OFFICIAL RECORDS

OF THE

DIPLOMATIC CONFERENCE
ON THE REAFFIRMATION AND DEVELOPMENT
OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE
IN ARMED CONFLICTS

GENEVA (1974 -1977)

VOLUME IX-

INTRODUCTORY NOTE

Volume I contains the Final Act, the resolutions adopted by the Conference, and the draft Additional Protocols prepared by the International Committee of the Red Cross. Volume II contains the rules of procedure, the list of participants, the *Désignation aux différents postes de la Conférence**, the *Liste des documents**, the report of the Drafting Committee and the reports of the Credentials Committee for the four sessions of the Conference. Volumes III and IV contain the table of amendments. Volumes V to VII contain the summary records of the plenary meetings of the Conference. Volumes VIII to X contain the summary records and reports of Committee I. Volumes XI to XIII contain the summary records and reports of Committee II. Volumes XIV and XV contain the summary records and reports of Committee III, and volume XVI contains the summary records and reports of the *Ad Hoc* Committee on Conventional Weapons. Volume XVII contains the table of contents of the sixteen volumes.

The Official Records of the Conference are published in all the official and working languages of the Conference. In the Russian edition, as Russian was an official and working language of the Conference only from the beginning of the second session, the documents of which no official translation was made in Russian are reproduced in English. The Arabic edition of the Official Records contains only the documents originally issued in Arabic and those translated officially into Arabic after Arabic became an official and working language at the end of the third session. The Final Act only has been translated into Chinese.

---

*Document circulated in French only.

On sale at *Eidg. Drucksachen - und Materialzentrale*, 3000 Bern, and at booksellers.

OFFICIAL RECORDS

OF THE

DIPLOMATIC CONFERENCE
ON THE REAFFIRMATION AND DEVELOPMENT
OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE
IN ARMED CONFLICTS

GENEVA (1974 - 1977)

VOLUME IX

Federal Political Department
Bern, 1978

OFFICIAL RECORDS

OF THE

DIPLOMATIC CONFERENCE
ON THE REAFFIRMATION AND DEVELOPMENT
OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE
IN ARMED CONFLICTS

CONVENED BY THE SWISS FEDERAL COUNCIL
FOR THE PREPARATION OF TWO PROTOCOLS ADDITIONAL
TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949
PROTOCOL I RELATING TO THE PROTECTION OF VICTIMS
OF INTERNATIONAL ARMED CONFLICTS
PROTOCOL II RELATING TO THE PROTECTION OF VICTIMS
OF NON-INTERNATIONAL ARMED CONFLICTS

HELD AT GENEVA ON THE FOLLOWING DATES:

20 FEBRUARY – 29 MARCH 1974 (FIRST SESSION)
3 FEBRUARY – 18 APRIL 1975 (SECOND SESSION)
21 APRIL – 11 JUNE 1976 (THIRD SESSION)
17 MARCH – 10 JUNE 1977 (FOUTH SESSION)

PREPARATION

OF THE TWO PROTOCOLS ADDITIONAL
TO THE GENEVA CONVENTIONS OF 1949,
PROTOCOL I RELATING TO THE PROTECTION OF VICTIMS
OF INTERNATIONAL ARMED CONFLICTS
PROTOCOL II RELATING TO THE PROTECTION OF VICTIMS
OF NON–INTERNATIONAL ARMED CONFLICTS

REAFFIRMING AND DEVELOPING THE FOLLOWING FOUR GENEVA CONVENTIONS:

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITONS OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD OF AUGUST 12, 1949

GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA OF AUGUST 12, 1949

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF AUGUST 12, 1949

VOLUME IX

CONTENTS

SUMMARY RECORDS OF COMMITTEE I

THIRD SESSION

(Geneva, 21 April - 11 June 1976)

COMMITTEE I

SUMMARY RECORDS OF THE FORTY-SECOND TO SIXTY-FIFTH MEETINGS

held at the International Conference Centre, Geneva

from 22 April to 9 June 1976

Chairman: Mr. E. F. OFSTAD (Norway)

Rapporteur: Mr. A. E. de ICAZA (Mexico)

CONTENTS

Page

SUMMARY RECORD OF THE FORTY-SECOND (OPENING) MEETING

held on Thursday, 22 April 1976, at 10.20 a.m.

Chairman: Mr. OFSTAD (Norway)

ORGANIZATION OF WORK

1. The CHAIRMAN welcomed representatives and expressed the hope that Committee I would be able to complete its work during the third session, being ready to compromise where necessary. While the Committee had adopted only one article (article 1) at the first session of the Conference, that was not an insignificant result in view of the particularly complex and controversial nature of the problems concerned. At the second session the Committee had adopted twenty articles, and had reason to be satisfied at having resolved, by consensus, the difficult question of the appointment of Protecting Powers and of their substitute. The Committee would nevertheless have to increase its rate of progress in order to complete its work at the present session.

2. The main items before Committee I were as follows: repression of breaches of the 1949 Geneva Conventions and of Protocol I (articles 74 to 79 of draft Protocol I submitted by the International Committee of the Red Cross (ICRC)); the question of reprisals; the remaining provisions of Part II of draft Protocol II on humane treatment of persons in the power of the parties to the conflict, and, lastly, the preambles and final provisions of both Protocols.

3. He drew the attention of representatives to the proposal (CDDH/I/233) to supplement article 1 of draft Protocol I as adopted by the Committee at the first session. He then described the preliminary plan of work suggested by the Secretariat. Committee I would hold twenty-one meetings. The first article it would have to consider was article 74 of draft Protocol I. In doing so it would be starting upon an important section - Section II of Part V, entitled "Repression of breaches of the Conventions and of the present Protocol" - which raised a number of difficult points. The Committee might deal with it by first having a short general debate on the Section as a whole, and the many problems created by the various draft articles, followed by the introduction of each article with its amendments and a brief discussion. Some delegations had suggested to the Chair that consideration of Section II might be entrusted to an ad hoc working group on which experts from Ministries of Justice would sit. The delegations concerned hoped that if the Committee adopted the proposal it would

set a date as soon as possible for the beginning of the working group's activities in order to enable the experts to arrange to travel to Geneva.

4. While Working Group A had completed all its assignments at the second session, Working Group B still had to conclude its consideration of articles 9 and 10 of draft Protocol II. Shortly before the end of the second session a Working Sub-Group, under the chairmanship of Mr. de Breucker (Belgium), had been set up to continue consideration of the two articles.

5. Mr. MILLER (Canada) felt that the working procedures adopted at the second session should be continued. The Committee had two very important questions to consider at the present session - repression of breaches and reprisals. Working Group A might continue to deal with the articles in draft Protocol I on the first question, while Working Group B would take up the articles of draft Protocol II on the second.

6. He wondered whether the setting up of another ad hoc working group was really essential. While he was not absolutely against it, he would ask the Committee to proceed cautiously in the matter. He had no difficulty with the overall organization of the Committee's work.

7. Mr. FREELAND (United Kingdom) agreed generally with the representative of Canada, but saw some attraction in the idea of setting up an ad hoc working group to consider the question of repression of breaches, in view of the complex technical issues involved. The Chairman might sound out representatives on that idea informally and, in the meantime, invite the Committee to start its own substantive consideration of the question as soon as possible.

8. The CHAIRMAN read out a note in which the Secretary-General of the Conference submitted to the Chairman of Committee I a memorandum, prepared by a group of non-governmental organizations invited to the Conference as observers, concerning both draft Protocols. The organizations concerned requested that the document should be circulated to all delegations as an official document of the Conference.

9. Under rule 61 of the rules of procedure of the Conference, it was for the Conference and its Main Committees to decide as the case arose whether observers should be permitted to present written or oral statements on problems relating to their spheres of activity. The Secretary-General asked the Chairman to let him know

whether, with regard to the articles it had to discuss, Committee I would allow the memorandum to be circulated as an official document.

10. He pointed out that the memorandum had been signed by forty-one non-governmental organizations. He asked whether members had any objection to the document being circulated.

There being no objection, it was decided that the memorandum could be circulated. 1/

11. Mr. HUSSAIN (Pakistan) felt that the Committee should not discuss working procedures before it had looked more closely into the proposed programme. He suggested that discussion of the matter should be adjourned, after a deadline had been set for the submission of amendments.

12. Mr. BALKEN (Federal Republic of Germany) said that while he was aware that the Committee had to complete its work as quickly as possible, he nevertheless felt that the proposal to set up additional working groups should be looked into carefully. He would like the question of the repression of breaches to remain within the competence of one of the working groups set up at previous sessions, which could ask a sub-group to study the matter. That would ensure a degree of consistency in the programme as a whole.

13. Mrs. HJERTONSSON (Sweden) agreed with that view. It would be best to maintain the two working groups set up previously, and to entrust the question of repression of breaches to Working Group A.

14. Mr. de BREUCKER (Belgium) said that he, too, failed to see the need to establish additional working groups. The working arrangements made at the first and second sessions seemed perfectly sound, and it would be logical for the study of the repression of breaches to be given to Working Group A, which could set up more specialized units for the detailed study of certain provisions and, if necessary, invite particularly well-qualified individuals to participate.

15. Mr. KUNUGI (Japan) thought it might perhaps be useful to ask the Chairman to prepare a document, with the help of the Secretariat, setting forth working procedures and a work programme, which could be circulated at the end of the afternoon. He agreed with the representative of Pakistan that the discussion on working procedures should be deferred until later.

1/ The memorandum was later circulated as document CDDH/Inf/224.

16. Mr. KAKOLECKI (Poland) considered that a proliferation of working groups would be undesirable, and that the problem of grave breaches and reprisals could be studied either in the Committee itself, or within the existing working groups.

17. Mr. BETTAUER (United States of America) said that the Committee should avoid any waste of time. If it was not possible to settle the question of working procedures immediately, it should be postponed until later, and the meeting should either be adjourned or begin considering the Committee's programme forthwith.

18. Mr. HUSSAIN (Pakistan) said that there was no need to change the working procedures already adopted. They had proved their worth, and had been considered perfectly satisfactory at the end of the second session.

19. Mr. REIMANN (Switzerland) agreed with that view. If no one was ready to discuss articles 74 to 79 of draft Protocol I immediately, it would be best to adjourn the debate, and take up the matter again at the beginning of the forty-third meeting on the basis of the working procedures used previously.

20. Mr. MILLER (Canada) agreed with those comments, but considered that it would only be possible to start the work on articles 74 to 79 properly on Monday, 26 April, with the participation of legal experts.

21. Mr. GIRARD (France) agreed with those who had expressed concern about the proliferation of working groups. He, too, would prefer the Committee to keep to the two existing Working Groups, the Chairmen of those groups being of course free to establish whatever sub-groups they thought necessary for the study of particular questions. He would prefer the Committee not to begin its consideration of articles 74 to 79 of draft Protocol I until the following day, particularly since the amendment to article 74 bis, submitted by France at the second session, had been revised, and the revised text was to be circulated later in the day. 2/

2/ The revised amendment was later circulated as document CDDH/I/221/Rev.1.

22. Mr. de ICAZA (Mexico), Rapporteur, said, in reply to a question from Mr. BETTAUER (United States of America), that the ICRC representative was not able to introduce articles 74 to 79 of draft Protocol I because at the General Committee meeting on the previous day a provisional time-table had been drawn up under which the Committee would examine in plenary articles 36 to 39 of draft Protocol II from 21 to 23 April, and the articles of draft Protocol I beginning on 26 April.

23. Mr. FREELAND (United Kingdom) said that, since the idea of establishing an ad hoc working group to consider the question of repression of breaches had not gained further support in the Committee, his delegation did not wish to pursue that idea and would rally to the majority view that the Committee should keep to the working procedure adopted at previous sessions, accordingly entrusting the consideration of articles 74 to 79 to Working Group A.

24. After a procedural discussion, in which Mr. BETTAUER (United States of America), Mr. de BREUCKER (Belgium), Mr. OBRADOVIĆ (Yugoslavia), Mrs. HJERTONSSON (Sweden), Mr. LONGVA (Norway), Mr. MILLER (Canada) and Mr. HUSSAIN (Pakistan) took part, the CHAIRMAN suggested that the Committee should start its consideration of articles 74 to 79 of draft Protocol I at its forty-third meeting and begin with a brief general discussion on those articles as a whole.

It was so agreed.

The meeting rose at 11.45 a.m.

SUMMARY RECORD OF THE FORTY-THIRD MEETING

held on Friday, 23 April 1976, at 10.20 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 74 - Repression of breaches of the present Protocol (CDDH/1, CDDH/210, annex 2, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/57, CDDH/I/85, CDDH/I/253)

Article 75 - Perfidious use of the protective signs (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2)

Article 76 - Failure to act (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2)

Article 77 - Superior orders (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/255)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/256, CDDH/I/266)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2)

1. The CHAIRMAN invited the representative of the International Committee of the Red Cross (ICRC) to express the views of his organization on articles 74 to 79 of draft Protocol I.

2. Mr. PILLOUD (International Committee of the Red Cross) reminded the Committee that the topic of the repression of breaches of humanitarian law had been under discussion for very many years. The most recent codification was that made in the 1949 Geneva Conventions, and most of the experts consulted would like to see the same system followed in draft Protocol I. It had not been easy to draft the appropriate provisions, and the sessions of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in 1971 and 1972, had yielded somewhat contradictory results. The ICRC had finally drawn up the articles embodied in draft Protocol I, which were briefly considered in the ICRC Commentary (CDDH/3, pp. 93-99). Since the presentation of those articles, a number of representatives and experts had expressed their concern to the ICRC regarding those texts, which, in their opinion, did not deal adequately with the question under consideration. In view of that

concern, and under the auspices of the San Remo International Institute of Humanitarian Law, the ICRC had consulted in 1974 some penal law experts; and in the light of those consultations it had been able, on 3 March 1975, to submit document CDDH/210, annex 2, entitled "Additional study of article 74 of draft Protocol I on the repression of breaches of that instrument".

3. Taking into account the opinions it had obtained, the ICRC had formulated a new proposal for article 74 (CDDH/210, annex 2), listing the acts that should be considered as grave breaches of Protocol I.

4. In September 1975, at a meeting held in San Remo, the ICRC had also considered the same question without, however, reaching very different conclusions. A new idea had nevertheless been introduced, namely, that a distinction should be made between the manner of dealing with breaches committed on the battlefield and those committed in other areas. Attention had likewise been drawn to the fact that it seemed difficult to determine what were grave breaches by defining the persons and objects affected by them. Indeed, there did not appear to be any intention of including, in the definitions under article 2 of draft Protocol I, a definition of the persons and objects protected by the Protocol.

5. It was most regrettable that despite all its efforts, the ICRC was as yet unable to offer a solution reflecting a consensus, even partial. On the contrary, it seemed that opinions on the point were still very divided. In connexion with article 74, the Conference had before it several amendments submitted by the Philippines (CDDH/I/57), the German Democratic Republic (CDDH/I/85) and Australia (CDDH/I/253). Other amendments, relating to articles 75 to 79 would be submitted as those articles came up.

6. The problem of the repression of breaches of Protocol I remained a difficult one. If it proved impossible to reach agreement, there might perhaps be no choice but to rest content with a very short article providing simply that the Contracting Parties should take all the necessary legislative and other measures to prevent breaches of the Protocol. If such a solution were envisaged, the ICRC experts would, of course, be ready to co-operate in drafting a text.

7. Lastly, he noted that Committee II had laid down in article 11 of draft Protocol I, that carrying out medical or scientific experiments on a wounded or sick person would be considered a grave breach of the Protocol. In the light of any solution adopted for article 74, it would be necessary to redraft that article.

8. Mr. MILLER (Canada) said that he had been very interested in the statement by the representative of the ICRC, in which the latter had recalled the efforts made to arrive at a text for article 74 the terms and scope of which could command general approval. He had referred, in that connexion, to the work done at the San Remo meeting with the penal law experts of the International Institute of Humanitarian Law.

9. In the course of those deliberations, two trends appeared to have emerged: one sought to broaden the concept of grave breach by including other breaches therein; the other sought to proceed with great caution with regard, in particular, to the inclusion of breaches committed on the battlefield in the category of grave breaches.

10. Moreover, consideration of the proposed amendments to article 74 appearing in document CDDH/225 and Corr.1, and particularly the new text submitted by the ICRC (CDDH/210, annex 2), showed a tendency to broaden the scope of the article to take account of certain aspects of Parts III and IV of draft Protocol I. Such enlargement could not fail to raise awkward problems when it came to practical application, and that was why the Canadian delegation, whose approach was similar to that of the representative of the ICRC, deemed that the utmost caution would be necessary if that course was taken.

11. Mr. SHELDOV (Byelorussian Soviet Socialist Republic), stressing the importance his country attached to ensuring effective prosecution and punishment of persons guilty of war crimes and crimes against humanity, reminded those present that, at the initiative of the Byelorussian delegation, the United Nations General Assembly had adopted at its first session resolution 95 (I) on the extradition and punishment of war criminals.

12. The system of punishment set out in the Geneva Conventions of 1949, and based on the obligation of Parties to those Conventions to detect and punish persons guilty of serious breaches of the Conventions, or to hand them over to another Party for punishment, must be extended to Protocol I. Since the adoption of the Geneva Conventions of 1949 several important instruments of international law had been approved, developing the provisions concerning punishment for war crimes and crimes against humanity. In particular, mention must be made of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)); the International Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly resolution 3068 (XXVIII)), and also General Assembly resolution 3074 (XXVIII) -

"Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity", adopted by the General Assembly in 1973.

13. The abovementioned Principles laid down that "war and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment." The Principles were fully in line with those enshrined in the Geneva Conventions, and the relevant articles of the draft Protocols should be strengthened.

14. Mr. ABI-SAAB (Egypt) observed that the controversy over the status of humanitarian law was largely a function of the probability of its observance in practice. One of the main questions to which the Diplomatic Conference had to address itself was how to bring about a high correlation between humanitarian rules and actual behaviour in specific situations. His delegation always considered that prevention was the most potent guarantee and consistently sought to perfect the system of scrutiny of implementation. BBut with the disappointingly loose system of scrutiny adopted in article 5 of draft Protocol I, it was now necessary to concentrate on the repression of breaches as remedial action.

15. Addressing himself to the procedural aspects of the question, he recalled the ICRC representative's statement to the effect that the system of repression of grave breaches in the Conventions had never been enforced. He considered it wiser to try to perfect that system rather than to adopt a new and more ambitious approach whose application risked facing even greater obstacles in practice. For example, paragraph 2 of article 78 of draft Protocol I could be interpreted as imposing an obligation on States to extradite their own nationals. Such an obligation would go against the constitutions of many States, and would reduce the probability of implementing the system in practice. It was thus important to adopt a realistic approach which could lead to a workable system.

16. Mr. BETTAUER (United States of America) observed that there were several ways in which the question dealt with in article 74 might be approached. Reference should be made to the ICRC draft article 74 (CDDH/1) and its revision (CDDH/210, annex 2) and to the various amendments submitted. None of the solutions proposed was satisfactory and they would, moreover, fundamentally alter the scope and character of the system advocated for the repression of grave breaches.

17. Two approaches might be envisaged: to undertake a fundamental revision of the criteria applied to define the term "grave breaches", which was likely to prove a lengthy and difficult task; or to adhere to the system provided for in the 1949 Geneva Conventions, subject to some minor refinements. In drafting provisions on which penal sanctions would be based, it was of the utmost importance to proceed with extreme caution and to be clear and precise, since there was a danger that any ambiguity in the provisions, far from reinforcing humanitarian law, might be used for political purposes. A text that was unduly ambitious might thus hamper the application of the Conventions. The United States believed the system should remain fundamentally the same as under the Conventions and consequently any extension of the scope of the provisions of the Conventions relating to grave breaches to render them applicable to violations of Protocol I should be limited to persons of the same type as those covered by the Conventions, i.e. basically those in the power of an adversary. Other violations of the Protocol should be classed as breaches which the Parties were under a duty to repress, but which were not made universal crimes subject to extradition. The existing provisions relating to grave breaches or to new breaches which were strictly analogous to them, might prove difficult to apply if extended to different kinds of violations of the Protocol. The system applicable to grave breaches was designed to cover situations involving persons in the hands of an adversary and definite breaches concerning specific objects. His delegation inclined to the view that the system covering grave breaches should apply to violations of the Protocol only when committed against protected persons within the meaning of articles 42 and 64 of draft Protocol I. Other breaches of the Protocol would be treated as breaches of the Geneva Conventions with respect to which States Parties and parties to conflicts would be under an obligation to take the necessary measures to repress.

18. He thought it would prove difficult to draft a provision, as the ICRC had endeavoured to do, in which grave breaches would be defined by giving a list of violations of Protocol I, since a list of that kind could give rise to lengthy discussion. For example, such phrasing as "attacks launched against military objectives which cause disproportionate losses among the civilian population", appearing in paragraph 2 (c) of document CDDH/210,annex 2, resulted in a standard so imprecise as to create the risk that any soldier involved in the conduct of warfare, would without intentional violation of the Protocol's provisions, be open to charges of war crimes. His delegation consequently considered that the term "grave breaches" should apply only in cases where the persons concerned were in the hands of the adversary, in other words to "protected persons" and to "protected objects" within the meaning of the 1949 Geneva Conventions, and to the persons

referred to in articles 42 and 64 of draft Protocol I. The definitions of what was meant by "protected persons" and "protected objects" in article 2 would no longer be needed and could be deleted, as could article 78 relating to extradition, since the question was dealt with in Articles 49 and 50, of the first Geneva Convention of 1949 and Articles 129 and 146 of the third Geneva Convention.

19. That being said, his delegation was wholeheartedly in favour of the repression of all breaches of Protocol I and would like the provisions of the 1949 Geneva Conventions requiring the Contracting Parties to take the necessary steps to repress all acts contrary to the Conventions including acts other than grave breaches to be made applicable to the Protocol.

20. Mr. GRAEFRATH (German Democratic Republic) said that his delegation recognized that the question of repressing breaches of the Conventions or of the Protocol was of the utmost importance for the execution of those instruments. He remembered the effect of the announcement by the allies during the Second World War that those responsible for war crimes would be punished and brought back to the countries where their crimes had been committed. He remembered also the long-lasting effect of the Nürnberg trials and the importance of the moral and legal values thus established. His delegation was convinced that those values were still recognized at the present time. It was, however, fully aware that the Conference must confine itself to drafting additional provisions to the 1949 Geneva Conventions and not try to elaborate a complete system of international criminal jurisdiction. For that reason, while paying due tribute to the work done by the Philippine delegation, his delegation felt that the proposal made by that delegation (CDDH/I/57) went beyond the competence of the Conference.

21. His delegation considered that three general principles should be respected.

22. Firstly, the Conference should follow the system for which provision was already made in the Geneva Conventions - in other words, a distinction should be made between breaches and grave breaches. His delegation considered that distinction important, since the term "grave breaches" placed an obligation on each Contracting Party to enact legislation providing effective penal sanctions for persons committing or ordering such breaches, to search for such persons and, regardless of their nationality, to bring them before its own courts or to hand them over for trial to another Contracting Party concerned. That first principle also afforded the accused person the safeguards of proper trial and defence.

23. The second principle was the following: in Protocol I, the definition of "grave breaches" should not repeat what was already covered by the Geneva Conventions but should be confined to new aspects.

24. The third principle was that the definition of "grave breaches" must comprise not only Part II, but also Parts III and IV of Protocol I, for it was desirable that the provision should apply at the same level to grave breaches against wounded, sick and shipwrecked persons; to grave breaches relating to the methods and means of combat; and to grave breaches against the civilian population. Any other approach would be unacceptable to the delegation of the German Democratic Republic, which could not countenance any differentiation between the various parts of the Protocol. For that reason, he proposed that any isolated reference to protected persons and objects should be avoided. A reference of that kind was to be found in the Conventions, but did not fit into Protocol I.

25. A similar approach to that of his delegation was to be found in the suggestions put forward by the ICRC in document CDDH/210, annex 2, para. 2, which he was prepared to support. His delegation set store not so much by the actual wording of its amendment (CDDH/I/85) as by the principles he had just outlined.

26. During unofficial discussions, he had observed that most of the arguments advanced against that approach started from the assumption that the provisions in question were directed only against the armed forces of the enemy and that it was necessary to define "grave breaches" as narrowly as possible in order to protect the armed forces against possible prosecution. That argument did not seem really convincing. The object was to provide guidelines for the penal legislation of the Contracting Parties, to underline the importance that must be attached to specific provisions of the Protocol and to their violation, and to convey to the armed forces of each Contracting Party the moral and legal value that Governments were prepared to give to the provisions of the Protocol. His delegation reserved the right to revert to article 74 in detail at a later stage.

27. So far as the other articles were concerned, his delegation was more or less able to accept them as a starting-point for discussion. It supported the amendment to article 77 (CDDH/I/255) submitted by the Australian delegation, and was prepared to co-sponsor it. It was not sure whether article 78 was an improvement on the existing provisions of the Geneva Conventions, but it was ready to support that text, subject to minor changes designed to bring it into line with certain other conventions.

28. Mr. GLORIA (Philippines) said that he did not agree with the representatives who had stated that the provisions of the 1949 Geneva Conventions and draft Protocol I should remain unchanged and that his delegation's proposal (CDDH/I/57) was unduly ambitious. That attitude would be tantamount to saying that the Geneva Conventions and Protocol I were nothing more than simple statements of principle. He reserved the right to revert to his "Draft Code of International Crimes in Violation of the Geneva Conventions of 1949 and the draft Additional Protocols" (CDDH/56/Add.1).

29. Miss POMETTA (Switzerland) said that for the time being she would do no more than make a few comments on the question of the repression of grave breaches. She would revert to article 74 bis later.

30. The system of repression of breaches had been instituted by the four Geneva Conventions of 1949, and the first point was to decide whether or not to extend the system.

31. The system of the Conventions defining grave breaches committed against protected persons or protected objects was clearly due for revision, since certain rules on the law of war were incorporated in draft Protocol I. That being so, the question arose whether the system of grave breaches should be widened to include certain standards arising from The Hague Law. Secondly, how were the grave breaches not covered by the four Geneva Conventions to be defined? The task had originally seemed simple enough, since it was hoped to have a complete and precise list of the persons and objects protected by Protocol I in article 2 (c), but that had not been possible.

32. The four Conventions, on the other hand, contained an exhaustive list of grave breaches based on the principle nullum crimen sine lege. Draft article 74 appeared to be based on the same principle, but on closer examination it would be seen that it applied to grave breaches which were neither defined nor specified even though universal jurisdiction would govern their repression. In the opinion of the Swiss delegation the definition of grave breaches should be clear and precise. Committee II had adopted in that connexion a wise solution by laying down, for example, in article 11, paragraph 4, that a breach of the rules defined in that article would constitute a grave breach. That method could perhaps be systematized.

33. Lastly, the Swiss delegation proposed the deletion of articles 74, 75, 76, 77, 78 and 79 which seemed to it to be badly planned and drafted. Articles 78 and 79 were not an advance on the Geneva Conventions. The principle aut dedere, aut punire must remain valid. The proposed deletion would not create any gaps, since draft

Protocol I stipulated over and over again that parties were under the obligation to ensure the application of that instrument which would lead States to adapt their relevant national legislation even when not bound by Protocol I to do so.

34. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that his delegation attached great importance to the articles dealing with the repression of breaches of the 1949 Geneva Conventions and of Protocol I. The Committee should scrutinize attentively the criteria to be applied in determining whether a grave breach had occurred. The proposals tabled by the ICRC in document CDDH/210, annex 2, appeared to offer a satisfactory basis for the drafting of article 74. His delegation held, however, that it was not enough to stop at the list of grave breaches enumerated in that document; the list should be supplemented on the basis of the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (United Nations General Assembly resolution 260 (III)) and of the International Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly resolution 3068 (XXVIII)). With regard to war criminals, recourse should be had to the principles applied by the Nürnberg tribunal. Listed among grave breaches should be crimes against humanity, such as the internment in concentration camps and mass executions of the population, committed during the Second World War.

35. In his delegation's view it was absolutely essential to include in Section II of Part V provisions to the effect that crimes against peace and humanity were grave breaches of Protocol I and the Geneva Conventions.

36. The USSR delegation considered that the system of penal sanctions for breaches of humanitarian law, as provided in the Geneva Conventions of 1949, should not only be extended to the new Protocols, but should also be further elaborated.

37. With regard to article 77, his delegation endorsed the amendment proposed by Australia (CDDH/I/255).

38. Mr. KUNUGI (Japan) thanked the Chairman and the Secretariat for the speedy circulation of the draft programme of work for the third session (CDDH/I/301), which contained most useful information and a suitable schedule of work.

39. His delegation had noted the efforts made in the ICRC's revised text of article 74 (CDDH/210, annex 2) and the amendments proposed by the German Democratic Republic (CDDH/I/85) and by Australia (CDDH/I/253). In order to ensure the proper functioning of the system of repression envisaged in Section II of Part V of draft

Protocol I, it was advisable to specify exactly what was meant by "grave breaches". His delegation accordingly approved of the rationale behind the three amendments proposed.

40. His delegation was inclined to propose that articles 75 and 74 should be combined to form one list of acts constituting grave breaches, provided that the inclusion of such a list was acceptable to the Committee.

41. With regard to the following four articles of the ICRC's draft, they embodied a number of new aspects which represented an advance as compared with the 1949 Geneva Conventions. His delegation would revert to those articles at a later stage.

42. So far as the two proposals for article 79 bis (CDDH/I/241 and CDDH/I/267) were concerned, his delegation wished to express its interest in those constructive proposals and to state its intention of submitting an alternative proposal taking into account the role of the Protecting Powers and their substitutes as that had a bearing on the functions of the proposed inquiry commission.

43. Mr. KEENS (United Kingdom) stressed the importance which his delegation attached to the development of a practical and realistic system for the repression of breaches of the Geneva Conventions or of Protocol I. He endorsed the remarks of the representatives of Canada and Egypt. His delegation was optimistic and did not doubt that the Conference would succeed in finding a satisfactory answer to a question beset with many difficulties.

44. The Geneva Conventions had established a system in which the duty to prosecute became operative only in respect of grave breaches and of those marked by deliberate intent to commit the act in question. The Conference should not depart from those principles.

45. The provisions laid down in the Conventions should apply only to persons already in the hands of the enemy who had committed specific and clearly identifiable acts. Even with the best possible intentions, those giving orders might make mistakes, and according to the ICRC's proposed text, such persons would be liable to prosecution. Justice, however, should operate in favour both of the accused and of the victim.

46. While paying a tribute to the efforts made by the ICRC to find a generally acceptable solution, his delegation was bound to state its reservations in regard to the grave breaches listed in document CDDH/210 annex 2. Some countries would undoubtedly find it very difficult to mount an inquiry into events which had occurred in a

remote part of the world and to qualify certain acts as grave breaches when the situation was confused and evidence was lacking.

47. Mr. BRING (Sweden) said that his delegation welcomed the ICRC's new text (CDDH/210, annex 2), which broadened the scope of the provisions covered by the Geneva Conventions in regard to the repression of grave breaches. In his delegation's opinion, the proposed system should apply not only to Part II but also to Parts III and IV of draft Protocol I. He was aware, however, of the fact that the list of grave breaches proposed by the ICRC should be more specific and that the question should be discussed whether some of the breaches listed should be deleted or whether others should be added. His delegation would comment further on the subject at a later stage.

48. Mr. REZEK (Brazil), referring to article 78, said that his country acceded to an average of seven requests yearly for extradition on the basis of domestic legislation which ruled that extradition was not contingent upon the existence of a treaty between Brazil and the requesting country. The countries most concerned were Portugal, the Federal Republic of Germany and France, which had no bilateral treaty with Brazil on the subject.

49. The tenor of article 78, as proposed, was punitive, thereby to some extent altering the nature of draft Protocol I, which was designed for the protection of victims of war. A further point was how far the lack of precision in the definitions given to the various crimes listed might not be used by defendants to bolster their defence. Under Brazilian law, all that was required was for the breach to be recognized as a crime under the law of the requesting and the requested State. The provisions dealing with extradition did not appear to be indispensable, and if the Swiss proposal for the deletion of article 78 was approved, extradition would still remain possible on a reciprocal basis.

50. His delegation could not accept paragraph 4 of the amendment to article 78 submitted by Australia (CDDH/I/256). Under Brazilian law, it was for the Supreme Court to decide on the political nature of an offence, and no absolute rule could govern its conclusions.

51. For those reasons, the Belgian amendment (CDDH/I/266) was fully acceptable to the Brazilian delegation.

52. To sum up, the deletion of article 78 would not severely impair the machinery for extradition for countries which did not hold the existence of a treaty to be indispensable, but if the article were retained, breaches which could give grounds for extradition would have to be more precisely defined.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-FOURTH MEETING

held on Monday, 26 April 1976, at 10.30 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 74 - Repression of breaches of the present Protocol (CDDH/1, CDDH/210, annex 2, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/85, CDDH/I/253, CDDH/I/303) (continued)

Article 75 - Perfidious use of the protective signs (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/303) (continued)

Article 76 - Failure to act (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/303) (continued)

Article 77 - Superior orders (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/303) (continued)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/303) (continued)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/303) (continued)

1. Mr. MURILLO RUBIERA (Spain) pointed out that the texts designed to reaffirm and supplement the Geneva Conventions of 1949 would be of limited value if they were not accompanied by provisions to ensure repression of breaches. Articles 74 to 79 of draft Protocol I were only part of the rules of application, which were also to be found in articles 5, 70, 71 and 72.

2. Under those penal provisions, there could be prosecution for breaches. That was a corollary, in humanitarian law, of the recognized principle that States and their organs and agents, like individuals, could incur penal responsibility under international law.

3. His delegation felt that it would be better to make the system set forth in the Geneva Conventions more effective, rather than go in for over-ambitious schemes.

4. On the question of definition, the established distinction between grave breaches and other violations should be maintained. Moreover, since what was involved was not an expression of opinion or a value judgement but the legal definition of an offence

each and every one of those acts or omissions prohibited under the Geneva Conventions of 1949 and draft Protocol I which were a danger to, or which violated humanitarian principles, should be considered as "grave". The fact that the list might not be complete did not mean that those definitions and types of breaches ought not to be mentioned specifically.

5. In the matter of reprisals, it should be recalled that reprisals against prisoners of war were expressly prohibited under Article 13 of the third Geneva Convention of 1949. To allow reprisals, whatever the circumstances, would be a retrograde step and would weaken provisions designed to reaffirm humanitarian law. Moreover, it would leave the door open to arbitrary judgements. Such action might be construed as inability to respect the rules adopted or a tacit admission that the rules for the application of humanitarian law did not serve any useful purpose.

6. His delegation was therefore prepared to agree to the concept of an offence against mankind contained in the wording proposed by the ICRC.

7. If the means of repressing breaches of humanitarian law were to be enforced, the judicial system would have to be improved.

8. Mr. CASSESE (Italy) said that he would like to focus on one of the most complex problems relating to violations of draft Protocol I, namely the range of violations falling under the category of "grave breaches".

9. His delegation favoured the idea of including among grave breaches the use of methods and means of combat prohibited by the Protocol, together with violations of the provisions protecting the civilian population against the effects of hostilities. It considered that breaches of the provisions included in Part III and Part IV of draft Protocol I were no less serious than infringements of substantive rules governing other equally important matters. The prohibition of certain methods and means of warfare and of indiscriminate attacks on civilians or civilian objects, already agreed upon by Committee III, would be of little value if it was not accompanied by effective measures of penal repression. Such measures were particularly needed in an area where belligerents were more inclined, for military reasons, to evade existing prohibitions. Thus, for instance, as attacks on civilians were prohibited by articles 46 to 53 of draft Protocol I, the protection thereby afforded to civilians would prove meaningless if no effective penal sanction was provided against the event of those prohibitions being evaded.

10. The main question arising with respect to the laws of war was the problem of assuring that the rules were actually implemented. The means of achieving that result were international machinery for supervision, penal repression of breaches, and reprisals. Unfortunately the system of Protecting Powers set up at the second session of the Diplomatic Conference was weaker than his delegation had hoped, although in some respects it was a major improvement over the present law.

11. As for reprisals, they were assuredly the most questionable means of enforcing the Protocol. His delegation hoped that reprisals would either be excluded altogether or admitted within very narrow limits.

12. Consequently, unless an effective system of penal repression for breaches of the protection of civilians from hostilities and the use of means and methods of warfare was set up, the substantive rules might not be effectively enforced and might thus end by having a mainly moral or psychological value.

13. The argument could be advanced that while it would be justified to regard violations of rules protecting civilians as grave breaches, because that would strengthen the protection of persons not participating in hostilities, there would be no justification for considering as grave breaches the use of prohibited means and methods of warfare. It was true that combatants were by definition the most exposed to the risks of war. They were, however, entitled to benefit from all provisions restraining the use of force by the enemy. It was therefore only natural that when safeguards were provided for combatants by substantive rules, they should be made as effective as possible by providing for adequate measures of penal repression.

14. Some delegations had asked for the exclusion of both Part III and Part IV of draft Protocol I from the system for penal repression of grave breaches. It had been contended that violations of Protocol I committed in a combat area raised special problems as it was difficult to produce evidence to prove that such violations had or had not occurred, particularly when the element of intent was a constituent feature of those violations. That argument, if accepted, would result in totally excluding battlefield crimes from the category of breaches of the Protocol. It was difficult to think that anyone would wish to go that far if only because those violations were already crimes under customary international law. The same problems of proof would arise if the aim was to make them simple breaches of the Protocol. That being so, he could not see why such violations should not fall under the category of "grave breaches". Some of the penal provisions relating to grave breaches might even facilitate the search for evidence. Article 79 relating to mutual assistance in criminal matters was a case in point.

15. His delegation favoured article 74 proposed by the ICRC in document CDDH/210, annex 2, although it considered that the list of grave breaches should as far as possible be illustrative and not exhaustive. Some provisions, in particular article 78, needed to be improved if it was to be made possible for States to accept the widening of the category of grave breaches. His delegation was willing to co-operate in any effort aimed at rendering substantive rules capable of being actually applied and thus having an impact on belligerents.

16. Mr. TORRES AVALOS (Argentina) said that laws must be realistic if their purpose was not to be defeated. He was aware of the work which had been done and recognized the importance of the proposals submitted by the ICRC. The document should be studied in detail in the appropriate working group. The question of extradition, brilliantly introduced by the representative of Brazil, was linked to that of individual responsibility.

17. As to breaches, he considered that the text of the Geneva Conventions should be supplemented if existing humanitarian law was to be reaffirmed and developed. That could be done explicitly, and he referred to the basic principles involved, namely, obedience to a superior order, orders issued by a superior authority within its sphere of competence, the form given to the order issued, and possible grounds for the refusal of a subordinate to obey, within the framework of the military institution to which he belonged.

18. His delegation intended to submit an amendment to reaffirm the principle of obedience already adopted by several countries, which was the keystone of the military system. That question had already been studied in relation to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945, and many of those tried by the Nürnberg tribunal had invoked that principle, which should reaffirm that the exemption from responsibility did not apply to the superior who gave the order.

19. With respect to grave breaches, and also the possibility of lesser breaches, he considered that the list set out in Article 50 of the first Geneva Convention of 1949 could be extended.

20. He could not support the proposals by the Swiss delegation (CDDH/I/303), which did not appear to be in line with the reaffirmation and development of international humanitarian law.

21. Mr. ALEXIE (Romania) said that the application of the provisions of the Geneva Conventions of 1949 and of Protocol I was of the greatest importance in the reaffirmation and development of international humanitarian law applicable in armed conflicts. The scrupulous observance of those Conventions and of the additional Protocols should be a matter of continuing concern to the High Contracting Parties.

22. His delegation believed that the approach to the problems concerning humanitarian law should be based on the need to abolish war and sources of conflict without delay, which not only affected the regions in which they arose, but also endangered the peace of mankind as a whole. There must also be an end to all acts of aggression and interference in the internal affairs of other States, and strict observance of the right of peoples to self-determination and to self-defence against an aggressor.

23. In the light of those general considerations, his delegation naturally attached special importance to the question of the repression of breaches of the Geneva Conventions of 1949 and of Protocol I, the question dealt with in articles 74 to 79 of draft Protocol I. He agreed with previous speakers that article 74 was the most important one.

24. The original text of those articles could be further improved and strengthened. Committee I already had certain proposals before it, and he thought that the suggestions of the ICRC about a new text for article 74 (CDDH/210, annex 2), and the proposal by the Australian delegation about the same article (CDDH/I/253), were promising.

25. Article 74 should state more clearly what acts represented grave breaches of the Geneva Conventions of 1949 and of draft Protocol I. The most common grave breaches might, for example, be listed with provision for the possibility of penalizing other acts prohibited by the Geneva Conventions of 1949 and by draft Protocol I. Attention could thus be drawn to the harmful consequences of violation of the provisions of draft Protocol I.

26. In view of the fact that international law condemned wars of aggression, his delegation believed that a very clear distinction should be drawn between the aggressor and aggression, on the one hand, and the victim of aggression and the right of self-defence, on the other. Obviously draft Protocol I should emphasize rules to ensure the protection of the victim in the exercise of his right to self-defence, as enshrined in international law and in the Charter of the United Nations.

27. His delegation considered that the gravest breaches of the rules of humanitarian law were aggression and the occupation of foreign territory. It was clear that the provisions of draft Protocol I should not restrict the victim's right to defend himself on his own territory by all possible methods and means of combat. A distinction must also be drawn between the combatants and civilian population, in particular by prohibiting the use of weapons of mass destruction, indiscriminate bombardment, reprisals, the taking of hostages, and all acts of terror against the civilian population. The civilian population should have general and effective protection against the dangers arising from the military operations. Consequently, the Romanian delegation was in favour of the prohibition of reprisals.

28. His delegation also supported the inclusion in draft Protocol I of provisions on the protection of undefended or neutralized localities. There must also be a prohibition of reprisals affecting the environment.

29. As to article 75, his delegation considered that the perfidious use of the protective signs by the aggressor in occupied territory constituted a grave breach.

30. Mr. OBRADOVIĆ (Yugoslavia) said he wished to avail himself of the opportunity to give his delegation's views on the main questions to be decided by Committee I. First, should the existing concept of a grave breach be extended to include not only crimes committed against protected persons and objects in the power of parties to the conflict, but also criminal acts committed on the field of battle? Secondly, who should be entrusted with the actual prosecution of persons committing grave breaches, in order to ensure that they were brought to justice before a competent court?

31. The Yugoslav delegation considered that the first question should be answered in the affirmative, for reasons based firstly on the practice followed after the Second World War by the Allied tribunals, and on the application of the Charter of the Nürnberg tribunal, approved by the General Assembly of the United Nations in its resolutions 3 (I) and 95 (I) and, secondly, on the provisions adopted in draft Protocol I. It was because most nations understood the seriousness of the dangers arising from hostilities, and the extent to which protected persons were exposed to the dangers arising from hostilities, that Section I had been included in Parts III and IV. His Government considered it unacceptable that the use of unlawful methods and means of combat should not be regarded as a grave breach, or that breaches of the provisions of article 50 of draft Protocol I should not be so regarded. Committee I should therefore deal with the problem of breaches of those provisions, which must necessarily be grave breaches.

32. It would be difficult in practice to establish exact proof of the responsibility of an individual in breaches of that nature. On that point he agreed with the representative of Canada, who had expressed misgivings on the subject at the forty-third meeting (CDDH/I/SR.43). However, since the post-war military tribunals had succeeded in dispensing justice in such cases, that could not constitute an insurmountable difficulty for tribunals established in the future. If Committee I decided now to define as grave any breaches of the provisions of Parts III and IV of draft Protocol I, it would be helping, by adopting those provisions, to prevent possible criminal acts. To pursue any other course would be as it were to renounce a common legal heritage, of which the Nürnberg principles undoubtedly formed a part, and at the same time to reduce the value and practical scope of a whole range of provisions already adopted. Once the principle of extending the idea of a grave breach was adopted, it remained to be seen how that principle should be formulated. The ICRC proposal in document CDDH/210, annex 2, provided a sound basis for discussion. That document invoked the provisions of the Geneva Conventions of 1949 on the subject, while adding the new elements set forth in draft Protocol I. His delegation was prepared to discuss any other proposals for rewording article 74.

33. As to the second question he had raised, he thought it more prudent and realistic to leave the responsibility for taking legislative or other measures to repress breaches to the Contracting Parties. That seemed to be the best course, since it did not appear that the time was yet ripe for establishing any international machinery in that field. However, in strengthening the obligations of the Contracting Parties in that sphere, thought must also be given to taking appropriate steps to block any loopholes that would enable those accused of committing grave breaches to escape from justice.

34. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that Section II of Part V of draft Protocol I (Repression of breaches of the Protocol) was of great importance and thus, if it were deleted, as proposed by the delegation of Switzerland (CDDH/I/303), the satisfactory application of the Conventions and of the Protocol would be prejudiced. Breaches of the Protocol should be severely punished, the prime responsibility for which lay with the Contracting Parties which must prosecute persons guilty of them by applying the penal legislation in force in their country. It did not follow from that, however, that the use of international instruments should be ruled out, and it was important that the principles established at Nürnberg and in international agreements should not be forgotten.

35. Ukrainian legislation provided for the arraignment and conviction of persons guilty of unlawful acts of violence, pillage or the destruction or appropriation of property committed against the inhabitants of combat zones, maltreatment of prisoners, wounded or sick persons and the perfidious use of protective signs.

36. His delegation thought that the new text of article 74 proposed by the ICRC (CDDH/210, annex 2) was fully acceptable as a basis for discussion. It deemed it inadvisable to include in Protocol I a list of those grave breaches which were already embodied in the Geneva Conventions. It suggested that the list of serious breaches should be exemplary rather than exhaustive, and that criteria for the determination of the gravity of breaches should be specified. In that connexion, he referred to Article 6 of the Charter and Judgment of the Nürnberg tribunal, according to which there were three categories of crimes: crimes against peace, war crimes and crimes against humanity. War crimes and crimes against humanity belonged to the category of grave breaches of the Conventions and draft Protocols, calling for exemplary punishment.

37. The responsibility of persons committing such crimes was based on universally recognized rules of international law, set forth, inter alia, in the Charter of the Nürnberg tribunal, the Geneva Conventions, the Hague Conventions of 1899 and 1907, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (United Nations General Assembly resolution 2391 (XXIII)), the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III)) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (General Assembly resolution 3068 (XXVIII)).

38. It was essential that draft Protocol I should state clearly that persons convicted of war crimes or crimes against humanity could not benefit from prisoner-of-war status and must be treated as persons undergoing punishment. War criminals must bear legal responsibility whether their acts were State-ordered or the criminal excesses of individual servicemen, and regardless of the way in which the crime was committed. In that connexion, the Ukrainian delegation had entered a reservation to Article 85 of the fourth Geneva Convention of 1949 relative to the treatment of prisoners of war.

39. His delegation supported article 76 and drew attention to the fact that it was the first time that positive international law provided for the penal responsibility of persons who had not taken the necessary measures to prevent breaches of the Protocol. As for reprisals, his delegation was opposed to them. The question of the creation of an international commission of inquiry was a matter that called for special study, and he reserved the right of his delegation to revert to it later.

40. Mr. de BREUCKER (Belgium) said that the grave breach was not only a moral but also a legal concept, which had the following specific characteristics: the 1949 negotiators had made a distinction between grave breaches and acts "contrary to the provisions of the Conventions"; grave breaches had been listed for each Convention in the form of a precise catalogue of clearly identified, extremely reprehensible acts, involving a high degree of guilt and committed against clearly specified, defenceless persons who were at the mercy of the enemy. For those grave breaches, the 1949 negotiators had drawn up a system of universal jurisdiction which bound unconditionally each Contracting Party, however remote it might be, geographically or mentally, from the field of conflict, to search for persons alleged to have committed such breaches, on whatever side they were, and bring them before its own courts or even extradite them.

41. Within the meaning of the 1949 Conventions, a "grave breach" was a highly reprehensible act committed against victims at the mercy of the enemy, and as such, subject to universal jurisdiction, and leading to trial or extradition. It was indeed significant that the obligation to proceed against persons accused of grave breaches was always placed before the article containing the list of breaches.

42. That intrinsically rigid system was most ambitious. The fact that, as recognized by the ICRC, it had never worked in practice was to be regretted and stressed the need for caution. Nevertheless, it was essential to preserve and maintain it.

43. Draft Protocol I reaffirmed and developed various provisions of the Geneva Conventions of 1949 protecting persons not involved in the fighting and also extending, in Parts III and IV, various provisions of The Hague Conventions of 1899 and 1907 relating to the battlefield.

44. The right approach was not to transfer the list given in the Conventions straight into Protocol I, but to see how the 1949 catalogue could be completed. In that respect, the Belgian delegation was particularly impressed by certain items constituting breaches set forth in the Australian proposal (CDDH/I/253), particularly in paragraph 2 (g), which defined as a grave breach the wilful depriving of a person protected under the Protocol or a prisoner of war of the right of fair and regular trial. Generally speaking, however, the items specified in article 74 as constituting grave breaches would necessarily relate to the articles of the Protocol prescribing an obligation or a prohibition. It would

therefore be necessary to verify in each case whether the article in question was such as to allow in the first place of a precise legal definition of the indictable act. That was a particularly complex problem as regards several articles of Parts III and IV, which were compromise texts.

45. Another difficulty was raised by the question of the material evidence of guilt, in particular in conflict situations.

46. Lastly, it would be necessary to know what the tribunal could reasonably accept as an excuse, justification or an extenuating circumstance, the more so since the jurisdiction which would cover such breaches would be foreign, national or enemy. As regards the last mentioned, it was easy to imagine what an enemy might be impelled to do with a badly drafted list of grave breaches in the case of a captive or a defeated combatant. For example, if the accused could prove that his act had been due to reprisals prohibited on the same grounds as the attack, would that be held in his favour before an enemy tribunal or that of a third State, Party to the Conventions, which might be required to try or extradite only the person responsible for the reprisals and not the person responsible for the initial attack, although that was also prohibited?

47. The 1949 system of grave breaches depended on universality of jurisdiction. That system must, in any case, be preserved, even if academic, in so far as concerned the Geneva Conventions and their extension in the Protocol, namely, in articles 42 and 64. Furthermore, it should, if possible, be extended to other provisions directly concerning persons who had fallen into the hands of the enemy, beginning with the provisions of Part II, or article 11 which already set forth a grave breach.

48. A number of possible breaches in other spheres than that covered by the 1949 Conventions, which were also morally grave, could be taken up under the legislation of each country, instead of under the system of universal jurisdiction, as soon as they could be well enough determined to be included in the various national codes; it could then be stipulated by a conventional norm adopted by the Conference that those codes should distinguish more clearly between highly reprehensible acts and certain secondary violations described by each Convention as being acts "contrary to the provisions of the Convention other than the grave breaches".

49. Mr. ORTEGA-JUGO (Venezuela) said that his delegation considered article 74 extremely important. He pointed out that if, as some delegations wished, all acts regarded as grave breaches were grouped together in one category, each delegation would no doubt insist on its own list being incorporated, and the enumeration would be endless, and in any case incomplete.

50. Moreover, there was no point in listing again the grave breaches which had been defined by the Geneva Conventions and thereby already codified. The same applied to the other international treaties and conventions already ratified dealing with similar subjects.

51. Penal law offered another solution - that of the standard offence, or in other words the legal definition in general terms of a de facto situation of a kind to constitute an offence or breach, the standard offence being broken up into various components corresponding to the general rule, as for instance in the case of homicide. His delegation considered such a formula applicable, since it would satisfy the needs of all Parties and be in accordance with the principles of international penal law, while at the same time avoiding repetitions.

52. Article 75 could be incorporated in article 74.

53. The contents of articles 73 to 79 would depend on those of article 74, provided that the provisions contained in the national law of each Party were respected, as had been requested by the Egyptian delegation in its statement and by the Australian delegation in its amendment (CDDH/I/253).

54. Lastly, he said it was his delegation's view that Section II of Part V of draft Protocol I should be retained, and that it was for countries to find a means of reconciling their own domestic provisions with the objectives of the Conference.

55. Mr. EL-FATTAL (Syrian Arab Republic) said that the repression of breaches of international humanitarian law had been and still was a basic element of the Geneva Conventions. In the absence of preventive or repressive provisions, the law remained a dead letter. The international community, drawing its conclusions from the Second World War, had agreed once and for all that the punishment of war crimes could not, and must not, fall within the exclusive competence of the national jurisdictions of the victor or vanquished. The punishment of war crimes had become an international responsibility, and the notion of crime against humanity had been extended to include acts hitherto regarded as conventional war crimes. It should be noted that there was hardly any difference between the grave breaches listed in the Geneva Conventions and crimes against humanity as defined by the Statute of the Nürnberg tribunal. Although the expressions "war crime" and "crime against humanity" were not used in the Geneva Conventions, they were none the less subsumed in the expression "grave breach". It was this that had led the Syrian delegation to submit the amendment contained in document CDDH/I/74.

56. It was regrettable that the penal system laid down in the Geneva Conventions had never been applied, whereas war crimes and crimes against humanity had not ceased to be committed since 1949.

57. On the one hand, that penal system was now out-of-date in so far as it sought to adapt the law to methods and means of combat employed during the first half of the century; and, on the other hand, the High Contracting Parties had not complied with the obligations arising therefrom.

58. For example: apartheid, which was now regarded as a crime against humanity, was not among the grave breaches listed in the Geneva Conventions of 1949 and draft Protocol I; there had never been any effective penal sanction for war crimes committed against persons fighting for their independence and sovereign rights; and war crimes committed in the form of infringement of territorial integrity, through the process of colonization, had remained unpunished.

59. In draft Protocol I, which completed the Geneva Conventions, the provisions concerning international crimes should be broadened. It was not enough to say that the provisions of the Conventions concerning repression of breaches would apply to the Protocol, but specific types of "grave breaches" must be defined, such as apartheid, annexation, colonization of occupied territories, opposition to the return of refugees to their homes at the end of hostilities - the most serious case being that in which a Contracting Party was maintaining that the fourth Geneva Convention did not apply to its occupation of a foreign territory.

60. His delegation found the texts submitted to the Conference disappointing. The main fault lay in the fact that, whereas in Parts II, III, IV and V of draft Protocol I protection was extended to persons and objects not protected under the terms of the Geneva Conventions of 1949, when it came to application and the repression of breaches, the Protocol borrowed heavily from the old system. There was some inconsistency, too, between the creation of new obligations and responsibilities and the retention of a restricted and sometimes outdated definition of the notion of war crime; the result was to diminish the obligations assumed, particularly so far as concerned the civilian population, methods and means of combat, and new categories of prisoners of war.

61. The amendments to draft article 74 submitted by the German Democratic Republic (CDDH/I/85) and Australia (CDDH/I/253) could form a basis for negotiation. But no mention was made in them of de jure or de facto annexations of occupied territories. There was some reference to prohibition of the deportation and displacement

of protected persons who were in occupied territories, but nothing was said about the transfer by the Occupying Power of a part of its own civilian population to the occupied territories, although that should be considered a grave breach.

62. Any change made in occupied territories by an Occupying Power in its own interests should also constitute a grave breach involving penal responsibility.

63. His delegation considered it premature to comment on articles 75 to 78 so long as the issues raised in article 74 had not been settled.

64. Mr. KUSSBACH (Austria) noted that while all the previous speakers had supported, either explicitly or implicitly, the idea of maintaining the system for the repression of breaches as contained in the Geneva Conventions, opinions differed regarding the possible extension of that system owing to the difficulties arising from Parts III and IV of draft Protocol I.

65. Those who were in favour of lengthening the list of grave breaches averred that the provisions of the Protocol could not be placed in two categories, each coming under a different system of sanctions. Those who were not in favour of adding some breaches not so far included were preoccupied by the particularly difficult situation created by actions on the battlefield. They were afraid, for instance, that a combatant would find it impossible, in view of the conditions in which he had to act, to furnish the necessary evidence in his defence in the event of his being accused. That difficult situation for the combatant would not be improved by the entry into force of Protocol I, whose provisions were highly complex and differentiated. In addition, the ideas expressed in the ICRC proposals (CDDH/210,annex 2) concerning new grave breaches were too general and therefore insufficiently specific to ensure uniformity of the legislative provisions that might be adopted in the matter at the national level.

66. His delegation hesitated, however, to subscribe to the Swiss delegation's proposal (CDDH/I/303) that articles 74 to 79 should be deleted.

67. The present difficulties resulted from the decision, taken previously, to include elements from the The Hague Law in the sphere of Geneva Law. It had been hoped by that means to strengthen the protection of the civilian population and of civilian property against the results of warfare and to improve the combatants situation. The opinion had even been expressed that the distinction between humanitarian law and the law of war no longer possessed any theoretical or practical value.

68. His delegation was in favour of adopting a pragmatic method. It was therefore not opposed to the list of grave breaches being lengthened, provided no attempt was made to change the system set up in 1949.

69. A representative had pointed out that supervision of the behaviour of armed forces and combatants was as important as, if not more important than, the subsequent repression of breaches. In the Austrian delegation's opinion, supervision and repression pursued the same purpose. Actually, supervision, especially if it was international, was also a type of sanction. The conclusions reached by a highly qualified international commission of inquiry would have the same effect as a sanction, and the incriminated Party would not be able to disregard them.

70. His delegation might have more to say when articles 74 to 79 were discussed individually.

71. Mr. ROSENNE (Israel) said that his delegation did not consider it expedient to list grave breaches other than those already appearing in the Geneva Conventions of 1949. If it was decided, however, to include additional breaches in Protocol I, it would be advisable to add, in particular, the use of prohibited means of combat and attacks against persons hors de combat. He referred to article 38 of draft Protocol I in that connexion.

72. The extradition of persons guilty of violating humanitarian law raised an extremely complicated problem from the legal point of view. It was possible, of course, to take the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971, as a model, but it must not be forgotten that the application of extradition treaties was suspended among belligerents, so that guilty persons could take refuge in the territory of one or other of them. Moreover, legal mutual assistance was provided for in the case of extradition. It would thus be necessary to ensure that the two systems were symmetrical.

73. Mr. EIDE (Norway) pointed out that at the second session great progress had been made in extending humanitarian law in armed conflicts to new areas. For example, Part IV of draft Protocol I dealt with the protection of the civilian population from the effect of hostilities. Public opinion in Norway attached great importance to that problem.

74. The present discussions were of great importance, for a legal rule had only a limited value unless some efforts were made to ensure that it was applied. As the representative of Egypt had pointed out at the forty-third meeting (CDDH/I/SR.43), the best method consisted in preventing breaches. It was just as important, however, to provide detailed instructions to future combatants. An important aspect of that was the right of a subordinate to refuse to obey orders when they would result in a violation of humanitarian law. Such refusal to obey orders even became an obligation in some cases, for under article 77 of draft Protocol I the fact of having acted pursuant to an order of his Government or of a superior did not absolve an accused person from penal responsibility.

75. The repression of breaches involved international co-operation which paid no attention to the guilty person's nationality.

76. It had been argued that combat situations called for different treatment. It was true that the provision of evidence presented difficulties, as did also the notion of personal guilt. No doubt in doubtful cases there would be an acquittal. In fact, the basic principle of presumption of innocence stated in article 65, paragraph 3 (c), of draft Protocol I would be applied.

77. International jurisdiction could certainly have a deterrent effect in so far as the combatants knew that they ran the risk of legal prosecution, but what was even more important was the training given to them prior to the conflict, which would make it possible to avoid resorting to certain tactics and, in general, taking decisions with detrimental consequences.

78. His delegation was prepared to accept articles 74 to 78 as a whole, but had some minor reservations: for example, the text of article 74 should be made more specific, without however mentioning any breaches other than those dealt with in Protocol I. It was desirable that the more serious breaches referred to in all the parts of the Protocol should be mentioned, not only those in Part II but also those in Parts III and IV. If a working group was instructed to draw up a list of such breaches, the Norwegian delegation would like to participate in its work. His delegation could accept the text of article 77, which was of crucial importance, and that of article 76, but it had not yet taken a position on article 78.

79. His delegation could not agree with the delegation of the Ukrainian Soviet Socialist Republic on the subject of prisoner-of-war status. There was no reason why prisoners of war, while being treated as such, should not be prosecuted for grave breaches that they had committed.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-FIFTH MEETING

held on Tuesday, 27 April 1976, at 10.20 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 74 - Repression of breaches of the present Protocol (CDDH/1, CDDH/210, annex 2, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/85, CDDH/I/253, CDDH/I/303) (continued)

Article 75 - Perfidious use of the protective signs (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/254, CDDH/I/303) (continued)

Article 76 - Failure to act (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/303) (continued)

Article 77 - Superior orders (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/303) (continued)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/303) (continued)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/303) (continued)

1. Mr. MAHONY (Australia) said that he would confine himself to indicating in general terms the Australian delegation's views on articles 74 to 79. He reserved the right to speak again on matters of substance when individual articles were discussed.

2. With regard to article 74, his delegation supported the maintenance of the distinction between grave breaches and other breaches of the Geneva Conventions of 1949. An article specifying acts that constituted grave breaches should be included in draft Protocol I. In addition, grave breaches ought to be defined in order to facilitate the implementation of the article through the domestic law of States and to leave no room for misunderstanding over what amounted to a grave breach. To that end, the Australian delegation had submitted an amendment to article 74 (CDDH/I/253). While upholding the view that grave breaches should relate to persons or objects protected by the Geneva Conventions or Protocol I, he took note of the desire of some delegations to add prohibitions concerned with occupied territory and other matters. He would be happy to work with other delegations to achieve an article acceptable to all.

