not be executed on pregnant women.**

*Ref.*: 1972 Report, vol. I, paras. 3.164, 3.249 and 3.252 to 3.254.

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[70] Article 53 of the Fourth Convention specifies:

" Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

[71] Article 55 (2) of the Fourth Convention states:

" The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods."

[72] Article 52 of the Hague Regulations of 1907 provides:

" Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

This article reaffirms and develops the existing law for the benefit of all women in the territory of the Parties to the conflict, and no longer only for the benefit of those women who fulfil the conditions of Article 4 of the Fourth Convention.[73]

*Paragraph 1*

This draft extends paragraph 2 of Article 27 of the Fourth Convention to all women, without distinction.[74]

*Paragraph 2*

Although this paragraph refers to pregnant women, its real purpose is to protect the *child uuborn*, and not the woman herself; this is why no prohibition has been made on the *pronouncement* of the death penalty.[75]

This draft supplements Article 16 of the Fourth Convention, which states in its first paragraph: " ...expectant mothers shall be the object of particular protection and respect ".

It upholds a practice already followed in numerous countries in favour of pregnant women sentenced to the death penalty.

At the request of the experts, the offence has been qualified: it must have been committed in connection with the armed conflict.

**Article 68. — Protection of children**

**1. Children shall be the object of privileged treatment. The Parties to the conflict shall provide them with the care and aid their age and situation require. Children shall be protected against any form of indecent assault.**

**2. The Parties to the conflict shall take all necessary measures in order that children aged under fifteen years shall not take any part in hostilities and, in particular, they shall refrain from recruiting them in their armed forces or accepting their voluntary enrolment.**

**3. The death penalty for an offence related to a situation referred to in Article 2 common to the Conventions shall not be pronounced on persons who were under eighteen years at the time the offence was committed.**

*Ref.*: 1972 Report, vol. I, paras. 3.229 to 3.254.

This article reaffirms and develops the existing law for the benefit of all children in the territory of the Parties to the conflict, without distinction, and no longer only of those children who fulfil the conditions of Article 4 of the Fourth Convention.

The present paragraphs make distinctions depending on age, in order to make allowance, as in the Fourth Convention, for the different situations which may arise.

*Paragraph 1*

The first sentence underlines the need for " privileged treatment ", which is justified by the physical and mental condition of children. This treatment involves, in particular, the provision of all necessary care and assistance so that children should not suffer any physical or moral

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[73] Article 27 relating to the treatment given to protected persons will be found under Part III, Section I, of the Fourth Convention.

[74] Article 27, paragraph 2, of the Fourth Convention specifies:

" Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

[75] See also the International Covenant on Civil and Political Rights, Art. 6 (5), on whose wording this draft was based.

after-effects as a result of the conflict and that they may develop in as normal a manner as possible. It has been felt preferable here not to mention age, in view of the general nature of the provision.

*Paragraph 2*

The Parties to the conflict shall neither encourage nor tolerate any participation whatsoever by children in the hostilities; not only shall direct participation in the hostilities be prohibited, but also any other act in relation with the latter: transmission of military information, transport of arms, ammunition and war material, sabotage, etc.

*Paragraph 3*

This draft is based on the fourth paragraph of Article 68 of the Fourth Convention which prohibits the pronouncement of the death penalty " on a protected person who was under eighteen years of age at the time of the offence " and applies to all protected persons under the age of eighteen [76] irrespective of their juridical situation.

At the request of the experts, the offence has been qualified: it must have been committed in connection with the armed conflict.

The text deliberately states that the death penalty shall not be *pronounced*, which implies, *a fortiori*, that it will not be *carried out*.[77]

**Article 69. — Evacuation of children**

**1. If their condition necessitates their evacuation for reasons of health, in particular to obtain medical treatment or to hasten convalescence, children may be transferred to a foreign country. Where they have not been separated by circumstances from their parents or legal guardians, the latters' consent must be obtained. In the case of evacuation to a foreign country, the operation shall be supervised or directed by the Protecting Power, in agreement with the Parties to the conflict concerned.**

**2. In the case of evacuation to a foreign country, the Party to the conflict carrying out the evacuation and the authorities of the receiving country shall arrange, if possible, for the children's education to be continued in the language and culture of the country to which they belong.**

**3. So as to facilitate the return, to their families and country, of children cared for or received abroad, the authorities of the receiving country shall establish for each child a card, with photographs, which they shall communicate to the Central Tracing Agency. Each card shall bear, whenever possible, the following minimum information:**

*(a)* **surname of the child;**
*(b)* **the child's first name;**
*(c)* **the place and date of birth (failing this, the approximate age);**
*(d)* **the father's first name;**
*(e)* **the mother's first name and her maiden name;**
*(f)* **the child's nationality;**
*(g)* **the address of the child's family;**
*(h)* **the date on which and the place where the child was found;**
*(i)* **the date on which and the place from where the child left his country;**
*(j)* **the child's blood group;**
*(k)* **any distinguishing features;**
*(l)* **the child's present address.**

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[76] If the age gave rise to objection, it might be possible to refer to the concept of minority. This would, however, present some difficulty, in view of differences in national laws, and also because of cases of plurinationality, stateless persons, etc. As this concept would lead to inequality, the age remains the most precise and objective criterion.

[77] Compare with Article 67 (2) and with the International Covenant on Civil and Political Rights, Art. 6 (5), on whose wording this draft was based.

*Ref.*: 1972 Report, vol. I, paras. 3.255 to 3.259.

*Paragraph 1*

It was found necessary to make Article 24 of the Fourth Convention more precise, by introducing a restriction in its second paragraph; [78] it appears desirable to prevent children from being removed from their environment abusively and unnecessarily.

Children shall be evacuated only if the following conditions are fulfilled:

(1) if evacuation is justified by their condition;

(2) if their parents or guardians consent to it.

The term " condition " means their physical health (e.g. wounds or serious illness) or mental health (e.g. severe shock). A further condition is that the medical care required for their cure or to facilitate their convalescence cannot be given on the spot or in their country.

The authorization of the parents or guardians is not required when circumstances prevent communication with them. The determining criterion shall always be the child's interest.

*Paragraph 2*

At the suggestion of the International Union for Child Welfare,[79] the idea of the *cultural protection* of children has been included, by developing Article 24 of the Fourth Convention on this point; it will be noted that these obligations would apply also to third States which have received children.

*Paragraph 3*

*Note:* The commentary in the French text refers here to the term " Agence centrale de renseignements " which is now called " Agence centrale de Recherches." The English text of this paragraph already contains the term " Central Tracing Agency " which is the actual name of the Agency in question.

In the opinion of the Agency, it would be useful to add the following headings: *sex*, *registration number*, *state of health*, and, possibly, *death* and *place of burial*, as has been done in the specimen card which could be included as Annex II to the Protocol. This card would be intended for the Central Agency. However, the authorities of the country of reception would find it advantageous to complete it in duplicate, so that one copy could be kept in their own files. The empty space on the back of the card under the heading " miscellaneous remarks " could be used by the authorities of the country of reception to record administrative information.

It would also be necessary to make a clear distinction in the card between the headings *Surname* and *First name* (see *(a)* and *(b)* of the present paragraph), because in many languages these two indications are liable to give rise to confusion.

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[78] Article 24 of the Fourth Convention specifies:

" The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means."

[79] See 1972 Report, vol. II, CE/COM. III/PC 117.

**SPECIMEN CARD**
**(front)**

Personal description card for evacuated children

Country of reception:

Surname: M F

First name(s) Sex

Photo (front)

Photo (profile)

Date of birth or approximate age

Place of birth

Father's first name:

Mother's first name and her maiden name:

Child's nationality:

Address of the family

Any distinguishing features: Eyes: Hair:

Blood group: Rhesus factor:

See overlaf

20 cm

**SPECIMEN CARD**
**(reverse side)**

PERSONAL DESCRIPTION CARD FOR EVACUATED CHILDREN

Date and place where the child was found:

Date and place of departure from country of origin:

Present address (camp, hospital, home, family, etc.):

Registration number:

State of health:

good health / sick / convalescent in hospital / undergoing treatment

Remarks:

If applicable, date and place of death:

Date and place of burial:

Card to be sent to:

CENTRAL TRACING AGENCY

International Committee of the Red Cross

GENEVA Switzerland

Miscellaneous remarks:

Seal and signature of competent authority

20 cm

# PART V

# EXECUTION OF THE CONVENTIONS AND OF THE PRESENT PROTOCOL

## SECTION I

## GENERAL PROVISIONS

In its 1972 draft, the ICRC had included in this Part an article entitled *Prohibition of reprisals and exceptional cases*: [1] paragraph 1 reaffirmed and stated the general prohibition of reprisals against persons and objects protected by the Conventions [2] and the Protocol; the purpose of paragraph 2, taking into consideration the fact that there was still no general prohibition of reprisals carried out by Parties to the conflict in the conduct of hostilities, was to reaffirm certain norms which regulate and limit resort to such reprisals.

The discussions showed that the experts held widely differing views: [3] a strong majority thought that paragraph 2 should not be included in the law of Geneva and should be deleted; several experts, arguing that recourse to reprisals including the use of force was already prohibited under general international law, advocated the complete removal of the article; others, who were in favour of maintaining paragraph 1, felt that a reaffirmation of a prohibition found in the Conventions and in certain provisions of the draft Protocol would be useful; some experts would have preferred to see paragraph 1 of this article transferred to Part I, and some, who were in favour of a revised version of paragraph 2, would have liked to see it placed in Part III.

Faced with such a wide variety of views, the ICRC refrained from including in the present draft a general provision in respect of the prohibition of reprisals against persons and objects protected by the Conventions and Protocol. Such a provision would be limited in fact to the reaffirmation of a prohibition which is already contained in the Conventions and, with regard to new categories of protected persons and objects, in certain provisions of the present draft. Article 20, reaffirming a provision in the First and Second Conventions relating to the prohibition of reprisals against the wounded, the sick and the shipwrecked, extends protection to medical personnel, units and means of transport referred to in Part II, while Articles 46(4), 48, 49(1) and 66 contain prohibitions of reprisals against persons and certain objects protected by Part IV. With regard to the reaffirmation of certain norms formulated in the 1972 draft, which regulate and limit the right of Parties to the conflict to resort, in the conduct of hostilities, to reprisals not yet prohibited by the law in force, the ICRC accepted the opinion of a majority of the experts; but it wishes to stress once again that the non-inclusion of this provision certainly does not solve the problem of reprisals carried out in the course of combat.

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[1] ICRC, Draft Protocol I, 1972, Art. 74.

[2] Geneva Conv. 1949, Art. 46/47/13/33.

[3] See 1972 Report, paras. 4.134 to 4.142.

**Article 70.—Measures for execution**

**1. The High Contracting Parties shall without delay take all necessary measures for the execution of the obligations incumbent upon them under the Conventions and the present Protocol, without availing themselves of special circumstances or of any advantages which a postponement might bring them.**

**2. The High Contracting Parties, acting through their military or civilian authorities, shall give orders and instructions to ensure observance of the Conventions and the present Protocol and shall supervise their execution.**

*Ref.*: 1972 Report, vol. I, paras. 4.128 to 4.133, 4.143 to 4.147, and 4.174 to 4.176.

*Paragraph 1*

A number of experts had proposed the insertion in the Protocol of an article, entitled *Implementation of essential provisions*, which would guarantee the implementation without delay of provisions expressly mentioned in the Conventions and prevent the postponement of that implementation in order to extract any political or other advantage. A majority of the experts displayed interest in such a proposal. The ICRC, while considering that by virtue of the principle *pacta sunt servanda* [4] and by Article 1 common to the Conventions the obligations assumed by Contracting Parties must be fulfilled by them in good faith, adopts the view expressed by the experts and presents this provision which refers to the fulfilment of all the obligations incumbent on the Contracting Parties under the Conventions and the Protocol.

*Paragraph 2*

This provision must be taken as being complementary to Article 1 common to the Conventions, by virtue of which the Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances. Most of the experts favoured this provision. It is derived from Article 1 of the Hague Convention No. IV of 1907, which states: " The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention. "

**Article 71. — Legal advisers in armed forces**

**The High Contracting Parties shall employ in their armed forces, in time of peace as in time of armed conflict, qualified legal advisers who shall advise military commanders on the application of the Conventions and the present Protocol and who shall ensure that appropriate instruction be given to the armed forces.**

*Ref.*: 1972 Report, vol. I, paras. 4.91, 4.126, 4127, 4.144 and 4.153 to 4.155.

The insertion in the Protocol of such a provision was warmly welcomed by the experts as a whole. Legal advisers attached to the armed forces would ensure a proper application of the Conventions and Protocol, many of the violations being often due to ignorance of the rules that are applicable.

The experts referred to the role of these legal advisers, in connection with their deliberations on the provisions relating to qualified persons (Art. 6), measures for execution (Art. 70) and dissemination (Art. 72).

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[4] This principle is enshrined in Vienna Convention of 1969, Art. 26.

**Article 72. — Dissemination**

**1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and 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 those instruments may become known to the armed forces and to the civilian population.**

**2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and the present Protocol must be fully acquainted with the text thereof.**

**3. The High Contracting Parties shall report to the depositary of the Conventions and to the International Committee of the Red Cross at intervals of four years on the measures they have taken in accordance with their obligations under this article.**

*Ref.*: 1972 Report, vol. I, paras. 4.149 to 4.159.

This article, which reaffirms and is complementary to an article common to the Conventions (Art. 47/48/127/144), was approved by a large majority of the experts. It should be read in close conjunction with Article 6 (*Qualified persons*), Article 70 (*Measures for execution*) and Article 71 (*Legal advisers in armed forces*). All the experts agreed that the dissemination of humanitarian rules applicable in armed conflicts constituted a vital measure for ensuring their implementation.

The Red Cross has long shown, by the work it has carried out, the importance it attaches to this task; it is one of the fields where National Red Cross (Red Crescent, Red Lion and Sun) Societies are called upon to play a prominent role as auxiliaries of the public services. Several resolutions concerning the dissemination of the Conventions have been adopted at various times by International Conferences of the Red Cross. [5] The United Nations, too, have invited at various occasions Member States to intensify their efforts in this field. [6]

*Paragraph 1*

Some experts observed that this provision went further than the relevant common article in the Conventions, which refers to programmes of military, and, *if possible*, civil instruction, subject to difficulties of a legislative order which might arise in certain States with a federal structure. The deletion of the words " if possible " is intended to reinforce the obligation incumbent on all the Contracting Parties under this article.

In contrast with the Third and Fourth Conventions which mention, in this context, authorities who would assume responsibilities in respect of protected persons, the present text was thought to be more in keeping with the general character of the responsibility that is undertaken.

*Paragraph 3*

Many experts wanted the Contracting Parties to report to the depositary of the Conventions and to the ICRC at regular intervals on the measures they have taken under this article. In this connection, the XXth International Conference of the Red Cross expressed in its Resolution No. XXI the wish—this being a new and essential point—that Governments and National Societies submit periodic reports to the ICRC on the steps taken by them in this sphere.

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[5] See Centenary Congress of the International Red Cross, Res. IV; XXth Internat. Conf. Red Cross, Res. XXI, Vienna, 1965; XXIst Internat. Conf. Red Cross, Res. IX, Istanbul, 1969.

[6] See, in particular, UN, res. 2852 (XXVI), entitled *Respect for human rights in armed conflicts*, operative paragraph 7.

**Article 73. — Rules of application**

**The High Contracting Parties shall communicate to one another, through the depositary of the Conventions and, in case of need, through the Protecting Powers, the official translations of the present Protocol, as well as the laws and regulations which they may adopt to ensure the application thereof.**

*Ref.*: 1972 Report, vol. I, paras. 4.160 to 4.164.

This article reaffirms, for the purposes of the Protocol, an article common to the Conventions (Art. 48/49/128/145).

" Official translations ", within the meaning of the present provision, means translations carried out by the Contracting Parties. These should be distinguished from those other translations which the depositary of the Conventions shall arange to be officially made under Article 90.

The term " laws and regulations " should be given the widest possible interpretation: it covers all acts of a legislative nature, whether issued by the executive or the legislative authorities, that have some relation with the application of the Protocol.

The present article confers specific functions on the depositary of the Conventions and—in the case of situations referred to in Article 2 common to the Conventions—on Protecting Powers or their substitute.

## SECTION II

## REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THE PRESENT PROTOCOL

*Ref.*: 1972 Report, vol. I, paras. 4.118 to 4.127.

In its 1972 draft, the ICRC, considering that the content and structure of the Protocol were not known sufficiently exactly for it to emit an opinion on the question of penal sanctions, had confined itself to presenting, in accordance with a wish expressed at the first session of the Conference of Government Experts, a provision concerning superior orders. [7] In its *Commentary* on this draft, [8] the ICRC referred to various suggestions submitted by experts at previous meetings and indicated that it was expecting governments to send replies to a questionnaire on measures to reinforce the implementation of the Conventions [9] one of its questions being on the problem of penal sanctions; it had stressed that if, at the present stage of the development of international humanitarian law, it seemed that one could not go beyond the limits of national jurisdictions governing the repression of breaches, then it was important that the different legislations of the Contracting Parties should provide remedies as similar as possible to each other and should apply to all, whether nationals or enemies, without distinction; it further said that, because the Protocol was additional to the Conventions, the rules of the Conventions relating to the repression of abuses and infractions—especially those dealing with grave breaches and with the liability of the Contracting Parties— should, in so far as they were not made more precise or supplemented, govern in principle the repression of infractions to the Protocol. It had, further, pointed out that in its view, two questions should be examined: on the one hand, the improvement of the penal

[7] See ICRC, Draft Protocol I, 1972, Art. 75 (2).

[8] See ICRC, Conf. Gvt. Experts, Commentary, part one, 1972, Part V, Introduction.

[9] This questionnaire is referred to in Part I, note 10.

system contained in the Conventions, and on the other, the rules relating to the repression of infractions of the Protocol.

In their replies to the questionnaire, all the governments laid stress on the necessity to reinforce the repression of infractions of the Conventions and submitted numerous suggestions as to the most appropriate measures to be taken to supplement the rules relating to penal sanctions, in the framework of both international and internal law.

At the second session of the Conference of Government Experts, lengthy discussions were devoted to this problem. A majority of the experts thought that the system of penal procedure in the Conventions should be supplemented and should apply to the Protocol. The numerous proposals that were submitted enabled a Drafting Committee to prepare draft articles; it was acknowledged that they required further detailed study. A meeting of experts on penal law was therefore convened by the ICRC.

The experts on penal law considered, too, that the repression of breaches of the Protocol should be governed by the penal provisions in the Conventions, supplemented by the present Section. The meeting formulated draft articles on which the ICRC has extensively drawn.

It should be noted that Article 74 deals only with infractions of the Protocol, while Articles 75 to 79, which supplement the Conventions, will apply to breaches of the Conventions as well as of the Protocol.

### Article 74. — Repression of breaches of the present Protocol

**The provisions of the Conventions relating to the repression of breaches supplemented by the present Section, shall apply to the repression of breaches of the present Protocol, including to that of the grave breaches committed against protected persons or protected objects within the meaning of Article 2 *(c)*.**

*Ref.*: 1972 Report, vol. I, paras. 4.121, 4.125 and 4.126.

This article stipulates that the repression of breaches of the Protocol should be governed by the penal provisions in the Convention, [10] supplemented by Articles 75 to 79.

The majority of experts considered that, for the purposes of the additional Protocol, the system of penal procedure adopted in the Conventions could be retained. This system is based on three essential obligations laid upon each Contracting Party: to enact special legislation; to search for persons alleged to have committed breaches of the Protocol; and to bring such persons before its own courts or, if the Contracting Party prefers and, since grave breaches are in question, in accordance with Article 78, to hand them over for trial to one of the other Contracting Parties concerned.

The system of penal procedure of the Conventions constitutes an important step forward in the development of international penal law by setting up the grave breaches generally known as " war crimes " into international crimes. It draws up a list of " grave breaches ", which are defined as those involving any of the following acts, if committed against protected persons and objects:

— in the case of all four Conventions: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health;
— in the case of the First, Second and Fourth Conventions: extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

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[10] Geneva Conv. 1949, Art. 49 to 52/50 to 53/129 to 132/146 to 149. Reference may usefully be made to *Commentary*, Geneva Conv. 1949.

— in the case of the Third Convention: compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving him of the rights of fair and regular trial prescribed in the Convention;

— in the case of the Fourth Convention: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed by the Convention, taking of hostages.

Under the penal system of the Conventions, the Contracting Parties must undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of those grave breaches. Each Contracting Party, too, must take measures necessary for the suppression of all acts contrary to the Conventions other than the above grave breaches.

Some experts, while acknowledging that, for the purposes of the Protocol, the distinction between grave breaches and other infractions should be maintained, stated that the interpretation to be put on the concept of grave breach with regard to violations of the provisions of Part III, Section I *(Methods and Means of Combat)*, and of Part IV, Section I *(General Protection against Effects of Hostilities)*, was not sufficiently clear. Bearing these difficulties in mind the ICRC wished to lay stress on the fact that grave breaches were those committed " against protected persons or protected objects within the meaning of Article 2 (*c*) ". In Article 2 (*c*), the aim of the Protocol is to confer protection, on very different grounds, on distinct categories of persons and objects. The articles in the Sections mentioned above and the commentary thereon indicate the situations in which a particular person or object is entitled to protection. Thus, a civilian will not enjoy any protection as long as he cannot be reasonably distinguished from the military units around him. The same would apply to a combatant wishing to surrender or to a combatant *hors de combat*.

**Article 75. — Perfidious use of the protective signs**

**The use of the red cross sign and of the other protective signs or markings recognized by the Conventions or by the present Protocol constitutes a grave breach of the Conventions or of the present Protocol when the use invites the confidence of the enemy with intent to betray that confidence.**

This article is intended to rectify an oversight of the 1949 Diplomatic Conference, which had not laid down as a grave breach the misuse of the protective sign of the red cross.

At the meeting of experts on penal law, mentioned in the introduction to the present Section, it had been considered that the Protocol could set up as a grave breach only the perfidious use of the protective sign of the red cross but not the perfidious use of protective signs indicated in juridical instruments other than the Conventions and the present draft. However, the ICRC is of the opinion that since those other signs are now covered by Articles 8 (*f*), 18, 36, 52, 53 and 59 of the Protocol, it is necessary that they should also be taken into consideration within the framework of this provision.

The term " perfidious " is used here in the meaning given to it in Article 35, entitled *Prohibition of perfidy*.

**Aricle 76. — Failure to act**

**1. The High Contracting Parties undertake to repress breaches of the Conventions or of the present Protocol resulting from a failure to perform a duty to act.**

**2. The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have**

**known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach.**

*Ref.*: 1972 Report, vol. I, paras, 4.122 to 4.126.

A large number of experts, as well as certain governments in their replies to an ICRC questionnaire concerning measures intended to reinforce the implementation of the Conventions,[11] asked for the inclusion of such an article.

It was recognized that it was very difficult to draft, in an international instrument, a rule regarding failure to act, in view of the considerable differences between the various national penal systems in this respect. The article might raise difficulties for certain States whose national legislations do not mention the failure to act as an offence. The ICRC has nevertheless bowed to the wish of those who favoured the insertion of such an article: it is in fact aware that offences for failure to act are not provided for yet in the legislation of several countries; examples of such offences are the failure of the officer in charge of a prisoner-of-war camp to provide food for his prisoners or the failure of an NCO to stop a mob lynching prisoners of war.

*Paragraph 1*

Some experts would have restricted this provision to grave breaches committed through a failure to act, but the ICRC subscribed to the view of other experts who rejected this proposal, on the grounds that it might lead to the inference that offences committed through a failure to act that were not grave breaches should not be repressed.

At the meeting of experts on penal law, mentioned above in the introduction to this Section, it was suggested that breaches resulting from " a failure in violation of a duty to act in the manner required by conventional or municipal law" should be mentioned. The question then arose whether one could mention, in an international instrument, a " duty to act in the manner required by municipal law ", and alternative texts were proposed, such as a reference to " all breaches of municipal law by virtue of the Conventions and the present Protocol ", or " all breaches under conventional law *and* the present Protocol ". The ICRC, considering that this specific question is governed by the general rules of international law concerning its relation with municipal law, has limited the present provision to breaches " resulting from a failure to perform a duty to act ". This refers, of course, to a legal duty to act.

*Paragraph 2*

A number of experts wished this article to contain a provision concerning the liability of a superior who would be aware of a breach committed by one of his subordinates and would allow it to go unpunished.

Some experts referred, in this connection, to the principle applied by the International Military Tribunal for the Far East in Tokyo in the trial of General Yamashita,[12] in accordance with which the following three conditions had to be fulfilled in order to establish the criminal liability of a superior: that he knew a breach had been committed; that he had the power to prevent that breach; that he did nothing to prevent it being committed. They would have wished the provision to state more clearly that the breach was a *direct* result of the superior's failure to act and that the superior did not measure the consequences that the breach overlooked by him could have. It was considered by the ICRC that these various points were sufficiently clearly brought out by the present provision.

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[11] See Part I, note 10.

[12] See *Law Report of War Criminals*, selected and prepared by the United Nations War Crimes Commission, Vol. IV. London, 1949.

**Article 77. — Superior orders**

**1. No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol.**

**2. The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order.**

*Ref.*: 1972 Report, vol. I, paras. 4.123 to 4.126.

This article deals with two separate questions: in its paragraph 1, cases where the refusal of a person to obey an order of his government or a superior is not punishable; in its paragraph 2 cases where the fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility.

The present article is based on the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal,[13] affirmed by the United Nations General Assembly in its resolutions 3(I) and 95 (I) and subsequently formulated by the United Nations International Law Commission at the General Assembly's request.[14]

*Paragraph 1*

Some experts criticized this provision on the ground that it mentioned only grave breaches, thus implying that acts other than grave breaches would *a contrario* be punishable, and wished to include a stipulation that the punishment of a person for refusing to obey an order which, if carried out, would constitute a violation of the Conventions or of the Protocol, should be prohibited. In common with the meeting on penal law, referred to in the introduction to the present Section, the ICRC believed that this provision would not be considered to be acceptable by certain governments unless it were limited to grave breaches: it was pointed out, in fact, by a number of experts, who remarked on the exigencies of military discipline, that it would be difficult to permit soldiers to decide at any moment whether to obey or not.

*Paragraph 2*

It was pointed out that this provision might put soldiers in an extremely difficult position, as they were compelled by military laws and regulations to obey orders issued to them. That is the reason why it was thought necessary to add to the sentence " he should have reasonably known that he was committing a grave breach " the words " and that he had the possibility of refusing to obey the order ".

**Article 78. — Extradition**

**1. Grave breaches of the Conventions or of the present Protocol, whatever the motives for which they were committed, shall be deemed to be included as extraditable offences in any extradition treaty existing between the High Contracting Parties. The High Contracting Parties undertake to include the said grave breaches as extraditable offences in every extradition treaty to be concluded between them.**

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[13] See United Nations, *The Charter and Judgment of the Nuremberg Tribunal, History and Analysis*, United Nations publication, Sales No. 1949, V. 7.

[14] See United Nations, *The Work of the International Law Commission*, United Nations Publication, Sales No.67.V.4.

**2. If a High Contracting Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another High Contracting Party with which it has no extradition treaty, the Conventions and the present Protocol shall be considered as the legal basis for extradition in respect of the said grave breaches. Extradition shall be subject to the other conditions provided by the law of the requested High Contracting Party.**

**3. High Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize the said grave breaches as extraditable offences between themselves subject to the conditions provided by the law of the requested High Contracting Party.**

*Ref.*: 1972 Report, vol. I, para. 4.124.

A number of experts, as well as certain governments in their replies to the ICRC questionnaire concerning measures intended to reinforce the implementation of the Conventions,[15] considered that the question of extradition of persons demanded for trial in respect of breaches of the Conventions or Protocol should be carefully studied and the decision should be taken on the possibility of supplementing the Conventions in this field.

The Conventions contain a common article (Art. 49/50/129/146) relating to penal sanctions; paragraph 2 states:

> " Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. "

The wording in the Conventions is based on the principle *aut dedere aut punire*, often accepted in extradition matters. As stated in the *Commentary* on the Conventions,[16] extradition is expressly made subject to the legislation of the State which holds the accused person. Moreover, a special condition is attached: the Contracting Party which requests the handing over of an accused person must make out a *prima facie* case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. What should be understood by " a *prima facie* case "? It may be stated as a general rule that it denotes a case which, in the country requested to extradite, would involve prosecution before the courts. Furthermore, the text of the Conventions does not in any way exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the 1949 Diplomatic Conference wished expressly to reserve the future position and not to raise obstacles to the progress of international law.

It was stressed by some of the experts that, for certain States, this article common to the Conventions constituted a treaty of extradition. They, therefore, did not deem it necessary to supplement the Conventions in this sphere.

The meeting of experts on penal law, mentioned in the introduction to the present Section, confined itself to issuing a suggestion to the ICRC to study — taking into consideration the remarks made by certain governments in their replies to the above-mentioned questionnaire, and bearing in mind a proposal submitted to the Conference of Government Experts [17] as well as Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide [18] — whether it was advisable to go beyond the principle *aut punire aut dedere* laid down in the Conventions.

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[15] See, above, Part I, note 10.

[16] See, e.g., *Commentary*, Fourth Geneva Conv. 1949, Art. 146 (2).

[17] See 1972 Report, vol. II, CE/COM IV/46, draft Art. 77, para. 4.

[18] United Nations, *Treaty Series*, vol. 78, 1951, No. 1201

The ICRC had at first considered submitting an article, based on the different suggestions mentioned above, which would have stated:

" 1. Whenever the better administration of justice so requires, the High Contracting Parties shall, in conformity with their legislation and with the treaties in force, grant extradition and all possible legal assistance for the purpose of the prosecution of the breaches in question.

2. For the purposes of extradition, grave breaches of the Conventions or of the present Protocol shall not be considered as being political crimes. "

After due consideration, this text was found by the ICRC not to be entirely satisfactory, because of its lack of precision, and it was thought more advisable, in accordance with views put forward, to take as a model the extradition clause to be found in certain recent treaties. In particular, the ICRC's attention was drawn to a parallel article in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970,[19] and in the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971.[20] Reference may be made to the deliberations of the International Conference on Air Law which, under the auspices of the International Civil Aviation Organization, drafted the text of these two Conventions.[21]

The ICRC has restated in substance the text of the article in question in the above-mentioned Conventions. But it has judged it necessary to insert in paragraph 1 of Article 78 a sentence—which was not included in these Conventions—specifying that grave breaches shall be deemed to be automatically by law included as extraditable offences in any extradition treaty, " whatever the motives for which they were committed ".

The ICRC feels that the present article requires further detailed study.

**Article 79. — Mutual assistance in criminal matters**

**The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of the present Protocol. The law of the High Contracting Party requested shall apply in all cases.**

As mentioned in the commentary on Article 78, the ICRC has examined, among other questions, when drafting the extradition clause, a proposal submitted by the Conference of Government Experts.[22] This proposal contained a reference to legal assistance to be granted to each other by the Contracting Parties for the purpose of the prosecution of the breaches in question.

The ICRC considers that the Conventions could be usefully supplemented by a provision of this nature. Here, too, the text is based upon an article in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970 [23] and in the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971.[24] Reference may be made to the deliberations of the International Conference on Air Law which, under the auspices of the International Civil Aviation Organization, drafted the text of these two Conventions.[25]

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[19] *Convention for the Suppression of Unlawful Seizure of Aircraft*, Art. 8.

[20] *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Art. 8.

[21] See, in particular, ICAO, *International Conference on Air Law*, The Hague, December 1970, vol. I, *Minutes* and vol. II, *Documents*, Montreal, 1972 (Doc. 8979—LC/165—1 and 2).

[22] See 1972 Report, vol. II, CE/COM IV/46, draft Art. 77, para. 4.

[23] *Convention for the Suppression of Unlawful Seizure of Aircraft*, Art. 10.

[24] *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Art. 11.

[25] See, in particular, ICAO, *International Conference on Air Law*, The Hague, December 1970, vol. I, *Minutes* and vol. II, *Documents*, Montreal, 1972 (Doc. 8979—LC/165—1 and 2).

## PART VI

## FINAL PROVISIONS

This Part contains general provisions regarding the final clauses of this draft Protocol. The articles in this Part therefore refer only to the present instrument and it is not their purpose to supplement the provisions of the Conventions.

When drafting these articles, the ICRC and the experts drew upon the final provisions in the Conventions, and also took into account various studies carried out by the United Nations: in particular, the greatest attention was paid to the *Handbook of Final Clauses*,[1] and to the work of the United Nations International Law Commission relating to the codification and progressive development of the law of treaties, culminating in the adoption, in 1969, of the *Vienna Convention on the Law of Treaties*.[2]

The ICRC has not included in this Part any article on the relation of this draft Protocol to existing law. The experts, the great majority of whom favoured the idea that the Protocol should constitute an instrument *additional* to the 1949 Geneva Conventions, presented different views on this subject:

— several experts pointed out that the 1949 Conventions themselves contain provisions concerning their relation to the previous Geneva and Hague Conventions [3] and that these provisions would be sufficient for the purposes of this additional Protocol;

— others, who were of the opinion that the purpose is to reaffirm, elaborate and supplement the rules which are not expressly referred to in the above-mentioned provisions of the Conventions — *inter alia* the regulations contained in the Declaration of St. Petersburg of 1868 and in the Hague Conventions No. V and No. IX of 1907 — pointed out that the relation of this Protocol to existing law should be clearly indicated in an article;

— a minority among the experts expressed the view that this Protocol, which would supplement not only the Geneva Conventions of 1949 but also numerous other rules of the law in force, should be drafted as a separate legal instrument.

While the ICRC is aware that the present draft reaffirms, elaborates and supplements rules of international legal instruments or of customary international law, which are not expressly referred to in the above-mentioned provisions of the Conventions, it shares the view of those who, having stressed the additional character of that instrument, felt that it was not necessary to introduce such a provision. It considers that the purpose of this draft, intended to supplement the Conventions for the Protection of War Victims, is primarily to elaborate certain provisions of these Conventions and to provide protection to additional categories of persons and objects. Unlike the Hague Conventions, its principal object is not to regulate the conduct of military operations and the use of weapons. It has therefore been judged preferable by the ICRC not to

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[1] United Nations, Secretariat, *Handbook of Final Clauses*, ST/LEG. 6 (5 August 1957).

[2] See Vienna Conv. 1969, *United Nations Conference on the Law Of Treaties*, first and second sessions, *Official Records*, United Nations, New York, 1971, Sales No.: E.70.V.5. This document also contains the *Draft articles on the law of treaties with commentaries*, adopted by the International Law Commission at its eighteenth session.

[3] See Geneva Conv. 1949, Art. 59/58/134 and 135/154.

introduce here a specific article on the relation of the present draft to these various pre-existing rules but to mention specifically this relation in the commentary on each of the articles where this question is raised.[4] It should be pointed out that those rules of the Law of The Hague which will not be reaffirmed by the Protocol will continue to be binding upon the Parties to the Protocol; these rules — as was expressly stated in 1946 by the International Military Tribunal at Nuremberg in its judgment, in connection with the provisions of the Hague Convention No. IV of 1907 — are accepted by all States and regarded by them as the codified expression of the laws and customs of war.[5]

Finally, it should be mentioned that the present draft refers to " conventional or customary international law " in paragraph 3 of its Preamble and exactly determines the relation of the Protocol to the Conventions by stating, in its Article 1, that the Protocol " supplements the Geneva Conventions of August 12, 1949 ".

**Article 80. — Signature**

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

*Ref.*: 1972 Report, vol. I, para. 4.179.

This article, taking into account Article 81, deals with what is known as " signature subject to ratification ". This was the procedure laid down in 1949 for the conclusion of the Conventions (Art. 56/55/136/151). The function of signature consequently is twofold: it is the general method of authenticating the text of the Protocol, and it constitutes a first step towards ratification.[6] It may be noted that there will be, on 28 December 1973, one hundred and thirty-five States Parties to the Conventions.

**Article 81. — Ratification**

**The present Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Confederation, depositary of the Conventions.**

*Ref.*: 1972 Report, vol. I, para. 4.180.

Ratification means the international act whereby a Party to the Conventions will establish on the international plane its consent to be bound by the Protocol.[7]

This article recalls that the depositary of the Conventions, mentioned in various provisions of the present draft,[8] is the Swiss Confederation, on whose territory have taken place, since more than a hundred years, the various diplomatic conferences that have elaborated the Conventions for the Protection of War Victims. The ICRC and the experts, drawing upon the Vienna Convention on the Law of Treaties,[9] have wished to mention here the depositary State.

This article should be read in conjunction with Article 88, relating to the depositary's functions, and Article 83, entitled *Entry into force.*

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[4] See commentary on Art. 2 (*c*) and 2 (*d*), 32 (4), 33 to 53, 64, 66, 70 and 77.

[5] See *Commentary*, Fourth Geneva Conv. 1949, Art. 154.

[6] See, on this subject, Vienna Conv. 1969, Art. 10, 12, 14 and 18.

[7] See Vienna Conv. 1969, Art. 2 (*b*) and 14.

[8] Art. 7, 72 and 73.

[9] See Vienna Conv. 1969, *Part VII. — Depositaries, notifications, corrections and registration* (Art. 76 to 80).

**Article 82. — Accession**

**The present Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary of the Conventions.**

*Ref.*: 1972 Report, vol. I, para. 4.182.

Accession means the international act whereby a Party to the Conventions will establish on the international plane its consent to be bound by the Protocol, of which it might not be a signatory, in accordance with Article 80.[10] Unlike the Conventions which, by virtue of their common article on accession (Art. 60/59/139/155), are treaties open to all, this additional Protocol will be open only to the Parties to the Conventions. This provision, in order to take into account the development of the law of treaties,[11] does not contain the condition — included in the above-mentioned common article — that accession cannot take place before the entry into force of the Protocol. The most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, so as to ensure the effectiveness of the procedure of conclusion of treaties.

This article should be read in conjunction with Article 88, relating to the depositary's functions, and Article 83, entitled *Entry into force*.

**Article 83. — Entry into force**

**1. The present Protocol shall enter into force six months after two instruments of ratification have been deposited.**

**2. For each Party to the Conventions thereafter ratifying or acceding to the present Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.**

*Ref.*: 1972 Report, vol. I, paras. 4.51 and 4.188 to 4.195.

This article restates the modalities and time-limits laid down in the article common to the Conventions relating to their entry into force (Art. 58/57/138/153). It thus stipulates that the Protocol is to enter into force six months after *two* instruments of ratification have been deposited. The time-lag, provided for in the two paragraphs, between the establishment of consent by a Party to the Conventions to be bound by the Protocol and the entry into force of the Protocol, with respect to that Party, is to enable the latter to take such preliminary steps, particularly legislative and administrative measures as will be necessary in view of the new obligations it will assume; most multilateral treaties provide for a period of time between those two moments.

The Conventions contain a provision (Art. 62/61/141/157) under which the situations provided for in their common Article 2 " shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or occupation ". Such a clause therefore specifies that the entry into force of the Conventions cannot be subject, in such cases, to the six months waiting period which follows ratification or accession under normal peacetime conditions. It was not judged necessary by the ICRC and the experts to introduce a provision of this kind in the present draft: it is clear that, through its additional character, the Protocol will be governed, as regards its entry into force, by the same rules as the Conventions. Should there be, however, some doubt on this matter, a provision referring to immediate effect, similar to the one in the Conventions, could be introduced.

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[10] See Vienna Conv. 1969, Art. 2 (*b*) and 15.

[11] See Vienna Conv. 1969, Art. 15.

**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 shall apply as supplemented by this Protocol.**

**2. Although one of the Parties to the conflict may not be bound by the present Protocol, the other Parties to the conflict shall remain bound by it in their mutual relations. They shall furthermore be bound by the present Protocol in relation to the said Party, if the latter accepts and applies the provisions thereof.**

*Ref.*: 1972 Report, vol. I, paras. 4.196 to 4.200.

This article, which should be read in conjunction with Article 1, entitled *Scope of the present Protocol*, deals with the new treaty situation created by the entry into force of the Protocol. There will then be two categories of Parties to the Conventions: (*a*) those which are Parties to the Conventions only, and (*b*) those which are Parties both to the Conventions and their Additional Protocol.

*Paragraph 2*

In accordance with the wish of a majority of the experts, the principles laid down in the third paragraph of Article 2 common to the Conventions are here restated.[12]

**Article 85. — Reservations**

**1. Each one of the Parties to the Conventions may, when signing, ratifying or acceding to the present Protocol, formulate reservations to articles other than Articles 5, 10, 20, 33, Article 35, paragraph 1, first sentence, Article 38, paragraph 1, first sentence, and Articles 41, 43, 46 and 47.**

**2. Each reservation shall be operative for five years from the entry into force of the present Protocol in respect of the High Contracting Party formulating the reservation. Any reservation may be renewed for further successive periods of five years subject to a declaration being sent to the depositary of the Conventions not less than three months prior to the expiry of the said period. A reservation may be withdrawn at any time by notification to this effect addressed to the depositary of the Conventions.**

*Ref.*: 1972 Report, vol. I, paras. 4.183 to 4.187.

Although there is no article on reservations in the Conventions, which are governed in this respect by the rules of international law, it was thought necessary by the ICRC and several experts, taking into account the development of the law of treaties, to include an article on this question in the present draft.

This article provides that each one of the Parties to the Conventions may, when signing, ratifying or acceding to the Protocol, formulate reservations to its articles. But, in accordance with the wish of a number of experts, it proposes to prohibit the formulation of reservations to certain expressly mentioned rules of the present draft.

The subject of reservations to multilateral treaties has been much discussed in recent years. It was considered in detail by the United Nations International Law Commission in the course of its work relating to the codification and progressive development of the law of treaties,[13] and an

[12] Reference may be made, concerning this subject, to *Commentary*, Geneva Conv. 1949, which gives a historical outline of common Article 2 (3).

[13] See reference given above, note 2.

important Section in the Vienna Convention on the Law of Treaties — which was the culmination of this work — is devoted to it.[14] During the preparatory studies it carried out on this subject, the International Law Commission recognized the complexity of the problems raised by the question of reservations to multilateral treaties (problems of formulation, acceptance of and objection to reservations); it concluded that, in the case of general multilateral treaties, " the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a ' collegiate ' system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States convened ".[15] The Vienna Convention on the Law of Treaties, which indicates the state of positive law governing the question of reservations, agreed with this conclusion. Reference may therefore be made to it, for the present draft does not contain a clause stipulating the legal consequences deriving from the formulation and acceptance of or objection to a reservation.

*Paragraph 1*

This paragraph contains the list of articles to which no reservations may be made. In its 1972 draft, the ICRC had left this list blank,[16] because the content of the Protocol had not yet been determined sufficiently precisely. The situation is different today, and it has been judged necessary by the ICRC to enumerate those provisions of the present draft to which, in its opinion, no reservations may be made. As indicated in the commentary on each of these provisions, they reaffirm, elaborate or supplement fundamental principles of existing rules which lie at the very basis of the present draft. A reservation to any of those fundamental principles would be incompatible with the object and purpose of the Protocol.

The list calls for the following remarks:

— *Article 5 (Appointment of Protecting Powers and of their substitute)*

The Protecting Powers institution itself, set up by customary international law and reaffirmed by the Geneva Conventions with a view to ensuring an impartial supervision of their implementation, has never given rise to a reservation. The purpose of this article is to the existing system by specifying the modalities for the appointment and acceptance of the Protecting Powers or of their substitute. A majority of the experts considered that modalities of this type were essential so as to permit the international machinery in question — which in their view constitutes a basic condition for the implementation of the Conventions — to produce fullest results.

— *Article 10 (Protection and care)*

This article is a restatement of one of the fundamental principles of the Conventions and has never been disputed. The other articles in Part II are derived from it.

— *Article 20 (Prohibition of reprisals)*

While reaffirming a prohibition already laid down in the Conventions, this article expressly extends its scope to civilian medical units and to their personnel, equipment and means of transport.

— *Article 33 (Prohibition of unnecessary injury)*, *Article 35, paragraph 1, first sentence (Prohibition of perfidy)*, *Article 38, paragraph 1, first sentence (Safeguard of an enemy* hors de combat *and giving quarter)*, and *Article 41 (Organization and discipline)*

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[14] See Vienna Conv. 1969, *Part II, Section 2: Reservations* (Art. 19 to 23).

[15] See *Draft articles on the Law of Treaties with commentaries*, mentioned above, note 2. It is introduction (para. 14) to the commentary to Art. 16 *(Formulation of reservations)* and to Art. 17 *(Acceptance of and objection to reservations)* of the draft of the United Nations International Law Commission.

[16] ICRC, Draft Protocol I, Art. 82.

No reservations have been made to these fundamental principles of existing law, which today are considered as rules of customary international law; it seems important that they should be included in the list in question.

— *Article 43 (Basic rule), Article 46 (Protection of the civilian population)*, and *Article 41 (General protection of civilian objects)*

The principle laid down in Article 43, the implentation of which is ensured essentially by Articles 46 and 47, constitutes one of the bases of international humanitarian law applicable in armed conflicts. All the provisions of Part IV relating to the general protection of the civilian population against effects of hostilities are derived from this principle.

The ICRC does by no means consider this to be an exhaustive list and would be the first to welcome the addition of other articles to this list.

In its 1972 draft, the ICRC had proposed the introduction of a paragraph relating to cases in which a reservation is incompatible with the object and purpose of the Protocol.[17] It had raised the question of the procedure to be established for determining whether a reservation is compatible with the object and purpose and had mentioned as an example, in this connection, Article 20, paragraph 2, of the *International Convention on the Elimination of All Forms of Racial Discrimination*,[18] which provides that a reservation shall be considered incompatible " if at least two thirds of the States Parties to this Convention object to it ". The experts found it difficult to lay down at which moment the two-thirds majority should be taken into consideration. The ICRC therefore deemed it preferable not to include such a provision, considering, besides, that this matter would be governed by the rules of the law of treaties [19] and that—as mentioned above—the present article mentions, in the list of prohibited reservations, the fundamental provisions in respect of which a reservation should be considered incompatible with the object and purpose of this instrument.

*Paragraph 2*

The ICRC judges it appropriate to include such a provision, based on reservation clauses in some recent treaties,[20] so as to encourage the withdrawal of reservations. Any reservation that is not renewed shall be considered as having been withdrawn. Under Article 88, the depositary of the Conventions shall inform all the Parties concerned of declarations received in this respect.

The present article, it is stressed, deals only with reservations to the present Protocol. It does not in any way concern reservations to the Conventions; the withdrawal or re-examination of such reservations, eagerly desired by many governments [21] and experts, is a matter quite independent of the elaboration of this Protocol.

**Article 86. — Amendment**

**1. Any High Contracting Party may propose one or more amendments to the present Protocol or its Annex. The text of any proposed amendment shall be communicated to the depositary of the Conventions which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.**

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[17] See ICRC, Draft Protocol I, 1972, Art. 82 (2).

[18] Adopted and opened for signature and ratification by the United Nations General Assembly, res. 2106 (XX) of 21 December 1965.

[19] See Vienna Conv. 1969, Art. 19 (c).

[20] See, for example, Art. 25 (1), in the *European Convention on the Adoption of Children*, concluded at Strasbourg on 24 April 1967.

[21] See replies sent by governments to the ICRC questionnaire concerning measures intended to reinforce the implementation of the Conventions (question 13); this document is mentioned in Part I, note 10.

**2. The depositary of the Conventions shall invite to this conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of the present Protocol.**

*Ref.*: 1972 Report, vol. I, paras. 4.109 to 4.114.

This article deals with the process of the amendment of the Protocol and its Annex.

Though, in this respect, the Conventions are entirely governed by the rules of customary international law, enshrined today in the Vienna Convention on the Law of Treaties,[22] a majority of the experts considered it necessary to lay down, in the Protocol itself, the process relating to proposals to amend this instrument. It should be mentioned, in this connection, that the United Nations International Law Commission pointed out, in its commentaries to its draft articles on the law of treaties (Art. 35 and 36),[23] that " the proliferation of multilateral treaties had led to and increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment ".

As indicated in the commentary on Article 7, the ICRC had proposed, in its earlier draft,[24] that the depositary of the Conventions should convene, whenever it deemed it expedient, a meeting of the Contracting Parties, in order, *inter alia*, to examine any amendment of the Conventions or of the Protocol proposed by anyone of them and to decide on the measures to be taken in this respect. Some of the experts declared they did not share this view: such a provision would confer upon the depositary of the Conventions functions considerably in excess of those customarily assigned to it; it was, moreover, too briefly worded and would be far from adequate, and therefore inappropriate, for providing replies to the highly complex questions raised by the process required for amending or revising a treaty; it should not be left to a meeting of the Contracting Parties, that is the Parties to the Protocol, to decide on a proposal to amend the Conventions, and the article, which could only be concerned with proposals to amend the Protocol, should therefore appear in the Part dealing with final clauses (Part VI). The ICRC acknowledges that these views are well founded.

It should be pointed out that this article is concerned with proposals to amend the Protocol between all the Contracting Parties, that is where the intention is to draw up a formal agreement between the Parties generally, for modifying or supplementing the Protocol in respect of their mutual relations, and not to draw up an agreement between some only of the Parties for the purpose of amending the Protocol as between themselves alone (*inter se* agreements).[25]

The ICRC, fully aware of the complexity of the problems raised by such an article, presents this proposal in response to the wish expressed by several experts, so that it might be subjected to more detailed consideration.

*Title*

The choice of the title of the present article was determined on the basis of certain indications given by the International Law Commission in its commentaries mentioned above: while the term " amendment " is at times used in relation to individual provisions of a treaty and the term " revision " for a general review of the whole treaty, there does not appear to be any difference

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[22] See Vienna Conv., 1969, *Part IV. — Amendment and modification of treaties* (Art. 39 to 41).

[23] See above, note 2.

[24] See ICRC, Draft Protocol I, 1972, Art. 9: *Meetings.*

[25] Reference should be made, concerning this matter, to Vienna Conv. 1969, Art. 40 and 41, and to the relevant commentaries prepared by the United Nations International Law Commission in its preparatory work—see above, note 2

in the legal process. It therefore seems sufficient to speak of " amendment ", this being a term which covers both the amendment of particular provisions and a general review of the whole Protocol.

*Paragraph 1*

This paragraph, which states first the conditions that must be fulfilled in order to present a proposal to amend the Protocol lays down the process to be followed for the examination of this proposal: the depositary of the Conventions shall decide, after consultation with the Contracting Parties and the ICRC, whether a conference should be convened for this purpose. This provision therefore does not say (1) what are the criteria on which the depositary of the Conventions will base its decision, and (2) what are the conditions under which an amendment may be adopted and come into force.

As regards the function of the depositary, it should be pointed out that, in accordance with the above-mentioned general rules of the law of treaties,[26] the depositary shall notify each of the Contracting Parties of any proposed amendment, and ask what action is to be taken in regard to such proposal; on the basis of the replies received—and also after consultation with the ICRC, which pays close attention to questions concerning the application and development of the Geneva Conventions—the depositary shall decide whether a conference should be convened to consider the proposed amendment. No doubt, this is an important function that is thus conferred upon the depositary of the Conventions. But Article 77 of the Vienna Convention on the Law of Treaties provides that that depositary may perform, in addition to the functions customarily conferred upon it (see Art. 88 of the present draft), any other functions that may be specified.[27] Article 76 (2) of the same Convention also states that " the depositary is under an obligation to act impartially " in the performance of its functions. It is recognized that in all cases the drawing up of an amending instrument is caught up in the functions of the depositary.