3. The Australian delegation supported the principle put forward in the ICRC text for article 75 on the perfidious use of protective signs. It thought it necessary, however, to specify the signs the perfidious use of which was prohibited, and it had submitted an amendment to that effect (CDDH/I/254).

4. His delegation supported in principle the text proposed by the ICRC for articles 76 and 79. On the other hand, it had difficulty in accepting the text of article 77, more particularly the provisions set out in paragraph 2. The question of obedience to superior orders was most important, and his delegation hoped that the Committee would be able to draw up a suitable text.

5. Finally, article 78 gave rise to considerable difficulty, as had already been underlined by many delegations. The Australian delegation hoped that the Committee could find some solution to the problem.

6. Mr. SAARIO (Finland) drew attention to the fact that in its original proposal (CDDH/1), the ICRC had been content with a brief reference to grave breaches committed against protected persons and objects within the meaning of article 2 (c), whereas in its new proposal (CDDH/210, annex 2) it listed certain acts that constituted grave breaches. The Finnish delegation considered that those acts should be included in article 74 in its final form and, like the ICRC, it did not judge it indispensable to repeat in that article the acts already specified in the 1949 Geneva Conventions. It also thought that in drawing up a list of grave breaches of Protocol I, the Committee should take account of the provisions in Part IV of the Protocol relating to the protection of the civilian population and of civilian objects which had been adopted by Committee III at the second session. The distinction between grave breaches and other breaches should be retained, even if it was difficult to give a satisfactory definition of grave breaches. Clarification of the concept of intent in the determination of guilt would undoubtedly be conducive to the achievement of such a definition. The amendments submitted by the delegations of the German Democratic Republic (CDDH/I/85) and Australia (CDDH/I/253) could help to make the ICRC text more precise.

7. With respect to articles 75 to 79, the drafts submitted by ICRC could afford a basis for discussion. Some drafting changes would have to be made to eliminate any interpretation problems. For instance, at the end of paragraph 2 in article 77, the word "possibility" could be interpreted in various ways. The Working Group should therefore replace it by a more suitable word.

8. Mrs. SUDIRDJO (Indonesia) said that her delegation could not support some of the principles embodied in articles 74 to 79. It was not opposed to making a distinction between grave breaches and other breaches. Articles 50 and 51 of the first and second Geneva Conventions of 1949, Articles 131 and 132 of the third Geneva Convention and Articles 147 to 149 of the fourth Geneva Convention, and also article 11 of draft Protocol I, dealt with grave breaches. However, since other parts of draft Protocol I also dealt with violations of the Protocol, the Indonesian delegation wondered whether it was necessary to elaborate either on the concept of a grave breach or on a category of other breaches.

9. Her delegation was unable to support article 76 dealing with failure to act. Apart from the fact that penal codes varied from country to country, some national legislations might be at variance with the provisions of that article. If so, article 76, could easily be interpreted as an interference in the internal affairs of a State. Article 77 was equally unacceptable to the Indonesian delegation, even with the addition of the words "and that he had the possibility of refusing to obey the order" at the end of paragraph 2. It seemed rather far-fetched to assume that such a position could arise, since military laws and regulations compelled a soldier to obey orders from his superiors.

10. On the question of extradition, in article 78, the Indonesian delegation wished to draw attention to the fact that most States adhered to the principle that their own nationals who had taken refuge in their home country should not be extradited. That did not necessarily lead to immunity for those nationals in respect of crimes committed abroad. In reality, the refusal to extradite was based on the concept of the close relationship between the State and its nationals, of which it was the protector and to which it alone could guarantee a just and fair trial. Moreover, there was no obligation on the part of a State to surrender a person who took refuge on its territory after having committed a crime in another country, unless an extradition treaty existed between the two States concerned. Indonesia had supported the insertion of provisions on extradition in the 1961 Single Convention on Narcotic Drugs and in the International Civil Aviation Organization (ICAO) Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971. Nevertheless, it was for the State to decide whether a criminal act or a grave breach constituted an extraditable offence.

11. Mr. PARTSCH (Federal Republic of Germany) pointed out that the term "grave breach" used in the Geneva Conventions of 1949 had acquired another meaning in the articles of draft Protocol I. In his view it should be made clear that a grave breach was a breach subject to a penal sanction. In that connexion, he reminded the Committee that at the forty-second meeting (CDDH/I/SR.42) the representative of Canada had asked delegations to exercise caution and not to abandon the system followed in the Geneva Conventions. The problem was how to apply that system to draft Protocol I which, in many respects, went beyond the four Conventions. It would not be realistic to limit punishment of grave breaches to those referred to in the Conventions. The purpose of draft Protocol I was to broaden humanitarian protection, and that protection included the suppression of grave breaches. There was, however, a significant difference between the obligations imposed by the Conventions, which were dictated by purely humanitarian considerations, and the new obligations contained in the draft Protocol. The obligations imposed by the Conventions were clearly defined and could appear in a penal code. Draft Protocol I contained some obligations which strengthened those provided for in the Geneva Conventions, but also other obligations of a more general nature which required more precise definition.

12. His delegation was impressed by the Swedish proposal, made at the forty-third meeting (CDDH/I/SR.43), which approached the question with the necessary caution and precision. If the Committee decided to draw up a list of grave breaches which ought to be penalized, the list should be both clear and precise. While it could refer to the provisions already included in the Geneva Conventions, it should not mention any obligation of a general nature which it would be difficult to include in a penal code. Moreover, to include in such a list the rules of warfare discussed in Parts III and IV of draft Protocol I would give rise to some difficulty. An obligation to penalize grave breaches should be realistic if compliance with the obligation was expected in all circumstances. A cautious approach could be more useful to the development of humanitarian law than an elaborate solution based entirely on legal theories.

13. Mr. BLOEMBERGEN (Netherlands) stressed the fact that a system for the repression of grave breaches of humanitarian law could only work if it took account both of humanitarian aspirations and of harsh realities. To those who claimed that Protocol I would remain a dead letter if a firm system of repression was not set up, he would reply that to go too far in that direction would have the same effect. The interests of the victims of armed conflicts would be best served if the rules of humanitarian law were applied on a universal basis.

14. The Netherlands delegation supported, in general, the principles stated in articles 74 to 79. Its remarks and suggestions regarding the drafting of some of those articles would be offered when the articles concerned were considered. With regard to a provision of extradition, the principle embodied in the Geneva Conventions could be retained and refined along the lines of the article on extradition in such recently-concluded conventions as that on hijacking (The ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971). His delegation agreed with the United States delegation that any attempt to go beyond what had been achieved at The Hague and Montreal in 1970 and 1971 would lead to protracted and sterile debates.

15. His delegation welcomed the initiative taken by Denmark, New Zealand and Sweden in proposing, in a new article 79 bis (CDDH/I/241), the establishment of an international commission of inquiry. It wished, however, to raise some drafting points with the delegations concerned.

16. With regard to article 74, the Netherlands delegation would stress the need for crystal-clear provisions and the avoidance of all ambiguity. If the Committee were to draft a list of grave breaches such a list should not be open to different interpretations. Hence the Netherlands could not support the suggestion that a list of grave breaches need not be exhaustive. While the Committee should exercise the utmost caution in drafting the article, that did not mean that it should confine itself to a reaffirmation of the provisions of the Geneva Conventions. It should attempt to go beyond them and to list as grave breaches some of those mentioned in Parts III and IV of draft Protocol I. It might, for instance, say that any person who wilfully killed an enemy hors de combat committed a grave breach. It might also say that to attack wilfully and knowingly the civilian population was a grave breach. The Netherlands delegation was prepared to explore all acts of that nature which might be included in a list of grave breaches. However, should those explorations not produce a satisfactory result it would feel compelled to take the only way out and to support the reaffirmation of the existing rules under the Geneva Conventions.

17. Some speakers had expressed concern that breaches other than grave breaches of Protocol I should be considered as breaches of a lower order and treated as such. Such an interpretation would be contrary to the spirit of the Conventions and of Protocol I. All breaches of the Protocol should be subject to repression and the Protocol should contain a provision stating clearly that all necessary measures would be taken to that effect.

18. Lastly he wished to state that, in his view, a breach was no less grave when committed by the victim of aggression than when committed by an aggressor.

19. Mr. GLORIA (Philippines) observed that since the XXth International Conference of the Red Cross, held at Vienna in 1965, his delegation had never ceased campaigning for the international community to adopt a draft code and procedure applicable to crimes committed in breach of the Geneva Conventions of 1949 and their Additional Protocols (CDDH/56/Add.1 and Corr.1). That draft had been submitted to the Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held at The Hague in 1971, then to the XXIInd International Conference of the Red Cross, held at Teheran in 1973, and again to the first session of the Diplomatic Conference in 1974 at Geneva. If his country's insistence began to seem something of an obsession, that was probably due, first, to the fact that, like so many others, the Philippines had known the horrors of war and concentration camps, and, secondly, to its being one of the smaller countries, i.e. those which were most often the victims of crimes against humanity.

20. The world was living under permanent threat of war, which was always being waged somewhere or other. It had hardly died down in the Far East, when it had blazed up again in 1971 in Pakistan. In the Middle East it was never very far below the surface. That being so, if world peace really could not be established and war had to be considered as inevitable, the least that should be done was to see that war, when it did occur, was regulated by humanitarian principles. Now, however, the present-day idea of global war and the emergence of highly advanced and destructive weapons made it reasonable to suppose that in the event of a world war, the concept of war offences would be more complicated still, from the legal standpoint.

21. After the Second World War, the efforts of the United Nations to safeguard human rights in time of armed conflict, like those of the International Committee of the Red Cross in its four Geneva Conventions of 1949, had been prompted by the pressing need to update the rules of warfare to conform to the current situation.

22. The memory of the crimes perpetrated in the Second World War, not to mention those at present being committed in guerrilla warfare in various parts of the world, strengthened still further the need for new rules on the conduct of war and measures to deal with breaches.

23. At the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva in 1972, the Philippine proposal for a code of international crimes and procedure had met with fierce opposition from the great Powers, and quite understandably so, since, with the modern methods of warfare at their disposal, they were mainly responsible for such violations: as witness the bombing of Hiroshima, Nagasaki and more recently North Viet-Nam, in which the main victims had been the civilian population.

24. His delegation wished to see that kind of violation dealt with by the incorporation of appropriate penalties in an international code. Some delegations had contended that it was impossible to formulate an international code of war crimes. Others had called the proposal ambitious. Others again considered it too far ahead of its time. But was not the purpose of the Diplomatic Conference the reaffirmation and development of international humanitarian law applicable in armed conflicts? And did not one of the means of strengthening respect for the law lie in penal sanctions as proposed by his delegation? Ambitious it might be, but the project was not unrealizable and it did offer a practical remedy to the ills of mankind.

25. It would be impossible to expand the concept of grave breaches without at the same time laying down penalties for those committing them, and without such penalties the Conference's work would only be half done. It was time to adopt an international code of criminal offences and procedure based on the four Geneva Conventions and the Additional Protocols.

26. Confronted with the radical divergencies of political opinion between the nations of the world, confronted with the race to acquire the most advanced weapons, despite all that the United Nations had sought to do in that field, confronted with the political considerations which underlay ostensibly altruistic statements in favour of humanitarian law, the world would ignore at its peril the appeal made by his delegation. It was not enough for the 1949 Geneva Conventions and other conventions relating to the rules of war just to list the various war crimes; nor was it enough to differentiate between grave breaches and others: provision must also be made in such texts for the penalties awaiting those guilty of breaches, and that was of prime importance.

27. At the forty-third meeting (CDDH/I/SR.43), the representative of the German Democratic Republic had contended that the Diplomatic Conference was not the proper forum in which to decide the question of penalties, as the task was properly one for the United Nations or the International Court of Justice. His delegation was not of that

opinion. In 1951, the United Nations International Law Commission had adopted a draft Code of Offences against the Peace and Security of Mankind. That Code had been supplemented in August 1951 by some articles on international criminal courts and tribunals. In the twenty-five years which had elapsed since then, neither text had been followed up in any way. It appeared unlikely, therefore, that the United Nations would be in a position to act on penal sanctions.

28. As to the International Court of Justice, his delegation very much doubted whether it was within its competence to draft a penal code or even whether, in view of its limited composition, it was capable of carrying out such a difficult task.

29. That left the Diplomatic Conference as the only body with the legal capacity to consider the adoption of an international code of war offences. The fact that the Geneva Conventions of 1949 had specifically covered those offences would enable the High Contracting Parties to proceed without difficulty to a definition of the appropriate punishments.

30. To follow the course desired by the International Committee of the Red Cross and by some other delegations, namely, to leave the matter to the jurisdiction of the countries concerned did not offer a satisfactory solution from the standpoint of international law, since national legal systems differed too widely. In support of his argument, he quoted the remarks of Alwyn V. Freeman of the Foundation for the Establishment of an International Criminal Court, to the effect that the concept of war crimes which had culminated in Nürnberg had no more become firmly established than had a truly international jurisdiction over crimes of that kind. National jurisdictions had, right up to the present, remained ineffectual. Yet there existed a whole category of crimes which transcended national frontiers and in whose prevention and punishment all States had a community of interest. None the less, there were frequently cases in which national courts or governments were unwilling to prosecute for political reasons.

31. The world today, shaken by individual ambitions, a prey to fear and sometimes hatred, was threatened with the disintegration of its social and political structure, if international problems of the first magnitude, among them the question of war crimes, could not be resolved.

32. Even international law, whose rules and standards were observed by all nations, might find itself swept away by the rule of force, which was a constant threat. International law, after all, was merely persuasive, a moral but not a legally binding obligation. Therein lay one of its great weaknesses in regard to the conduct of global warfare.

33. It emerged from the foregoing that there was an irresistible need for penal sanctions against war crimes to be embodied in the 1949 Geneva Conventions. His delegation believed that the Diplomatic Conference could lay down the necessary rules in the interests of humanitarian principles and in accordance with progressive international law.

34. Mr. CALOGEROPOULOS-STRATIS (Greece) said he agreed with the statement of the representative of Belgium at the forty-fourth meeting (CDDH/I/SR.44) that although a distinction had to be made between grave breaches and others, as the 1949 Geneva Conventions intended, it was also necessary to distinguish between different types of grave breaches, which were not always liable to the same penalties. On the other hand, there should be no discrimination as regards persons guilty of war crimes, whether they were nationals of an aggressor country or of a country which was the victim of aggression, since on either side individuals were the only victims. From the legal standpoint, aggression was governed by jus ad bellum and not on jus in bello, upon which humanitarian law was founded.

35. So far as war crimes were concerned, a distinction had to be drawn between the crimes of individuals and accessories and crimes involving a whole structure and system. The 1949 Geneva Conventions, however, referred only to the authors of crimes or to those who ordered them; they said nothing about the authorities who tolerated such crimes or who did nothing to put a stop to them, although aware that they were being committed. The Conventions adopted by the United Nations General Assembly - the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III)) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (General Assembly resolution 2391 (XXIII)) expressly covered accomplices. His delegation was happy at the incorporation in draft Protocol I of the provision relating to omissions.

36. The punishment of war crimes was a sine qua non if humanitarian law was to be effective, and for that reason it was necessary to give a strict definition of what constituted grave breaches. In that connexion, the text proposed by ICRC (CDDH/210, annex 2) might, subject to some improvements, serve as a useful basis for further discussions on article 74.

37. Mr. PILLOUD (International Committee of the Red Cross), reminded the Committee of the reasons which had prompted the ICRC to submit the new draft text of article 74 contained in document CDDH/210, annex 2. The primary aim was to give an exhaustive definition of acts which, in Protocol I, would be assimilated to the grave breaches referred to in the Geneva Conventions. The list that had been drawn up was based on the text of Protocol I, which was still

at the drafting stage. That list would of course, have to be looked at again and account taken of the final text adopted by the Conference. That meant that it would be necessary to review each article of draft Protocol I in order to ensure that article 74 took its contents into account. Contrary to the views of some experts who would have liked to see the grave breaches provided for in the Geneva Conventions of 1949 also embodied in draft Protocol I, ICRC had preferred to confine itself to the grave breaches specifically referred to in the actual Protocol.

38. He also drew the attention of delegations to the suggestion made by some experts that, in the list of grave breaches drawn up by ICRC, it would be desirable for some of them to be described in precise terms. Specific reference was made to paragraph 2 (a), (d) and (e) of article 74 (see CDDH/210, annex 2, page 4).

39. He thought that a study of document CDDH/210, annex 2, would make delegations' tasks easier when the text of article 74, as proposed by the ICRC, was examined by the Working Group.

40. Mr. Kun PAK (Republic of Korea) said he considered article 74 to be the most important of the six articles dealing with the repression of breaches. That article should accordingly be extended with the aim of tightening supervision, producing a deterrent effect and taking into account modern means and methods of combat. It was, however, necessary to proceed with caution, because individuals were not in a position to choose on the battlefield and could not always act as they would in normal circumstances; because it was very difficult to apply texts which were not always free of ambiguities and to prove guilt; because there was a risk that any victor might set up tribunals which would abuse their powers of decision over the vanquished and, lastly, because experience had shown that some parties to conflicts had never bothered to prosecute persons committing violations.

41. The universal enforcement of international law seemed to be an elusive goal. Some countries would not hesitate to go to the length of total war in order to ensure success and escape punishment. An extension of the concept of "grave breaches" was desirable only if humanitarian, military and judicial considerations were taken into account. In that connexion, the new ICRC text was not entirely adequate. There would be no point in multiplying the numbers of breaches unless at the same time appropriate provisions and machinery for enforcing the texts were to be adopted. The proposals submitted by the Philippines (CDDH/I/57), and by Denmark, New Zealand and Sweden (CDDH/I/241), had the advantage of calling for the establishment of an international inquiry commission. That would in fact be the best way of guaranteeing universal non-discriminatory enforcement of the Conventions and Protocol I. The Australian

amendment (CDDH/I/253) might provide a better basis for discussion than the ICRC text, provided that the last part of the sentence in paragraph 2 (h) was amended.

42. Mr. REIMANN (Switzerland) said he wished to make it clear that, while his delegation was in favour of deleting article 74, it had in no way abandoned the idea of broadening the concept of "grave breach". There were difficulties of enforcement which made it impossible to settle the question by adopting an article drafted in general terms. The adoption of another method was thus justified.

43. The Committee certainly considered it necessary that the regulations concerning breaches specified in the four Geneva Conventions of 1949 must be maintained. In addition it was already stated in draft Protocol I, by the articles adopted by Committee I, that States must ensure that those instruments were enforced. From that standpoint, the Conventions and the provisions concerning the enforcement of Protocol I together formed a solid basis. Without such a basis, Committee II would not have been able to adopt paragraph 4 of article 11, which specified that any violation of the provisions of that article should be a grave breach.

44. That method of designating the grave breaches in the relevant articles of draft Protocol I was preferable to retaining article 74, and even deserved to be systematized. By following such a procedure, the Committee would make its task easier, since otherwise it was likely to come up against insoluble problems in attempting to define, in a general way, new grave breaches in any given article. The Committee had the necessary authority to deal with the question in that way for, on the one hand, there was no doubt as to its competence in the subject of grave breaches and, on the other hand, there was no essential difference between adopting separate provisions and adopting texts which supplemented the provisions adopted by other committees. His delegation was fully aware that the method it proposed ran the risk of complicating the Committee's task, but felt that it would facilitate the enforcement of law.

45. Mr. ABI-SAAB (Egypt) recalled the comments he had made at the forty-third meeting (CDDH/I/SR.43). Basing himself on the statement of the ICRC representative that the procedural system of repression of grave breaches in the Conventions had never been enforced, he considered it useless to adopt a new and more ambitious system, which would be even harder to apply in practice, instead of trying to make the present system more workable. As the representative of the Netherlands had pointed out, the emphasis on grave breaches must not lead to other breaches being forgotten, since the cumulative effect of breaches regarded as relatively innocuous might exceed by far that of some breaches characterized as "grave". The system of prevention and repression of all breaches must be built into the institutional set-up of armies, thus becoming part of their daily routine.

46. Addressing himself to the substantive issues raised by article 74, he detected two divergent opinions concerning the scope of that article: some thought that it would be preferable to limit the concept to its present scope in the Conventions, i.e. to certain acts committed against individuals who were in the power of the enemy. That would exclude from it all breaches of Parts III and IV of Protocol I relating to means and methods of combat and to the protection of civilians, including those who were not in the power of the enemy. Others thought that the scope of grave breaches had to cover all parts of the Protocol. His delegation could not accept the first opinion. It was illogical to extend the substantive humanitarian protection to new areas while denying serious violations of that extended protection the sanction of the system of "grave breaches"; especially since serious violations of Parts III and IV were likely to cause much harm and suffering in practice.

47. The supporters of the limitative opinion put forward two arguments: the first was that many of the prohibitions in Parts III and IV were loosely formulated - their violations could not be sufficiently defined to entail personal criminal responsibility for their perpetrators, according to the fundamental principle nulla poena sine lege. That objection raised a technical question of drafting, which could be taken into consideration in the Drafting Committee, but it could not place an obstacle in the way of the sanctioning of some of the most serious violations of Protocol I. It had also been argued that it was difficult to produce proof of crimes committed on the battlefield or at some remove from the armies concerned; but that argument was also open to doubt. It had to be recognized that violations committed against persons in the power of the enemy such as the maltreatment of prisoners of war or civilians in occupied territory were much easier to conceal than air attacks against civilian objectives for instance.

48. It would be neither logical nor humanitarian to discriminate between the different provisions of Protocol I, restricting the concept of grave breaches only to some of them.

49. Mr. MILLER (Canada) thought that the drafting of paragraph 2 of the amendment submitted by the German Democratic Republic (CDDH/I/85) needed improving, particularly as regards the protection of goods and persons. He was satisfied with the details given in the document submitted by the ICRC (CDDH/210, annex 2) and thought some of them should be taken into account by Working Group A. To draw a distinction between grave and minor breaches would raise problems whose solution would need to be approached very carefully. Of all the amendments that had been submitted, the Australian one (CDDH/I/253) seemed to be the most suitable but, as the representative of the Republic of Korea had pointed out, the wording of paragraph 2 (h) was too vague.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-SIXTH MEETING

held on Wednesday, 28 April 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. K. Obradović (Yugoslavia), Vice-Chairman, took the Chair

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 74 - Repression of breaches of the present Protocol (CDDH/1, CDDH/210, annex 2, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/85, CDDH/I/253, CDDH/I/303, CDDH/I/304, CDDH/I/309) (continued)

1. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that as his delegation had remarked at the forty-third meeting (CDDH/I/SR.43) it considered article 74 of draft Protocol I to be vital. The aim of that article was to strengthen and develop the system of penal sanctions for breaches of humanitarian law which was laid down in the Geneva Conventions of 1949 and which had received wide recognition in many international instruments, including the United Nations Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)), article 1 of which included among the crimes subject to statutory limitations war crimes as defined in the Charter of the Nürnberg International Military Tribunal, and the grave breaches listed in the 1949 Geneva Conventions.

2. The new article 74 proposed by the ICRC (CDDH/210, annex 2) was a very satisfactory working basis. The experts who had helped to prepare it were in favour of retaining in Protocol I the system of penal sanctions provided for in the Geneva Conventions, and had seen fit to list some serious breaches: that list was regarded by his delegation as illustrative rather than exhaustive and it could perhaps be amplified in the light of the amendments submitted by the German Democratic Republic (CDDH/I/85) and Poland (CDDH/I/304) and, to some extent, along the lines of the Australian amendment (CDDH/I/253).

3. It followed from what he had said that his delegation could not agree with the Swiss amendment (CDDH/I/303) proposing to delete articles 74 to 79 altogether. The method of approach proposed by the representative of Switzerland could only complicate the work of the Committee and of the whole Conference, for the absence from Protocol I of the provisions contained in articles 74 to 79 would not only not promote the reaffirmation and development of international humanitarian law but would indisputably be a retrograde step in the work of the Conference.

4. His delegation would express its views later on the amendments proposed that day by other delegations after carefully studying them.

5. Mr. KAMMER (Legal Secretary) said that amendments to the text of article 74 proposed by the ICRC had been submitted by Switzerland (CDDH/I/303), Poland (CDDH/I/304), the United Kingdom of Great Britain and Northern Ireland and the United States of America (CDDH/I/309).

6. Mr. BIALY (Poland) said that his delegation too considered article 74 to be one of the most important in draft Protocol I. Contrary to the doubts expressed in the discussion, it was not only possible but vital for that Protocol to contain a clause on grave breaches. The aim was no doubt an ambitious one, but was it not the purpose of the Diplomatic Conference to reaffirm and develop international humanitarian law applicable in armed conflicts?

7. His delegation, while welcoming the draft code submitted by the Philippines (CDDH/56/Add.1 and Corr.1), would remind the Committee that for many years the International Law Commission's work on the punishment of war crimes had come up against the difficulty of defining aggression. A definition of aggression had finally been adopted by the United Nations General Assembly at its twenty-ninth session, on 14 December 1974 (General Assembly resolution 3314 (XXIX)). The Diplomatic Conference should therefore recommend the United Nations to pursue to a conclusion its work on a war crimes code.

8. The Committee still had to prepare a new article 74 which would be duly realistic. The texts proposed by the ICRC (CDDH/210, annex 2) and the Australian amendment (CDDH/I/253) would form a useful basis to work on, with certain improvements. For instance, paragraph 2 (c) of article 74 proposed by the ICRC was inadequate. There was also no need to repeat what was already in the 1949 Geneva Conventions, although some considered that to be necessary. The list of breaches contained in the Australian amendment was incomplete since there was no mention of deportation and unlawful transfer. Obviously it was impossible to define all grave breaches and so the list should be illustrative rather than exhaustive. In the light of its experience Poland could not agree that grave breaches should go unpunished. The list, which was completely satisfactory in international law, would be bound to have a considerable deterrent effect. The Geneva Conventions and the future Protocol I should therefore be given the widest possible circulation.

9. Referring to the statement by the Greek representative at the forty-fifth meeting (CDDH/I/SR.45), he agreed that the articles on the repression of grave breaches should contain provisions relating not only to the persons actually committing breaches but also to their accomplices and persons guilty of incitation or conspiracy. Provisions of that nature were already contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III)), and in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XIII)), as well as in many countries' penal codes. That was why the Polish delegation had submitted an amendment (CDDH/I/304) amplifying the future article 74 along those lines.

10. Mr. ALEXIE (Romania) was in favour of retaining article 74, which, once its wording had been improved and strengthened, would give still greater weight to Protocol I. It should be expressly stated in the text that the Articles of the Geneva Conventions of 1949 on the repression of breaches, as supplemented by the articles of Protocol I, would apply to the repression of breaches of that Protocol. It would also be advisable to give a stricter definition of the various categories of grave breaches, without making an exhaustive list. All breaches, whether or not grave, should be punishable.

11. With regard to the wording of the future article 74, his delegation thought that the Committee could with advantage use the text proposed by the ICRC (CDDH/210, annex 2), which broadened the scope of the penal provisions of the Geneva Conventions. Certain improvements could be made, and in particular the list of grave breaches in the ICRC draft could be supplemented.

12. Mr. ABU-GOURA (Jordan) said that he was in complete agreement with the very objective statement concerning article 74 made at the forty-fifth meeting (CDDH/I/SR.45) by the representative of Egypt. Nevertheless, his delegation believed that in the present state of the world it was essential to mention all categories of grave breaches in the article. With regard to the drafting of the new article 74, his delegation was in favour of the ICRC draft (CDDH/210, annex 2) and the Australian amendment (CDDH/I/253), but would like to see included in the final text a new paragraph containing a complete list of grave breaches. His delegation would in due course submit an amendment to that effect.

13. Mr. de ICAZA (Mexico) said that he supported draft article 74 submitted by the ICRC. He was particularly in favour of paragraphs 2 (a), (c), (d) and (e), since they corresponded closely to the wishes of developing countries, which during the last thirty years had very often been the scene of armed conflicts.

14. His delegation, like others, thought that the list of grave breaches could be illustrative rather than exhaustive. The texts proposed by other delegations also seemed acceptable, except for those which tended to remove any responsibility for grave breaches in the event of indiscriminate attacks, and those which justified the destruction or appropriation for military needs of protected objects.

New article 74 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/221/Rev.1)

15. Mr. GIRARD (France) said he was aware that new article 74 bis submitted by his delegation (CDDH/I/221/Rev.1) raised a question of principle. Many delegations had, in fact, felt that the effect of the proposal was to justify reprisals. That was not the true aim of the proposal and in drafting it the French delegation had had in mind only the cause of humanitarian law.

16. The purpose of the draft Protocol to be drawn up at the present Conference was to protect civilian persons and objects and to ensure that armed conflicts took place in as humane conditions as possible. It sought to reaffirm humanitarian law and to develop it in hitherto unexplored fields which affected the conduct of military operations, i.e. the defence and consequently the security of States. One aspect of the problem which had not been resolved was the manner in which the rules were to be applied, that is to say, the machinery which would ensure respect for the increasingly detailed and strict humanitarian law formulated at the present Conference.

17. The ICRC had of course provided for penal sanctions and States attached great importance to the matter, but it had just been seen that it was difficult to find a solution.

18. The fact must never be ignored that the rules of the Protocols were intended to be applied in times of armed conflict by armies engaged in operations; and that they governed the conduct of those operations. As the Norwegian representative had said at an earlier meeting, the law must be respected and for that reason its rules should be effective, fair and credible.

19. From the point of view of effectiveness, his delegation doubted whether the existing system of penal sanctions provided a true safeguard against violations of the Conventions. During a period of armed conflict it was not after the event that the machinery of sanctions should come into action but at the time when the rule was broken, and when that breach could cause a serious and perhaps decisive upset in the balance of forces.

20. As things were at present, if one of the belligerents deliberately violated the rules the victim would have no other recourse than to appeal to the ICRC to recall the party committing the breach to a respect for the rules to which it had subscribed. It was unlikely that such a reminder would be sufficient to stop the breach. If the victim was on the losing side all it could do would be to note with bitterness the futility of the Protocol.

21. In those circumstances was it fair, as a representative had asked, that the party committing the breach should be protected more than the victim? That was in fact the point at issue.

22. If States subscribed to rules, it was in order to apply them, but they should also be in a position, if need be, to force their adversaries to respect them. The Romanian delegation had claimed that a party which was the victim of an aggression should have the right to defend itself by all possible means. His own delegation was asking that the victim should be allowed to defend itself against breaches committed during a period of armed conflict. If States were deprived by the texts of a Convention of any means of deterrence they would be at the mercy of an enemy who would act in defiance of all the rules. It would be unjust to place the combatant who respected the law in a position of inferiority to the combatant who violated it.

23. If that were to be case, what credibility would be left to humanitarian law? Violation of that law by one of the parties to the conflict would either destroy the confidence of the other party in that law or, what would be worse, would lead it to act in the same way, and violence would then escalate disastrously.

24. That was precisely what his delegation wished to avoid: not only the breach of the law but the escalation of breaches. Hence the purpose of its proposal was not to allow the victim to react with violence, but to give it the possibility under the Conventions of deterring the party committing the breach from continuing its action, of obliging it to respect the law. Such a threat should be sufficient to serve the purpose, and therefore it must be formally proclaimed at the highest level. It should of course arise from "serious, manifest and deliberate" breaches not requiring recourse to a commission of inquiry. They would clearly not just be the individual breaches mentioned in article 74. Such a possibility of deterrence sanctioned by a convention would have to be limited by strict conditions.

25. The French proposal (CDDH/I/221/Rev.1) was supported moreover by a recent example, striking in its dignity and effectiveness, when the party which was the victim of a manifest and deliberate breach had had no other means of persuading the adverse party to

respect the law than to threaten recourse to similar measures. It was not the military authorities that had taken that formidable decision but the Government, that is to say, the highest political authority in the country. The solemn warning had proved effective and the breach had ceased.

26. Since his delegation's main purpose was to give the victim of a breach a means of deterrence, it hoped that paragraph 3 of its proposal might never have to be applied. That was the reason for the use of the word "imperative". If, however, the threat ever had to be carried out it would then be essential in the words of the Oxford Manual, published by the Institute of International Law, that "the nature and scope (of the reprisals) should never exceed the measure of the infraction" which prompted them.

27. Generally speaking, the French proposal was designed to cover cases in which, as the Oxford Manual stated, there was an urgent need to recall the party committing the breach to a respect for the rules to which it had subscribed.

28. Mr. AREBI (Libyan Arab Republic) said that his delegation could unfortunately not agree with the French delegation either on the subject or on the form of the draft text in document CDDH/I/221/Rev.1. Even though the word "reprisals" did not appear in the text, it was clear that the draft related exclusively to reprisals and that the words "certain measures" had no other meaning. Admittedly, the French delegation had sought to reduce the number of victims, but the inevitable effect of those measures of deterrence would be to increase it.

29. Mr. JOMARD (Iraq) said that the text of new article 74 bis, submitted by the representative of France (CDDH/I/221/Rev.1), called for thorough study since it raised a sensitive point in international law.

30. The measures mentioned in proposed article 74 bis were the subject of controversy among international lawyers. Some of them considered that the States whose laws had been violated had the right to take such measures once their elements had been constituted. Others considered the measures barbarous and based on jungle law because they had been incorrectly applied in the past.

31. In order that the measures mentioned in the proposed article might have a precise legal character he felt that the word "party" should be replaced by "State" and the word "parties" by the word "States".

32. Mr. TORRES AVALOS (Argentina) said that his country had for long been concerned with the prohibition of reprisals, as was evidenced by the Drago doctrine which had been embodied in international law, inter alia in Article 1 of The Hague Convention No. II of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.1/ His delegation therefore welcomed the efforts of the French delegation (CDDH/I/221/Rev.1) and favoured the extension of the prohibition of reprisals to complement Article 33 of the fourth Geneva Convention of 1949, which itself supplemented Article 2 of the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War.

33. With regard to paragraph 1 of the French proposal, it might be wondered what authority would be held responsible for taking measures of reprisal in the case of a people struggling against colonial domination, foreign occupation or a racist régime, and against whom such measures of reprisal would be taken.

34. In the case of paragraph 2 (c), it might further be asked what authority should notify the party committing the breach and to whom such notification should be addressed in cases where a colonial Power was the victim of a breach of humanitarian law.

35. Moreover, paragraph 3 should perhaps be completed so as to ensure that excessive reprisals did not lead to counter-reprisals. Lastly, the text imposed no obligation to halt reprisals once the party committing the breach had desisted from its offence or agreed to reparations. His delegation approved the prohibition of reprisals and hoped that the French draft would be improved.

36. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) agreed with the Libyan representative that reprisals as a means of compelling observance of the Geneva Conventions and Protocols should be prohibited: experience had shown that they carried with them a real danger of arbitrary action and that it was sometimes impossible

---

1/ Article 1 reads as follows:

"Article 1. The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, only applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any 'Compromis' from being agreed on, or, after the arbitration, fails to submit to the award."

to limit the extent and scale of their uses. The threat of reprisals could have a preventive effect, but the consequences might be dreadful. To recognize a party's right to violate the Protocol, even in order to oblige the other party to respect it, would be to imperil the Protocol itself and its humanitarian rules. The use of reprisals against the civilian population was quite inadmissible for it constituted a breach both of international law and of criminal law, since the civilian population was regarded as not taking part in war and the use of repressive measures against it was not allowable, and since the placing of responsibility on some persons for acts committed by others was tantamount to applying the principle of objective incrimination, which was prohibited in criminal law.

37. On 27 April 1942, at the height of the Second World War, the Government of the Soviet Union had declared - despite Germany's attitude towards prisoners of war - that it would refrain from reprisals against German prisoners, thus acting in accordance with the provisions of The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land.

38. It was claimed that the purpose of reprisals would be to oblige the party committing the breach to respect the law; but in fact it would merely introduce the law of retaliation. Under international law, the rules of war were often reduced to three principles: humanity, chivalrous behaviour on the part of the combatants, and military imperatives. The law of reprisals violated two of those principles. It might therefore be wondered whether reprisals were not a manifestation of the law of the strongest. From a moral standpoint, could the Conference, in the last quarter of the twentieth century, approve measures directed against the innocent and thus overlook the purposes for which it had been summoned?

39. Although the text submitted by the French delegation did not contain the word "reprisals", it none the less permitted them in order to oblige an adversary to desist from a breach. The text contained several conditions, but there was no guarantee that they would be observed. It was to be feared that once a party took retaliatory measures, it would attract counter measures; in turn, that would lead to a generalized breach of the Protocol and the outcome might be the opposite of that sought. Furthermore, the French text did not say what retaliatory measures were allowed. Reprisals were already prohibited under Article 46 of the first Geneva Convention of 1949, Article 13 of the third Convention and Article 33 of the fourth Convention, and the provisions contained in those articles could not be revoked.

40. In conclusion, his delegation recognized that the aim of stopping breaches of the Conventions and the Protocols was praiseworthy, but considered that to achieve that aim by using reprisals was so costly a method that the question could rightly be asked whether the price to be paid was not too high.

41. Mr. KAKOLECKI (Poland) said that he attached special importance to the prohibition of reprisals against persons and objects protected by draft Protocol I.

42. To admit reprisals, even on a limited or exceptional scale, would be a backward step. All reprisals against persons and objects were prohibited by The Hague and Geneva Conventions, and that prohibition should be confirmed and extended by the Protocol. Moreover, reprisals would be contrary to the spirit of both the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)). Lastly, even limited reprisals raised serious humanitarian objections in particular because persons in the power of an adversary needed absolutely incontestable legal protection.

43. His delegation did not share the view of those who held that reprisals might help to ensure respect for international law. They could only lead to counter-reprisals, even if the strictest conditions were laid down. As the Ukrainian representative had rightly pointed out, the history of the Second World War had shown that it was completely possible to refrain from taking reprisals.

44. The Conference at its second session had already, in the course of meetings of Committees II and III, advocated the prohibition of reprisals. As for the Polish delegation, it had as long ago as 1 October 1974 (CDDH/III/103) taken a clear stand on the prohibition of such measures in Protocol I. The adoption of a general provision similar to those of the Conventions should satisfactorily resolve the question; if a majority of delegations so wished, however, his delegation would be prepared to support any solution based on a prohibition contained in specific articles of the Protocol. In such an event, the prohibition should be carefully drafted and should be included in all the articles relating to the protection of persons and objects.

45. Mr. MILLER (Canada) observed that the French proposal (CDDH/I/221/Rev.1) had led to a discussion which was not only of great value and importance but also of great complexity. Since the purpose of the Conference was to extend the provisions of the Geneva Conventions of 1949 by bringing them into line with the conditions and needs of today, the participants were naturally inclined to lay special stress upon the humanitarian aspects of the problems before them and to strive to ensure respect for humanitarian law by formulating rules which could be applied universally.

46. Experience had shown that the Geneva and The Hague Conventions were not always applied by States Parties to those Conventions; it often happened that a party victimized by a breach reacted by resorting to extra-legal measures called "reprisals". The draft of article 74 bis submitted by France made it possible to bring such actions out into the open and to impose limits and conditions which would be both accepted and acceptable. The humanitarian aspect of the proposal, which aimed at preventing reprisals from being taken accidentally, with a risk of escalation, was further emphasized by the changes which its authors had made to the original text.

47. In the new article 74 bis, the conditions for justifying reprisals were more narrowly limited and more clearly defined. Thus it was no longer a question (as in the original text) of repressing "serious and deliberate" breaches but breaches which were "serious, manifest and deliberate". Furthermore it was only when all other efforts to induce the adverse party to comply with the law had failed that the victimized party became entitled to resort to measures designed to repress the breaches and to induce compliance with the Protocol. In the earlier text (CDDH/I/221), the decision to resort to reprisals was to be taken "by the Government", whereas the new text laid it down that such decisions should be taken only "at the highest level of the Government". That provision thus ensured that no such decision would be taken in the heat of battle, but only at a distance from the field. Even then further limits were imposed: no decision could be taken without due warning. In this respect the revised text was more precise than the earlier, since it spoke of "specific, formal and prior warning", not merely "due warning". Finally, paragraph 3 of the new draft contained, in addition to the reaffirmation of certain provisions of the Geneva Conventions of 1949, a new clause which did not appear in the original text, namely that such extraordinary measures must cease when the exceptional circumstances which prompted them had themselves ceased to exist.

48. The authors of this new draft would doubtless take into consideration the comments and very legitimate concern of certain speakers. It would, for example, be advisable to state explicitly that reprisals could not be taken against persons or objects protected by the Geneva Conventions. Such a statement would go far to allay the concerns of the representative of Poland and would meet the arguments put forward by the Ukrainian representative regarding innocent people.

49. It would undoubtedly be easier to settle the question by making no mention at all of the possibility of resorting to certain forms of reprisals; but experience had shown that such a possibility occurred fairly often and that the laws on the matter were very vague. The French proposal had the merit of trying to limit

the scope of reprisals to which a party might otherwise resort without limitation; and the present Protocol did not contain any clear and explicit provision on the matter.

50. Mr. BINDSCHEDLER (Switzerland) observed that the French proposal had the great merit of tackling a problem of the highest importance which undoubtedly existed and which had to be settled; namely, acts of reprisal even though the word itself did not occur in new article 74 bis. His delegation supported the amendment in principle and would study the new text which had been put forward with the closest attention. For the moment he would only submit a few observations:

51. If article 74 bis did not figure in Protocol I, the rules of general international law on reprisals would then apply. Now, jurists were well aware that those laws were disputed, that they were very vague and that they did not provide any measures against the risk of escalation. Article 74 bis represented a considerable step forward, for it made the rules of international law clear and rendered measures of deterrence taken by States subject to certain conditions and restrictions.

52. The Swiss delegation was happy to see that paragraph 3 of the revised text stipulated that it was forbidden to take any measures of reprisal prohibited by the Geneva Conventions of 1949. The delegation wondered, however, whether that prohibition should not be extended to other categories of persons or even to objects. Furthermore, it considered that the new article should not be included in Section II of Part V of draft Protocol I, which contained a rudimentary penal code and involved individual responsibility. Since reprisals involved the responsibility of States, any article dealing with the question should be transferred to the beginning of Section I.

53. Mr. de BREUCKER (Belgium) said that his delegation supported all measures designed to ensure respect for law. That was why it attached special importance to the proposals put forward concerning article 79 bis by Denmark, New Zealand and Sweden (CDDH/I/241) and by Pakistan (CDDH/I/267) which aimed at setting up an international commission of inquiry. Unfortunately, breaches of law frequently occurred on the battlefield, in the form of additional blows designed to win the day. Breaches of Protocol I could, of course, be denounced by commissions of inquiry; but these never operated until much time had elapsed, and delay itself weighed heavily in the balance of the fortunes of war. Moreover, commissions of inquiry might well find themselves denied access to territories in which the breaches had occurred.

54. The French proposal (CDDH/I/221/Rev.1) had the merit of discouraging not only breaches of the Protocol, but at the same time brutal and unrestrained resort to the sinister practices of reprisals. It aimed at preventing breaches of international law rather than at repressing them. Where grave breaches might have been committed, it suggested measures to prevent disproportionate retaliation calculated to engender further violence. Finally it sought to establish a legitimate right of self-defence in the last resort, in the face of a ruthless act of violence.

55. The Belgian delegation was not yet ready to make any definitive judgement on article 74 bis, but wished to pay a tribute to the French delegation for the humanitarian and realistic way in which it had tackled the problem of reprisals. The conditions and limits imposed on measures designed to deter breaches provided guarantees against the escalation of violence and deserved the closest and most attentive scrutiny. It would also be advisable to specify the various categories of people who should be protected against reprisals.

The meeting rose at 12.40 p.m.

SUMMARY RECORD OF THE FORTY-SEVENTH MEETING

held on Thursday, 29 April 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. K. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

COMMUNICATION FROM A NON-GOVERNMENTAL ORGANIZATION

1. The CHAIRMAN drew attention to a letter from the Secretary-General of the Conference enclosing a communication concerning the draft Protocols from the International Confederation of Former Prisoners of War, a non-governmental organization invited to the Conference as an observer. The Confederation had requested that its memorandum be distributed to delegations as an official Conference document.

2. Rule 61 of the rules of procedure of the Conference provided that "The Conference and its Main Committees shall decide ... whether such observers shall be permitted to present written or oral statements ...". If there were no objections, he would take it that the Committee authorized circulation of the communication from the Confederation.

It was so agreed.*

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 74 - Repression of breaches of the present Protocol (continued) (CDDH/1, CDDH/210, annex 2, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/85, CDDH/I/253, CDDH/I/303, CDDH/I/313)

3. The CHAIRMAN announced that he proposed to allow the representatives of the United Republic of Tanzania and Uganda to introduce their amendment to article 74, although the Committee had already debated that article.

4. Mr. KABUAYE (United Republic of Tanzania), introducing the amendment submitted by his delegation and that of Uganda (CDDH/I/313), said that it was designed to amplify paragraph 2 (c) of the Australian amendment (CDDH/I/253) by including apartheid among the "grave breaches" mentioned there.

---

* This communication was later circulated as document CDDH/Inf/226.

5. The sponsors felt it essential that apartheid should be included as a crime requiring prompt repression by the parties to a conflict. They were particularly concerned with the need to reaffirm and develop international humanitarian law applicable in armed conflicts, with the need to take into account developments in the years since 1949, and with the need to prevent human suffering. In that context, the Tanzanian delegation opposed the Swiss proposal (CDDH/I/303) to delete articles 74 to 79 of Section II (Repression of Breaches of the Conventions and of the present Protocol) of Part V of draft Protocol I. It agreed that penal sanctions against those violating the prohibitions in the Geneva Conventions of 1949 and Protocol I were vital to the humanitarian aims involved, but felt that to omit such provisions in accordance with the Swiss proposal would be tantamount to reducing documents that had cost three years of discussion to mere declarations of intent.

6. The sponsors believed it essential to find a formula that would make article 74 a helpful guide for the future conduct of States in difficult situations. In that connexion, he commended the attempt made by the ICRC in its proposal (CDDH/I/210, annex 2). The article needed to be made more explanatory, however, and should be brought into line with the Geneva Conventions of 1949, especially with respect to grave breaches and their repression. The Geneva Conventions of 1949 dealt with three areas - the amelioration of conditions, the situation of prisoners of war, and the civilian population - in which there existed, in different contexts, possibilities of breaching the principles of humanitarian law.

7. In all three areas two factors deserved attention from the standpoint of breaches. The first was the identical nature of some grave breaches referred to in all four Conventions of 1949, e.g. wilful killing, torture and inhuman treatment. The second was the fact that other grave breaches did not appear in all four texts, e.g. the compulsion to serve in a hostile force, which was only mentioned in the third and fourth Geneva Conventions of 1949.

8. The lesson to be drawn was that any new instruments such as the Protocols should recapitulate all the grave breaches already noted and give additional precision and emphasis to those breaches which were peculiar to specific situations.

9. The Australian proposal, as well as those of the German Democratic Republic (CDDH/I/85) and the ICRC (CDDH/210, annex 2), were thus in accordance with precedent. The Australian text listed breaches of the Geneva Conventions in Protocol I, and also mentioned breaches relevant to the Protocol but not to the Conventions. The

sponsors approved that approach, for the Conference was called upon, not to amend the Conventions, but to provide for new situations not envisaged in them.

10. The sponsors' aim was to make it clear that the practices of apartheid were serious war crimes as well as dangerous crimes against humanity. The International community had recognized them as such. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)) listed as grave breaches acts covered by the Charter of the Nürnberg tribunal, and the practices of apartheid and genocide.

11. Other United Nations Conventions and resolutions denounced apartheid as an inhuman manifestation, an outrage to the dignity of human beings and an evil tending to disrupt international understanding, peace and security. It was of the utmost importance to denounce it explicitly in the Protocol under discussion, such action being the logical outcome of the Committee's earlier decisions regarding the status of wars of national liberation, decisions which in essence gave recognition to the military situation in many areas where freedom movements were active.

12. The Committee must interpret the Australian proposal with reference to the content of the four Geneva Conventions of 1949. It was important to ensure that the section dealing with repression of grave breaches was consistent with the Conventions and also that it covered situations dealt with in Protocol I alone.

13. His delegation therefore suggested that the proposals of the ICRC and the German Democratic Republic might be merged so as to provide a well-balanced text, and hoped that delegations would be able to accept the amendment in CDDH/I/313.

14. Mr. BABA (Uganda) supported the Australian amendment to article 74 (CDDH/I/253), since it clearly listed grave breaches of the Geneva Conventions and Protocol I. Inclusion of such a list in the Protocol would minimize the danger of exposing combatants to penal risks, and leave less room for ambiguity.

15. In his delegation's view, grave breaches of Protocol I should include acts or practices which, if unheeded, might escalate war, with its attendant human suffering. If, on the other hand, such acts or practices were contained by appropriate measures, the risk of war might be diminished and human suffering alleviated.

16. While realizing that the articles now being drafted would be applied in situations of armed conflict, his delegation took the view that the Conference must not be unmindful of preventive measures likely to diminish the risks of war. For that reason it was sponsoring amendment CDDH/I/313. Moreover, apartheid was not only a "grave breach"; it had now brought about a combat situation. In areas where apartheid was openly practised and institutionalized, resistance movements, manifestly falling within the meaning of article 42 of draft Protocol I, had sprung up, clearly distinguishing themselves from the civilian population. Furthermore, the laws institutionalizing apartheid, for instance the laws establishing separate homelands based on racial discrimination, were clearly inspired by considerations of security.

17. Nor must it be forgotten that the treatment of prisoners belonging to resistance movements or national liberation movements had been humiliating.

18. It was essential for the Conference not to provide protection for one section of humanity while neglecting another which might be undergoing suffering and humiliation through the actions of the first.

19. The CHAIRMAN said he would in future be unable to allow representatives to take up subjects already discussed by the Committee. Moreover, when a proposal had several sponsors, only one of them should introduce it.

New article 74 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/221/Rev.1) (continued)

20. Mr. GRAEFRATH (German Democratic Republic) thanked the French delegation for revising its original amendment (CDDH/I/221) to article 74 bis, and for introducing the new text (CDDH/I/221/Rev.1), thus making it easier to understand.

21. The original amendment had given the impression of prohibiting reprisals in general. The new version made it clear that the intention was not to do that, but to determine the conditions under which reprisals were permitted, and thus to abandon the prohibition of reprisals which had already been approved by Committee III. Despite the fact that Committee I was thus faced with a proposal to reconsider questions already decided by Committee III, his delegation would not invoke rule 32 of the rules of procedure, for the problem was too important to be dealt with as a procedural matter.

22. The revised proposal had the advantage of making it quite clear, as the original version had not, that a general suspension of the prohibition of reprisals taken in the case of a serious violation of Protocol I, or of reprisals against an aggressor, was not envisaged. The French proposal only sought to suspend the prohibition of reprisals against the civilian population and against the civilian objects listed in articles 47, 47 bis, 49 and, perhaps, 66 of draft Protocol I. Thus, it was very selective as to the suspension provided for, but not as to the serious breaches which it was proposed should be the grounds for such suspension.

23. His delegation could not accept that approach, and was not prepared to revise the prohibition of reprisals already approved by Committee III. Protocol I laid down provisions for the protection of the civilian population and civilian objects at the beginning; it could not annul them at the end. Moreover, the criteria on which according to the French proposal, the suspension of the prohibition of reprisals would depend were very vague and ambiguous. Many questions remained unanswered: was a "serious breach" the same as a "grave breach"? Was it sufficient for a serious, manifest and deliberate breach to be manifest to the Government wishing to suspend the prohibition of reprisals? Were some delegations prepared to allow, for a grave violation, the collective punishment of a civilian population, without any procedural guarantees, instead of the prosecution, under a universal jurisdiction, of those responsible?

24. He understood the concern of the French delegation to meet the case of a country facing air raids against its civilian population, cities, cultural property and natural environment. Unfortunately, that concern was not met by the proposal, which could in fact be misused by an aggressor to justify an air raid against a civilian population and civilian objects on the grounds of serious, manifest and deliberate breaches of any of the obligations assumed under the Protocol. All the careful drafting of Part IV of Protocol I might easily be sacrificed on the pretext that serious and deliberate breaches had been committed.

25. Moreover, the French proposal would have very one-sided effects in the case of parties to a conflict at widely differing levels of technical development. In a war between a country with an air force and a country without one, if the technically-developed country, in open and deliberate breach, launched air raids against the civilian population or civilian objects, the other party would be allowed to do the same - but would have no means of so doing. If, on the other hand, the party without an air force committed or was said to have committed such breaches, even if not directed against the civilian population, the other party could take that as an excuse for suspending the provisions concerning the protection of the civil population.

26. At the discussion at the forty-sixth meeting (CDDH/I/SR.46), it had been said that article 74 bis would function as a threat and prevent violations of Protocol I: but the examples he had given clearly showed for whom and against whom such a threat would operate.

27. The question had also been raised, what the situation would be without article 74 bis, the answer being that customary international law would prevail. His delegation wished to point out, however, that without article 74 bis the prohibition of reprisals in articles 46, 47, 47 bis, 48 and 49 of Protocol I would stand, without the possibility of those prohibitions being suspended. His delegation felt that the proposal in CDDH/I/221/Rev.1 would not help to implement Protocol I but would rather tend to weaken it; and he therefore strongly opposed it.

28. Mr. ORTEGA JUGO (Venezuela) said that the question of reprisals should be covered by Protocol I as a means of making the latter more effective to ensure its proper observance.

29. Reprisals were not, of course, a pleasant matter to discuss at a meeting of the present nature dealing with standards and rules of humanitarian law and protection; however, the Conference could not ignore the fact that reprisals had been covered by international law in times both of peace and war, and had always been treated as an exception because of their very nature.

30. The French proposal (CDDH/I/221/Rev.1) was excellent and would form a good basis to work on, though it needed to be more explicit and detailed as to identification of the parties, proportionality of reprisals, duration and so on. In that respect, the points raised by the representative of Argentina at the forty-sixth meeting, and other points raised in Committee I which needed no repetition, were most relevant.

31. The final text should include all the prohibitions on reprisals laid down in the 1949 Geneva Conventions, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and those already laid down and still to be laid down by Protocol I. Such a list, even though merely a repetition of earlier legislation, would help to give Protocol I greater legal strength, for there was in law a phrase to the effect that "the superfluous cannot do any harm", and in the present material nothing was superfluous since everything was helping towards the specific aim of the present Diplomatic Conference.

32. The final text should also include a formal prohibition of counter-reprisals so as to avoid situations in which the parties to a conflict become involved in a vicious circle and also because counter-reprisals were a negation of the law; indeed, the working group which was going to deal with article 74 should consider classifying them as grave breaches.

33. Mr. DRAPER (United Kingdom) said that in the past the enforcement of international humanitarian law in armed conflict had been very weak, and the principle contained in the French proposal (CDDH/I/221/Rev.1) was an attempt to make that law a living reality rather than a series of hopeful aspirations that had no effect in binding the parties at war. The proposal was designed as a mechanism for the repression of breaches of Protocol I, and therefore deserved very serious consideration. The mechanism was a carefully controlled and last-resort system of legitimate counter-measures permissible against an adversary committing serious breaches of Protocol I. Any State might find itself in the predicament of facing an adversary adopting that course, and the problem was how to respond in a lawful manner.

34. He considered that article 74 bis was the right place to insert a text designed to ensure observance of Protocol I. The proposal was allied to the penal repression system in article 74 but distinct from it as a measure of repression. It had been suggested that the counter-measures proposed as legitimate were a form of punishment, collective or otherwise, or that the proposal implied retaliation. As could clearly be seen, however, from the last three lines of paragraph 1 of the proposal, the intention was to repress breaches and induce compliance with the Protocol.

35. Many jurists had said that there had traditionally been a mischievous tendency towards artificiality in the law of armed conflict. In drafting new law it was important to avoid the dangers of such artificiality; anything that could lead to false expectations of high standards in war could only lead to bitter disappointment.

36. The proposed text would be out of place in Parts II and IV of the Protocol, which dealt with the different question of the control of the rules of combat. He could not agree with the representative of the German Democratic Republic that the question of counter-measures had already been disposed of in a negative manner in Committee III, by deletions in articles 46 to 48. The United Kingdom considered that the acceptance by many delegations at that time of the deletion of references to counter-measures was ultimately subject to consideration by, and the action to be taken in, Committee I.

37. In view of the nature of the exchange of armed force in conflict, it was clear that some mechanism was needed beyond the Geneva Conventions to restrain the type of excesses that were familiar to all. Existing methods had proved inadequate. State responsibility and compensation under The Hague Regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on

Land could only be effective subject to the conclusion of a peace treaty and a financial settlement. A Protecting Power might not be able to restrain the use of the type of action referred to in the French proposal.

38. It was not true that at the present time the old system of lawful counter-measures was excluded; it still existed under customary law, and any exclusion must be expressed, as in the Geneva Conventions. Paragraph 3 of the French proposal was careful to preserve the prohibitions of the Geneva Conventions. Paragraph 2 provided stringent safeguards on the exchange of counter-measures. The opposition to the idea of counter-measures was due to concentration on the possible abuses of the system, but it was not logical to rule out a system because of possible abuses. The proposal provided for counter-measures as a last resort, only after a government decision at the highest level, and only after full and effective warning. The counter-measures must be proportionate to the aim of terminating the adversary's illegal acts, and must cease instantly when those acts stopped. The proposal provided for a rational and legal response to an adversary's serious breaches of Protocol I. In the interests of the observance of humanitarian law and the repression of breaches - i.e., enforcement - he did not believe the Conference should reject the proposed method of recalling the parties to a conflict to observance of humanitarian law. Nothing placed a greater strain on the legal mechanism than restraining the conduct of men in armed conflict, and that was what the proposal was designed to do. The United Kingdom would therefore support the principle embodied in it.

39. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that his delegation had carefully studied the proposals contained in article 74 bis. They were really concerned with reprisals, and analysis revealed that they contravened the meaning and spirit of the Geneva Conventions of 1949 and draft Protocol I. The implementation of the rules of article 74 bis could in practice lead to far-reaching consequences and could even undermine the basis of international humanitarian law. The rules allowed one of the parties to a conflict arbitrarily to decide whether violations of the provisions of Protocol I had taken place. On the pretext of compelling the other party to the conflict to respect the provisions of Protocol I the "victimized party" was entitled to resort to certain measures which would otherwise be prohibited by Protocol I. Thus, the "victimized party" was afforded unlimited possibilities of violating the provisions of Protocol I. That in turn gave scope for the taking of reprisals against all persons and property protected by Protocol I, including prisoners of war, the wounded and sick, and the civilian population.

40. His delegation took the view that reprisals were inhumane and unjust. They inevitably involved persons who had not participated in the original violation alleged to have taken place, and they mainly affected the civilian population. Yet the work of the Conference should be directed towards strengthening the protection accorded to the civilian population, the wounded and sick, and prisoners of war. Article 74 bis was therefore unacceptable to his delegation.

41. Moreover, the Final Act of the Conference on Security and Co-operation in Europe stated that participating States would, in their mutual relations, refrain from any acts of reprisal involving force. The Heads of State and Government of a number of countries which supported article 74 bis had also signed the Final Act. The problem was to ensure that the document was adhered to by all participants in the European Conference.

42. Mr. EIDE (Norway) said that the dilemma to which the French proposal was directed arose when one of the parties systematically violated the humanitarian law that had been developed, and continued to do so because no effective system of enforcement was available. He agreed with the French representative that it was necessary not only to enact material law, but also to make arrangements for increasing the probability that the law would be respected. That was why Norway supported the proposals for international inquiry, such as that put forward by Denmark, New Zealand and Sweden, under new article 79 bis (CDDH/I/241). He also agreed with the United Kingdom representative that existing systems of upholding humanitarian law were very weak.

43. He was obliged to differ with the French representative, however, as to the effect of his proposed solution, for it seemed to open the way to violations of humanitarian law no less than it contributed to preventing them.

44. He accepted the value of bringing the system of reprisals out of the shadows, as it were, and into the open, as the Canadian representative had suggested at the forty-sixth meeting (CDDH/I/SR.46). It should be noted that reprisals represented collective sanctions, and not repressions of breaches in the sense used in articles 74 to 78. The aim there was to pin responsibility on a guilty individual, in which case there would be such legal safeguards as presumption of innocence. It was considered that the relationship between guilt and punishment might have a certain restraining effect. But in the French proposal those who committed the original breach were not necessarily those who suffered from the reprisals; those responsible were the least likely to suffer

45. It had been pointed out that although reprisals took place between States, the effects were felt by individuals - civilians or combatants. The French proposal assumed that the threat of reprisals against persons or property otherwise protected under Protocol I would cause the Government or military command to end the violations. That was a doubtful assumption. In the past, desperate leaders had not been induced to act more responsibly by threats to their nationals, and that might well apply where a minority régime faced a war of national liberation. It was doubtful whether a victim State or party would be helped by resorting to actions directed against the innocent, even if it had done so in the past. Reprisals might well have the opposite effect, and lead to counter-reprisals. The proposal must be judged not only by its capacity to enforce the law, but also by its other consequences. It was difficult to see how the problem of counter-reprisals could be dealt with. Moreover, the threat or use of reprisals might serve to prevent a legitimate military attack.