With regard to the adoption and entry into force of an amendment, it may be noted that the said Vienna Convention contains an article [28] which, while it includes a formulation of the basic rules concerning the process of amendment, does not attempt, given the great variety of amendment clauses found in multilateral treaties, to frame a comprehensive code of rules regarding the amendment of treaties. The *Handbook of Final Clauses*, prepared by the United Nations,[29] shows that certain clauses concerning the adoption and entry into force of an amendment require its acceptance by all the Parties to the treaty, that others admit some form of qualified majority as sufficient, while others still provide for the use of the two preceding conditions (unanimity, qualified majority) according to the provisions to be amended.

While recognizing that it would be virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the Parties to the Protocol (unanimity rule) [30] and that one is led, in the law of treaties, to an increasing practice of bringing amending agreements into force as between those Parties willing to accept the amendment, the ICRC considers nevertheless that is is essential—in order to maintain the universality of the rules regarding the protection of the victims of armed conflicts—to avoid, to the utmost, the creation of distinct communities of Parties to the Conventions. While, therefore, there is no doubt as to the complexity of the problem concerning the amendment of the provisions of the Protocol itself, the matter is perhaps different—as was pointed out by some experts—with regard to the provisions of the Annex, which are of a technical nature and whose periodical revision

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[26] See Vienna Conv. 1969, Art. 40: *Amendment of multilateral treaties.*

[27] Vienna Conv. 1969, Art. 77, para. 1 (*h*).

[28] See Vienna Conv. 1969, Art. 40: *Amendment of multilateral treaties.*

[29] See note 1 for the reference to *Handbook of Final Clauses.*

[30] Such a procedure is, however, provided for in Art. 39 of the Hague Convention of 1954, entitled *Revision of the Convention and of the Regulations for its Execution*, which some experts wished to take as a basis.

would appear to be necessary; in this connection, reference should be made to the commentary on Chapter V of the Annex, entitled *Periodical revision*, where the process regarding amendment proposals is examined and suggestions put forward.

*Paragraph 2*

It is desirable to associate those that are entitled to become Parties to the Protocol and, consequently, to the amended Protocol, that is—in accordance with Articles 80 and 82—the Parties to the Conventions, with the examination of a proposed amendment. There remains still the question whether the right of only the Parties to the Protocol to proceed with the negotiation and conclusion of an amending agreement in order to embody in it desired improvements should be recognized: this raises complex problems of procedure regarding the adoption and entry into force of amendments. The Vienna Convention of 1969, in this respect, only provides the following:

" Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended ".[31]

**Article 87. — Denunciation**

**1. In case of the High Contracting Party should denounce the present Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. However, if on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article 2 common to the Conventions, the denunciation shall not take effect until the end of the armed conflict or occupation and, in any case, until after operations connected with release, repatriation and establishment of the persons protected by the present Protocol have been terminated.**

**2. The denunciation shall be notified in writing to the depositary of the Conventions, which shall transmit it to all the High Contracting Parties.**

**3. The denunciation shall have effect only in respect of the denouncing Party.**

*Ref.*: 1972 Report, vol. I, paras. 4.201 to 4.206.

This articles is based on an article common to the Conventions (Art. 63/62/142/158) which expressly provides that any Contracting Party has the right to withdraw unilaterally from the community of Parties to the Conventions.

Some experts, pointing out that ever since the Geneva Conventions came into existence, no State has ever denounced them and considering that the right of denunciation would be quite incompatible with the character of an instrument relating to the protection of the victims of armed conflicts, did not wish the insertion of such a clause. A majority, however, thought it desirable to introduce an article of this kind: the right of denunciation, which exists by virtue of customary international law, must be circumscribed; it is essential for the Protocol, which supplements the Conventions, to contain a right provided for in the latter.

*Paragraphs 1 and 2*

This provision, like the above-mentioned article common to the Conventions, states that the denunciation will not take effect immediately: under normal peacetime conditions, it will only take effect one year after notification to the depositary of the Conventions, in accordance with paragraph 2. Should the denouncing Party be involved in a situation covered by Article 2 common to the Conventions,[32] the waiting period — as provided for also in the denunciation clause of the Conventions — will be prolonged.

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[31] See Vienna Conv. 1969, Art. 40, para. 3.

[32] See, in this connection, the commentary on Article 1.

*Paragraph 3*

Several experts would have liked to see this provision supplemented by the insertion, as was done in paragraph 4 of the common denunciation article in the Conventions, of a clause similar to the so-called Martens clause, which appears in the Preamble of the Hague Convention No. IV of 1907.[33] Such a provision takes its whole significance in the Conventions from the fact that the latter do not contain a Preamble where this clause would have been most appropriately placed, but the case is different regarding the present draft which embodies the clause — in accordance with the wish expressed by several experts — in one of the paragraphs of its Preamble.[34]

**Article 88. — Notifications**

**The depositary of the Conventions shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of the present Protocol, of the following:**

*(a)* **signatures affixed to the present Protocol and the deposit of the instruments of ratification and accession under Articles 81 and 82;**

*(b)* **the date of entry into force of the present Protocol under Article 83;**

*(c)* **communications and declarations received under Articles 73, 85 and 86;**

*(d)* **denunciations under Article 87.**

*Ref.*: 1972 Report, vol. I, paras. 4.207 and 4.208.

The ICRC and the experts, drawing upon the Vienna Convention on the Law of Treaties,[35] considered it desirable to state in a single article the functions customarily assigned to a depositary.

Under certain provisions of the present draft, any notifications or communications must, as the case may be, be transmitted to the depositary, who, under this article, shall take steps to inform the other Parties concerned. Had this clause enumerated all the functions of the depositary, it could have undoubtedly been entitled " Functions of the depositary ". But such is not the case: on the one hand, the law of treaties confers upon the depositary a number of duties, which are so generally known that it did not appear necessary that they should be here reaffirmed,[36] and, on the other hand, the present draft, in addition, requires the depositary to perform certain functions, which, because of their different character (see Art. 7, 89 and 90), cannot be included in the list in this article. The title of the article is derived from indications appearing in the *Handbook of Final Clauses*,[37] which places a provision of this kind under the heading " Clauses providing for notifications by the Depositary ".

In order to ensure the widest possible participation in the Protocol, it will be the function of the depositary to inform all those entitled to become Parties to the Protocol, that is — under Articles 80 and 82 — all the Parties to the Conventions.

*Sub-paragraph (c)*

The communications and declarations referred to are the following:

— under Article 73, the Contracting Parties shall communicate to the depositary the official translations of the Protocol which they may have drawn up, as well as the laws and regulations which they may adopt to ensure the application thereof;

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[33] See The Hague Convention No. IV of 1907, Preamble, para. 8.

[34] See paragraph 3 of the Preamble. See also *Commentary*, Geneva Conv. 1949, para. 4 of common Art. 63/62/142/158.

[35] See Viena Conv. 1969, Art. 76 *(Depositaries of treaties)* and Art. 77 *(Functions of depositaries)*.

[36] See Vienna Conv. 1969, Art. 77.

[37] The reference to the *Handbook of Final Clauses* is given above in note 1.

— under Article 85, the Contracting Party which has formulated a reservation, must, if it desires to have it renewed, communicate its declaration to the depositary within the specified time-limit; the depositary must also be notified of the desire of any Contracting Party to withdraw a reservation. Further, in accordance with the law of treaties,[38] the depositary shall act in connection with the deposit of documents containing reservations or objections to reservations: it shall communicate the text of such documents to all Parties concerned, without passing on the legal effect of reservations or objections to reservations and leaving it to each Contracting Party to draw legal consequences from such communications;

— under Article 86, the text of any proposed amendment to the Protocol or its Annex put forward by a Contracting Party must be communicated by the latter to the depositary, who, in accordance with the present article, will inform all the Parties concerned. Of course, if the amending process of the Protocol were to be supplemented, in accordance, as the commentary in Article 86 would like it to be, with the rules of the law of treaties, the depositary might also be called upon to inform all the Parties concerned of the declarations whereby the Contracting Parties would accept amendments, as well as objections to amendments notified to it and the date of the entry into force of the amendments.

**Article 89. — Registration**

**1. After its entry into force, the present Protocol shall be transmitted by the depositary of the Conventions to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.**

**2. The depositary of the Conventions shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to the present Protocol.**

*Ref.*: 1972 Report, vol. I, paras. 4.209 and 4.210.

This article is based on a final clause of the Conventions (Art. 64/63/143/159) and on Article 80 of the Vienna Convention on the Law of Treaties.[39]

**Article 90. — 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 of the Conventions, which shall transmit certified true copies thereof to all the Parties of the Conventions.**

**2. The depositary of the Conventions shall arrange for official translations of the present Protocol to be made into ... .**

*Ref.*: 1972 Report, vol. I, para. 4.211.

This article is based on a final clause of the Conventions (Art. 55/54/133/150).

*Paragraph 1*

As in the Conventions, it is provided that only the French and English texts are to be regarded as authentic. Both will be treated on a footing of equality.

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[38] In this connection, see the commentary on Art. 85.

[39] Vienna Conv. 1969, Art. 80: *Registration and publication of treaties.*

In accordance with the law of treaties,[40] the depositary shall prepare certified copies of the original text and any further text in such additional languages as may be required under paragraph 2 and transmit them to the Parties to the Conventions.

*Paragraph 2*

After drawing up the two authentic texts, the Diplomatic Conference may entrust the preparation of official translations of the Protocol into other languages to the depositary. The Conventions provided for such translations to be made in Russian and Spanish. This is to avoid the production of a variety of different versions in the same language.

These versions will be official in that the body which will prepare them will be specified by the Conference itself. But, unlike the French and English, these texts will not be authentic.

[40] Vienna Conv. 1969, Art. 77, para. 1 (*b*).

## ANNEX

## REGULATIONS CONCERNING THE IDENTIFICATION AND MARKING OF MEDICAL PERSONNEL, UNITS AND MEANS OF TRANSPORT, AND CIVIL DEFENCE PERSONNEL, EQUIPMENT AND MEANS OF TRANSPORT

These Regulations supplement the provisions of the draft Protocol concerning the identification of medical personnel, medical units and means of medical transport [1] and civil defence personnel, buildings, equipment and means of transport; [2] they make it unnecessary to burden the Protocol provisions with technical specifications.

The Conventions specify what persons and objects are entitled to use the protective sign (Art. 38 to 44 of the First Convention; art. 41 to 45 of the Second Convention; Art. 18 and 20 to 22 of the Fourth Convention), but give no particulars as to how the sign should be used apart from the marking of hospital ships and other medical craft (Art. 43 of the Second Convention). Chapter II of the present Regulations proposes to fill the gap.

The mobility of the armed forces has increased considerably over the past few years. Moreover, they now use new methods of detection and remote-control weapons which can reach targets beyond visual range. The 1949 Diplomatic Conference, aware of the inadequacy of the distinctive emblem for the identification of medical units and means of transport, recommended in its Resolution 6 that:

> " . . . the High Contracting Parties will, in the near future, instruct a Committee of Experts to examine technical improvements of modern means of communication between hospital ships, on the one hand, and warships and military aircraft, on the other, and also to study the possibility of drawing up an International Code laying down precise regulations for the use of those means . . . ".

It will be noted that a link exists between this resolution and Article 43 of the Second Convention, regarding the marking of hospital ships and other medical craft, the eighth paragraph of which reads thus:

> " Parties to the conflict shall at all times endeavour to conclude mutual agreements in order to use the most modern methods available to facilitate the identification of hospital ships. "

Chapter III of the present Regulations follows up these recommendations. It contains proposals on the use of modern marking and identification methods particularly for medical aircraft and, as far as possible, for hospital ships and other medical craft as well as medical units and vehicles.

### ABBREVIATIONS

The organizations and documents referred to in the present commentary are the following:

A. *Organizations*

| | |
|---|---|
| CIE | *Commission internationale de l'éclairage*, Paris (International Commission on Illumination) |
| ICAO | International Civil Aviation Organization, Montreal |
| IMCO | Inter-Governmental Maritime Consultative Organization, London |
| ITU | International Telecommunication Union, Geneva |

B. *Documents*

| | |
|---|---|
| ICRC, Conf. Gvt. Experts, Doc. Geneva, 1971, CE/7b | Volume VII, CE/7b, *Protection of the Wounded and Sick* |

[1] Draft Protocol I, Art. 18.

[2] Draft Protocol I, Art. 59.

| | |
|---|---|
| Radio Regulations | International Telecommunication Union, *Radio Regulations*, 1959 |
| International Code of Signals | Inter-Governmental Maritime Consultative Organization, *International Code of Signals*, London, 1965 |
| International Convention for the Safety of Life at Sea | Inter-Governmental Maritime Consultative Organization, *International Convention for the Safety of Life at Sea*, in International Conference on Safety of Life at Sea, 1960, Final Act of Conference, London, 1960 |
| Chicago Convention, | International Civil Aviation Organization, *Convention on International Civil Aviation*, signed in Chicago on 7 December 1944 |
| Chicago Convention, Annex 8 | International Civil Aviation Organization, *International Standards, Airworthiness of Aircraft*, Annex 8 to the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 |
| Chicago Convention, Annex 10 | International Civil Aviation Organization, *International Standards and Recommended Practices. Aeronautical Telecommunications.* Annex 10 (Vol. I and II) to the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 |
| Chicago Convention, Annex 11 | International Civil Aviation Organization, *Air Traffic Services*, Annex 11 to the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 |
| ICAO, Rules of the Air | International Civil Aviation Organization, *Procedures for Air Navigation Services, Rules of the Air and Air Traffic Services*, Doc. 4444 - RAC/501/10 |
| ICAO, Abbreviations and Codes | International Civil Aviation Organization, *Procedures for Air Navigation Services, ICAO Abbreviations and Codes*, Doc. 8400/3 |
| Designators for Aircraft Operating Agencies, Aeronautical Authorities and Services | International Civil Aviation Organization, *Designators for Aircraft Operating Agencies, Aeronautical Authorities and Services*, Doc. 8585/10 |

## Chapter I

## Documents

**Article 1. — Permanent civilian medical personnel**

**1. Permanent civilian medical personnel shall carry a special identity card bearing the distinctive emblem. This card shall be water-resistant and of such size that it can be carried in the pocket. It shall be worded in the language of the country concerned and in one of the languages mentioned in Article 90 of the present Protocol and shall mention the surname and first names, the date of birth, function and the service number, if any, of the holder. It shall state in what capacity the holder is entitled to the protection of the Conventions and the present Protocol. The card shall bear the photograph of the holder as well as his signature or his fingerprints, or both. It shall bear the embossed stamp of the competent authorities.**

**2. The identity card shall be uniform throughout the territory of each High Contracting Party and, as far as possible, of the same type for all the High Contracting Parties. The High Contracting Parties may be guided by the model shown below [1]. At the outbreak of hostilities, they shall transmit to each other a specimen of the model they are using. Identity cards shall be made out, if possible, at least in duplicate, one copy being kept by the issuing authorities.**

**3. In no circumstances may the said personnel be deprived of their identity cards. In the event of loss, they shall be entitled to obtain a duplicate copy.**

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**[1] The model of the identity card will be established subsequently.**

*Ref.*: 1972 Report, vol. I, para. 1.45.

This article is virtually identical with the articles of the Conventions relating to the identification of medical and religious personnel (art. 40 of the First Convention; Art. 42 of the Second Convention).

*Model*: see page 114

**Article 2. — Temporary civilian medical personnel**

**1. Temporary civilian medical personnel shall carry a special identity card similar to that provided for in Article 1 above. This card shall specify the medical training of the holder, the temporary nature of his functions and the right to display the distinctive emblem.**

**2. The High Contracting Parties may be guided by the model shown below [2]. Identity cards shall be made out, if possible, in duplicate, one copy being kept by the issuing authorities.**

---

**[2] The model of the identity card will be established subsequently.**

*Model of identity card for permanent civilian medical personnel*
(one-quarter of A4 format—fold along dotted line)

*Outside of card*

| Taille<br>Height | Yeux<br>Eyes | Cheveux<br>Hair |
|---|---|---|

Autres éléments éventuels d'identification:

Other distinguishing features:

Instruction sanitaire:

Medical training:

Fonction du titulaire:

Function:

Pays/Country:

No. matricule/Registration No.:

**CARTE D'IDENTITÉ**
**IDENTITY CARD**

**PERSONNEL SANITAIRE CIVIL**
**CIVILIAN MEDICAL PERSONNEL**

PERMANENT

*Inside of card*

NOM/NAME:

PRENOM/FIRST NAME:

Date de naissance/Date of birth:

*Photo*

Signature:

Empreintes digitales/Fingerprints:

Le titulaire de la présente carte est protégé par le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux en qualité de:

The holder of this card is protected by the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts, as:

Date de l'établissement de la carte/Date of issue:

Timbre sec de l'autorité délivrant la carte:

Embossed stamp of issuing authority:

*Model of identity card for temporary civilian medical personnel*
(one-quarter of A4 format—fold along dotted line)

*Outside of card*

| Taille<br>Height | Yeux<br>Eyes | Cheveux<br>Hair |
|---|---|---|

Autres éléments éventuels d'identification:

Other distinguishing features:

Instruction sanitaire:

Medical training:

Fonction du titulaire:

Function:

Pays/Country:

No. matricule/Registration No.:

**CARTE D'IDENTITÉ**
**IDENTITY CARD**

**PERSONNEL SANITAIRE CIVIL**
**CIVILIAN MEDICAL PERSONNEL**

TEMPORAIRE/TEMPORARY

Valable du . . . . . .au . . . . . .
Validity from . . . . . .to . . . . . .

*Inside of card*

NOM/NAME:

PRENOM/FIRST NAME:

Date de naissance/Date of birth:

*Photo*

Signature:

Empreintes digitales/Fingerprints:

Le titulaire de la présente carte est protégé par le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux en qualité de:

The holder of this card is protected by the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts, as:

Date de l'établissement de la carte/Date of issue:

Timbre sec de l'autorité délivrant la carte:

Embossed stamp of issuing authority:

*Ref.*: 1972 Report, vol. I, para. 1.45.

This identity card for temporary civilian medical personnel (see model) differs from that provided for in Article 1 in that, on the front, it bears the word " temporary " and states the duration of validity. The temporary nature of the holder's duties might, for instance, be specified under *Function.*

*Model*: see page 115

**Article 3. — Lists of personnel**

**The management of each civilian medical unit shall at all times keep an up-to-date list of the names of its personnel at the disposal of the competent authorities.**

*Ref.*: 1972 Report, vol. I, para. 1.45.

This list of personnel attached to the civilian medical unit will include chaplains and other persons performing similar functions (see Art. 15 of draft Protocol). The present provision is intended to facilitate supervision of medical personnel by the military and civilian authorities.

**Article 4. — Flight plan**

**The agreements and notifications relating to flight plans provided for in Article 30 of the present Protocol shall be established as far as possible in accordance with procedures laid down by the International Civil Aviation Organization.**

*Ref.*: 1972 Report, vol. I, paras. 1.66 to 1.97.

The experts pointed out that even in peacetime an aircraft's course was subject to authorization, and that aeronautical procedures existed to that effect.

The purpose of this article is to facilitate the agreements and notifications provided for in Articles 26 to 29 and 32 of the draft Protocol. In the sphere of medical air transport referred to in the draft Protocol, this article opens up prospects of procedures similar if not identical to the procedure followed by international civil aviation in peacetime in regard to flight authorization and the control of civil air traffic. Among these procedures, that relating to civil flight plans allows, *inter alia*, standardization of the information which should appear in the agreements and notifications provided for in Article 30 of the draft Protocol.

Some of the Annexes to the Convention on International Civil Aviation [3] specify the procedure which should be applied—before the take-off or during flight—in transmitting flight plans, obtaining flight authorization, and peacetime co-ordination of civil and military air traffic control. These procedures, which are simple and flexible, would enable the local military authorities of the Parties to the conflict to proceed to a quick dissemination of the information required to ensure an adequate level of security for flights by medical aircraft in zones of military operations. These procedures would have the advantage of giving agreements and notifications on such medical air transport the requisite international technical content.

## Chapter II

## Distinctive emblem

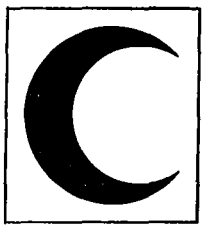
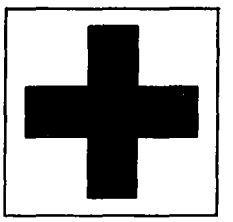
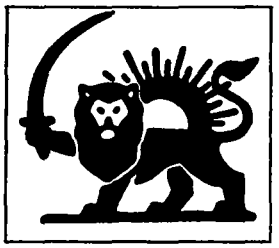
**Article 5. — Shape and nature**

**1. The distinctive emblem shall be as large as possible. The red and white surfaces shall be, as far as possible, of equal area. For the shapes of the cross, the crescent or the lion and sun, the High Contracting Parties may be guided by the models shown below.**

**2. At night or when visibility is reduced, the distinctive emblem may be lighted or illuminated; it may also be made of materials rendering it recognizable by technical means of detection.**

[3] Annexes 10, 11 and 12 to the Chicago Convention; see also ICAO, *Rules of the Air*, and ICAO, *Abbreviations and Codes.*

*Emblems in red on a withe ground*

*Ref.*: 1972 Report, vol. I: Report of Commission I, Annexes III and IV C.

During the second session of the Conference of Government Experts, the ICRC organized tests on the visibility of the distinctive emblem. The experts who witnessed the tests in the field observed that the emblem became indistinct even at a short distance and that only too often it was invisible when a member of the medical corps wore it on the left arm—especially when observed from his right side, back or front—(see Art. 40 of the First Convention). At night, medical personnel, vehicles and installations visible to infra-red detecting cannot be identified unless the sign is marked in a special way.

Bearing in mind the observations of the experts, the ICRC proposes that the visibility of the distinctive emblem should be improved.

*Paragraph 1*

The size of the distinctive emblem determines the distance from which it can be identified by the naked eye, be day, under normal conditions of visibility. The best proportion appears to be a red surface equal to the surface of the white background.

*Examples*

| *Size of cross (crescent or red lion and sun)* | *Distance beyond which the emblem becomes indistinct* |
|---|---|
| 10 centimetres (e.g. on armband) . . . . . | 60 metres |
| 40 centimetres (e.g. on ambulance) . . . . . | 300 metres |
| 5 metres (e.g. on hospital roof, flat surface, seen from aircraft) . | 2500 metres altitude |

*Paragraph 2*

During nocturnal military operations, or when visibility is restricted owing to unfavourable weather conditions, various types of " sensors ", radar, light amplifiers and infra-red detecting devices can be used by the armed forces. To ensure that the distinctive emblem retains its protective value under such conditions, it may be necessary to make it visible in the dark by means of lamps, projectors or some pre-established luminous device which can be operated at will. Again, when ordinary paint is used for the distinctive emblem, it cannot be identified by infra-red monitoring. It can be visible to infra-red detectors if fitted with retro-reflective sheeting. [4]

**Article 6. — Use**

**1. The distinctive emblems shall be marked on a flat surface or on flags visible from all possible directions and from as far as possible.**

**2. As far as possible, medical personnel removing casualties from the battle area shall wear headgear and clothing bearing distinctive emblems.**

*Ref.*: 1972 Report, vol. I: Report of Commission I, Annex III C.

The details given in this article on the use of the emblem are the result of visibility tests carried out in the field.

[4] This retro-reflective sheeting, which is frequently used in road signals to increase their reflecting power, is formed of tiny glass spheres embedded in a transparent surface in the form of thin slabs, strips, adhesive tapes, etc.

*Paragraph 1*

To ensure that the visual range of the emblem is not diminished and that it can be immediately identified, the emblem should, if possible, be on a flat surface. If marked on an uneven surface, for instance across the slopes of a roof, the angles of a tent or the angular surface of an aircraft, ship or other vehicle, the emblem will look deformed and diminished, according to the angle from which it is observed; even at a short distance it may no longer be identifiable.

A flag, especially when waved, is extremely conspicuous. It is a good optical stimulus for signalling. This article, although its main concern is the use of the distinctive emblem in battle areas, does not specify the size of the flag. It should, however, like all distinctive emblems, be visible from any quarter and from as far off as possible. Flags should therefore be very large, e.g. more than a metre high, and the distinctive emblem itself should not be less than a metre. By day, the emblem could then be identified by the naked eye at a distance of about 500 metres. [5]

To facilitate recognition of colours at a distance, the use of fluorescent red and white, radiating ultra-violet, is recommended. The reflecting power of those colours is greater, not only by day but also at dusk and at dawn. The luminous energy stored up by phospherescent colours during the day, or after exposure to electric light, is only feebly rendered, and only for a short time, at night. Such colours are therefore of very little use for medical marking.

Fluorescent colours and reflectorized substances are recommended by various international maritime and aeronautical bodies for the marking of individual rescue equipment and collective rescue craft. [6] It would be advisable for the distinctive emblems to be used in the same way by medical personnel, units and means of transport, and lifeboats.

*Paragraph 2*

During the Second World War, it became a practice for the helmet worn by members of the medical corps to be marked with the distinctive emblem painted on a circular white ground approximately 12 centimetres in diameter. Visibility tests have shown that the small size of this emblem limits visual range to about 60 metres. With outer garments, considerably larger distinctive emblems coud be worn, back and front. The identification of medical personnel in the field would then the possible at a distance closer to the average range of small-arms (300 to 400 metres) and with much greater speed. The increased mobility of armed forces calls for better medical marking, even though the conclusion of local truce agreements, the effects of which are limited, may enable the Parties to the conflict to evacuate the wounded and the sick with greater ease.

## Chapter III

## Dinstinctive signals

The distinctive signal no longer suffices for the marking of medical units and means of transport in modern armed conflicts. Methods in which radio-electric waves are used for detection, location and identification do not show markings. The widespread use of technical detection systems (radar, infra-red, electro-acoustics, various " sensors " and so forth) allows control of areas beyond the range of vision. With these means, targets can without previous identification be reached by long-range weapons, guided with precision at the end of the trajectory by the homing devices (missiles, torpedoes) or area weapons, remote controlled or not (bombs, artillery, etc.). There is an identification system by radar pulse decoding known as the IFF transponder (Identification Friend or Foe transponder), but it is solely used for the identification of " friendly " military units and therefore does not allow the identification of medical units.

Chapter III contains the necessary rules for the signalling and identification, by technical systems, of medical units and means of transport. It relates to all medical services: land, sea and air. The experts made recommendations and specified distinctive signals for medical aircraft. [7] In the case of medical sea and land transport, they recommended that a study be made of the extent to which the distinctive signals of medical aircraft would apply. [8] With the physical diversity of air, sea and land, and the great variety of technical characteristics of aircraft, ships and vehicles, the needs of and the rules governing signaling and telecommunication differ. Hence, apart from military requirements, the problem of distinctive signals

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[5] The minimum standards of visual acuity are, in general, visual angles (A) of one minute for the eye's resolving power and five minutes for contrast. In the case of a one-metre cross seen at a distance of 500 metres, we have: $\tan A = \frac{1}{500}$ hence a visual angle (A) of seven minutes.

[6] Colours used for marking rescue craft, for example, retroreflect the luminous energy of a simple pocket torch at a distance of 500 metres, which facilitates the search for shipwrecked persons. At maximum visual range, the most easily distinguishable colours are fluorescent orange, white and pale yellow. A medical aircraft painted entirely white can be more easily identified unless the background, too, is white (snow or clouds), in which case the aircraft's extremities might be painted fluorescent orange, as is done by certain search and rescue services.

[7] The majority of those consulted were experts in medical air transport.

[8] See 1972 Report, vol. I, Report of Commission I, Annex III.

should be studied from the aeronautical, maritime and land standpoints. Any comments made by States and international specialized agencies [9] will permit a more accurate statement of the technical characteristics of maritime and land distinctive signals, the study of which has not been completed.

This Chapter contains no mandatory provisions, but is based on a uniform concept of the medical signalling and identification methods which the equipment of modern armies renders necessary.

### Article 7. — Optional use

**The distinctive signals referred to in the present Chapter shall be used exclusively by medical units and means of transport; their use is optional.**

*Ref.*: 1972 Report, vol. I: paras. 1.63, 1.66, 1.76, 1.80, 1.89 to 1.93, and Report of Commission I, Annexes II, III, III D.

For various reasons of a technical, military or other nature, the Parties to the conflict are not always in a position to use medical distinctive signals. The experts stressed the point, and this article bears this view in mind.

### Article 8. — Light signals

**1. The light signal shall consist of a blue light flashing at a frequency of between 40 and 100 flashes a minute.**

**2. Medical aircraft and vehicles may be equipped by the Parties to the conflict with signals consisting of one or more blue lights, flashing as mentioned in paragraph 1, and placed in such a way as to be visible in as many directions as possible [3].**

---

**[3] The chromatic boundaries of the luminous signal's blue light are represented on the chromatic diagram of the International Commission of Illumination by the three straight lines determined by the following equations:**

| | |
|---|---|
| **green boundary** | $y = 0.065 + 0.805\,x$ |
| **white boundary** | $y = 0.400 - x$ |
| **purple boundary** | $x = 0.133 + 0.600\,y$ |

**The triangle formed by the intersection of these three lines determines the blue zone, recommended for this signal, shown on the chromatic diagram given in Publication No. 2 " Colours of Light Signals " of the International Commission on Illumination.**

**The effective intensity of the blue luminous signal should not be inferior to 400 candelas.**

*Ref.*: 1972 Report, vol. I: para. 1.66, and Report of Commission I, Annexes II, III, III D.

The light signal increases the range of visual signalling. It can, at will and according to need, facilitate identification by day, at night and with poor visibility. The medical light signal must not, however, infringe international rules and standards of air, sea or land light signalling. The experts therefore submitted standards for the distinctive light signal to be used by medical aircraft, and recommended that the extension of those standards to medical ships and craft be considered by maritime signalling experts. [10]

The article allows the same distinctive light signal to be used for medical aircraft and vehicles. The only remark by the experts concerned, the use of the light signal, in peacetime, by priority vehicles, medical or otherwise, in road traffic (see C below). The experts studied the following points:

A. *Signalling of medical aircraft*

*Paragraph 1*

Blue has been selected as a distinctive colour as it is not being used for the navigation lights of aircraft or ships. The number of flashes, 40 to 100 per minute, corresponds to the frequency of anti-collision lights of aircraft (see Annex 8 to the Chicago Convention).

The ICRC conveyed the experts recommendations on the signalling of medical aircraft to ICAO, which replied that the questions were being studied.

The experts having recommended that the ICRC specify the colorimetric co-ordinates of the blue to be used, these co-ordinates—transmitted by CIE—are given in a note appended to the present article.

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[9] CIE, ICAO, IMCO and ITU.

[10] It should be noted that the ICRC's consultations with experts have not yet made it possible to propose technical standards for the light signal of medical ships and craft.

*Paragraph 2*

CIE states that the luminous intensity of anti-collision lights has been raised from 100 to 400 candelas in the United States of America, where air traffic is intense. On clear nights, the visual range of a light having a 400 candelas intensity may extend several kilometres, but by day it becomes indistinct at less than one kilometre. Recent studies on the visibility of flashing lights have shown a visual range, by day, of about one kilometre for lights having a real intensity of 3,300 candelas.

The location of the blue light on the aircraft and its luminous characteristics should conform to international standards governing the issue of airworthiness certificates, so that governments may approve the blue light under those standards (see Annex 8 to Chicago Convention).

B. *Signalling of medical ships and craft*

*Paragraphs 1 and 2*

Article 43 of the Second Convention states that hospital ships shall at night take the necessary measures to render their painting and distinctive emblems sufficiently apparent. This, however, is insufficient for the purpose of identifying the ship. The distance at which illuminated distinctive signals can be identified is, in fact, shorter than the range of the weapons of an aircraft or warship. Hence the need to add a luminous distinctive signal that will allow identification at a greater distance. Experts who.n the ICRC consulted about the use of flashing blue lights on hospital ships, stated that such signalling could be carried out by means of a 4-ampere power source, with 10 amperes on lighting, under 250-volt tension, with a 500-volt secondary transformer. These blue lights, placed on either side of the ship, would show an uninterrupted light throughout an arc of 180 ° from the bows to the stern and should be visible at a distance of at least 5 miles. [11]

Rule 13 of *Regulations for Preventing Collisions at Sea* (Annex B to the *Final Act of the International Conference on Safety of Life at Sea*, 1960) authorizes governments to arrange for additional lights on board ships they control. The use of flashing blue lights [12] by hospital ships and small medical craft can therefore be submitted to IMCO for consideration, with a view to including that distinctive light in the International Convention for the Safety of Life at Sea when next revised.

C. *Signalling of medical vehicles*

*Paragraphs 1 and 2*

Every day, road traffic accidents show that by day a civilian ambulance equipped with flashing blue lights is easily identified from about 500 metres. The installation of flashing blue lights with 40 to 100 flashes per minute, which would be exclusively reserved for medical vehicles, poses no technical problems. Such lights are always controlled by a switch. Some experts, however, held the view that in some States the exclusive use of those lights by medical services might give rise to legal problems, as non-medical priority vehicles were using flashing blue lights as a signal.

If the use of the flashing blue light were exclusively reserved for medical services, non-medical priority means of transport might simply exchange the blue glass casing for one of some other colour (at least during a period of armed conflict). The legal problems posed by the exclusive use of the blue light by medical services come under the international conventions on land (road traffic), sea and air light signalling.

**Article 9. — Unilateral radio signal**

**1. The unilateral radio signal consists of a radiotepephonic or radiotelegraphic message preceded by the call sign " MEDICAL " emitted three times and followed by the call sign of the medical means of transport. This message is transmitted in English at frequent intervals on an agreed or specified frequency. The use of the call sign " MEDICAL " shall be restricted exclusively to the medical services.**

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[11] ICRC, Conf. Gvt. Experts, Geneva, 1971, Doc. CE/7b, p. 64.

[12] ICRC tests on the visibility, to the naked eye, of a flashing blue light equipped with a 45-Watt bulb on small craft (6 to 12 metres long) show that the blue can be identified, by day and in calm weather, up to a distance of 250 metres when placed 1.5 metre above water level, and up to a distance of 500 metres when placed 3 metres above water level. At night, the blue light installed 3 metres above water level is identifiable at a distance of 2 nautical miles. The lights were observed from a height of 4 metres above water level.

**2. The radio message shall convey the following data:**

*(a)* **" MEDICAL " followed by the call sign of the means of transport;**

*(b)* **position of the means of transport;**

*(c)* **number and type of medical means of transport;**

*(d)* **itinerary;**

*(e)* **timetable;**

*(f)* **any other information, such as flight altitudes, radio frequencies, languages, secondary radar modes and codes.**

**3. So as to facilitate the communication of information referred to in paragraphs 1 and 2 of the present article, the High Contracting Parties shall designate and publish the national frequencies to be used by them. These frequencies shall be notified by the High Contracting Parties to the International Telecommunication Union for listing in the Master International Frequency Register and for inclusion in Service Documents.**

**4. The use of other frequencies shall be the subject of special agreements entered into between the Parties to the conflict which, as a general rule, shall inform the International Telecommunication Union.**

*Ref.*: 1972 Report, vol. I: paras. 1.66 and 1.87, and Report of Commission I, Annexes II to III E.

Detection by technical means implies, particularly in the case of means of medical transport, the need to be identified by procedures that allow the Parties to a conflict to provide the respect and protection to which they are entitled. Radiocommunication makes this possible. Owing to the fact, however, that the frequencies used for air, sea and land radiocommunications differ, and that each of the armed services has its own frequencies, it seems vital to establish some co-ordination in the matter. To this end, the experts have recommended that medical radiocommunication should abide by existing international rules and standards, and that the problem be studied by ITU (see *Radio Regulations*, the Annexes to the Chicago Convention and the *International Code of Signals*). Pursuant to the recommendations made by the experts, the ICRC requested the Swiss Government to submit the problem to the ITU Plenipotentiary Conference meeting in September 1973.

In the Regulations discussed here, medical radiocomonications are covered in Articles 9, 10, 12 and 13. The procedures provided for in these articles aret to be submitted to the international organizations concerned for approval.

The above Article 9 states the method recommended by the experts for non-visual identification of medical aircraft by radiocommunication, and it offers other medical means of transport the possibility of using this method.

A. *Medical aircraft*

*Paragraph 1*

The ICRC informed ICAO of the proposed use of the call sign MEDICAL for radiocommunication by medical aircraft. ICAO answered that such a proposal should be channelled through member States. It added that the two-letter designator "YX", which ICAO had allocated to military services or organizations, might be used by medical aircraft in international aeronautical telecommunication (see ICAO, Designators for Aircraft Operating Agencies, Aeronautical Authorities and Services).

*Paragraph 2*

The information given in the message, as specified by the expert , is typical of a medical aircraft's message of identification and position. The message might be included among the types of message standardized by ICAO for air traffic services (see ICAO, *Rules of the Air*). This might facilitate air traffic control, especially in zones of military operations, where there may be some interference between civilian and military air traffic.

*Paragraph 3*

Advance publication of the frequencies used by medical aircraft is also useful in peacetime, as such aircraft may be called upon to intervene in case of accidents, natural disasters, etc...

*Paragraph 4*

In order to avoid involuntary interference in medical radio communications, the other frequencies chosen must have ITU approval.

B. *Medical ships and craft*

*Paragraph 1*

It is desirable that the call sign MEDICAL be mentioned in the chapters dealing with rescue and radiocommunication at sea, in Radio Regulations and in the International Convention for the Safety of Life at Sea.

*Paragraph 2*

In the case of medical ships and craft, the message might mention the following components:

(*a*) MEDICAL, emitted three times and followed by the ship's call sign;
(*b*) ship's estimated position;
(*c*) number and type of medical ship and craft;
(*d*) speed in knots and true course;
(*e*) from . . . (point of departure) to . . . (point of arrival);
(*f*) other particulars such as radio frequencies, language, radar identification modes and codes, underwater acoustic identification system, etc.

*Paragraph 3*

Some experts suggested that the following frequencies and methods be used for transmitting the identity and position of medical ships and craft: [13]

— On maritime frequencies: an automatic MF (medium frequency) transmitter with a range of 50 nautical miles, transmitting on the 2182 KHz frequency a signal composed of the word MEDICAL emitted three times (pronounced in the English way and separating the syllables), followed by the ship's call sign spelt according to the International Code of Signals spelling table. At regular intervals, the message is transmitted three times within a three-minute cycle.

— On aeronautical frequencies: an automatic VHF (very high frequency) transmitter emitting the signal as defined above on the 243 MHz frequency. At regular intervals, the message is transmitted three times within a three-minute cycle.

The automatic transmitters would thus transmit on frequencies watched in the mobile maritime and aeronautical services. In accordance with the principle of emergency position-indicating radiobeacons, the signal will be of a standard pattern permitting radiolocation of the medical ship or craft.

Procedures adopted in accordance with this article might be submitted to ITU for consideration and approval.

*Paragraph 4*

The provisions of Radio Regulations on the allocation of frequencies must at all times be respected, as ITU members and associate members have undertaken to do.

C. *Medical vehicles*

*Paragraph 1*

The call sign MEDICAL might be used by medical units and vehicles if they use radiocommunication for signalling and identification purposes. This may apply to an amphibious vehicle, hovercraft, etc. on the beach.

*Paragraph 2*

The radio signal of medical vehicles and units may be of the same pattern as those of aircraft and ships, especially if the nature of the terrain (desert, etc.) or general conditions of the action require identification at a great distance.

*Paragraphs 3 and 4*

Obviously it would be unrealistic to require all radiocommunication stations of the armed forces to watch the frequencies allocated to medical services. The agreements between Parties to a conflict should therefore specify in what manner and by what control units the watching of medical frequencies, as provided for by international standards, will be carried out. The agreement should also lay down that those frequencies shall be jammed as little as possible.

[13] ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/7b, p. 64.

**Article 10. — Bilateral radio signal**

**1. The bilateral radio signal consists of an exchange of radio messages, in the language and on the frequency provided for in Article 9. It is initiated by the transmission of a unilateral radio signal.**

**2. The bilateral radio signal permits the communication and, if necessary, the discussion of the measures that should be taken to reinforce the protection of medical personnel, units and means of transport.**

*Ref.*: 1972 Report, vol. I: paras. 1.66 and 1.87, and Report of Commission I, Annexes II to III E.

This article provides for international procedures to be used for medical radiocommunication. While the unilateral radio signal (Art. 9) allows means of medical transport to identify themselves without need of any reply from the adverse party, the bilateral radio signal, on the contrary, implies a reply from the adverse party.

A. *Medical aircraft*

*Paragraph 1*

Military air traffic controllers and pilots of medical aircraft may use the procedures provided for civil air navigation services as indicated in the Annexes to the Convention on International Civil Aviation (see Annexes mentioned above, footnote 3).

*Paragraph 2*

The international civil aviation telecommunication procedures mentioned in paragraph 1 will prove particularly useful to medical aircraft on approaching contact zones (see Art. 27 of the draft Protocol). Mobile communication stations, which directly control air operations in those zones, will be better informed if international procedures are applicable.

B. *Medical ships and craft*

*Paragraphs 1 and 2*

Medical ships and craft may use the international maritime radio communication procedures laid down in:

(*a*) Radio Regulations

(*b*) International Code of Signals

(*c*) International Convention for the Safety of Life at Sea.

C. *Medical vehicles*

*Paragraphs 1 and 2*

The radiocommunication fo medical vehicles and units may, by analogy, be in accordance with the relevant international procedures.

If ITU, which now has the problem of medical radiocommunication before it, should propose special rules and procedures for radiocommunication by medical vehicles, it would be advisable to adopt them when revising the present Regulations, as provided for in Chapter V.

**Article 11. — Secondary surveillance radar system signal**

**1. Identification by the secondary surveillance radar system, which consists of an exchange of electromagnetic impulses, may be used to identify and to follow the course of medical aircraft.**

**2. For that purpose, the secondary surveillance radar system as specified in Annex 10 to the Chicago Convention on International Civil Aviation of 7 December 1944 may be used.**

**3. The exchange of impulses shall be made in mode A/3, using the radar code or codes assigned by the International Civil Aviation Organization for the identification of medical aircraft in accordance with the international standards, practices and procedures recommended by the Organization. The Parties to the conflict may agree to use other modes and codes. They shall inform the International Civil Aviation Organization of the agreements.**

**4. The High Contracting Parties may establish the use of a similar system for other means of medical transport.**

*Ref.*: 1972 Report, vol. I: Report of Commission I, Annexes II, III, III C and III D.

Targets beyond visual range may be detected and identified by a secondary surveillance radar system if those targets are equipped with a transponder.

A. *Medical aircraft*

*Paragraph 1*

The use of secondary surveillance radar (SSR) system in civilian and military air traffic control is not as yet universal, but is becoming more widespread. An increasing number of States are adopting this system for the sake of safety in the air and the development of commercial aviation. Miniaturization and mass production of components have reduced installation costs and facilitated maintenance. It is now possible to equip all aircraft with a 4096-code secondary radar transponder and such equipment is, in fact, compulsory in some areas. Some of these 4096-code transponders are designed for eventual adaptation to a 8192-code system. Since the cost of these transponders is not excessive, it is possible to install two of them on certain types of small aircraft.

*Paragraph 2*

Other ICAO documents (in particular, the ICAO Rules of the Air) contain instructions on the use of radar in air traffic services in addition to those specifications contained in Annex 10 to the Chicago Convention concerning the SSR system.

*Paragraph 3*

Mode A/3 specifies the type of radar pulses common to civilian and military air traffic control systems. Other modes may be used by agreement between Parties to the conflict and after notifying ICAO. In the interests of air safety, ICAO should in turn inform the air traffic control authorities of States not parties to the conflict, in the usual way.

The SSR code assignment plan is published by ICAO regional offices, but the assignment of individual codes is left to the discretion of States. The co-ordination required for assigning radar codes to medical aircraft should be arranged by States either among themselves or through ICAO, which must be informed of the assigning of such codes.

B. *Medical ships and craft*

*Paragraph 4*

In the opinion of some experts, identification by the SSR system should be used by medical ships as well as by aircraft. The ICRC has been requested to look into this matter as soon as possible. Investigations show that " navalized " transponders are available and would be suitable for radar identification of medical ships. The cost is practically the same as for aircraft, and the same modes and codes are used.

C. *Medical vehicles*

*Paragraph 4*

If the use of radar for detecting ground targets becomes widespread, could the miniaturized transponders mentioned in A above be used to identify medical units and vehicles? This question has not as yet been gone into.

The aim of this article is to provide for other means of comunication if the use of radiocommunications is impossible for any reason. The international signalling systems provide a suitable alternative.

**Article 12. — Other means of communication**

**When the use of the bilateral radio signal is not possible, the signals as provided for in the International Code of Signals by the Inter-Governmental Maritime Consultative Organization and in Annex 12 to the Chicago Convention on International Civil Aviation of 7 December 1944 shall be used.**

The aim of this article is to provide for other means of communication if the use of radiocommunications is impossible for any reason. The international signalling systems provide a suitable alternative.

A. *Medical aircraft*

In the opinion of some experts, only some of the visual ground-air signals mentioned in Annex 12 referred to need be used by medical aircraft and adapted for their purposes.

*Examples*:

" All clear ", by adapting Signal No. 14, Figure 1, meaning " All well ".

" Land here ", by adapting Signal No. 12, Figure 1, meaning " Probably safe to land here ".

" Impossible continue. Return to base " by adapting Signal No. 4, Figure 2, meaning " We are not able to continue. Returning to base. "

Furthermore, and in order to simplify intercepting medical aircraft and summoning them to land (Art. 36 and 37 of the First Convention; Art. 39 and 40 of the Second Convention; Art. 22 of the Fourth Convention; Art. 31 and 32 of the present draft Protocol) use should be made of those interception procedures and signals recommended by the International Federation of Air Line Pilots' Associations (IFALPA) at Tokyo in March 1973.

B. *Medical ships and craft*

The International Code of Signals specifies the visual signalling techniques to be used.

Since torpedoes with electro-acoustic homing devices may be launched from most submarines at a target which has not been identified, some experts raised the question of sonic underwater signalling by medical ships and craft.

Those experts had envisaged the use of sonic or ultrasonic underwater signals by medical ships in order to identify themselves to submerged submarines.

According to the investigations of the ICRC, an underwater electro-acoustic transmitter operating with a transducer would enable a ship to communicate its call sign by ultrasonic morse signals. Investigations on this system are still proceeding.

C. *Medical vehicles*

The visual signalling techniques of the International Code of Signals, and the visual signals specified in Annex 12 to the Chicago Convention, may be used on the ground as well as elsewhere.

**Aricle 13. — Use of international codes**

**The medical units and means of transport of the Parties to the conflict may use the International Code of Signals radio codes, and the International Telecommunication Union's Q code for their communications by radiotelegraphy or radiotelephony. The use of such codes shall be in accordance with international standards, practices and procedures laid down by the International Telecommunication Union, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization.**

*Ref.*: 1972 Report, vol. I: paras. 1.66 to 1.87 and Report of Commission I, Annexes II, III, III C to III E.

It may be safely assumed that pilots of medical aircraft and navigators of medical ships are trained to know some of the international codes and procedures in international radio or other means of communication. It cannot, however, be assumed that the personnel handling communications in medical units, vehicles or small craft are familiar with such procedures. It would undoubtedly help this personnel in their work if soldier's manuals and especially manuals handed out to military or civilian medical personnel were to contain those extracts from international codes and procedures which would provide basic essential information on international medical communications on the ground, at sea and in the air.

## Chapter IV

## Civil defence

**Article 14. — Documents**

**1. The identity card delivered to permanent civil defence personnel in accordance with Article 59, paragraph 2, of the present Protocol shall be similar to that referred to in Article 1 for permanent civilian medical personnel.**

**Documents delivered in respect of means of transport permanently assigned to the civil defence services shall certify that the means of transport are so assigned and shall carry a description thereof.**

*Ref.*: 1972 Report, vol. I: paras. 3.333 to 3.340 and Report of Commission III, Annex to Report of Civil Defence Sub-Commission.

*Model*: see page 126

*Model of identity card for civil defence personnel*
(one-quarter of A4 format—fold along dotted line)

*Outside of card*

| Taille<br>Height | Yeux<br>Eyes | Cheveux<br>Hair |
|---|---|---|

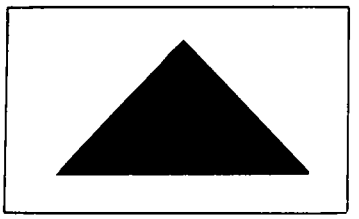
Autres éléments éventuels d'identification:

Other distinguishing features:

Pays/Country:

No. matricule/Registration No.:

**CARTE D'IDENTITÉ**
**IDENTITY CARD**



**PERSONNEL DE PROTECTION CIVILE**

**CIVIL DEFENCE PERSONNEL**

*Inside of card*

NOM/NAME:

PRENOM/FIRST NAME:

Date de naissance/Date of birth:

*Photo*

Signature:

Empreintes digitales/Fingerprints:

Le titulaire de la présente carte est protégé par le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux en qualité de:

The holder of this card is protected by the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts, as:

Date de l'établissement de la carte/Date of issue:

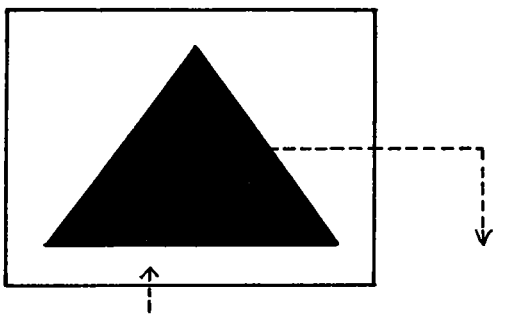
Timbre sec de l'autorité délivrant la carte:

Embossed stamp of issuing authority:

**Article 15. — International distinctive sign for civil defence services**

**The international distinctive sign for civil defence services as provided for in Article 59, paragraph 4, of the present Protocol shall be in accordance with the model below.**

*Proposal I*



*light orange* *light blue*

**(a) the background to the sign may be in the form of different geometrical shapes (circle, square, rectangle);**

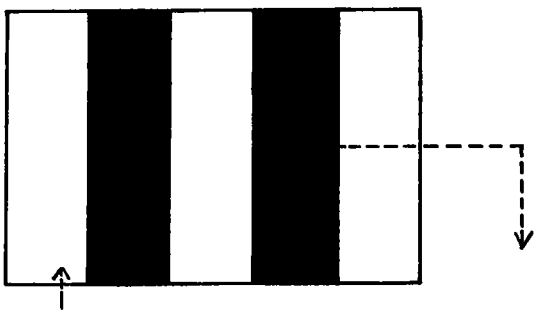
**(b) if the triangle is on a flag or armlet or tabard, the background to the triangle shall be the flag or armlet or tabard;**

**(c) one of the angles of the triangle shall be pointed vertically upwards; if the background is a square or rectangle, the side of the triangle opposite the afore-mentioned angle shall be parallel to one of the sides of the background;**

**(d) no angle of the triangle shall touch the edge of the background;**

**(e) the area covered by the triangle shall be, as far as possible, equal to the background area.**

*Proposal II*



*light orange* *light blue*

**(a) the background to the sign may be in the form of different geometrical shapes (square, rectangle);**

**(b) if the stripes are on a flag or armlet or tabard, the background to the stripes shall be the flag or armlet or tabard;**

**(c) the stripes shall be vertical and parallel; they shall touch the background edges;**

**(d) the area covered by the stripes shall be, as far as possible, equal to the background area.**

*Ref.*: 1972 Report, vol. I: paras. 3.333 to 3.340 and Report of Commission III, Annex to Report of Sub-Commission on Civil Defence.