46. The French proposal involved a subjective determination by one party as to whether the justifying conditions existed, even where an international commission of inquiry had made a finding concerning an initial breach. Moreover, the proposal was vague as to who would constitute the legitimate targets of the reprisal. Restrictions were imposed in that connexion by the provisions of the Geneva Conventions, leaving open only the protections from combat situations developed in the Protocols. Norway did not think the Conference could go back on what had been agreed to in Committee III. Nor could it refrain from providing similar protection in Protocol II, whatever the wording used. He thought the Conference should continue as at the two previous sessions, gradually reducing the shadowy area of the reprisals problem by relating the question to the various substantive articles protecting civilians and providing for safeguards.

47. Mr. SPERDUTI (Italy) said that his delegation was in general agreement with the motives that had led the French delegation to submit its proposal (CDDH/I/221/Rev.1). The Conference must recognize the great importance of the problem of ensuring the application of the rules of the Geneva Conventions and of Protocol I, and also the great difficulty of doing so. The rules of international law, though directed to States and other political bodies, were applied through the actions of men, and the international community had not yet succeeded in achieving a level of organization that would enable it to ensure the observance of international law and to exercise direct power over men to that end. Thus, there would have to be continuing reliance on States to ensure the observance of international law, which was why the Conference attached such importance to the repression of breaches of the Protocols by national courts, on the basis of the universality of

jurisdiction in the field of war crimes. The French proposal was realistic in recognizing that even when national courts could act, action was often too late to be effective, and therefore they could not provide a sufficient guarantee of the enforcement of international law.

48. His delegation could not support the proposal without reservation, and thought it needed far-reaching amendment. From the standpoint of the required conditions laid down, he could accept the proposal in principle, leaving aside for the moment the difficult question of the decision on what measures of reprisal the victim State should take. In so far as there did not yet exist any prohibition of reprisals by the parties to the conflict in the conduct of hostilities, the adoption of the regulations proposed by France would serve a humanitarian aim, because of the strict criteria applied. To that extent it filled a gap in existing international practice.

49. The Italian delegation did not believe the time was yet ripe to introduce any general prohibition of reprisals in armed conflict. So far, apart from the new article 70 bis proposed by Poland (CDDH/III/103), there had been no suggestions other than those seeking to confirm the existing prohibitions in the Conventions, and extend them to persons and objects in certain additional categories.

50. The Conference could not go back on what it had already decided, and the French proposal appeared to have the effect of neutralizing article 46, paragraph 4 of draft Protocol I, which prohibited reprisals against the civilian population or against civilians. His delegation could not accept that. It attached great importance to the absolute character of the rules of the Protocol designed to protect the civilian population. He referred also in that connexion to Article 60 of the Vienna Convention on the Law of Treaties, paragraphs 1 to 3 of which dealt with the voiding of bilateral treaties and the suspension of bilateral and multilateral treaties in case of substantial violations of those treaties; nevertheless, paragraph 5 of the Article asserted that those same paragraphs 1 to 3 did not "apply to provisions concerning the protection of the human person contained in treaties of humanitarian character", including provisions excluding "any form of reprisal against persons protected by such treaties."

51. The existing law of armed conflict and the provisions in the various parts of draft Protocol I still left sufficient room for the use of reprisals to allow the purpose of the French proposal to be achieved within the framework of the Protocol, in the form of reprisals against enemy armed forces and enemy military objects.

It would have to be made clear in paragraph 1 of the French text that the measures envisaged were measures prohibited in other circumstances. Secondly, the second sentence of paragraph 3 should specify that the measures concerned involved no derogation from the provisions of the 1949 Geneva Conventions and Protocol I concerning the prohibition of reprisals.

52. Mr. KUSSBACH (Austria) said he had some difficulty in approaching the French proposal (CDDH/I/221/Rev.1). Austria supported the absolute prohibition of reprisals against protected persons and objects; nevertheless, it well understood that the concern of the French delegation was motivated by a desire to see the humanitarian rules of Protocol I observed. It must be asked whether the proposal really provided the best solution, and if the measures suggested were in accordance with the spirit and requirements of humanitarian law. Austria had some doubts on that point. A rule allowing reprisals would have its proper place in the law of war, but not in humanitarian law. That was true even though draft Protocol I contained some provisions deriving from the law of war. But those provisions had been included in the Protocol precisely in order to extend humanitarian protection to the persons and objects in question. The text of article 74 bis clearly reflected the dilemma of its authors, since it mixed together two very distinct forms of legal responsibility. It established the responsibility of the parties to the conflict, a responsibility under international law. Yet in several places in the proposal there were references to breaches, clearly a notion from penal law relating to individual responsibility. The proposal gave a good definition of what a reprisal was, but it raised a number of questions. Did the provision derogate from the prohibition of reprisals already adopted by Committee III, or was it a kind of super-reprisal? And could it be applied to the civilian population? What was meant by a "serious" breach of obligations under the Protocol? Austria might have other questions to raise in the Working Group. In any case, even if adopted, the provision would be out of place in Section II of Part V of draft Protocol I. Austria would support any effort to strengthen the system of sanctions under humanitarian law, and had emphasized its interest in provisions to establish an international commission of inquiry, but it had great difficulty with the idea of introducing into humanitarian law a legal sanction of the law of war always regarded as incompatible with the very principle of humanity. While fully understanding the motives for the French proposal, Austria feared it would weaken the system of humanitarian law and involve a retreat from the principles on which that law had been based for over a century.

53. Mr. KIRALY (Hungary) said that his delegation was convinced that new article 74 bis proposed by the French delegation in document CDDH/I/221/Rev.1 did not serve the purposes of international humanitarian law. His delegation's views had been expressed at the

Conferences of Government Experts on the Reaffirmation and Development of International Law applicable in Armed Conflicts, held in 1971 and 1972, and had met with widespread support, which had been instrumental in excluding from the draft Protocols of any provision admitting the possibility of reprisals. On the contrary, the Protocols contained a whole series of measures expressly forbidding reprisals, e.g. article 46, paragraph 4, and articles 48 and 49. Furthermore, at the first and second sessions, the Main Committees had adopted other measures against the institution of reprisals, for example, article 47, paragraph 1; new article 47 bis, sub-paragraph (c), and new article 48 bis, paragraph 2.

54. The original version of the French proposal (CDDH/I/221) was obviously retrograde in that it appeared to permit reprisals against persons protected by the Geneva Conventions - the civil population, the wounded and prisoners of war - but the new version itself did not constitute a development of international humanitarian law.

55. The following sentence had been adeed: "The measures (of reprisals) may not involve any actions prohibited by the Geneva Conventions of 1949". But what were those measures? They could only be measures contrary to Protocol I, taken against persons and property protected by the rules of international humanitarian law. Was it possible to call such measures a development of that law? His delegation hardly thought so.

56. Many previous speakers had questioned the desirability and lawfulness of reprisals. If the parties to the conflict were evenly balanced, reprisals would lead to counter-reprisals and thus to escalation, rather than to respect for law. When the forces were not evenly balanced, reprisals would merely increase the advantage of the stronger power. It would not be difficult to mention a few examples. The adoption of article 74 bis would create more problems than it would solve. How could it be proved that the victimized party had no other remedy than to resort to reprisals in order to repress breaches of the Protocol? In the proposed article the sole ground for the taking of reprisals was that the breach should be deliberate, a matter which it was as difficult to prove as the use of forbidden methods of warfare.

57. It had to be admitted that thus far no provision had been made in agreements on international law for the taking of reprisals. All the experts who had dealt with the question during the past one hundred years were agreed that the inclusion of provisions concerning reprisals would have doubtful effects.

58. The competence of the Conference extended only to the taking of comprehensive or partial measures against reprisals with regard to protected persons and property. His delegation did not have any doubt regarding the well-meant intention of the French proposal before the Committee; nevertheless, it would not fulfil the purposes which it was intended to serve. It should therefore be rejected.

59. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that his delegation had carefully followed the Committee's discussions on the proposal to include article 74 bis in draft Protocol I. It had compared the new text in document CDDH/I/221/Rev.1 with that of document CDDH/I/221, also proposed by France at an earlier stage. Some delegations had endeavoured to show that the new proposal was an improvement and that its principal purpose was to secure the implementation of Protocol I. Nevertheless, whatever the approach or terminology adopted, the point at issue was the taking of reprisals, and that was what the earlier (CDDH/I/221) and later proposals (CDDH/I/221/Rev.1) submitted by France had in common.

60. One speaker had even affirmed that the inclusion of such a provision in Protocol I would fill a gap in the rules of humanitarian law and would facilitate its implementation. The delegation of the Byelorussian Soviet Socialist Republic could not agree with that approach. Firstly, it was clearly intended to lead to the maintenance, and further to a kind of regulation, of reprisals, and not to their prohibition. Secondly, his delegation was deeply convinced that the right to take reprisals was fraught with the grave danger of their abuse; and, by thus paving the way for violations, the French proposal would endanger the whole Protocol, which was basically prohibitive in character.

61. The Geneva Conventions of 1949, in Article 46 of the first Convention, Article 47 of the second Convention, Article 13 of the third Convention and Article 33 of the fourth Convention, prohibited the taking of reprisals, as did a number of important international instruments adopted in recent years. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) adopted in 1970 clearly stipulated that States were bound to refrain from acts of reprisals involving the use of force. Also, the Final Act of the Conference on Security and Co-operation in Europe signed on 1 August 1975, laid down that participating States would, in their mutual relations, refrain from any acts of reprisal relying on force. Thus, there was a clearly expressed general trend towards the prohibition of reprisals, and the French proposal (CDDH/I/221/Rev.1) ran counter to that trend and to the aforementioned international instruments.

62. As had been convincingly demonstrated by many speakers, any toleration of the possibility of taking reprisals, especially against the civilian population, would be in radical conflict with the spirit and meaning of the Geneva Conventions and would lead to the review of a number of articles of the Protocol now being worked out and already partly agreed on in Committee III of the Conference. Furthermore, it would run counter to a number of resolutions of the United Nations General Assembly - for instance, resolutions 2444 (XXIII) entitled "Respect for human rights in armed conflicts" and 2675 (XXV), entitled "Basic principles for the protection of civilian populations in armed conflicts", where reference was made to the prohibition of attacks on a civilian population. Thus, any attempt to commit reprisals against the civilian population represented, not a reformation or development of international humanitarian law, but a serious blow against the Geneva Conventions, Protocol I currently being elaborated, and a whole series of international instruments already adopted. Being fully in favour of the prohibition of reprisals against the civilian population, his delegation was therefore opposed to the French proposal (CDDH/I/221/Rev.1).

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-EIGHTH MEETING

held on Friday, 30 April 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. K. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

New article 74 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/221/Rev.1) (continued)

1. Mr. ALEXIE (Romania) emphasized the extreme complexity of the question of reprisals, and said that the Conference, in its efforts to remove any possibility of conflict and aggression, must codify humanitarian law in the light of the evolution that had taken place since the Second World War, and not lay down rules for armed conflicts. In that context, his delegation supported the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and wished to point out that the United Nations Charter (Article 51) recognized the right of individual or collective self-defence, which meant that the acts committed by an aggressor in occupied territory could not be recognized in law. There must accordingly be a clear distinction between aggressor and victim, and at the same time it should be made clear that the measures taken by the victim were not breaches of Protocol I. That distinction should be included in Section I of Part V of the Protocol. The Romanian delegation reiterated its support of the prohibition of reprisals against persons and objects protected by the Protocol, whose provisions should be strengthened in accordance with the United Nations Declaration referred to above, which laid down that States had a duty to refrain from acts of reprisal involving the use of force.

Mr. Ofstad (Norway) resumed the Chair.

2. Mr. PARTSCH (Federal Republic of Germany), in reply to statements by a number of delegations, including those of the Union of Soviet Socialist Republics and the Byelorussian Soviet Socialist Republic, pointing out that the Final Act of the Conference on Security and Co-operation in Europe prohibited any act of reprisal, said that the aim of that Conference had been different from that of the present Diplomatic Conference. The Final Act of the former Conference prohibited recourse to the use of force in time of peace, whereas the work of the present Conference concerned armed conflict.

3. Turning to the amendment in document CDDH/I/221/Rev.1, he said that the French delegation deserved credit for having had the courage to raise a difficult and controversial question that many other delegations would have preferred to pass over in silence. Although the word "reprisals" did not appear in the text, the amendment, as had been pointed out, should be considered in the light of the evolution of the law applying to reprisals. Reference might be made in that connexion to the arbitral awards of 1928 and 1930 in the Naulilaa case 1/, to the work of the Institute of International Law in 1934, to the decisions of the Nürnberg tribunal, and to the 1949 Geneva Conventions, which went further than those decisions and gave absolute protection to the population of occupied countries.

4. Paragraph 1 of the French proposal took full account of several of those texts in so far as it rejected any resort to retaliation and was based solely on legal considerations. On that point it was appropriate to refer to the sharp criticism voiced by the delegations of some countries that were hardly strong supporters of international courts, and had entered all sorts of reservations to a binding decision of the International Court of Justice, the implementation of which had been entrusted to the Secretary-General of the United Nations.

5. In paragraph 2, the text of sub-paragraph (a) was based on the Naulilaa case and on the decisions of the Nürnberg tribunal. The condition in sub-paragraph (b) represented some advance on the Nürnberg decisions. The third condition, in sub-paragraph (c), was directly based on the awards handed down in the Naulilaa case and on the decisions of the Nürnberg tribunal.

6. In paragraph 3, the first sentence reaffirmed that in reprisals the principle of proportionality must always be observed, in accordance with the precedents established in 1928 and 1930, which were now universally recognized. The provision in the second sentence of paragraph 3 was the most important in the whole of the proposal since it really did protect prisoners of war and the civilian population in occupied territory. Some delegations seemed to have overlooked that part of the text. That provision should be completed by including in it a reference to the relevant Articles of the Geneva Conventions. The last sentence of paragraph 3 provided an additional safeguard.

1/ See Reports of International Arbitral Awards (United Nations publication, Sales No. 1949.V.1), pp. 1019-1033 and 1069-1077.

7. Several delegations had claimed that the adoption of a general article on that subject would be incompatible with the work of Committee III (Chapters II and III of Part IV of draft Protocol I), and that Committee I had no competence in that sphere. The representatives who had participated in the second session of the Conference would recall that the Chairman of Committee III had sought to arrange for the establishment of a body to co-ordinate work on that question. It should also be noted that foot-note 1 on page 97 of the synoptic table of the draft additional Protocols to the Geneva Conventions of August 12, 1949 and the texts adopted by the Main Committees at the first and second sessions of the Diplomatic Conference (CDDH/226) stated that the final decision on paragraph 2 of article 48 bis would "await the resolution of the problem of reprisals in general in Protocols I and II." That indicated that the study of the question had not been concluded and that Committee I should be asked to study the question as a whole.

8. In conclusion, he said that the French proposal (CDDH/I/221/Rev.1) introduced new legal elements, for it had the merit of seeking to limit reprisals contractually, which was clearly an advance. It was a bold and remarkable text, and deserved to be taken into account, subject to certain minor improvements.

9. Mr. MURILLO RUBIERA (Spain) said that the Spanish delegation had already pointed out that it was dangerous to introduce the approval of curbing reprisals, especially in a provision of humanitarian law. He believed that the French proposal, which he found bold, clear and consistent, introduced new elements that deserved careful study. Far from authorizing reprisals, its aim was to try to solve a phenomenon that was foreseeable and almost unavoidable and which penal sanctions could not solve.

10. In repressing an activity, there could be only two types of rules: those which prohibited it, and those which imposed conditions. The former were already included in the Geneva Conventions of 1949, and had considerably changed international law. The latter had not yet been anywhere defined, but had already been referred to in several places, including the Regulations respecting the Laws and Customs of War on Land, annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, the draft submitted by Russia at the Brussels Conference of 1874, and the report submitted by the ICRC to the XXIst International Conference of the Red Cross (Istanbul, 1969). The prohibitory rules could be improved by making them clearer and enlarging their scope, and that was precisely the aim of the proposals made at the second session of the Diplomatic Conference in 1975 for the amendment of articles 26, 26 bis, 27 and 28 of draft Protocol II. As to the rules imposing conditions, the French delegation had wished to improve them by affirming that reprisals were only to be used as a last

resort for putting an end to grave breaches and ensuring the observance of international law.

11. One delegation had raised the question of what would happen in practice if the proposed article did not exist in Protocol I. The reply was that prohibitory rules which restricted targets of reprisals had always existed. Furthermore, in practice certain conditions set forth in military handbooks were respected. If, on the other hand, the French proposal were adopted, the possibility of reprisals might persuade a violator to change his methods. The restrictions the proposal introduced would not be sufficient either to avoid an escalation of violence and arbitrary reprisals or the influence exercised concerning their use by the difference in the power of the opponents, or to ensure respect for the principle of proportionality. It could not be presumed that such risks would disappear with the decision to place what was illegal at the service of the law. In such a case his delegation was ready to run that risk now that a text reaffirming and developing humanitarian law was available.

12. It was obvious that the law and the matter of reactions to grave and deliberate violations of the rules of jus en bello must be laid down and for that purpose an effort must be made to establish a realistic system. To fight more effectively against violations of that law, a commission of inquiry should be established that could act with keenness and rapidity to ensure that the dilatory mechanism of penal sanctions did not favour those who decided to resort to reprisals. In any case, such a commission should be able to intervene without prejudice to subsequent penal sanctions.

13. The Spanish delegation was ready to study the French draft, but hoped it would be considered in relation to both Protocols in co-ordination with the work of the other Committees on the same matter.

14. Mr. BLOEMBERGEN (Netherlands) said that while reprisals were a very questionable means of securing respect for humanitarian law, they might perhaps serve some purpose in the absence of effective international machinery. The debate on Protecting Powers had unfortunately shown clearly that such machinery would not be established for some time to come. In the circumstances, the Netherlands delegation felt that reprisals should remain a measure of last resort by which to induce an enemy to respect the law, provided that certain strict conditions and safeguards were observed, and that the "certain measures" referred to in article 74 bis, proposed by the French delegation were never directed against the civilian population.

15. In view of the fact that virtually every form of reprisal was banned under Part IV of draft Protocol I, the French delegation should be congratulated on seeking to modify the situation, though its proposal might be considered premature. The President of the Diplomatic Conference himself had instructed Committee I to consider the question of reprisals in the light of the prohibitions adopted by Committee III at the second session. While several delegations had expressed doubt as to whether the question could be reconsidered, the Netherlands delegation was sure that Committee III had taken its decision on the understanding that the matter would be taken up again, in particular by a special working group on which representatives from all the Committees would sit. It had been decided, in the meantime, that the question should be considered by Committee I. For the present the Netherlands delegation would like the Chairman of Committee I to tell members whether the President of the Conference had in fact wished the Committee to re-examine the prohibitions already adopted. If so, that should be done before the proposed new article was considered.

16. While he endorsed the position taken by the delegation of the Federal Republic of Germany, he considered that the reprisals mentioned in the Final Act of the Conference on Security and Co-operation in Europe were retaliatory measures rather than actual reprisals from the point of view of humanitarian law.

17. The CHAIRMAN, replying to the Netherlands representative's question concerning the Committee's mandate, quoted the following passage from the summary record of the thirty-first plenary meeting of the Conference (CDDH/SR.31): "The General Committee had therefore voted to assign to Committee I the problem of reprisals as a whole, as presented in the two draft Protocols". It was thus clear that Committee I was entitled to consider the question of reprisals.

18. Mr. ABI-SAAB (Egypt) observed that the discussion of reprisals caused some embarrassment because it implied that in certain cases and under certain conditions, it was permissible to set aside the standards of humanitarian protection. That was the reason why the subject had been avoided at the Brussels Conference in 1874 and at The Hague Conference of 1899, both of which concerned the laws and customs of war.

19. The only criterion which the Committee should apply in considering the French proposal (CDDH/221/Rev.1) was its incidence on the scope of humanitarian protection: would it be wider if the Protocol did not refer to reprisals at all or in case it included a provision such as the French proposal? A maximalist solution would be to include a general prohibition of reprisals. But previous interventions in the discussions had demonstrated that such a solution was unattainable under present circumstances. If no provision was

included the matter would continue to be subject to controversy beyond the specific prohibition in the Geneva Conventions of reprisals against protected persons and property. A strong party tempted to disregard humanitarian restraints could invoke his right to take reprisals under general international law without necessarily respecting the admittedly blurred legal limitations on that institution; with the ensuing danger of eroding humanitarian law through reaction and counter-reaction.

20. Would a provision regulating reprisals in Protocol I improve on that situation? The French representative, in introducing the proposal at the forty-third meeting (CDDH/I/SR.43), stated that it aimed at strengthening the provisions of Protocol I by providing a credible threat against those who committed serious and continuous violations, albeit under clearly defined conditions in order to prevent abuse. Speakers critical of the French proposal argued that by permitting recourse to reprisals, it prevented the law from subsequently developing in the direction of a general prohibition of reprisals, and afforded an additional argument to those who sought to misuse them. To evaluate those criticisms, it was necessary to ask whether a State seeking to misuse reprisals would have greater freedom of action if Protocol I contained the French proposal than if it did not. That, in turn, required the examination of two further questions.

21. First, to what extent did the proposed text regulate, hence restrict, recourse to reprisals? In that respect, the French proposal provided, in paragraph 2, a precise and rigorous formulation of the conditions placed upon such recourse: all other efforts to induce the adverse party to comply with the law must have failed; the decision to have recourse to reprisals must have been taken at the highest level of the Government of the victim; and the party committing the breach must have been given specific formal and prior warning that measures of reprisal would be taken if the breach was continued or renewed. Furthermore, paragraph 3 reiterated the requirement of strict proportionality between the breaches and reprisals. That was a cardinal principle for the prevention of abuses, which might need further elaboration. On the whole, however, the French proposal made a positive contribution in defining the procedures to be followed and the conditions to be fulfilled before recourse to reprisals could be had.

22. The other question pertained to the scope of the ban on reprisals. The French text provided that reprisals must not invoke any actions prohibited by the Geneva Conventions of 1949. The Conventions prohibited the taking of reprisals against protected persons, namely the wounded, sick and shipwrecked, prisoners of war, and civilians in the power of the adverse party, as well as against protected installations and property. What was then omitted -

the rules protecting civilians and civilian property and installations not in the power of the adverse Party and rules relating to the means and methods of combat.

23. It should therefore be made clear whether the French proposal applied to draft Protocol I as a whole, including those fundamental provisions relating to the protection of civilians (which constituted the main achievement of the present Diplomatic Conference), or whether it was more restricted in scope. In the latter case, the exact scope of the proposal would have to be determined before the humanitarian import of article 74 bis could be assessed.

24. In any event, to seek to evade the serious problem of reprisals was not the ideal solution and was unlikely to benefit humanitarian law.

25. Mr. Kun PAK (Republic of Korea) said that two points had to be considered with reference to the proposed article 74 bis. One was the repression of breaches by physical constraints and the other was the regulation or control of reprisals.

26. Solution of the problem of repression of breaches depended, in the final analysis, upon the will of the parties to the conflict to comply with the obligations imposed upon them. One party to the conflict might, in the event of breaches, take preventive or penal measures, whereas the other party might not do so or might even allow additional breaches to be committed in spite of the protests and outcry of world opinion. It was hardly possible, during hostilities, to apply effective penal sanctions against the Party guilty of breaches. On the other hand, to wait until the end of hostilities in order to punish the loser by prosecuting him for war crimes would not improve matters. Moreover, many wars ended inconclusively, which meant that neither party could institute legal proceedings against war criminals. It was doubtless with such considerations in view that the French delegation had prepared the proposed article, which would fill a gap in the present system of repression of breaches, and the French delegation should be congratulated on its initiative.

27. While the French proposal did not remove the danger of an increase in breaches on the grounds of reprisal, that was an unavoidable risk where reprisals were concerned. On the other hand, the proposal could prevent many abuses by clearly indicating the limits of what was permitted and lawful.

28. Draft article 74 bis could be improved upon and was certainly not the only possible solution. If those delegations which had criticized or rejected the French proposal were in a position to present anything better, his delegation would be happy to consider their suggestions. Until they did so, it considered the proposal to be the only document likely to ensure a more effective repression of breaches and a more satisfactory regulation of reprisals.

29. Mr. BABA (Uganda) said he would like to ask some questions about draft article 74 bis. Once it was admitted that one of the parties to the conflict had committed a serious, open and deliberate breach of its obligations, and that the victimized party had fulfilled the conditions listed in paragraph 2, who would decide whether the reprisals taken had or had not exceeded the extent of the breach committed? On the other hand, how could the victimized party be sure that the measures taken would oblige the adverse party to cease his breach? If the suffering inflicted was worse than that caused by the alleged breach, could the reprisals be considered a means of righting a wrong? Lastly, should reprisals be authorized between a strong and a weak country, when the victimized party was the weaker country?

30. Mgr. LUONI (Holy See) stressed the full gravity of the point of conscience raised for the members of Committee I by the problem of reprisals, and it was certainly greatly to the credit of the French delegation to have brought that point before them. The reasons why that delegation had submitted a new draft article 74 bis, and why several others had supported it, were fully understandable. Faced with the practice of reprisals, becoming only too frequent in the world today, there was undoubtedly a great temptation to seek to limit the damage by regulations.

31. He wondered, however, whether such regulations, even were they restrictive, would really represent an advance and whether they would bring about a just solution. Would they be in conformity with the aims of the present Diplomatic Conference, which sought to put a more and more powerful brake on the inhumanity of war, in the hope of ridding mankind of war for all time? The final objective of the Conference was not to regulate war, but to construct peace. Peace, to quote the words of Paul VI in his message of 1 January 1974 for the World Day of Peace, was "the goal of mankind in the process of its growing self-awareness and of the development of society on the face of the earth". It was based on respect for human dignity and should be a supreme moral goal for the conscience of mankind, an intrinsic requirement for the unity and solidarity of the human community.

32. Article 74 bis, as proposed (CDDH/I/221/Rev.1), was contrary to all those basic principles and the delegation of the Holy See could not endorse it. Indeed, to admit that a party to a conflict could, in certain more or less well-defined cases, have recourse to reprisals would sanction the idea that that lamentable practice was legitimate and would change it from a deplorable de facto practice to one regulated by law, which would be inadmissible.

33. The proposed article and the discussion to which it had given rise certainly showed the weakness of the measures prescribed by existing instruments of humanitarian law which guaranteed respect for the prevailing rules, but those shortcomings were no justification for the text proposed.

34. It was incumbent on the international community to seek other legal and morally acceptable means of ensuring respect for humanitarian law. Some interesting proposals had been made on the subject. The system of international sanctions, as it already existed in the international economic sphere, could provide an example. It was precisely one of the tasks of the Conference to reflect on that problem and to find a satisfactory solution.

35. Moreover, the delegation of the Holy See doubted whether article 74 bis, as submitted, could prevent any violation of humanitarian law. On the contrary, by making the principle of prohibition of reprisals less absolute, it would favour the increase of violence. Experience had shown that when a party thought that it was authorized to disregard humanitarian rules, the result, to quote the words of the Pope, was "the contention of blind and uncontrolled forces which always involve human victims and incalculable and unimputable ruin".

36. The delegation of the Holy See could not share the view expressed by some representatives who considered that a provision which set limits and conditions to recourse to reprisals would thereby make reprisals more acceptable. That was a fallacy, for respect for humanitarian law could not be assured by authorizing its violation, even in exceptional cases.

37. It was obviously essential to find legal means of punishing violations of international humanitarian law, so that those who transgressed it would not feel that they could do so with impunity. It was, however, unthinkable from the legal standpoint that any means which were themselves a violation of humanitarian law could be codified. That would be neither more nor less than a revised and amended law of retaliation.

38. On the other hand, a country which had suffered a violation and refrained from having recourse to reprisals would give the most striking practical proof of the value it attached to respect for humanitarian rules in all circumstances and of the strength of its own determination to respect them. That was the only way of demonstrating the credibility and effectiveness of those rules.

39. Pacta sunt servanda was the still valid axiom for those who desired to see effective relations between States, the stability of justice between nations and the progress of international law for the good of all mankind.

40. Mrs. BUJARD (International Committee of the Red Cross) said that, in response to the wishes of the experts whom it had consulted in 1971, the ICRC had introduced article 74 entitled "Prohibition of reprisals and exceptional cases" in the draft additional Protocol I of 1972.

41. In paragraph 1 of that article, the ICRC had reaffirmed the principle of the prohibition of reprisals against persons and property protected by the 1949 Geneva Conventions, and the prohibition had been extended to cover persons and objects protected by Protocl I, namely, the wounded, the sick, shipwrecked civilians, civilian medical units and means of transport, and the civilian population and the objects indispensable to their survival.

42. In paragraph 2 of the same article, certain rules were set forth regulating and limiting recourse to reprisals, taking into account the fact that reprisals were not yet subject to any general prohibition. Those rules were on the same lines as the conditions laid down in paragraphs 2 and 3 of draft article 74 bis submitted by France (CDDH/I/221/Rev.1).

43. Since the vast majority of participants at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in 1972 under the auspices of the ICRC, had felt that regulations on recourse to measures of reprisal had no place in an instrument concerned with international humanitarian law, the ICRC had given up the idea of inserting a general provision relating to the prohibition and regulation of such measures in draft Protocol I which was now before the Conference. Consequently, the ICRC had limited itself to including an absolute prohibition of reprisals in a number of provisions of draft Protocol I, namely, article 20 of Part II, article 46, paragraph 4, articles 48 and 49, paragraph 1, and article 66 of Part IV. Since then Committees II and III had progressed in their work and had taken the decisions of which all were aware.

44. That reminder of the earlier work of the ICRC should be useful to the Working Group that would be required to make a detailed study of the proposed article 74 bis. The ICRC had no desire to prejudge the future work of the Committee, but it would nevertheless like to point out at the present stage that, if the Committee were to adopt a provision along the lines of the French proposal - whatever its final form - the article should embody a clear and unequivocal reaffirmation of the absolute prohibition of reprisals laid down in the Geneva Conventions of 1949 and in The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. It should also include a prohibition of any counter measures against persons or property protected under the provisions of Part II of draft Protocol I - wounded, sick and shipwrecked, medical personnel, units and means of transport, which were in the same category as persons and objects protected by the Geneva Conventions.

45. The ICRC would give its views, at the appropriate time, on other questions of substance raised by the French proposal.

46. Mr. GIRARD (France) noted with regret that, whether deliberately or otherwise, some representatives had interpreted the French proposal as providing a loophole for evading the prohibitions concerning persons and objects protected by the Geneva Conventions of 1949. His delegation protested vehemently against any such interpretation. It was clear in the proposed text that the measures contemplated included none of the acts prohibited by those Conventions. It was, of course, possible to criticize the text as not being drafted in sufficiently precise terms, but it was not acting in good faith to interpret it as stating the opposite of what it clearly specified.

47. As far as the prohibition of recourse to measures of reprisal proclaimed in the Final Act of the Conference on Security and Co-operation in Europe was concerned, the French delegation endorsed the views expressed on that subject by the Netherlands and the Federal Republic of Germany; but that prohibition did not apply to the cases with which the present Diplomatic Conference was concerned.

48. He would not refer to all the objections and comments to which the French proposal had given rise. The great majority of delegations shared the concern felt by France and had already replied to them to a great extent. His delegation thanked them for their support and was resolved to take into account scruples which it shared.

49. The French delegation wished to reaffirm the hope that the measures advocated as a last resort against deliberate violations of humanitarian law would never be applied and that the very threat of resorting to them would be sufficient to dissuade any would-be

perpetrator of such violations. It was necessary that any Government that infringed the rules of humanitarian law in an armed conflict should be fully aware that in so doing it was exposing its own population to acts similar to those which were being committed, on its orders, against the population of the adverse party.

50. One delegation had stated that it was not admissible to give the victim the right to violate the Conventions. It was easy enough, no doubt, to uphold humanitarian ideals with high-sounding phrases, but the French delegation could not agree that humanitarian law should result in protecting those who violated it at the expense of those who respected it.

51. In the consideration of the proposal by the Working Group, the French delegation would be open to all suggestions concerning the wording which would ensure a respect for the law that was not merely theoretical in the cases envisaged.

New article 70 bis (Reprisals) (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/III/103)

52. Mr. KRIZ (Czechoslovakia) said that his delegation was in favour of the absolute prohibition of all measures of reprisal, as laid down in the new article 70 bis submitted by Poland (CDDH/III/103). He pointed out that the Final Act of the Conference on Security and Co-operation in Europe showed a general tendency to prohibit such measures.

53. Mr. KAKOLECKI (Poland) said that it seemed to him that the delegations which had spoken against the admissibility of reprisals were ipso facto, in favour of the spirit of the new article 70 bis submitted by his delegation (CDDH/III/103).

54. Mr. BETTAUER (United States of America) said that, while he had not spoken on article 74 bis, the United States delegation agreed with the views expressed by those delegations which had supported article 74 bis submitted by France. On the other hand, proposed article 70 bis submitted by Poland (CDDH/III/103) was unacceptable. The United States delegation therefore thought that the question of reprisals should be studied on the basis of the French proposal.

55. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that his delegation had already explained at the forty-seventh meeting (CDDH/I/SR.47) the reasons why it considered the French proposal unacceptable, as its adoption would lead to the retention and a kind of regulation of the taking of reprisals. The taking of reprisals against a civilian population must be prohibited, as laid down in the new article 70 bis submitted by Poland, which was in conformity with the wishes of many delegations.

56. Mrs. DARIIMAA (Mongolia) said that her delegation wholeheartedly supported article 70 bis submitted by Poland. The value of that text lay, firstly, in its solemn reaffirmation of the prohibition of any measures of reprisal against persons and objects protected by the Geneva Conventions of 1949 and by draft Protocol I - a prohibition which the nature of the protected persons and property, i.e. wounded, sick and shipwrecked, made imperative - and, secondly, in its confirmation of one of the major rules of international humanitarian law which it was the task of the Conference to promote.

57. Her delegation had nothing to add to the basic objections made to the French proposal (CDDH/I/221/Rev.1). The problems it raised were obviously very delicate and complicated, but the principle of prohibition of recourse to reprisals must be irrevocable. It was by imposing that principle on a world-wide scale that the Diplomatic Conference could make a fruitful contribution to the development of humanitarian law.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FORTY-NINTH MEETING

held on Monday, 3 May 1976, at 10.20 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 75 - Perfidious use of the protective signs (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/254, CDDH/I/303, CDDH/I/305, CDDH/I/314) (continued)*

1. Mrs. BUJARD (International Committee of the Red Cross) explained that article 75 applied not merely to Protocol I, but also to the Geneva Conventions, in which it was designed to fill a gap; the aim was to rectify an oversight by the Diplomatic Conference of 1949 for the Establishment of International Conventions for the Protection of Victims of War, which had failed to lay down that misuse of the protective sign of the Red Cross (Red Crescent, Red Lion and Sun) would be a grave breach of the Conventions. True, perfidious use of the sign of the Red Cross did not come automatically under the system of repression of grave breaches established in 1949, which was designed to repress breaches committed against protected persons or protected objects. For all that, the lack of a provision concerning the sign of the Red Cross was a very serious gap, for perfidious use of the protective sign in order to deceive the adversary would tend to weaken respect for the sign, and that was already happening, as recent events showed. The reaffirmation in draft Protocol I of existing signs and the creation of new signs and markings thus offered an opportunity to rectify the situation.

2. In line with the wishes expressed by the experts consulted, article 75 would cover not merely perfidious use of the protective sign of the Red Cross, but also perfidious use of other protective signs mentioned in draft Protocol I and in the other legal instruments to which it made reference.

3. Essentially, the following signs and markings were involved: the protective emblem of the Red Cross (Red Crescent, Red Lion and Sun); distinctive signals for the exclusive use of medical units and means of transport (article 8, sub-paragraph (f) - which had not yet been adopted); other protective emblems, signs or signals

---

* Resumed from the forty-fifth meeting.

recognized internationally, including the flag of truce, and the protective emblem of cultural property (article 36, adopted by Committee III); signs for marking of non-defended localities and demilitarized zones on the creation of which the parties to the conflict might agree (articles 52 and 53, adopted by Committee III); civil defence signs (article 59, considered by Committee II, but not yet adopted).

4. A complete, and more precise, list of the signs covered by article 75 could be drawn up once Committees II and III had completed their work.

5. Article 75 made perfidious use of the signs in question a grave breach, perfidious use being defined as use inviting the confidence of the enemy with intent to betray that confidence. A similar form of words also appeared in article 35, at present under study by the Working Group of Committee III. The latter Committee had not yet completed its work, but it would appear that the definition of perfidy would be amended on the following lines: "Acts inviting the confidence of an adversary that he is entitled to, or is obliged to accord, protection under international law applicable in armed conflicts, with intent to betray that confidence, shall constitute perfidy". Account should be taken of that definition in the final drafting of article 75.

6. Mr. MILLER (Canada), introducing the amendment to article 75 of draft Protocol I sponsored by Canada, the Federal Republic of Germany, Nicaragua and the Philippines (CDDH/I/314), said that there was no political motive behind the proposal, nor did it in any way seek to produce a political reaction. However, in view of the implications of certain de facto situations, discussion of the amendment might be freer and fuller in a working group than in the Committee.

7. The amendment closely followed the ICRC text and simply added to the protective signs or markings recognized by the Geneva Conventions or draft Protocol I those which were used by one of the High Contracting Parties and of which notice had been given to the adverse party through the Protecting Power or the International Committee of the Red Cross or some other impartial international humanitarian organization.

8. The existence of many other protective signs and markings had been recognized, e.g., by Committee III when it had adopted article 36 of draft Protocol I at the second session of the Diplomatic Conference. The second sentence of paragraph 1 of that

article read as follows: "It is also forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property". The purpose of the amendment was to insert a provision matching that provision of article 36 in article 75. It was in no way intended to create new signs; the amendment merely took account of those already existing and was designed to ensure that they were used for humanitarian purposes by making it a grave breach to misuse them. Nor was the procedure of notifying the adverse party a new one. Moreover, the notification of a protective sign to an adverse party obviously did not imply any official or unofficial recognition of that sign by that party.

9. The amendment should therefore raise no fears of any proliferation of protective signs: far from encouraging proliferation, it would discourage it, since any perfidious use of such signs would incur penal sanctions for which there was at present no provision in either the Geneva Conventions or Protocol I.

10. Mr. ABI-SAAB (Egypt) said that he regarded article 75 as an important reaffirmation of a basic principle of humanitarian law and that, as such, he could accept it in principle. But the text of article 75 did not follow the wording used in the other articles relating to protective signs (which adopted an enumerative approach); in that respect, the Australian amendment (CDDH/I/254) seemed preferable.

11. He was strongly opposed to amendment CDDH/I/314, from both the procedural and the substantive points of view.

12. So far as the procedural aspect was concerned, new protective signs should not be dealt with in article 75 on perfidy, but in the articles dealing with recognized signs.

13. From the point of view of substance, the amendment ran counter to the system underlying both the Geneva Conventions and the draft Protocols, whereby the protection afforded was limited to a very small number of signs generally recognized in international instruments and by all the States Parties to the Geneva Conventions, the purpose being to prevent any confusion as far as possible and to make protection as absolute as possible. To adopt amendment CDDH/I/314 would be to open Pandora's box and would lead to the appearance of innumerable protective signs, which would prove worthless precisely because of their numbers. Amendment CDDH/I/314 was therefore extremely dangerous and should not be referred to the Working Group, in which, after all, not all delegations participated.

14. Mr. GRANDISON (United States of America) introduced his delegation's amendment to article 75 (CDDH/I/305), the purpose of which was to replace the words "when the use invites the confidence of the enemy with the intent to betray that confidence" by the words "when the use involves a violation of article 35 of the present Protocol".

15. The purpose of the amendment was to call attention to the need to arrive at a text for article 75 that was consistent with article 35 as adopted by Committee III.

16. His delegation had always maintained that, because of their importance, which made them extraditable offences, grave breaches should be confined to those that were serious by their very nature and clearly and precisely defined. It was important to specify in article 75, either by a reference to article 35 or in the text of article 75 itself, that grave breaches meant those which resulted in the killing, injury or capture of an adversary.

17. The expression "confidence of the adversary" used in the existing text should be clarified through the inclusion in article 75 of wording to the effect that acts of perfidy meant those inviting the confidence of an adverse party that he was entitled to or obliged to accord protection under international law.

18. His delegation supported amendment CDDH/I/314.

19. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said he supported the ICRC's text of article 75: the perfidious use of the Red Cross sign and other protective signs recognized by the 1949 Geneva Conventions and by the draft Protocols, should be categorically prohibited; it was a serious breach and should be treated as such, with all the ensuing consequences. The number of such protective signs should be strictly limited; that was the most reasonable and practical solution. To permit any undue proliferation of them would be to devalue them and cause involuntary errors, and that would jeopardize their essential role, i.e. their protective functioning. For that reason his delegation could not agree to amendment CDDH/I/314.

20. The amendment involved another risk because it would allow one of the High Contracting Parties, at its discretion, to make a unilateral declaration concerning the use of a distinctive sign.

21. He questioned the wisdom of amendment CDDH/I/305, which proposed the insertion of the words "when the use involves a violation of article 35 of the present Protocol". It was better to avoid such internal references since experience had shown that they were difficult to interpret in practice. It was better to be over-explicit than not explicit enough.

22. Amendment CDDH/I/254 submitted by Australia was in some ways an improvement on the ICRC text, since it contained a full list of protective signs and would facilitate the implementation of article 75, but at the present stage in the work of the Conference, when not all the articles in draft Protocol I had been finalized, it was perhaps too soon to make such a list. Nevertheless the Working Group should take the amendment into account.

23. Mr. KUNUGI (Japan) said that "the perfidious use of the protective signs" should be included in the list of acts constituting grave breaches to be included in article 74. Such an act, however, should only be considered as a grave breach if it resulted in the killing, injury or capture of the adversary. His delegation supported the proposal to link the provision of article 74 dealing with the repression of "grave breaches" and the provision of article 35, paragraph 1, prohibiting resort to perfidy. For that purpose it would be sufficient to add the words "in violation of article 35" to the phrase in article 74 describing the perfidious use of protective signs as a grave breach.

24. Mr. ABU-GOURA (Jordan) observed that at the XXth International Conference of the Red Cross at Vienna in 1965 and the World Red Cross Conference on Peace at Belgrade in 1975, the participants had opposed the addition of other protective signs to those already recognized. The adoption of amendment CDDH/I/314 would in the end lead to any and every national or racial sign being used, whereas the red cross, having lost all religious significance, had become a universally accepted humanitarian sign, as the name "League of Red Cross Societies" indicated. Amendment CDDH/I/314 would cause confusion, and he therefore opposed it.

25. Mr. MUDARRIS (Saudi Arabia) said that his delegation fully supported article 75 of draft Protocol I as formulated by the ICRC. The respect for and proper use of the recognized protective signs were vital to the humanitarian cause. Article 75 of draft Protocol I in its present form filled the existing gap in the provisions of the Geneva Conventions of 1949 concerning the perfidious use of the protective signs.

26. His delegation wondered whether the revised version in amendment CDDH/I/314 was consistent with the mandate given to the Conference by article 1 of draft Protocol I, whereby the additional Protocol was to "supplement the Geneva Conventions" but not to try to amend them. The proposal in document CDDH/I/314 would invoke amendments, in particular to Article 38 of the first Geneva Convention of 1949 and Article 41 of the second. Such changes might conceivably be acceptable if they served to strengthen

humanitarian law; the proposal in question, however, would not only weaken the Conventions but undermine the application of humanitarian law by leaving the way open for any national or racial emblems to be imposed as protective signs. The draft additional Protocols had been drawn up very carefully after many different sessions of the Conference of Government Experts for the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. The participants had already at that stage decided against the adoption of new protective signs, and some had gone so far as to ask for the use of a single sign, in order to avoid confusion. It would be advisable to keep to the existing protective signs, in order to ensure the effective application of the Geneva Conventions and the Protocols.

27. He was doubtful of the motives behind amendment CDDH/I/314 and feared that, if it were adopted, it might have very grave implications for international humanitarian law.

28. Despite the statements of the Canadian representative, the Saudi Arabian delegation remained convinced that the amendment would in itself encourage the indiscriminate use of any and every racial or national emblem. It could therefore not accept the revised text of article 75 submitted by Canada.

29. Mr. AL-FALLOUJI (Iraq) considered it a matter of great urgency that Protocol I should include an article such as article 75 on "the perfidious use of protective signs", so as to strengthen and complete the Geneva Conventions.

30. In his view amendment CDDH/I/314 was fraught with many dangers. The very concept of perfidy was treated as secondary. Not only was the amendment out of place in Protocol I, but it put at risk the whole system of clearly recognizable protective signs. It was supposed to widen the existing system but would in fact only weaken it. In any case the question had already been fully discussed, and there was no point in going over the same ground again. Discussions of that sort were liable to degenerate into political debates and jeopardize the success of the Conference. He therefore strongly opposed the amendment.

31. Mr. SAMAD (Afghanistan) thought that the Australian amendment (CDDH/I/254) would be an improvement. He was opposed, however, to amendment CDDH/I/314, which was likely to result in a proliferation of protective signs.

32. Mr. BLOEMBERGEN (Netherlands) stressed that it was absolutely essential for protective signs to be respected. He therefore supported the efforts to discourage their perfidious use and to make such misuse a grave breach of the Conventions and Protocols.

33. The original text of article 75 was not clear enough on one point: in order to make the act of perfidy punishable, the article should mention the purpose or purposes of such acts. That point was brought out clearly in the United States amendment (CDDH/I/305). The perfidious use of protective signs could only be regarded as a grave breach of the Conventions when it involved a violation of article 35 of Protocol I. The acts to be regarded as grave breaches should be explicitly spelt out. His delegation thus fully supported the United States amendment.

34. Mrs. DARIIMAA (Mongolia), speaking as co-sponsor with the United Republic of Tanzania and Uganda of amendment CDDH/I/313, said that Mongolia, opposing the policy of apartheid, had signed an international convention against apartheid and racial discrimination. The amendment, however, did not directly involve the substance of article 75. She supported the ICRC proposal, which in her view provided an adequate basis for the discussion on article 75.

35. In regard to amendment CDDH/I/314, she did not propose to repeat the arguments already put forward by other delegations to the effect that it was liable to create dangerous complications. It provided for "protective signs or markings ... used by one of the High Contracting Parties, of which notice had been given to the adverse party through the Protecting Power or the International Committee of the Red Cross or some other impartial international humanitarian organization".

36. The signs in question could thus be new signs, other than those mentioned in the international conventions, used unilaterally by any party to a conflict, and there was no provision requiring the agreement of the adverse party to be obtained to the use of such signs: the information was merely conveyed that they existed. To adopt the amendment would thus be not only to risk creating a useless multiplicity of protective signs and signals; it might also have very serious consequences in cases of armed conflict. Her delegation was therefore unable to support it.

37. Mr. EL-FATTAL (Syrian Arab Republic) said that nobody questioned the fact that the Committee's task was to fill the gaps in the Geneva Conventions of 1949; the aim, however, was to supplement, rather than modify, those Conventions. They had not taken into consideration the perfidious use of the protective signs, which was a grave breach, and thus a war crime. A distinction should, however, be made between such perfidious use and other acts of war undertaken in bad faith and with the intention to mislead; and the signs in question should be clearly defined. The use of other signs was a misuse, and the Committee should take a very clear stand on the whole problem.

38. The ICRC draft was in keeping with the spirit of the Conventions. The Australian proposal (CDDH/I/254) afforded a good basis for discussion, and would be a helpful addition to the Conventions. As to amendment CDDH/I/314, which was no doubt put forward with good intentions, it had the drawback of involving the recognition of signs which were not recognized in the international conventions.

39. The texts under consideration aimed at protecting victims and no policy which might run counter to that purpose should be adopted.

40. Mr. BEN ACHOUR (Tunisia) said that, in principle, he fully approved of the text of article 75 submitted by the ICRC, but could not support amendment CDDH/I/314, which he considered highly dangerous and disturbing. It provided that, in addition to the red cross sign and other protective signs and markings recognized by the Geneva Conventions or the Protocols, new signs could be used by a High Contracting Party merely after giving notice to the adverse party. Several delegations had pointed out the risks of adopting that proposal. From the legal standpoint, such a text would undermine the essential unity of the Geneva Conventions and subsequent protocols. As had been said, article 36 of draft Protocol I, adopted at the second session of the Diplomatic Conference in 1975, had settled the matter once and for all, and it would be unwise to raise it again. Humanitarian law aimed at setting up a system which would have unity. The proposal put forward by Canada, the Federal Republic of Germany, Nicaragua and the Philippines (CDDH/I/314), however, was likely to destroy that unity, which had existed since the end of the nineteenth century. For all those reasons, his delegation found amendment CDDH/I/314 unacceptable.

41. Mr. AL-FALLOUJI (Iraq) speaking on a point of order, said that it seemed to him that some members of the Committee who were on the list of speakers were not in fact speaking. If they did not intend to do so, the Committee could take a decision forthwith on amendment CDDH/I/314. He asked the Chairman to consult the members concerned.

42. Miss AKUFFO (Ghana), Mr. CARNAUBA (Brazil) and Mr. CHOUIREF (Algeria) said that they would forgo their right to speak for the moment.

43. Miss POMETTA (Switzerland) recalled that in document CDDH/I/303, the Swiss delegation had proposed the deletion of article 75 for methodological reasons and also because the abuse of protective signs was in any case covered by the rules of international law condemning perfidy.

44. Amendment CDDH/I/314 was fraught with real dangers and was likely, as had been emphasized by the representatives of the Ukrainian Soviet Socialist Republic and Afghanistan, in particular, to cause a proliferation of protective signs. The procedure laid down in that amendment could give rise to confusion. How to determine, for example, in case of conflict what was a truly impartial humanitarian body. Was the door not being opened to political disputes at a time when victims of conflicts would have the greatest need of automatic machinery for their protection? The protective signs already recognized were not national or religious emblems but were protective humanitarian signs. The fewer they were, the more their universal character would be recognized.

45. Mr. MISHRA (India), speaking on a point of order, suggested that if no one wished to speak in favour of amendment CDDH/I/314, it should be put to the vote and the other matters referred to the Working Group.

46. Mr. FREELAND (United Kingdom) said that his delegation would not comment on the amendments to article 75 until they had been considered by the Working Group. With regard to the Indian representative's proposal, arguments had been put forward both for and against amendment CDDH/I/314. The arguments differed widely and had not convinced him. It would be over-hasty to reject the amendment immediately. The wisest thing would be to follow normal practice - i.e., to let the Working Group discuss the matter further before coming to a decision.

47. Mr. MILLER (Canada) considered that the very instructive and interesting discussion which had just taken place had shown that amendment CDDH/I/314 was not fully understood. The United Kingdom representative had been right in his view that it was too early at the present stage to take a vote and that discussion should continue in the Working Group.

48. Mr. MUDARRIS (Saudi Arabia) agreed with the Indian representative that amendment CDDH/I/314 should be put to the vote.

49. Mr. AL-FALLOUJI (Iraq) agreed. According to the rules of procedure, when all the speakers on the list had spoken, the body in question had to take a decision. The situation seemed clear. None of the speakers had spoken in favour of the proposal submitted by Canada, the Federal Republic of Germany, Nicaragua and the Philippines (CDDH/I/314). The rules of procedure should be applied and the Indian proposal should be adopted, in order to facilitate further discussion.

50. Mr. MILLER (Canada) did not agree that every speaker had opposed amendment CDDH/I/314; on the contrary, it seemed to have interested several countries. The wisest course of action would therefore be to postpone a vote until the fiftieth meeting.

51. The CHAIRMAN agreed.

52. Mr. MISHRA (India), speaking on a point of order, pointed out that he had made a formal proposal that amendment CDDH/I/314 should be put to the vote and that the other amendments should be referred to the Working Group. However, the Chairman had not put the matter to the members of the Committee.

53. Mr. BETTAUER (United States of America), speaking on a point of order, referred to rule 26 of the rules of procedure, under which during the discussion of any matter, a representative might move the suspension or the adjournment of the meeting. He moved the adjournment of the meeting.

54. The CHAIRMAN, at the request of Mr. ABI-SAAB (Egypt), put the motion of the United States representative to the vote.

There were 26 votes in favour and 26 against, with 4 abstentions. The motion was not adopted.

55. The CHAIRMAN put the Indian proposal to the vote.

By 38 votes to 22, with one abstention, it was decided that amendment CDDH/I/314 should be put to the vote.

56. Mr. GIRARD (France), speaking on a point of order, said that he had not participated in the last vote because the matter at issue had not been clearly defined.

57. Mr. MISHRA (India) repeated his proposal.

Amendment CDDH/I/314 was rejected by 43 votes to 5, with 21 abstentions.

The meeting rose at 12.50 p.m.

SUMMARY RECORD OF THE FIFTIETH MEETING

held on Tuesday, 4 May 1976, at 10.25 a.m.

Chairman: Mr. OFSTAD (Norway)

ORGANIZATION OF WORK

1. The CHAIRMAN read out a note in which the Secretary-General said that the Drafting Committee would meet from 2.30 to 4 p.m. and the Committees or their Working Groups (or the Drafting Committee of Committee II) from 4 to 7 p.m. on Mondays, Wednesdays and Fridays. The Technical Sub-Committee of Committee II, whose work would not interfere with that of the Drafting Committee, could meet at 3 p.m. on the same days. Committees or their subsidiary bodies could meet from 3 to 7 p.m. on Tuesdays and Thursdays.

2. Referring to the forty-ninth meeting of Committee I (CDDH/I/SR.49), he said that draft articles 70 bis, 74, 74 bis and 75 would be transmitted to Working Group A if the members of the Committee had no objection.

It was so agreed.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

New article 75 bis - Repatriation on close of hostilities (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/22)

3. The CHAIRMAN invited the representative of Pakistan to introduce the new article 75 bis proposed by his delegation (CDDH/I/22).

4. Mr. HUSSAIN (Pakistan) emphasized the importance of protecting prisoners of war and civilian internees under humanitarian law. Two of the Geneva Conventions of 1949, the third and the fourth, dealt with the amelioration of their plight and their repatriation. The reason for the work on humanitarian law which had been going on since 1949 was the inadequacy of some of the provisions of the Conventions; the point was that parties to conflicts had sometimes evaded them and sidetracked the attention of the international community by raising questions unrelated to the actual situation. Prisoners in the hands of one party to a conflict or of an Occupying Power had suffered interminably from confinement, maltreatment, undernourishment and even brainwashing, while the victorious party had used their detention as a lever to extract political or other advantages.

5. The provisions of Articles 132 to 134 of the fourth Geneva Convention needed strengthening to prevent situations of that kind, and that was why his delegation had proposed draft article 75 bis, as reproduced in document CDDH/I/22. The text, entitled "Repatriation on close of hostilities", emphasized the requirements of Articles 132 to 134 of the fourth Geneva Convention of 1949 on the protection of civilian persons in time of war. It also emphasized the gravity of the crime of extracting political or other advantages in exchange for the release or repatriation of prisoners of war and civilian internees. The aim of the new article was to make the repatriation of such persons mandatory immediately upon the cessation of hostilities.

6. To ensure that the provisions were applied, his delegation had proposed that any breach of the Geneva Conventions and Protocol I should be classified as a grave breach. That was the least the international community could do to ensure the observance of humanitarian law in that connexion.

7. Some prisoners of war or internees might refuse to be repatriated, a matter on which he referred to the ICRC commentaries on the third Geneva Convention of 1949. However, it was unlikely that large numbers of prisoners would refuse repatriation, and so there was no need to adopt a formal provision on that point.

8. Mr. GLORIA (Philippines) and Mr. JOMARD (Iraq) fully supported the Pakistan amendment, which in their view was entirely in conformity with the principles of humanitarian law.

9. Mr. de BREUCKER (Belgium) said that, although the intention behind the wording of paragraph 1 of proposed article 75 bis was sound, his first reaction was that the text was less precise than the provisions of Article 118 of the third Geneva Convention of 1949. It was well known that in a recent conflict the provisions of Article 118 had not been observed. It would, however, be desirable to check carefully whether the wording of the new article 75 bis really served to strengthen the application of the law. Failing that, a resolution would be a better way of dealing with the failure to apply provisions of international instruments.

10. The wording of paragraph 2 seemed unsatisfactory to his delegation, which also regretted that certain provisions of the Geneva Conventions were not always applied as they should be.

11. Mr. PARTSCH (Federal Republic of Germany), referring to Article 118 of the third Geneva Convention of 1949, considered that the Pakistan amendment introduced a fresh element, namely the idea of political or other advantage which one of the parties to the conflict might try to extract. It therefore deserved consideration by the Committee and the Conference.

12. Mr. AREBI (Libyan Arab Republic) fully supported the new article 75 bis proposed by the representative of Pakistan (CDDH/I/22). The aim of the text was fundamentally humanitarian and its importance was all the greater in that many modern wars produced an ever-increasing number of homeless persons, whose numbers in some cases ran into millions. However, paragraph 1 of the proposal might be worded more precisely, particularly as regards the words "to extract any political or other advantage". Also, the words "Delay in the repatriation" in paragraph 2 were too broad and therefore too vague. It would be essential, without restricting its scope, to exclude any chance of differing constructions being placed on the text, which might thus be improved on those two particular points.

13. Mr. GIRARD (France) supported the Pakistan proposal, which had its place among the humanitarian provisions being considered by the Conference. He had no reservations on paragraph 1, but paragraph 2 called for careful consideration. He wondered where exactly those provisions should appear. The idea of delay referred to needed closer definition. The text also seemed to prejudge the outcome of the debate still in progress on the general problem of grave breaches.

14. Mr. MILLER (Canada) said that in principle he supported the new article 75 bis proposed by Pakistan, which was in line with the provisions of draft Protocol I already adopted. He had, however, reservations on paragraph 2, and particularly on the idea of delay in repatriation. Also, the list of grave breaches would, of course, have to be completed first.

15. Mr. SPERDUTI (Italy) shared the thinking that lay behind the Pakistan proposal. He supported paragraph 1 but was hesitant about the wording of paragraph 2, for the list of breaches of Protocol I was still far from having been established. A breach, even if not considered grave, would still come under the rules applicable to breaches other than grave breaches. Also, paragraph 2 raised the question of the responsibility of States parties to a conflict.

16. The problem also came up in the last four lines of paragraph 1 of article 75 bis, which took into account political reasons which might delay the release of prisoners.

17. Mr. MURILLO RUBIERA (Spain) thought that the Pakistan amendment (CDDH/I/22) was a contribution to the development of humanitarian law and was worthy of the Conference's attention.

18. Paragraph 1 was an improvement on the legal situation under the Geneva Conventions of 1949, particularly the third and fourth, with regard to repatriation of prisoners of war and civilian internees.

19. He was not completely opposed to paragraph 2 of the proposed text, but thought that care was needed because making an act a grave breach was an important matter. The national and international consequences of any system of punishment adopted would have to be considered, and paragraph 2 would have to be studied more closely once the list of grave breaches had been completed.

20. Mr. KUNUGI (Japan) supported paragraph 1 of new article 75 bis proposed by Pakistan, but reserved his position on paragraph 2, since he had some doubts about the possibility of applying the proposal; it needed to be considered in relationship to article 74 of the draft Protocol, the scope of which had still not been settled. He hoped that the various points of view so far expressed could be reconciled.

21. Mr. KUSSBACH (Austria) supported the idea behind the Pakistan amendment, which was without any doubt likely to produce appreciable improvements in the protection of prisoners of war and civilian internees. Paragraph 1 of article 75 bis strengthened the existing law. As regards paragraph 2, he shared the fears of other representatives that the definition of a grave breach might not be applicable in municipal law; perhaps the Working Group could find an appropriate wording which would be consistent with the four Conventions.

22. Mr. PILLOUD (International Committee of the Red Cross) said that he had noted the Pakistan amendment with interest.

23. With regard to paragraph 1 of article 75 bis, it should be noted that Article 118 of the third Geneva Convention of 1949 stated that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". Any delay was therefore a breach of the Conventions, whether prisoners were detained as a means of applying pressure to obtain political advantages or because they were used for reconstruction work as reparation or because they would be unable to find anywhere to live in their own countries. It would therefore be better not to pick out one of those reasons and put it in a separate article. The paragraph should be worded in such a way as not to weaken the general principle laid down in the third Convention.

24. Paragraph 2 made delay in repatriation a grave breach, but it did not appear in Article 130 of the third Convention; it might therefore be explicitly mentioned in Protocol I. It would then be a crime that could be committed only by Governments.

Article 76 - Failure to act (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/306) (continued)*

25. Mrs. BUJARD (International Committee of the Red Cross) pointed out that the ICRC had included article 76 (Failure to act) and article 77 (Superior orders) in draft Protocol I at the request of many experts. Those articles were concerned with delicate questions which had not yet been satisfactorily dealt with in international law, and which to some extent went beyond the scope of the Protocol. If those provisions were to give rise to serious divergences which made it impossible to find a solution acceptable to all, it would be better not to insist on them.

26. Article 76, like article 75, was valid not only for Protocol I, but also for the Geneva Conventions. Paragraph 1 was less strict than the relevant provisions of the Geneva Conventions which it aimed at perfecting and which, in respect of grave breaches laid down that the High Contracting Parties must enact any legislation necessary to provide effective penal sanctions. Article 76 was nevertheless stricter than the provisions of the Conventions on other breaches, under which the High Contracting Parties must take measures necessary for the suppression of those acts: the High Contracting Parties should in future repress breaches of the Conventions and of Protocol I resulting from a failure to perform a duty to act.