These proposals were worked out by specialists who took part in the work of an expert meeting on the international distincitve sign in civil defence.[14]

The provisions of Chapter II of the present Regulations on the nature, form and use of distincitve signs have a general application and are, therefore, equally applicable to the international distinctive sign in civil defence.

## Chapter V

## Periodical revision

**Article 16. — Procedure**

**Every five years, after the entry into force of the present Protocol, the International Committee of the Red Cross, after prior consultation with experts, shall submit to the High Contracting Parties a report on any possible amendments to be made, arising from technical developments, to the present Annex.**

*Ref.*: 1972 Report, vol. I: para. 1.76 and Report of Commission I, Annex II, paras. 1.3 and 1.4.

In view of swift developments in detection methods, the distinctive signals provided for in the present Regulations are liable to become obsolete at any time. This calls for a procedure to be laid down for a periodical revision of the provisions contained in this Annex.

[14] ICRC, Report on the Distinctive Sign in Civil Defence, 1973.

This article, which is complementary to Article 86 of the draft Protocol, ensures that the aforementioned provisions are examined periodically.

The ICRC shall be free to consult specialists of its own choice. Since their technical expertise, in particular, must be taken into consideration, such specialists need not be nationals of the Contracting Parties. The aim of the periodic report shall be to inform Contracting Parties of any proposed amendments to these Regulations as a result of technological developments and their effect on the protection of medical units and means of medical transport. The Contracting Parties shall thereafter be entitled to submit amendments to the Regulations, in conformity with the procedure laid down in Article 86 of the draft Protocol. Reference should be made to the commentary on the said article.

In the commentary on Article 86 (1) of the draft Protocol, the ICRC raises the question of whether, with regard to the Protocol itself, only those amendments adopted by all the Contracting Parties (unanimity rule) should enter into force. On the other hand, the ICRC points out that the matter is different with regard to amendments to those rules in the present Regulations which are of a technical nature and whose periodical revision appears to be necessary. It might therefore be advisable to provide for special provisions for amending the Regulations. One expert, referring to Article XVI of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, proposed the following draft:

" 1. A joint international meeting of technical experts from the High Contracting Parties shall be convened by the International Committee of the Red Cross every [four years] or, at any time, at the request of [one third] of all the High Contracting Parties to review Chapter III of the present Annex and, where appropriate, to propose amendments thereto. Specialized organizations may be invited to participate in these meetings in an advisory capacity.

2. Following every meeting referred to in the foregoing paragraph, a conference of High Contracting Parties may be convened by the depositary of the Conventions, at the request of [one third] of the High Contracting Parties or at the request of the International Committee of the Red Cross to consider amendments proposed by the meeting of technical experts.

3. Every amendment adopted at the aforementioned conference of High Contracting Parties by a two-thirds majority vote of the High Contracting Parties represented shall be communicated by the depositary of the Conventions to all High Contracting Parties.

4. Any amendment communicated to the High Contracting Parties under paragraph 3 shall come into force for all High Contracting Parties from the thirteenth month from the date on which the amendment was communicated to them. However, those High Contracting Parties who formally reject the amendment within that period shall not be bound by the said amendment, which shall not come into force if formally rejected within that same period by [one third] of the High Contracting Parties.

5. Those High Contracting Parties which reject the proposed amendments shall continue to be bound by the version as accepted by them of Chapter III of the present Annex. Cases of incompatibility in the provisions of the present Annex shall be settled by negotiation between the High Contracting Parties.

6. The depositary of the Conventions shall inform the signatory States and High Contracting Parties of any amendments which come into force under the present article, together with the date on which such amendments came into force. "

It should be noted that the above proposal applies only to the amendment to Chapter III of the Regulations, taking into account the fact that technological developments affect mainly distinctive signals. However, it appears somewhat limited in scope. Investigations on the need to improve the visibility of colours may possibly, also call for an amendment to Chapter II of the Regulations.

# Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

## COMMENTARY

**The High Contracting Parties,**

*Recalling* **that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of August 12, 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,**

*Recalling* **furthermore that international instruments relating to human rights offer a basic protection to the human person,**

*Emphasizing* **the need to ensure a better protection for the victims of those armed conflicts,**

*Recalling* **that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience,**

*Have agreed* **on the following:**

*Ref.*: 1972 Report, vol. I, paras. 2.522 to 2.541.

The draft preamble submitted by the ICRC to the second session of the Conference of Government Experts [1] gave rise to numerous objections. It was said that it was impossible to decide on such a draft at a time when the provisions of the Protocol were not fully known; it was recalled that the Conventions did not contain a real Preamble owing to the total absence of a consensus, at the Diplomatic Conference of 1949, on the text contemplated, and it was pointed out that the same difficulties were bound to arise over the draft Preamble to the Protocol. Some experts favoured a far more complete Preamble while others thought that the Preamble should be brief, simple and to the point. The ICRC endorsed the latter suggestion.

*First paragraph*

This reaffirms the full value of common Article 3 of the Geneva Conventions of August 12, 1949 (hereinafter referred to as " common Article 3 "), which is the only provision in those Conventions applicable to non-international armed conflicts. Common Article 3 lays down the essential humanitarian rules which ensure basic humane treatment to victims of non-international armed conflicts. It also provides a legal basis for the offer of the services which an impartial humanitarian body, such as the International Committee of the Red Cross, may extend to the parties to the conflict, in order to bring assistance to such victims.

In its earlier draft, [2] the ICRC had envisaged Protocol II as a Protocol designed to be additional to common Article 3, which would have reaffirmed the basic principles of that article and supplemented it on a number of points. Considered as such, Protocol II would have been applicable in every case in which common Article 3 was applicable.

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[1] ICRC, Draft Protocol II, 1972, Preamble.

[2] See ICRC, Draft Protocol II, 1972, Art. 1; ICRC. Conf. Gvt. Experts, Commentary, part two, 1972.

The ICRC endorsed the view expressed by many experts, according to which there was an advantage for *common Article 3 and Protocol II to co-exist independently of each other.* By linking the Protocol to common Article 3, the field of application of the latter would as a result have been narrowed; but the scope of common Article 3 has in the first place to remain unchanged since it provides fundamental guarantees for the victims of all non-international conflicts.

The effect of the structure that has been adopted for the present draft is that common Article 3—which has a wide field of application—will continue to be applicable to all non-international armed conflicts, whereas the Protocol, designed as an instrument additional to the 1949 Geneva Conventions, shall apply to all armed conflicts within the meaning of Article 1 (1) and (2). Reference may be made to the commentary on Article 1. In many cases, common Article 3 and the Protocol would apply simultaneously.

*Second paragraph*

This satisfies the wish of many experts for the inclusion in the Preamble of a reference to international instruments on human rights.

Human rights are above all intended to be applied to situations covered by the law of peace, whereas international humanitarian law applies to situations of armed conflict. The system of protection set up by international humanitarian law therefore differs from that provided by instruments on human rights.

Nevertheless, the view was held that some basic provisions of the International Covenant on Civil and Political Rights—particularly those from which no derogation may be made even in time of public emergency which threatens the life of the nation—should be applicable in the context of armed conflicts as defined in Article 1 of the present draft. As every legal instrument specifies its own field of application, some of the Covenant's provisions [3] have been restated within the framework of the draft Protocol.

[3] See Articles 6 and 9 of the present draft.

## PART I

## SCOPE OF THE PRESENT PROTOCOL

### Article 1. — Material field of application

**1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command.**

**2. The present Protocol shall not apply to situations of internal disturbances and tensions,** *inter alia* **riots, isolated and sporadic acts of violence and other acts of a similar nature.**

**3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949.**

*Ref.*: 1972 Report, vol. I, paras. 2.9 and 2.45 to 2.106.

*Paragraph 1*

A non-international armed conflict is one in which the government of a State is engaged in fighting a dissident group or in which two or more groups are fighting each other.

It differs from an international armed conflict in the legal status of the parties in opposition: Article 2 common to the four Geneva Conventions of 1949, which is referred to in this provision, states that the said Conventions " ... shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ... ".

Further, non-international armed conflicts differ from situations of internal disturbances and tensions, which are excluded from the field of application of Protocol II.

The present provision specifies, for the purpose of the Protocol, the characteristics of the hostilities: these consist in encounters between armed forces or other organized armed groups capable of carrying out concerted military operations under the leadership of a responsible command. Isolated acts of violence carried out by scattered individuals are not included. The groups must be organized, thus implying that these armed forces are subject to a sufficiently firm discipline that will ensure respect, in the conduct of the hostilities, of the provisions laid down in the Protocol.[4]

In accordance with the request formulated by a number of experts, a distinction has been made between " armed forces " and " other organized armed groups under responsible command ": the expression " armed forces " applies to the armed forces, regularly constituted in conformity with national legislation of the government in power; the expression " armed groups " refers to the armed forces constituted by the insurgents with the object of carrying on an armed struggle; the expression " responsible command " means a commanding authority whose leadership is recognized by subordinates and who is able therefore to assume responsibility for their acts. The confrontation may take place:

— between groups of the regular armed forces themselves, if part of the governments army revolts;

[4] See, in this respect, Article 36, *Measures for execution.*

— between armed forces and other organized armed groups, if the government is faced by other insurgents;
— between armed forces that have seized power and armed groups organized by the population to offer resistance to them;
— between several organized armed groups, with or without the intervention of government armed forces, if several rival parties confront each other (for instance, if there is no longer any established government).

Some of the experts would have wanted a better definition of hostilities, to specify a characteristic degree of their intensity and duration. This proposal was not retained by the ICRC: it appeared to the ICRC that the requirement that the armed groups must be organized and the exclusion of situations of internal disturbances and tensions from the field of application already implied a certain degree of intensity in the hostilities. The criterion of prolonged duration seemed to the ICRC to be of doubtful validity because obviously it could only be established after a certain time had elapsed; at the start of the fighting, there would be a period during which no rule would be applicable, and it would be better if this were avoided.

*Paragraph 2*

The notion of internal disturbances and tensions has been made more explicit by an enumeration, albeit not exhaustive, of situations considered to be consistent with that notion irrespective of whether constitutional guarantees have or have not been suspended:
— *riots*, that is to say, all disturbances which from the start are not directed by a leader and have no concerted intent;
— *isolated and sporadic acts of violence*, as distinct from military operations carried out by armed forces or organized armed groups;
— *other acts of a similar nature* which cover, in particular, mass arrests of persons because of their behaviour or political opinion.

Some experts would have wished to have crimes and offences against penal law included in the list enumerated above.[5] The ICRC decided not to do so because most penal codes lay down that acts of insurrection constitute an offence against penal law, even if those acts take on the form of an organized movement pitting armed forces or armed groups against each other. To state that the Protocol would not be applicable in the case of acts punishable by national penal codes would render illusory its application.

*Paragraph 3*

The Protocol, which was conceived as an instrument that would be additional to the Conventions—and not only to common Article 3—leaves untouched the conditions of application of common Article 3, as is stressed in the provisions of the present paragraph.

**Article 2. — Personal field of application**

**1. The present Protocol shall apply, without any adverse distinction, to all persons, whether military or civilian, combatant or non-combatant, affected by an armed conflict within the meaning of Article 1.**

**2. Even after the end of the armed conflict, all persons whose liberty has been restricted for reasons in relation to the armed conflict and who might not have been released, as well as persons arrested for these same reasons, shall enjoy the protection of Articles 8 and 10 until released.**

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[5] See 1972 Report, vol. II, CE/COM II/3.

*Ref.*: 1972 Report, vol. I, paras. 2.542 to 2.557.

*Paragraph 1*

The Protocol shall apply to all persons affected in one way or another by the armed conflict, either because they would be exposed to the dangers resulting from the armed conflict, whether or not they participated in the hostilities, or because they are taking part in the hostilities and therefore must abide by certain rules of behaviour with regard to adverse armed forces and to the civilian population.[6] The present rule links the application of the Protocol provisions to persons " affected by an armed conflict within the meaning of Article 1 ". The present draft does not contain any provision with regard to the area of the field of application. This meets the concern voiced by some experts who considered it exaggerated to lay down the automatic application of all the Protocol provisions to the entire territory of a High Contracting Party, even though only a very small part of the country might be affected by the armed conflict. What is important is that persons affected by the armed conflict should be entitled to the protection of the Protocol, wherever they might be. Thus, a person arrested in some place far from the combat zone for an act committed in connection with the armed conflict ought to be protected by Articles 8, 9 and 10.

*Paragraph 2*

The essential purpose of this provision is to ensure, for persons whose liberty has been restricted, a much-needed protection against any possible arbitrary action by the victorious party immediately after the end of hostilities, when passions have not had time to cool down. No time-limit has been set for the end of the application of these provisions. Articles 8 and 10 lay down fundamental guarantees to which all categories of accused and detained persons should continue to be entitled, and it does not seem excessive to ask the victorious party to respect such guarantees after the restoration of law and order. Besides, the guarantees are barely wider than those laid down in most national legislations.

**Article 3. — Legal status of the parties to the conflict**

**The legal status of the parties to the conflict or that of the territories on which they exercise authority shall not be affected by the application of the provisions of the present Protocol, or by all or part of the provisions of the Geneva Conventions of August 12, 1949, and of the Additional Protocol relating to the protection of victims of international armed conflicts brought into force in accordance with Article 38 or by the conclusion of any agreement provided for in the Geneva Conventions and their Additional Protocols.**

*Ref.*: 1972 Report, vol. I, paras. 2.313 to 2.319.

This provision is based on the principle stated in paragraph 4 of common Article 3. It specifies that the application of Protocol II would not entail any change in the legal status of the parties to the conflict. The purpose of the draft is purely humanitarian; it is designed to ensure for the human person fundamental guarantees that are valid in all circumstances; it concerns human beings, moral behaviour towards them and the treatment to which they are entitled. The application of this instrument by the parties to the conflict would not therefore constitute a recognition, even implicit, of belligerency, and would have no effect whatsoever on the legal qualification of the relations between the parties to the conflict.

[6] See ICRC, Conf. Gvt. Experts, Geneva, 1971, Report: this provision is founded on proposal CE/Plen./2 bis, 1971, Art. 1, para. 2.

**Article 4. — Non-intervention**

**Nothing in the present Protocol shall be interpreted as affecting the sovereignty of States or as authorizing third States to intervene in the armed conflict.**

When a State concludes a treaty, it does not thereby renounce its sovereignty, it exercises it. Nevertheless, by the present provision, it was deemed expedient to specify that " nothing in the present Protocol shall be interpreted as affecting the sovereignty of States ... ". It may be pointed out, as an example, that the Protocol does not in any way circumscribe the right of States to protect themselves against subversion and does not affect their right to prosecute, try and sentence a person in accordance with the law.

The present article also specifies that the Protocol may not serve as a pretext for other States to intervene in an armed conflict taking place on the territory of a High Contracting Party. Assistance by third parties may however prove helpful to enable the parties to the conflict to fulfil the obligations under the Protocol, but in every case, a saving clause has been inserted with the object of preventing interference going beyond that assistance. Thus, the conditions under which relief actions may be carried out are strictly laid down (Art. 33); that is why the co-operation which certain bodies might provide for to the parties to the conflict with a view to facilitating the observance of the Protocol have not been made mandatory (Art. 8, para. 5 and Art. 39).

**Article 5. — Rights and duties of the parties to the conflict**

**The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.**

The experts several times voiced their concern that the insurgent party might only be lightly bound by the Protocol, and the view was expressed that it would be desirable to make an attempt to strengthen its obligations. In this regard, the present draft follows a technique similar to the one adopted in common Article 3: an engagement entered into by the State is not only binding upon the government but also upon the constituted authorities and the private individuals who are on the national territory, upon whom certain obligations are thus imposed; this is a technique frequently adopted in contemporary international law. Article 5 implies that it is this same technique that is followed in the present draft and clearly indicates that the rights and duties of private individuals extend over a range that is identical to that of the rights and duties of State organs.

## PART II

## HUMANE TREATMENT OF PERSONS IN THE POWER OF THE PARTIES TO THE CONFLICT

The purpose of this Part is the protection of the whole population of a High Contracting Party, on whose territory an armed conflict within the meaning of Article 1 is taking place, against the arbitrary authority of the parties to the conflict in whose power the population may be, even if it were for a relatively short period.

The personal field of application of the present Part is defined in paragraph 1 of Article 6 and is valid for the whole of this Part; it thus concerns all persons, without any adverse distinction, in particular with regard to nationality, and whatever may be their condition (the wounded, the sick, or persons whose liberty has been restricted). Persons taking a direct part in the hostilities, but only for as long as their participation lasts, are not covered by this Part. The goal pursued in this Part is to protect *all persons* affected by the armed conflict, without setting up categories of protected persons enjoying special treatment. Contrary to the 1971 and 1972 proposals,[7] the present draft does not set any distinction between the treatment of members of armed forces fallen into the hands of the adverse party and that of civilians whose liberty has been restricted. This question is examined in greater detail in the commentary on Articles 8 and 10.

### Article 6. — Fundamental guarantees

**1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, their honour and their religious convictions and practices. They shall in all circumstances be treated humanely, without adverse distinction.**

**2. The following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:**

*(a)* **violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.**

*(b)* **taking of hostages;**

*(c)* **acts of terrorism in the form of acts of violence committed against those persons;**

*(d)* **outrages upon personal dignity, in particular humiliating and degrading treatment;**

*(e)* **slavery and the slave-trade in all their forms;**

*(f)* **pillage;**

*(g)* **threats to commit any of the foregoing acts.**

**3. Women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution, and any other form of indecent assault.**

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[7] ICRC, Conf. Gvt. Experts, Doc., Geneva, 1971, CE/5b, Chap. 2C.
ICRC, Draft Protocol II, 1972, Art. 25 and 26;
ICRC, Conf. Gvt. Experts, Commentary II, part two, 1972, Chap. VI.

*Ref.*: 1972 Report, vol. I, paras. 2.114 to 2.139.

*Paragraph 1*

This provision lays down the general principle with regard to the humane treatment of persons, the moral behaviour to be adopted towards them, and the respect to be offered towards their physical and moral soundness.

*Paragraph 2*

The general principle stated in paragraph 1 is clarified by a specific enumeration of prohibited acts. Since the Protocol will have its own field of application, it was considered expedient to include in it the provisions already laid down in the Conventions and in the International Covenant on Civil and Political Rights.

The prohibitions laid down in sub-paragraphs (*a*), (*b*) and (*d*) are taken from the first paragraph, sub-paragraphs (1) (*a*), (1) (*b*) and (1) (*c*) of common Article 3. For the purpose of the provision laid down in sub-paragraph (*b*), hostages may be defined as persons who, of their own free will or through compulsion, are in the power of a party to the conflict or of one of its agents and are answerable with their freedom, their body or their life for the execution of the orders given by the party to the conflict in whose hands they are, or for hostile acts committed against it.

The prohibition of acts of terrorism in sub-paragraph (*c*) is based on Article 33 of the Fourth Convention. Sub-paragraph (*c*) prohibits all acts of violence committed against protected persons with the object of exerting pressure upon them. A distinction should be made between acts of terrorism and attacks intended to spread terror. The latter are prohibited under Article 26 (1). The present provision prohibits acts of terrorism committed by the parties to the conflict against all persons who, in one way or another, are in their power.

*Sub-paragraph (e)* concerning slavery and the slave-trade is taken from Article 8 (1) of the International Covenant on Civil and Political Rights.

*Sub-paragraph (f)* concerning pillage is taken from the second paragraph of Article 33 of the Fourth Convention. It refers both to organized pillage and to looting resulting from isolated acts of indiscipline.

*Paragraph 3*

This provision is based on the second paragraph of Article 27 of the Fourth Convention, regarding respect due to women. It restates Article 67 (1) of Draft Protocol I.

**Article 7. — Safeguard of an enemy *hors de combat***

**1. In accordance with Article 6, it is forbidden to kill, injure, ill-treat or torture an adversary *hors de combat*. An adversary *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:**

**(*a*) is unable to express himself, or**

**(*b*) has surrendered or has clearly expressed an intention to surrender**

**(*c*) and abstains from any hostile act and does not attempt to escape.**

**2. If a party to the conflict decides to send back to the adverse party those combatants it has captured, it must ensure that they are in a fit state to make the journey without any danger to their safety.**

*Ref.*: 1972 Report, vol. I, paras. 2.425 to 2.432.

The present article is essentially based on Article 38 (1) and (2) in Draft Protocol I. As stated in the introduction to the present Part, its purpose is to protect against the arbitrary authority

of the parties to the conflict the whole population of a High Contracting Party on whose territory an armed conflict within the meaning of Article 1 is taking place. For members of the armed forces or armed groups, this protection becomes operative from the time they are placed *hors de combat* until, if their liberty is restricted, their release. In the context of this draft, members of armed forces or armed groups do not have any particular status; the present article is therefore included in Part II while the corresponding article of Protocol I (Art. 38) is in Part III.

*Paragraph 1*

This cardinal rule is based on Article 23 (*c*) of the Hague Regulations of 1907, which forbids to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion. Its underlying principle is that violence is permissible only to the extent strictly necessary to weaken the adversary's military resistance (see Art. 24), that is, to the extent necessary to place him *hors de combat* and to hold him in power, but no further. The reaffirmation of this rule should dissipate any uncertainty concerning its applicability in certain situations, for instance when troops ordered not to surrender have exhausted their means of fighting, or when a serious casualty is incapable of expressing himself.

*Paragraph 2*

This rule is based on the fourth paragraph of Article 2 of the Geneva Convention of 1906 which states that belligerents shall be free " to send back to their country, after rendering them fit to travel or after their recovery, the wounded or sick whom they do not wish to retain as prisoners of war ". From this article stems the present provision, which gives the parties to the conflict the faculty of releasing on the spot prisoners who have fallen into their power. Nevertheless, such release should not result in these released prisoners being placed in a desperate situation.

**Article 8. — Persons whose liberty has been restricted**

**1. All persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict, shall, whether they are interned or detained, be treated humanely, in accordance with Article 6.**

**2. In addition, the parties to the conflict shall respect at least the following provisions:**

**(*a*) the wounded and sick shall be treated in accordance with Article 12;**

**(*b*) the persons referred to in paragraph 1 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 dangers of the armed conflict;**

**(*c*) they shall be provided with adequate supplies of drinking water and with food rations sufficient to keep them in good health; they shall be permitted to secure or to be provided with adequate clothing;**

**(*d*) women shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. This does not apply to those cases where members of the same family are in the same place of internment.**

**3. The parties to the conflict shall also respect the following provisions within the limits of their capabilities:**

**(*a*) the persons referred to in paragraph 1 shall be allowed to receive individual or collective relief;**

**(*b*) they shall be allowed to practise their religion and receive spiritual assistance from chaplains and other persons performing similar functions;**

**(*c*) they shall be allowed to send and receive letters and cards. The parties to the conflict may limit the number of such letters if they deem it necessary;**

*(d)* **places of internment and detention shall not be set up close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to dangers arising out of the armed conflict, if their evacuation can be carried out in adequate conditions of safety.**

**4. Measures of reprisals against the persons referred to in paragraph 1 are prohibited.**

**5. Subject to temporary and exceptional measures, the parties to the conflict shall endeavour to facilitate visits to the persons referred to in paragraph 1 by an impartial humanitarian body such as the International Committee of the Red Cross.**

*Ref.*: 1972 Report, vol. I, paras. 2.159 to 2.197.

The present article refers, without distinction, to all persons whose liberty has been restricted for reasons in relation to the armed conflict: these persons may be members of the armed forces fallen into the hands of the adverse party or they may be civilians whose liberty has been restricted for having taken up the cause of the adverse party. These provisions are applicable as soon as there is restriction of liberty, whether, for example, by internment or detection, and they are supplementary to the guarantees provided in Article 6 which are valid for all persons in the power of the parties to the conflict, whatever their situation may be.

*Paragraph 1*

This provision lays down the principle that all persons deprived of liberty are entitled to humane treatment.

*Paragraphs 2 and 3*

In addition to the obligation to respect persons whose liberty has been restricted and to abstain from committing against them acts of violence, there is also the duty to provide decent conditions of internment and detention.

Some experts expressed the fear that the requirements laid down in paragraphs 2 and 3 might be considered excessive in many countries where part of the population, even in peacetime, might not enjoy the material conditions of existence stated in those two paragraphs. The purpose of that list is to provide a basis for what ought to be considered as the humane treatment of persons whose liberty has been restricted. Even under the most difficult circumstances, they should not be treated worse than those who hold them in detention.

The rules stated in paragraph 2, sub-paragraphs (*a*) to (*d*), should be considered as the minimum requirements (" at least ") to ensure adequate living conditions for protected persons. Sub-paragraph (*b*) is based on Article 22 of the Third Convention and Article 85 of the Fourth Convention; sub-paragraph (*c*) on Articles 26 and 27 of the Third Convention and Articles 89 and 90 of the Fourth Convention; and sub-paragraph (*d*), on Article 82 of the Fourth Convention.

The rules stated in paragraph 3 are not imperative; the parties to the conflict are called upon to respect them " within the limits of their capabilities ". The list could be supplemented with further rules. Sub-paragraph (*a*) is based on Article 72 of the Third Convention and Article 108 of the Fourth Convention sub-paragraph (*b*), on Article 34 of the Third Convention and Article 93 of the Fourth Convention; sub-paragraph (*c*), on Article 71 of the Third Convention and Article 107 of the Fourth Convention; and sub-paragraph (*d*), on Article 23 of the Third Convention and Article 83 of the Fourth Convention.

*Paragraph 4*

The ICRC refrained from introducing into the present draft Protocol a general provision on the prohibition of reprisals against protected persons and objects. On the other hand, the prohibition of reprisals is specially mentioned in the various Parts in every case where it is

necessary to protect the persons and objects referred to in those Parts. The present provision is based on Article 13 of the Third Convention and on Article 33 of the Fourth Convention. It extends the prohibition of reprisals in respect of all persons protected by this present article.

*Paragraph 5*

It was not considered possible, within the context of a non-international armed conflict, to set up machinery for supervising the treatment of persons whose liberty has been restricted in the same way as that laid down in the Conventions in Article 126 of the Third Convention and Article 143 of the Fourth Convention. On the other hand, the experts recognized the possibility open to a humanitarian body to offer its services to assist the persons referred to in this article. The present provision urges the parties to the conflict to accept and facilitate action being taken by such a body.

**Article 9. — Principles of penal law**

**1. No one may be punished for an offence which he or she has not personally committed; collective penalties are prohibited.**

**2. No one may be punished on account of any act or omission contrary to a duty to act which was not an offence at the time when it was committed.**

**3. No one shall be liable to be prosecuted or punished for an offence for which he has already been finally acquitted or convicted.**

**4. No one shall be held guilty of an offence except under those provisions of law which were in force at the time when the offence was committed.**

**5. Everyone charged with an offence is presumed innocent until proved guilty according to law.**

*Ref.*: 1972 Report, vol. I, paras. 2.203 to 2.208.

As will be seen below in the commentary on paragraphs 1 to 5, the present article contains numerous provisions to be found in the Third and Fourth Conventions and in the International Covenant on Civil and Political Rights; it also stems directly from Article 65, paragraph 3 (*a*) to (*d*), in Draft Protocol I.

The list of principles of penal law and procedures in the present article is not exhaustive; it includes only those that are the most important.

*Paragraph 1*

This provision states the principle of the personal character of penal liability. That principle is to be found also at the beginning of Article 33 of the Fourth Convention and is supplemented, in both Article 33 and the present provision, by the prohibition of collective penalties, that is to say, all kinds of penalties inflicted on persons or groups of persons for acts which they did not commit.[8] A similar provision is contained in Draft Protocol I under Article 65 (3) (*a*).

*Paragraph 2*

This provision restates the principe *Nullum crimen sine lege* enshrined in Article 99 of the Third Convention and Article 67 of the Fourth Convention. This principle is stated, too, in Article 15 (1) of the International Covenant on Civil and Political Rights.

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[8] See *Commentary*, Fourth Geneva Conv. 1949, Art. 33.

*Paragraph 3*

This provision restates the principle *Non bis in idem* enshrined in Article 86 of the Third Convention and is implicit in Article 67 of the Fourth Convention, which refers to " general principles of law ". This principle is stated, too, in Draft Protocol I under Article 65 (3) (*b*), and in Article 14 (7) of the International Covenant on Civil and Political Rights.[9]

*Paragraph 4*

This provision restates the principle of the *non-retroactivity* of penal law enshrined in Article 65 of the Fourth Convention. This principle is stated, too, in Draft Protocol I, under Article 65 (3) (*d*), and in Article 15 (1) of the International Covenant on Civil and Political Rights.

*Paragraph 5*

This provision enshrines the principle of the presumption of *innocence* which is implicit in Article 67 of the Fourth Convention which refers to the " general principles of law ". This principle is stated, too, in Draft Protocol I, under Article 65 (3) (*c*) and in Article 14 (2) of the International Covenant on Civil and Political Rights.[10]

**Article 10. — Penal prosecutions**

**1. No sentence shall be passed or penalty inflicted upon a person found guilty of an offence in relation to the armed conflict without previous judgment pronounced by a court offering the guarantees of independence and impartiality which are generally recognized as essential, in accordance with a procedure affording the accused the necessary rights and means of defence.**

**2. Everyone shall have the right of appeal against any sentence pronounced upon him. He shall be fully informed of his right to appeal and of the time limit within which he may do so.**

**3. The death penalty pronounced on any person found guilty of an offence in relation to the armed conflict shall not be carried out until the hostilities have ceased.**

**4. The death penalty shall not be pronounced for an offence in relation to the armed conflict committed by persons below eighteen years of age and shall not be carried out on pregnant women.**

**5. In case of prosecutions carried out against a person only by reason of his having taken part in hostilities, the court, when deciding upon the sentence, shall take into consideration, to the greatest possible extent, the fact that the accused respected the provisions of the present Protocol.**

**6. At the end of hostilities, the authorities in power shall endeavour to grant amnesty to as many as possible of those who have participated in the armed conflict, in particular those whose liberty has been restricted for reasons in relation to the armed conflict, whether they are interned or detained.**

*Ref.*: 1972 Report, vol. I, paras, 2.148 to 2.152, 2.155 and 2.156, 2.209 to 2.235.

Like common Article 3, the present draft Protocol does not affect the right of the constituted authorities to prosecute and sentence persons found guilty of an offence. The only purpose of the present article is to prevent sentences being pronounced without previous judgment. It forbids the passing of sentences without due process of law and thereby contributes to the avoidance of increased violence.

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[9] and [10] These provisions of the International Covenant on Civil and Political Rights may be subject to derogations by virtue of its Art. 4 (1).

Like Article 8, *Persons whose liberty has been restricted,* this article is general in scope and applies to civilians as much as to those members of the armed forces who are in the hands of the adverse party and who might be the object of penal prosecutions.

*Paragraph 1*

This provision is based on sub-paragraph (1) (*d*) in the first paragraph of common Article 3. However, the words " regularly constituted ", qualifying the word " court " in common Article 3, were removed, as some experts considered that it was not very likely that such a court could be regularly constituted within the meaning of the national legislation if it were set up by the insurgent party. Nevertheless, sentences must be passed by a court " offering the guarantees of independence and impartiality which are generally recognized as essential ". These guarantees mean that the accused must be given the right and the means to defend himself, i.e. the right to be informed of the nature of the charge against him, the right to be heard and, if necessary, to call on the services of an interpreter, the right to have legal assistance for his defence, and the right to call witnesses and produce evidence that might lessen his liability or free him from all liability.

*Paragraph 3*

A number of experts had been opposed to the proposal, already put forward in 1971 by the ICRC, that sentence of death should not be carried out until the hostilities have ceased. Some experts had seen in the stay of execution an encouragement to rebellion while others had considered that such a measure was a form of mental cruelty inflicted on the condemned person.[11] Other experts said they were all the same in favour of this provision, which finally the ICRC decided to insert, for the following reasons:

(1) it is not entirely new, for Article 101 of the Third Convention, relating to a delay in execution of the death penalty, says:

> " If the death penalty is pronounced on a prisoner of war, the sentence shall not be executed before the expiration of a period of at least six months . . . "

(2) executions carried out by one or the other side would lead inevitably to an escalation of violence and to further executions carried out by way of reprisal.

This provision affects all persons condemned to death for an act committed by them in relation to the armed conflict; this solution is in accordance with the system in the present draft which does not provide for any difference in the treatment of combatants or of civilians when deprived of their freedom.

*Paragraph 4*

This paragraph restates, in the main, Article 67 (2) and Article 68 (3) of Draft Protocol I.

The prohibition of the pronouncement of the death penalty on persons under eighteen years of age at the time the offence was committed is based, also, on the fourth paragraph of Article 68 of the Fourth Convention. The text deliberately states that the death penalty " shall not be pronounced ", which implies, *a fortiori,* that it will not be carried out.

The purpose of prohibiting the carrying out of the death sentence on a pregnant women is to protect the unborn child and not the woman herself; this is why no prohibition has been made on the *pronouncement* of the death penalty.[12]

This provision supplements Article 6 (3), which states that " women shall be the object of special respect . . . ".

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[11] See ICRC, Conf. Gvt. Experts, Geneva, 1971, Report, in particular paras. 261 and 262, and 1972 Report, vol. I, in particular para. 2.221.

[12] International Covenant on Civil and Political Rights, Art. 6, para. 5.

It upholds a pratice already followed in numerous countries in favour of pregnant woman sentenced to the death penalty. After the birth of the child, the motive for a stay of execution no longer exists; however, execution may be suspended under paragraph 3.

*Paragraph 5*

The present draft, which does not confer any impunity on combatants for having taken part in hostilities, nevertheless imposes upon them certain obligations which they must fulfil towards adverse armed forces as well as towards the civilian population. In order to encourage combatants to respect the Protocol in spite of any penal prosecutions that might be brought against them, the ICRC judged it advisable to call upon the courts, when deciding upon the sentence, to take into consideration the fact that the accused respected the Protocol provisions.

*Paragraph 6*

The purpose of this provision, which supplements paragraph 3, is to encourage the parties to the conflict — in particular, the victorious party — to grant amnesty, at the end of hostilities, to as many as possible of those who participated in the armed conflict. This conciliatory action should contribute to hastening the re-establishment of a normal situation.

## PART III

## WOUNDED, SICK AND SHIPWRECKED PERSONS

As will be seen from the following commentary on Articles 11 to 19, the present Part restates a great many Convention rules. It also has a direct connection with Part II of Draft Protocol I. On the other hand, and in view of the opinion expressed by some experts on the need to take the special combat conditions peculiar to non-international conflicts into account, the ICRC has not included in the present draft all the detailed rules in Part II of Draft Protocol I.

### Article 11. — Definitions

**For the purposes of this Part:**

*(a)* **" the wounded and the sick " means persons, whether military or civilian, who are in need of medical assistance and care and who refrain from any act of hostility. The term includes** *inter alia:* **the wounded, the sick, the shipwrecked, the infirm, as well as expectant mothers, maternity cases and new-born babies;**

*(b)* **" shipwrecked persons " means persons, whether military or civilian, who are in peril at sea as a result of the destruction, loss or disablement of the vessel or aircraft in which they were travelling and who refrain from any act of hostility;**

*(c)* **" medical unit " means medical establishments and units, whether military or civilian, especially all installations of a medical nature, such as hospitals, blood transfusion centres and their medical and pharmaceutical stores; such units may be fixed or mobile, permanent or temporary, and are exclusively assigned to medical purposes;**

*(d)* **" medical transport " means the transport by land, sea or air of the wounded, the sick or the shipwrecked, and of medical personnel and equipment;**

*(e)* **" means of medical transport " means any means of transport assigned exclusively ot medical transport, under the control of a competent authority of a party to the conflict;**

*(f)* **" medical personnel " means:**

- **i. the medical personnel of the parties to the conflict, whether military or civilian, permanent or temporary, exclusively engaged in the operation or administration of medical units and the means of medical transport, including their crews, and assigned** *inter alia* **to the search for, removal, treatment or transport of the wounded and the sick;**
- **ii. the civil defence medical personnel referred to in Article 30 and the medical personnel of the National Red Cross (Red Crescent, Red Lion and Sun) Societies referred to in Article 35;**

*(g)* **" distinctive emblem " means the distinctive emblem of the red cross (red crescent, red lion and sun) on a white ground.**

*Ref.*: 1972 Report, vol. I, para 2.357.

At the request of the experts, the definitions contained in Article 8 of Draft Protocol I have been restated for the purposes of this Part, and have been adapted accordingly.

*Sub-paragraph (a)*

The new factor in their definition, compared with the Geneva Conventions (Art. 12 of the First and Second Conventions, Art. 16 of the Fourth Convention) is the condition under which persons referred to in Article 12 come under the present Part, namely, that they must be in need of medical assistance and care and refrain from any act of hostility.

The definition has the advantage of including a list of persons entitled to the same protection as the wounded and the sick. This list would avoid tedious enumeration or reference to another article, in all instances where protected persons are referred to.

It will be noted that this definition does not contain the words " non-combatants or combatants rendered *hors de combat* ", since it attempts to cover all categories of wounded and sick provided they fulfil the above-mentioned conditions.

*Sub-paragraph (b)*

A second factor not contained in Article 12 of the Second Convention, is the definition of " shipwrecked ". Shipwrecked persons are on the same footing as wounded and sick persons. The definition is an extension of sub-paragraph (*a*).

*Sub-paragraph (f)*

This definition lists the various categories of medical personnel entitled to protection under this Part. It is based on the definition contained in Article 8 (*d*) of Draft Protocol I.

*Sub-paragraph (f)* (i)

This definition covers all the medical personnel of the parties to the conflict insofar as this personnel is recognized and authorized by those parties. It includes all persons giving care to the wounded and the sick, and those persons engaged in the administrative work of medical units and means of medical transport.

*Sub-paragraph (f)* (ii)

Civil defence, National Red Cross, and other relief society medical personnel assisting the military or civilian medical services of the parties to the conflict are assimilated to the medical personnel mentioned in (*f*) (i). Such personnel must be assigned to the same kind of work as the personnel of the aforesaid medical services.

**Article 12. — Protection and care**

**1. The wounded and the sick shall be respected and protected.**

**2. In all circumstances, they shall be treated humanely and shall receive with the least possible delay and without any adverse distinction the medical care necessitated by their condition.**

**3. All unjustified acts or omissions harmful to the health or to the physical or mental well-being of the persons referred to in paragraph 1 are prohibited. This prohibition applies even if those persons give their consent.**

**4. It is accordingly prohibited to carry out on the persons referred to in paragraph 1 physical mutilations or medical or scientific experiments, including grafts and organ transplants, which are not justified by their medical treatment and are not in their interest.**

*Ref.*: Report, vol. I, paras. 2.361 to 2.366.

At the request of the experts, the essential parts of Article 10 and 11 of Draft Protocol I are incorporated in the present article.

*Paragraph 1*

This provision is based on the first paragraph of Article 12 of the First and Second Conventions, and on the first paragraph of Article 16 of the Fourth Convention. It lays down the principle of immunity for the wounded and the sick, from which all the obligations provided for in this Part derive. This principle applies to all the wounded and the sick as defined in Article 11 (*a*). The duty of respect and protection applies not only to members of armed forces or of armed groups, but also to the civilian population (Article 14 (1)).

*Paragraph 2*

This provision is based on the second paragraph of Article 12 of the First and Second Conventions. To the duty of respect and protection for the wounded and the sick, is added the obligation to take concrete measures to ensure that they receive the medical care required by their state of health.

*Paragraph 3*

This provision is based on the second paragraph of Article 12 of the First and Second Conventions, the first paragraph of Article 13 of the Third Convention and Article 32 of the Fourth Convention. It has a broad scope of application and is valid for all wounded and sick persons as defined in Article 11 (*a*). The reasons for the selection of the word " unjustified " are outlined in the commentary on Article 11 (1) of Draft Protocol I.

As indicated in the last sentence of the present paragraph, this protection is regarded as an inalienable right of protected persons. The fact that they might consent, owing to ignorance, the attractive prospect of improving their lot or even because their mind might be unbalanced, would in no way relieve the parties to the conflict from their obligation to refrain from any of the acts referred to in paragraphs 3 and 4.

*Paragraph 4*

The reference to " grafts and organ transplants " is new as compared with the provisions of the Conventions mentioned in the commentary on paragraph 3. The advances of medical technique now allow surgery which was not possible in 1949. The aim of this provision is to protect the wounded and the sick from fresh dangers produced by the development of science and technology.

**Article 13. — Search and evacuation**

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

**2. Whenever circumstances permit, local arrangements shall be concluded by the parties to the conflict for the removal of the wounded and the sick from the combat zone or from a besieged or encircled area.**

*Ref.*: 1972 Report, vol. I, paras. 2.367, 2.379 and 2.380.

This article is based on Article 15 of the First Convention, Article 18 of the Second Convention and Article 17 of the Fourth Convention. It applies to wounded and sick persons as defined in Article 11 (*a*), it being understood that the obligation to " search for and collect the wounded and the sick " after an engagement is valid only for the area in which the engagement has taken place. The evacuation of children is provided for in Article 32 (*c*).

The general obligation to take care of the sick and the wounded is specified in Article 12 (2). The obligation to provide this care, as required by paragraph 1 of Article 13, is confined to the first aid which must be given as a matter of urgency to the wounded in and during their removal from the combat zone.

**Article 14. — Role of the civilian population**

**1. The civilian population shall respect the wounded and the sick, even if they belong to the adverse party, and shall refrain from committing acts of violence against them.**

**2. Relief societies and the civilian population shall be permitted to offer shelter, care and assistance to such wounded and sick persons, either spontaneously or at the request of the parties to the conflict.**

**3. No one shall be molested or convicted for having given shelter, care or assistance to the wounded and the sick, even if they belong to the adverse party.**

*Ref.*: 1972 Report, vol. I, paras. 2.368 to 2.373.

This article is based on Article 18 of the First Convention and restates the essential parts of paragraphs 1 to 3 of Article 17 of Draft Protocol I.

*Paragraph 1*

This provision lays down that the principle of immunity for the wounded and the sick, as stated in Article 12 (1), must be respected not only by members of the armed forces, but also by the civilian population.

*Paragraph 2*

The aim of this provision is to facilitate the implementation of the rule requiring the wounded and the sick to be cared for with the least possible delay (see Art. 12 (2)). Authorization to collect, to treat and to assist the wounded and the sick shall be given to relief societies and to the civilian population whenever their help is required to provide without delay the care necessitated by the victims' condition. The civilian population shall collaborate as much as possible with the medical personnel of the parties to the conflict and with relief societies (see Art. 35 with regard to relief societies).

*Paragraph 3*

This provision is the corollary of paragraph 2. Rendering assistance to the wounded and the sick is a duty incumbent on all civilians where there is urgent need for such assistance and where qualified relief workers are not available.

**Article 15. — Medical and religious personnel**

**Medical personnel and chaplains and other persons performing similar functions, whether military or civilian, shall, in all circumstances, be respected and protected. They shall be granted all the aid necessary for the discharge of their functions and shall not be compelled to carry out tasks unrelated to their mission.**

*Ref.*: 1972 Report, vol. I, paras. 2.374 and 2.376.

This provision is based on Articles 24, 25 and 26 of the First Convention and Article 20 of the Fourth Convention. It restates the principle underlying Article 15 of Draft Protocol I,

which provides for extending to all civilian medical personnel the protection due to medical personnel according to the above-mentioned provisions of the Conventions.

This article refers to all medical personnel as defined in Article 11 (*f*), and also to religious personnel when carrying out their functions. The words " and other persons performing similar functions " are meant to extend the term " chaplain ". The protection afforded chaplains shall therefore be extended to all persons performing the same functions whatever may be the religion to which they belong and by whatever term they are designated.

Temporary medical personnel, whether military or civilian, are entitled to special protection for the whole duration of their medical assignment, even when off duty. Medical assignment means the assignment of personnel to strictly medical duties.

To be entitled to that special protection, medical and religious personnel shall abstain from taking part in hostilities.

With regard to the use of the distinctive emblem by medical personnel, see Article 18.

**Article 16. — General protection of medical duties**

**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. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to rules of professional ethics or to abstain from acts required by such rules.**

**3. No person engaged in medical activities may be compelled to give to any authority information concerning the sick and the wounded under his care should such information be likely to prove harmful to the persons concerned or to their families. Compulsory medical regulations for the notification of communicable diseases shall however be respected.**

*Ref.*: 1972 Report, vol. I, para. 2.376.

The present article restates Article 16 of Draft Protocol I.

*Paragraphs 1 and 2*

This rule is the corollary of the principle whereby the wounded and the sick shall be entitled to the care necessitated by their condition (Art. 12 (2)). It concerns any person exercising a medical activity, whether doctor, dentist, nurse or stretcher-bearer; whether a member of the medical personnel as defined in Article 11 (*f*) or persons exercising such an activity, although not attached to a medical unit of a party to the conflict.

Paragraphs 1 and 2 of the present article relate to professional ethics, which are generally defined by the medical profession in each State.

*Paragraph 2*

Under the present provision, the parties to the conflict cannot oblige persons exercising a medical activity to " perform acts or to carry out work contrary to rules of professional ethics ", *inter alia*, to conduct pseudo-medical research or take part in the manufacture of weapons or of other means of destruction. Those persons should not be compelled to administer drugs to prisoners for the purpose of eliciting information; such acts are besides generally prohibited in Article 12 (3).

*Paragraph 3*

The present provision attempts to solve a delicate problem, namely the non-denunciation during a period of armed conflict, by medical personnel of the wounded and sick in their care.

The problem has been thoroughly studied by medical circles, and particularly at meetings of the International Law Association. They advocated non-denunciation, on the grounds that the wounded and sick would otherwise not take the risk of going to seek medical attention or of calling a doctor.

They also considered that the fact of rendering medical assistance never implied that the medical personnel took sides in a conflict. They held the view, moreover, that to make direct or indirect use of medical personnel for a military operation (the capture of members of an adversary's armed forces) which was a matter for combatant forces alone, would be in contradiction with the neutrality of medical personnel.

The solution adopted here gives more latitude than that advocated by the medical profession; it allows the medical personnel discretion.

This provision does not, of course, refer to the wounded and the sick who have fallen into the power of the adversary or who are in military or civilian medical establishments belonging to the parties to the conflict. The question of denunciation does not arise in such cases.

Allowance is of course made for the dictates of hygiene in the general interest. When these apply, the parties to the conflict may, and possibly must, make notification of communicable diseases an obligation.

### Article 17. — Medical units and transports

**Medical units and means of medical transport, whether military or civilian, shall in all circumstances be respected and protected.**

*Ref.*: 1972 Report, vol. I, paras. 2.377 and 2.378.

The principle of respect and protection for medical units and means of medical transport is drawn from the Conventions, in particular Articles 19, 20, 35 and 36 of the First Convention, Articles 22, 23 and 24 of the Second Convention, and Articles 18, 21 and 22 of the Fourth Convention. Reference may be made to Draft Protocol I, Part II, especially Articles 12 and 24.

The protection provided by this article applies to all medical units and means of medical transport as defined in Article 11 (*c*), (*d*) and (*e*) and is valid for the duration of their assignment to strictly medical duties, whether this assignment be of a permanent or temporary nature.

The obligation to respect means in the first place that medical units and means of medical transport shall not be attacked. It also means that parties to the conflict shall not hamper their operations.

The obligation to protect requires the parties to the conflict to make the necessary arrangements to enforce respect of medical units and means of medical transport, and also to assist them in case of need. The use of the distinctive emblem, of primary significance here, is referred to in Article 18.

The appropriate authority of the parties to the conflict shall supervise their conditions of employment. They shall also ensure that medical units are located at places where they would not be exposed to danger during attacks on military objectives.

Although the present draft makes no provision for the cessation of the protection of medical units and means of medical transport, it must not be forgotten that the protection shall cease only if the medical units and means of medical transport are used to commit acts harmful to the enemy, and only after a warning has been given setting a reasonable time-limit and after such warning has remained unheeded. Certain circumstances shall not, however, be regarded as

nullifying the obligation to respect and to protect, as laid down in Article 22 of the First Convention and Articles 13 and 24 (3) of Draft Protocol I. These circumstances are, *inter alia*:

— the fact that personnel of a medical unit or personnel assigned to means of medical transport are armed for their own defence or that of the wounded and the sick in their charge;

— the presence in medical units and means of medical transport of small arms and ammunition taken from the wounded and the sick and not yet handed over to the proper service;

— the fact that medical units are guarded by armed sentries or escort responsible for keeping order.

**Article 18. — The distinctive emblem**

**1. The emblem of the red cross (red crescent, red lion and sun) on a white ground, which is the distinctive emblem of the medical personnel, medical units and means of medical transport of the parties to the conflict and of Red Cross (Red Crescent, Red Lion and Sun) organizations, shall be respected in all circumstances.**

**2. It may not be used to protect other persons or objects; the parties to the conflict shall adopt special measures for supervising its use and for preventing and repressing any misuse of it.**

*Ref.*: 1972 Report, vol. I, paras. 2.381 to 2.383.

This article is based on the relevant provisions of the Conventions. Reference may be made in this connection to Chapter VII, entitled *The distinctive emblem*, of the First Convention. (including Articles 38 to 42); Chapter VI, entitled *The distinctive emblem*, of the Second Convention (including Articles 41 to 43) and Articles 18, 20, 21 and 22 of the Fourth Convention.

*Paragraph 1*

The red cross (red crescent, red lion and sun) emblem is for the sole use of *medical personnel, medical units and means of medical transport* under protection within the provisions of this Part.

The red cross (red crescent, red lion and sun) emblem does not provide protection to individual members of medical units and objects used by them. It is merely the visible sign which helps to identify the persons and objects entitled to protection. Identification is not compulsory, but protection cannot be effectively provided unless parties to the conflict are able positively to identify the nature of persons and objects which must be respected.

Use of the emblem shall be at the discretion of the military or civil authorities of parties to the conflict, who shall supervise this use.

*Paragraph 2*

According to the present provision, the distintive emblem " may not be used to protect other persons or objects " than those mentioned in paragraph 1. This prohibition is of a general scope and applies to all persons, whether military or civilian. In this connection, reference may be made to Articles 21 and 23 of Part IV, entitled *Methods and Means of Combat.*

A distinction should be made between the use of the protective emblem from its use as an indicatory sign showing that a person or object is connected with the Red Cross, without this implying that the person or object is protected under the provisions of this Part. The Red Cross (Red Crescent, Red Lion and Sun) Societies carrying out activities other than assistance to military or civilian medical services may still use the indicatory sign, which should be smaller than the protective sign.

With regard to the operations of Red Cross National Societies, see Article 35.

**Article 19. — Prohibition of reprisals**

**Measures of reprisals against the wounded, the sick, and the shipwrecked as well as against medical personnel, medical units and means of medical transport are prohibited.**

*Ref.*: 1972 Report, vol. I, para. 2.124.

As stated in the commentary on Article 8 (4), the ICRC refrained from introducing in the present draft a general provision on the prohibition of reprisals against protected persons and objects. On the other hand, the prohibition of reprisals is specially mentioned in every case where it is necessary to protect persons and objects.

The present article restates Article 46 of the First Convention and Article 47 of the Second Convention. It is also derived from Article 20 of Draft Protocol I.