27. The text was, in essence, based on two considerations: first, paragraph 1 applied not merely to failures to perform a duty to act which constituted grave breaches, but to any failure to act which constituted a breach; second, account had been taken, in accordance with the wishes of the experts consulted, of the appreciable differences between different national penal systems, some of which did not provide for failure to act. Despite those difficulties, the ICRC had bowed to the wishes of those for whom the failure of the officer-in-charge of a prisoner-of-war camp to provide food for his prisoners or a non-commissioned officer to stop a mob lynching prisoners of war constituted breaches which could not be left unpunished.

---

* Resumed from the forty-fifth meeting.

28. Paragraph 2 was concerned with the penal responsibility of a superior who knew that one of his subordinates was committing a breach and allowed it to go unpunished. Some experts had suggested that three conditions should be fulfilled for establishment of a superior's penal responsibility: that the superior knew that a breach was being committed; that he had the power to prevent it; and that he did nothing to prevent it.

29. Mr. EL-FATTAL (Syrian Arab Republic) said that after hearing the comments of the ICRC representative, he did not feel it necessary for his amendment (CDDH/I/74) to be considered by the Committee.

30. Mr. BETTAUER (United States of America) said that he supported the text proposed by the ICRC for article 76, and that his country's amendments (CDDH/I/306) were essentially technical modifications designed to make the article clearer; the amendments could be studied by the Working Group. It was also proposed that, in the English text, the words "to perform a duty to act" should be replaced by "to act when under a duty to do so". In paragraph 2 the word "penal" would be deleted, for the article also covered ordinary breaches for which there could be other penalties. In addition, the words "in the circumstances at the time", which already appeared in article 77, had been added. Also, in the English text, the words "or would commit" had been replaced by "or was going to commit". Finally, the word "feasible" had been inserted before "measures" for, in certain circumstances, it might not be feasible to prevent a breach.

31. Mr. SCHUTTE (Netherlands) said that recognition in written international law of individual responsibility of superiors who, without excuse, failed to do all in their power to prevent the commission of war crimes by their subordinates supplemented the principle contained in article 77, according to which subordinates were individually responsible for war crimes which they had committed, even when acting under superior orders.

32. The principle set out in article 76 was not a new one. Although it did not appear in the Charter and the Judgement of the Nürnberg tribunal it had nevertheless played an important part in post-war jurisprudence.

33. In general, the responsibility of superiors was strongly emphasized in existing law of war, whether The Hague Regulations respecting the Laws and Customs of War on Land, annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land or the first and second Geneva Conventions of 1949. Similarly, article 41 of draft Protocol I dealt with the organization and discipline of armed forces, as a condition of the observance of the law of war.

34. At Nürnberg there had been recognition of the individual responsibility of commanders whose failure to act could be regarded as criminal negligence; in particular, however, it was at the post-war trials in the Far East that persons held responsible for ensuring the observance of the law of war had been accused of having deliberately disregarded their legal duty to take adequate steps to prevent breaches of the said law, and thereby of having violated the provisions in force.

35. Nevertheless, it was difficult to specify the limits of responsibility in cases of failure to act, and the courts would reach their decision in each case only after taking into account all the relevant facts, even though the principle of individual responsibility was now recognized by a great number of States.

36. His delegation supported the United States amendment (CDDH/I/306), which sought to define the duties of responsible superiors, whether military or civilian. He would suggest its insertion immediately before the proposed ICRC article 76. His delegation was willing to assist, if necessary, in the improvement of the text of articles 76 and 76 bis in the Working Group. It associated itself with the comments made on the qualification of responsibility in cases of failure to act, in regard to each of the different types of breach of the Geneva Conventions and of Protocol I.

37. Miss DOKOUPIL (Austria) welcomed the fact that the ICRC had made a provision concerning failure to act. Her delegation was aware of the difficulties that might arise in implementing such a provision, and of the impact it might have on national legislations. The question was whether a failure to act could or could not be treated as equivalent to a positive action and whether the penal responsibility of its author could be involved in certain circumstances.

38. Penal sanctions were inevitable to ensure the implementation of Protocol I in cases of grave breaches, and in order to be effective, the system of sanctions should be as comprehensive as possible; hence it should include failure to act, which could be as harmful as the commission of a breach.

39. Failure to act could, of course, only involve penal responsibility if there was a definite duty to act, and recent theory tended to emphasize that the duty to act should be based on rules of law, whether they were derived from explicit provisions, contractual obligations or previous delinquent behaviour. The responsibility of a military superior for the acts of his

subordinates, if known to him, and his duty to prevent subordinates from behaving wrongfully, could not be questioned without impairing the effectiveness of the system of guarantees which the Conference was seeking to establish.

40. In order to provide a legal basis for the duty to act, it might be necessary to define in more detail the duties of a commander with regard to the prevention and repression of possible breaches committed by his subordinates, and that was what the United States delegation had endeavoured to do in its amendment (CDDH/I/306).

41. Nevertheless, it would not be advisable to widen the concept of penal responsibility to such an extent as to render its general acceptance by States more difficult. So far, the Conference had considered only deliberate breaches of certain provisions of the Geneva Conventions or of Protocol I. The Conventions contained no provision concerning the criminal nature of negligent behaviour, whether in the form of positive action or of failure to act. Her delegation was therefore of the opinion that the Conference should keep to the established system, which excluded acts of negligence by definition and, consequently, negligent failure to act.

42. While her delegation was in favour of the repression of breaches resulting from a failure to act, it did not approve of the phrases "or should have known" and "or would commit such a breach" in article 76, paragraph 2 of draft Protocol I.

43. The amendment submitted by the United States delegation clarified and limited the scope of article 76 but did not solve the problem of negligence as such. Her delegation preferred, therefore, to support the amendment proposed by the Syrian Arab Republic (CDDH/I/74).

44. The situation would, of course, be different if the Conference decided that penal responsibility was not involved in a case of failure to act. In that case her delegation would fully support the United States amendment which avoided any reference to grave breaches.

45. In any case the text would have to be so worded as to avoid any misunderstanding or misinterpretation.

46. Mr. GREEN (Canada) said that he wondered whether it was necessary to retain articles 76 and 77 of draft Protocol I.

47. Discussion of article 76, entitled "Failure to act", was concerned with the responsibility of superiors as much as with that of subordinates. Yet the provisions of existing law were infinitely clearer than the wording of article 76 proposed by the ICRC. In the Canadian military code, for instance, direct responsibility rested with any superior, whatever his rank.

48. His delegation found the United States amendment (CDDH/I/306) acceptable, since the draft ICRC text seemed too dogmatic and left superiors with several possibilities with regard to prohibiting the commission of breaches. Since the United States amendment proposed to add the words "or should reasonably have known in the circumstances at the time that he was committing or was going to commit such a breach", it established some kind of direct link between the superior and his subordinates.

49. He had not quite understood what some previous speakers had meant with regard to that amendment. It surely went without saying that such breaches were "grave". Penal sanctions consonant with the nature of the act committed should be applied.

50. Mr. EL-FATTAL (Syrian Arab Republic) reminded the Committee that he had not introduced his country's amendment (CDDH/I/74) at the beginning of the meeting, as requested by the Chairman. After his talks during the intermission, it seemed to him that the moment had come. In the first paragraph, his Government wished to limit responsibility for failure to act to "grave" breaches.

51. In paragraph 2, it was proposed to delete the words "or should have known" and "or would commit". They seemed unclear, and it would be difficult for a court, whether national or international, to base its verdict on the ICRC draft of article 76.

52. He hoped that his delegation's amendment would be discussed by the Working Group.

53. Mr. CERDA (Argentina) said that his delegation largely endorsed the Syrian amendment (CDDH/I/74), for the following reasons.

54. With regard to paragraph 1, the addition of the word "grave" before the word "breaches" seemed indispensable. The ICRC draft would undermine the basic object of article 74, which was to refer back to the provisions of the four Geneva Conventions of 1949 relating to the repression of breaches. He considered it illogical to introduce an express obligation in respect of violations by negligence when there was no corresponding obligation in respect of violations by deed, which could be just as grave.

55. He could convey his delegation's approval of paragraph 2, but thought that penal responsibility should be interpreted in a very clear sense. In the ICRC draft, the words "or should have known" introduced a lack of clarity with regard to the conduct of superiors. That wording would be tantamount to reversing the responsibility for submitting proof, which would be incompatible with the presumption of innocence common to all Latin American legal systems.

56. A superior, indeed, should always have knowledge of any breach committed by his subordinates, in order to repress it.

57. As to the words "or would commit", his delegation took the view that they should be retained. If a superior knew of preparations for an act liable to constitute a breach, he was obviously responsible.

58. Mr. KUNUGI (Japan) said that his delegation had already endorsed at the Committee's forty-third meeting (CDDH/I/SR.43) the underlying principle of article 76 of the ICRC draft. The draft, however, needed further clarification. Perhaps a few words should be added concerning the responsibility of superiors.

59. Paragraph 2 of article 76 dealt with two categories of cases: first, the case in which superiors "knew" and, secondly, the case in which superiors "should have known". In both categories, the penal responsibility of the superior was involved, and a superior who failed to take steps to prevent or repress a breach by his subordinate would be pursued. Although the ICRC had presented a commentary on article 76, the words "should have known" should be clarified further. It would seem that the second category of cases referred to responsibility arising from the superior's negligence in the exercise of his supervisory duties, and was not aimed at a wilful misfeasance or non-feasance.

60. If that interpretation was correct, a clearer formulation of the article was needed, to distinguish between penal responsibility of the superior in category one and his responsibility in category two.

61. For those reasons, his delegation endorsed the ideas set forth in the United States amendment (CDDH/I/306), which was closely linked with draft article 76 bis (CDDH/I/307) proposed by the same country. The Committee should give serious consideration to both those documents, and if need be propose drafting changes.

62. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that during the general debate on articles 74 to 76, his delegation had already endorsed the principles and provisions of the ICRC draft of article 76 of Protocol I. As could be seen from the commentaries, and as the ICRC representative had stressed, the draft was based on important considerations of international law.

63. On studying the United States amendment (CDDH/I/306), and in the light of explanations given by the United States representative, he had noticed that it not only contained drafting changes to article 76 but also touched upon the substance of some questions dealt with in that article. The purpose of the United States amendment was to alter substantially the wording of paragraphs 1 and 2 of article 76. Those questions should be given detailed and careful consideration in the Working Group.

New article 76 bis - Duty of commanders (CDDH/I/307)

64. The CHAIRMAN invited the United States representative to introduce his delegation's amendment concerning the new article 76 bis on duty of commanders (CDDH/I/307).

65. Mr. GRANDISON (United States of America) explained that the purpose of the amendment submitted by his delegation (CDDH/I/307) was to provide a clear and concrete statement describing the responsibility of commanders to prevent and, where necessary, to repress breaches of the Geneva Conventions and of Protocol I.

66. Several speakers had already pointed out that one of the most effective methods of achieving the implementation of humanitarian law applicable in armed conflict was that which prevented the commission of breaches through effective training in the Geneva Conventions and Protocol I, and through the establishment of valid administrative and disciplinary procedures. Committee I had already adopted article 72 of draft Protocol I, which required the Contracting Parties to include the study of the Geneva Conventions and Protocol I in their programmes of military instruction; it had also adopted article 70, which required the Parties to give orders and instructions to ensure observance of the Conventions and Protocol.

67. The United States delegation believed that both articles 70 and 72 of draft Protocol I were important; it therefore fully supported their adoption. The delegation was, however, of the opinion that it was necessary to go beyond those articles which only established general obligations for States, and more specifically to define the commanders' responsibilities in preventing and repressing breaches.

68. By and large, implementation of Protocol I and of the Geneva Conventions depended on commanders. Without their conscientious supervision, general legal requirements were unlikely to be effective.

69. The United States amendment was designed to provide commanders with clear notice of their responsibilities both in the prevention and repression of breaches during the actual conduct of military operations and in the prevention and repression of breaches through the establishment of appropriate training measures required at all times.

70. Paragraph 1 of the amendment stated that commanders had "a duty to prevent and, where necessary, to repress breaches of the Conventions and of the present Protocol." In its reference to "commanders", the amendment was intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command.

71. Paragraph 2 specified three of the most important measures which commanders should take to carry out their responsibility to prevent and repress breaches.

72. Paragraph 2 (a) described the commander's duty to intervene when he became aware that a breach was going to be, or had been, committed and to prevent breaches or, where appropriate, to initiate disciplinary or penal action against those having committed grave breaches. The paragraph was intended to complement the text of article 76 as amended in the United States amendment (CDDH/I/306).

73. Paragraph 2(b) established for a commander a legal responsibility to ensure that troops under his command "are aware of their responsibilities under the Conventions and this Protocol". That in effect required commanders at various levels to ensure that measures were taken to apply article 72 of draft Protocol I. Such measures would differ at different levels of command. For example, a senior commander might meet his responsibilities by designating a member of his staff to establish programmes for disseminating the Conventions and Protocol I, and to receive periodic reports on the status of such programmes. At lower levels commanders would have more direct responsibilities for ensuring that persons under their command received adequate instruction and had sufficient knowledge of their responsibilities to be able to implement them effectively.

74. Paragraph 2 (c) required that commanders should establish procedures among the troops under their command "for reporting breaches of the Conventions or of the present Protocol". That was in line with the general requirements of article 70; but, again, the specific procedures required would vary with the level of command.

75. The United States delegation believed that the new article would constitute a positive step towards improving the overall implementation of the Geneva Conventions and of Protocol I. The delegation would be happy to see its amendment discussed in detail by the Working Group.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE FIFTY-FIRST MEETING

held on Wednesday, 5 May 1976, at 10 a.m.

Chairman: Mr. OFSTAD (Norway)

TRIBUTE TO THE MEMORY OF MR. LOPEZ-HERRARTE, PERMANENT REPRESENTATIVE OF GUATEMALA TO THE INTERNATIONAL ORGANIZATIONS AT GENEVA AND HEAD OF THE DELEGATION OF GUATEMALA

1. The CHAIRMAN announced the death of Mr. Enrique Lopez-Herrarte, Head of the delegation of Guatemala.

On the proposal of the Chairman, the members of the Committee observed a minute of silence in tribute to the memory of Mr. Lopez-Herrarte.

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

New article 76 bis - Duty of commanders (CDDH/I/307)(continued)

2. Mr. FANAIAN (Iran) pointed out that the purpose of article 76 bis was to warn commanders not to evade the responsibilities they must assume under the Geneva Conventions and Protocol I, and not to be passive or indifferent in enforcing the provisions of the Geneva Conventions and Protocol I. Nevertheless, in order to avoid ambiguity which might provide a loophole for violators, the meaning of the word "commander" should be made clear. The wording of paragraph 2 (b) and (c) indicated that the person concerned should be at least a company commander; but there were also battalion commanders, division commanders, and army commanders. The meaning of the word "commander" might not always be the same in different countries and it might be better to give a definition at the beginning of the article by stating, for instance, that "commander" meant a person who was in direct command of his men.

3. Mr. ROSENNE (Israel) endorsed the United States amendment (CDDH/I/307). He would merely add that he agreed with the Japanese representative that a distinction should be drawn between grave breaches involving a heavy responsibility and simple breaches where the responsibility was administrative or disciplinary.

4. Mr. GIRARD (France) said that he would support the United States amendment, subject to a few drafting changes, especially in paragraph 2 (c) which he would submit to the Working Group.

5. Mr. CASSESE (Italy) said that his delegation supported the new article 76 bis which would strengthen and improve not only the system for the repression of grave breaches, established by the Geneva Conventions of 1949 and Protocol I, but also the system for the repression of simple breaches. The common provisions concerning the latter were too weak, for they merely stated that the High Contracting Parties would take the measures necessary for the suppression of violations of the Conventions other than grave breaches. The United States proposal (CDDH/I/307) was precisely designed to make repression of simple breaches more effective by rightly imposing on commanders the duty to prevent and, where necessary, to repress breaches of the Conventions and Protocol I. The proposal covered only crimes committed by subordinates, without mentioning the large-scale crimes committed as part of a general policy decided upon by a country's highest military authority. Notwithstanding that gap, it usefully supplemented article 76 and constituted a major step towards the effective repression of breaches.

6. He proposed that the order of the sub-paragraphs of paragraph 2 of the new article 76 bis should be changed. Logically, what should come first was sub-paragraph (b), stating that a commander should take measures to ensure that troops under his command were aware of their responsibilities under the Conventions and Protocol I, since it constituted the pre-condition for all the other measures. Then should come sub-paragraph (c) concerning procedures for reporting breaches of the Conventions and Protocol I, and the present sub-paragraph (a), on disciplinary or penal action to be taken against violators, should come last.

7. Mr. de BREUCKER (Belgium) endorsed the new article 76 bis, which was a logical addition to article 76. The proposed text could, however, be made somewhat more precise: it should be stated in paragraph 1 that the duty in question was that of a commander towards his own men. That paragraph might also be improved by listing three cases: the case in which something was prevented from happening; the case in which the commander himself repressed, for example, an infraction of discipline; and the case in which the repression of what was deemed to be a major violation was referred to a military tribunal. Similarly, it would be better to state in paragraph 2 (c), that the procedure for reporting breaches to a higher authority should already exist and that it was the commander's duty to follow such procedure, or, if no such procedure was provided to initiate it himself. It was indeed difficult to decide whether it lay with a "commander" to initiate such procedure, since the officer in question might be of high or lower rank.

8. Mr. PARTSCH (Federal Republic of Germany) approved of the new article 76 bis, but felt that some of the suggestions made by the previous speakers should be followed. For instance, the word "commander" should be defined, for the officer's position in the military hierarchy must be known. Moreover, the Italian representative's proposal for changing the order of the sub-paragraphs of paragraph 2 would make the text more logical.

9. Mr. GLORIA (Philippines) pointed out that, in any military organization, a commander was under an obligation to prevent his men from committing acts of a criminal nature, otherwise he could be charged with criminal negligence. Under United States military law, which was almost identical to that of the Philippines, a commander who failed in his duty either to prevent or to repress breaches committed by his men could be charged with having committed an act prejudicial to good order and discipline. It was therefore unnecessary to insert in draft Protocol I the provisions of paragraph 1 of the new article 76 bis. Paragraph 2 (a) set forth another established legal principle. A commander who did not carry out the obligations set out in that paragraph should not be in any military organization. Moreover, the duty laid upon commanders in sub-paragraph (b) was, in fact, incumbent on legal advisers in armed forces under article 71, which had been adopted by Committee I at its thirty-eighth meeting on 9 April 1975. In the same way, sub-paragraph (c) in effect repeated the provisions of article 72, adopted by the Committee at that same meeting.

10. In view of the foregoing considerations, his delegation regretted that it was not in a position to support the new article 76 bis.

11. Mr. CARNAUBA (Brazil) supported the United States proposal, but reserved the right to suggest a few amendments of form to the Working Group which would consider the new article 76 bis.

12. Mr. MURILLO RUBIERA (Spain) supported the United States proposal, which met the Committee's desire to reaffirm and develop the principles of humanitarian law. The text proposed called for some comments, which he would submit to the Working Group. For the time being, he would merely point out that there was a very close link between the new article 76 bis and article 76, paragraph 2. He wondered whether the text of paragraph 1 of the United States proposal should not be the first sentence of an article devoted to the question of the responsibility of superiors The new article 76 bis should certainly be considered alongside the provisions of article 76. In paragraph 2, the text of sub-paragraph (b) should come first. In sub-paragraph (c), some points should be made clearer when the text came to be submitted to the Working Group.

13. Mr. DRAPER (United Kingdom) supported the principle in new article 76 bis, which proposed realistic measures calculated to strengthen the application of Protocol I. He wondered, however, whether the text was in the right place in Section II of Part V, and whether it should not rather belong to Section I (General Provisions). Moreover, he too thought that the word "commander" might create confusion. The last part of paragraph 2 (a): "and, where appropriate, to initiate disciplinary or penal action against violators thereof" showed clearly that that word could be applied only to certain levels of command. Furthermore, the term "to initiate" was not very clear: it might mean merely to report to the competent authorities, or it might mean to set in motion the machinery of disciplinary or penal proceedings.

14. Paragraph 1 should specify the breaches which were to prevent and, where necessary, to repress. It would scarcely be possible to make commanders responsible for breaches committed by the enemy. Paragraph 2 (a) referred to "subordinates", while the phrase in sub-paragraphs (b) and (c) was "troops under his command". The right word should be found and then used throughout the text.

15. Mr. MILLER (Canada) observed that the text proposed by the United States delegation was already in the military law of several countries, including Canada; his delegation could not, therefore, do other than support it.

16. In common with many of the previous speakers, he felt that the word "commander" was highly ambiguous. The word "superior" would perhaps be more appropriate. He shared the views of the United Kingdom representative concerning paragraph 1 and agreed that the last part of paragraph 2 (a) indicated that the term "commander" could be applied to various categories of officer. He thought, however, that even a section commander, or a corporal, could initiate disciplinary or penal action.

17. The Committee should give careful thought to the choice of the Section in which the new article 76 bis should appear. It should make sure that the new article tallied with article 72, although the latter was of much wider scope. Indeed, under article 72, the High Contracting Parties would not only undertake to disseminate the Conventions and the present Protocol as widely as possible and to organize programmes of military instruction, but would assume responsibilities in respect of the application of the Conventions and the present Protocol.

18. If there was a link between the United States proposal and article 76, the order of the sub-paragraphs of paragraph 2 should be changed, as proposed by the Italian representative. It might be possible to merge the two articles unless it was deemed preferable to include in draft Protocol I two articles on the duty of commanders to act.

19. The CHAIRMAN declared the discussion on new article 76 bis closed; the article would be referred to Working Group A for consideration.

Article 77 - Superior orders (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/255, CDDH/I/303, CDDH/I/308)(continued)*

20. Mrs. BUJARD (International Committee of the Red Cross) said that article 77 as proposed by the ICRC complemented paragraph 2 of article 76. Its provisions rested on one of the major principles of international law, a principle embodied in the Charter of the Nürnberg tribunal and the sentences handed down by that tribunal, confirmed by the United Nations General Assembly and formulated by the International Law Commission.

21. Paragraph 1 of article 77 applied to cases where refusal to obey an order, whether given by the Government or by a superior, was not punishable. That clause related solely to grave breaches of the provisions of the Geneva Conventions and Protocol I. In restricting the scope of the absolvitory plea strictly to grave breaches, the ICRC had in fact bowed to the arguments of most of the experts consulted, who, bearing in mind the exigencies of military discipline, had pointed out that it would be difficult to permit soldiers to contest, in all circumstances, the orders of their superiors. None the less, the ICRC recalled that, in the view of some other experts, it would be unwise to limit the scope of responsibility in that way.

22. Paragraph 2 of article 77 was based on Principle IV of the Charter of the Nürnberg tribunal, the terms of which she outlined adding that the ICRC had drawn on part of the Principle in the last phrase of paragraph 2, beginning with the words: "he should have reasonably known that he was committing a grave breach...". The ICRC had borne in mind, in keeping with the wishes of the experts, the extremely difficult situation of a soldier subject to military laws and regulations which compelled him to obey orders.

---

* Resumed from the forty-fifth meeting.

23. The CHAIRMAN said that the Committee had before it three amendments to article 77, namely, those of the Syrian Arab Republic (CDDH/I/74), Australia (CDDH/I/255) and the United States of America (CDDH/I/308). He invited the representatives of those countries to explain their texts.

24. Mr. EL-FATTAL (Syrian Arab Republic) stated the reasons which had led his delegation to propose a radical amendment to paragraph 1 of the ICRC text. It would be unrealistic to absolve from any penalty persons who refused to commit a grave breach of the provisions of the Convention or the Protocol, since that would enable a subordinate to disobey an order of his Government or of a superior; in other words, it would establish equality between those who gave orders and those who carried them out, and that was unrealistic. His delegation therefore preferred a reaffirmation of the duty of States to punish and repress grave breaches.

25. Paragraph 2 of the Syrian amendment (CDDH/I/74) closely resembled the ICRC text. He pointed out, however, that the Syrian text implied that any refusal to comply with superior orders presupposed, on the part of the subordinate, the realization that he was committing a breach and had the possibility of not carrying out the order.

26. Mr. MAHONY (Australia) said that his delegation supported the objectives sought in the ICRC text of article 77. Since the article should relate solely to grave breaches, paragraph 1 could be approved without reservation.

27. It was difficult, however, to accept paragraph 2, since it provided penal responsibility only if the subordinate should reasonably have known that he was committing a grave breach and it did not refer to the case where a subordinate knew as a fact that he was committing a grave breach. That was a gap which should be filled.

28. Presumably, in introducing the phrase "and that he had the possibility of refusing to obey the order", the ICRC sought to take into account the obligation to obey military orders. That clause, however, was far too broad and his delegation thought that the best course might be to delete it; that would increase the degree of responsibility to be imposed on soldiers. In other words, if a soldier, in the circumstances existing at the time, should reasonably have known that he was committing a grave breach of the Geneva Conventions or of Protocol I, he should be prohibited from committing the act which constituted a grave breach, whatever the consequences might be for him, and of course they would usually be most severe. In the Australian text (CDDH/I/255) there was no provision which would give immunity to a soldier if he had had no opportunity of refusing to obey an order.

29. There might well be reason for thinking that those standards were too high. Some delegations might consider that they imposed too strict a duty on soldiers. In that case, his delegation would wish to assist in drafting an article relating to superior orders that would be acceptable to all, if the Conference decided to include such an article.

30. Mr. GRANDISON (United States of America) said that his delegation supported generally the ICRC draft of article 77. The United States amendment (CDDH/I/308) contained for the most part drafting changes which could appropriately be left to the consideration of the Working Group.

31. The most important change suggested was the deletion of the word "grave" from the two paragraphs of draft article 77. The principles enunciated in both paragraphs should be applicable to all breaches of the Geneva Conventions and Protocol I, since such breaches, even if not grave, could still be serious offences. Moreover, if the scope of the article was limited to grave breaches, the article could be susceptible to the interpretation that a subordinate who was ordered by a superior to commit a breach of the Conventions and Protocol I that was not a grave breach had no legal grounds on which to justify disobedience, or to present his defence if accused. His delegation believed that the better approach would be to state specifically in article 77 that the provisions applied both to breaches and grave breaches.

32. His delegation had proposed three changes in article 77, paragraph 2. The first was the deletion of the word "penal" since now, under the United States amendment, in addition to grave breaches which were subject to penal measures, there would also be other breaches which could result in administrative, disciplinary or penal measures. The second change proposed was that the words "he should have reasonably known" should be replaced by the words "he knew or should reasonably have known", in order to cover the case where actual knowledge on the part of the offender could be proved. The last change proposed, involved replacing the clause "and that he had the possibility of refusing to obey the order" with the sentence "The fact that the individual was acting pursuant to orders may, however, be taken into account in mitigation of punishment" was to make it possible for the penalty incurred to be reduced. The ICRC wording was too vague and might lead to abuses. His delegation believed that it would be better to permit the defence of duress, which was more specifically limited. However, his delegation felt that it was not necessary specifically to list all generally recognized defences such as self-defence, duress and mistake of fact as those were generally recognized defences for all criminal offences.

33. His delegation did not believe that an offender could absolve himself from responsibility by alleging that he had acted under superior orders if he knew or should have reasonably known that he was committing a breach. It did believe, however, that in the case of an offender who had acted under orders, the special circumstances of the case should be considered in determining the punishment to be imposed.

34. The Revd. Father ARRIGHI (Holy See) said that the Holy See attached great importance to the moral significance of article 77, which was so worded as to give a man the possibility of safeguarding his dignity by acting according to his conscience and not only under external pressure.

35. Article 77 contained two main elements, the refusal to obey and the responsibility of the person opposing or not opposing that refusal. It concerned not so much soldiers in the field who had no choice but to obey, as those in authority. Only when the commander acted with respect for moral standards were subordinates morally bound to obey. That meant that Governments and superior authorities should, for their part, give orders in accordance with those standards, in fact, orders which did not violate the Conventions.

36. Deliberate violations of the Geneva Conventions and orders leading to violations were grave breaches. Blind obedience to such orders did not excuse those who executed them.

37. It seemed desirable that article 77 should not be confined to grave breaches of the provisions of the Geneva Conventions, but should be extended to cover acts found reprehensible by the universal conscience, which was becoming ever clearer and more demanding. The ICRC text would thus be improved by including some mention of the demands of the universal conscience.

38. As to article 77, paragraph 2, the question was to know what authority would be qualified to assess the penal responsibility of a subordinate accused of having committed a breach of the kind referred to in the article. The delegation of the Holy See believed that an international court would offer a greater guarantee of impartiality and justice than, for instance, a tribunal of the victorious country. It would revert to its proposals when draft article 77 was discussed in the Working Group.

39. Mr. DRAPER (United Kingdom) regretfully recalled that, when the Geneva Conventions of 1949 were being drafted, the participants had not succeeded in reaching agreement on an article dealing with superior orders. It was therefore the duty of the present Diplomatic Conference to make good that omission and to agree on a text which should become one of the essential articles of the Protocol. It was very difficult to find the right wording, however, for a fair balance had to be struck between, on the one hand, those who were subject to orders and, on the other, the legal order, which must be respected. The ICRC was to be congratulated on having tried to strike such a balance in its article 77.

40. At the time when war crimes were being adjudicated and thereafter, a good deal had been written on the subject of superior orders. Writers had shown how complex the problem was, since, as the representative of the Holy See had pointed out, it affected moral principles. Furthermore, it must never be forgotten that war crimes, or grave breaches, were not committed solely by military authorities; there were unfortunately very many cases in history in which civil elements had also been guilty of them, thus, the civil authorities might also have to be arraigned.

41. Moreover, though under the military code of every country it was the duty of the soldier and any subordinate to obey his superior's orders, it would be absurd and contrary to law to suggest that such obedience should be absolute; in no legal system, surely, would a soldier be required to obey a criminal order.

42. His delegation was afraid that the text of paragraph 1 of the ICRC draft article 77 might be interpreted as an unwarranted intrusion into the criminal law of States. While approving the principle implicit in the text, he suggested that it might be better to say, in substance, that the High Contracting Parties undertook to see to it that the provisions of domestic criminal law relating to cases of disobedience of orders should apply only to orders which were in accordance with domestic law, and with international law, in particular the Geneva Conventions of 1949 and Protocol I.

43. Paragraph 2 of article 77 raised problems much too difficult to be dealt with in a single article. Of course, the basic principle which had to be laid down at the outset was that the fact of having acted on the orders of a superior authority did not, of itself, absolve an accused person of penal responsibility. At the same time, a person so accused might have some moral and legal defence. His case must always be considered in relation to the situation in which he was placed at the time he was ordered to

commit a grave breach, and also in relation to such knowledge as he might reasonably be expected to have had of that situation. There was thus a distinction to be made between the time when an order was given and the time when it was carried out. It was also necessary to know the precise circumstances in which the accused person had been given the order, since such orders were often given orally, in action, and under fire. Also, one must take account of the pressures to which he had been subjected. The problem, then, was, on the one hand, to determine what knowledge the accused person had had of a given situation, and, on the other hand, to determine whether other circumstances that might have hindered him in the exercise of his own will, such as pressure by way of threats of punishment or violence. Lastly, it must not be forgotten that, when anyone committed a crime on the orders of a superior, the penalty might have to be mitigated.

44. Mr. OBEBE (Nigeria) said that on the whole he approved article 77 as submitted by the ICRC and unreservedly supported the United States amendment (CDDH/I/308). Referring to the United Kingdom representative's remarks on paragraph 1, he said that since it was difficult to judge the degree of gravity of breaches of the Geneva Conventions and of Protocol I, it was justifiable to delete the word "grave". Furthermore, as the United Kingdom representative had pointed out, the words "refusing to obey an order of his Government" raised problems of national law. It was difficult to see how a Nigerian commander, for example, could refuse to obey an order of his Government. The task of adapting the domestic law of each country to international law would be almost insuperable.

45. With reference to article 77, paragraph 2, he said that a subaltern might be forced to obey an order under constraint; he therefore approved the suggestion that the words "at the time when the order was carried out" should be added. A lapse of time between the receipt and the carrying out of an order might well modify the degree of responsibility to be imputed to the executant. In short, the Nigerian delegation shared the view of the United Kingdom representative, approved the United States amendment and hoped the Working Group would revise the text so as to take account of both.

46. Mr. de BREUCKER (Belgium) said he approved in general the idea underlying the ICRC proposal. The purpose of the Australian representative in wishing to delete from paragraph 2 the words "and that he had the possibility of refusing to obey the order" was no doubt to prevent an accused soldier from pleading the bad excuse of military discipline or fear of his Government. Both history and

everyday life, however, conveyed the reminder that not all Governments were democratic, and that a military commander might be under terrifying threats from the civil power and the police. That was therefore an argument against the categorical approval of the Australian proposal.

47. The United States delegation, too, had omitted from its draft the words which Australia wished to delete; but it had emphasized that the fact of having acted under orders might be taken into consideration in "mitigation of punishment". The last sentence of paragraph 2 was not precise enough, and mentioned only extenuating circumstances. It should be possible to interpret it to mean "The fact that the accused person had acted pursuant to an order, or the fact, if duly established, that he had had no possibility of refusing to obey the order shall be taken into consideration during the trial". The text would thus widen the range of standard solutions at the tribunal's disposal, from grounds for exculpation and extenuating circumstances to full and complete responsibility, notwithstanding the order received. The problem really depended for its solution on the meaning given to the words "does not absolve an accused person from penal responsibility". The question needed careful consideration in view of the differences in approach of the various systems of penal law. His delegation was prepared to study the question in the Working Group.

48. Mr. LYON (Chile) expressed his concern about the ICRC text, in particular paragraph 1, since it might conflict with the principles of municipal law. The rules and punishments governing military discipline were a mainstay of armies. The various national penal legislations had sanctioned the principle of either absolute obedience, as was the case with Chilean law, or of rational obedience or again considered obedience, which meant that a subordinate could ask his superior to reconsider his order, but would have to obey if the order was confirmed. Only the superior was empowered to settle any disagreement and the order had to be carried out. The Chilean delegation would therefore like the words "of his Government" to be deleted from article 77 and it recommended that the comments of the United Kingdom representative should be used as a basis for discussion. The words "of his Government" in paragraph 2 should also be deleted. The Working Group should be asked to define more accurately the words at the end of paragraph 2: "and that he had the possibility of refusing to obey the order".

49. Miss EMARA (Egypt) recalled that in the general discussion her delegation had expressed its reservations on paragraph 1 and had pointed out that the exigencies of military discipline made the application of paragraph 1 difficult. That, moreover, was the opinion of the experts consulted by the ICRC; they had also pointed out in connexion with paragraph 2, that obedience was an integral part of military rules and regulations. It was therefore to be hoped that the United Kingdom delegation would be able to prepare a text for the Working Group.

50. Mr. KAKOLECKI (Poland) said that the persons responsible for war crimes always tried to evade or minimize their responsibility by pleading the obligation to obey orders. Experience showed that a legal solution that permitted too much latitude weakened responsibility and led to the adoption of a punishment which was not severe enough for the crime. Such was the case with the ICRC text, which might in practice endanger the application of international law. His delegation therefore supported the Australian amendment (CDDH/I/255), the aim of which was to guard against any reduction of the responsibility of individuals before the courts, while having due regard to fundamental legal guarantees.

51. Mr. Kun PAK (Republic of Korea) said that he approved of the ICRC text, although he realized that some representatives, including those of Nigeria, Egypt and Poland, had raised fundamental objections to it. Since it was in the nature of things that there were always more subordinates than superiors, it might be wondered whether it was human for the former to be treated like the latter. Every ex-serviceman knew that a soldier could not be expected always to bear the Geneva Conventions - and soon Protocol I - in mind, even if those instruments had been circulated by his Government and military command. Article 77, with its tendency to equalize penal responsibilities as between superiors and subordinates, might undermine military discipline whereas it was precisely the intention of other parts of Protocol I to strengthen it. It should be possible to achieve the aims of article 77 by means of the prohibitions already appearing in articles 76 and 76 bis.

52. Mr. RUUD (Norway) said that his delegation supported the ICRC text, in principle, which embodied two important and closely linked principles. The principle in paragraph 2 was already recognized in international law and should be incorporated in Protocol I since it might have a preventive effect by making subordinates think before carrying out an order. The principle set forth in paragraph 1 had been incorporated in Norwegian legislation for a

long time and should be incorporated in the Protocol too. Failure to do so would mean that a subordinate would be placed in a most embarrassing situation when he was faced with the choice of obeying or refusing to obey an order. Also, of course, in most cases the risk of immediate prosecution would drive him to carry out the order, in the hope that the breach would not be discovered or that he would never be prosecuted. Paragraph 2 would therefore lose its deterrent effect.

53. With regard to paragraph 1, his delegation appreciated the United Kingdom proposal, which had the merit of limiting obedience to "lawful" orders and of stating that the word "lawful" related expressly to compliance with the provisions of international law, including those of the Geneva Conventions and Protocol I. His delegation also supported the United States proposal for the deletion of the word "grave", for no one knew how to define the gravity of a breach and the subordinate should have the possibility of refusing to obey any orders in breach of the Geneva Conventions and Protocol I.

54. The word "grave" should be deleted from paragraph 2 as well. The United States amendment to paragraph 2 (CDDH/I/308) did not really improve the ICRC text, for it was doubtful whether it was wise to say: "The fact that the individual was acting pursuant to orders may, however, be taken into account in mitigation of punishment". Such a provision might reduce sentences to vanishing point. The Working Group would have to clear up the ambiguity of the United States proposal, which seemed to cover error of fact and not error of law.

55. The comments by the Belgian delegation were well worth considering.

The meeting rose at 12.40 p.m.

SUMMARY RECORD OF THE FIFTY-SECOND MEETING

held on Thursday, 6 May 1976, at 10.25 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 77 - Superior orders (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/74, CDDH/I/255, CDDH/I/303, CDDH/I/308) (continued)

1. Mr. AREBI (Libyan Arab Republic) said that he was not in favour of any of the amendments proposed to article 77.

2. He found paragraph 1 of the ICRC text unacceptable. He would not repeat the arguments on the point which had been advanced by several delegations at the fifty-first meeting (CDDH/I/SR.51) and with which he agreed, but would merely say that the paragraph should simply be deleted.

3. Conversely, paragraph 2 seemed to him acceptable, although he had some reservations inasmuch as it did not make sufficient allowance for hard facts or for human behaviour and might therefore prove dangerous. The combatant was held to "have reasonably known that he was committing a grave breach", but surely no one could think that every soldier was perfectly familiar with the Geneva Conventions and the Protocols or that, if he did know them, he would interpret them correctly in relation with his superiors' orders. Furthermore, the words "in the circumstances at the time" were open to subjective interpretation.

4. There was also the problem of the degree of penal responsibility. It was not always easy for an officer or a soldier to judge of the effects of an act which he was asked to carry out, especially since the notion of a criminal act gave rise to widely varying interpretations in the text of the regulations themselves. A subordinate might very well be unaware that he was taking part in the commission of a breach.

5. He was opposed to the deletion of the word "grave" in the ICRC text, as suggested by the United States delegation, and to the Australian proposal (CDDH/I/255) for the deletion of the words "that he had the possibility of refusing to obey the order" in paragraph 2. The latter amendment seemed to be quite unrealistic. Paragraph 1 of the amendment proposed by the Syrian Arab Republic (CDDH/I/74) seemed unnecessary, and paragraph 2 offered an accused person less guarantees than those provided by the ICRC text.

6. Mr. GREEN (Canada) pointed out that the problem raised in article 77 was closely related to the problem of the obligations incumbent on superior officers, which had been considered earlier and upon which article 77 followed logically.

7. He considered that the texts adopted by the Conference ought not in any case to restrict or obstruct the application of existing international law. He was therefore grateful to the United States delegation for the proposal to delete the word "grave" from paragraph 1 of article 77 (CDDH/I/308), he also supported the idea put forward by the United Kingdom delegation that only orders concerning lawful actions should be carried out.

8. The principle underlying paragraph 1 of the ICRC text was wholly acceptable. If a subordinate refused to obey an order which ran counter to the provisions of criminal law, it would also be because, if he carried out such an order, he would be guilty of a crime which would make him liable to prosecution under the laws of his country. In Canada the provisions of the Geneva Conventions had been incorporated in its municipal legislation.

9. At the fifty-first meeting (CDDH/I/SR.51) the United Kingdom representative had expressed understanding of the fear that the text of paragraph 1 of the ICRC draft might be interpreted as interference in the penal law of States. Such a fear was exaggerated and the United Kingdom proposal on that went too far. International conventions and treaties were nearly always ahead of the national legislation of some countries at the time that they were promulgated, but such countries gradually caught up with the provisions of international instruments in their own legislation. It was necessary to reflect upon the tendency over the last century to cease to regard soldiers as mere machines and to realize that when a soldier put on military uniform he remained a human person.

10. It had also been pointed out that a distinction should be drawn between orders from a Government and those from an individual. Such a distinction would be totally pointless.

11. At the fifty-first meeting (CDDH/I/SR.51) the United States representative had brought up the question of duress in support of the last part of his delegation's amendment (CDDH/I/308). It was true that in some legal codes the fact that the accused had acted under orders could be held to diminish his responsibility. It should be made clear, however, that that consideration applied only to certain breaches.

12. The Belgian representative had proposed an amendment to the last part of the United States text. The wording of that text seemed to be very close to that of the records of the Nürnberg trials. The Canadian delegation was prepared to accept that proposal in principle, but the wording would certainly have to be modified. The grounds for mitigation of punishment varied so greatly in most jurisprudence texts that it would be better to leave the matter, to a large extent, to the competence of the courts.

13. Legal texts were often drafted in language many people found difficult to understand. Moreover, soldiers did not usually carry into combat the texts of the Geneva Conventions. In the United States proposal, the part of the first sentence of paragraph 2 following "should have known" could be replaced by the following: "that such orders would give rise to acts which were obviously criminal", so that those concerned would appreciate the gravity of the act they were being ordered to carry out.

14. Mr. BEN ACHOUR (Tunisia) said that the ICRC text of article 77 raised a thorny question, in that it called into question the fundamental principle of all military organization - the absolute obedience of subordinate to superior, the basis of all military discipline.

15. But the ICRC text was logical and coherent, for if it was affirmed that the fact of having acted pursuant to an order of a superior did not absolve from penal responsibility, the subordinate must have the possibility of refusing to obey a manifestly illegal order which would oblige him to commit a grave breach; that would be the only way for him to be relieved of his responsibility.

16. The amendments proposed to article 77 were inadequate, since they did not proceed to the limit of their own logic: the fact of having acted pursuant to an order did not absolve the person concerned, but the text failed to draw the inevitable conclusion that the subordinate must be enabled to escape the penal responsibility he would incur if he were to obey his superior's illegal order. It was useless to say that the fact of having acted pursuant to an order did not absolve an accused person, if the problem of refusal to obey was not also faced.

17. There were, consequently, two possible solutions: to admit that the fact of having acted pursuant to an order did not exonerate an accused person and hence to admit a refusal to obey; or refuse to admit the principle of non-exoneration, which presumably would run counter to the views of all delegations.

18. Refusal to obey was not so exceptional as might be thought: several national legal codes admitted it, in any case for civil servants; there was no reason why it should not be admitted also for soldiers.

19. Mr. SCHUTTE (Netherlands) reminded those present that the burning question of the individual responsibility of an offender acting under superior orders had given rise to a vast amount of literature before the Second World War, and even more after it. The question had been dealt with extensively in post-war jurisprudence. From the decisions in many hundreds of trials, it could be concluded that such individual responsibility did exist, and that the plea of having acted under superior orders was no defence per se.

20. That principle, formulated in the Charter of the Nürnberg Tribunal and further developed by that tribunal, had eventually found universal recognition as a general principle of international law, and had been affirmed by the International Law Commission, at the request of the United Nations General Assembly (General Assembly resolution 174 (II)).

21. That generally recognized principle would at long last be enshrined in an international treaty, and the fact was to be applauded. The ICRC text tallied very closely with the ideas of the Netherlands delegation. Drafting improvements could perhaps be made in order to make even clearer the precise legal relationship between a plea of having acted under superior orders, and the general defence of justifiable mistake in law or fact, or of compulsion.

22. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said he favoured in principle, an article affirming the responsibility of a person carrying out a criminal order and welcomed the ICRC efforts to change article 77 in such a way as to take account of the principles and practice of the Nürnberg International Military Tribunal. A subordinate carrying out an order which was a grave breach, became a direct accomplice to the breach, and therefore bore penal responsibility.

23. In the first line of article 77 the word "power" or "authority" would be preferable to "Government", which was more restrictive.

24. His delegation could not accept, in paragraph 2 of the ICRC text of article 77, the clause which implied that a subordinate would be absolved from penal responsibility if it were established that he had not had the possibility of refusing to obey the criminal order. That argument had often been pleaded by the Nazi war criminals brought to trial after the war, but the Ukrainian military courts had not upheld it. The Ukrainian delegation therefore supported the Australian amendment (CDDH/I/255) for the deletion of that clause.

25. For the same reasons his delegation had reservations about paragraph 2 of the Syrian amendment (CDDH/I/74). On the other hand it supported paragraph 1, whereby the High Contracting Parties undertook to punish and repress grave breaches of the provisions of the Conventions and of the Protocol.

26. The United States amendment (CDDH/I/308) gave cause for concern. To delete the word "grave" would weaken the effect of the article for no good reason, and would help to create confusion between ordinary breaches and grave breaches; it would therefore diminish criminal liability for grave breaches, with the result that in practice a person committing a grave breach would be enabled to evade criminal responsibility.

27. It was essential to make a clear distinction between liabilities arising from ordinary breaches and liabilities arising from grave breaches, and to ensure that war crimes and crimes against humanity carried a heavy penal liability. That was why twelve countries had proposed to add a new paragraph 6 to article 65, stating that "None of the provisions of this Protocol may be used to prevent the prosecution and punishment of persons accused of war crimes and crimes against humanity" (CDDH/III/315 and Add.1).

28. The fact that an individual was acting pursuant to orders might of course be taken into account in the mitigation of punishment, as proposed by the United States delegation in the last sentence of its amendment (CDDH/I/308); but at the same time the gravity of the act must be borne in mind.

29. Mr. GLORIA (Philippines) supported articles 76 and 77, which in his view were complementary to each other, and some of the amendments, particularly the United States amendment (CDDH/I/308). He still had some doubts, however, as to how the provisions of articles 76 and 77 could be applied effectively. He wondered, in particular, what body would be responsible for implementing the two articles, whether international or municipal law would be applicable and what court would try breach cases.

30. Recalling the trial of the Japanese General Yamashita, in Manila in 1945, he stressed the need for further study of those very important articles.

31. Mr. TORRES AVALOS (Argentina) said that the principle of due obedience was the corner-stone of the military system of many countries attending the Conference. On the whole he supported the ICRC text of article 77, which retained that principle, but he was open to any suggestions for improving the text.

32. He could not accept the United States and Australian amendments (CDDH/I/308 and CDDH/I/255), since they did not retain the principle of due obedience and went beyond reasonable limits. If it was tolerable for a subordinate to refuse to obey the order of a superior where such an order constituted a grave breach of the Geneva Conventions or of Protocol I, such a clause would be unacceptable if applied to breaches other than grave breaches, for it would perturb the system of military discipline.

33. In principle, the Argentine penal code and military justice code postulated that due obedience was a reason for exoneration from criminal liability; but the civil and military courts in Argentina had for some time past been watching world trends in humanitarian law and had not been holding strictly to that principle. That was why his delegation accepted what might be termed "the human function of due obedience", in other words the fact that in case of the flagrant breach of a fundamental humanitarian principle exoneration on account of due obedience did not apply. Lastly, after pointing out that the United States amendment (CDDH/I/308) was not simply a question of form, he said he might revert to the various points mentioned above in the Working Group.

34. Mr. ABU-GOURA (Jordan) said that article 77 as proposed by the ICRC could be amended in several ways so as to make it more consonant with the principle of the sovereignty of States.

35. The article raised important questions: for instance the question of who would protect a subordinate refusing to obey an order from the punishment which would then be applied to him. The article was acceptable in principle because it was essential to prevent war crimes, but it did raise a number of interconnected questions which merited careful consideration. An amendment along the lines of the clarifications sought by the United Kingdom representative at the fifty-first (CDDH/I/SR.51) meeting would therefore be desirable.

36. Mr. MISHRA (India) said that he interpreted the word "repress" in paragraph 1 of article 76 to mean both "prevent" and "repress". If that were not the case he would like the word "prevent" to be added. One of the measures contemplated for preventing breaches of the Geneva Conventions and Protocol I was to distribute those instruments and arrange for instruction in them (article 71).

37. Another preventive and repressive measure was the heavy responsibility placed on superiors under paragraph 2 of article 76. In that respect, his delegation approved the underlying principle of new article 76 bis as proposed by the United States (CDDH/I/307) concerning the duties of commanders.

38. On the other hand, his delegation had great difficulty in accepting article 77, which amounted to encouraging subordinates to disobey orders which they deemed contrary to the provisions of the Geneva Conventions and Protocol I. The assumption was that Governments or superior officers would in some cases commit deliberate breaches of Protocol I. In such cases, enjoining an ordinary soldier to refuse to obey would be asking too much and, in any case, whatever provisions might be inserted would remain inoperative.

39. In short, article 77 raised serious problems of discipline and Government policy. In case of the adoption of article 76, as amended, and of the principle of article 76 bis, article 77 could be deleted as the Swiss delegation had proposed (CDDH/I/303).

40. Mr. ROSENNE (Israel) said he favoured the inclusion of article 77 in draft Protocol I. The principles set out in that article had formed part of Israeli law since the adoption of the Military Justice Act, Article 125 of which provided that a soldier who refused to obey a manifestly illegal order did not incur penal responsibility. Although refusal to obey an order might strike against military discipline, the choice was one between, on the one hand, carrying out a manifestly illegal order - in other words perpetrating a violation of humanitarian law - and, on the other hand, respect for military discipline. But since it was a question of grave breaches, any violation of humanitarian law was far more dangerous in its effects than a possible failure to observe military discipline. Article 77 reflected fairly faithfully international criminal law as defined by the international military tribunals at the end of the Second World War. A committee of experts had submitted a similar draft article when the 1949 Geneva Conventions were being drawn up; but the Diplomatic Conference had decided not to include it, for fear of creating dissension and delaying the ratification of the Conventions. The only remaining references to it - indirect ones, perhaps - were to be found in Article 49 of the first Geneva Convention of 1949, Article 50 of the second, Article 129 of the third, and Article 146 of the fourth.

41. His delegation took the view that the Australian amendment (CDDH/I/255) was a step in the right direction, because it would increase the responsibility of members of the armed forces. His country would also support the United States amendment (CDDH/I/308) to paragraph 2, which was exactly in line with the Nürnberg principles. With those changes, article 77 should be included in draft Protocol I. It would be a retrograde step to reject such an article when its principles were already included in many a country's domestic legislation. The Working Group might find the proper form of words which would avoid causing too much difficulty

for too many delegations. Between the doctrine of passive obedience and that of "thinking bayonets", positive international law had opted for "thinking bayonets". That was therefore the doctrine which should be embodied in draft Protocol I, with all the necessary precautions.

42. Mr. MOHIUDDIN (Oman) said that the United Kingdom's views on paragraph 1 of article 77, which might create an element of interference in the national penal laws of a State, deserved close attention. The Committee should also take into consideration the views expressed at the fifty-first meeting (CDDH/I/SR.51) by the representatives of the Republic of Korea and of Nigeria on the very delicate situation concerning the practical application of the paragraph. The United States amendment (CDDH/I/308), by further enlarging the scope of the provision, would make the problems still more difficult. The amendment suggested by the Syrian Arab Republic in document CDDH/I/74 would perhaps be a better alternative, although in some respects it only reaffirmed what was contained in paragraph 3 of article 1 of draft Protocol I.

43. Paragraph 2 of article 77 would have to be looked into more thoroughly in the light of the Australian amendment (CDDH/I/255), which in essence aimed at diminishing the hypothetical factor. The United States amendment (CDDH/I/308) spelt out a more comprehensive guideline, but the last sentence of paragraph 2 left too much latitude in prescribing the punishment for violations. It might also lead to discrimination between nationals and non-nationals. A situation where one of the Parties to an armed conflict was not bound by Protocol I should likewise be considered.

44. Article 77, as drafted, was not satisfactory, and his delegation reserved the right to make further comments.

45. Mr. BOSCH (Uruguay) supported the principles underlying article 77, which undoubtedly had its place in the section of draft Protocol I dealing with the repression of breaches. In the ICRC draft, however, the article fell short of its target, since it did not take enough account of the fact that the dictates of human conscience were relative - a relativity which must be recognized, whether it was deplored or not. If article 77 was to be applicable, it must be practical. Some delegations, it should be noted, only wanted grave breaches to be repressed.

46. The text proposed by the Syrian Arab Republic (CDDH/I/74) was acceptable and would be a useful basis for discussion by the Working Group.

47. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) said that in his view the repression of breaches was linked with the problem of legal guarantees for the implementation of the Geneva Conventions and Protocol I. With regard to article 77, the first essential was to compel parties to the conflict to observe the Geneva Conventions and Protocol I faithfully, and articles must be drafted with that end in view. It would be unnecessary to hedge about the repression of breaches with conditions if it could be assumed that the Geneva Conventions would be faithfully observed and duly publicized. If, for instance, the premise was accepted that parties to a conflict would normally observe the Geneva Conventions and Protocol I there was no need to include reservations in the definition of breaches. Humanitarian law must try to protect victims and to condemn criminals like the imperialists who took possession of other countries' territory and destroyed their national sovereignty. In that way it would help to forestall breaches.

48. Article 77 called for thorough study along those lines, but his delegation was strongly opposed to the United States amendment (CDDH/I/308).

49. Mr. BOUTROS GHALI (Observer for the Sovereign Order of Malta) speaking at the invitation of the Chairman, supported the valuable suggestion made at the fifty-first meeting (CDDH/I/SR.51) by the representative of the Holy See that an international tribunal should be set up to try breaches of the Geneva Conventions and the additional Protocols. If such a tribunal were permanent, and therefore established prior to the conflicts giving rise to the breaches, it would have to try, it would be a necessary addition to the international institutions concerned with safeguarding civilized values. It would have the advantage of creating valuable case law. In particular, it would establish valid precedents for the very delicate problems of responsibility and repression arising from articles 76 and 77. It was not, of course, within the competence of the Conference to adopt that suggestion itself, but it could perhaps take the initiative by approving, for example, a desire expressed by Committee I for the establishment of a permanent tribunal and for the launching of studies and talks for that purpose.

50. Mr. GIRARD (France) said that in his view the efforts of the ICRC to make the text of the Geneva Conventions known were justified inasmuch as they implied that soldiers were individuals and should be aware of their responsibilities.

51. His delegation had no objection to paragraph 1 of article 77. The rules governing French military discipline contained a similar provision. There was a danger that the deletion of the paragraph would face combatants with an alarming choice and make them liable to prosecution before two different courts, such as a court-martial in their own country and a tribunal responsible for judging violations of humanitarian law like the Nürnberg tribunal. In that respect he fully endorsed the views of the Tunisian representative. He was not opposed to the deletion of the word "grave" from paragraph 1 of article 77, as proposed in the United States amendment (CDDH/I/308), which would extend article 77 to ordinary breaches.

52. His delegation would also support the idea contained in the United States amendment, paragraph 2, last sentence, if it were agreed that instead of the idea of mitigation of punishment, there would be a reference to appraisal by the court of the responsibility of the accused.

53. Mr. HUSSAIN (Pakistan) recapitulated the many vain attempts made since the end of the First World War to settle the thorny question of the culpability of subordinates where breaches of international law occur. He warned the Committee against endorsing any provision which might affect discipline in the armed forces. Obedience by subordinates could not depend on the construction they placed on various treaties relating to international law; on the other hand, those in command were supposed to be familiar with international law, and not to allow acts to be committed in breach of it, unless, of course, the armed forces concerned were those of a Fascist or Nazi régime, in which event the soldiers could hardly be expected to do otherwise than follow the orders of their superiors blindly.

54. The provisions of article 77, which were likely to impair military discipline very seriously, would probably not be acceptable to many Governments with standing armies.

55. While he was not suggesting that where a breach of the Geneva Conventions and Protocol I occurred, the subordinate should be completely exonerated from his criminal liability, nevertheless, he did believe that in view of its complexity, article 77 should leave the tribunal or court wide discretion to weigh the circumstances in each case. His delegation accordingly favoured the adoption of the formula contained in Article 8 of the Nürnberg Charter.

56. The CHAIRMAN proposed that article 77 should be referred to Working Group A.

It was so agreed.

The meeting rose at 12.25 p.m.

SUMMARY RECORD OF THE FIFTY-THIRD MEETING

held on Friday, 7 May 1976, at 10.25 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/256, CDDH/I/266, CDDH/I/303, CDDH/I/309, CDDH/I/310 and Add.1) (continued)*

New Article 78 bis (CDDH/I/312 and Add.1)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/57, CDDH/I/279) (continued)*

1. Mrs. BUJARD (International Committee of the Red Cross) said that article 78 relating to extradition was supplemented by article 79 dealing with mutual assistance in criminal matters. Introducing the two texts, she said that the discussion would centre mainly on article 78. The system of repression of grave breaches under the Geneva Conventions was based on the principle aut dedere aut punire, whereby each Contracting Party could either bring any person charged with a serious breach before its own courts, or else hand that person over to be tried by another High Contracting Party concerned in the prosecution, in the manner prescribed by its laws. Some experts had expressed the view that that provision sufficed, and that there was no object in adding anything to the Conventions on the subject. Others, however, had been of the opinion that it was necessary to go further in the matter of extradition. That was why the ICRC had drafted articles 78 and 79; it had done so, however, on a tentative basis only, as they still called for detailed consideration.

2. Article 78 was based, not, as had been suggested by some, on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations General Assembly resolution 260 (III)), whose provisions as to extradition referred only to the national laws of the High Contracting Parties and to the treatries in force between them, but on more recent international instruments: the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. Article 8 of each of those Conventions dealt with extradition.

---

* Resumed from the forty-fifth meeting.

3. The Article 8 in question, which was in the nature of a multilateral treaty, contained three parts: the offence must be deemed to be included as an extraditable offence in any extradition treaties existing between the Contracting States and in every extradition treaty to be concluded between them. Moreover, the Convention could be regarded as the legal basis for extradition in cases where a Contracting State which made extradition conditional on the existence of a treaty received a request from another Contracting State with which it had no extradition treaty. Lastly, the Contracting States which did not make extradition conditional on the existence of a treaty must recognize the breach as an extraditable offence between themselves.

4. The text proposed by the ICRC followed that formula fairly closely, while limiting extradition to cases of grave breach of the Geneva Conventions and Protocol I. It should also be emphasized that the system of repression envisaged, both in The Hague and Montreal Conventions and in the Geneva Conventions, was based on the principle of universal jurisdiction.

5. Mr. STÄMPFLI (Legal Secretary) observed that amendments to draft article 78 had been submitted by Australia (CDDH/I/256), Belgium (CDDH/I/266), Switzerland (CDDH/I/303), the United Kingdom of Great Britain and Northern Ireland and the United States of America (CDDH/I/309) and the Socialist countries (CDDH/I/310 and Add.1). Amendments to article 79 had been submitted by the Philippines (CDDH/I/57), and by France, Mali and Switzerland (CDDH/I/279).

6. Mr. BETTAUER (United States of America) said that his delegation and the United Kingdom delegation considered that article 78 added nothing to the common provisions on extradition contained in the Geneva Conventions of 1949. Those could, in fact, be regarded as an antecedent of the much more detailed wording contained in Article 8 of The Hague and Montreal Conventions. Although the ICRC text was based on them, it added nothing substantial to them. That was why the amendment submitted jointly by the United Kingdom and United States delegations (CDDH/I/309) proposed that the article should be deleted, and that a clause including extradition among measures for the repression of grave breaches should be inserted in article 74. That solution would be by far the simplest and would enable the Committee to avoid prolonging a complicated discussion.

7. His delegation was not radically opposed, however, to the text in question, and would in due course, should it be maintained, propose a number of changes to bring it into line with the provisions of the international instruments adopted in recent years, particularly those of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (General Assembly resolution 3166 (XXVII)).

8. Mr. de BREUCKER (Belgium) observed that the relevant articles of the four Geneva Conventions of 1949, in particular Article 146 of the fourth Convention relative to the Protection of Civilian Persons in Time of War, made it obligatory on the Contracting Parties to prosecute and try any person alleged to have committed or to have ordered to be committed, grave breaches of the Conventions, or, should they prefer it, to extradite such person. The purpose of the ICRC's article 78 was to specify the conditions for extradition, largely on the basis of The Hague Convention of 1970 and the Montreal Convention of 1971. His delegation was prepared, in principle, to accept the ICRC text, which it did not, however, consider to show any advance on that of the Geneva Conventions.

9. He then drew attention to a discrepancy between paragraphs 1 and 3 of article 78. Paragraph 1 concerned cases of extradition for grave breaches "whatever the motives for which they were committed", where there was an extradition treaty between the High Contracting Parties; whereas in paragraph 3, under which extradition was not made conditional on the existence of a treaty between the Contracting Parties, a breach was extraditable only "subject to the conditions provided by the law of the requested High Contracting Party". His delegation was not at all of the opinion, however, that extradition was always required. It was not certain that the person extradited would enjoy, in the requesting State, all the guarantees of impartiality demanded by a sound administration of justice. It would therefore greatly prefer the article originally proposed by the ICRC, presented in the Commentary on the draft Additional Protocol (CDDH/3, p.99). There it was stated that "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".