## PART IV

## METHODS AND MEANS OF COMBAT

Pursuant to Article 1, *Material field of application*, this Protocol shall apply in cases of armed conflict as defined in that article, involving armed forces or other organized armed groups. In this context, Part IV is apposite: it lays down that, in fighting, armed forces and other organized armed groups shall respect certain rules of human behaviour. Even in the context of non-international armed conflict, there must be some rules on the application of which combatants may rely. The application of such rules will also safeguard the civilian population not taking part in the hostilities. In non-international armed conflicts, as in international armed conflicts, violence and suffering should be confined to the military purposes pursued.

The provisions of this Part, as stated in Article 3, have no effect on the legal status of the parties to the conflict and in particular, on that of the members of their armed forces or other armed groups.

### Article 20. — Prohibition of unnecessary injury

**1. The right of parties to the conflict and of members of their armed forces to adopt methods and means of combat is not unlimited.**

**2. It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances.**

*Ref.*: 1972 Report, vol. I, paras. 2.400 to 2.410.

The present article is a repetition of Article 33 of Draft Protocol I. It is based on Articles 22 and 23 (*e*) of the Hague Regulations of 1907 and on the fourth paragraph of the Declaration of St. Petersburg of 1868.

*Paragraph 1*

This is a basic rule; the other rules relating to the conduct of hostilities, particularly those contained in Chapter I of Part V, are based on the principle laid down in this paragraph. Articles 8 (4), 12 (1), 15, 17, 19 and 30 are instances of the application of this rule inasmuch as they limit the choice of the methods and means of injuring the adversary.

*Paragraph 2*

This provision is based on the principle that hostilities must be confined to the destruction or weakening of the adversary's military potential (see also Art. 24 (1)). Injury and suffering in excess of that which must be employed to place a combatant *hors de combat* are therefore con-

sidered unnecessary. This rules then, precludes the infliction of suffering for its own sake, as a means of compulsion or intimidation, for instance, or as an act of revenge or mere indulgence in cruelty.

**Article 21. — Prohibition of perfidy**

**1. It is forbidden to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of the adversary with intent to betray that confidence are deemed to constitute perfidy. Such acts, when carried out in order to commit or resume hostilities, include the following:**

*(a)* **the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign;**

*(b)* **the feigning of a cease-fire, of a humanitarian negotiation or of a surrender;**

*(c)* **the feigning, before an attack, of non-combatant status;**

*(d)* **the use in combat of the enemy's distinctive military emblems.**

**2. On the other hand, ruses of war, that is to say, those acts which, without inviting the confidence of the adversary, are intended to mislead him or to induce him to act recklessly, such as camouflage, traps, mock operations and misinformation, are not perfidious acts.**

*Ref.*: 1972 Report, vol. I, paras. 2.411 to 2.416.

The present article restates, in its essential parts, Article 35 of Draft Protocol I. It is based on Articles 23 (*b*) and 24 of the Hague Regulations of 1907.

A large majority of experts were in favour of a general definition of perfidy; despite the difficulty of doing so, they felt a single definition for both Protocols, i.e. valid in international and non-international conflicts alike was absolutely necessary. The list of examples given in this article did not give rise to the same difficulties. It appeared necessary to forbid perfidy in the context of non-international armed conflict for the reason that even in such situations — as stated in the introduction to this Part — there should be some rules on the application of which combatants might rely. The application of such a provision will also tend to strengthen protection for the civilian population.

Like ruses, perfidy involves simulation; but in addition it aims at creating falsely a situation in which the adversary feels obliged by a legal or moral rule to abstain from any hostile act or to neglect to take precautions which are in fact necessary, thereby putting himself at a disadvantage.

Articles 18 (2), 23, 26 (5) and 28 (2) may be considered as instances of application of the general rule laid down in the present article.

**Article 22. — Quarter**

**It is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis.**

*Ref.*: 1972 Report, vol. I, paras. 2.425 to 2.432.

The present article repeats Article 38 (3) of Draft Protocol I and is based on Article 23 (*d*) of the Hague Regulations of 1907.

It forbids refusing to spare the life of an enemy who surrenders or is captured, deciding on his extermination of threatening to exterminate him in order to hasten his surrender. A demand by a party to the conflict for unconditional surrender by its adversary in no way relieves that party from the obligation to give quarter to surrendering enemies.

**Article 23. — Recognized signs**

**1. It is forbidden to make use of the protective sign of the red cross (red crescent, red lion and sun) and of the protective emblem of cultural property for purposes other than those provided for in the Conventions establishing those signs.**

**2. It is forbidden to make improper use of the flag of truce.**

*Ref.*: 1972 Report, vol. I, paras. 2.417 to 2.420.

The present article restates, in its essential parts, Article 36 (1) and (2) of Draft Protocol I. It is also based on Article 23 (*f*) of the Hague Regulations of 1907.

*Paragraph 1*

The provision reminds combatants of the general prohibition contained in Article 18 (2), of using the emblem of the red cross on a white ground for the protection of persons and objects other than those entitled thereto, namely: medical personnel, medical units and means of medical transport of the parties to the conflict, and of Red Cross organizations (see Art. 18). Further, this prohibition has been extended to the emblem of the Hague Convention of 1954.

# PART V

# CIVILIAN POPULATION

The present Part is directly derived from Part IV of Draft Protocol I. It does not contain any provision specifying its particular field of application; nevertheless the principles laid down in Article 44 of Draft Protocol I are equally valid here: the obligations contained in Articles 24 to 31 are binding on members of the armed forces or other organized armed groups in respect of all military operations liable to cause effects on land, whether they are directed from land, sea or air.

In the present draft, certain notions relating to the conduct of hostilities—*attacks*, *military objectives*, *military operations*—have not been given definitions by the ICRC, though there are references to them in several provisions.

However, the definitions of *attacks* and *military objectives* drawn up for Draft Protocol I are restated here for a better comprehension of the present draft:

Within the meaning of Article 44, paragraph 2, of Draft Protocol I, " acts of violence committed against the adversary, whether in defence or offence ", are considered as *attacks*.

Within the meaning of Article 47, paragraph 1, of Draft Protocol I, objectives ... " which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage ", are considered as *military objectives*.

As for the term " military operations ", it has been briefly defined in the commentary on Article 3, paragraph 1, Article 42, paragraph 1 and Article 44, paragraph 1, as " offensive and defensive movements by armed forces in action ".

## Chapter I

## General protection against effects of hostilities

### Article 24. — Basic rules

**1. In order to ensure respect for the civilian population the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.**

**2. Constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding or launching of an attack.**

*Paragraph 1*

This provision restates Article 43 of Draft Protocol I. It constitutes one of the foundations of international humanitarian law applicable in armed conflicts. In one way or another, nearly all the provisions in this Chapter are derived from it. It is, in particular, by virtue of " ... the distinction between the civilian population and combatants... " that the parties to the conflict shall refrain from attacking the civilian population as such and shall abstain from using civilians in attempts to shield military objectives, in accordance with Article 26 (1) and (5). Unlike Draft Protocol I (Art. 47), the distinction "... between civilian objects and military objectives " is not amplified by a special provision on the protection of civilian objects. But it is clear from the present rule that objects designed for civilian use shall not be made the object of attack, except if they are used mainly in support of the military effort, in which case they would be considered as military objectives. Objects indispensable to the survival of the civilian population are protected by a special provision (Art. 27).

The rule on distinction is referred to in resolutions adopted by the United Nations [13] and by International Conferences of the Red Cross, [14] which, it should be pointed out, do not make a distinction between the different categories of armed conflicts.

Although Chapter I of the present Part and Part IV, entitled *Methods and Means of combat* have each their own purpose, they should be constantly related to each other, since they both refer to the conduct of hostilities. Some of their provisions, as for instance Article 20, entitled *Prohibition of unnecessary injury*, and the present article could even have appeared under the same heading. Article 20 is not restricted to the suffering caused to combatants: " injury " caused to the civilian population is equally " unnecessary ", by the very fact that it does not advance the attainment of the only possible goal of the hostilities, which is to place enemy armed forces *hors de combat* and to put out of action enemy military objectives.

*Paragraph 2*

This provision is based on the first and second sentences of Article 50 (1) in Draft Protocol I. It is meant for all members of the armed forces or other armed groups who are in a position to carry out the preparation, decision or execution of an attack, whetever the level of the command.

This provision shall in no case limit the scope of the principle stated in paragraph 1 or of that of the articles which proceed from it (Art. 26, 27 and 28). On the contrary, it is meant to facilitate their application, and it states, accordingly, the general rule containing guidelines for the conduct of combatants in respect of the dangers accompanying military operations and, in particular, attacks, for protected persons and objects.

**Article 25. — Definition**

**1. Any person who is not a member of armed forces is considered to be a civilian.**

**2. The civilian population comprises all persons who are civilians.**

**3. The presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.**

*Ref.*: 1972 Report, vol. I, paras. 2.463 to 2.474.

The present article restates, in its essential parts, Article 45 of Draft Protocol I.

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[13] In particular, UN. res. 2444 (XXIII), operative paragraph 1 (*c*); UN, res. 2675 (XXV), operative paragraph 2.

[14] In particular, XXth Internat. Conf. Red. Cross, Res. XXVIII, Vienna, 1965, third principle.

*Paragraphs 1 and 2*

Within the framework of this Chapter, all human beings, who are on the territory of a High Contracting Party on which an armed conflict within the meaning of Article 1 is taking place and who do not form part of the armed forces or of other armed groups, are considered to be civilians. Civilians are protected against the effects of hostilities *vis-à-vis* all parties to the conflict.

It is also necessary to define civilian persons not only as individual persons, but also taken collectively, i.e. the *civilian population*, a term which is often used in the present draft. This definition is based on that of the civilian person.

As will be seen below under Article 26 (2), entitled *Protection of the civilian population*, it is not enough to be a civilian in order to enjoy complete immunity; such persons must moreover abstain from committing acts of hostility.

*Paragraph 3*

The civilian population comprises all persons who are civilians, but it often happens that certain persons who do not fall within the definition given in paragraph 1 (i. e. members of the armed forces or other armed groups) are present together with civilians. It might well be questioned whether, in such a case, the population would cease to answer to the definition in paragraph 2, and hence be no longer protected against attacks. It was considered that in an armed conflict it was inevitable that there would be at times some members of the armed forces mingling with the civilian population. Unless the definition of the civilian population were to lose all substance and the protection to which it was entitled were to be invalidated, it must be recognized that the presence of single individuals not answering to the definition of civilians should not in any way modify the civilian character of a population.

**Article 26. — Protection of the civilian population**

**1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. In particular, mehods intended to spread terror among the civilian population are prohibited.**

**2. Civilians shall enjoy the protection afforded by this article unless and for such time they take a direct part in hostilities.**

**3. The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited. In particular it is forbidden:**

**(*a*) to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other;**

**(*b*) to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.**

**4. Attacks against the civilian population or civilians by way of reprisals are prohibited.**

**5. The parties to the conflict shall not use the civilian population or civilians in attempts to shield military objectives from attacks.**

*Ref.*: 1972 Report, vol. I, paras. 2.475 to 2.486, 2.504.

The present article restates, in its essential parts, Article 46 of Draft Protocol I.

The rule relating to the immunity of the civilian population is referred to in several United Nations resolutions. [15]

[15] In particular, UN, res. 2444 (XXIII), operative paragraph 1 (*b*); UN, res. 2675 (XXV), operative paragraph 4.

*Paragraph 1*

This rule, by reaffirming the immunity of the whole of the civilian population, covers civilians, whether they are taken singly, in groups or as a whole. Although the protection to be granted to civilians does not depend on their number, attacks against the civilian population as such have assumed such proportions in contemporary conflicts that it was necessary to stress this aspect in particular. Such acts are usually committed with the object of compelling the population to support or to abstain from supporting one or the other of the parties to the conflict.

None the less, civilians who are within or in the immediate vicinity of military objectives [16] run the risk of " incidental " effects as a result of attacks launched against those objectives. In such cases other provisions of the present draft would be applicable (see Art. 24 (2) and para. 3 (*b*) of the present article).

In the second sentence, the term " methods " has been used in order to include all possible cases that might arise.

In the general context of this article, many experts raised objections to the notion of intention. However, by way of exception, it was retained here (in the expression " methods intended "), as any attacks, even if it were strictly limited to a specific military objective, would by its *very nature* " spread terror " among the neighbouring civilian population. The omission of any mention regarding intention in this case would have meant that any attack which only had a psychological effect on the civilian population would be, *a posteriori*, unlawful.

*Paragraph 2*

The immunity of civilians is subject to a very strict condition: they must not take a direct part in hostilities, which means they must not become combatants. What should be understood by *direct part in hostilities*? The expression covers acts of war intended by their nature or purpose to strike at the personnel and matériel of adverse armed forces. Thus, a civilian taking part in fighting, whether singly or in a group, will not be protected for such time when he takes a direct part in hostilities.

What is the position of such a civilian when he ceases to fight? There are two possibilities:

(1) he may fall into the adversary's power, or

(2) he may not fall into his power.

(1) Although the problem of treatment in the event of capture lies outside the scope of this Chapter, it would be useful to consider here what would happen to a civilian *who did fall into the adversary's power*, either by capture during combat or if he were subsequently taken into custody. This civilian would be covered by Article 8 from the time his liberty was restricted, whether it was, for example, by internment or detention; besides, Article 8 is valid for all categories of persons whose liberty has been restricted for reasons in relation to the armed conflict; if, moreover, that civilian were to be the object of penal prosecutions, he would be covered by the guarantees laid down in Articles 9 and 10.

(2) *If he does not fall into the adversary's power*, a civilian who has taken part in hostilities may no longer be the object of attack from the moment he ceases to take such part. It is essential to have such a rule if the population as a whole is to be afforded effective protection.

*Paragraph 3*

This provision flows directly from Article 24. The expression " means of combat " covers mainly weapons, while the word " methods " covers the use that is made of those weapons.

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[16] The mention of a situation *of fact* of this kind in the earlier draft had led to considerable discussion (see, ICRC Draft Protocol II, 1972, Art. 15, para. 3).

To supplement the notion of the verb " strike ", which refers more particularly to the means of combat, the verb " affect ", which refers rather to the methods, was added, so as to cover all cases that might arise. It is to be noted, too, that this article, like Article 24 (2), does not in itself imply any prohibition of a specific weapon.

*Sub-paragraph (a)*

The intention of this provision is to prohibit target area bombing, also called " carpet-bombing ". This method of waging total warfare, whether it is carried out from land, sea or air (as indicated by the words " by bombardment or any other method "), causes very heavy losses among the population and rouses civilians to take counteraction by taking a direct part in the hostilities.

This practice has been resorted to in order to spread terror among the population as well as to hit a few military objectives suspected to lie *somewhere or other* within an area that might be very extensive and densely populated.

There seem to be some technical difficulties in laying down precise measurements for the term " at some distance ", because of the variety of factors involved (position of persons in relation to the terrain, meteorological conditions, etc.).

Besides, these area bombardments are not only expressly prohibited under the present provision, but also implicitly forbidden under Article 24. Given the importance of this question, there is good cause for drawing up a distinct and explicit provision concerning it.

*Sub-paragraph (b)*

This provision is intended, as may be seen from the word " incidental " to urge the author of an attack to consider the probable or possible errors or inaccuracies that he might commit due to a number of factors, and the consequences that would have to be borne by the civilian population. This rule, which relates to the notion of proportionality, therefore refers to the accidental effects of attacks on protected persons and objects. The dangers they run arise from widely differing factors, such as *the location of the persons and objects concerned* (in the immediate vicinity of a military objective), *the configuration of the terrain* (danger of landslide, of rico chetting, etc.) *the accuracy of the weapons used* (relative dispersion according to trajectory, range ammunition used, etc.), *meteorological conditions* (visibility, effect of wind, etc.), *specific nature of the military objectives* (ammunition stores, fuel tanks, army nuclear stations, etc.) and *combatants' mastery of techniques.* The present rule is valid, in particular, for persons and objects that might be within or near military objectives. Although these persons and objects are theoretically protected, yet they are liable to suffer *incidental* effects by reason of their situation.

*Paragraph 4*

As indicated above in the commentary on Article 8, paragraph 4, the ICRC refrained from introducing into the present draft Protocol a general provision on the prohibition of reprisals against protected persons and objects. On the other hand the prohibition of reprisals is specially mentioned in the various Parts of the present draft in every case where it is necessary to protect the particular persons and objects referred to. The present prohibition is based on Article 33 of the Fourth Convention, the essentiel purpose of which is to protect civilians from the parties to the conflict in whose power they might be, and the provision in paragraph 4 here extends that rule to the field of hostilities and is applied to *the whole of the civilian population* within the meaning of Article 25.

*Paragraph 5*

This provision is based on Article 28 of the Fourth Convention [17] which stipulates that civilians may not be used to shield military objectives or operations.

[17] Article 28 of the Fourth Convention says: " The presence of a protected person may not be used to render certain points or areas immune from military operations ".

**Article 27. — Protection of objects indispensable to the survival of the civilian population**

**It is forbidden to attack, destroy or render useless objects indispensable to the survival of the civilian population, namely, foodstuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether it is to starve out civilians, to cause them to move away or for any other reason.**

*Ref.*: 1972 Report, vol. I, paras. 2.487 to 2.496.

The present article restates, in their essential parts, Articles 48 and 66 of Draft Protocol I.

While, in Draft Protocol I, a distinction has been drawn between the obligations of the party to the conflict which is in control of the objects indispensable to the survival of the civilian population and those of the party to the conflict which is not in control of such objects, an attempt has been made here to draw up a provision of quite general scope. It is valid for all parties to the conflict, in respect of those objects in the hands of an adverse party as well as of those on the territory controlled by the parties, even if it were for only a short period.

The purpose is to ensure the civilian population's survival and avoid the creation of movements of refugees. The words " or for any other reason " were added to cover whatever situation might arise.

Examples are given of some objects which should be regarded as indispensable. An exhaustive list would have involved the risk of an oversight or arbitrary selection. In the matter of food, for instance, customs and needs differ widely from one region to another.

It is obvious that in requesting special protection for objects of this nature, the ICRC has no intention of diminishing general protection for other civilian objects. In the case of indispensable objects, it has been considered judicious to increase the *degree* of protection.

**Article 28. — Protection of works and installations containing dangerous forces**

**1. It is forbidden to attack or destroy works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations, whenever their destruction or damage would cause grave losses among the civilian population.**

**2. The parties to the conflict shall endeavour to avoid locating any military objectives in the immediate vicinity of the objects mentioned in paragraph 1.**

The present article restates, in its essential part, paragraphs 1 and 2 of Article 49 in Draft Protocol I.

The purpose of this article is to spare the civilian population the disastrous effects of destruction of, or damage to, works containing dangerous forces, through the release of natural or artificial elements.

The experts showed two trends: a large number of experts considered that all such objects should enjoy absolute and automatic immunity, while others regarded the prohibition to attack or destroy those objects as utterly impracticable owing to the fact that some would be used for military purposes.

The compromise solution here consists in adopting the principle of a limited immunity whenever the destruction or damage of such works " would cause grave losses among the civilian population ", and in confining that prohibition to certain objects specified in an exhaustive list given in paragraph 1.

*Paragraph 1*

In view of the immense dangers which the destruction of certain works would entail for the population, the ICRC considers that the nature of those works — whether military, civilian or part military-part civilian — would no longer be determinant.

*Paragraph 2*

This paragraph is intended to facilitate application of the rule contained in paragraph 1. It would be an anomaly if the immunity granted to dams, dykes and nuclear generating stations were to be extended to military objectives. Should one of the parties to the conflict place in the vicinity of protected works military objectives in order to shield the latter from attack, the opponent shall take, when attacking, the precautionary measures which flow from Article 24.

**Article 29. — Prohibition of forced movement of civilians**

**1. The displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should the parties to the conflict undertake such displacements, they shall take all possible measures in order that the civilian population be received under satisfactory conditions of hygiene, health, safety and nutrition.**

**2. Civilians shall not be compelled to leave their own national territory.**

*Ref.*: 1972 Report, vol. I, para. 2.503.

*Paragraph 1*

This provision refers to displacements, whether singly or in groups, of civilians within the territory of a Contracting Party, on whose territory an armed conflict, within the meaning of Article 1, is taking place. Such displacements, ordered and sometimes carried out by the parties to the conflict, were considered only too often to be measures forming part of normal military operation, and the displaced population was at times obliged to live under most unsatisfactory conditions. In accordance with the present provision, these displacements should be undertaken only in exceptional cases and limited to those where the security of the civilians involved or imperative military reasons so demand. Displaced persons must be received in places where decent conditions of existence are made available to them.

*Paragraph 2*

This provision lays down that it is absolutely prohibited to compel the civilian population to leave its own territory or to cause it to move off. The prohibition applies to all the authorities of the parties to the conflict, including those of their armed forces or other armed groups, involved in military operations.

The present provision does not affect national legislation of the Contracting Parties with regard to aliens.

## Chapter II

## Civil defence

**Article 30. — Respect and protection**

**1. Civil defence personnel shall be respected and protected and, except in the case of imperative military necessity, shall be authorized to discharge their tasks.**

**2. In no circumstances shall the fact of having taken part in civil defence activities be considered to be punishable.**

*Ref.*: 1972 Report, vol. I, paras. 2.508 to 2.521.

The present provision is based on Article 55 of Draft Protocol I.

It does not circumscribe in any way the foregoing rules relating to the protection of the civilian population. Further, it does by no means signify that, had this provision not been included, civil defence personnel would not be respected or protected. Respect and protection are in fact conferred, primarily, by Article 26.

The purpose of the present provision is to grant special protection to certain civilians who differ from other civilians in the tasks they perform — which require them to go to the aid of victims of armed conflicts —, in order that they might fulfil their humanitarian activities in circumstances which otherwise might cast doubts on their civilian nature. Article 30 refers to the personnel of civil defence bodies as well as to civilians who, although not members of such bodies, perform civil defence tasks under the supervision of the proper authorities concerned. In accordance with Article 11 (*f*) (ii), civil defence medical personnel are included in the medical personnel of the parties to the conflict when they are given the same duties to perform.

In order to be entitled to the special protection mentioned in Articles 15 and 30, civil defence personnel must obviously abstain from taking any part in hostilities.

**Article 31. — Definition**

**Civil defence includes the following tasks:**

(*a*) **rescue, first aid, conveyance of wounded, fire-fighting;**

(*b*) **safeguard of objects indispensable to the survival of the civilian population;**

(*c*) **provision of emergency material and social assistance to the civilian population;**

(*d*) **emergency repair of public services indispensable to the civilian population;**

(*e*) **maintenance of public order in disaster areas;**

(*f*) **preventive measures, such as warning the civilian population, evacuation, provision of shelters;**

(*g*) **detection and marking of danger areas.**

*Ref.*: 1972 Report, vol. I, paras. 2.508 to 2.521.

The present article restates, in its essential part, Article 54 of Draft Protocol I.

It provides a definition of civil defence based on the criterion of the functions exercised. Accordingly, civil defence must not be a monopoly of specialized bodies, as was proposed in Article 34 of the 1972 draft; the idea underlying this new concept is based on the possible participation of every civilian in tasks of civil defence.

*Sub-paragraph (a)*

It is clear that, in the context of this definition, fire-fighting should provide assistance in rescuing only civilians or military personnel who are *hors de combat* and preventing damage to civilian objects.

*Sub-paragraph (b)*

For the conception of " objects indispensable to the survival of the civilian population ", reference should be made to Article 27.

## Chapter III

## Measures in favour of children

As indicated in the commentary on Article 32 below, the present Chapter is based on several provisions of the Fourth Convention which are so fundamental that it was considered that they should also be reaffirmed in the context of non-international armed conflicts. It is also directly derived from Article 68 of Draft Protocol I.

### Article 32. — Privileged treatment

**1. Children shall be the object of privileged treatment; they shall be especially protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid their age and situation require.**

**2. To this end, the parties to the conflict shall,** *inter alia*:

**(*a*) endeavour to furnish the means for the identification of children, where necessary in the area of armed conflict;**

**(*b*) take care that children who are orphaned or separated from their families as a result of armed conflict are not abandoned;**

**(*c*) take measures, if necessary and with the consent of their parents or persons responsible for their care, to remove children from the area of combat and ensure that they are accompanied by persons entrusted to provide for their safety;**

**(*d*) take all necessary steps to facilitate the reuniting of families temporarily separated;**

**(*e*) take the necessary measures in order that children under fifteen years of age shall not take any part in hostilities and, in particular, they shall refrain from recruiting them in armed forces or accepting their voluntary enrolment.**

*Ref.*: 1972 Report, vol. I, paras. 2.140 to 2.156.

*Paragraph 1*

This provision is based on Article 68 (1) of Draft Protocol I.

The first sentence underlines the need for " privileged treatment ", which is justified by the physical and mental condition of children. Such treatment involves, in particular, the provision of all necessary care and assistance so that children might not suffer any physical or moral after-effects as a result of the conflict and so that they may develop in as normal a manner as possible. It has been felt preferable not to mention age, in view of the general nature of the provision.

*Paragraph 2*

This provision supplements the general rule concerning the " privileged treatment " to which children are entitled, and obligates parties to the conflict to take certain concrete measures, a number of which are listed, by way of example (" *inter alia* "), under sub-paragraphs (*a*) to (*e*).

*Sub-paragraph (a)*

This rule is based on Article 24, third paragraph, in the Fourth Convention.

In accordance with the wish formulated by many experts who considered it impracticable to demand the parties to the conflict to provide for the means of identification of all children throughout the territory where an armed conflict within the meaning of Article 1 was being waged, the rule was worded in such a way so as to encourage (" endeavour ") the parties to the conflict to facilitate identification of children in the region affected by the hostilities (" area of armed conflict "), in particular in places where such identification is absolutely necessary, i.e. in or near the combat zone. Identification would be particularly desirable in the event where children were to be removed under sub-paragraph (*c*).