10. The phrase which the ICRC had considered it necessary to insert in paragraph 1 ("whatever the motives for which they were committed") strengthened the obligation to extradite. The Belgian amendment (CDDH/I/266) suggested the deletion of that phrase, for the rule that should be maintained was the one which had been established in 1949.

11. Mr. KAKOLECKI (Poland) said that the purpose of the amendment by the Socialist countries (CDDH/I/310 and Add.1) was to supplement the ICRC article 78 by emphasizing the need for co-operation among States to ensure extradition to the country where the breach had been committed. Extradition to the country that had suffered the harm was considered to be a just and effective form of repression of war crimes and crimes against humanity. The idea was not that

the country most affected should be given the opportunity of taking revenge, but that that was the country where the evidence could most easily be collected and where a sentence that was in keeping with the gravity of the breach could be handed down, with all the safeguards provided for in the Geneva Conventions and Protocol I.

12. Moreover, the wording proposed had a preventive value. The knowledge that there was a general rule providing for punishment in the country where the crime was committed would be a powerful deterrent to any violation of humanitarian law. The wording would therefore help to strengthen humanitarian law by ensuring greater respect for it.

13. In addition, the said proposal, which was fully in accordance with existing international law, was in line with the progressive work of the current Conference. First, the principle of choice between punishment and extradition, as embodied in the Geneva Conventions, remained untouched, even though preference was given to extradition. Second, the text proposed was a direct extension of the provisions of article 78, which reaffirmed, among other things, the principle that extradition was always subject to the conditions provided for by the law of the requested High Contracting Party. Third, the proposed amendment was not an innovation: it was based, in particular, on General Assembly resolution 3074 (XXVIII) of 3 December 1973 on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. It would be noted in that connexion, that the proposal had been submitted in English and that its wording was closely based on the text of the General Assembly resolution to which reference was made. The other language versions should therefore also be based on that text.

14. Miss POMETTA (Switzerland) explained why her delegation had proposed, in amendment CDDH/I/303, the deletion of article 78 of the ICRC draft. It considered that the provisions of Articles 49, 50, 129 and 146 of the Geneva Conventions of 1949, based on the principle of aut dedere aut punire, were satisfactory. The ICRC text disregarded that principle and contained serious gaps. It should be emphasized in particular, that the parallel drawn in the ICRC Commentary (CDDH/3, p. 99) between article 78 and the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, was only a seeming analogy. Article 78 said that extradition was compulsory for the Parties to the Protocol, even if the latter were not linked by an extradition treaty, while the Conventions of The Hague and of Montreal merely provided that the Parties had the option to consider

those Conventions as "the legal basis for extradition". Further, article 78 specified that "grave breaches of the Conventions and of the present Protocol, whatever the motives for which they were committed, shall be deemed to be included as extraditable offences." That was an innovation of very wide scope for States which, like Switzerland, never granted extradition for political offences and did not intend to give up their right to grant asylum.

15. Lastly, while The Hague and Montreal Conventions provided for extradition for clearly defined offences, that was not so in article 78. Until grave breaches had been clearly defined either in an exhaustive list or in an express qualification in articles describing the breach, article 78 would open the way to every kind of arbitrary action and would not permit of the exercise of impartial justice concerning the rights of the accused whatever the unspeakable type of crime committed. It was true that article 78 subjected extradition to "conditions provided by the law of the requested High Contracting Party", but it did not specify whether those "conditions" applied to the law or to procedure. For example, would a State whose Constitution prohibited corporal punishment and special tribunals be constrained to allow another State to apply punishment or procedures condemned by its own basic law?

16. That did not in any way signify that those who committed grave breaches should not be prosecuted and punished, but it would be rash to wish to settle such a serious problem on the basis of such a brief text as that of article 78. It should be borne in mind that extradition was the subject of numerous bilateral and multilateral treaties of a very complex nature. In that connexion, Article 7 of The Hague Convention of 1970 deserved careful study. It stipulated that "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". That provision introduced an important innovation into international law and had been accepted by numerous States whose legal systems were often very different. In the opinion of the Swiss delegation, that was the way in which the thorny problem might be settled, provided, however, that, as in The Hague and Montreal Conventions, the list of grave breaches was detailed.

17. The Swiss delegation supported the Belgian amendment (CDDH/I/226) and the amendment of the United Kingdom and United States delegations (CDDH/I/309). On the other hand, amendment CDDH/I/310 and Add.1 was unacceptable as it passed over in silence the rights of the requested State.

18. Mr. MAHONY (Australia) said that his delegation was withdrawing its amendment (CDDH/I/256) and would intervene at a later stage.

19. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that the ICRC should be congratulated on having submitted a text which supplemented the common provision on extradition provided for in the system of measures for the repression of breaches of the Geneva Conventions, and on having based itself on the extradition clauses contained in a number of recently-adopted international Conventions. While the ICRC text could indeed be taken as a basis for the drafting of article 78, it needed supplementing and strengthening along the lines suggested by the group of Socialist countries in their amendment (CDDH/I/310 and Add.1).

20. The representative of Poland had already adduced convincing arguments in support of that amendment, which in addition to strengthening the rules for the repression of breaches also strengthened those which would serve to prevent such breaches in the future. Co-operation between States in matters of extradition was essential, as the General Assembly had recognized in its resolution 3074 (XXVIII) of 3 December 1973 on Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity. The relevant provisions of that resolution were based on instruments of international law such as the Moscow Declaration of 1 November 1943, signed by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America, concerning enemy atrocities in the course of the Second World War; the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London by the United Kingdom of Great Britain and Northern Ireland, United States of America, France and the Union of Soviet Socialist Republics on 8 August 1945, and the Charter of the Nürnberg tribunal, which formed an integral part of that Agreement. Extradition was thus a long-established principle in international instruments concerning war crimes and their repression. The General Assembly, for example, from the time of its inception until the present, had repeatedly stressed, in its resolutions and decisions that persons guilty of war crimes or of crimes against humanity should be extradited to the countries where the crimes had been committed. It had done so, inter alia, in resolution 3 (I) of 13 February 1946 on the Extradition and Punishment of War Criminals, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)), and resolution 2840 (XXVI) of 18 December 1971 on the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity. It was important that the amendment submitted by the Socialist countries, which served

the interests of humanity and strengthened the text proposed by the ICRC, should receive the full support it deserved. His delegation, needless to say, could not accept either the Swiss amendment (CDDH/I/303) or the one submitted by the United Kingdom and the United States delegations (CDDH/I/309).

21. Mr. BOBYLEV (Union of Soviet Socialist Republics) read out, on behalf of the sponsors, the new draft article 78 bis (CDDH/I/312 and Add.1). Its sponsors had filled in the gaps in the Geneva Conventions of 1949 in the light of the development of humanitarian law, and had sought to increase the penal responsibility of persons guilty of war crimes and of crimes against peace and humanity. The text of article 78 bis was based on universally recognized rules of contemporary international law, particularly the Charter of the Nürnberg tribunal, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (United Nations General Assembly resolution 2391 (XXIII)), several other General Assembly resolutions and various other texts. Under Article IV of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the States Parties undertook to prosecute and punish the persons guilty of those crimes.

22. Moreover, paragraph 1 of the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity (General Assembly resolution 3074 (XXVIII)) stated that all such crimes "shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment." Obviously, the persons responsible for such crimes should not benefit from prisoner-of-war status. The security of all countries depended upon that, for those crimes were the most dangerous and constituted grave breaches of the Conventions and Protocols. That was why his delegation hoped that article 78 bis would receive the support and understanding of the other delegations.

23. Mr. BENMAKHLOUF (France) stated that the amendment submitted by France, Mali and Switzerland (CDDH/I/279) was designed to bring the provisions of article 79 into line with those of the bilateral and multilateral treaties relating to mutual assistance in criminal matters, all of which clearly laid down the applicable regulations. They listed the documents to be included with any request for mutual assistance and laid down rules for the conduct of commissions of inquiry, the notification of legal documents and the calling of witnesses. That applied particularly to the European Convention on Mutual Assistance in Criminal Matters, 1959, which had been signed by ten European States, and to more than twenty bilateral agreements concluded between France and other States of Europe and Asia. The proposed amendment recapitulated the provisions of the ICAO

Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and of the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1971). The sponsors' aim was to make article 79 more specific, while conforming to international law in the matter of mutual assistance in criminal matters.

24. Mr. BETTAUER (United States of America) said that his delegation was opposed to the proposal by the Union of Soviet Socialist Republics and others (article 78 bis, document CDDH/I/312 and Add.1), on the grounds that it would tend to undermine humanitarian law rather than reaffirm it. Article 85 of the third Geneva Convention of 1949 provided that persons prosecuted under the laws of the Detaining Power for acts committed prior to capture retained the benefits of prisoner-of-war status, even if convicted. The proposed article 78 bis would reverse that humanitarian rule. Acceptance of such a proposal could well force the United States Government to reject Protocol I in its entirety.

25. Mr. DRAPER (United Kingdom) pointed out that the ICRC text of article 78 raised some very important questions in regard to the application of humanitarian law and would greatly complicate matters for States. The Geneva Conventions of 1949, which had been drafted after the transfer of the war criminals of the Second World War, had lost none of their value, as they were realistic, humane and practical.

26. They had established the principle of the universality of jurisdiction, supplemented by appropriate machinery for extradition.

27. Several delegations had laid stress on the fact that in some countries domestic law or the national constitution did not allow for the extradition of their nationals. The Geneva Conventions took that difficulty into account, as did the original ICRC draft of article 74, by making extradition conditional on the domestic legislation of the various countries. The ICRC representative had appropriately referred to the principle aut dedere aut punire, which should be enforced so that war criminals could be brought to justice. As some delegations, and particularly that of the United States of America, had pointed out, the laws governing extradition had developed since 1949, but the provisions of the Geneva Conventions were still wholly valid, and the text proposed by the ICRC wording was no improvement on them. Indeed, whereas the ICRC draft made no mention of transfers of persons convicted of grave breaches from occupied territories, Article 49 of the fourth Convention expressly prohibited such transfers.

28. His delegation drew attention to the contradiction between the working of the proposed new article 78 bis (CDDH/I/312 and Add.1), and the heading under which it had been tabled. Whereas the text of

the proposal read "Prisoners of war convicted, under the laws of the country in which they are held prisoner, of war crimes and crimes against humanity in the meaning of the principles laid down at the Nürnberg trials ...", the heading to Section II of Part V of Protocol I was "Repression of breaches of the Conventions and of the present Protocol". He noted further that the ICRC had rightly confined the scope of article 78 to grave breaches of those two instruments. Furthermore, the new article 78 bis stated that such prisoners "shall be subject to the régime established in that country for persons serving a sentence". It repeated in other words the reservations entered by various States in relation to Article 85 of the third Geneva Convention of 1949. It must be recognized, however, that a reservation regarding Article 85 also constituted a reservation regarding Article 5 of the same Convention, which was even more important, and read as follows: "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation". That was one of the cornerstones of humanitarian law regarding prisoners of war. That being so, the Committee must reject the proposal to article 78 bis, for its adoption would strike a grave blow at the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

29. His delegation considered that none of the arguments adduced so far showed the ICRC draft to be in any way an improvement on the 1949 Conventions; and, like the United States delegation, it would like to see article 78 deleted and the proposed article 78 bis rejected.

30. Mrs. DARIIMAA (Mongolia) said that extradition was a very complex matter, closely related to domestic legislation. Under Mongolian law, nationals were not extradited to face prosecution or punishment. That thesis was confirmed by an agreement with other countries on co-operation in legal matters. Grave breaches of the rules of humanitarian law set out in the Geneva Conventions of 1949, however, and grave crimes against humanity, formed a special category of breach, and her delegation accordingly accepted the wording proposed by the ICRC as a basis for discussion, and endorsed the amendment to article 78 submitted by the Socialist countries (CDDH/I/310 and Add.1). That amendment, stressing co-operation in regard to extradition between Contracting Parties, emphasized the priority to be given to national policy in dealing with questions of extradition, and thus strengthened the effectiveness of the Geneva Conventions and the additional Protocols. The idea of extraditing persons guilty of grave breaches to the country where the breach had been committed arose from a desire to wipe out the vestiges of the Second World War. Her delegation might speak again on the various amendments proposed to article 78 when they were discussed in the Working Group.

31. As to article 78 bis, proposed by the Socialist countries (CDDH/I/312 and Add.1), she thought that grave crimes against humanity, such as the mass slaughter of defenceless populations, belonged to the category of especially dangerous crimes with serious aggravating circumstances. She hoped therefore that the Working Group, when it came to consider the various amendments submitted to article 78, would find a compromise formula.

32. The CHAIRMAN observed that many delegations had asked for the floor on article 78, and he requested speakers to be as brief as possible.

33. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, said that he could not accept a time-limit on speeches. Meetings began very late, and intervals were too long, so that much time was lost. He asked the Chairman not to set a time limit as all the speakers listed should be free of any such constraint.

34. The CHAIRMAN explained that he had not invoked rule 22 of the rules of procedure, which allowed the Conference to limit the time allowed to speakers. He had merely asked speakers to be good enough to be as brief as possible.

35. Mr. GREEN (Canada) said that he agreed with the United Kingdom and United States representatives regarding the provisions of the 1949 Geneva Conventions relating to extradition as adequate. He was even inclined to think that the article 78 proposed by ICRC was less complete, for while it spoke of extradition, it made no provision for prosecution and trial. Protocol I was intended to supplement the Geneva Conventions of 1949; but in its present form, the proposed text could be construed as amending the Conventions, since it dealt with extradition only. If the Committee considered that the Conventions should be amended, his delegation would be in favour of the language of Article 7 of The Hague and Montreal Conventions, which stipulated clearly the need for prosecution and punishment if there was no extradition.

36. Too much emphasis was being placed on the word dedere and not enough on punire. The Committee was considering grave breaches for which there was a universal jurisdiction, so that a trial could take place in accordance with the law of the State holding the criminal without there being any need for extradition. It was only if that State did not wish to take judicial action that the option of extradition would arise.

37. That approach would probably accommodate the various problems of domestic legislation and, more particularly, of constitutional law. Moreover, it would meet the concern expressed by the representative of Switzerland with regard to political offences and political asylum. While it might be accepted that grave breaches should never be regarded as non-extraditable political offences, it must also be recognized that just as an accused might seek immunity by pleading a political offence, so also a State might sometimes request extradition as a cover for a political operation. By placing the emphasis on judicial prosecution rather than on extradition, that risk would be radically reduced.

38. His delegation had certain reservations with regard to the amendment proposed by the Socialist countries (CDDH/I/310 and Add.1), although it sympathized with the idea that the trial should take place in the territory in which the offence had been committed. The proposal seemed to have been drafted with occupied territories in mind. Grave breaches could, however, be committed against prisoners of war held in a camp within the territory of the belligerent responsible for such breaches, in which case it was surely not intended that the offender should be handed over for trial to the authorities of his own country. Besides, the victims of breaches committed in one country might be nationals of another. If, in such circumstances, the accused were to be handed over to any authority, a case could be made for his being handed over to the authorities of the victims' country, and not to those of the country where the breach had been committed. His delegation would come back to that point when the text was submitted to the Working Group.

39. As to article 78 bis, the Canadian delegation thought that whatever the crime committed, the accused could not be denied the protection afforded him by the Geneva Conventions, Protocol I, the law of war and international law. It could not share the opinion of the Mongolian delegation that persons guilty of crimes against humanity should forfeit the right to protection. The Geneva Conventions and Protocol I must be applied without any discrimination whatsoever. Consequently, his delegation could not accept article 78 bis.

40. Miss DOKOUPIL (Austria) said she shared the view of the experts that the extradition provisions of the Geneva Conventions of 1949 should be regarded as sufficient. In fact, the idea of aut dedere aut punire already guaranteed the prosecution of grave breaches in any country where the offender was found or to which he might be extradited. There was no need for a multinational extradition treaty binding upon the Contracting Parties. An instrument of that kind would involve many problems and would give rise to questions which would prove very difficult to resolve.

41. True, the prosecution of grave breaches within the meaning of the draft Protocol should be provided for; but such breaches should first be very clearly defined. There was even a case for drawing up an exhaustive list. Moreover, the draft Protocol set forth certain principles to ensure that the offender received a fair and just trial before an impartial independent court. It would accordingly be dangerous to create a binding obligation as to extradition, since the requested party might be led to deny extradition if the existence of procedural guarantees was insufficiently proven by the requesting State.

42. Although the prospect of prosecution in the country where the offence had been committed might have a preventive effect, strong arguments in favour of prosecution in the home country of the offender or in other countries might also be advanced. For that reason, her delegation was opposed to the amendment submitted by the Socialist countries (CDDH/I/310 and Add.1) and preferred to support that submitted by the United Kingdom and the United States delegations, which suggested that article 78 should be deleted. Whatever the final text of article 74 might be, it could include a reference to the provisions relating to extradition in the Geneva Conventions.

43. Her delegation did not see how the new provision proposed by the Socialist countries (CDDH/I/312 and Add.1) could fit into the existing system for the repression of grave breaches. It shared the doubts expressed by several delegations, and hoped that the sponsors would be able to provide some clarifications to the Working Group.

44. Lastly, her delegation thought that the provisions of article 79 were useful, and it raised no objections to them.

45. Mr. NASUTION (Indonesia) observed that, during the general discussion on articles 74 and 79, his delegation had stressed that most States adhered to the principle of not extraditing their own nationals who had taken refuge in their own country, but that did not necessarily lead to immunity for the crimes they had committed abroad. In his opinion, there must be an extradition treaty between the requesting State and the requested State before a person taking refuge in the latter's territory after committing a crime in another country could be extradited. Even where a treaty of that kind existed, the decision whether to grant extradition or not was still subject to some restrictions with which the requesting State had to comply. Other rules should also be applied in cases of extradition, such as the rule of speciality, the rule of "double criminality" and that of non-extradition for political crimes.

46. The problem posed by the rule of speciality was whether it formed part of international law, the extent to which it should be applied and whether it was merely a matter of commitment between the Contracting States.

47. According to the rule of double criminality, the act giving rise to extradition should constitute a crime in the legal systems of both the requesting and the requested States. It could be observed if the extraditable crimes were specified in a list drawn up by both the States concerned.

48. One of the methods used in overcoming the difficulty of measuring the seriousness of a crime was to specify extraditable crimes both in national law and in a list included in an extradition treaty. Only those crimes enumerated in the list would be extraditable between the two Contracting States.

49. The underlying reason for the non-extradition of political offenders was that extradition could be regarded as interference in the internal affairs of other States.

50. His delegation considered, in the final analysis, that the ICRC draft of article 78 should be deleted, and it agreed with the view of that article expressed by the Swiss delegation.

51. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) supported the amendments submitted by the Socialist countries (CDDH/I/310 and Add.1 and CDDH/I/312 and Add.1), and said they deserved careful study before being referred to the Working Group.

52. Miss AKUFFO (Ghana) said that her delegation could not support the ICRC text because of its mandatory nature. Under Ghana's legislation, extradition was granted only on the basis of bilateral treaties.

53. Under paragraph 3 of article 78 of the ICRC text, the procedure for extradition was subject to the law of the requested High Contracting Party. The requested State would have no assurance that the accused would have a fair trial. The offender, however, like the victim, should have the benefit of the principles of humanitarian law; even war criminals had the right to justice and a fair trial. She considered that there should be a case-by-case assessment of each request for extradition rather than a general rule compelling the granting of every request for extradition.

54. Her delegation considered that article 78 was unnecessary. If the Committee thought it useful to formulate provisions on extradition, her delegation could support only a text similar to those in The Hague and Montreal Conventions, which left the

requested State the choice between prosecution and extradition. It also thought that the provisions on extradition should include a list of grave breaches that should be regarded as extradition cases, and that that list should be viewed as illustrative and not exhaustive.

55. Mr. ROSENNE (Israel) pointed out that, by definition, extradition existed only between countries similar in character. That was why extradition agreements were of a regional nature and mainly bilateral. He did not think that an extradition treaty could be concluded among 140 States. National legislation varied from country to country and some countries would, for instance, refuse to extradite a person to a country where the death penalty was in force, particularly if that person was charged with a grave breach subject to the death penalty in the requesting country.

56. The provisions of the Geneva Conventions relating to extradition were adequate and there was no reason to insert an article on the subject into draft Protocol I. He therefore supported the amendments submitted by Switzerland (CDDH/I/303) and the United Kingdom and United States of America (CDDH/I/309) providing for the deletion of article 78.

57. He was unable to accept article 78 bis for the reasons already stated by previous speakers. He supported the ICRC text of article 79 and the amendment proposed by France, Mali and Switzerland (CDDH/I/279).

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE FIFTY-FOURTH MEETING

held on Monday, 10 May 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/266, CDDH/I/303, CDDH/I/309, CDDH/I/310 and Add.1) (continued)

New article 78 bis (CDDH/I/312 and Add.1) (continued)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/279)(continued)

1. Mr. ORTEGA JUGO (Venezuela) informed the Committee of certain basic provisions of Venezuelan criminal law in regard to extradition: not to agree to the extradition of Venezuelan nationals, who, if they had to be tried should be tried in their own country; not to agree to the extradition of an alien for political offences; not to agree to the extradition of an alien accused of an offence carrying either the death sentence or life imprisonment under the laws of the requesting country; not to agree to the extradition of an alien for offences under ordinary law unless the requesting procedure was carried out in accordance with provisions laid down in international treaties ratified by Venezuela or in its domestic legislation.

2. That was his Government's traditional position and it explained why it had entered an express reservation to Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide (General Assembly resolution 260 (III)).

3. His delegation favoured the formula established by the Geneva Conventions of 1949 but was unable to endorse the text submitted by the ICRC or, indeed, any article or amendment which failed to recognize the above-stated principles of public policy. It would like a text to be worked out embodying a restrictive clause to the effect that extradition could take place only in conformity with the penal code of the countries and the bilateral or multilateral treaties which they had signed. That would ensure that national sovereignty was respected, without any derogation of humanitarian law.

4. Mr. MAHONY (Australia) drew attention to the fact that in drafting article 78 the ICRC had drawn on an article from the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970, and from the ICAO Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal in 1971. His delegation doubted, however, whether the inclusion of that article in draft Protocol I was really necessary. There were already useful provisions in the Geneva Conventions of 1949 relating to penal sanctions and extradition: Article 49 of the first Convention, Article 50 of the second Convention, Article 129 of the third Convention and Article 146 of the fourth Convention. The adoption of article 74 of draft Protocol I would reduce the need to introduce an article providing for extradition for grave breaches of the Conventions or of Protocol I, especially as article 78, as it stood, did not appear to be an effective or realistic addition to the existing provisions.

5. A further factor was that any article relating to extradition must take account of the domestic law of the various countries, which differed considerably from one country to another. For example, many countries refused to extradite their own nationals and others refused extradition for political offences. Consequently, some countries could rely on their domestic legislation in refusing an application for extradition.

6. Before discussing article 78, the Committee should decide on the text of article 74 relating to grave breaches. In any event, article 78 did not appear likely to be effective for the enforcement of provisions dealing with the repression of breaches of the Geneva Conventions and Protocol I. For that reason his delegation supported the proposals by Switzerland (CDDH/I/303) and by the United Kingdom and the United States delegations (CDDH/I/309) that article 78 should be deleted.

7. Mr. HUGLER (German Democratic Republic) stated that the amendment (CDDH/I/310 and Add.1), of which his country was a sponsor, was in no way intended to limit or restrict the rights of a State to which a request for extradition was made. On the contrary, it made allowance for them, as was clear from the reference made to paragraphs 1 to 3 of the ICRC text and from the words "The High Contracting Parties shall co-operate on extradition ...". The idea of co-operation was so emphasized in the amendment that it could be understood as an addition to the substantive provisions of article 79 should the Conference decide to delete article 78.

8. Amendment CDDH/I/312 and Add.1, sponsored by a number of States, among them the German Democratic Republic, related to a set of problems of great political and legal importance: the repression of war crimes and crimes against humanity which were also covered by the Conventions and Protocol I. The text was in conformity with the relevant applicable international law, under which those who committed such crimes must be prosecuted and punished with all due severity. The punishment of crimes not subject to statutory limitations did not permit of any restriction, not even a reference to certain "legal guarantees". It was, of course, quite justifiable to endeavour to safeguard the rights and means of defence, as provided in Article 105 of the third Convention and the German Democratic Republic respected all the provisions concerning the trial up to the final conviction, but at the time of its accession to the Geneva Conventions his Government had entered a reservation in respect of Article 85 of the third Convention, to the effect that it would not give the benefits of the Geneva Conventions to prisoners of war sentenced for war crimes or crimes against humanity pursuant to the principles of the Nürnberg tribunal. So far as war criminals were concerned, to extend to them those "legal guarantees" would be to grant them privileges and preferential treatment which were wholly unjustified. Those persons were subject to the generally applicable provisions concerning the execution of the sentence. Accordingly his delegation rejected any imputation according to which the application of domestic legislation would be tantamount to a breach of basic principles of humanity. The relevant provision of Article 85 of the third Convention did not constitute general international law but was binding only on those States which had accepted it. He reminded the Committee that the Geneva Conventions did not prohibit reservations, unless they concerned the subject matter and purpose of those Conventions. According to the basic principles of the Nürnberg tribunal, confirmed by a number of legal documents of the United Nations, and particularly by United Nations General Assembly resolution 3 (I) of 13 February 1946 and resolution 95 (I) of 11 December 1946, the prosecution and punishment of war crimes and crimes against humanity could never be used as an admissible reason for any objection to a reservation such as that entered by the German Democratic Republic and other States with regard to Article 85 of the third Geneva Convention of 1949. On the same grounds, similar objections in respect of amendment CDDH/I/312 and Add.1 could not reasonably be sustained. That was one of the basic elements of the foreign policy of his Government, which was nevertheless prepared, in a spirit of co-operation, to seek a solution acceptable to all participants in the Conference.

9. Mr. KIRALY (Hungary) said that his delegation approved of the ICRC's efforts to draw up a text for the repression of grave breaches. The proposed text could be amended, it could be further elaborated, but it could not be purely and simply deleted; his delegation was accordingly opposed to the Swiss amendment (CDDH/I/303). Amendment CDDH/I/309, submitted jointly by the United Kingdom and the United States delegations, was merely a variation on article 74 and did no more than recapitulate points already dealt with in the 1949 Geneva Conventions. The version proposed for article 78 was even worse than the original text. His delegation accordingly opposed the adoption of that amendment. Amendment CDDH/I/310 and Add.1, however, of which Hungary was a sponsor, was in conformity with the rules of international law, and the various national legal codes were no obstacle to it. Amendment CDDH/I/312 and Add.1, sponsored by Hungary in conjunction with other Socialist countries, proposed that persons convicted of war crimes and crimes against humanity should be subject to the law of the country in which they were tried and should, upon conviction, cease to enjoy prisoner-of-war status. In that connexion, he recalled the reservation entered by his country in respect of Article 85 of the third Geneva Convention of 1949. With regard to article 79, his delegation was firmly opposed to the adoption of amendment CDDH/I/279.

10. Mr. ILIESCU (Romania) considered that the problem of extradition was of the utmost importance for the effective application of the Geneva Conventions and of Protocol I. While recognizing that the ICRC text of article 78 was in accordance with the principles of Romanian criminal law, his delegation did not deem it essential to include that article in Protocol I, in view of the discussions it had occasioned and the fact that most extradition agreements were bilateral. Moreover, the Geneva Conventions already included provisions on that question (Article 49 of the first Convention, Article 50 of the second Convention, Article 129 of the third Convention and Article 146 of the fourth Convention).

11. If, however, it was decided that the ICRC text was essential, his delegation would accept amendment CDDH/I/310 and Add.1, which was designed to supplement article 78 by the addition of a new paragraph on co-operation between the High Contracting Parties on extradition matters.

12. Mr. KEITH (New Zealand) said that he shared the doubts of some delegations concerning the ICRC text of article 78, because of the great variations in the domestic legislation of various countries. Perfection was not of this world, so his delegation supported the deletion of that article as proposed by Switzerland (CDDH/I/303), and by the United Kingdom and United States delegations (CDDH/I/309). The proposed article 78 bis had been presented as a progressive

development of the law, but in fact it amounted to a regression from the law stated in Article 85 of the third Geneva Convention of 1949. The High Contracting Parties which had expressed reservations with regard to it were only a small minority, no more than about 10 per cent. The grounds put forward by those countries for the preparation of a law on the basis of those reservations were not convincing. There was nothing in the Geneva Conventions that jeopardized the repression of war crimes.

13. Mr. PARTSCH (Federal Republic of Germany) said that he had some objections to make to the ICRC text of article 78. Besides, since he also considered that the Geneva Conventions were adequate, he supported the amendment submitted by the United Kingdom and the United States delegations (CDDH/I/309).

14. With reference to amendment CDDH/I/312 and Add.1, he pointed out that the system embodied in the Conventions was based on the repression of grave breaches. That text introduced a new concept: the concept of the war crime, which was not clearly defined. Moreover, if the amendment were adopted, it would establish discrimination among the various categories of prisoners of war. The majority of States had approved Article 85 of the third Geneva Convention of 1949, and to replace it by another text would be to go back on that decision.

15. Mr. AINA (Nigeria) said that his delegation had the greatest interest in the development of humanitarian law and in observance of the 1949 Conventions and the Protocols. It also wished to ensure that persons found guilty of breaches should be punished. It nevertheless shared the views of other delegations which had opposed article 78 as it stood.

16. In the first place, it was not clear whether the intention of the article was to compel a country to extradite its own nationals to another requesting State. That would be contrary to the provisions of the Constitution of the Federal Republic of Nigeria, which forbade the banishment or exile of Nigerian citizens.

17. Moreover, the text could be interpreted to mean that the Conference could, by its decisions, intervene directly in the domestic legislation of the High Contracting Parties. If grave breaches of the Conventions and Protocol I, whatever their motive, were deemed legal grounds for extradition in treaties concluded between the High Contracting Parties, and if the provisions of the treaties differed on that point from the domestic laws of the countries concerned, those laws would have to be modified accordingly. The Nigerian Extradition Decree, promulgated in 1966, contained a list of extraditable offences which it would be difficult to amend without having recourse to the national legislative machinery.

18. The 1949 Geneva Conventions contained a common article on extradition, which should be allowed to stand. That did not mean that the ICRC should not keep an eye on its application and, if necessary, submit a more acceptable text.

19. Articles 10, 11, 12, 34, 75 and 76 of the draft Protocols effectively guaranteed respect for the Geneva Conventions and the Protocols and their dissemination among participants in armed conflicts.

20. His delegation supported article 79 of draft Protocol I submitted by the ICRC.

21. Mr. MURILLO RUBIERA (Spain) recalled that the purpose of draft Protocol I was, not to modify, but to supplement the provisions of the different Conventions. Article 78 submitted by the ICRC respected the principle of universal jurisdiction embodied in the common provisions of the four Geneva Conventions of 1949 (Article 49 of the first Convention, Article 50 of the second, Article 129 of the third and Article 146 of the fourth). The intention was to supplement the second part of those provisions, which dealt with the notion of extradition. That second part was somewhat weak, but it was coherent from the standpoint of the principle of universal jurisdiction.

22. Extradition was a means of international co-operation for the repression of crime, but in a system based on universal jurisdiction it was a subsidiary element, which did not always make for a good solution in that respect. In drafting article 78, the ICRC had taken as a model the extradition machinery provided for in The Hague and Montreal Conventions for the suppression of unlawful acts against air navigation. Those texts, however, were not based on the principle of universal jurisdiction. They were based on the recognition of certain concurrent obligations and of a universal subsidiary obligation. The mechanism of extradition was not of course new; it was found in other international instruments. But the ICRC text raised many problems. To supplement the provisions on extradition implicit in the common provisions of the Geneva Conventions, it would be enough to admit the possibility of extradition, maintaining, on the one hand, that grave breaches would be deemed to be extraditable offences and, on the other hand, that the Conventions and Protocol I would provide the legal basis for a decision to extradite. The first formula would satisfy countries that did not insist on treaties and the second, those which considered them necessary. It would also be necessary to refer to the conditions laid down in the legislation of the requested High Contracting Party. The problem of the extradition of a country's nationals would thus be solved in accordance with the system of universal jurisdiction.

23. Amendment CDDH/I/309 raised a problem of structure. There was no objection to collecting in a single provision everything relating to penal sanctions, as had been done in Article 36 of the Single Convention on Narcotic Drugs, 1961, but it would be better to wait till the end of the discussion on article 74 of draft Protocol I and establish a clear and full definition of grave breaches. Also, the text proposed in document CDDH/I/309 should be clarified and simplified.

24. Document CDDH/I/310 and Add.1 seemed hardly compatible with the principle of universal jurisdiction, which should always be respected. His delegation was above all critical of amendment CDDH/I/312 and Add.1, however, which still left room for confusion between the status of a prisoner of war and the situation in which a convicted person who had confessed to having committed war crimes might find himself. The adoption of that amendment would be a retrograde step.

25. While the principle of article 79 could be accepted, mutual legal assistance should also be envisaged for less serious breaches.

26. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) stressed that the new article 78 bis proposed by the Socialist countries (CDDH/I/312 and Add.1) was based on the need for effective suppression of the gravest breaches of the Geneva Conventions and of Protocol I, and he observed that it was impossible to lay down rules severely condemning such breaches and at the same time adopt clauses for the protection of persons committing them. The most elementary justice required that no unjustified leniency should be accepted that might be an encouragement to the guilty. Efforts must, of course, be made to mitigate the sufferings and privations that war brought to the populations involved, but it was the victims who must be protected, not those who by their criminal acts added to the suffering and wretchedness - they must be punished without mercy.

27. It was not the Conference's task to prepare rules extraneous to humanitarian considerations that might weaken the protective provisions of the Geneva Conventions and Protocols. There was no reason why those who committed war crimes or crimes against humanity should benefit from the favourable conditions granted to prisoners of war, and he asked why prisoners of war convicted of war crimes should be given different treatment from that allotted to common criminals. Those were the considerations underlying amendment CDDH/I/312 and Add.1.

28. It had been suggested that that amendment might undermine the system of humanitarian law, and that Protocol I as thus amended would become unacceptable to certain Governments. But that argument was not worthy of consideration. Under the provisions already in force, a war criminal who was a prisoner and had been convicted could benefit from the provisions of Article 85 of the third Geneva Convention of 1949. If, under an extradition treaty, that criminal were returned to his own country convicted, he would serve his sentence in the same way as all other prisoners and no one would raise an eyebrow. If extradited to the country where he had committed his crimes and convicted there, that same criminal would also serve his sentence like an ordinary prisoner.

29. There were no legal and moral grounds for any special attitude towards prisoners of war convicted of war crimes and crimes against humanity. Amendment CDDH/I/312 and Add.1 was based on principles of equity and humanity, and was fully in keeping with the general aims of the Conference.

30. Mr. REZEK (Brazil) said he could support the text of article 78 proposed by the ICRC, which did not seem to him likely to create problems of national legislation.

31. The critics of the text based themselves on the fact that some countries made extradition conditional on a treaty, generally bilateral, while others did not impose that requirement. But those two categories included some countries that had adopted a system of general clauses, and others which preferred to base their decisions on a list of breaches that would justify extradition. In the first case the parties undertook to grant extradition on the grounds that breaches of the Conventions and of Protocol I were crimes justifying an exceptional measure but, in the second, some countries that made their decisions conditional on a treaty also relied on a list of breaches. Other countries did not make their decisions conditional on any treaty and merely adopted criteria of a general nature.

32. Paragraph 2 provided that the Conventions and Protocol I should be considered as the legal basis for extradition in respect of grave breaches if a High Contracting Party which made extradition conditional on the existence of a treaty received a request for extradition from another High Contracting Party with which it had no extradition treaty. It seemed that such a provision would be difficult to accept for countries that deemed a prior treaty necessary.

33. After careful consideration, the Brazilian delegation thought that the proposals to delete article 78 could be supported. The representative of Australia had rightly pointed out that if article 74 was to be redrafted, it would no longer be necessary to keep article 78, which was giving rise to reservations.

34. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that at the fifty-third meeting (CDDH/I/SR.53) his delegation had made clear its position on article 78 and on certain proposed amendments to that article.

35. As one of the sponsors of amendment CDDH/I/312 and Add.1, his delegation wished to point out that the purpose of the proposal was to introduce a new article into draft Protocol I to strengthen the Protocol's provision for the repression of breaches of the Geneva Conventions and of the Protocol under consideration.

36. As some representatives had noted, amendment CDDH/I/312 and Add.1 put forward by a group of delegations from Socialist countries, was based on rules of international law in force, and was designed to ensure that persons guilty of war crimes and crimes against humanity were not able, by invoking the status of prisoners of war, to escape their deserved punishment.

37. Quite clearly, it was not being suggested that all prisoners of war should automatically be prosecuted or convicted. The proposal was that prisoners of war convicted under the laws of the country in which they were held prisoner, of war crimes and crimes against humanity in the meaning of the principles laid down at the Nürnberg trials, should be subject to the régime established in that country for persons serving a sentence.

38. That proposal fully took account of Principle 5 of General Assembly resolution 3074 (XXVIII), a resolution which strengthened the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. That resolution, adopted by a large majority, plainly stated that persons presumed guilty of war crimes or crimes against humanity should be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they had committed those crimes.

39. During the discussion of amendment CDDH/I/312 and Add.1, various interpretations had been given which did not correspond with its true meaning, since in the first place its purpose was to punish those who had committed war crimes and crimes against humanity, and since, in the second place, it was designed to strengthen the relevant provisions of the Protocol so as to close any loophole through which the guilty might escape their just punishment. It had even been suggested, during the debate, that the provisions suggested in the amendment might lead to reprisals

against individuals. But that was either completely to mistake the intention of the amendment, or to distort it deliberately. The point was not to instigate reprisals, but to make punishment necessary and unavoidable. That was a basic principle of penal law which was embodied in many domestic rules of such law, and entered into quite a number of international conventions. To be consistent, it should also be confirmed in Protocol I.

40. Mr. SCHUTTE (Netherlands) observed that a number of delegations had urged the deletion of article 78 on the grounds that it did not add much to the existing provisions of the Conventions. In fact, the articles on extradition in several recent Conventions, from which the wording of article 78 was derived, served a particular purpose in those Conventions, since in those documents the competence of third States to exercise jurisdiction was directly related to a refusal to extradite. The provisions in the four Geneva Conventions of 1949 on the competence of third States to exercise jurisdiction were, however, in themselves sufficiently clear.

41. With respect to article 78, it was not obvious that a criminal should be tried by a third State, i.e. a State that could not base its jurisdiction on the principle of territoriality or of nationality. Whether a State would be eager to try war crimes committed during an armed conflict to which it was not a party was open to question. Even if it wished to do so it might in practice occur only with the explicit or silent consent of States more directly concerned. The third State would probably prefer to hand over war criminals to States more concerned, or it might prefer not to see those offenders tried and virtually to grant them asylum. The Geneva Conventions, in which use of the word "extradition" had been carefully avoided, allowed the State concerned, if it preferred, to take the initiative and to hand the offenders over for trial to another High Contracting Party concerned. Obviously, a choice between extradition and transfer of proceedings depended upon the extent of the evidence at the disposal of each of the States concerned. It was clear that the provisions of the Conventions with respect to the possibility of transfer of persons charged with grave breaches were adequate.

42. On the other hand, if a State refused either to extradite a guilty person or to hand him over to be tried elsewhere, and the person therefore went unpunished, the State concerned would be avoiding its obligations. Whether it could be held to account for doing so was debatable, since under the Geneva Conventions extradition was governed by the laws of that State, which, moreover, might have good reasons for refusing extradition, e.g. where evidence was inadequate for finding that a grave breach had been committed, or if there was reason to believe that the person charged would, upon being handed over, be prosecuted on grounds of race, religion, nationality or political opinions. None of those reasons would prejudice the readiness of the State requested from bringing proceedings itself against the alleged offender. Such readiness would be prejudiced only if the offence was deemed to be a political one and for that reason not liable to extradition.

It had been argued that the provisions on extradition in the Conventions should not jeopardize the right of States to grant asylum, yet international instruments excluded asylum for persons with respect to whom there were serious reasons for considering that they had committed a war crime as defined in international instruments containing provisions respecting such crimes. Grave breaches should therefore not be considered as political offences for purposes of extradition. For that reason, deletion of the article on extradition would be regrettable.

43. With respect to article 78 bis, his delegation endorsed the views expressed by the United Kingdom representative at the fifty-third meeting (CDDH/I/SR.53) and considered the article to be totally unacceptable.

44. Article 79 had been drawn from Article 10 of the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970, in which the Contracting Parties were urged to afford each other the greatest measure of assistance in criminal proceedings relating to the offence of hijacking as defined in Article 1 of that Convention. Any provision going beyond that would exceed the scope of that Convention. Presupposing that under Protocol I and the four Geneva Conventions of 1949, criminal proceedings might be brought in respect both of grave breaches and of unqualified breaches thereof, it was hard to understand why assistance in criminal proceedings should be confined to criminal proceedings brought in respect of grave breaches only and should not be extended to any other criminal proceedings arising out of a violation of the Geneva Conventions or of Protocol I.

45. He saw no difficulty in such an extension of the scope of the article. The fact that the law of the State requested must apply in all cases left a certain amount of discretion to that State. It might mean that only reasonable requests would be taken into consideration, that requests would be refused if there was sufficient ground to believe that they related to proceedings brought with a view to prosecuting the offender for reasons of religion, race, nationality or political opinions. Furthermore, requests might be refused if compliance would contribute to double jeopardy, or if they related to offences considered to be of a political nature, or if compliance could affect the sovereignty, safety, public order or any other essential interests of the requested State. If none of those impediments presented itself, it was hard to see why letters rogatory and other types of mutual assistance should not be worth considering in all criminal proceedings that might result from violations of the Conventions and Protocol I. The Protocol might at least provide the machinery for such co-operation.

46. Mr. KAKOLECKI (Poland) said that article 78 should be included in Protocol I since it represented a development of humanitarian law based on analogous provisions in the international Conventions referred to earlier. He fully endorsed the views of the representative of Hungary in that respect.

47. The amendment to article 78, of which Poland was a sponsor (CDDH/I/310 and Add.1), made it incumbent upon all States to co-operate on extradition in accordance with the provisions of the earlier paragraphs of the article. In other words, it maintained the principle set out in paragraphs 2 and 3 of article 78 which made extradition subject to the law of the requested High Contracting Party. Respect for the national legislation of the party requested was thus clearly safeguarded by the amendment.

48. Moreover, the amendment did not violate the principle, applied by most States, that their own nationals were not extraditable, nor did it contravene the rules usually laid down in extradition treaties, such as the one on dual nationality.

49. The amendment envisaged extradition as a matter of priority only to the country where the offence was committed. That solution took account of the fact that, in practice, most war crimes and crimes against humanity were perpetrated on the territory of the occupied country. It did not, however, exclude the possibility of another decision if that was justified in a particular case, for instance where an offence was committed against nationals of a country outside that country's territory.

50. The suggestion made by the representative of the German Democratic Republic that the amendment might, if necessary, be inserted into article 79 was most relevant and might make it easier for the Spanish delegation to accept the amendment.

51. He stressed the value and merits of amendment CDDH/I/312 and Add.1, proposing a new article 78 bis, of which his delegation was a sponsor and which was designed to ensure that persons convicted of war crimes and crimes against humanity - the most barbarous and the most atrocious crimes - should not be able to benefit from a more favourable régime than persons serving a sentence for other offences. He associated his delegation with the arguments put forward by the delegations of the Socialist countries in favour of that amendment.

52. Mr. REIMANN (Switzerland) observed that his delegation proposed the deletion of article 79 (CDDH/I/303), which, like article 78 had some serious shortcomings. Nevertheless, it remained a sponsor of the amendment submitted by France, Mali and Switzerland at the second session (CDDH/I/279), which was designed to make good a deficiency in the ICRC text of article 79.

53. He announced that the delegation of Thailand had asked him to say that it was joining the sponsors of amendment CDDH/I/279.

54. Article 79 proposed by the ICRC, which was the counterpart of Article 10, paragraph 1, of the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft, would then become paragraph 1 of article 79 and would be followed by the new paragraph proposed in document CDDH/I/279, which was modelled on paragraph 2 of Article 10 of the same Convention. Whereas paragraph 1 contained provisions concerning the legal basis for implementing a request for mutual assistance, the second set forth the rules governing questions of admissibility, and made it possible to restore a balance which had not only been already established in other instruments, but which was well calculated to meet the existing situation in international relations.

55. Mr. BENMAKHLOUF (France) said that his delegation wished to associate itself with the remarks made by the representative of Switzerland concerning article 79 and amendment CDDH/I/279 to that article.

56. Since article 78 proposed by the ICRC was based on the relevant provisions of The Hague and Montreal Conventions, which France had approved, that article could be accepted in principle by his delegation, especially as the text - in particular, paragraph 3 - was completely consonant with French legislation. In fact, since 1927 a law had made it possible to start extradition proceedings, even where no bilateral treaty existed with the State requesting extradition.

57. The wording of article 78 should, however, establish the basic principle of aut dedere aut punire, which the 1949 Geneva Conventions were designed to apply.

58. The inclusion in draft Protocol I of a clause of universal competence was highly desirable since that Protocol, on the model of the Geneva Conventions which it was intended to complement, dealt with law which was essentially universal and, as such, should exclude any discrimination between de jure subjects. The Committee should accordingly consider - perhaps in the Working Group - how to

combine application of the principle of aut dedere aut punire with the provisions proposed by the ICRC, since the latter were not necessarily incompatible with the former.

59. His delegation thought that the Belgian amendment (CDDH/I/266) to delete the words "whatever the motives for which they were committed" was pertinent, since it was difficult to see the exact scope of the provision; it was not clear and there seemed to be no need for it.

60. Since paragraph 1 of article 77 referred to the idea of a grave breach, which was the subject of article 74, his delegation would be unable to take a final position on article 78 until such time as the question of article 74 had been settled.

61. Mr. OBRADOVIĆ (Yugoslavia) said that Yugoslav legislation dealt satisfactorily with the problem of repressing breaches. The penal code already provided for the punishment of war crimes and crimes against humanity, as also for the grave breaches which the Geneva Conventions were intended to cover. Military regulations included provisions to meet the requirements of articles 76 and 77. The aim of Yugoslav legislation in that respect was to set forth precise rules, describing all crimes, misdemeanours, omissions or offences objectively, so that the population might be fully aware of what acts were prohibited. That aim contributed largely to the prevention of unlawful acts. So far as mitigating circumstances and subjective factors in each specific case were concerned, it lay with the court to take them fully into consideration.

62. His delegation would lend its support to any provision which would, in clear and precise terms, strengthen the existing system for the repression and prevention of offences against humanitarian law - prevention being very important.

63. It fully endorsed articles 78 and 79 submitted by the ICRC. The provisions set forth in those articles represented a step forward compared with the system of the Geneva Conventions, although they did not change that system in its essentials. Indeed, they did not challenge the principle of aut dedere aut punire. In his delegation's view, the important thing was that a person accused of committing grave breaches should be unable to evade justice. The country in which that person would be tried was of little significance provided that the accused appeared before a competent court. If all the Contracting Parties applied the principle of punishing breaches, the question of extradition would not arise. Unfortunately, there were still criminals at large who had committed atrocities during the Second World War - among them, a well-known criminal of Yugoslav origin - who had been neither punished nor extradited.

64. If a criminal could not be tried in the country in which he happened to be - although, so far as Yugoslav legislation was concerned, it was hard to see why such could be the case - the remaining possibility was that of extradition. Article 78 was to a large extent based on analogous rules in the ICAO Convention signed at The Hague in 1970 and the ICAO Convention signed at Montreal in 1971, and there was no reason why provisions along similar lines could not be included in draft Protocol I. The Committee should not lose sight of the fact that the United Nations had adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII)), which must be duly taken into consideration.

65. As to the notion of "political crime" raised during the debate, he explained that it had nothing to do with grave breaches of humanitarian law.

66. The various amendments to articles 78 and 79 could be discussed in the Working Group. His delegation was open to any suggestion for improving either the content or the wording of those articles.

67. He did not fully grasp, however, the significance of draft article 78 bis in document CDDH/I/312 and Add.1. It had already been laid down that prisoners of war subject to trial for war crimes or crimes against humanity were, after sentence had been pronounced on them, transferred to penal establishments where they served their sentences "under the same conditions as in the case of members of the armed forces of the Detaining Power" (Article 108 of the third Geneva Convention of 1949), which meant that they were subject to the régime established in that country for its own nationals serving a sentence. He was unable, therefore, to see clearly in what way article 78 added anything new to the provisions of the third Geneva Convention in that respect.

68. Mr. MORENO (Italy) said it was clear from the debate that article 78 raised difficulties for a number of countries with regard both to their domestic law and to international law.

69. His delegation was not convinced that an article providing for extradition "whatever the motives for which they /the crimes/ were committed" could be regarded as in conformity with the essential legal principles enshrined in the Italian Constitution, namely, the principle of the right of asylum and the principle barring extradition for political offences. Moreover, the rule had always so far been to recognize extradition only in the case of specific and well-defined offences. The adoption of a principle of more general and necessarily vaguer scope would call for detailed reflexion as to the effects it might have on national law.

70. He also wondered whether it was really necessary to insert an article on extradition into draft Protocol I, and to what extent that would represent any noteworthy progress. The provisions in the Conventions relative to penal sanctions retained all their relevance and defined clearly and satisfactorily the rights and duties of the parties in that difficult matter. He therefore shared the doubts expressed as to the need for including article 78, and supported the proposals for its deletion.

71. Should the article be retained, he hoped the wording, while based on the relevant provisions of The Hague and Montreal Conventions of 1970 and 1971, would be redrafted so as to take account of the difficulties mentioned. In that connexion, the Belgian proposal to delete the clause "whatever the motives for which they were committed" (CDDH/I/266) deserved support.

72. In the case of the amendments contained in documents CDDH/I/310 and Add.1 and CDDH/I/312 and Add.1, his delegation, for reasons arising directly from the Italian system and philosophy of law, would be unable to accept those proposals, whose links with humanitarian law were difficult to discern.

73. His delegation was in favour of article 79, relating to mutual assistance in criminal matters, which very usefully supplemented the Geneva Conventions. Some amendments to that article deserved consideration in the Working Group. His delegation viewed with great interest the amendment submitted by France, Mali and Switzerland (CDDH/I/279).

74. Mr. de BREUCKER (Belgium) said that the question was whether extradition necessarily corresponded to the requirements of sound justice. The answer, in the case of every country with a respect for the individual, was in the negative. Furthermore, provision had already been made for it in the Geneva Conventions, and the provisions taken from The Hague and Montreal Conventions of 1970 and 1971 added nothing new. At all events, the rule should remain aut dedere aut punire.

75. New proposals, such as the amendment contained in document CDDH/I/310 and Add.1, sought to lay down that, as far as possible, the convicted person should be extradited to the country where he had committed the crime. If, however, provisions were adopted, without any possible loophole, for the automatic extradition of the offender to the country with a grievance against him, that would be tantamount to the acceptance by convention of compulsory vengeance.

76. The discussion of draft article 78 on extradition had cost the Committee a great deal of time, and it was for that reason that his delegation associated itself with the other delegations which had proposed the deletion of that article.

77. According to amendment CDDH/I/312 and Add.1 a prisoner of war convicted, under the laws of the country in which he was held prisoner, of war crimes or crimes against humanity, would lose his status as a prisoner of war and would be subject to the régime established in the detaining country. In other words, he would no longer benefit from the guarantees provided under the third Geneva Convention of 1949 and would be subject to arbitrary treatment, or at any rate, to the full severity of the law in the detaining country. That proposal was contrary to Article 85 of the third Convention, which stipulated that prisoners of war should retain "even if convicted, the benefits of the present Convention". By ratifying such a proposal, the Conference would sanction a setback in humanitarian law. Some delegations would like the terms of the reservations that had been expressed on the subject of Article 85 of the third Convention to become the law of the Conference; and the Hungarian delegation had clearly stated that Hungary would be prepared to withdraw its reservation regarding Article 85 if the Conference adopted amendment CDDH/I/312 and Add.1. On the pretext of the more thorough repression of grave breaches, concepts totally at variance with the Geneva Conventions would be incorporated in Protocol I, and existing humanitarian law would thereby suffer a setback.

The meeting rose at 12.45 p.m.

SUMMARY RECORD OF THE FIFTY-FIFTH MEETING

held on Tuesday, 11 May 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 78 - Extradition (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/266, CDDH/I/303, CDDH/I/309, CDDH/I/310 and Add.1, CDDH/I/315)(continued)

New article 78 bis (CDDH/I/312 and Add.1) (continued)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/279)(continued)

1. The CHAIRMAN invited the representative of the Philippines to introduce his delegation's amendment to article 78 (CDDH/I/315).

2. Mr. GLORIA (Philippines) said that the amendment proposed by his delegation (CDDH/I/315) to the ICRC draft of article 78 was based on the same principle of universality as the article itself, and was designed to enlarge the scope of extradition and to make the administration of justice more effective, the grave breaches involved being of an international character.

3. In commenting on the various parts of document CDDH/I/315, he emphasized that his delegation could not agree that extradition should be made conditional. That was why the deletion of the last sentence of paragraph 1, the last sentence of paragraph 2, and the last phrase of paragraph 3 of article 78 was proposed.

4. The addition of a new paragraph was based on purely humanitarian considerations, and represented an act of faith in human justice. It would not prejudice any right of the Parties to the Conventions and the present Protocol.

5. Some delegations had expressed the view that the provisions of article 78 conflicted with the constitutions of their countries, while others had said that the article duplicated certain provisions of the Geneva Conventions and was therefore unnecessary. It was ironical that some delegations were opposing article 78 as a duplication, although they had supported the United States amendment (CDDH/I/307) to include an article 76 bis which clearly duplicated

some articles adopted at the second session. It must not be forgotten that the purpose of the Conference was as much to reaffirm as to develop rules in the light of the evolution that had taken place since 12 August 1949.

6. To those who objected that article 78 was incompatible with their own national constitutions he would point out that there were cases where national constitutional provisions should yield to the urgency of a particular situation. The Government of the Philippines, animated as always by a spirit of co-operation, and convinced of the need to ensure the peace and security of the world community, would willingly sacrifice a part of its domestic jurisdiction without feeling that it was hurting its national pride in so doing.

7. To delegations objecting that article 78 invaded national political rights, he would point out that the work of the Conference must above all be imbued with the spirit of co-operation and mutual understanding.

8. The Philippine delegation, in proposing its amendments to article 78, was aware that serious legal problems were involved which must be solved at an international level within the concept of universality. Despite the absence of any world-wide conflict, there was today a proliferation of acts constituting grave breaches. He was referring in particular to unlawful acts against civil aviation which jeopardized persons and property and undermined the confidence of the world community in the safety of civil aviation. Thus, during the Seventeenth Extraordinary Assembly of the International Civil Aviation Organization (ICAO) held in 1970 in Montreal, the most important legal matter taken up had been extradition. He was surprised to note that delegations which had come out firmly in favour of extradition for a limited class of grave breaches at Montreal were now opposing the same legal provision having a much wider scope and applying to a great number of grave breaches with much more serious effects on mankind. He found such an attitude mystifying. The delegations of those same countries that had supported the adoption of the ICAO Convention for the Suppression of the Unlawful Seizure of Aircraft, signed at The Hague in 1970, and the ICAO Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal in 1971, were now claiming that those two Conventions bore no relation to article 78 because the offences involved were not international crimes. The two Conventions had been adopted because the member States of ICAO were aware of the grave consequences of the hijacking of aircraft and other unlawful acts

against civil aviation, which affected more than one or two States. That was why the two Conventions proceeded from the proposition agreed on at the Seventeenth Extraordinary Assembly of ICAO, that such grave breaches were crimes against humanity.

9. In brief, extradition, if it was to be effective and to fulfil its function of repressing grave breaches in armed conflicts, must rest on a multilateral basis and not be subject to any conditions or reservations whatever.

10. The CHAIRMAN said that during the discussion, the Committee had examined articles 78, 78 bis and 79 of draft Protocol I. As article 78 had given rise to keen controversy, it might be advisable to refer it to Working Group A, and he accordingly proposed that the Committee should vote on that point.

11. Mr. AL-FALLOUJI (Iraq) said that every delegation must face its responsibilities with respect to article 78. It was more than a matter of form, and before the members of the Committee considered referring the article to Working Group A, they should decide whether or not they were prepared to accept it.

12. Mr. MILLER (Canada) said that his delegation was not in a position at the moment to state its views on the substance of the article. It felt, nevertheless, that the wording could certainly be improved and that Working Group A could work to useful purpose to achieve that end.

13. Mr. de BREUCKER (Belgium) supported the Chairman's suggestion that the issue should be put to the Committee. If the Committee decided to delete the article, the question would be settled ipso facto.

14. Miss POMETTA (Switzerland) agreed with the representative of Belgium.

15. Mr. SHUKRI (Kuwait) endorsed the view expressed by the representative of Iraq that the question was not merely one of form but also one of principle on which the Committee must take a decision.

16. Mr. CARNAUBA (Brazil) said that the general debate had revealed a trend in favour of the deletion of article 78. A decision by the Committee was required.

17. Mr. MORENO (Italy) felt that the Committee should take a vote on article 78.

18. Mr. BOBYLEV (Union of Soviet Socialist Republics) observed that the Committee should attempt to find formulations acceptable to all instead of seeking to delete articles. It was therefore truly essential that the Working Group should consider an article which had been discussed at length. He agreed with the representative of Canada that article 78 should be referred to the Working Group.

19. Mr. OBRADOVIĆ (Yugoslavia), Mr. KAKOLECKI (Poland) and Mr. KŘIŽ (Czechoslovakia) endorsed the view expressed by the representative of the Union of Soviet Socialist Republics.

20. Mrs. DARIIMAA (Mongolia) pointed out that the Committee could take a vote on an article at any time. However, in view of the sharp differences of opinion on article 78 and the importance of the subject, no effort should be spared in seeking to reconcile the various points of view. It was therefore difficult not to give Working Group A an opportunity of seeking and perhaps finding a formula satisfactory to all. The Committee could take its decision subsequently.

21. Mr. KIRALY (Hungary) stressed that article 78 was particularly complex. While he agreed that the Committee was made up of the best experts in humanitarian law, the matter should be considered by a small expert group. He therefore agreed with the representatives of Canada and the Union of Soviet Socialist Republics that draft article 78 should be referred to Working Group A.

22. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) observed that article 78, to which very important amendments had been submitted, had been discussed by the Committee at several meetings, and had given rise to a number of comments. It had been pointed out during the discussion that the article was related to a whole series of other articles and clauses in the same Part of Protocol I. Of course within the context of a general debate it was impossible to go into all those questions with the requisite thoroughness, and it was for that reason that his delegation considered that, however difficult it might be, as mentioned at the present meeting, strenuous efforts should be made to find a satisfactory solution at the Working Group level. Article 78 should therefore be referred to Working Group A.

23. Mr. SADI (Jordan) said that he could not accept article 78 in its present wording. It was only fair, in accordance with the wish expressed by many delegations, that Working Group A should be given an opportunity to redraft the article. The Committee could subsequently take a decision if the article was still unsatisfactory.

24. Mr. NASUTION (Indonesia) said that in the interests of efficiency, the Committee itself should decide on article 78.

25. The CHAIRMAN put to the vote the question whether article 78 should be referred to Working Group A.

The Committee decided, by 27 votes to 26, with 11 abstentions, to refer article 78 to Working Group A.

26. The CHAIRMAN said that in consequence of the vote article 78 would be referred to Working Group A.

27. He put it to the Committee that the provisions now to be referred to Working Group A were articles 78, 78 bis and 79, which had already been considered by the Committee. In the absence of objections he would take it that that was the Committee's wish.

28. Mr. EL-FATTAL (Syrian Arab Republic) said that his delegation had abstained in the vote in order to allow Working Group A to go fully into the present wording. His delegation's abstention did not mean that it accepted the text as it stood.

29. Mr. MILLER (Canada) said that, although his delegation had voted to refer article 78 to Working Group A, it did not consider that it had also taken a decision on article 78 bis, referral of which it would have opposed.

30. Mr. MURILLO RUBIERA (Spain) explained that, in casting its vote, his delegation too had taken a position on the referral to Working Group A of article 78 alone, and not of articles 78 bis and 79. In the circumstances, the Working Group would have to show considerable flexibility in view of the fact that some articles closely related to the aforementioned articles (e.g. article 74) had still to be drafted.

31. Mr. GERLICZY-BURIAN (Liechtenstein) said that he too had been convinced that article 78 was the only article on which the vote on referral had been taken.

32. Mr. BOBYLEV (Union of Soviet Socialist Republics) considered that the decision had been taken to refer to Working Group A not only article 78 but also its adjuncts (article 78 bis and 79). The question should not be re-opened.

33. Mrs. MANTZOULINOS (Greece), speaking on a point of order, said that she agreed with the delegations which felt that the vote had been taken on article 78 alone and not on articles 78 bis and 79.