*Sub-paragraph (b)*

This rule is based on Article 24, first paragraph, of the Fourth Convention.

*Sub-paragraph (c)*

This rule is based on Article 17 of the Fourth Convention.

The purpose of this provision is to obtain the removal of children away from the combat zone whenever they would be more particularly exposed to the dangers resulting from hostilities. Such removal would remain all the same an exceptional measure and would depend on the persons responsible for the children's care giving their consent (see also Art. 29 (1)). It should be carried out under adequate safety conditions. Moreover, steps should be taken to ensure that children removed from dangerous zones are not abandoned: they must therefore be " accompanied by persons entrusted to provide for their safety "; it is during an operation for evacuation that the identification of children as indicated in sub-paragraph (*a*) above would be particularly necessary.

*Sub-paragraph (d)*

This rule is based on Article 26 of the Fourth Convention. To facilitate the reuniting of families temporarily separated by the armed conflict, the parties to the conflict may take measures, *inter alia*, to promote the work of information bureaux, provided for under Article 34.

*Sub-paragraph (e)*

This rule restates Article 68 (2) of Draft Protocol I.

The parties to the conflict shall neither encourage nor tolerate any participation whatsoever by children in the hostilities; not only shall direct participation in hostilities be prohibited, but also any other act in relation with the latter: transmission of military information, transport of arms, ammunition and war material, sabotage, etc..

## PART VI

## RELIEF

**Article 33. — Relief actions**

**1. If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the parties to the conflict shall agree to and facilitate, to the fullest possible extent, those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction. Relief actions fulfilling the above conditions shall not be regarded as interference in the armed conflict.**

**2. The parties to the conflict and any High Contracting Party through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1.**

**3. When prescribing the technical methods relating to assistance or transit, the parties to the conflict and any High Contracting Party shall endeavour to facilitate and accelerate the entry, transport, distribution, or passage of relief.**

**4. The parties to the conflict and any High Contracting Party may set as condition that the entry, transport, distribution, or passage of relief be executed under the supervision of an impartial humanitarian body.**

**5. The parties to the conflict and any High Contracting Party shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.**

*Ref.*: 1972 Report, vol. I, paras. 2.245 to 2.266.

The present article is based on Article 23 of the Fourth Convention and restates, in the main, Article 62 of Draft Protocol I. It also largely stems from Resolution XXVI of the XXIst International Conference of the Red Cross (Istanbul, 1969) and United Nations resolution 2675 (XXV), which, it should be pointed out, do not make any distinction between the various categories of armed conflicts.

It is in the first place the duty of the parties to the conflict to see that the civilian population does not lack the objects which are indispensable to its survival (see Art. 27).

*Paragraph 1*

The purpose of this provision is to encourage the parties to the conflict to agree to and facilitate relief actions which are intended solely for the civilian population, provided two conditions are fulfilled: relief actions must be exclusively humanitarian and impartial in character and must be conducted without any adverse distinction. In this way, it should be possible to avoid being faced, for political reasons, with a refusal on the part of the parties to the conflict to agree to relief actions for civilian populations in distress. Under the present provision, relief actions fulfilling the aforementioned conditions " shall not be regarded as interference in the armed conflict ".

To determine whether the civilian population is " inadequately supplied ", the parties to the conflict shall refer to their own findings and shall take into consideration those made on the spot by a qualified humanitarian organization. The standard of living to which the population is accustomed and the needs stemming from the conflict must be taken into account.

*Paragraph 2*

The purpose of this provision is to encourage the parties to the conflict and any Contracting Party to grant free passage of consignments when circumstances require the transit of relief supplies through their territory (for instance, relief actions for a civilian population in encircled or besieged areas). The scope of this provision is limited to relief actions fulfilling the conditions in paragraph 1.

*Paragraph 3*

The present provision, which recognizes the right of the parties to the conflict and any Contracting Party to prescribe the technical methods to be used in relief actions, strengthens still further the guarantees against abuse (they may, under paragraph 4, set as condition that the relief action be executed " under the supervision of an impartial humanitarian body "); but its object is, especially, to ensure the safety and rapidity of the execution of relief operations. The methods adopted should under no circumstances delay the rapid forwarding of relief consignments (see, also, end of paragraph 5 of the present article).

**Article 34. — Recording and information**

**1. If necessary, the parties to the conflict shall organize, with the co-operation of the International Committee of the Red Cross, information bureaux to which they shall communicate all relevant information on the victims of the conflict 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 Information Agency provided for in the Geneva Conventions of August 12, 1949, the information thus obtained, and shall transmit it to the next of kin concerned; the information bureaux shall also be responsible for replying to all enquiries concerning the victims of the conflict, and shall take the necessary steps to search for them; the transmission of information or the search for the victims shall not be undertaken if they are liable to be prejudicial to the interests of the victimes or of their relatives.**

*Ref.*: 1972 Report, vol. I, paras 2.267 to 2.272.

This article is based on Article 16 of the First Convention, Article 19 of the Second Convention, Article 122 of the Third Convention, and Articles 136, 137 and 138 of the Fourth Convention. Its object is to enable contact to be maintained between victims of armed conflicts and their families, and to enable families that have been separated by hostilities to communicate.

*Paragraph 1*

The paragraph as at present does not specify the body which is to organize the information bureaux, this decision being left to each party to the conflict. On the other hand, it does encourage those parties to request the ICRC to help the chosen body to carry out its work. It also leaves the door open for parties to the conflict to request the ICRC to organize the information bureaux.

The paragraph further states that all parties to the conflict shall communicate " all relevant information on the victims of the conflict ... ". Such information should make it possible to identify protected persons, the hospital where they may have been admitted, and to report on

the condition of the sick or wounded. It should also indicate the place of internment or detention of persons deprived of their freedom, report their transfer or release, report deaths, and register children evacuated from the combat zone in accordance with Article 32 (*c*).

*Paragraph 2*

The bureaux should, apart from communicating information received, reply to all enquiries concerning victims of the conflict. From whom such enquiries might emanate is not specified. It might be a humanitarian organization, such as the Central Information Agency or some other organization, but the paragraph in its present form enables private individuals to make enquiries at the information bureaux on the fate of people of concern to them.

Although this presupposes that the information bureaux have to deal with enquiries from any source, a safety clause is provided by the insertion of the words " the transmission of information or the search for the victims shall not be undertaken if they are liable to be prejudicial to the interests of the victims or of their relatives ". Thus the victims themselves should be able to request that information concerning them should not be transmitted if they consider that this might be dangerous to their relatives.

**Article 35. — National Red Cross and other relief societies**

**1. The National Red Cross (Red Crescent, Red Lion and Sun) Society and its branches, acting if necessary independently, shall be permitted to pursue their humanitarian activities in accordance with the principles of the Red Cross as stated by the International Conferences of the Red Cross. Other relief societies shall be permitted to carry out their humanitarian activities in accordance with similar conditions.**

**2. In no circumstances shall the fact of having taken part in these activities be punishable.**

*Ref.*: 1972 Report, vol. I, paras. 2.273 to 2.278.

This article is based on Article 63 of the Fourth Convention. Its aim is to enable the National Red Cross (Red Crescent, Red Lion and Sun) Society to continue its work in the event of a non-international armed conflict and permit other relief societies to operate.

*Paragraph 1*

The National Red Cross (Red Crescent, Red Lion and Sun) Society is the society having been officially recognized as such, which presupposes that it has been recognized by the established government.

The work of the Red Cross must go on, even if the main body of the National Society has been paralysed by the armed conflict or cut off from some local branches located in territory occupied by the adverse party. For this reason, a measure of autonomy has been given to National Society branches " acting if necessary independently ".

On the other hand, the National Society—both the main body and its branches—should carry out its work in accordance with " the principles of the Red Cross as stated by the International Conferences of the Red Cross ".[18] The officers and personnel of the Society must therefore

[18] See, in particular, XXth Internat. Conf. Red Cross, Res. VIII, Vienna, 1965.

observe strict impartiality in carrying out their humanitarian mission, and abstain from all political and military activity. In this connection, it should be noted that the *medical personnel* of the National Society shall be entitled to the same protection whenever it carries out the same work as the medical personnel of the parties to the conflict (see Art. 11 (*f*) and Art. 15).

" Other relief societies " are those carrying out work on the basis of the same principles as the Red Cross, having humanitarian aims and authorized by the established government to work in peacetime; they may also be societies set up during the armed conflict and authorized to work by the relevant authorities of the parties to the conflict.

## PART VII

## EXECUTION OF THE PRESENT PROTOCOL

### Article 36. — Measures for execution

**Each party to the conflict shall take measures to ensure observance of this Protocol by its military and civilian agents and persons subject to its authority.**

The present draft Protocol is first and foremost the expression of general principles which, in practice, require parties to the conflict to take many measures to ensure the application of the provisions of the Protocol in specific circumstances. These measures include the dissemination of knowledge of the Protocol, in accordance with Article 37 (2); the founding of a medical service; the supervision of the use of the distinctive emblem; instructions to the armed forces with a view to enforcing observance of the provisions of Parts IV and V during hostilities; and the drawing up of rules of discipline for the armed forces.

In order that the authorities of the parties to the conflict, particularly those in command of the armed forces or of armed groups, may discharge their obligations under the present article, their military or civilian subordinates must be organized and subject to adequate discipline. The article in question therefore, supplements Article 1 (1) which, for the purposes of the Protocol, characterizes hostilities, one characteristic of which is this very requirement of " organized " armed forces or armed groups engaged in the fighting (see commentary on Article 1 (1)).

### Article 37. — Dissemination

**1. The High Contracting Parties undertake to disseminate the present Protocol as widely as possible in time of peace 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. In time of armed conflict, the parties to the conflict shall take appropriate measures to bring the provisions of the present Protocol to the knowledge of its military and civilian agents and persons subject to its authority.**

*Ref.*: 1972 Report, vol. I, paras. 2.320 to 2.328.

The present article is based on one which is common to the four Geneva Conventions (Art. 47/48/127/144). In essence, it repeats Article 72 (1) of Draft Protocol I.

*Paragraph 1*

Some experts expressed reservations, fearing that peacetime dissemination of knowledge of the Protocol might encourage insurrection. However, just as Protocol I does not encourage international conflict, so does Protocol II not encourage any party to start a non-international armed conflict, the motives of which are more basic.

*Paragraph 2*

The present provision mentions one of the measures to be taken by parties to the conflict, in accordance with Article 36, to ensure observance of the Protocol.

**Article 38. — 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 depositary of the Geneva Conventions of August 12, 1949, or to the International Committee of the Red Cross, all or part of the provisions of those Conventions and of the Additional Protocol relating to the Protection of Victims of International Armed Conflicts.**

*Ref.*: 1972 Report, vol. I, paras. 2.287 to 2.291.

The present article is based on the third paragraph of common Article 3.

The object and purpose of Protocol II being to provide fundamental protection against the dangers of armed conflict repeats only the essential rules of the Conventions and of Draft Protocol I: for that reason it is highly desirable for parties to the conflict, complying with the encouragement contained in the present article, to apply other rules of international humanitarian law as widely as possible.

In view of the difficulty for parties to communicate direct with each other and to conclude direct agreements during the conflict, provision is made for the entry into force of any part or all of the Conventions and of Protocol I on the basis of unilateral declarations addressed to the depositary of the Conventions or to the ICRC.

This in no way affects the possibility for any party to the conflict of declaring itself prepared unilaterally to observe certain requirements of humanitarian law.

Consistent with Article 3 entitled *Legal status of the parties to the conflict*, the conclusion of agreements, whatever their form, shall not affect the legal status of the parties to the conflict.

**Article 39. — Co-operation in the observance of the present Protocol**

**The parties to the conflict may call upon a body offering all guarantees of impartiality and efficacity, such as the International Committee of the Red Cross, to co-operate in the observance of the provisions of the present Protocol. Such a body may also offer its services to the parties to the conflict.**

*Ref.*: 1972 Report, vol. I, paras. 2.292 to 2.312.

The system of Protecting Powers and their substitutes, as provided for in the Conventions and supplemented by Draft Protocol I with a view to guaranteeing the impartial supervision and facilitation of their application, was not deemed feasible in non-international armed conflicts.

Under Draft Protocol II, the supervision of the application of its provisions comes solely within the competence of the parties to the conflict. However, the parties might encounter difficulties in applying those provisions, so that the assistance of a third party which would help in the observance of the Protocol could be useful. That is why this article gives parties to the conflict encouragement to call upon an organization of their choice. Moreover the draft Protocol has two special provisions under which parties to the conflict may obtain assistance from a humanitarian body, that is to say, for visits to persons deprived of freedom (Art. 8 (5)) and for supervision of the forwarding and distribution of relief (Art. 33 (4)).

The final sentence of the present article restates the principle of the second paragraph of common Article 3.

## PART VIII

## FINAL PROVISIONS

This Part contains general provisions regarding the final clauses of this draft Protocol. Th articles of this Part therefore refer only to the present instrument.

When drafting these articles, the ICRC and the experts drew upon the final provisions of the Conventions, and also took into account various studies carried out by the United Nations: in particular, the greatest attention was paid to the *Handbook of Final Clauses*, [19] and to the work of the United Nations International Law Commission relating to the codification and progressive development of the law of treaties, culminating in the adoption, in 1969, of the *Vienna Convention on the Law of Treaties.* [20]

### Article 40. — Signature

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

The present article is identical with Article 80 of Draft Protocol I.

Taking into account Article 41, it deals with what is known as " signature subject to ratification ". This was the procedure laid down in 1949 for the conclusion of the Conventions (Art. 56/55/136/151). The function of signature consequently is twofold: it is the general method of authenticating the text of the Protocol, and it constitutes a first step towards ratification. [21] It may be noted that there will be, on 28 December 1973, one hundred and thirty-five States Parties to the Conventions.

### Article 41. — Ratification

**The present Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Confederation, depositary of the Conventions.**

The present article is identical with Article 81 of Draft Protocol I.

Ratification means the international act whereby a Party to the Conventions will establish on the international plane its consent to be bound by the Protocol. [22]

This article recalls that the depositary of the Conventions, already mentioned in Article 38 of the present draft, is the Swiss Confederation, on whose territory have taken place, since more

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[19] United Nations, Secretariat, *Handbook of Final Clauses*, ST/LEG. 6 (5 August 1957).

[20] See Vienna Conv. 1969, *United Nations Conferences on the Law of Treaties*, first and second sessions, *Official Records*, United Nations, New York, 1971, Sales No.: E.70.V.5. This document also contains the *Draft articles on the law of treaties with commentaries*, adopted by the International Law Commission at its eighteenth session.

[21] See, on this subject, Vienna Conv. 1969, Art. 10, 12, 14 and 18.

[22] See Vienna Conv. 1969, Art. 2 (*b*) and 14.

than a hundred years, the various diplomatic conferences that have elaborated the Conventions for the Protection of War Victims. It was thought necessary, on the basis of the Vienna Convention on the Law of Treaties, [23] to mention here the depositary State.

This article should be read in conjunction with Article 45, relating to the depositary's functions, and Article 43, entitled *Entry into force.*

### Article 42. — Accession

**The present Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary of the Conventions.**

The present article is identical with Article 82 of Draft Protocol I.

Accession means the international act whereby a Party to the Conventions will establish on the international plane its consent to be bound by the Protocol, of which it might not be a signatory, in accordance with Article 40. [24] Unlike the Conventions which, by virtue of their common article on accession (Art. 60/59/139/155), are treaties open to all, this additional Protocol will be open only to the Parties to the Conventions. This provision, in order to take into account the development of the law of treaties, [25] does not contain the condition — included in the above-mentioned common article—that accession will not take place before the entry into force of the Protocol. The most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, so as to ensure the effectiveness of the procedure of conclusion of treaties.

This article should be read in conjunction with Article 45, relating to the depositary's functions, and Article 43, entitled *Entry into force.*

### Article 43. — Entry into force

**1. The present Protocol shall enter into force six months after two instruments of ratification have been deposited.**

**2. For each Party to the Conventions ratifying or acceding to the present Protocol thereafter, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.**

The present article is identical with Article 83 of Draft Protocol I.

It restates the modalities and time-limits laid down in the article common to the Conventions relating to their entry into force (Art. 58/57/138/153). It thus stipulates that the Protocol is to enter into force six months after *two* instruments of ratification have been deposited. The time-lag, provided for in the two paragraphs, between the establishment of consent by a Party to the Conventions to be bound by the Protocol and the entry into force of the Protocol with respect to that Party, is to enable the latter to take such preliminary steps, particularly legislative and administrative measures, as will be necessary in view of the new obligations it will assume; most recent multilateral treaties provide for a period of time between those two moments.

The Conventions contain a provision (Art. 62/61/141/157) under which the situations provided for in their common Article 3 " shall give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict before or after the beginning of hostilities or

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[23] See Vienna Conv. 1969, *Part VII. — Depositaries, notifications, corrections and registration* (Art. 76 to 80).

[24] See Vienna Conv. 1969, Art. 2 (*b*) and 15.

[25] See Vienna Conv. 1969, Art. 15.

occupation ". The Conference of Government Experts did not examine this question when it studied the 1972 draft. If the introduction of such a provision in Protocol II were judged necessary, the said article of the Conventions could then be taken as a basis.

**Article 44. — Amendment**

**1. Any High Contracting Party may propose one or more amendments to the present Protocol. The text of any proposed amendment shall be communicated to the depositary of the Conventions which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.**

**2. The depositary of the Conventions shall invite to this conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of the present Protocol.**

This article, which deals with the process of the amendment of the Protocol, restates, in its essential parts, Article 86 of Draft Protocol I.

Though, in this respect, the Conventions are entirely governed by the rules of customary international law, enshrined today in the Vienna Convention on the Law of Treaties, [26] it is considered necessary to lay down in the present draft the process relating to proposals to amend this instrument. It should be mentioned, in this connection, that the United Nations International Law Commission pointed out, in its commentaries to its draft articles on the law of treaties (Art. 35 and 36), [27] that " the proliferation of multilateral treaties had led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment ".

The ICRC, fully aware of the complexity of the problems raised by such an article, presents this proposal so that it might be subjected to more detailed consideration.

*Title*

The choice of the title of the present article was determined on the basis of certain indications given by the International Law Commission in its commentaries mentioned above: while the term " amendment " is at times used in relation to individual provisions of a treaty and the term " revision " for a general review of the whole treaty, there does not appear to be any difference in the legal process. It therefore seems sufficient to speak of " amendment ", this being a term which will cover both the amendment of particular provisions and a general review of the whole Protocol.

*Paragraph 1*

This paragraph, which states first the conditions that must be fulfilled in order to present a proposal to amend the Protocol, lays down the process to be followed for the examination of this proposal: the depositary of the Conventions shall decide, after consultation with the Contracting Parties and the ICRC, whether a conference should be convened for this purpose. This provision therefore does not say (1) what are the criteria on which the depositary of the Conventions will base its decision, and (2) what are the conditions under which an amendment may be adopted and come into force.

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[26] See Vienna Conv. 1969, *Part IV. — Amendment and modifications of treaties* (Art. 39 to 41).

[27] See the reference given in note 20.

As regards the function of the depositary, it should be pointed out that, in accordance with the above-mentioned general rules of the law of treaties, [28] the depositary shall notify each of the Contracting Parties of any proposed amendment, and ask what action is to be taken in regard to such proposal; on the basis of the replies received—and also after consultation with the ICRC, which pays close attention to questions concerning the application and development of the Geneva Conventions—the depositary shall decide whether a conference should be convened to consider the proposed amendment. No doubt, this is an important function that is thus conferred upon the depositary of the Conventions. But Article 77 of the Vienna Convention on the Law of Treaties provides that that depositary may perform, in addition to the functions customarily conferred upon it (see Art. 45 of the present draft), any other functions that may be specified. [29] Article 76 (2) of the same Convention also states that " the depositary is under an obligation to act impartially " in the performance of its functions. It is recognized that in all cases the drawing up of an amending instrument is caught up in the functions of the depositary.

With regard to the adoption and entry into force of an amendment, it may be noted that the said Vienna Convention contains an article [30] which, while it includes a formulation of the basic rules concerning the process of amendment, does not attempt, given the great variety of amendment clauses found in multilateral treaties, to frame a comprehensive code of rules regarding the amendment of treaties. The *Handbook of Final Clauses*, prepared by the United Nations, [31] shows that certain clauses concerning the adoption and entry into force of an amendment require its acceptance by all the Parties to the treaty, that others admit some form of qualified majority as sufficient, while others still provide for the use of the two preceding conditions (unanimity, qualified majority) according to the provisions to be amended.

While recognizing that it would be virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the Parties to the Protocol (unanimity rule) [32] and that one is led, in the law of treaties, to an increasing practice of bringing amending agreements into force as between those Parties willing to accept the amendment, the ICRC considers nevertheless that it is essential—in order to maintain the universality of the rules regarding the protection of the victims of armed conflicts—to avoid, to the utmost, the creation of distinct communities of Parties to the Conventions.

*Paragraph 2*

It is desirable to associate those that are entitled to become Parties to the Protocol and, consequently, to the amended Protocol, that is—in accordance with Articles 40 and 42— the Parties to the Conventions, with the examination of a proposed amendment. There remains still the question whether the right of only the Parties to the Protocol to proceed with the negociation and conclusion of an amending agreement in order to embody in it desired improvements should be recognized: this raises complex problems of procedure regarding the adoption and entry into force of amendments. The Vienna Convention of 1969, in this respect, only provides the following: " Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended ". [33]

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[28] See Vienna Conv. 1969, Art. 40: *Amendment of multilateral treaties.*

[29] Vienna Conv. 1969, Art. 77, para. 1 (*h*).

[30] See Vienna Conv. 1969, Art. 40: *Amendment of multilateral treaties.*

[31] See note 19 for the reference to the *Handbook of final clauses.*

[32] Such a procedure is, however, provided for in Article 39 of the Hague Convention of 1954, entitled

[32] Such a procedure is, however, provided for in Article 39 of the Hague Convention of 1954, entitled *Revision of the Convention and of the Regulations for its Execution*, which some experts would have wished to take as a basis.

[33] See Vienna Conv. 1969, Art. 40, para. 3.

**Article 45. — Notifications**

**The depositary of the Conventions shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of the present Protocol, of the following:**

**(*a*) signatures affixed to the present Protocol and the deposit of the instruments of ratification and accession under Articles 41 and 42;**

**(*b*) the date of entry into force of the present Protocol under Article 43;**

**(*c*) communications and declarations received under Article 44.**

The present article, taking into account the Vienna Convention on the Law of Treaties, [34] sets forth the functions customarily assigned to a depositary; it restates, in its essential parts, Article 88 of Draft Protocol I.

Under certain provisions of the present draft, any notifications or communications shall, as the case may be, be transmitted to the depositary, who, under this article, shall take steps to inform the other Parties concerned. Had this clause enumerated all the functions of the depositary, it could have undoubtedly been entitled " Functions of the depositary ". But such is not the case: on the one hand, the law of treaties confers upon the depositary a number of duties, which are so generally known that it did not appear necessary that they should be here reaffirmed,[35] and, on the other hand, the present draft, in addition, requires the despositary to perform certain functions, which, because of their different character (see Art. 38), cannot be included in the list in this article. The title of the article is derived from indications appearing in the *Handbook of Final Clauses*, [36] which places a provision of this kind under the heading " Clauses providing for notifications by the Depositary ".

In order to ensure the widest possible participation in the Protocol, it will be the function of the depositary to inform all those entitled to become Parties to the Protocol, that is—under Articles 40 and 42—all the Parties to the Conventions.

*Sub-paragraph (c)*

Under Article 44, the text of any proposed amendment to the Protocol put forward by a Contracting Party must be communicated by the latter to the depositary, who, in accordance with the present article, will inform all the Parties concerned. Of course, if, as suggested in the commentary on Article 44, the amending process of the Protocol were to be supplemented in accordance with the rules of the law of treaties, the depositary might also be called upon to inform all the Parties concerned of the declarations whereby the Contracting Parties would accept amendments, as well as objections to amendments notified to it and the date of the entry into force of the amendments.

**Article 46. — Registration**

**1. After its entry into force, the present Protocol shall be transmitted by the depositary of the Conventions to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.**

**2. The depositary of the Conventions shall also inform the Secretariat of the United Nations of all ratifications and accessions received by it with respect to the present Protocol.**

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[34] See Vienna Conv. 1969, Art. 76 (*Depositaries of treaties*) and Art. 77 (*Functions of depositaries*).

[35] See Vienna Conv. 1969, Art. 77.

[36] The reference to the *Handbook of Final Clauses* is given above in note 19.

This article is based on a final clause of the Conventions (Art. 64/63/143/159) and on Article 80 of the Vienna Convention on the Law of Treaties. [37] It is identical with Article 89 of Draft Protocol I.

**Article 47. — 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 of the Conventions, which shall transmit certified true copies thereof to all the Parties to the Conventions.**

**2. The depositary of the Conventions shall arrange for official translations of the present Protocol to be made into... .**

This article is based on a final clause of the Conventions (Art. 55/54/133/150).

*Paragraph 1*

As in the Conventions, it is provided that only the French and English texts are to be regarded as authentic. Both will be treated on a footing of equality.

In accordance with the law of treaties, [38] the depositary shall prepare certified copies of the original text and any further text in such additional languages as may be required under paragraph 2 and transmit them to the Parties to the Conventions.

*Paragraph 2*

After drawing up the two authentic texts, the Diplomatic Conference may entrust the preparation of official translations of the Protocol into other languages to the depositary. The Conventions provided for such translations to be made in Russian and Spanish. This is to avoid the production of a variety of different versions in the same language.

These versions will be official in that the body which will prepare them will be specified by the Conference itself. But, unlike the French and English, these texts will not be authentic.

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[37] Vienna Conv. 1969, Art. 80: *Registration and publication of treaties.*

[38] Vienna Conv. 1969, Art. 77, para. 1 (*b*).