34. Mr. MILLER (Canada), speaking on a point of order, said that there had been a misunderstanding. The Committee had in fact decided to refer article 78 alone. Article 78 bis was not an amendment but a new article. In the circumstances the best course might be to take another vote.

35. Mr. TORRES AVALOS (Argentina) said that the vote on referring article 78 to the Working Group was the only decision to which his delegation could agree. He asked that another vote be taken on articles 78 bis and 79.

36. Mr. HUSSAIN (Pakistan) said that normal practice had been followed. A vote had been taken on the question of referring article 78 to Working Group A and his delegation had cast a negative vote. The Committee was now asked to vote on the referral of articles 78 bis and 79. Another vote was all that was required.

37. Mr. GIRARD (France) agreed with the representative of Pakistan that following the vote to refer article 78 to Working Group A, the Committee should be asked to decide on articles 78 bis and 79. He felt, however, that those two articles should be taken up separately.

38. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that the ICRC text was still the basic text and that all the others were merely amendments. He was convinced that article 78 bis was simply an addition or a kind of appendix to article 78 and that it was therefore unnecessary to vote on whether it should be referred to Working Group A.

39. Mr. AL-FALLOUJI (Iraq) said that his delegation also took the view that the procedure followed was clear, and that it was unnecessary to vote on referring articles 78 bis and 79 to Working Group A.

40. Mr. GLORIA (Philippines) pointed out that any text had to be considered before being referred to a working group, which had not been the case with article 79.

41. The CHAIRMAN replied that the representative of ICRC had introduced the three articles 78, 78 bis and 79 together, and that the discussion had been concerned with all three articles.

42. Mr. de ICAZA (Mexico) said that his delegation had voted solely on the referral of article 78. He made a formal request for a further vote to be taken.

43. Mr. MILLER (Canada) said he supported the request made by the representative of Mexico, but would ask the Legal Secretary to explain which texts would be dealt with by the new vote.

44. Mr. BOBYLEV (Union of Soviet Socialist Republics), speaking on a point of order, reminded the Committee that under rule 32 of the rules of procedure, a two-thirds majority was required if a question on which a decision had already been reached was to be reconsidered.

45. Mr. MILLER (Canada), speaking on a point of order, repeated his request.

46. Mr. STÄMPFLI (Legal Secretary) said that the vote would be on article 78 and amendments CDDH/I/303, CDDH/I/309, CDDH/I/310 and Add.1 and CDDH/I/315.

47. Mr. BOBYLEV (Union of Soviet Socialist Republics) expressed his astonishment that amendment CDDH/I/312 and Add.1, submitted jointly by his delegation and others, had not been mentioned by the Legal Secretary. He asked the reasons for such discrimination.

48. Mr. STÄMPFLI (Legal Secretary) said that there was no question whatever of discrimination, but that document CDDH/I/312 and Add.1 in fact contained a new article (article 78 bis), which should in accordance with normal procedure be considered separately.

49. Mrs. DARIIMAA (Mongolia) pointed out that at the first and second sessions the Committee had always considered each article and the relevant amendments together, and that new article 78 bis should accordingly be considered together with article 78. She was surprised that the Legal Secretary was proposing that a new procedure should be followed in the case of article 78 bis, which was nothing more or less than an amendment.

50. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that, in accordance with rule 40 of the rules of procedure, the proposal in document CDDH/I/312 and Add.1 should be considered an amendment.

51. Mr. SHUKRI (Kuwait) said he supported the observations made by the Legal Secretary. In his opinion, article 78 bis constituted a new article.

52. Mr. de BREUCKER (Belgium) said that he also thought article 78 bis dealt with a matter that had nothing to do with extradition, which was the subject of article 78.

53. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that, as he understood it, the Chairman had already decided to refer article 78 bis to Working Group A. There were no grounds for reversing that decision.

54. The CHAIRMAN explained that, after the vote on referring article 78 to Working Group A, he had not considered it necessary to take a fresh vote on articles 78 bis and 79.

55. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said he wished to endorse the remarks made by the representative of the Byelorussian Soviet Socialist Republic. Furthermore, the question of referring articles 78, 78 bis and 79 to Working Group A had already been decided as a consequence of the vote on article 78. If that decision were to be reconsidered, it would be necessary to apply rule 32 of the rules of procedure, which provided for a special procedure.

56. Mr. SANSON-ROMAN (Nicaragua) formally requested a vote on referring article 78 bis to Working Group A.

57. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, said there could be no question of voting on article 78 bis. The issue was whether the Chairman's decision had been justified. It was the Chairman's decision that was in dispute.

58. Mr. FREELAND (United Kingdom), speaking on a point of order, said that in his delegation's view the vote taken had been solely on referring article 78 to Working Group A. There had been no ruling by the Chairman that article 78 bis should be so referred. In order to bring the ensuing discussion on article 78 bis to a conclusion as speedily as possible, the best course would be to fall in with the proposal made by the representative of Nicaragua and proceed to vote on that article.

59. Mr. AREBI (Libyan Arab Republic) said that in his delegation's view, because of the short time available to the Conference, it would be preferable to adopt forthwith the Chairman's proposal to refer article 78 bis, together with articles 78 and 79, to Working Group A. It would not alter the situation appreciably whether article 78 bis was or was not referred to Working Group A.

60. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that, as the Chairman had already taken a decision on article 78 bis, the vote should not be on the proposal by the Nicaraguan delegation, but on the Chairman's decision.

61. Mr. AL-FALLOUJI (Iraq) formally moved the adjournment of the debate in accordance with rule 24 of the rules of procedure.

62. The CHAIRMAN asked the representative of Iraq whether he would agree to a vote on referring article 78 bis to Working Group A.

63. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, observed that the Iraqi delegation's proposal had priority. The Committee should therefore proceed to vote on the adjournment of the meeting.

64. Mr. de ICAZA (Mexico) proposed that the meeting should be suspended in accordance with rule 27 of the rules of procedure. That motion would have priority over the Iraqi delegation's motion.

65. After a further exchange of views, Mr. AL-FALLOUJI (Iraq) agreed to withdraw his proposal, since the suspension of the meeting would enable the different delegations to consult each other.

66. Mr. OBRADOVIĆ (Yugoslavia) and Mr. MILLER (Canada) said they were in favour of suspending the meeting.

The proposal of the representative of Mexico was adopted.

The meeting was suspended at 11.50 a.m. and resumed at 12.20 p.m.

67. The CHAIRMAN observed that the question of referring article 78 to Working Group A had already been settled by a vote, and that he had also suggested referring articles 78 bis and 79 to Working Group A as well. His suggestion had been opposed by certain representatives. Consequently, the best solution would be to vote on referring article 78 bis to Working Group A.

The proposal for referral was rejected by 29 votes to 23, with 12 abstentions.

68. Mr. EL-FATTAL (Syrian Arab Republic), speaking on a point of order concerning the vote asked for his delegation to be added to those which had voted to refer article 78 bis to Working Group A.

69. Mr. SHUKRI (Kuwait) said that although his delegation was opposed to the principle contained in articles 78 and 78 bis, it had voted to refer article 78 bis to Working Group A merely in order that the two articles might be treated on an equal footing.

70. Mr. OBRADOVIĆ (Yugoslavia), speaking in explanation of vote, said that his delegation had not clearly understood the implications of article 78 bis, but had voted for it to be referred to Working Group A, which would have made it possible to clarify the question.

71. Mrs. DARIIMAA (Mongolia) said she regretted the decision which the Committee had just taken. In any case, the question raised by article 78 bis still remained. Working Group A would have been able to discuss the matter; and that would have enabled delegations to consult their Governments and perhaps arrive at a compromise which would have been acceptable to all.

72. The CHAIRMAN pointed out that the Committee had not voted on the substance of the issue, but only on referring article 78 bis to Working Group A.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE FIFTY-SIXTH MEETING

held on Wednesday, 12 May 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Article 79 - Mutual assistance in criminal matters (CDDH/1, CDDH/225 and Corr.1, CDDH/226 and Corr.2) (continued)

1. The CHAIRMAN recalled that the Committee had decided at the fifty-fifth meeting (CDDH/I/SR.55) to refer article 78, but not article 78 bis, to Working Group A. The Committee might now wish to refer article 79 to Working Group A.

It was so agreed.

New article 79 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/241 and Add.1, CDDH/I/267, CDDH/I/316)

2. Mr. STAMPFLI (Legal Secretary) said that the following amendments to draft article 79 bis were before the Committee: CDDH/I/241 and Add.1 (Denmark, New Zealand, Norway and Sweden), CDDH/I/267 (Pakistan) and CDDH/I/316 (Japan).

3. Mr. SERUP (Denmark), speaking on behalf of his own delegation and of those of New Zealand, Norway and Sweden, introduced new article 79 bis (CDDH/I/241 and Add.1). The proposal envisaged the establishment of a permanent international inquiry commission, the task of which would be to inquire into alleged violations of the Geneva Conventions of 1949 and of Protocol I, together with other rules relating to the conduct of an international armed conflict. The commission would be composed of fifteen members representing different areas of the world. They would be appointed by the ICRC. The commission would function not only at the request of one or more parties to the conflict but also on its own initiative. The inquiry would be carried out by a chamber of five members whose findings would be communicated to the parties and made public unless the parties agreed otherwise. The activities of the commission would be financed by voluntary contributions.

4. The sponsors of the new article had taken into account articles 5 and 74 to 79 of draft Protocol I. Article 5, paragraph 2, provided that the Protecting Powers had the function of applying the Geneva Conventions and Protocol I but did not say that they must also inquire into violations. However, the Geneva Conventions already contained provisions to that effect. As the ICRC representative had pointed out at the second session of the

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in 1972, neither the ICRC nor the Protecting Powers were authorized to report on cases of violations. With regard to the repression of breaches, article 74 as proposed by the ICRC (CDDH/210, annex 2) specified that the provisions of the Geneva Conventions applied also to repression of breaches of Protocol I. It was thus left to the signatories themselves to take the necessary measures to secure observance of the rules of war and to repress breaches. That procedure would be possible only when a measured agreement existed between the parties involved. Where there was no agreement and where reciprocal allegations of violations were made by the two parties, there was need for suitable machinery. The question then arose whether such machinery should be established on an ad hoc basis or whether it should be of a permanent character. Inquiries had hitherto been conducted on an ad hoc basis, a procedure which had given rise to objections of some weight. Among the arguments adduced in favour of permanent machinery, not the least cogent was the claim that only such a system would have the necessary deterrent effect.

5. There was nothing novel or revolutionary in the provisions of new article 79 bis. In fact the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, already specified that inquiries should be instituted at the request of a belligerent, but left it to the parties to decide how that should be done - obviously an unsatisfactory solution. The text had been modified in the four Geneva Conventions of 1949, which provided that the parties should appoint an umpire if they were unable to reach agreement. Those provisions of the 1929 and 1949 Conventions had, however, never been applied.

6. The Danish delegation had consistently advocated the adoption of an effective system of control. It had done so particularly at the second session of the Conference of Government Experts, in 1972, when it had proposed the insertion of an article creating a new procedure for inquiry and conciliation.

7. The question arose as to what should be the role of the ICRC in the matter. The sponsors of amendment CDDH/I/241 and Add.1 were fully aware of the implications of the proposal. None of the provisions should in any way affect the traditional impartiality of the ICRC or its humanitarian activities. But the ICRC itself had recommended, as far back as 1937, a reinforcement and improvement of Article 30 of the Geneva Convention of 1929, a recommendation which had resulted in a proposal for a procedure of inquiry which had apparently never received any consideration by the Diplomatic Conference in 1949.

8. During the general debate on article 74 to 79, several delegations had expressed their sympathy with the proposal to establish an international inquiry commission. Some delegations also referred to the relationship between the rules on reprisals and the inquiry procedure, pointing out that such a new system might well have a deterrent effect. The four sponsors of new article 79 bis would be interested to hear, in Committee I or in Working Group A, other views on the substance or the form of their proposal.

9. The CHAIRMAN, replying to a question by Mr. HUSSAIN (Pakistan) and also by Mr. SHUKRI (Kuwait), said that new article 79 bis submitted by Pakistan (CDDH/I/267) was a separate proposal from CDDH/I/241 and Add.1, and not an amendment to it.

10. Mr. BRING (Sweden) said that the rules in force on inquiry procedures had not succeeded in preventing violations of the law during international armed conflicts. It was therefore reasonable to ask whether new machinery would improve the situation, and if the parties to conflicts would be prepared to accept machinery that functioned automatically. Experience had shown that such parties rejected any impartial observation regarding prisoners of war, and concerning what they considered to be unfounded allegations of violations of the law. But international public opinion reflected an increasing desire for impartial inquiry that could put an end to unchecked allegations and denials. Indeed, the very existence of machinery for such a purpose might have a deterrent effect. But it was clear that arrangements of that kind made by groups of private individuals would not necessarily be such as to win universal trust.

11. The four Geneva Conventions of 1949 each contained an identical article on an inquiry procedure (Article 52 of the first Convention, Article 53 of the second Convention, Article 132 of the third Convention and Article 149 of the fourth Convention), but those provisions had never been applied because they were quite clearly inadequate. The fact that both parties must agree was enough to make the provisions completely ineffective. They should therefore be supplemented by the establishment of a permanent body whose impartiality would be guaranteed through the appointment of its members on a basis free of any political consideration. That was what article 79 bis proposed.

12. The Protecting Power system, as agreed upon at the second session of the Diplomatic Conference, did not provide for inquiry into violations of the Geneva Conventions and the Protocols, but it would obviously be better if supplemented by inquiry machinery. Unlike the provisions in the Geneva Conventions of 1949, the new article 79 bis was based on the premise that agreement by the parties was given in advance of any cases arising. Thus, there would be no possibility of obstruction, unless one of the parties

refused to allow any inquiry in loco. But such a refusal would not mean that all inquiry must be dropped, since statements by witnesses, documents, etc., could provide evidence. When the international inquiry commission was unable to perform its task, it must content itself with stating as much and explaining why. In any case, the result of the inquiry would be published. Pressure from world public opinion was the best way of inducing compliance with international law.

13. Lastly, it must also be appreciated that an inquiry procedure was not designed solely to reveal violations; it could help to unmask false allegations and unfounded rumours, and thus to establish the innocence of a party.

14. Mr. HUSSAIN (Pakistan) expressed regret that Japan had not yet had the opportunity of submitting its amendment (CDDH/I/316) to the proposal contained in document CDDH/I/241 and Add.1, in accordance with normal procedure, but he would abide by the Chairman's decision.

15. His delegation deplored the fact that another year had passed shaken by conflicts - political, economic, racial or religious - which had subjected mankind to useless hardships. The chances were that that deplorable situation would continue, and immediate attempts should be made to counteract it. But it must be admitted that the Diplomatic Conference, although fully aware of the situation and having affirmed its purely humanitarian intentions, had often lost sight of that problem during the second session. The subtle theories propounded had too often left practical aspects on one side, and the evil force of national sovereignty had too frequently been invoked to the prejudice of peoples. Countries which produced dangerous weapons had claimed that they were looking after their national economic interests and that they were full of concern for their fellow human beings, but they had not ceased to oppose the setting up of institutions capable of protecting humanity. The situation was truly alarming. But voices had been raised demanding that remedies be brought to bear.

16. As regards new article 79 bis, Article 1, common to the four Geneva Conventions of 1949, stipulated that the High Contracting Parties undertook to respect and to ensure respect for the Conventions in all circumstances; but current conflicts showed that those provisions did not meet the needs. Machinery should therefore be set up so as to compel the parties to a conflict to respect the provisions of the Conventions, the implementation of which had already raised serious problems. Such was the case with Article 118 of the third Geneva Convention of 1949 relative to the release and repatriation of prisoners of war without delay at the close of hostilities. The question was, what would happen if one of the

parties refused to fulfil its obligations. The question applied similarly to Article 132 of the same Convention. What was to happen if one of the parties refused to agree on the choice of an umpire? Clearly, something had to be done to compel each of the parties to comply with those provisions.

17. In its Commentary on Article 1 of the Conventions of 1949, the ICRC emphasized that each of the Contracting Parties (neutral, allied or enemy) should endeavour to bring any Power failing to fulfil its obligations back to an attitude of respect for the Conventions. It was for that reason that his delegation proposed the setting up of a permanent commission for the enforcement of humanitarian law (CDDH/I/267). That commission would, in particular, be given the task of taking appropriate steps to resolve all disagreements concerning the application of the Geneva Conventions and the Protocol, holding an inquiry and bringing back to an attitude of respect any party failing to fulfil its obligations thereunder. But the Conference also had before it another proposal submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1). The main differences in those proposals were as follows: whereas those four countries proposed the setting up of an "international inquiry commission", which would restrict the activities of that body, Pakistan opted for the setting up of a "commission for the enforcement of humanitarian law", whose tasks he had just enumerated; and whereas the four countries proposed that the members of the commission should be appointed by the ICRC, Pakistan advocated the drawing up of regional lists of the High Contracting Parties in alphabetical order and the annual appointment of a representative in each region, so as to avoid involving the ICRC in inevitable disputes. Also, no provision was made by the four countries for replacing members of the commission: Pakistan, on the other hand, proposed that they be appointed for one year, so that new blood might be continually injected into the membership. Lastly, while the four countries left the channelling of voluntary contributions to the ICRC, Pakistan recommended that that task be entrusted to the depositary of the Protocol.

18. Lastly, he said that his delegation would submit an amendment in Working Group A which would give the commission the authority to continue an inquiry on the expiry of its members' terms of office but without impeding the admission of new members.

19. Mr. YAMATO (Japan), introducing amendment CDDH/I/316, observed that many delegations, like his own, wished to pay tribute to the constructive proposals by Denmark, New Zealand, Norway, Sweden and Pakistan.

20. Whatever its merits, the Pakistan proposal was perhaps too far in advance of the development of humanitarian law. Hence it would be better to approve the four-Power proposal (CDDH/I/241 and Add.1) which was a more modest and practical approach, provided that a few changes were made so as to make the proposed commission of inquiry more effective and widely acceptable. The setting up of a practical and effective inquiry system was all the more urgent in that during the past twenty-seven years, no country had invoked the relevant provisions of the Geneva Conventions of 1949. The existing provisions should be supplemented by a new, more comprehensive procedure which, through its automatic operation, would revive general interest in the former. The setting up of a permanent inquiry commission would be a decisive step towards ensuring the general observance of humanitarian law, but that body should be able to act at very short notice if breaches of the 1949 Conventions and of Protocol I were to be avoided. As his delegation attached great importance to the preventive function and speed of the commission's action, it hoped that the commission would be empowered to inquire into situations allegedly leading to breaches (paragraph 2) and that an appropriate time-limit be specified depending on the urgency or nature of the particular case (paragraph 5). It was a truism that prevention achieved in time was far more important than repression after the event, and that maxim should evidently be applied to grave breaches of humanitarian law. Thus, it was necessary to apply a time-limit also to the preparation of a report by the inquiry commission. As there were historical examples to show that inquiry commissions set up solely for the purpose of investigating an incident or an alleged violation had often played a useful intermediary role between the parties to a conflict, his delegation recommended that the Conference should adopt a provision enabling the inquiry commission to perform its good offices so as to facilitate the repression or prevention of breaches, but only in so far as there was no risk of its failing to be impartial. Furthermore, experience showed that the participation of ad hoc members appointed by the parties to the conflict would facilitate the commission's work and ensure respect for its findings.

21. If those few amendments were acceptable to the co-sponsors of the four-Power amendment (CDDH/I/241 and Add.1), his delegation would be prepared to join as a co-sponsor of a revised proposal.

22. Mrs. BUJARD (International Committee of the Red Cross) said that she would confine herself to explaining the ICRC position on the task that might be entrusted to it in an international inquiry commission. She would deal later with the technical questions of procedure raised by the suggestions contained in the proposal for a new article 79 bis.

23. As previous speakers had emphasized, the 1949 Geneva Conventions contained a common provision relating to the inquiry which had to be instituted, at the request of a party to the conflict, concerning any alleged violation of the Geneva Conventions. A provision of that nature had already been embodied in the 1929 Convention. The provision common to the 1949 Geneva Conventions complemented the provisions relating to the Protecting Powers and their substitutes, under which most of the cases of alleged violations would be dealt with by those supervisory bodies. In that connexion, it should also be remembered that an official inquiry sometimes had to be instituted by the Detaining Power.

24. Under the 1949 Conventions, an inquiry was mandatory whenever one of the belligerents requested it; nevertheless, there was no rule laying down the procedure, whose methods had to be established by the parties themselves or, in the absence of agreement, by an umpire of their choice. The ICRC took the view that both texts of article 79 bis were calculated to strengthen the implementation of and respect for international humanitarian law, and that they deserved careful study.

25. One of those texts (CDDH/I/241 and Add.1) proposed, as it were, to entrust the duties of administering the permanent international inquiry commission to the ICRC. That was a task that the ICRC was ready to accept, even though it might at times be very difficult, and it hoped it could count on the active support of all the participating States. Of course, it would be necessary to provide the ICRC with the material means for performing such duties; but what was of paramount importance was that the nature of that function - which must remain distinct from the other tasks undertaken by ICRC - was open to no ambiguity. There must be no possibility of confusion between its role as administrator of the international inquiry commission and the traditional dutiies of protection and assistance conferred upon it by the Geneva Conventions and Protocol I. Every possible step must be taken to ensure that administration of the international inquiry commission did not have adverse repercussions on ICRC's ability to carry out its mission in times of armed conflict. With that in mind, the ICRC had noted with satisfaction the escape clause at the end of paragraph 1 of article 79 bis submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1).

26. Lastly, the ICRC considered it very important, perhaps even essential - if the international inquiry commission was to be capable of achieving the aims assigned to it, and if ICRC was to feel able to accept the duties with which it was planned to invest it - that the establishment of the commission should receive the approval of a large majority of the delegations present at the Conference, that the ICRC's nomination as administrator of the commission should not arouse controversy, and that the ICRC should receive the necessary approval and support.

27. Mr. EL-FATTAL (Syrian Arab Republic) said he stood by the statement he had already made, that international humanitarian law would remain a dead letter if it did not include provisions to ensure its application and the repression of breaches. It was important not only to protect victims, but also to re-establish the structure of humanitarian law, which, as many actual events bore witness, had collapsed.

28. The machinery for the repression of breaches of humanitarian law was doomed to failure, since it presupposed the determination of both parties to institute an inquiry concerning any alleged violation of the Conventions. The provision common to the Geneva Conventions placed the aggressor and the victim of aggression on an equal footing, which was a mistake from the legal point of view. Moreover, in view of its multi-disciplinary character, the ICRC did not not have the necessary competence to intervene effectively.

29. In the course of the past few years, breaches of the Geneva Conventions had been committed in numerous armed conflicts. In every instance, the aggressor had been protected, since he had had only to invoke his right to refuse to apply the provisions in the Conventions relating to inquiries. States could then have recourse to the machinery of the United Nations, which had likewise shown itself impotent to repress breaches of humanitarian law, since it, too, was based on the willingness of the two parties concerned to embark upon an inquiry. It was accordingly essential to establish permanent international machinery without delay with unrestricted freedom of action which would undertake the inquiries requested without paying undue heed to one Party or the other. For that reason, his delegation supported the Pakistan proposal (CDDH/I/267) to establish a permanent commission for the enforcement of humanitarian law, and it was disposed to take the other text for new article 79 bis (CDDH/I/241 and Add.1), as well as all the proposed amendments, into consideration.

30. Mr. BLOEMBERGEN (Netherlands) observed that during the general discussion on articles 74 to 79, his delegation had supported the idea of establishing an international inquiry commission, while adding that it would like to ask some questions before it could give full support to new article 79 bis (CDDH/I/241 and Add.1). In the meantime, the sponsors of that text had provided some useful clarifications, and his delegation was now able to make the following comments.

31. With regard to paragraph 1, the second sentence might be more concise. It might be enough to say that the ICRC would appoint the members of the international inquiry commission, with the addition, however, of the phrase "regardless of their nationality".

32. So far as paragraph 2 (a) was concerned, his delegation doubted the wisdom of having the commission inquire into every complaint concerning violation of "other rules relating to the conduct of an international armed conflict". That provision was very vague and might give rise to disputes. Furthermore, his delegation was not at all certain that the parties concerned would be happy about agreeing to the commission undertaking an inquiry "on its own initiative". The establishment of an international inquiry commission would be easier to accept if those two aspects were left outside its competence.

33. The remainder of the article, with the exception of paragraph 6, should constitute an annex to Protocol I: it was preferable not to overload the text of a treaty with detailed provisions concerning working methods. So far as concerned the financing of the commission's activities, he thought that, instead of requiring all countries to come forward with contributions, it would be preferable to ask the parties concerned to meet the costs of the inquiry.

34. His delegation hoped that the sponsors of new article 79 bis would bear those comments and suggestions in mind. The article, as thus amended, would constitute a very useful additional element in the machinery for repressing breaches of the Geneva Conventions and Protocol I.

35. The amendment proposed by Japan (CDDH/I/316) contained some interesting ideas which merited very close study. So far as concerned paragraph 2 (b), the Japanese delegation might perhaps clarify what it meant by "allegations that the provisions ... are about to be breached."

36. Lastly, his delegation wished to thank the ICRC for being prepared to accept the duties that would be entrusted to it under new article 79 bis proposed by Denmark, New Zealand, Norway and Sweden.

37. Mr. KUSSBACH (Austria) pointed out that in the Commentary on the 1949 Geneva Conventions, the reader could note that the common provisions on inquiry procedure had never been applied, at least so far as the International Committee of the Red Cross was aware. Moreover, in the Commentary, p. 605, emphasis had been laid "on the difficulty in time of war of reaching agreement between belligerent States". The text went on: "The difficulty will be all the greater if the point at issue is a violation alleged to have been committed by one of the belligerents and the opening of an inquiry on its territory". Hence it was essential to strengthen and develop the inquiry procedure provided for in the Conventions.

38. His delegation welcomed the initiative taken on the one hand by Denmark, New Zealand, Norway and Sweden, and on the other by Pakistan. Despite some differences, both texts of new article 79 bis were designed to overcome the difficulties encountered in time of war in establishing a commission of inquiry. Both drafts contained detailed provisions for the establishment of such a commission in time of peace. That solution would make it possible to avoid the need, in certain cases, for long negotiations, often ending in total failure, before the contemplated inquiry could even be opened.

39. The methods advocated in the two texts were very different. The Pakistan draft (CDDH/I/267) had significant advantages; but the text submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1) was more realistic and proposed more effective measures. Moreover, its provisions would give the international inquiry commission a permanent status, stability and, above all, the independence it needed to carry out its work.

40. The latter draft nevertheless called for some reservations. His delegation did not see why the competence of the commission should extend to all the rules relating to the conduct of an international armed conflict. Then again, the provision authorizing the commission to institute an inquiry "on its own initiative" went a little too far. In that respect, his delegation preferred the Japanese amendment (CDDH/I/316), according to which it was for the parties to the conflict to take the initiative of requesting the inquiry. That amendment also contributed useful details regarding the composition of a chamber of the commission.

41. Subject to those reservations, the Austrian delegation supported new article 79 bis (CDDH/I/241 and Add.1).

42. With reference to the text submitted by Pakistan (CDDH/I/267), he said his delegation found the method proposed for the appointment of the members of the commission and the brief duration of their term of office rather unsatisfactory. That text also raised other problems calling for very full discussion. His delegation reserved the right to speak again later when the drafts were considered by Working Group A.

43. Mr. SHUKRI (Kuwait) said he was favourably disposed to the idea of establishing an international inquiry commission for the enforcement of humanitarian law, the more so since, in his capacity as a professor of law, he was often asked to answer the awkward question whether humanitarian law was really effective, or whether it merely stated moral principles. Unfortunately, like the representative of the Syrian Arab Republic, he had to admit that international humanitarian law was a dead letter.

44. The international community should set up a proper Court of Criminal Justice for the repression of breaches of the Geneva Conventions and Protocol I, so that aggressors and those who violated the rules of international criminal law should not go unpunished. It would be very difficult however, to establish such a court at present because the international community did not seem to be prepared for it. The two texts of article 79 bis were thus a first step towards the creation of a body able to ensure the enforcement of humanitarian law.

45. The text submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1) contained the more practical provisions so far as concerned the composition and operation of the proposed commission. So far as concerned the commission's competence, on the other hand, the provisions of the Pakistan draft (CDDH/I/267) were the clearer and more precise. Perhaps the two texts could be merged, and the commission's work would thus be facilitated. In both texts, the provisions relating to the financing of the commission's activities should be reviewed; the Netherlands representative's proposal deserved consideration in that connexion.

46. In the view of his delegation, the amendment submitted by Japan (CDDH/I/316) weakened the initial text of new article 79 bis (CDDH/I/241 and Add.1). The provisions of paragraph 4 were very vague. Paragraph 2 (b) raised some doubts as to the efficacy of the powers to be given to the commission.

47. His delegation would speak again on the subject when the texts of article 79 bis were considered by Working Group A.

48. Mr. ABU-GOURA (Jordan) said he agreed with the representative of the Syrian Arab Republic as to the efficacy of the present system for the repression of breaches of international humanitarian law. He approved in principle the article 79 bis submitted by Pakistan (CDDH/I/267), which set out in detail appropriate measures for the enforcement of international humanitarian law. He had reservations, however, regarding the provisions for the composition of the commission. He would also like to have some clarification of paragraph 8. While supporting the Pakistan draft, he thought it should be considered in greater detail by Working Group A.

49. The text submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1) was, in his opinion, an excellent basis for discussion.

50. Mr. RUUD (Norway) said that, speaking as one of the co-sponsors of new article 79 bis (CDDH/I/241 and Add.1), he hoped that the establishment of a permanent inquiry commission might be instrumental in ensuring respect for the provisions of the Geneva Conventions

and Protocol I. The provisions relating to inquiry procedure did not go far enough and could not be described as effective. Some improvement there, then, was required.

51. His delegation wished to draw the attention of the Committee to some of the more important features of the proposed article. First of all, the international inquiry commission should be a permanent body so that it could start any inquiry requested without delay. It should also adopt rules of procedure to enable it to do its work more easily and effectively.

52. Furthermore, the chamber of the commission should publicly report its findings on the facts and the law unless the parties agreed otherwise. That provision, embodied in paragraph 4 (e), of document CDDH/I/241 and Add.1 was most important on account of the serious nature of the questions that would be handled by the commission. If the chamber found that grave breaches of the Geneva Conventions and Protocol I had in fact been committed, the public should know about them. If, on the other hand, the chamber considered that the allegations made were without foundation, it should announce its views, so as to clear the accused party of all blame.

53. His delegation had listened with much interest to the various comments and criticisms put forward during the debate. It wished to see an impartial and effective instrument of inquiry established, and it was willing to accept any amendment or proposal for that purpose.

54. Some speakers had expressed the view that the powers of the commission should not extend to all the rules relating to the conduct of an international armed conflict, and that the commission's competence should be confined to violations of the Geneva Conventions and Protocol I. His delegation had no strong feelings on that point and could accept such a limitation, although it feared that, in some cases, its effect might be too restrictive. The provisions of the Geneva Conventions and Protocol I were closely linked with other rules concerning armed conflicts, and if its competence was excessively restricted the commission might not be able to deal with more than part of a complex of breaches of humanitarian law. Another, and even more dangerous, possibility was that an inquiry might be held up by endless procedural debates on whether the breach submitted to the commission was a violation of the Geneva Conventions or of Protocol I, or a violation of other rules not contained therein. Consequently, his delegation considered that, if the provision could not be accepted as it stood, it should be studied further, and that the Committee should not over-hastily decide to delete it.

55. His delegation could accept the deletion of the clause stipulating that the international inquiry commission could institute an inquiry "on its own initiative". Before that was done, however, he would like to have the clause considered further by Working Group A. In the opinion of his delegation, the Geneva Conventions and Protocol I were also of great importance to the civilian population. He therefore wondered whether it was fair that only parties to the conflict should be entitled to request the commission to open an inquiry. In any case, that right should not pertain solely to the official representatives of the parties concerned, but should also be allowed to the civilian population if the official representatives of their country should neglect to make the request for one reason or another.

56. New article 79 bis raised many difficult questions which Working Group A would have to answer. The Group would also consider the new article submitted by Pakistan (CDDH/I/267), which was largely based on the same fundamental idea as the proposal of which his delegation was a sponsor.

57. Mr. de BREUCKER (Belgium) declared himself in favour of the two proposals for a new article 79 bis, both of which were aimed at the establishment of a permanent international inquiry commission to supervise the implementation of the Geneva Conventions and the Protocols. The proposals originated in the provision concerning the inquiry procedure common to the four Geneva Conventions of 1949. Unfortunately that provision had never been put into practice, for though it stipulated that in the event of a violation of the Convention, an inquiry must be held if one of the parties to the conflict so requested, it lost much of its force because it was left to the interested parties to decide between themselves the manner of such an inquiry. The question of procedure thus provided a party to the conflict with a means of obstructing the inquiry machinery, itself very inadequate, provided for in the Geneva Conventions.

58. The merit of the two proposals before the Committee was that they overcame that major drawback by establishing permanent machinery for arbitration. His delegation attached as much importance to those proposals as to the article dealing with Protecting Powers. It also saw a clear link between the two texts under consideration and the French proposal relating to reprisals (new article 74 bis)(CDDH/I/221/Rev.1), the principle of which it fully endorsed. The one objective they all shared was the creation of an impartial mechanism for the verification of real or alleged breaches of humanitarian law and, although their viewpoint was different and they were aimed at different situations, they contributed equally to the observance or restoration of that law.

59. The procedures suggested in the proposal put forward by the three Scandinavian countries and New Zealand (CDDH/I/241 and Add.1) deserved careful study. It was particularly important that the international inquiry commission should be empowered to intervene only in the event of grave breaches of humanitarian law, to the exclusion of all other circumstances. A further point was that it should not be left to the commission to institute an inquiry "on its own initiative". The responsibility for such an initiative rested with the international community or one of the parties to the conflict. The danger was that, by taking a wrong decision, the commission might afford a State involved in a conflict a pretext for refusing to co-operate. Furthermore, the phrase "and other rules relating to the conduct of an international armed conflict" in paragraph 2 (a) needed clarification.

60. Although there was much to be said for it, the Pakistan proposal (CDDH/I/267) was not quite satisfactory either; in particular, the procedure for the annual nomination of members of the commission (paragraph 2) was far too rigid.

61. Despite those defects, the idea underlying the two proposals was excellent. By some, the proposals would doubtless be called utopian or dangerous, in that they would empower a commission of inquiry to intervene in the very thick of military operations, or in areas covered by military secrecy. At the present time, however, national sovereignty could no longer be alleged to be an insuperable barrier, even under cover of military necessity. Atrocities committed in the heat of battle or as deliberately premeditated acts could not remain unpunished.

62. One must, after all, be consistent. If the present Diplomatic Conference attached genuine importance to the repression of grave breaches, it must do all it could to bring them to an end as soon as possible. Several States had expressed the view that an exhaustive list of grave breaches of Protocol I should be established, and his delegation would like to think that those same States would be the first to urge that responsibility for detecting such breaches should be vested in a permanent commission of inquiry even if that commission might have to carry out investigations in their own territory.

63. There was a logical, irrefutable and essential link between the desire to define certain acts as grave breaches, and the wish to see an impartial mechanism in operation, designed to expose them and to call on the guilty party to end them. Further, from a humanitarian point of view of fundamental importance in the present context, it was vital that grave breaches should be detected at the earliest possible juncture, so that they could be stopped, and so that lives could thus be saved. So far as concerned repression,

the determination of breaches by an impartial body would be the best guarantee of an effective administration of justice wherever severity was required.

64. The reception given to the two proposals (CDDH/I/241 and Add.1 and CDDH/I/267) would be a test of the good faith of certain States in regard to the treatment of grave breaches. To refuse to allow such breaches to be detected without delay by an impartial body, so that they could be stopped and those responsible prosecuted wherever they might be, would be seriously damaging to the credibility or, at least, to the humanitarian vocation, of the system of penal sanctions proposed for dealing with grave breaches or war crimes. One was irresistibly drawn to the conclusion that those who urged that as complete as possible a list of grave breaches of the Protocol be drawn up, while at the same time refusing to agree to an impartial mechanism for detecting them, were only concerned with securing for themselves a cloak of legality under which to take revenge for real or imaginary misdeeds on a captured or defeated enemy.

65. Replying to a question from Mrs. DARIIMAA (Mongolia), Mr. KAMMER (Legal Secretary) explained that articles followed by the word "bis" were in fact new provisions and not amendments; the proposals submitted in documents CDDH/I/241 and Add.1 and CDDH/I/267 were two separate proposals which for practical reasons were being considered at the same time. The general discussion was accordingly concerned with those two new texts together with the Japanese proposal (CDDH/I/316), which was an amendment to the proposal in document CDDH/I/241 and Add.1.

66. Mr. MURILLO RUBIERA (Spain) reaffirmed his delegation's interest in the repression of grave breaches and drew attention to the connexion between the proposals under consideration and article 74. It was incumbent upon all Contracting Parties to repress grave breaches. The proposals before the Committee provided an opportunity to establish much stricter, and therefore more effective, control machinery than that provided under the terms of the 1949 Geneva Conventions. The method of appointing the members of the international inquiry commission, and the commission's prerogatives, would have to be considered by Working Group A. He would confine himself, for the moment, to a few general remarks. As he had stated on many occasions, the set of rules drafted for articles 74 to 79 bis were generally concerned with the procedure for applying the provisions of the Geneva Conventions and the Protocols, and not merely with the machinery for the repression of breaches. Article 79 bis was thus closely related to Article 1 common to the four Geneva Conventions of 1949, under which the High Contracting Parties were required to respect and to ensure respect for the Conventions in all circumstances.

67. Moreover, there was a direct link between the establishment of an international inquiry commission and the recourse to measures of reprisal suggested by France (CDDH/I/221/Rev.1), to which the Spanish delegation had objected. The two questions should be considered together. On the other hand, there was no connexion between the establishment of such a commission and the question of aggression, which was not part of humanitarian law but a matter for the international community and, more particularly, for the United Nations Security Council. The question of the establishment of an international inquiry commission should be the subject of a feasibility study, on the same principles as those applied in the field of economics. The commission, if set up, would clearly be a powerful instrument not only of repression but also of deterrence.

68. Under the proposal submitted by the Scandinavian countries and New Zealand (CDDH/I/241 and Add.1), the commission would have the degree of permanence and impartiality essential to the performance of its functions. With regard to the appointment of its members, the essential point was that, whatever the machinery adopted, the procedures must be determined in advance and must be consistent with those provided for in article 5 of draft Protocol I. As far as the commission's authority was concerned, his delegation considered that the commission should deal only with grave breaches at the international level, on the understanding that those breaches would be clearly defined in article 74. His delegation also felt that the commission should be authorized to act on its own initiative. While it appreciated the reservations and doubts of the delegations which did not wish the commission to be given so much latitude, there were tragic occasions when the commission must be able to act forthwith, such as when a civilian population was subjected to napalm bombing. It was therefore in the interests of humanitarian law that the commission should be in a position to act with flexibility, speed and effectiveness.

69. The proposal submitted by Pakistan (CDDH/I/267) and the Japanese amendment (CDDH/I/316) embodied a number of ideas worth considering and Working Group A should go into them more fully.

70. Lastly, his delegation congratulated the sponsors of the two proposals on article 79 bis. They made a substantial contribution to the establishment of a penal system that was both effective and fair.

71. Mr. BINDSCHEDLER (Switzerland) said that the two proposals before the Committee were based on an excellent principle. It was indeed most desirable to establish an impartial and neutral body to inquire into violations of the Conventions and the Protocols. Nevertheless, he could not help feeling sceptical about the practical application of the proposals, because even if the proposed

international inquiry commission was a permanent body, its procedure would inevitably be long-drawn-out, and consequently its influence on events uncertain. It was questionable whether it would be able to improve the lot of the victims of conflicts whose protection was the overriding concern of the present Conference. Moreover, the commission would have largely the same attributes as those which, under the Conventions and the Protocols, had devolved upon the Protecting Powers which had the advantage of being in the area and thus of being able to take immediate action, with the necessary flexibility and effectiveness. In any case, the inquiry commission, if established, should not hamper the work of the Protecting Powers, which had proved their worth during the Second World War.

72. Those few reservations on the part of the Swiss delegation, dictated by a spirit of realism, did not mean that it objected to the proposed texts, on which he wished to make the following comments.

73. Firstly, as other delegations had pointed out, it would be unacceptable for the commission to institute an inquiry on its own initiative, as suggested in paragraph 2 (a) ii of amendment CDDH/I/241 and Add.1. The inquiry commission was not a supra-national body and it was doubtful whether a belligerent State would allow a commission to conduct an inquiry without its consent. From that standpoint the clause in paragraph 5 of the Pakistan proposal (CDDH/I/267) was more realistic, since the inquiry would take place only at the request of a party to the conflict or of a Protecting Power. In that context the Japanese amendment (CDDH/I/316) was also acceptable.

74. Secondly, paragraph 4 (e) of proposal CDDH/I/241 and Add.1 provided that the chamber of the inquiry commission should publicly report its findings. Such publicity was completely contrary to the spirit of humanitarian law, since it could only furnish material for propaganda and false accusations from each side, without being of any help to the victims to be protected. On the contrary, discreet diplomacy was called for. The formula proposed in the Pakistan text (CDDH/I/267) was therefore to be preferred. Only the parties to the conflict and the depositary would be informed of the findings of the commission.

75. Thirdly, the Pakistan proposal would give the inquiry commission much wider powers, relating to the general problem of the application of legal rules. In particular, the provision in paragraph 5 (c), under which the commission should endeavour to bring back to an attitude of respect for the Conventions and the Protocol a party which failed to fulfil its obligations, was most useful and would be in the interests of the victims of conflicts. The Swiss delegation welcomed that provision.

76. Fourthly, it was highly desirable that the ICRC should be responsible for appointing the members of the inquiry commission. It could not fail to choose outstanding individuals. That task, however, could also be entrusted to the International Court of Justice, along the lines proposed by Pakistan, and it might even be wise for the Court to make the appointments after consultation with the ICRC. It was not certain that the appointment system proposed by Pakistan could be applied, since the regional groups were not clearly defined, their membership fluctuated and it could happen that States belonged to several groups at the same time. Those groups would therefore have first to be defined on the clearest possible geographical basis. The political merit of the system would be to ensure that there was equitable representation in the commission. With regard to the term of office, he thought that the period of one year proposed by Pakistan was too short; it should be increased to five years as the delegation of Pakistan itself had said. Moreover, according to a well-established legal principle, a case should be concluded without any change in the membership of the commission.

77. Lastly, the Swiss delegation agreed with the Spanish delegation that the article on the commission of inquiry was not of a penal nature, but was linked in a much more general manner to the control of the implementation of the Geneva Conventions and the Protocols. It would therefore be better for the article to be inserted after article 5 of Protocol I.

78. The Swiss delegation, while reaffirming its doubts about the practical application of the proposals under consideration, was ready to study those proposals in Working Group A.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE FIFTY-SEVENTH MEETING

held on Thursday, 13 May 1976, at 10.10 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

New article 79 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/241 and Add.1, CDDH/I/267, CDDH/I/316) (continued)

1. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that, although article 79 bis submitted by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1) had certain positive aspects, it was unacceptable both for practical reasons and for reasons connected with international law.

2. The establishment of a permanent international inquiry commission, such as that proposed in new article 79 bis, went beyond the Conference's diplomatic powers, for such a commission deviated from the spirit and meaning of the Geneva Conventions. In the various international bodies his delegation had invariably opposed the idea of setting up supranational bodies with wide powers of supervision of the activities of States and empowered to act against the freely declared will of States, for that amounted to a derogation from the sovereignty of States and to interference in their internal affairs, both of which were contrary to the universally recognized principles of international law.

3. Secondly, the procedure for forming the inquiry commission, and for its operation did not take existing world realities into account. It was inadmissible that an international non-governmental organization, however worthy of respect it might be, like the ICRC, should accept the appointment and in practice control the action of an international inquiry commission engaged in supervising the activities of States. It would be unrealistic to transpose into the domain of international law a procedure for the establishment of facts - a matter within the domestic competence of States.

4. The Geneva Conventions of 1949 gave the Protecting Powers supervisory rights (Article 8 of the first three Conventions, Article 9 of the fourth) and provided for an inquiry procedure concerning breaches of the Conventions. The relevant provisions were based on agreement between the parties to the conflict and took into account their interests. His delegation did not consider it wise, in the present circumstances, to make any radical changes in those provisions, especially as there was nothing to prove that the changes made would produce positive results.

5. It had been said that the inquiry and supervisory procedure under the Geneva Conventions was imperfect. The truth was that the imperfection of that procedure was simply a reflection of the imperfection of the contemporary world and of international relations at the present stage of development of human society.

6. Moreover, it must be borne in mind that in an international armed conflict the parties were particularly sensitive to anything affecting their security and that consequently, any measure establishing a system of supervision without their agreement would be unworkable.

7. It was essential that there should be a strict observance of the duties incumbent on the parties, especially with regard to the repression of breaches of the Geneva Conventions and the Protocols. Each party must ensure that its armed forces respected the provisions of those instruments and, if breaches were committed, must punish those guilty of them.

8. A procedure for inquiring into breaches of the Geneva Conventions and the Protocols must be acceptable to the States concerned, otherwise it was bound to fail. His delegation, for its part, could not recognize the competence of an inquiry commission unless the clauses relating to the constitution, terms of reference and operational system of such a body were acceptable to it.

9. The most fundamental way of making the Geneva Conventions and the Protocols operative was to create such conditions that no enforcement of the provisions of those instruments would be necessary; hence the importance of consolidating international peace and security, improving international relations and encouraging détente, putting a stop to the armaments race and taking steps towards true disarmament, renouncing the use of force for settling international disputes, and causing war to disappear from the life of society. If each State were to adopt those objectives, such questions as the setting up of an international inquiry commission would become pointless.

10. Mr. ROSENNE (Israel) stressed the importance of new article 79 bis, the cornerstone of the entire system of humanitarian law which the Conference was endeavouring to create.

11. His delegation knew from experience that if a State opposed the establishment of an inquiry commission, the procedure for inquiry could not go into operation. In order to be effective, the inquiry machinery must fulfil certain conditions, especially where there was no Protecting Power. In the first place, the inquiry body must be permanent and in existence prior to the conflict, for it was difficult to set up an organ of inquiry when States were at war.

Its members must be nationals of neutral States so that the inquiry could be conducted in completely objective conditions; membership of the inquiry body must not be such that it would become a mouthpiece for propaganda on behalf of one of the parties to the conflict. All the inquiry proceedings should be public - paragraph 4 (e) of new article 79 bis in document CDDH/I/241 would have to be revised in that respect - so that public opinion should know who were the guilty, which would induce greater respect on the part of States for the Geneva Conventions and the Protocols. Lastly, it must be laid down that the inquiry commission must meet within a given period, for if it were to meet several months after the breaches had been committed, it would be difficult to decide who was responsible for them.

12. With regard to the competence of the inquiry commission, paragraph 5 (a) of new article 79 bis submitted by Pakistan (CDDH/I/267) called for detailed consideration, for if the authority of the commission was extended to include alleged violations of "other rules relating to the conduct of an international armed conflict", that would go beyond the scope of the Protocol.

13. Mr. MILLER (Canada) said that the limited interest so far displayed by States with regard to international arbitration tribunals and investigating bodies of the United Nations, and the failure to enforce Articles common to the four Geneva Conventions of 1949 urging parties to carry out their obligations and to facilitate inquiries concerning breaches of the Conventions, should dissuade the Committee from trying to go too far in the matter.

14. The Committee had the choice between drafting a far-reaching and detailed text, which could not then be of a mandatory nature and would take the form of an annex to Protocol I of an optional kind, and working out a more modest text that could be made enforceable for the Parties to the Protocol. A modest text taking into account the susceptibilities and sovereignty of States should be acceptable to all.

15. Efforts should be made to improve the wording of the relevant provisions of the Conventions, to work out inquiry procedures acceptable to all the Parties - in short, to make the phrase "in a manner to be decided between the interested Parties", which appeared in the common articles relating to inquiry procedure, more explicit.

16. The inquiry should consist essentially in establishing the facts. The task would be entrusted to a group of experts, each of whom should not only be of great personal integrity but should be acquainted with, and have interdisciplinary experience of, the various aspects of enforcement of the Geneva Conventions and the

Protocols and would be chosen also on the principle of fair geographical representation - a principle included in the Pakistan proposal (CDDH/I/267).

17. Great caution should be exercised in considering liaison that might be established with the ICRC and the respective roles of the Protecting and Detaining Powers; the ICRC must not be placed in a situation that would be incompatible with its traditional role, its right of initiative and its neutrality, nor must any arrangement run counter to the provisions of the Geneva Conventions concerning the information to be obtained by the Protecting Powers or the ICRC from the Detaining Powers.

18. The initiative for the inquiry should come from the parties to the conflict, as was provided in the Geneva Conventions. In a situation of armed conflict, it would be unwise to saddle the inquiry commission with that responsibility. What was more, a provision of that kind would undoubtedly discourage some States from ratifying Protocol I.

19. His delegation agreed that the inquiry machinery should be set in motion without delay.

20. The persons responsible for establishing the facts should be able to make inquiries on the spot. The parties should authorize them to do so, except in completely exceptional circumstances which they would have to make known publicly should the occasion arise.

21. The inquiries should cover breaches of the Geneva Conventions and the Protocols in general and not merely grave breaches.

22. He agreed with the representative of Israel that to establish the facts concerning violations of other rules relating to the conduct of an international armed conflict would prove too ambitious an undertaking for the inquiry commission.

23. The inquiries should be directed solely to existing situations and not to situations which might be foreseen, as proposed by Japan (CDDH/I/316).

24. Those carrying out an inquiry should confine themselves to establishing the facts and should not sit in judgement to decide questions of law relating to the way in which a State conducted its affairs - questions of responsibility and of compensation at the end of a conflict, and so forth. Their findings should first be conveyed privately to the parties involved, in order to give them an opportunity of remedying the situation as established by the inquiry. There must, however, be machinery to allow the findings

of the report to be made public, if necessary, since it was public opinion which would, in the last resort, ensure application of the Geneva Conventions and the Protocols and would discourage persistent violations of the provisions of those instruments.

25. The expenses of the group of experts should be borne by the party requesting the inquiry; a system of voluntary contributions channelled through the ICRC would be too complicated.

26. To sum up, new article 79 bis proposed by Denmark, New Zealand, Norway and Sweden (CDDH/I/241 and Add.1) afforded a good basis for discussing the question in depth, although some of its provisions might go too far. The other amendments were also worthy of attention, but certain points needed to be amended.

27. Mr. PARTSCH (Federal Republic of Germany) said that his delegation was very much in favour of enforcing international control, by an inquiry agency, of the observation of the provisions set forth in the Geneva Conventions and the Protocols.

28. For practical reasons, it had been proposed that the formulation of detailed procedures for the appointment of the members of the inquiry commission and the actual task of appointing them should be entrusted to the ICRC. States Parties should, however, participate in that process. It would be necessary to provide that each State Party was entitled to put forward one of its nationals as a candidate and that the fifteen members of the inquiry commission should be selected with due regard for the rule of just geographical distribution.

29. New article 79 bis, as proposed by the four countries, did not specify whether the members would serve in a personal capacity or as representatives of their respective States. The mention of high personal integrity gave his delegation the impression that the sponsors of the proposal were acting on the first assumption - for the high personal integrity of representatives of States could be taken for granted - but that point should be made clear. It should also be stipulated, on the assumption that the experts would be serving in a personal capacity, that they should be protected from receiving instructions from their Governments.

30. With regard to the functions of the inquiry commission, his delegation preferred the Japanese version (CDDH/I/316), since it would be dangerous to include complaints concerning violations of other rules relating to the conduct of an international armed conflict.

31. It would also be undesirable to limit the functions of the commission to grave breaches alone. The States Parties should be free to judge what type of breaches they wished to bring before the commission.

32. The somewhat vague wording of paragraph 2 (b) of the Japanese amendment (CDDH/I/316) would be justified if a State Party were to announce that it was going to commit a breach.

33. His delegation also preferred the Japanese version of paragraph 3.

34. With regard to publication of the findings of the inquiry, where appropriate, he thought that, as a first step, those findings should be brought to the attention of the States Parties directly involved; as a second step, other States Parties should be notified, and, as a third step, the commission itself should, in the last resort, be afforded an opportunity of appealing to public opinion. Premature publicity for the findings of the inquiry, far from increasing the effectiveness of the inquiry commission's work, might well be prejudicial to its efforts.

35. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that new article 79 bis relating to the establishment of an international inquiry commission faced the Committee with one of the most intractable problems that it had been called upon to resolve. Of course, the Geneva Conventions already included a number of provisions establishing the system of Protecting Powers and providing for inquiry and conciliation procedures. He referred to Articles 8, 11 and 52 of the first Geneva Convention of 1949, Articles 8, 11 and 53 of the second Convention, Articles 8, 11 and 132 of the third Convention, and Articles 9, 11, 12 and 149 of the fourth Convention. Those provisions laid down a simple system of control, which had been functioning effectively for the past quarter of a century or so and which should be maintained. There was no need to seek to set up a new body, especially as in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975) the signatory States had undertaken to abide by the treaties under international law concluded up to that time.

36. The international inquiry commission would, in fact, be a supranational body, which might derogate from the national sovereignty of countries, especially in a non-international conflict, and might constitute interference in their internal affairs. If new provisions were to be drafted, due heed must be paid to the rules of international law and to the spirit in which the Geneva Conventions had been drawn up. To adopt the proposed article would be to venture too far along a dangerous path. Not only were there grounds for criticizing the actual principle underlying the proposal

(CDDH/I/241 and Add.1) but some of its technical aspects were obscure: the proposed procedure for appointment was vague and the duties of the chamber which would be made responsible for carrying out inquiries would be liable to duplicate those of the inquiry commission. Furthermore, the commission would be able to institute an inquiry on its own initiative, without the agreement of the parties concerned, which would be something unprecedented. Even in the case of the International Court of Justice, the agreement of the parties concerned was required. No provision was made to ensure the impartiality of the members composing the commission. That body would be doomed from its very inception, and consequently ineffectual. He accordingly opposed the addition of a new article 79 bis (CDDH/I/241 and Add.1).

37. Mr. DOWLING (United States of America) said that his delegation was in favour of the actual principle underlying the various proposals to include an article 79 bis in draft Protocol I. It supported the efforts made to establish a mechanism designed to improve the implementation of humanitarian law, which would be responsible for investigating specific charges concerning breaches of the Conventions.

38. He wished, however, to express some doubts about the technicalities of the proposals submitted to Committee I. Any inquiry mechanism must establish clear-cut procedures and provide guarantees of neutrality. The proposal in document CDDH/I/241 and Add.1, however, failed to specify either the identity of the members composing the international inquiry commission or the procedures for their selection by the ICRC. The President of the commission would be free to choose the majority of the commission's members, which would confer wide powers upon him, but there was no provision in the proposal designed to guarantee the neutrality of the President.

39. If such a body was to operate effectively, all possible measures must be taken to ensure its objectivity; furthermore, the procedures for the selection of its members, its methods of inquiry and the form, nature and availability of its final report must be laid down clearly in advance. His delegation doubted whether a permanent commission was really necessary, for various considerations of a practical nature must be borne in mind: financing, the appointment of new members, and the fact that the commission might perhaps not have enough to do. It might be more appropriate to institute a more flexible inquiry procedure, but one that was more clear-cut than that provided for by the Geneva Conventions. Those were merely a few preliminary remarks. His delegation was anxious to participate in the negotiations and appropriate drafting of a final text for the new article in Working Group A.

40. Mr. GRAEFRATH (German Democratic Republic) said that he was most sceptical as to the effectiveness of an international inquiry commission when States were unable, even in time of peace, to agree on an over-all procedure for the peaceful settlement of disputes.

41. In view of the present international situation, it would be best to allow the United Nations Security Council to inquire into breaches of the Conventions. It would be premature to institutionalize in Protocol I an inquiry procedure binding on all States, since many of them were not prepared to accept it. The Geneva Conventions already provided for an inquiry and also for conciliation procedure based on the consent of the parties to a conflict. While there was nothing to prevent States which desired such procedures from establishing them, the German Democratic Republic was unable to accept the two proposals in documents CDDH/I/267 and CDDH/I/241 and Add.1, as they both went beyond that point. The setting up of an organ to enforce humanitarian law was a generous concept but was somewhat unrealistic and impractical, as the representative of Switzerland had pointed out at the fifty-sixth meeting (CDDH/I/SR.56). It might also be questionable whether the inquiry procedure should be initiated in the same way as the conciliation function. Some States might well agree to a mission of conciliation but would object to the commission undertaking an inquiry on its own initiative or at the request of the Protecting Power. The latter might then be placed in a very delicate position.

42. There were additional grounds for criticizing the two proposals under consideration. It would be dangerous if the proposed commission could be moved not only by one party, but also by a Protecting Power or take the initiative itself. No inquiry procedure should be instituted unless the two parties agreed to it. Nor should the authority of the commission be broadened by allowing it to inquire into every violation of the laws of war. Another point giving rise to concern was the provision for conveying the findings of the commission to the depositary of the Conventions, which would thus be faced with a supervisory function which was not in conformity with its general obligations and which would considerably restrict its ability to act as a Protecting Power. Furthermore, were the commission to make its findings public, the facts might be distorted by the world's leading information organs, given the political opinions held by most of them.

43. Whatever solution those points of detail might receive, the German Democratic Republic stood faithfully by the principle that an inquiry procedure could not function effectively without the consent of both parties, and should therefore not be institutionalized as a general and compulsory procedure.

44. Mr. Kun PAK (Republic of Korea) said that reaffirmation and development of humanitarian law was useless unless accompanied by measures providing for its effective implementation. He therefore welcomed the principle inspiring the two proposals (CDDH/I/241 and Add.1 and CDDH/I/267). But it was necessary to be realistic. The proposed commission could not be impartial, neutral and effective unless three basic conditions were fulfilled: it must have freedom of access and of movement, and reservations to article 79 bis by the acceding parties must be ruled out. He accepted the principle stated in the Japanese amendment (CDDH/I/316), although he felt that the wording might be improved. The amendment was a compromise between the two earlier proposals and rightly emphasized that it was more important to prevent grave breaches than to inquire into breaches that had already been committed.

45. Mrs. MANEVA (Bulgaria) said that while she appreciated the motives of the sponsors of the amendments in documents CDDH/I/241 and Add.1 and CDDH/I/267, she shared the doubts expressed by the representatives of the Ukrainian Soviet Socialist Republic, the German Democratic Republic and the Union of Soviet Socialist Republics concerning the effectiveness of the procedures proposed. The amendment in document CDDH/I/241 and Add.1 did not explain how the ICRC was to appoint the members of the commission. The States Parties would thus remain in ignorance of the rules of procedure and of the composition of the inquiry commission. That appeared to be unacceptable, the more so as the rules were concerned with the impartiality and objectivity of the proposed machinery.

46. Her delegation shared the reservations expressed at the fifty-sixth meeting (CDDH/I/SR.56), by the representative of Switzerland concerning the commission's power to institute inquiries on its own initiative.

47. Moreover, the commission's attributes would be too broad, since it would have to inquire not only into violations of humanitarian law but also into the rules governing the conduct of an international armed conflict. Its terms of reference would therefore go beyond the Geneva Conventions and Protocols, and that seemed to be both excessive and unrealistic. Finally, the amendments did not provide for the consent of the parties to the conflict. The Bulgarian Government insisted on such consent as a matter of principle.

48. It might be best not to underestimate the inquiry procedure already provided for in the Geneva Conventions or the mechanism of the Protecting Powers. That mechanism could, in a number of admittedly limited cases, play a positive part in the implementation of the Geneva Conventions and the Protocol.

49. Mr. YAMATO (Japan) said that he thought the time was ripe for a modest practical step towards full observance of international humanitarian law. He wished to give some clarifications in response to several queries concerning the Japanese amendment (CDDH/I/316) raised by the representatives of the Netherlands and of Kuwait. In the words of the Japanese amendment (paragraph 2), "the main function of the commission shall be ... to undertake an inquiry into ... allegations that the provisions of the Conventions or of the present Protocol are about to be breached". Prevention of a breach while there was time was far more important than repression after the event. Some actions or situations that did not in themselves constitute breaches might lead to a violation of humanitarian law if they persisted. Thus, some forms of treatment of prisoners of war might not constitute a breach at a given time, but if continued, could lead to widespread epidemics or mass starvation. The construction of a dam might lead to the destruction of innocent civilian life or civilian installations. The inquiry commission could play a preventive role in such specific cases.

50. The same practical considerations applied to good offices that might be performed by the commission. The Japanese delegation would gladly welcome any suggestions designed to ensure that the provision relating to the preventive role of the commission was not used for propaganda purposes.

51. With respect to the publicity to be given to the findings of an inquiry, he thought that the President of the commission and the chamber must be left free to decide on the question, in consultation with the parties.

52. Mr. MORENO (Italy) said that he supported the establishment of an impartial body that could usefully reinforce the system of protection provided by the Geneva Conventions and Protocol I. He would not speak on the respective merits of amendments CDDH/I/241 and Add.1, CDDH/I/267 and CDDH/I/316, but wished to support them in principle.

53. However, some general comments appeared called for. The membership of the proposed commission was an important and fundamental question that should be closely studied in the light of the three factors of impartiality, equitable representation, and replacement of members.

54. Whether the powers of the commission were broad or narrow, they must above all be clearly defined. There must be co-ordination between the powers of the commission and the functions of the Protecting Power. Furthermore, it seemed desirable to restrict the jurisdiction of the commission to violations of the Geneva Conventions and of Protocol I, or in other words, to the field of international humanitarian law.

55. He believed that the commission should not be empowered to initiate an inquiry, since that would be to give it a political character incompatible with the role of arbiter that it should have.

56. As to the results of the inquiries, it might well be that discretion would be advisable in some cases, but that in others publication might be useful. In any case, the important point was that the findings should be conveyed to the parties to the conflict.

57. The Italian delegation reserved the right to speak further on the various proposals in the Working Group.

58. Mr. OBRADOVIĆ (Yugoslavia) said that he supported the countries that had submitted amendments CDDH/I/241 and Add.1 and CDDH/I/267, and generally approved those amendments. There were, however, very serious difficulties to be overcome. On the one hand, experience showed that such enterprises in the various spheres of international law had not been successful; while on the other hand, even if a consensus on principle emerged, there would still be the problem of drafting. Indeed, many States were not yet prepared to accept in advance any permanent body, which would constitute a sort of jurisdiction acting in specific cases without the express consent of the parties concerned.

59. As a first step, it might perhaps be very useful if the sponsors of document CDDH/I/241 and Add.1 and Pakistan collaborated with a view to producing a single proposal. A study of the texts submitted therefore seemed premature, and it was for Working Group A to discuss them in detail.

60. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) agreed with a number of other delegations which had raised serious doubts both on practical grounds and from the standpoint of international law, about the utility of including an article 79 bis in Protocol I, an article which some of its supporters viewed as a fundamental means of ensuring the application of the Geneva Conventions and Protocol I.

61. In his delegation's view, compliance with the Geneva Conventions and Protocol I would best be achieved by means of a strict and scrupulous regard on the part of participating States for their obligations under international law, obligations arising on the one hand from the universally recognized principles and rules of international law and on the other from the provisions of the relevant treaties and conventions, and, in particular, the Geneva Conventions. His delegation considered that the corresponding provisions of the Geneva Conventions in that field were adequate. They were based on the principle of the agreement of the parties and of a due regard for their interests.

62. The proposed article 79 bis, as set out in document CDDH/I/241, followed a very different path by providing for the establishment of a supranational control body, endowed with very wide powers, which would be entitled to act on its own initiative without the consent of the parties concerned. That proposal was contrary to international law inasmuch as it was likely to lead to interference in the internal affairs of the countries concerned and to an encroachment on their sovereignty.

63. Moreover, given its unusual sphere of competence and composition, and its complex structure, the proposed inquiry commission would hardly be able to function in practice, to make a proper investigation of all aspects of the breaches in question, and reach authoritative conclusions which all parties concerned would respect. It was also worth mentioning that in view of differences between penal systems which laid down differing procedure with regard to evidence, it was hard to see how the validity of evidence would be assessed.

64. The delegation of the Byelorussian Soviet Socialist Republic would therefore be unable to support the proposals on the matter which were before the Committee, since it regarded them as a deviation from the provisions formulated in the Geneva Conventions.

65. Mr. DRAPER (United Kingdom) said that the proposals to establish a body for the investigation of alleged breaches of the Conventions and of the Protocols, to be permanently available to conduct inquiries as provided in Article 149 of the fourth Geneva Convention of 1949, were most laudable in principle and also in conformity with the aims of the Conference.

66. The three proposals before the Committee were not without their positive aspects, and all had the advantage of providing for an investigatory, rather than an accusatorial, mechanism. Nevertheless he endorsed the remarks proffered by a number of countries, among them Switzerland. The representative of Switzerland had emphasized the role of the Protecting Powers, already in situ in the country, probably well informed as to the background to events, and able, by speeding up inquiries, to make a powerful contribution to the success of the investigations. Moreover, as provided in Article 11 of the first Geneva Convention of 1949, those Protecting Powers were in a position to intervene to good effect in the conciliation procedure. Care was needed to ensure that the inquiry commission did not hinder their efforts.

67. He would state his disagreement with those who had spoken against article 79 bis. Lastly, he urged that the three proposals be very carefully studied by Working Group A.

68. Mr. MAHONY (Australia) expressed his delegation's approval in principle to the establishment of a commission as set out in either of the documents CDDH/I/241 and Add.1 or CDDH/I/267. He had noted the proposal contained in CDDH/I/316. The three proposals were worthy of consideration, for while the Geneva Conventions provided for the investigation of any alleged violation of a Convention, no actual inquiry procedure had been laid down.

69. However, the proposals called for a certain number of observations. The international inquiry commission proposed in document CDDH/I/241 would operate independently, without the agreement of a party to a conflict, and could thus not be obstructed from the start. Even so, there would probably be some reluctance by States to subject themselves to international investigation which might impinge on their sovereignty.

70. The functions of that commission would appear to be limited to investigating and reporting, whereas the proposal by Pakistan, (CDDH/I/267) containing as it did provisions for wider functions for the permanent inquiry commission with respect to the application of humanitarian law, was preferable in terms of that law.

71. As other speakers had pointed out, the inquiry commission would be able to institute an inquiry on its own initiative, which seemed unrealistic. All in all, proposal CDDH/I/241 as drafted was lacking in precision.

72. His delegation noted with interest that both the international inquiry commission and the commission for the enforcement of humanitarian law might include experts in the inquiry; and also that neither commission would be appointed in relation to a particular conflict. Those provisos should safeguard their impartial and apolitical nature. The term for which members were appointed under the proposal by Pakistan seemed too short, but the system for appointing them was more attractive than that contained in document CDDH/I/241. The principle of representation of the five geographic regions on the permanent commission commended itself to his delegation.

73. In any event, the inquiry procedure should only be set in motion for grave breaches of the Geneva Conventions and of Protocol I. With regard to financing, that would appear to require a more secure basis than that set out in the various drafts.

74. The three proposals had positive aspects, which his delegation would revert to later in Working Group A.

75. Mr. DIXIT (India) expressed doubts as to the usefulness of new article 79 bis. The ICRC and later the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts had worked on the provisions of draft Protocol I for some years, but they had not seen any need to include a provision for an international inquiry commission such as that proposed in new article 79 bis. The Geneva Conventions and draft Protocol I itself provided for the intervention of the Protecting Powers in order to facilitate the enforcement of certain provisions and safeguard the interests of the parties to the conflict. The parties to the conflict were also responsible for observing the principles and provisions of the Conventions and Protocol I. The Geneva Conventions and Protocol I were part of international law, under which the United Nations had the primary responsibility for ensuring that its Members fulfilled their obligations. The settlement of disputes could also be undertaken by the International Court of Justice and the Permanent Court of Arbitration. There might be conflict between the obligations under the Charter of the United Nations and the provisions of new article 79 bis, and in that event the former would prevail. Why set up a new body which would probably arouse opposition in some countries? Co-operation between the parties was the way to ensure that the rules were kept, rather than confrontation in any inquiry commission. Moreover, the proposed commission would operate only in the event of a conflict, thus in an atmosphere unconducive to impartial inquiries. The findings of the proposed commission might also be used for political propaganda, which would not make for co-operation between the parties. Finally, the consent of both parties was essential for the success of such a commission.

76. Without wishing to recapitulate all the arguments already put forward to that effect, he wished to warn the Committee against decisions which might interfere with the operation of existing institutions.

77. Mr. EL-FATTAL (Syrian Arab Republic) expressed surprise that, for the first time since it had occupied Arab territory, the delegation of Israel was lending its support to the establishment of international machinery to inquire into breaches of the Geneva Conventions and the Protocols. He asked the representative of Israel to state whether his Government would be prepared to apply the fourth Convention, once it had signed and ratified it without reservations.

78. Mr. ROSENNE (Israel) exercising his right of reply, protested at remarks which cast doubt on his Government's sincerity. He stated that his country did comply with the provisions of the fourth Geneva Convention of 1949, and pointed out that problems relating to the Middle East were not within the purview of the Committee.

79. Mr. AL-FALLOUJI (Iraq) rose to a point of order. He, too, considered that those problems did not fall within the competence of the Committee, and he requested that the meeting be suspended.

80. The CHAIRMAN suspended the meeting in accordance with rule 27 of the rules of procedure.

The meeting rose at 12.45 p.m.

SUMMARY RECORD OF THE FIFTY-EIGHTH MEETING

held on Friday, 14 May 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

New article 79 bis (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/241 and Add.1, CDDH/I/267, CDDH/I/316)(continued)

1. Mr. GLORIA (Philippines) said that he had listened attentively to the statements made by various delegations for and against the proposals concerning the setting up of a commission of inquiry into complaints of breaches of the Geneva Conventions or Protocol I. Nobody, however, had said what the parties to the conflict or any authorized body would do if an inquiry revealed that a grave breach had been committed.

2. Mr. KIRALY (Hungary) said that the arguments put forward by those in favour of setting up an international inquiry commission had not convinced him that breaches would be prevented by the adoption of such a measure.

3. The inquiry procedure provided by the Geneva Conventions of 1949 was based on an excellent principle, namely, that the parties to the conflict should agree on the need for an inquiry. Without the active participation of the parties no provision would produce practical results and the creation of a new body would be purely a matter of form. Nor was it desirable to contribute to the proliferation of international bodies.

4. The setting up of an inquiry commission would raise many practical difficulties. For instance, the ICRC would be unable to carry out the functions envisaged in new article 79 bis, proposed by Denmark, New Zealand, Norway and Sweden in document CDDH/I/241 and Add.1 without jeopardizing its reputation as an impartial body. Moreover, the small group of persons serving on the commission would not automatically be impartial. The commission and its President would be assigned tasks that had no precedent in either international law or international practice. The commission would be able, on its own initiative, to interfere in the relations between the parties. The sponsors of the new article 79 bis had not sufficiently considered the possible consequences of setting up an inquiry commission, nor had they been in a position to weigh the difficulties of such a step against the possible advantages.

5. Quite apart from those difficulties, there was reason to doubt the usefulness of such a commission. His Government considered that international bodies like the proposed commission had no power to conduct an inquiry or to take decisions without the consent of the parties concerned.

6. Mr. ABI-SAAB (Egypt) stressed the importance of the idea underlying the proposed new article 79 bis. His delegation had always favoured measures calculated to improve the system of implementation of the Geneva Conventions and Protocol I. Practice revealed that the main weakness of the system of implementation of the Conventions, through the instrumentality of the Protecting Powers or their substitutes, was its purely consensual basis.

7. At the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, his own and a few other delegations had tried to make good that shortcoming by proposing the creation of a body which, in the absence of a Protecting Power, would fulfil those supervisory functions which the ICRC could not or would not carry out, including that of investigating alleged violations of humanitarian law. With the same end in view, the Arab and some European and other delegations had submitted an amendment at the second session of the Diplomatic Conference, designed to add a paragraph 4 bis to article 5, but it had not been adopted. The new article 79 bis might bridge the gap, at least to some extent.

8. With regard to the membership of the inquiry commission, both the systems proposed in documents CDDH/I/241 and Add.1 and CDDH/I/267 would be difficult to apply in practice. Under the first proposal, the ICRC would be responsible for appointing the members of the commission; however, such a provision might prove embarrassing to the ICRC and that body should perhaps specify what it understood by "the administrative functions" which its representative had declared it would accept. It would be well to know whether the ICRC would be prepared, as part of those functions, to appoint the members of the commission. Proposal CDDH/I/241 and Add.1 did not provide that members of the commission should be appointed on the basis of equitable geographical distribution. The Pakistan proposal (CDDH/I/267) envisaged a system of yearly rotation by country, on an alphabetical basis; it would also be difficult to follow in practice, in view of its extremely automatic character.

9. It was not necessarily a good thing for the acceptability of the idea of a commission to keep Governments completely out of the process of nomination. His delegation would prefer to have the commissioners elected periodically by the High Contracting Parties,

within the framework of the International Red Cross Conferences. That was not very different from the system adopted in the International Convention on the Elimination of all Forms of Racial Discrimination (United Nations General Assembly resolution 2106 (XX)) which had been strongly recommended by the representative of the Federal Republic of Germany.

10. The scope of the activities of the commission should not be too narrowly restricted. Paragraph 5 of the Pakistan proposal was considered excessive by some representatives for extending the investigative and supervisory powers of the commission to rules pertaining to the conduct of war; but it should be remembered that an entire section of draft Protocol I was devoted to methods and means of combat.

11. The powers of the commission should also be widely construed. A positive contribution of the Pakistan proposal was the emphasis it put on the role of the commission in trying to bring violation to an end. That was a conciliatory role which required tact and discretion. But if the guilty party persisted in its attitude, the only available remedy was to appeal to international public opinion through public reporting, as envisaged in the four-Power proposal (CDDH/I/241 and Add.1).

12. The powers of the commission should not extend, however, to the point of allowing it to investigate, on its own initiative, possible violations. Such a faculty would not add much in terms of practical activities but would reduce the political acceptability of the idea.

13. On the whole, he considered the idea an excellent one and the two proposals (CDDH/I/241 and Add.1 and CDDH/I/267) as important contributions which could serve as a basis for a satisfactory unified text.

14. Mr. AMIR-MOKRI (Iran) supported the idea of setting up a permanent international inquiry commission and congratulated the delegations which had submitted texts to that end.

15. With regard to document CDDH/I/241 and Add.1 submitted by Denmark, New Zealand, Norway and Sweden, his delegation thought that it would be unrealistic to empower the commission to institute an inquiry on its own initiative. Such a provision might in practice encounter insurmountable obstacles and difficulties. Moreover, there seemed to be no need to set up a chamber in the commission. The latter could undertake the inquiry immediately, thus avoiding the difficulties inherent in the appointment of the members of the chamber. On that point his delegation preferred

the text submitted by Pakistan (CDDH/I/267). With regard to the provision in paragraph 4 (e), whereby the chamber would publicly report its findings on the facts and the law, his delegation agreed with those representatives who had stated that discreet diplomacy would be better. In connexion with paragraph 6 of document CDDH/I/241 and Add.1, he wondered whether the principle of voluntary contributions would be the best way to finance the commission's activities. On that point the Netherlands suggestion at an earlier meeting deserved support.

16. There were a number of useful ideas in document CDDH/I/316, submitted by the Japanese delegation, but there were also some defects. The reference in paragraph 2 to the "main function" of the commission implied that the commission would have functions which were other than its main function but those functions were not defined. Paragraph 2 (b) was not clear, for it was hard to see how the commission could inquire into "allegations that the provisions of the Conventions or of the present Protocol are about to be breached".

17. The Iranian delegation proposed to participate in the work of Working Group A on article 79 bis.

18. Mr. JOMARD (Iraq) said that he appreciated the efforts of the delegations which had submitted texts for improving the application of humanitarian law in armed conflicts. The Pakistan proposal (CDDH/I/267) provided a good basis for that purpose. Whatever text was drawn up, the inquiry commission would obviously have many obstacles to overcome in the performance of its duties, but the establishment of the commission might well prevent breaches of the Geneva Conventions and the Protocols. The important thing was to give the commission powers which would enable it to take effective action. In particular, the Pakistan proposal should incorporate a provision whereby refusal by any party to accept the commission's findings would be considered to be a breach of international humanitarian law.

19. Mr. OBEBE (Nigeria) said that in principle his delegation supported the establishment of a permanent inquiry commission. The composition of the commission should be acceptable to all the parties and it would have to be impartial, for it should in no way be seen to contribute to the escalation of conflicts. The procedure to be followed by the commission should be clearly defined so that the parties to the conflict could follow it easily. Members of the commission should be appointed on the basis of equitable geographical distribution.

20. New article 79 bis proposed in document CDDH/I/241 and Add.1, could be improved. The ICRC should not be involved in the appointment of the commission's members (paragraph 1). The commission should not be able to institute inquiries on its own initiative, for that might cast doubt on its impartiality. The United Nations Security Council, however, should have the power to determine whether the commission should investigate and report on its findings (paragraph 2 (a) (ii)). Paragraph 4 (d) seemed to conflict with article 6 and article 79 of draft Protocol I; the words "if such persons are made available by a High Contracting Party" should be replaced by "shall be made available by the High Contracting Party". Finance for setting up the inquiry commission should come from voluntary contributions, but subsequent financing should be the responsibility of the parties to the conflict (paragraph 6).

21. In document CDDH/I/316, paragraph 2 (b) might be open to many interpretations, and paragraph 4 was not sufficiently clear.

22. Paragraphs 6, 7 and 8 of the Pakistan amendment (CDDH/I/267) should be incorporated in the draft appearing in document CDDH/I/241 and Add.1. That would facilitate matters for Working Group A, in which his delegation would be happy to participate.

23. He endorsed the Indian representative's remark at the fifty-seventh meeting (CDDH/I/SR.57) that the United Nations already had bodies, such as the Permanent Court of Arbitration, capable of dealing with cases of the violation of humanitarian law. Care must be taken to avoid the proliferation of judicial bodies. Furthermore, the United Nations might not take kindly to the establishment of a body which would encroach upon the role of the Security Council.

24. Mr. CALOGEROPOULOS-STRATIS (Greece) said he was in favour of setting up an international commission of inquiry such as might serve to strengthen international humanitarian law, the inquiry system for which, as provided for in the Geneva Conventions, had never been applied. The commission should be permanent, for if an ad hoc commission had to be set up whenever hostilities broke out difficulties might be created similar to those encountered in connexion with the Protecting Powers system.

25. It seemed both fitting and realistic to request the ICRC to administer the commission, since it had very wide experience in that field. That function, however, should remain quite distinct from the other tasks of ICRC, and not call in question that body's purely humanitarian and neutral character.

26. Since the members of the commission of inquiry would act independently and as individuals, there was no obvious reason why it should be necessary to provide for the participation ad hoc of persons nominated by the belligerents. Armed conflict today was usually of a mixed character, involving nations without necessarily involving States. Nomination of members ad hoc might lead to difficulties in practice. The belligerents would have to give evidence or facilitate the commission's task without their presence being institutionalized.

27. His delegation failed to see how the formation of any such commission of inquiry could be regarded as an infringement of national sovereignty or as unwarranted interference in the internal affairs of States. Armed conflict between nations was surely a perfect example of a case in which matters of international concern arose; it involved relations between a State and foreign nationals. It would be absurd to talk of a "reserved area" when it came to keeping watch over the rules and principles of humanitarian law, and at the same time set up international legal agencies for the protection of human rights or institute commissions of inquiry, as the United Nations had done.

28. He congratulated the sponsors of new article 79 bis and amendments, and expressed the hope that the discussions in the Working Group would lead to satisfactory results.

29. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) said that his delegation was in full sympathy with the sponsors of the amendments, who wished to see the 1949 Geneva Conventions and the Protocol at present under review correctly applied. His delegation appreciated the efforts made to devise effective measures for the prevention and punishment of grave breaches of those instruments. It was obvious that the only way to do that fairly would be to support the party which was the victim of aggression and to stop the party that was guilty of it. Such measures should make it possible to condemn and unmask, at the international level, the acts of imperialists who, while claiming to respect humanitarian law, had in fact committed crimes against peace and humanity by permanently occupying the territory of other countries.

30. His delegation associated itself with those which had rightly insisted on the need to respect the principle of national sovereignty and of non-interference in the internal affairs of any country; and it wished to emphasize that the will of peoples which had fallen victim to imperialist and colonialist aggression must also be taken into account. Only absolute respect for those principles and for that will would render the imperialists' evil practices impossible.

31. The United States representative had said that the application of new article 79 bis would raise problems of a technical nature. He himself was convinced that the main problem was not one of technical details but of the attitude of the imperialists; and there was no reason to believe that they would act more fairly and generously in the future so far as the issues dealt with in new article 79 bis were concerned.

32. Mr. KAKOLECKI (Poland) said that, after careful consideration of the proposed draft, he felt he must voice some doubts as to the advisability of inserting a new article 79 bis.

33. The 1949 Geneva Conventions and draft Protocol I were based on the principle that it was for the Contracting Parties to ensure respect for the obligations contracted under those instruments; and, to that end, they contained a number of provisions on the repression of breaches. True, the Geneva Conventions included a provision for possible inquiries; but that was subject to a condition: the consent of all the parties concerned.

34. Since it would be able to act without the agreement of all the parties concerned, a permanent body such as that envisaged in new article 79 bis would be supranational; and that, in his delegation's view, would run counter to the principle on which the existing system was founded. Moreover, to establish such a body would be to go beyond the Conference's objectives.

35. Furthermore, he considered that in practice the proposed permanent body could not function without the consent of the parties to the conflict. As drafted, the proposed article 79 bis would be an infringement of the sovereign rights of States and could not, therefore, play a truly effective part in concrete situations, or really strengthen international law. Besides, it might perhaps be well to recall that not much support for the idea of adopting the proposals under discussion was to be derived from previous endeavours in the United Nations or under the auspices of other international conferences, to set up bodies for applying a mandatory procedure. As the representative of the German Democratic Republic had pointed out at an earlier meeting, if it had not been possible to set up such bodies for peacetime, it would be rather unrealistic to try and do so for times of conflict.

36. For those reasons, his delegation would be unable to support the proposals for the insertion of a new article 79 bis in draft Protocol I; and he sided with the representatives who advised caution.

37. Mr. KEITH (New Zealand), speaking on behalf of the sponsors of new article 79 bis (CDDH/I/241 and Add.1), said that he wished to thank all the delegations which had put forward some highly constructive proposals concerning the draft. He also thanked the ICRC representative, who had stated that her organization was ready to assume the difficult task under the new article, as long as there was a large majority support and its designation was not controversial. The sponsors were convinced that the new article would in no way encroach upon the ICRC's essential work. Indeed, as stated in paragraph 1 of the draft itself, the ICRC would in no way be responsible for the inquiries undertaken or the findings emerging from them.

38. Moreover, as the Danish representative had said at the fifty-sixth meeting (CDDH/I/SR.56), the sponsors of document CDDH/I/241 and Add.1 would be interested to join other delegations, particularly those of Pakistan and Japan, in working out a draft for submission to the Working Group.

39. Reviewing the arguments raised against new article 79 bis (CDDH/I/241 and Add.1), he said that at the beginning of the current session and during the second session, there had been much stress upon the fact that the Conference was called upon, not just to state the rules, but to find proper methods of applying them. That was the basic point that lay behind new article 79 bis.

40. Referring to the proposed commission's power to undertake an international inquiry, he pointed out, in reply to those who had spoken of the risk of infringing national sovereignty and interfering in a State's internal affairs, that under paragraph 2 (a) the commission in question was only empowered to inquire and report, not to impose a solution. The sponsors had been careful to indicate throughout the article the various ways in which the parties could influence the procedure, especially in connexion with the composition of the chamber. As for the danger of infringing national sovereignty or interfering in a State's internal affairs, the concept of national sovereignty was constantly evolving and in practice an increasing number of States were ready to accept methods of peaceful settlement in a given situation by a third party. It was difficult to see the force of the argument that the commission would be interfering in a State's internal affairs since its task would be to look to complaints with expressly agreed rules of international law.

41. The sponsors had been anxious to establish a specific procedure for the peaceful settlement of disputes. Taking the existing system as a basis, they had tried to find a balance between idealism and realism and to fill the gaps without hampering the

machinery already in operation. To delegations which had objected that the new article would jeopardize the system of Protecting Powers, he pointed out that it was not the task of those Powers or the ICRC to detect infringements and publicly lay blame. The inquiry commission would be entitled to intervene in a given situation, to arrive at conclusions, and to give them some publicity. That could not be said to jeopardize the existing system.

42. Many delegations had questioned whether it was desirable to have a provision that the proposed Commission could launch an inquiry "on its own initiative", which they felt was further than the Conventions and the Protocol should go. Perhaps, the sponsors of the new article had gone a bit far, and they would be willing to study the question further with the delegations concerned. On the other hand, they were not prepared to accept that the powers of the commission should be limited to grave breaches. It was not merely the penal responsibility of individuals which was involved; the situation was just as likely, and indeed more so, to be a quite different one in which a State or Government was implicated; for that reason, the provision should be wider in scope. The sponsors were also not persuaded by the idea put forward by the Canadian representative at the fifty-seventh meeting (CDDH/I/SR.57) and taken up again by the Japanese representative at the same meeting, to the effect that the commission should confine itself to fact-finding.

43. Regarding the appointment of members of the commission and the chamber, he explained the existence of the larger body by reference, first, to the difficulty of appointing a smaller one with equitable geographical representation and, second, to the advantages to the parties in having some control over the membership of a particular chamber. He stressed the importance of striking the correct balance between neutrality and the parties' involvement in the composition of the chamber. The former required that the President or person acting for him must be neutral in the particular dispute. The latter was reflected in the method of appointing the chamber; but the co-sponsors would also consider positively the idea that ad hoc members be included. In any event, the commission must be permanent, so that it was accessible, so that delays were reduced and so that it could benefit fully from the experience its members built up.

44. The question of the publicity to be given to the chamber's findings had worried some delegations. While recognizing the Swiss representative's point about the advantages of discreet diplomacy, the co-sponsors felt that it might be necessary, in extreme cases, to appeal to the bar of public opinion. However, there was no reason why there should not be a provision that the chamber could give the parties time for reflection before publicly reporting its findings. He noted, moreover, that the present text

contained some flexibility since the parties could agree (possibly at the prompting of the chamber) not to have the report published, and the chamber would have a wide discretion in the way it drafted its report.

45. Finally, he said that the co-sponsors would be happy to meet any interested delegations in order to draw up a document which could be passed on to Working Group A.

46. Mrs. BUJARD (International Committee of the Red Cross), replying to the representative of Egypt, pointed out that the ICRC had accepted, under specific conditions, the task entrusted to it in new article 79 bis, as set out in amendment CDDH/I/241 and Add.1: to draw up the procedures for appointment, as well as other rules relating to membership, including the Presidency of the Commission, and undertake the appointments.

47. The term "administration" or "administrator" used in ICRC's general statement had perhaps raised doubts about its acceptance, because that task went much further than "administration". She therefore wished to confirm that ICRC had accepted the task in its full extent. That was, moreover, in accordance with its practice. If, in application of the article on inquiry procedure (common to all four Conventions), the parties to a conflict had agreed on the establishment of an international inquiry commission, ICRC would always be ready to help by approaching persons not on the staff of ICRC on whose appointment the requesting Parties were in agreement. ICRC, however, would not itself take part in the activities of the Commission.

48. There were several possible procedures for appointing the members of the commission: one, for instance, would be a system based on regional representation (as proposed in document CDDH/I/267). The ICRC would like to await the outcome of the Working Group's discussions before stating how it envisaged the appointment procedure in practice, because it wished to take account of delegation's opinions. Nevertheless, she could confirm at the present stage that ICRC had, under certain conditions, accepted all the functions envisaged, including appointment of the members of the Commission.

New article 79 bis and the amendment thereto was referred to Working Group A.

CONSIDERATION OF DRAFT PROTOCOL II (CDDH/1) (continued)

Article 36 - Measures for execution (CDDH/1, CDDH/226 and Corr.2)

Article 37 - Dissemination (CDDH/1, CDDH/226 and Corr.2)

Article 38 - Special agreements (CDDH/1, CDDH/226 and Corr.2)

Article 39 - Co-operation in the observance of the present Protocol (CDDH/1, CDDH/226 and Corr.2)

49. Mrs. JUNOD (International Committee of the Red Cross), introducing Part VII of draft Protocol II, pointed out that it contained general provisions on the execution of that Protocol. Its four articles (articles 36 to 39) were closely interlinked, in the sense that the provisons on measures for execution (article 36) were complemented by a provision on the dissemination of humanitarian rules (article 37), and the application of the measures for execution was facilitated by an article concerning co-operation in the observance of the rules of the Protocol which an impartial humanitarian body might offer at the request of a party to the conflict (article 39).

50. Draft articles 36 to 39 in a simplified form were taken from existing law or based on articles of draft Protocol I already adopted by the Conference at its second session.

51. Turning to the study of Part VII, she first introduced article 36 which reiterated in a simplified form article 70, paragraph 2 of draft Protocol I. It also drew on Article 45 of the first Geneva Convention of 1949 and Article 46 of the second Convention, which already conferred on each party to the conflict the essential responsibility for executing the Conventions. Although draft Protocol II contained more provisions than the ICRC initial draft, it was nevertheless the expression of great principles which in the field of practical realities demanded that parties to the conflict should take numerous measures of execution in order to enable such provisions to be applied in concrete situations. Those measures were of special importance for rebels whose organization was at the formative stage. As examples she cited the establishment of a health service, the control of the use of the distinctive emblem, instructions given to armed forces in order to ensure respect for the provisions of Parts IV and V during hostilities, and so forth. She emphasized that as regards the insurgent party one of the first measures to be taken was the fulfilling of obligations laid down by article 1 and submission to a disciplinary rule.

52. In fact, articles 1 and 36 were closely linked. Article 1 laid down the principles of the application of the Protocol while article 36 set out precise rules for putting it into effect. According to article 1, the insurgent party must be organized and of a structure that would allow it to appoint responsible persons and thus take the measures for execution set out in article 36.

53. She also recalled article 3 which set out the equality of rights and duties of each party to the conflict, namely that each must apply the Protocol.

54. The insurgent party, even if it had not ratified the instrument in question, was linked by the engagement contracted by the State, for such engagement was valid not only for the established Government but also for the authority set up by it, as well as for all individuals in the territory of the High Contracting Party.

55. Thus, the following were bound to respect and to ensure respect for those measures of execution: "Military and civilian agents and persons subject to its /the party's/ authority". She pointed out that the term "agent" had been chosen by the ICRC rather than "authority" because it was wider and more flexible. Each civilian and military responsible person should be able to give instructions at all levels to ensure that the provisions of the Protocol were observed.

56. The CHAIRMAN opened the general debate on article 36 of draft Protocol II.

57. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) and Mr. KAKOLECKI (Poland) pointed out that the agenda of the meeting did not include consideration of article 36 of draft Protocol II. They were not opposed to the opening of the discussion but were not ready to give their views on that article at the current meeting.

58. Mr. HUSSAIN (Pakistan) said that in his view it would be better to postpone the discussion until the fifty-ninth meeting.

59. Mr. BOBYLEV (Union of Soviet Socialist Republics) asked the ICRC representative whether article 36 assumed that each party to the conflict had accepted Protocol I, and what would happen if one of the parties had not done so.

60. Mrs. BUJARD (International Committee of the Red Cross), replying, said that the whole of Protocol II was based on the assumption that the insurgent party was bound by the obligation undertaken by the State. In fact that obligation applied to the established Government, to any authority constituted by it, to any organization that happened to be on the territory of the State and lastly to any individual who happened to be on the territory of the State, and therefore it applied also to the insurgent party which formed part of the population of that State. Hence the ratification of the Protocol by a High Contracting Party was binding on the legal Government and on the insurgent party.

61. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he was satisfied with the reply given by the ICRC representative.

62. Mr. AL-FALLOUJI (Iraq) said that he had two questions he would like to ask the ICRC representative, to which he would like a very clear reply, but not necessarily at once.

63. First, if an insurgent party flatly refused to observe Protocol II, what would be the legal basis for the obligation to ensure observance of the Protocol, in other words what would be the validity of the Protocol with regard to the two parties? Could one party really impose an obligation on both parties to the conflict.

64. Secondly, could reservations made by Governments be binding on the insurgent party as well as on the Government, and what would be the legal responsibility in that connexion?

ORGANIZATION OF WORK

65. After an exchange of views on the organization of the work of the Committee and Working Groups A and B, in which Mr. MILLER (Canada), Mr. de ICAZA (Mexico), Rapporteur, Mr. BETTAUER (United States of America), Mr. OBRADOVIC (Yugoslavia), Chairman of Working Group B, and Mr. GLORIA (Philippines) took part, and at the request of Mr. SHELDOV (Byelorussian Soviet Socialist Republic), the CHAIRMAN outlined the programme of work for the following week.

The meeting rose at 12.20 p.m.

SUMMARY RECORD OF THE FIFTY-NINTH MEETING

held on Monday, 17 May 1976, at 10.10 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. K. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

CORRECTIONS TO THE PROVISIONAL SUMMARY RECORDS OF COMMITTEE I

1. Mr. SHUKRI (Kuwait), speaking on a point of order, said he wished to draw attention to the fact that serious errors were arising in the provisional summary records of the meetings of Committee I.

2. The explanation of his delegation's vote at the fifty-fifth meeting (CDDH/I/SR.55) on the referral of article 78 bis to the Working Group was inadequate.

3. He understood that a number of other delegations had similar complaints to make.

4. Mr. HUSSAIN (Pakistan) said that he had been misrepresented in the provisional summary records of meetings even when he had handed in a written statement to the Secretariat. In those circumstances, he did not consider that he should have to rewrite his statement.

5. Mr. ABU-GOURA (Jordan) said that in the provisional summary record of the fifty-sixth meeting (CDDH/I/SR.56) the statement attributed to him did not accurately reflect what he had said concerning article 79 bis.

6. He looked to the Chairman to decide how the complaints which he had just heard should be dealt with.

7. The CHAIRMAN said that as three delegations had made complaints, he would address a letter to the Secretary-General asking him to take steps to ensure that such errors did not occur in the future.

CONSIDERATION OF DRAFT PROTOCOL II (CDDH/1) (continued)

Article 36 - Measures for execution (CDDH/1, CDDH/226 and Corr.2) (continued)

8. The CHAIRMAN reminded the Committee that at the fifty-eighth meeting (CDDH/I/SR.58), the ICRC representative had introduced in general terms Part VII of draft Protocol II entitled "Execution of the present Protocol" and had also introduced article 36 more specifically. He invited comments on that article.

9. Mrs. DARIIMAA (Mongolia) said that she supported the ICRC text of article 36 with some minor reservations. The use of the expression "Each party to the conflict" in the ICRC draft showed that it dealt with non-international armed conflicts. A Government which had ratified Protocol II was bound by its provisions. On the other side there was the insurgent party. In view of the fact that, before the armed conflict began, the national jurisdiction extended also to the insurgent party, there was reason to suppose that Protocol II could automatically extend to the insurgent party with its tacit consent, without its formal accession being required. That supposition did not affect the right of the insurgent party, at a given stage in the development of the armed conflict, to accede formally to Protocol II if it preferred that procedure.

10. On the other hand there might be situations in which the Government had not ratified Protocol II but the adverse party desired the Protocol to be effective as far as it was concerned and therefore wanted to accede to it. In that case one of the parties was a Party to the Protocol and the other not.

11. Again, the fact that one Party had not accepted the provisions of the Protocol should not be used by the adverse party which had accepted them as justification for non-compliance with its obligations.

12. The victims of armed conflicts could not be deprived of the protection afforded by Protocol II. Since there were some lacunae in the ICRC text, she hoped that the Working Group would be able to fill them in in the light of the comments made in the Committee.

13. The CHAIRMAN said that the representative of Mongolia had raised a very important question: what would happen if one party to a conflict had ratified the Protocol and the other had not? The ICRC representative would answer that question and any others at the conclusion of the debate.

14. Mr. BETTAUER (United States of America) said that his delegation basically supported article 36, with certain minor drafting changes. He would not submit any amendment, as they were questions which could be dealt with in the Working Group. Nevertheless he suggested the insertion of the words "the necessary" between "take" and "measures" in the first line and the replacement of the word "authority" by the word "control" in the second line.

15. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that questions relating to the implementation of the provisions of Protocol II acquired particular importance in view of the specific nature of internal armed conflict.

16. Article 36 assumed that there was an obligation on all parties to the conflict to ensure observance of the provisions of Protocol II by all civilian and military persons under their authority. That was clear not only from article 36 but also from article 5 of Protocol II, which defined the rights and duties of the parties to the conflict.

17. Article 36 did not specify what steps should be taken by those parties but left it to them to decide. He considered that provision to be wise. Such steps must be sufficiently effective, however, to guarantee the observance of all the protective aspects of Protocol II. He found the text clear and well-balanced and believed that there should be no difficulty in adopting it.

18. Mrs. BUJARD (International Committee of the Red Cross), replying to questions raised by the representative of Iraq at the fifty-eighth meeting (CDDH/I/SR.58), said that speakers at the current meeting had to a large extent already replied to them.

19. Protocol II must be applied by both parties to the conflict - the Government and the insurgent party. The rights and duties laid down in draft Protocol II were equally valid for everyone, in accordance with article 5.

20. Article 36 was based on the same system as Article 3, common to the Geneva Conventions of 1949, namely that the commitment of the State was valid not only for the Government but also for any constituent authority and for all individuals on the territory of the High Contracting Party.

21. That meant that in the case with which the Committee was concerned the commitment undertaken by the State was valid for the insurgent party. Neither the manner in which the insurgent party was established nor the fact that it was no longer for the time being under the Government's control weakened or did away with the commitment undertaken by the State. The insurgent party continued to be bound by it. That was perfectly sound from a legal point of view. The insurgent party did not have to express a desire to accept and apply the Protocol to be bound by it. Such a declaration would in no way involve rights or duties. It would simply be a confirmation of an existing right.

22. It should be added that the obligation to respect the Protocol was for both parties to the conflict unconditional and unilateral. Respect by one of the parties of the few rules in the Protocol would not have a detrimental effect for that party if the adverse party did not conform to the provisions of Protocol II, on the contrary, as experience had more than once revealed in the past, the party which respected the Protocol would obtain a real advantage, since by so doing it would prevent an escalation of violence, cruelty and ever-increasing reprisals and would induce the adverse party to behave humanely. In that context, article 3 of Protocol II should be borne in mind.

23. The application of international humanitarian law was not based on reciprocity. In that respect, paragraph 5 of Article 60 of the Vienna Convention on the Law of Treaties stated that paragraph 1 to 3 did not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character." If reciprocity was not a factor in international armed conflicts as far as the application of international humanitarian law was concerned, it was even less so in the case of a non-international armed conflict when it was a question of respecting, with regard to one's own nationals, a few basic humanitarian rules.

24. Regarding the reservations which a State could formulate at the time of signing, ratifying, accepting, approving or acceding to a treaty, and the legal consequences which such reservations would have on the commitment of the insurgent party, if a State formulated reservations to Protocol II, it should first be recalled that the question had not yet been discussed by Committee I, and would only be discussed when the final provisions of both Protocols were considered. Her comments, therefore, would in no case prejudice the decision that the Committee would take on the question. It should be noted that draft Protocol II contained no provision concerning reservations and that the Protocol would therefore, in principle, be subject on that point to general international law - mainly customary law - part of which had been codified by the Vienna Convention. It should also be noted that Protocol II, in view of its nature, hardly lent itself to reservations.

25. Replying to the representative of Iraq (fifty-eighth meeting) (CDDH/I/SR.58), she outlined a theoretical case: if a State was able to accompany its acceptance of Protocol II by reservations, either pursuant to public international law in the absence of any suitable provision or, within certain limits, pursuant to a provision which might be based on article 85 of Protocol I, the signatory State might, by means of reservations, limit the extent

of its commitment; that commitment would be valid for all nationals of that State, meaning that the Government party and the insurgent party would be equally bound by the terms of the State's commitment as restricted by the reservations.

26. Mr. AL-FALLOUJI (Iraq) thanked the representative of the ICRC for her explanation. However, it did not really answer his question, since she had been talking about declarations of acceptance while his question had referred to a declaration of refusal. If the rebel party refused Protocol II, what was the legal basis of its responsibility? In other words, if that party were expressly to refuse the Protocol, what was to happen?

27. Even if there was a declaration of acceptance, it was his understanding that the legal basis of the commitment was reciprocity, which was the basis of the law of treaties and in turn was based on international law.

28. When he had brought up the question of reservations, he had done so because there was a lacuna in draft Protocol II. Would the question be dealt with in the same way as in draft Protocol I? If so, the consequences would be even more serious.

Article 37 - Dissemination (CDDH/1, CDDH/226 and Corr.2) (continued)

29. Mrs. JUNOD (International Committee of the Red Cross), introducing article 37, said that among the various measures suitable for strengthening the existing law, there was no doubt that the dissemination of humanitarian principles and rules was one of the most important.

30. That duty, which the High Contracting Parties should assume already in peacetime, and the parties to the conflict in a period of armed conflict, had special significance in the context of draft Protocol II. In fact, the implementation and supervision of the application of that rule would fall essentially within the competence of the parties to the conflict, since it was hardly likely that machinery could be established in Protocol II to ensure impartial supervision of its application, similar to the system of Protecting Powers and their substitutes. The question of assistance in the application of Protocol II would be dealt with when article 39 was discussed. Dissemination henceforth would be one of the essential measures to ensure observance of humanitarian rules in the case of internal armed conflict, as had been pointed out by many experts at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts in 1972. Although recognizing the

need for serious dissemination by the parties to the conflict from the beginning of the armed conflict, some experts had nevertheless formulated reservations concerning the obligation on the High Contracting Parties to disseminate Protocol II in peacetime, fearing that such action might encourage rebellion. The ICRC was convinced that the hope of obtaining protection under Protocol II could not by itself incite a party to start an internal armed conflict, the deep-rooted causes for which were of an entirely different nature. In contrast, respect for humanitarian rules during an armed conflict was likely to avoid a substantial increase in violence and to promote, in the final analysis, a return to a normal situation and national reconciliation. In fact, as resolution XII of the XXIInd International Conference of the Red Cross stressed, "widespread dissemination of an instruction in the Geneva Conventions" was urgently needed in a world torn by violence and was hence a factor for peace.

31. In article 37, "dissemination" was covered in two paragraphs, based on article 72, paragraph 1 of draft Protocol I, which had been adopted by Committee I, by consensus at the second session of the Conference.

32. It had seemed better, in draft Protocol II, to deal in two separate paragraphs with the measures which should be taken in time of peace on the one hand and in time of armed conflict on the other. Those two provisions were differentiated by the status of the subjects of law to which they related.

33. In peacetime, it was the High Contracting Party which was required, as in draft Protocol I, to disseminate the Protocol as widely as possible, so that it should be known to the armed forces and the civilian population. On the other hand in time of armed conflict, it was the responsibility of the governmental authorities and the leaders of the insurgent party to take all the necessary steps to make the contents of Protocol II known to the military and civilian leaders under their authority.

34. Lastly, it should be noted that to take into account the needs of civilian education in federal States the expression "to include the study in their programmes of military and civil instruction" had been replaced in article 72 of draft Protocol I by "to include the study thereof in their programmes of military instruction and to encourage their study by the civilian population." The latter formula might be used in paragraph 1 of article 37.

35. Mr. GLORIA (Philippines) said that long before article 37 - which was identical with article 72 of draft Protocol I - was drafted, his Government had already ordered the widest possible dissemination of the Geneva Conventions in all military educational

establishments throughout the country. No distinction was made in those establishments between international and non-international conflicts: the Geneva Conventions were always considered as a whole. Why then should the parties to the conflict be required to undertake that duty under Protocol II when it was already a requirement under Protocol I and was already being carried out?

36. Mr. GREEN (Canada) thanked the representative of the ICRC for having drawn attention to the fact that article 37 was based on article 72 of draft Protocol I as adopted at the second session of the Diplomatic Conference. With regard to the needs of civilian education in federal States, the text should be brought into line with the language adopted at the second session.

37. Mr. GRANDISON (United States of America) said that his delegation supported the text of article 37 in general and believed that dissemination of Protocol II and instruction in it was one of the most effective means of securing compliance with humanitarian law.

38. His delegation would be proposing two drafting changes in Working Group B: paragraph 1 should be brought into line with paragraph 1 of article 72; and in paragraph 2 the word "authority" should be replaced by the word "control", the latter being used in article 1 and being more appropriate. "Authority" might be taken to imply that rebels possessed legitimate power, whereas "control" was a broader and more neutral term, referring simply to power exercised in fact, whether legitimate or not.

39. Mr. CALERO RODRIGUES (Brazil) said that he was not entirely happy with article 37. He did not object to the idea that Protocol II should be made known. That was useful and necessary, but it was not desirable that the text should be too definite. If it were, it could create difficulties for States which were in duty bound to apply article 37. Thus, it was normal that military and civilian instruction should include information about Protocol II, but he did not think it should be stated that it was the duty of States to ensure it.

40. Furthermore, he did not consider it necessary or useful to establish different provisions for the two cases, i.e. in time of peace and in time of armed conflict. It would be sufficient if the provisions of Protocol II were known in time of peace. It would be much more difficult to make them known in time of armed conflict.

41. He therefore proposed that article 37 should be redrafted and undertook to submit an amended text in writing.

42. Mr. DRAPER (United Kingdom) said that he had little doubt that the proposal in the ICRC text was of the greatest importance in relation to the types of conflict governed by Protocol II. The whole population should be made aware of it in the context of internal conflict. It was particularly important that Protocol II should contain its own provision for dissemination and instruction. There was, however, an analytical distinction between article 72, paragraph 1 of draft Protocol I and article 37, paragraph 1 of draft Protocol II. It might well make it easier for States to adopt the texts if a distinction was made between the obligation to instruct the military, and the responsibility towards the civilian population. Thus, paragraph 1 might refer to the inclusion of the study in programmes of military instruction and the encouragement of the study by the civilian population, as was done in article 72 of draft Protocol I.

43. He was opposed to the idea of dispensing with any dissemination provision in Protocol II. It was one of the most important factors in the implementation of humanitarian principles. If people were taught what was expected of them in time of internal conflict, they would find it far harder to obey when given diametrically contrary orders.

44. Mr. Kun PAK (Republic of Korea) said that his delegation was basically in favour of the widest possible dissemination of Protocol II among both the civilian population and the armed forces. Nevertheless he thought that the position of, say, a high-school student, faced with the task of learning Protocol I, Protocol II or the Geneva Conventions, would be both difficult and confusing. He would find it very difficult to distinguish between Protocol I and Protocol II. The most important point to be kept in mind was that the principles and concepts of humanitarian law, whether applicable to an international or to a non-international armed conflict, should be emphasized in the education of the civilian population. In teaching those principles and concepts technically, however, it would be undermining their basic purposes to state that humanitarian law was less strict in non-international than in international conflicts, and that, in the former, the armed forces could engage in activities that were more inhuman in character. The broad idea, that the dissemination of the humanitarian law embodied in the two draft Protocols must be encouraged, should be stated in article 37 of draft Protocol II, as in article 72 of draft Protocol I. No State should, however, be obliged to include the texts of those Protocols in its school curricula.

Article 38 - Special agreements (CDDH/1, CDDH/226 and Corr.2) (continued)

45. Mrs. JUNOD (International Committee of the Red Cross), introducing article 38, said that the provision reaffirmed the third paragraph of Article 3 common to the Geneva Conventions of 1949 and supplemented it in two ways: firstly, by encouraging the parties to the conflict to implement the provisions of Protocol II; and secondly, by introducing a new arrangement whereby the parties would be able to implement those provisions, not only by means of direct agreements between them, but also by declarations addressed to the depositary of the Geneva Conventions or to the ICRC.

46. Draft Protocol II did no more than restate the essential provisions of the Geneva Conventions and of draft Protocol I in simpler terms for the purpose of protecting the victims of non-international armed conflicts, as defined in article 1, but it was highly desirable that the parties to the conflict should apply as broadly as possible the other rules of international humanitarian law, in particular when a conflict was prolonged and the number of victims was therefore large. The implementation of the maximum number of humanitarian rules then became a true moral obligation. In addition, it had been found in practice that, when the opposing parties had reached a balance of strength, such agreements or declarations were to some extent imposed by circumstances, since they served the interests of both parties.

47. The article did not impose an obligation, but was a pressing invitation to the parties to the conflict to apply international humanitarian law as broadly as possible. Stricto jure, the parties to the conflict could not have obligations greater than those contained in the Protocol.

48. If the parties were able to communicate and negotiate, admitting a de facto situation which involved one as well as the other, they would try to conclude special agreements, which could be recorded by the ICRC. Often, however, they would avoid direct communication and would not make such agreements for fear that, by so doing, they would strengthen the enemy's authority, although under article 3 of draft Protocol II, the conclusion of an agreement, whatever its form, would not affect the legal status of the parties to the conflict. To overcome the difficulty the ICRC had proposed that the parties should make known their willingness to apply all or some of the provisions of the Geneva Conventions or of Protocol I by means of unilateral declarations addressed to the depositary of the Conventions or to the ICRC. If such a declaration was made by one party alone, it would be binding only on that party; in that case, the ICRC, by communicating it to the other party, could encourage it to make a similar declaration. The parties could also both make declarations of similar character, thus indicating their tacit agreement and the ICRC would then merely record those declarations.

49. Mr. DRAPER (United Kingdom) wondered whether the unqualified obligation implied by the words "The parties to the conflict shall endeavour" was appropriate to a situation in which a conflict was in progress and negotiations were therefore difficult. He proposed that the words "where they consider it appropriate" should be inserted after "shall".

50. Mr. Kun PAK (Republic of Korea) said that article 38 was intended to cover a situation in which a unilateral declaration was made by one of the parties; that was not clear, however, from the wording.

51. Mr. PARTSCH (Federal Republic of Germany) said that he found the wording of article 38 perfectly clear. The goal was always that unilateral declarations should be made by both sides. If the declarations were required to be reciprocal, however, they would be less likely to be made, since each side would wait for the other to move. It was therefore necessary to encourage a unilateral declaration by one side so as to stimulate the other to do likewise. The ICRC text covered that situation and was therefore correct.

Article 39 - Co-operation in the observance of the present Protocol (CDDH/1, CDDH/226 and Corr.2) (continued)

52. Mrs. JUNOD (International Committee of the Red Cross) said that article 39 reaffirmed and supplemented the second paragraph of Article 3 common to the Geneva Conventions of 1949. It supplemented that provision by making it possible for the parties to the conflict to appeal to an impartial humanitarian body, such as the ICRC, and then restated the right of such a body to act on its own initiative, a right already mentioned in the second paragraph of common Article 3. At the second session of the Conference of Government Experts in 1972, it had been proposed that, in addition to providing for assistance by an impartial humanitarian body in the observance of the provisions of Protocol II, a system for monitoring the implementation of those provisions should be set up. The ICRC had not included provision for such a system in its draft, since it considered that, in a non-international armed conflict, it would be better for implementation and monitoring to remain the responsibility of the parties to the conflict. The parties, nevertheless, might come up against certain difficulties in applying the provisions of Protocol II, in which case the assistance of a body in monitoring its implementation might be both desired and useful; its activities, however, could only be of an auxiliary character.

53. Assistance should be provided by a body that was both impartial and effective. The ICRC was mentioned in that connexion as an example of a humanitarian and impartial body, but also because it

was an institution called upon, by virtue of its constitution and by tradition, to act in cases of armed conflict. Nevertheless, it was mentioned only by way of example; the parties to the conflict therefore remained completely at liberty with regard to the choice of such a body.

54. It was important to note the optional character of the provisions, which were no more than an encouragement to the parties to the conflict.

55. The last sentence of the article restated the right of a humanitarian body to act on its own initiative, already mentioned in common Article 3 and restated for the purposes of Protocol II. Such an offer of services did not have to be accepted by the party to whom it was addressed. The parties could reject the offer if they believed themselves able to implement Protocol II without outside help. Such an offer could not, in any case, be considered as an unfriendly act by the parties; that was well established and had been generally accepted since the adoption of common Article 3.

56. Mr. CACERES (Mexico) said that his delegation found article 39 unacceptable since it would permit an intolerable interference in the internal affairs of a country during a non-international armed conflict. It was therefore in conflict with article 4 of draft Protocol II. For that reason, he proposed that article 39 should be deleted.

57. Mr. Kun PAK (Republic of Korea) said that his delegation also saw certain problems in connexion with article 39. The text would impose an obligation on a State to call for assistance by the ICRC whenever a non-international armed conflict took place. Also, he failed to see what more the ICRC could do in addition to all the measures already discussed to facilitate the observance of the Geneva Conventions and the Protocols. He was inclined to agree with the representative of Mexico that article 39 could be interpreted as an infringement of State sovereignty. He wondered what contribution the article would make towards the implementation of humanitarian law.

58. Mr. BETTAUER (United States of America) said that the second sentence of article 39 merely reaffirmed the second paragraph of common Article 3 which was not binding; the offer of services did not have to be accepted. The provision was a desirable one, especially as it would be helpful to the ICRC in providing a basis for action. It did not, however, force the ICRC to act or any party to accept its services.

59. The first sentence of the article was new, but was merely a truism; whether or not it was included, any party to a conflict could always take such a step.

60. Article 39 imposed no new obligations and expanded no rights; his delegation fully supported it, without even any drafting changes.

61. Mr. BLOEMBERGEN (Netherlands) said that his delegation fully supported the inclusion of article 39 in draft Protocol II. Under the terms of article 1, draft Protocol II only covered situations which attained a certain scale. Some non-international conflicts could in fact have the magnitude of an international conflict, so that there might not be much difference in practice. In such conflicts, as in international ones, the ICRC or some other impartial humanitarian organization could play a very useful role. Article 39 was very carefully worded so as not to create any obligations. The ICRC or any other humanitarian body could function effectively only with the consent of both parties; without such consent it would not even begin to act. The situation was like that discussed at the second session with regard to Protecting Powers.

62. Mr. Kun PAK (Republic of Korea) said that article 39 was one of the more important articles in draft Protocol II, since in a way it set up, in non-international conflicts, a system resembling that of the Protecting Powers in international conflicts. In contrast to article 5, which was so important that it was not subject to reservations, article 39 was wordy and weak, and therefore any party was free to reject it.

63. In an actual situation, because the article was so weakly worded, some parties would never invoke it; it was therefore meaningless. In his view, if a system like that of the Protecting Powers was to be introduced into non-international conflicts, it should be strengthened and made binding. It would serve no purpose to include in draft Protocol II provisions that would not be implemented.

64. Mr. JOMARD (Iraq) said that the distinction between international and non-international conflicts was being lost. Article 39 dealt with matters involving the infringement of State sovereignty. If it was adopted, the State would lose its sovereignty and internal matters would become international matters. The sovereignty of the State over its territory would cease to exist. For that reason, his delegation thought that article 39 should be deleted.

65. Mrs. MANTZOULINOS (Greece) said that her delegation supported the inclusion of article 39 in draft Protocol II as worded and without any change whatsoever. It imposed no obligations on the parties to the conflict, but merely made it possible for them to

agree to call on an impartial organization, such as the ICRC. The ICRC's right to offer them its services was already provided for in Article 3 common to the Geneva Conventions of 1949.

66. Mr. NASUTION (Indonesia), referring to articles 38 and 39, said that, in the view of his delegation, it was unnecessary for any High Contracting Party, in endeavouring to implement all, or even part of the provisions of the Geneva Conventions or of the Protocols, to make special agreements or declarations. Once it had ratified those provisions, it was the duty of a High Contracting Party to implement them. Articles 38 and 39 were both concerned with non-international armed conflicts; their implementation would naturally be governed by the national laws of the country in question.

67. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that his delegation had some doubts regarding the wording of article 39. There was nothing to prevent the ICRC offering its help, even without such an article, which in any case would have no effect on its activities. It might be possible to amend the article by adding a reference to national Red Cross societies, but since some delegations thought that the provisions of article 39 would endanger State sovereignty, he was prepared to support the Mexican proposal that article 39 should be deleted.

68. Mr. de BREUCKER (Belgium) said that he fully supported article 39, although the title was perhaps misleading, as shown by the comparison made by some representatives with the Protecting Powers in international conflicts. That comparison was incorrect. The ICRC had an established status in the Conventions, and article 39 merely developed it. The ICRC was not obliged to offer its services or the parties to accept them. He was therefore unable to see how State sovereignty was affected or how any international obligation was created. It had been suggested that article 39 would be ignored. That would be a great pity, but he doubted whether it was true. In the conflicts covered by Protocol II, there would be heavy losses and great suffering on both sides. In their own interests and in those of the victims, the parties would try and obtain the assistance of the ICRC. In his view, the status of the ICRC, as defined in common Article 3, should be reaffirmed.

69. Mr. DRAPER (United Kingdom) said that the provisions of article 39 were of undoubted value in Protocol II; he would go so far as to say that they were essential. He therefore endorsed the remarks made by the representatives of Belgium, the Netherlands and the United States of America. The nature of internal conflicts must be borne in mind; it was self-evident that such conflicts would lead to some erosion of sovereignty, but article 39 in no way derogated from such sovereignty. Article 39 contained two

provisions which were an extension and improvement of common Article 3: the first gave parties the power to co-operate with an impartial body in the observance of the provisions of Protocol II, and the second gave the ICRC the power to offer its services. Sovereignty was not infringed in any way. He therefore supported article 39.

70. Mr. AMIR-MOKRI (Iran) said that he was in favour of including article 39 in draft Protocol II because it was optional and imposed no obligation on States. He entirely agreed with the views expressed by the United Kingdom representative. The article would not impinge on the sovereignty of any State.

71. Mr. PARTSCH (Federal Republic of Germany) said that he agreed completely with what the United Kingdom representative had said. Article 39, which was very carefully drafted, was essential to Protocol II. It might meet the doubts of certain representatives if the article were to state that its provisions in no way prejudiced article 4 of draft Protocol II.

72. Mr. JOMARD (Iraq) asked what the legal position of a Government would be if it were faced with rebels wishing to secede from it and an airport had been seized and was under the control of another State.

73. Mr. SLIM (Tunisia) said he had the impression that people were trying to make article 39 say something that it was not meant to say. Some saw it as entirely useless, others as violating national sovereignty. Taking the article as drafted, his delegation thought it could be very useful. It was concerned with non-international armed conflicts, which were far more difficult to resolve than international ones. It was surely not pointless to provide for every possible means of securing observance of Protocol II. Article 39 was simply giving the parties to a conflict the possibility of calling on the good offices of impartial bodies to that end. As long as it imposed no obligation, there was nothing in it that was prejudicial to the sovereignty of a State.

74. Mr. KUSSBACH (Austria) said that his delegation supported article 39 without reservation. It was an important article. Its provisions were optional and therefore did not impinge on national sovereignty. He entirely agreed with the comments of the Belgian and United Kingdom representatives.

75. Mr. de ICAZA (Mexico) considered that the words "the parties to the conflict" could apply to the parties jointly or individually. That would mean that insurgents could call upon an impartial body without the consent of the legitimate Government, which under

article 4 of draft Protocol II was responsible for safeguarding law and order. It was difficult to understand how it could be claimed that in such circumstances there was no violation of a State's authority and responsibility.

76. Mr. Kun PAK (Republic of Korea) said that he would like to hear from the ICRC what its position would be if it were asked by rebels to co-operate in the observance of the provisions of Protocol II and the Geneva Conventions and the Government which was the other party to the conflict rejected its help. He also wondered what the ICRC's position would be in the event of some other body finding itself in a similar situation.

77. Mr. CALERO RODRIGUES (Brazil) said that it was an exaggeration to describe article 39 as important or essential. In any case, the second sentence was unnecessary, since the offer of services by an impartial humanitarian body such as the ICRC was already provided for in common Article 3 of the Geneva Conventions of 1949. Article 39 could, however, be useful in drawing the attention of parties to a non-international conflict to the possibility of calling upon an impartial body; and on that basis he was not opposed to its inclusion in draft Protocol II.

78. With regard to the problem raised by the Mexican representative, as long as article 39 meant that all parties to a conflict jointly could call upon an impartial body, there would be no question of violating national sovereignty; but if one party alone could do so, the Mexican representative's concern would be justified. All depended on the interpretation given to the opening phrase of the article. If it were made absolutely clear that the action in question had to be agreed by all the parties to the conflict, his delegation would not oppose inclusion of article 39 in draft Protocol II.

79. Mr. MORENO (Italy) said that he was in favour of article 39 as drafted. It was an important humanitarian provision and was consistent with common Article 3 of the Geneva Conventions of 1949. As it was optional, he did not see how it could involve violation of national sovereignty. He agreed with the views of the United States, Belgian, Greek and Austrian representatives.

80. Mr. MILLER (Canada) said that article 39, though perhaps not essential, was desirable. He understood the concern expressed over its interpretation, but did not think that it would be misused in practice. Some of the hypothetical situations mentioned in the discussion were irrelevant, because in practice article 39 could not be applied if a Government would not accept an offer of co-operation from an impartial body such as the ICRC.

81. Article 39 contained two ideas. The second sentence introduced nothing new because it repeated what was contained in common Article 3 of the Geneva Conventions of 1949, but it was useful in the light of the special situations provided for in article 1 of draft Protocol II. With regard to the first sentence, he did not believe that in practice it could possibly infringe on the sovereignty of any State Party to the Protocol. It was not mandatory; it was merely an encouragement to seek a means of co-operating in observing the provisions of Protocol II, and that was a desirable feature in a humanitarian instrument.

82. Mr. TORRES AVALOS (Argentina) said that he was in favour of including article 39 in draft Protocol II, although he understood the fears expressed by the representatives of Mexico and the Republic of Korea. He suggested that Working Group B should endeavour to make amendments - such as those suggested by the representative of the Federal Republic of Germany, in order to meet the misgivings that had been expressed.

83. Mrs. DARIIMAA (Mongolia) said that article 39 was not important in itself because its provisions were optional. For that reason, her delegation had no problem with it but because some delegations interpreted it as involving an infringement of national sovereignty, she supported the proposal to delete it.

84. Mr. AMIR-MOKRI (Iran) said that he did not agree that article 39 was unnecessary. It was very useful because it drew the attention of the parties to a conflict to the possibility of calling in an impartial body to co-operate in the observance of the provisions of the Protocol.

85. Mrs. BORODOWSKY (Cuba) said that she welcomed the Mexican representative's statement. It was not necessary to include article 39 in draft Protocol II.

86. Mr. BABA (Uganda) said that he was in favour of article 39. It was clear and well drafted, it was not mandatory and it did not impinge on national sovereignty.

87. Mr. MISHRA (India), speaking without prejudice to his position on draft Protocol II as a whole, said that article 39, once adopted, would inevitably be used for political reasons by a party opposing or in rebellion against a Government. A Government which refused the services of the ICRC or some other impartial body called in by the rebel party might be accused of having something to hide. Consequently, despite the sincere humanitarian motives of the authors of the text, his delegation supported the representatives who wanted it deleted.

88. Mr. KUNUGI (Japan) said that he fully supported the ICRC draft of article 39. It was an improvement on common Article 3 of the Geneva Conventions of 1949 because its wording - particularly the use of the word "may" - allowed some flexibility and discretion in applying its provision. He hoped that the Conference would accept the article unchanged, including the opening words "The parties to the conflict". It was clear from the other provisions of draft Protocol II that when those words were used they meant one or more parties to the conflict.

89. Mr. de STOOP (Australia) said that he fully supported the inclusion of article 39 in draft Protocol II and agreed with the reasons given by the Belgian and United Kingdom representatives. He said that the main reason for the difficulties of some delegations with article 39 was the manner in which the words "the parties to the conflict" had been interpreted. His delegation understood them to mean all parties, not merely one party, because article 39 had to be read in the context of Part VII of draft Protocol II. By contrast article 36 referred to "Each party to the conflict" only. He believed that that difference in wording indicated that the drafters intended that article 39 would come into operation only when all the parties to a conflict agreed to seek impartial help.

90. The CHAIRMAN suggested that articles 36 to 39 should be sent to Working Group B.

It was so agreed.

91. The CHAIRMAN said that the ICRC representative would reply to the questions of the representative of the Republic of Korea in Working Group A.

The meeting rose at 12.20 p.m.

SUMMARY RECORD OF THE SIXTIETH MEETING

held on Thursday, 3 June 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)*

Report of Working Group A (CDDH/I/324)

Article 74 - Repression of breaches of the present Protocol

1. The CHAIRMAN said that the work of the Committee had not progressed as rapidly as expected, because of its extreme complexity. Two articles of draft Protocol I and six articles of draft Protocol II had still to be adopted.

2. At the final meetings of the current session the Committee should not become deadlocked in procedural discussion or deal with questions of substance, for the latter had already been considered by the Working Groups and Sub-Groups. The articles to which the report (CDDH/I/324) referred should as far as possible be adopted by consensus, failing which they would have to be put to the vote.

3. Mr. STÄMPFLI (Legal Secretary) pointed out a drafting error in the original French text of the report (CDDH/I/324). In article 74, paragraph 4 (d), the word "conclu" was wrongly placed after the words "arrangement particulier" in the fifth line. It should be inserted after the word "directement" in the eighth line.

4. Also in the French text, a comma should be inserted after the word "religieux" in article 74, paragraph 2, while in the Spanish text the word "referencia", in the sixth line of note 7 on page 5, should be amended to read "preferencia".

5. Mr. de ICAZA (Mexico), Rapporteur, took note of the corrections.

6. The CHAIRMAN asked representatives if they would agree to the reservations expressed in the notes to the report being merely mentioned without reopening the substantive discussion.

---

* Resumed from the fifty-eighth meeting.

7. Mr. ABI-SAAB (Egypt) said he could not accept the procedure proposed by the Chairman. The reservations were on important points and representatives did not pursue their discussion further in Working Group A on the understanding that they would have the opportunity of setting forth their views in a plenary meeting of the Committee, particularly since the proposed modifications did not even appear in square brackets in the report.

8. Mr. GLORIA (Philippines) said he agreed with the Egyptian representative.

9. Mr. ABI-SAAB (Egypt) insisted that certain additional categories should be included in paragraph 2 of article 74 at least those covered by article 42 bis. The purpose of paragraph 2 was to extend the provisions of the Geneva Conventions on grave breaches to the new categories of protected persons in Protocol I. Those were not only the persons covered by articles 42 and 64, which were mentioned in paragraph 2, but also those covered by articles 42 bis and 65, which were not. He would have liked to see both those articles mentioned in paragraph 2, but he understood the difficulties article 65 posed for certain delegations, especially its inclusion of the State's own nationals and of civilians not in its power.

10. In a spirit of compromise, he would propose adding only article 42 bis, which covered detained persons who did not qualify for prisoner-of-war status, and which had already been adopted by Committee III, to articles 42 and 64, which were mentioned in paragraph 2, but whose adoption was still pending in Committee III.

11. Mr. KHARMA (Lebanon) expr ssed agreement with the Egyptian representative.

12. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, asked whether the report was being considered paragraph by paragraph or whether the discussion was on article 74 in particular. In his view the Committee should follow the former procedure.

13. Mr. KHARMA (Lebanon) said he agreed with the Ukrainian representative.

14. The CHAIRMAN said he also was of the opinion that the Committee should study the report paragraph by paragraph.

Paragraph 1

Paragraph 1 of the report was adopted.

Paragraphs 2, 3 and 4

15. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) observed that the Russian translation of the beginning of paragraph 2 did not correspond to the English text.

16. The CHAIRMAN said that the mistake could easily be rectified.

Paragraphs 2, 3 and 4 of the report were adopted.

Paragraphs 5 and 6

17. Mr. GLORIA (Philippines) said that he had not had a chance to submit the Philippine amendment (CDDH/I/GT/93) to paragraph 5. He withdrew his amendment, but would like to submit another amendment at the current meeting.

Paragraphs 5 and 6 of the report were adopted.

Article 74, paragraph 1

Paragraph 1 of article 74 was adopted.

Article 74, paragraph 2

18. Mr. de BREUCKER (Belgium), Mr. HUSSAIN (Pakistan) and Mr. GIRARD (France) associated themselves with the Egyptian representative's observations concerning a reference to article 42 bis.

19. Mr. MILLER (Canada) requested the Egyptian representative to explain the reasons for his proposal, of which he added that he was in favour.

20. Mr. OBRADOVIĆ (Yugoslavia), Mr. BETTAUER (United States of America), Mr. FERRARI BRAVO (Italy), Mr. PARTSCH (Federal Republic of Germany), Mr. KABUAYE (United Republic of Tanzania), Mr. CALERO RODRIGUES (Brazil), Mr. BOBYLEV (Union of Soviet Socialist Republics) and Mr. EIDE (Norway) also supported the proposal by the Egyptian representative.

21. The CHAIRMAN suggested that the Egyptian proposal should be taken into account in the final drafting of article 74.

It was so agreed.

Article 74, paragraph 3

22. Mr. GLORIA (Philippines) submitted an oral amendment and asked that the text be included in the report. He proposed the addition of a new paragraph 3 (g) stipulating the types of weapons whose use would constitute a grave breach. The words "the use of methods and means of combat" proposed by ICRC in document CDDH/210, annex 2, were too vague. With the support of the Indonesian delegation, therefore, he had prepared his amendment in the desire to save mankind from total annihilation. The use of indiscriminate weapons, which was already prohibited by The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land, and by the 1949 Geneva Conventions, had been reaffirmed by the present Diplomatic Conference.

23. Most of the weapons enumerated in his proposed amendment had long been prohibited, except of course nuclear weapons, which were a fairly recent development. Despite the opposition of a powerful minority, it had been established that their use violated all traditional principles of humanitarian law and threatened the future of mankind. The problem had already been discussed at the two sessions of the Conference of Government Experts on the Use of Certain Conventional Weapons, held at Lucerne in 1974 and Lugano in 1976, and was at present being considered by the Ad Hoc Committee on Conventional Weapons. What fate was in store for mankind if the use of the weapons enumerated was not deemed to constitute a grave breach? In a spirit of compromise, however, his delegation was prepared to agree to the deletion of the final phrase of its proposed text: "and all types of nuclear weapons".

24. Mr. HUSSAIN (Pakistan) supported the Philippine proposal, whose adoption would contribute to the development of humanitarian law.

25. Mr. OBRADOVIĆ (Yugoslavia) said that in view of the provisions of article 33 (Methods and means of combat), his delegation supported the Philippine proposal. Since his delegation's position had been stated at length during the Committee's general debate on article 74, there was no need to revert to it.

26. Mrs. SUDIRDJO (Indonesia) said that she, too, supported the Philippine proposal, which actually introduced nothing new and was of a general nature.

27. Mrs. ROULLET (Holy See) also supported the Philippine proposal.

28. Mr. BETTAUER (United States of America) said that although he understood the reasons behind the Philippine proposal, he had the strongest reservations about it. Since no restrictions on specific weapons had yet been adopted by the Ad Hoc Committee on Conventional Weapons, Committee I should not insert a provision on that matter in article 74 and thus prejudge the work or the conclusions reached by the Ad Hoc Committee. Adoption of the Philippine amendment would jeopardize the acceptability of article 74 if not of Protocol I as a whole. He was therefore opposed to that amendment.

29. Mr. de ICAZA (Mexico) said he approved the actual principle of the Philippine amendment. His country had already submitted a proposal for the prohibition of incendiary weapons. None the less, the opposition of certain delegations had to be taken into account, and if the Philippine proposal was going to complicate the task of the Ad Hoc Committee his own delegation would regretfully be unable to endorse it.

30. Mr. ALEXIE (Romania) said he was in favour of the Philippine proposal.

31. Mr. BLOEMBERGEN (Netherlands) said he understood the concern of the Philippine delegation but had reservations about the proposal for the same reasons as those given by the United States representative. It would not be desirable to include among the grave breaches the use of weapons that had not yet been sufficiently defined, since grave breaches should be formulated as unambiguously as possible.

32. Mr. de BREUCKER (Belgium) said that he understood the humanitarian motive underlying the Philippine delegation's proposal, but considered that with reference to grave breaches the material and the moral factor together must provide sufficient grounds to justify a charge in relation to the prohibitions formulated in Protocol I. But with regard to methods and means of combat, articles 33 and 34 were too vague to serve as a basis for such a charge. At the current stage of the work, to make the use of certain methods and means of combat a grave breach would certainly not get humanitarian law much further forward. As for the idea of including a list of specific weapons, as proposed by some other delegations, it would only make the current task of the Ad Hoc Committee more difficult.

33. Where grave breaches were concerned, it seemed advisable for the present, to keep strictly to the offences listed in draft Protocol I. His delegation, much to its regret, was therefore unable to support the Philippine proposal.

34. Mr. MARTIN HERRERO (Spain) said that he wished to join the delegations which, while paying tribute to the motives underlying the Philippine proposal, were unable to accept it at the present juncture, for fear of hampering the work of the Ad Hoc Committee and prejudging the results.

35. Mr. FREELAND (United Kingdom) said that he shared the doubts expressed by the United States representative concerning the Philippine proposal. Such a vague provision would hardly be an adequate basis on which to bring a charge of a grave breach. He also seriously questioned its listing specific weapons, especially in view of the stage which the Ad Hoc Committed had reached in its work. For both reasons its inclusion would be unacceptable to his delegation.

36. He was also very anxious about the repercussions the inclusion of such a provision might have on the fate of article 74 as a whole, and sincerely hoped that the Philippine delegation, in a conciliatory spirit, would not press its proposal to a vote.

37. Mr. MISHRA (India) said that he understood the motives behind the Philippine proposal, but found it somewhat unclear.

38. He could, of course, agree to any proposal to include in the list of grave breaches the use of weapons prohibited by international instruments to which States were Parties, such as the Geneva Protocol of June 17, 1925, for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, or the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (General Assembly resolution 2826 (XXVI), annex) where the weapons could be mentioned specifically. But the wording of the Philippine proposal, which referred to the use of weapons violating the traditional principles of international and humanitarian law, was too vague. Compared with the introductory sentence of article 74, paragraph 3, submitted by Working Group A, and article 33 of draft Protocol I, the Philippine proposal - unless it were made far clearer - was likely to be a retrograde step.

39. He shared the view of the representative of Mexico concerning the effect which the adoption of the Philippine proposal might have on the results of the Ad Hoc Committee's work. He, too, hoped that the proposal would not be put to the vote.

40. Mr. EIDE (Norway) said he shared the anxiety of the Philippine delegation, and suggested that the Committee might agree on a footnote indicating that it would reserve for consideration at the Conference's fourth session the question of including in the list of grave breaches violations of prohibitions concerning the use of

certain methods and means of combat. There were three reasons for that suggestion. First, the Philippine proposal needed more detailed discussion in a working group. Second, before deciding, the Committee needed to have a clearer idea of the prospects for results in the Ad Hoc Committee. Third, in view of the shortage of time, Committee I should confine itself to taking a decision on texts which had been debated enough to offer a possibility of agreement.

41. Mr. GIRARD (France) said that while he well understood the motives underlying the Philippine proposal, he could in no way agree to insert a provision on specific weapons in article 74.

42. Mr. PARTSCH (Federal Republic of Germany) endorsed the points of view of the Belgian and United Kingdom representatives.

43. Mr. ABDUL-MALIK (Nigeria) said that he supported the principle of the Philippine proposal but found it difficult to agree to the inclusion of the provision in article 74 at the present stage. The fact was that the prohibition of many weapons listed in that proposal would not be accepted by many countries. Moreover, it was necessary to await the outcome of the Ad Hoc Committee's work.

44. Though it would vote for the proposal if it was put to the vote, his delegation considered that its consideration had better be postponed and supported the Norwegian delegation's suggestion to that effect.

45. Mr. KUSSBACH (Austria) congratulated the Philippine delegation on its courageous proposal and said that he fully shared the concern which inspired it. For the reasons already expressed however, particularly by the Mexican representative, he was unable to support it at the present stage.

46. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he also shared the concern of the Philippine delegation but could not support its proposal because the question of prohibiting certain weapons was outside the terms of reference of the Conference.

47. Mr. AMIR-MOKRI (Iran) said that the Philippine proposal was an interesting one, but he agreed with those delegations which had explained why it could not be accepted at the present stage and had asked for its withdrawal.

48. Mr. de ICAZA (Mexico) supported the suggestion of the Norwegian delegation.

49. The Philippine proposal should be set aside for the present on the understanding that the Conference could revert to it at its fourth session, in the light of the progress made by the Ad Hoc Committee.

50. His delegation would support the Philippine proposal, or a similar one, if the Ad Hoc Committee made no progress and if delegations continued to assert that the question of prohibiting certain weapons was not within the competence of the Conference.

51. Mr. HUSSAIN (Pakistan) said that the foot-note suggested by the Norwegian delegation should indicate clearly that all delegations which had expressed an opinion on the Philippine proposal had found it very valuable, but that on account of certain technical difficulties it had been decided to postpone the consideration of it.

52. Mr. GLORIA (Philippines) said that he approved unreservedly the suggestions made by the representatives of Pakistan and Norway. He was prepared to have his delegation's proposal held over until the fourth session of the Conference, but not to withdraw it.

53. Mr. BLIX (Sweden) thanked the Philippine delegation for submitting its proposal, which helped to bridge a gap noted by Working Group A in the law of war. It remained to be said, however, that the wording of the proposal was unacceptable to many delegations at the present stage and required improvement.

54. Moreover, rule 29 of the rules of procedure stipulated that as a general rule no proposal should be discussed or put to the vote at any meeting of the Conference unless copies of it had been circulated to all delegations not later than the day preceding the meeting.

55. He agreed with the United Kingdom representative that the provision proposed by the Philippine delegation was too vague in its scope.

56. In the light of paragraph 2 of article 33 of draft Protocol I, which stated that it was "forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate ..." suffering, he failed to see how it could be maintained that the question of the prohibition of certain weapons was not within the jurisdiction of the Committee.

57. Provisions of that kind, however, raised problems of interpretation and it was difficult to determine whether particular weapons did or did not cause unnecessary injury. He could therefore quite understand that some delegations favoured the idea of imposing sanctions on the use of specific weapons such as dum-dum bullets or the weapons envisaged in the 1925 Protocol.

58. Finally, he welcomed the Norwegian suggestion that in its report the Committee should note that it had decided to postpone to a later date consideration of the question of the inclusion, in the list of grave breaches, of violations of the prohibitions relating to certain methods and means of combat. That decision should be recorded in the body of the report and not in a foot-note.

59. Mr. MILLER (Canada) said that he associated himself with the delegations that had asked the Philippine delegation not to press its proposal for the time being. He stressed the need for care in drafting the paragraph of the report of Committee I that would record its decision to resume consideration of the question later, so that its decision could not be interpreted as a threat to the work of the Ad Hoc Committee; his delegation was in fact anxious that the Ad Hoc Committee should produce acceptable results regarding the use of certain conventional weapons.

60. Mr. OBRADOVIĆ (Yugoslavia) supported the Norwegian delegation's suggestion, which should be embodied in a text drafted along the lines indicated by the Pakistan delegation.

61. Miss AKUFFO (Ghana) wholeheartedly supported the Norwegian suggestion.

62. Mr. FREELAND (United Kingdom) said that, while he was generally in sympathy with the Norwegian delegation's suggestion, he thought that the members of the Committee should have before them the text of the paragraph to be included in the Committee's report before taking a final decision on it.

63. If the Committee, however, confined itself to saying that it would resume consideration of the question at its fourth session, it would be difficult for it, having thus expressed reservations on part of article 74, to take a final decision on the rest of that article at the current session.

64. Mr. REIMANN (Switzerland) said that he was glad the Philippine proposal had not been withdrawn.

65. He flatly rejected the idea that the question under consideration was not within the competence of the Committee. Articles 33 and 34 - already adopted by Committee III - provided the basis for a possible decision on the Philippine proposal. That was also the reason why he considered that the work of the Ad Hoc Committee on Conventional Weapons could not be said to be jeopardized.

66. He supported the inclusion in the report of a paragraph drafted along the lines suggested by the representatives of Pakistan and Sweden.

67. Mr. BETTAUER (United States of America) said that he, too, thought that the report should mention the problem and the way in which it could be dealt with. The paragraph included on the subject should draw attention to the interest that had been aroused, if not by the substance of the proposal, at least by the humanitarian concern underlying it. It should not indicate that the Conference necessarily had to take up the problem at its fourth session, but should note that it would be open to delegations to raise the question again.

68. Mr. GIRARD (France) said he fully supported the comments of the United Kingdom and the United States representatives. In the view of his delegation, article 74 should be considered as a whole, and no specific position on any one paragraph could prejudge the decision to be taken on the whole of the text.

69. At the suggestion of the CHAIRMAN it was decided that the Secretariat should submit a suitable text to the Committee.

70. Mr. GIRARD (France), referring to the introductory part of article 74, paragraph 3, drew attention to the fact that that text tended to make a grave breach of the acts or omissions defined in article 11 even if they were committed by a State against its own nationals, on its own territory. Such a provision, contrary to all French doctrine on jurisdiction, was unacceptable in principle, even though such a situation was hardly probable. It had been asked that the question should be referred to Committee II. As long as it had not been settled in one way or another, his delegation would formally object to that part of paragraph 3.

71. Mr. BLOEMBERGEN (Netherlands), Mr. KUNUGI (Japan) and Mr. de BREUCKER (Belgium) were of the same opinion as the representative of France on that point.

72. The CHAIRMAN confirmed that the question would be referred to Committee II.

Paragraphs 3 (a), (b) and (c) of article 74 were adopted by consensus.

73. Mr. KUNUGI (Japan) said that, in paragraph 3 (d), the reference to articles 52 and 53, which appeared in the ICRC draft, should be retained. The text would then be more precise.

74. Mr. MILLER (Canada) and Mr. GIRARD (France) concurred on that point.

Paragraphs 3 (d) and (e) of article 74 were adopted by consensus.

75. Mr. KABUAYE (United Republic of Tanzania) asked that in paragraph 3 (f) of the English text, the comma following the words "Red Lion" should be deleted.

76. Mr. NASUTION (Indonesia) said that his delegation, while willing to regard the perfidious use of the Red Cross (Red Crescent, Red Lion and Sun) signs as a grave breach, expressed reservations as regards the phrase "and other protective signs", an expression that might be held to refer to signs newly adopted by Committee II, which were not to be the subject of technical discussions in other international gatherings until 1977. Those words could be deleted.

Paragraph 3 (f) of article 74 was adopted by consensus.

Article 74, paragraph 4

77. Mr. GIRARD (France) observed that none of the sub-paragraphs of paragraph 4, save for the last one, set out a point which his delegation regarded as essential to article 74, namely, the possibility that the breaches committed might involve loss of life. Nor was any mention made of the possibility of property being destroyed. For that reason, without opposing any consensus that might be reached on paragraph 4 as a whole, his delegation would like it to be clearly understood that it would not join the consensus, except with reference to paragraphs 4 (d) and (e). His delegation hoped that the position it had taken would not inhibit other delegations from expressing their views on the various sub-paragraphs of paragraph 4.

78. Without wishing to go back on the already-existing provisions of the Geneva Conventions of 1949 concerning the transfer of populations by the Occupying Power, which characterized such practices as grave breaches, he considered that there was no reason to mention such acts again in article 74.

79. Mr. PARTSCH (Federal Republic of Germany), referring to paragraph 4 (c), drew the Committee's attention to an alternative version given in note 7 of the report, which his delegation believed was more precise and clearer.

80. Mr. MILLER (Canada), said that he, too, preferred that version.

81. Mr. de BREUCKER (Belgium) concurred. Since it was grave breaches that were being discussed, the text given in note 7 was more precise.

82. Mr. BABA (Uganda) considered that the text in note 7 misrepresented the problem. He pointed out, moreover, that all United Nations bodies, and the Security Council in particular, had always drawn a clear-cut distinction between racial discrimination and apartheid, and he referred in that connexion to two Security Council resolutions: resolution 190 (1964) of 9 June 1964, and resolution 311 (1972) of 4 February 1972.

83. Mr. AMIR-MOKRI (Iran) said he agreed with the Ugandan representative. With reference to the French text of paragraph 4 (b), he pointed out that a "retard injustifié" was not an "acte", but rather a failure to act. The English text, which characterized "unjustifiable delay" as a "breach", seemed better.

84. Mr. AL-FALLOUJI (Iraq), Mr. KABUAYE (United Republic of Tanzania) and Mr. ABU-GOURA (Jordan) associated themselves with the Ugandan representative's comments.

Paragraph 4 (c) of article 74 was adopted by consensus.

85. Mr. ABI-SAAB (Egypt), referring to note 8, reminded the Committee that his delegation and other Arab delegations had reserved the right to raise again, in connexion with paragraph 4 (d), the question of identification of the historic sites and monuments, an attack on which would constitute a grave breach. The identification seemed to be based on different concepts in article 47 bis and paragraph 4 (d). That was a technical problem which could perhaps be solved by amending paragraph 4 (d). He proposed that "either", in the fourth line of the English text, should be replaced by "such as", and that the words "or, if the party concerned so chooses, directly with the adverse party," should be deleted.

86. Mr. AL-FALLOUJI (Iraq) and Mr. KABUAYE (United Republic of Tanzania) seconded that proposal.

87. Mr. MILLER (Canada) asked whether the amendment suggested by the Egyptian representative meant that the special arrangement could only be made within the framework of a competent international organization, or whether that possibility, as he believed, was merely cited as an example.

88. Mr. ABI-SAAB (Egypt) confirmed that that type of arrangement was cited as an example, and that "such as" could be replaced by "for example".

89. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) and Mr. MILLER (Canada) supported the latter suggestion.

90. Mr. MISHRA (India) asked whether "for example" was to be placed before "within" or after "framework".

91. Mr. FREELAND (United Kingdom) said that in his view it was correct to place "for example" before "within".

92. Mr. de ICAZA (Mexico), Rapporteur, said he thought that point should be referred to the Drafting Committee.

93. Mr. GIRARD (France) said he would prefer the matter to be settled by the Committee.

94. Mr. AL-FALLOUJI (Iraq) concurred, for the Drafting Committee might decide to consult yet another Committee.

95. Mr. MISHRA (India) said that, while understanding the Egyptian representative's motives, he thought the Committee should avoid taking hasty decisions, and he suggested that the matter be settled at the sixty-first meeting.

It was so agreed.

The meeting rose at 12.45 p.m.

SUMMARY RECORD OF THE SIXTY-FIRST MEETING

held on Thursday, 3 June 1976, at 3.15 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL I (CDDH/1) (continued)

Report of Working Group A (CDDH/I/324) (concluded)

Article 74 - Repression of breaches of the present Protocol (concluded)

Article 74, paragraphs 4 (d) and (e)

1. The CHAIRMAN invited the Committee to continue its consideration of article 74, the text of which appeared in the report of Working Group A (CDDH/I/324).

2. Mr. ABI-SAAB (Egypt) said that in agreement with the representative of India, he would propose the replacement, in paragraph 4 (d) of the word "either" by the word "example", while deleting the last part of the sentence, as he had suggested at an earlier meeting.

The proposal was adopted.

3. Mr. TORRES AVALOS (Argentina) said that in Spanish it would be preferable to translate "for example" by "tal como".

Article 74, paragraph 4 (d), as amended, was adopted by consensus.
Article 74, paragraph 4 (e) was adopted by consensus.
Article 74, paragraph 4, as a whole, as amended, was adopted by consensus.

Article 74, paragraph 5

4. Mrs. SUDIRDJO (Indonesia) said that her delegation was among those which had entered serious reservations regarding paragraph 5 of article 74. To classify grave breaches as war crimes could only create confusion, and would be incompatible with the notions underlying the Geneva Conventions, which were concerned only with the humanitarian aspects of international law.

5. The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London by the United Kingdom of Great Britain and Northern Ireland, the United States of America, France and the Union of Soviet Socialist Republics on 8 August 1945, gave a definition of war crimes, but the drafters of

the Geneva Conventions of 1949 had avoided the term, which did not appear in any of the Geneva Conventions. Article 70 of the fourth Convention of 1949 referred only to "breaches of the laws and customs of war". It was therefore illogical to introduce in a new Protocol an expression that had been used in 1945 but given up in 1949. Moreover, paragraph 5, while making no substantive change, introduced an emotional aspect that contributed nothing. The Geneva Conventions and the Protocols constituted a body of international rules concerned primarily with humanitarian law. The question of war crimes had been dealt with elsewhere, and was the subject of a separate body of legal provisions.

6. The Indonesian delegation was therefore unable to support paragraph 5, and asked that its position be recorded in the report of Committee I.

7. Mr. GIRARD (France) said that his delegation supported the present wording of paragraph 5 in a spirit of compromise and in view of the interest shown by some delegations; but the definitive stand that France might wish to take when article 74 had been given its final form was in no way prejudged. Furthermore, his Government considered that the provisions of paragraph 5 in no way determined the question whether or not acts covered by article 74 were also crimes against humanity. He asked that his comments be included in the Committee's report.

8. Mr. MISHRA (India) said that the introduction of the notion of war crimes raised the problem of the prosecution of war criminals. In view of the provisions of paragraphs 3 and 4 of article 74, it was difficult to see how such crimes could be tried. For example, the provision in paragraph 4 (b) regarding "unjustifiable delay in repatriation of prisoners of war" gave the impression that the prisoners of war had been captured by the victorious party. How then could the defeated be accused of "unjustifiable delay in repatriation of prisoners of war"? In other words, it was hard to see the connexion between the provisions in paragraph 5 and some of the provisions in paragraphs 3 and 4.

9. He reserved his delegation's position on paragraph 5, because he did not see how the concept of war crimes could be applied to certain grave breaches listed in the article, as for instance in paragraph 4 (c). He asked that his comments be included in the Committee's report.

10. Mr. HUSSAIN (Pakistan) said that although he had asked to speak he now had nothing to add to the comments of the representative of India.

11. Mr. MORENO (Italy) reiterated the reservations to paragraph 5 that he had already expressed in Working Group A.

Article 74, paragraph 5 was adopted by consensus.

12. The CHAIRMAN said that at the sixtieth meeting (CDDH/I/SR.60), the representative of the Philippines had proposed the addition of a new sub-paragraph (g) to paragraph 3 of article 74, and had then agreed not to press the proposal to a vote, provided that it was duly recorded in the Committee's report.

13. He (the Chairman) then read out the following text of a note that might be included in the Committee's report:

"At the sixtieth meeting of Committee I the representative of the Philippines submitted the following oral proposal:

"Article 74 - Grave breaches

"Add to paragraph 3 a new sub-paragraph to read:

"(g) the use of weapons prohibited by the law of war, such as asphyxiating, poisonous or other gases and analogous liquids, materials or devices, dum-dum bullets, and those weapons that violate the traditional principles of international law and humanitarian rules, such as biological weapons, blast and fragmentation weapons."

"Several representatives approved this proposal. Others, while approving it in principle, were not in entire agreement with the wording of the draft. Still others who had indicated objections also expressed their sympathy with the humanitarian objectives that had led to its introduction.

"After a full discussion, it was suggested that no decision should be taken on this proposal at the present session, it being understood that the question of including in the Protocol a provision for the treatment of such violations as grave breaches could be taken up at the fourth session.

"With this understanding the proposal was not pressed to a vote at the present session."

"Some representatives stressed the fact that the progress of the Ad Hoc Committee's work must not be put at risk."

14. Mr. FREELAND (United Kingdom) said that he was not happy with the third paragraph, beginning with the words "After a full discussion". The paragraph seemed to imply that the Committee felt that the list of grave breaches in article 74 was incomplete and that it might decide to expand it at its fourth session. In the circumstances the Committee could hardly be expected to adopt article 74, since it formed a whole which could not be adopted unless all its provisions were known. On the one hand, the Committee could not adopt an incomplete article. On the other hand, it would be regrettable if the Committee, having fully considered the article, were unable to take a final decision on the present text.

15. He therefore proposed that the second part of the paragraph should be amended to read as follows: "... it being understood that any delegation will be free to revert to it at the fourth session."

16. Mr. BLOEMBERGEN (Netherlands) agreed with the United Kingdom representative. His delegation could not accept article 74 if the list of grave breaches was deemed to be incomplete.

17. Mr. EIDE (Norway) felt that the new wording proposed by the United Kingdom representative would not solve the problem, since any delegation would be free to revert to the Philippine proposal and the list could therefore be expanded. The Committee should take final action on article 74. It would be better to specify that additions to the list would form the subject of a separate article. The Committee could thus conclude its work on article 74 in a satisfactory manner.

18. Mr. HUSSAIN (Pakistan) considered that provision should be made for the list of grave breaches to be expanded if the Ad Hoc Committee on Conventional Weapons prohibited the use of certain weapons in certain circumstances. He failed to see why a new article on grave breaches should be included in draft Protocol I. If the Committee felt that additions might be made to the list of breaches, it should postpone any decision on article 74 until the fourth session.

19. Mr. BETTAUER (United States of America) endorsed the views of the United Kingdom and Netherlands representatives. With regard to the proposed text, he pointed out that his delegation, for its part, had raised serious objections of a substantive nature.

20. Mr. de ICAZA (Mexico) said that he was surprised at the stand taken by the United Kingdom delegation, since the Committee had agreed, at its sixtieth meeting (CDDH/I/SR.60), that the Philippines would not press its proposal to a vote on the understanding that the Committee could take up the question again at the fourth session.

21. He drew attention to the words "it being understood that the question of including ... could be taken up at the fourth session", which meant that further consideration was not mandatory. It would depend on the work of the Ad Hoc Committee on Conventional Weapons. The present text simply provided for the possibility of a return to the question. That was what the Committee had decided at its sixtieth meeting. To make that point absolutely clear a full stop might be placed after the words "present session", the rest of the sentence being deleted.

22. Mr. BINDSCHEDLER (Switzerland) shared the misgivings and views expressed by the delegation of Pakistan. In point of fact the question remained open, since the Committee's position was that article 74 could be modified. That was the meaning of the present text.

23. The Swiss delegation could agree to the insertion of sub-paragraph (g), since the use of prohibited weapons could constitute a grave breach. However, it could not be expected to endorse article 74 without knowing all its provisions because, as some delegations had pointed out, the article formed a whole. Adoption of the article should therefore be postponed.

24. Mr. MURILLO RUBIERA (Spain) pointed out that his delegation had consistently taken the position that the list of grave breaches should not be comprehensive, but illustrative. Many delegations had supported the Philippine proposal but could not, for reasons of expediency, of prudence and of a technical character, agree to its inclusion in paragraph 4 of article 74. His delegation had supported the proposal but had pointed out that the work of the Ad Hoc Committee should be taken into account before a decision was taken. Inclusion of the proposed text in the Committee's report meant that delegations could constantly revert to the article for the purpose of adding new categories of grave breaches. The principle of a comprehensive list was not at variance with the Philippine proposal which, for technical reasons, could not be considered before the fourth session of the Conference.

25. Mr. MISHRA (India) suggested that the second paragraph of the proposed note should be worded as follows: "Several representatives approved this proposal. Some others approved of it in principle, but were not sure of the language. The representatives who had indicated some objections ...".

26. The last paragraph seemed to have no connexion with the remainder of the note. It would perhaps be better to add the words "in the light of the discussions in the Ad Hoc Committee" at the end of the third paragraph.

27. Mr. FREELAND (United Kingdom), replying to a remark by the representative of Mexico, pointed out that at the current meeting he had only reverted to a concern which he had expressed at the sixtieth meeting (CDDH/I/SR.60). It was not his intention now to seek to block the inclusion of an article on the question raised by the Philippines if it were to be decided at the fourth session that an article along those lines was necessary. But he wished to dispel the impression created by the proposed text that there might be a reopening of discussion of article 74. For that reason, it was in his view undesirable to accept the suggestion made by the representative of Mexico to delete the last part of the third paragraph, which might encourage the belief that article 74 would have to be reconsidered because the Committee would have to decide at the fourth session whether to introduce a new paragraph into it.

28. He proposed the following new wording for the close of the third paragraph: "... it being understood that the question of including in the Protocol a provision for the treatment of such violations as grave breaches could be taken up at the fourth session". In order to take account of the amendment proposed by the representative of India, the words "in the light of the discussions in the Ad Hoc Committee" might be added.

29. Mr. GLORIA (Philippines) said that the suggestion made by the representative of Mexico was in line with what he himself had proposed. To the representatives who had criticized the way in which his proposal had been drafted, he would point out that it was the Committee's express responsibility to work out a form of words which would satisfy everybody, while at the same time bearing in mind that the issue before them was solely one of humanitarian law, and not one of political humanitarian law. He therefore agreed with the representative of Pakistan that article 74 must keep a certain measure of flexibility, since a great deal depended on the results of the Ad Hoc Committee's proceedings. He was not pressing for a decision to be taken there and then on his proposal, and he was entirely willing to wait for that to be done at the fourth session of the Conference.

30. Mr. MILLER (Canada) said that he had already stressed the need to show great circumspection in drafting article 74. He would be able to accept one or other of the two versions put forward by the United Kingdom representative. He would, however, be grateful to the representative of India if he did not press for the addition of the words "in the light of the discussions in the Ad Hoc Committee" at the end of the paragraph beginning with the words: "After a full discussion ...", since such action would be liable to endanger the work of that Committee.

31. Mr. EIDE (Norway) said that he could support the second version of the proposal made by the United Kingdom representative which seemed to him likely to lead to a consensus.

32. Mr. de ICAZA (Mexico) said that he approved the second version of the text proposed by the United Kingdom representative and supported by Norway; but, like the representative of Canada, he could not agree to the addition of the sentence suggested by India at the end of the third paragraph, which could prove prejudicial to the proceedings in the Ad Hoc Committee.

33. Mr. MISHRA (India) said he thought that it might be possible to reach a consensus on the basis of the second version of the United Kingdom text. If, however, the Committee did not agree to add the words "in the light of the discussions in the Ad Hoc Committee" at the end of the third paragraph, then logic indicated that a consensus would only be possible provided the final paragraph of the proposed text was deleted.

34. Mr. HUSSAIN (Pakistan) thought that what had caused some delegations to feel misgivings about accepting article 74 was the possibility of that article being reconsidered at a later stage. He suggested that the representative of the Philippines might be asked to submit his amendment to article 75 and not to article 74. The first part of the text proposed for inclusion in the Committee's report could perhaps then read: "Several representatives approved this proposal. Others, who had raised some objections, expressed their sympathy with the amendment". Reference should then be made to the fact that the representative of the Philippines had agreed to the discussion of his proposal being postponed to the fourth session of the Conference.

35. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that his delegation would be prepared to participate in a consensus in support of either the first or the second version of the text proposed by the United Kingdom representative. He was inclined to prefer the first version.

36. Mr. EL HASSEEN EL HASSAN (Sudan) noted that the Committee was virtually unanimous in accepting the principle on which the text proposed by the representative of the Philippines was based. It seemed to him premature, however, to include a text of that kind in article 74, since those concerned had not yet succeeded in specifying the weapons whose use was prohibited and would accordingly constitute a grave breach. As the question was currently being considered by the Ad Hoc Committee, it would be desirable to await the conclusions reached by it, but meanwhile there was nothing to prevent the Committee from taking advantage of the unanimous agreement which seemed to have emerged on article 74 by adopting it in its entirety.

37. Mr. ABI-SAAB (Egypt) proposed that, instead of adopting an incomplete article to allow for the subsequent addition of further categories, a final residual clause should be added to article 74 which might be worded as follows: "the other grave breaches specifically mentioned in the present Protocol". That was part of the amendment to article 74 that his delegation had introduced at an earlier stage.

38. Mr. FREELAND (United Kingdom) observed that the second version of the text proposed by him seemed to meet with the approval of almost all delegations. He thought that the text referred to in no way precluded the possibility of a separate article on the issue being worked out at the fourth session. It seemed that consensus might indeed be attained if, as helpfully suggested by the representative of India, it was decided to delete the last paragraph instead of adding the words "in the light of the discussions in the Ad Hoc Committee" at the end of the third paragraph.

39. Mr. MISHRA (India) said that he was satisfied with the text proposed for the third and fourth paragraphs of the note by the United Kingdom representative.

40. At the request of the representative of the Union of Soviet Socialist Republics, Mr. FREELAND (United Kingdom) read out the second version of the text proposed by him for the third paragraph, which would be worded as follows:

> "After a full discussion, it was suggested that no decision should be taken on this proposal at the present session, it being understood that the question of including in the Protocol a provision for the treatment of such violations as grave breaches could be taken up at the fourth session".

41. Mr. MISHRA (India) read out the text which he proposed for the second paragraph: "Several representatives approved this proposal. Some others, while approving of it in principle, were not sure of the language. The delegations which indicated some objections ...". The remainder of that paragraph would remain unchanged.

42. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he was unable to accept that text.

43. Mr. MISHRA (India), in response to a comment made by the representative of the United States of America, said that he could see no drawback in deleting the word "some" before the word "objections" at the end of his suggested wording.

44. Mr. MILLER (Canada) thought that the words "were not sure of the language", in the passage which the representative of India had read out, was too vague.

45. Mr. MISHRA (India) suggested the phrase "... were not in entire agreement with the drafting".

46. Mr. de ICAZA (Mexico), Rapporteur, said that the second paragraph of the text submitted by the Philippine delegation and amended by the Indian delegation did not directly concern the text of article 74 but reflected the discussion at the present meeting. Perhaps it could be left to the Rapporteur to revise the drafting of the text. The important thing was that the third paragraph should indicate clearly that the matter could be taken up at the fourth session.

47. Mr. OBRADOVIĆ (Yugoslavia), Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), Mr. EL HASSEEN EL HASSAN (Sudan) and Mr. GIRARD (France) considered that the Rapporteur should be entrusted with the drafting of the two paragraphs in the light of the discussion at the current meeting.

48. Mr. PARTSCH (Federal Republic of Germany) said that to avoid any ambiguity it should be recorded that some delegations had agreed with the spirit underlying the proposal but not with the proposal itself.

49. Mr. GIRARD (France) said that he had no objection to the second paragraph provided that the English word "objectives" was rendered in French by the word "mobiles". He had not expressed any doubts on how the proposal had been drafted, but his position on the subject had been completely negative.

50. After an exchange of views on a point of detail about the form of the paragraphs concerned, the CHAIRMAN said that, in the absence of any objections, he would consider that article 74 was adopted by consensus.

It was so agreed.[1/]

51. Mr. GIRARD (France) said that he was not objecting to the consensus which had been so rapidly announced but he would like to point out that if the text of article 74 had been put to a vote, his delegation would have abstained.

1/ For the text of article 74, as adopted, see the report of Committee I (CDDH/234/Rev.1, para.78).

Article 76 - Failure to act (concluded)

52. The CHAIRMAN requested the Committee to take up article 76 forthwith. He would then give the floor to delegations wishing to explain their position on the decision just taken.

53. Mr. MILLER (Canada), referring to paragraph 11 of the report of Working Group A (CDDH/I/324), said that he would like the words "should have" to be inserted between "which" and "enabled" in the English text of the last paragraph of article 76.

54. Mr. GIRARD (France) said that he had no objection to that amendment to the English text, but he insisted on retaining the term "leur permettant de conclure" in the French text rather than the literal translation "qui auraient dû leur permettre".

55. Mr. de ICAZA (Mexico), Rapporteur, said that the text in dispute had been discussed at length. He did not think it was possible to adopt divergent versions. He therefore thought that if the Canadian amendment proposed to the English text was adopted, the Spanish text would have to become "que deberían permitirles concluir" and the French text would have to read "qui auraient dû leur permettre de conclure".

56. Mr. GIRARD (France) said that he was sorry he had to insist on the French text remaining as drafted, although he realized that the English text might need amending. Any resulting difference between the two texts would at least not be a difference of substance.

57. Mr. MILLER (Canada) confirmed that his proposal amounted to saying in legal terms in the English text exactly what the existing French text said. It was impossible for the two versions to be strictly parallel.

58. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) thought that the addition of the suffix "бы" would be enough to bring the Russian text into line with the English text. That was just a minor drafting amendment.

59. The CHAIRMAN suggested that the Committee might adopt the text of article 76 with the amendments proposed in the English, Russian and Spanish versions.

Article 76 was adopted by consensus, with the amendments proposed in the English, Russian and Spanish versions.2/

60. The CHAIRMAN invited any representatives who might wish to do so to explain their position on articles 74 and 76.

2/ For the text of article 76, as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 83). Article 75 was included in article 74, paragraph 3 (f) (see the report of Committee I - CDDH/234/Rev.1, para. 79).

61. Miss POMETTA (Switzerland) said that her delegation had preferred not to oppose the consensus which had been reached on article 74. It had therefore not requested a vote on its proposal to delete that article (CDDH/I/303), but in any case it did not withdraw its objections to the article. The text would doubtless give rise to a wide divergence of interpretation and application.

62. Article 74 was based on wrong criteria and paragraph 5 included a provision basically foreign to the system of the Geneva Conventions which draft Protocol I was meant to develop.

63. The inclusion of regulations known as "The Hague Regulations" in a list of grave breaches was questionable. According to paragraph 3 of the article it was not the violation of one of those regulations that constituted a grave breach but the fact that the violation had been committed intentionally and had resulted in death or had caused serious bodily harm or injuries to health. That qualificative factor based on the result was incompatible with the very principles of The Hague law which provided that it was the act itself and not only the result of that act that constituted a violation. What should be thought of the principle of proportionality - the result of a bad compromise - when it was applied to an indiscriminate attack against the civilian population, civilian objects or installations containing dangerous forces?

64. Lastly, her delegation could not approve the inclusion of paragraph 5 which incorporated in the Protocol a notion foreign to the Geneva Conventions both as regards its source and the regulations governing it.

65. Article 74, conceived as a basis for national legislation and of a universal juridical system could, by its ambiguity, have serious consequences, and that was the reason for the strong opposition of the Swiss delegation.

66. Mr. FREELAND (United Kingdom) said that he had been glad to be able to join the consensus on article 74, which on the whole was satisfactory. His delegation had some misgivings, however, about paragraph 4, which seemed to include many superfluous provisions; in addition, it wondered whether the texts of sub-paragraphs (a), (b) and (c) were appropriate to be the subject of individual penal responsibility and whether they really fostered the achievement of the humanitarian aims of the instrument the Conference was preparing. Because those matters found their initiation and conception on Government policy, it might be wondered whether the accused could expect a fair trial. He therefore feared that individuals might suffer unduly and that consequently the grave breach might be weakened. His delegation had not wished, however, to stand in the way of the consensus.

67. It was hard to accept sub-paragraph (d); the difficulty arose in part from the wording of article 47 bis itself and from the coverage of sub-paragraph (a) of that article. It had been repeatedly pointed out that precision was essential in drafting texts on criminal matters, and article 47 bis simply was not sufficiently precise. In view of the reference to special arrangements proposed subsequently, however, some greater precision had been introduced.

68. Lastly, in his delegation's view, the protection arising from the reference in paragraph 2 of article 74 to article 42 bis extended only to persons found to be prisoners of war and to those whose status as such remained to be established; it did not extend to persons who had been found not to be prisoners of war.

69. Mr. BLOEMBERGEN (Netherlands) said that he had joined in the consensus but nevertheless wished his delegation's serious reservations about the introduction of the concept of war crimes into draft Protocol I, to appear in the summary record. He did not see why some members thought it necessary to introduce the legal principles applied at Nürnberg into the legal rules of the Geneva Conventions, but he hoped that the fact of regarding grave breaches of those Conventions as war crimes would never be made an excuse for anyone to evade the application of the four Geneva Conventions of 1949. He shared the misgivings expressed by the United Kingdom representative in regard to paragraph 4.

70. Mr. PARTSCH (Federal Republic of Germany) said that he wished first of all to pay a tribute to Mr. Hussain, Chairman of the Working Sub-Group, who had directed discussions of exceptional difficulty in a masterly fashion.

71. His delegation, too, had found it difficult to accept the passage relating to the protection of works of art and feared that the application of those measures in practice might run into serious difficulties. The provisions of paragraph 4 (c) also raised a real difficulty, because the text did not follow the usual form. He found paragraph 5 unsatisfactory and had only been able to join in the consensus by considering that it was clearly understood that the words "application of the Conventions and of the present Protocol" meant their full and complete application.

72. If a vote had been taken, his delegation would have had to abstain at least on the two provisions he had mentioned.

73. Mr. KUNUGI (Japan) said that his delegation foresaw some practical difficulties at the stage of implementation, if all the provisions of paragraph 4 were adopted by the Conference.

74. Some of the matters concerned came within the province of political responsibility, in that decisions rested with the Heads of State or Governments. Other difficulties arose from the fact that the implementation of those texts would run counter to the basic principle "nulla poena sine lege"; that consideration would apply for instance to "unjustifiable delay in repatriation of civilians".

75. According to the provisions of the fourth Geneva Convention (Article 134), the High Contracting Parties would "endeavour" to ensure the return of all internees; there was no question, however, of forbidding any delay in the repatriation of civilians.

76. He wished to place on record his reservations on paragraph 5 of article 74. Although the question had been debated at length, in the Working Sub-Group and in Working Group A, his delegation was not clear about the meaning of that provision or the need for it to appear in draft Protocol I. It had therefore had some difficulty in accepting the text of paragraph 5, although it had not wished to stand in the way of a consensus.

77. Mr. BLIX (Sweden) said that, if article 74 as a whole had been put to the vote, his delegation would not have been able to vote in favour of it. It was clear that few delegations found the article satisfactory; that was perhaps a sign that a reasonable compromise had been found. He understood that States might want to have a relatively narrow definition of offences that would justify universal jurisdiction and extradition; but the list should have been built on a consistent philosophy of what should generally be regarded as grave breaches rather than on pure political expediency.

78. His delegation was much concerned about the absence of reference to a variety of breaches, especially of some rules of combat, which his delegation considered serious. There was an incongruence between various elements included in the list, some being not of major importance, while other more important elements were missing.

79. In view of the deficiencies in the list, it seemed necessary to stress that the significance of the label "grave breaches" was chiefly to make such breaches extraditable offences for which there was universal jurisdiction. That must not be used as a ground for pretending that other breaches were insignificant. Indeed, States would be obliged to ensure good-faith implementation of all the rules of Protocol I and to provide for sanctions regardless of whether or not the breaches were grave. If States felt that the provisions of Protocol I were not sufficiently clear they could clarify them in their national legislation.

80. Mr. de BREUCKER (Belgium) pointed out that grave breaches implied a certain degree of criminal intent and were clearly committed in violation of the Geneva Conventions and Protocol I. In addition to breaches, the material and moral factors together must give sufficient grounds for indictment in relation to the prohibitions listed in the Protocol. In other words, the text of article 74 should be half-way between the provisions of the Protocol to which it referred - as stated in paragraph 3 - and what States would have to insert in their penal codes. Moreover, the text should be specific enough to be used by universal jurisdiction. Hence the need for strictness in terms, a need which had been respected in paragraphs 1, 2 and 3, but less in paragraph 4, especially in sub-paragraph (c), the wording of which was not sufficiently clear to allow individuals guilty of discriminatory practices to be charged.

81. His delegation would have preferred the alternative text appearing in paragraph 7 of the Notes (CDDH/I/324).

82. With regard to paragraph 4 (d), once it had been decided to protect historic monuments and places of worship, it had seemed necessary to determine in what conditions their deliberate destruction would really be a grave breach. The reference to a special arrangement within the framework of a competent international organization seemed appropriate. His delegation regarded that as an allusion to the United Nations Educational, Scientific and Cultural Organization and to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

83. Similarly, the application of the concept of a grave breach in depriving a person protected by the Geneva Conventions of his right to fair trial merited unconditional support and was in line with his delegation's proposals on the same subject in Committee III.

84. Lastly, the use in paragraph 5 of the expression "war crimes", which was out of place, could in no way interfere with the application of the four Geneva Conventions of 1949 and Protocol I, or deprive anyone of the benefit of those instruments.

85. Mr. GRAEFRATH (German Democratic Republic) said that, although he was in favour of adopting a system of repression valid for all Parties to the Protocol, he noted that the breaches listed in article 74 included only certain grave violations and left out other important cases. He had been able to accept the consensus on paragraph 5; for his delegation, war crimes were war crimes, whether the rules invoked were those of The Hague Convention or those of the Geneva Conventions.

86. Miss EMARA (Egypt) said that her delegation had joined in the consensus in a spirit of compromise. It would have preferred the categories protected by article 65 of draft Protocol I, with the exception of nationals of a party to the conflict, to be included in paragraph 2 of article 74.

87. Her delegation had reservations concerning paragraph 3 (c). The text would have to be interpreted in such a way as to take account of the provisions of article 49, adopted by consensus by Committee III. Attacks against works and installations containing dangerous forces constituted a grave breach when they caused severe losses among the civilian population or the destruction of civilian objects.

88. With regard to paragraph 3 (f), her delegation recognized as distinctive emblems only those specifically mentioned in the Geneva Conventions and the Protocols.

89. Mr. ALEXIE (Romania) said that he had supported article 74 because he thought that it would help to reinforce the protection of victims against an aggressor. The article did not cover all categories of grave breaches, however, and, since national legislation took precedence, the text should not conflict with municipal law.

90. In adopting a common attitude, the members of the Committee were contributing to co-operation between States.

91. Mr. FERRARI BRAVO (Italy) said that he had joined in the consensus on article 74, which was the fruit of a difficult compromise. He associated himself with those who had congratulated the Chairman of the Working Sub-Group and the Rapporteur.

92. Article 74 was not wholly satisfactory; it would be difficult to introduce the provisions of paragraphs 4 (a), (b) and (c) and paragraph 5 into the national law of some countries. However, his delegation supported that acceptable compromise.

93. Paragraph 4 (d), the text of which had been altered several times, was an important affirmation of principle for the future.

94. Mr. PILAVACHI (Greece) said he had joined in the consensus on article 74 but would like it to be made clear that the provisions of paragraph 5 would not be prejudicial to Protocol I.

95. Mr. MILLER (Canada) recognized that Working Group A had drafted article 74 with great care. He had been able to join in the consensus although not without some misgivings: the provisions of paragraph 4 in particular contained elements which reflected the

political realities of the present-day world and it would be difficult to introduce such rules of law into national legislations.

96. He particularly wished to associate himself with the Netherlands representative's observations concerning paragraph 5.

The meeting rose at 6 p.m.

SUMMARY RECORD OF THE SIXTY-SECOND MEETING

held on Friday, 4 June 1976, at 12.5 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL II (continued)*

Report of Working Group B (CDDH/I/323)

Article 36 - Measures for execution (concluded)

1. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, said that all the corrections made to the text of the report at the meeting of the Drafting Committee which had just ended had been noted and they would be faithfully reproduced in all the languages.

2. He read out the text approved by Working Group B for article 36:

> "Each Party to the conflict shall take the necessary measures to ensure observance of this Protocol by its military and civilian agents and persons subject to its supervision."
>
> Article 36 was adopted by consensus.1/

Article 37 - Dissemination (resumed from the fifty-ninth meeting)

3. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, read out the text of article 37 as approved by Working Group B:

> "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 instruction, and to promote the study thereof by the civilian population, 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 control."

---

* Resumed from the fifty-ninth meeting

1/ For the text of article 36 as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 106).

4. Mr. CALERO RODRIGUES (Brazil) drew the Committee's attention to a difference between the wording of the English and the French texts, which created a difference of substance. The phrase "dès le temps de paix" in paragraph 1 of the French text implied that the Protocol would be disseminated, not solely in time of peace, whereas the English phrase "in time of peace" might give the impression that there was no obligation to disseminate the Protocol in time of conflict.

5. The CHAIRMAN, replying to a question by Mr. JOMARD (Iraq), said that there was no need to reconsider the substance of article 37; it was merely a matter of translation.

6. Mr. de ICAZA (Mexico) disagreed; the difference in the wording did indeed create a difference of substance. He asked whether the same difference occurred in article 72 of draft Protocol I, on which article 37 was based.

7. Mr. KAMMER (Legal Secretary) said that the expression "en temps de paix" had been used in the French text of article 72 and the expression "in time of peace" in the English text of that article.

8. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, said that the French text would be brought into line with that of article 72.

9. Mr. CALERO RODRIGUES (Brazil) said that, although his delegation thought that it was legitimate to oblige the High Contracting Parties to disseminate the Protocol as widely as possible in time of peace, it felt that the ways and means of disseminating it should be left to the choice of each Party. It therefore asked for a separate vote to be taken on the phrase "and in particular to include the study thereof in their programmes of military instruction, and to promote the study thereof by the civilian population".

10. Mr. AMIR-MOKRI (Iran) and Mr. JOMARD (Iraq) supported that request.

11. Mr. AMIR-MOKRI (Iran) and Mr. de BREUCKER (Belgium) pointed out an error in the French text of paragraph 2: the word "ses" should be replaced by "leurs" and the word "son" by "leur" Paragraph 2 would then read:

> "2. En période de conflit armé, les parties au conflit prendront les mesures propres à faire connaître les dispositions du présent Protocole à leurs agents militaires et civils et aux personnes soumises à leur contrôle."

12. Mr. MILLER (Canada) pointed out, similarly, the word "its" in the English text of paragraph 2 of article 37 should be replaced by "their"; the final phrase would then read "... of their military and civilian agents and persons subject to their control.".

13. Mr. TORRES AVALOS (Argentina) said that, in the Spanish version of article 37, the word "ya" in the expression "ya en tiempo de paz" in paragraph 1 was superfluous.

14. Mr. MURILLO RUBIERA (Spain) said that he was against the deletion of the word "ya", which introduced an additional shade of meaning.

15. Mr. de ICAZA (Mexico) agreed with the Spanish representative. It was a matter of substance, not simply a question of drafting. In any case, the various versions of that article, which were based on article 72 of draft Protocol I, must be brought into line.

16. Mr. GIRARD (France) said that he considered the expression "dès le temps de paix" to be satisfactory in the French text: it was better to specify that the High Contracting Parties undertook to disseminate the Protocol as soon as possible, without awaiting the outbreak of hostilities. To replace that expression by the term "en temps de paix" would be to introduce a limitation.

17. Mr. MURILLO RUBIERA (Spain) agreed that it was a question of substance; he was in full agreement with the French representative.

18. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, considered that the expression "en temps de paix" was sufficient since it balanced the term "en période de conflit armé" in paragraph 2.

19. Mr. CALERO RODRIGUES (Brazil) agreed with the Yugoslav representative.

20. Mr. de ICAZA (Mexico) reiterated his preference for the retention of the word "ya".

21. The CHAIRMAN put to the vote the deletion of the phrase in paragraph 1: "and in particular to include the study thereof in their programmes of military instruction, and to promote the study thereof by the civilian population".

The deletion was approved by 30 votes to 25, with 2 abstentions.

22. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, read out article 37 as amended.

23. Mr. GLORIA (Philippines) asked to be told the exact significance of the words "agents" and "control" appearing in article 37, paragraph 2.

24. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, replied that the words were self-explanatory.

25. Mr. AL-FALLOUJI (Iraq) said he was against replacing the words "its control" by "their control" at the end of paragraph 2. In any country, people could be subject only to a single control, since there was only one Government. He was therefore unable to join in a consensus on article 37.

26. Mr. GLORIA (Philippines) made an oral proposal for a slight drafting amendment to the last three lines of article 37, paragraph 2.

27. Mr. de ICAZA (Mexico) said that, on principle, and under rule 29 of the rules of procedure, he could neither discuss nor decide upon a text which had not been circulated beforehand in the various working languages.

28. Mr. MISHRA (India), referring to the reservations made by the delegation of Iraq, said that he had some reservations on all the articles of draft Protocol II. He had raised no objection when article 36 had been approved by consensus, because he felt that the approval of an article by consensus in Committee did not oblige delegations to approve draft Protocol II.

29. Mrs. BUJARD (International Committee of the Red Cross), replying to the Philippine representative's request for an explanation, said that the word "agents" had been used in order to take into account the special nature of the authorities of the insurgent party, who were not representatives appointed in conformity with national legislation but self-established de facto authorities.

30. Mr. HUSSAIN (Pakistan) agreed with the representative of the Philippines that the text of article 37 should be made more explicit, so that it could be perfectly understood by those responsible for interpreting and applying it.

31. Mr. de BREUCKER (Belgium) said that he was surprised that at that advanced stage of the work Committee members should indulge in an exegesis of texts on which the Committee was required to decide.

32. The text of article 37 was clear: "military agents" had been used in preference to "armed forces" because the latter term covered only Government armed forces, whereas the provision in question also concerned disloyal members of the armed forces. Similarly, the term "civilian agents" had been preferred to "officials" because, there again, some officials might have gone over to the other side. The proper criterion was that of responsibility: the term "military and civilian agents" covered people with responsibilities in the military and civilian fields.

33. Mr. de ICAZA (Mexico) supported by Mr. MISHRA (India), moved the adjournment of the meeting.

The motion was adopted.

The meeting rose at 1 p.m.

SUMMARY RECORD OF THE SIXTY-THIRD MEETING

held on Friday, 4 June 1976, at 3.20 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOL II (CDDH/1) (continued)

Report of Working Group B (CDDH/I/323) (concluded)

Article 37 - Dissemination (concluded)

1. Mr. HUSSAIN (Pakistan) withdrew the objections he had put forward at the sixty-second meeting (CDDH/I/SR.62) to the words "military and civilian agents" in article 37, paragraph 2 (CDDH/I/323).

2. The CHAIRMAN took note of the reservations entered by the representatives of India and Iraq at the sixty-second meeting in respect of the proposed text, and said that if there were no other objections, he would consider that the text in question could be adopted by consensus.

Article 37 was adopted by consensus.[1/]

Article 38 - Special agreements (concluded)

3. Mr. JOMARD (Iraq) maintained the reservations he had entered at the sixty-second meeting with respect to article 38 (CDDH/I/323).

4. Mr. MUDARRIS (Saudi Arabia) said that he was flatly opposed to the proposed text, which in his view could have untold consequences. There could be no question of attaching political and military obligations to humanitarian law: it must be observed and implemented unconditionally. The suggested article, however, ran counter to humanitarian law and would stand in the way of general observance of the Geneva Conventions and Protocol I.

5. Mr. NASUTION (Indonesia) maintained his view that article 38 was unnecessary. Once the High Contracting Parties had signed and ratified the Conventions and the Protocol, they would be under an obligation to observe them. The entry into force of those instruments should therefore be governed by the relevant domestic law, and not by agreements or reciprocal declarations.

1/ For the text of article 37 as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 106).

6. Mr. ABDUL-MALIK (Nigeria), Mr. AMIR-MOKRI (Iran) and Mr. MOHIUDDIN (Oman) wished to be associated with the reservations entered by the previous speakers.

7. Mr. Kun PAK (Republic of Korea) considered that the expression "reciprocal declarations" in article 38, was synonymous with joint or concerted declarations. Seen in that light, article 38 might indeed have serious consequences. His delegation, therefore, could not but endorse the reservations already entered.

8. The CHAIRMAN took note of the reservations made by the seven delegations which had spoken, and suggested that the Committee should adopt the proposed text by consensus.

9. Mr. PARTSCH (Federal Republic of Germany) said that his delegation would join in the consensus on the understanding that "reciprocal declarations" was not taken to mean joint or concerted declarations, but declarations made unilaterally and in parallel.

Article 38 was adopted by consensus.[2/]

Article 39 - Co-operation in the observance of the present Protocol (concluded)

10. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, said that Working Group B had given prolonged consideration to article 39, but without coming to an agreement. No compromise having been reached, the text submitted to the Committee (CDDH/I/323) was full of square brackets. It was therefore for the Committee to decide whether the article should be kept or not, and if so, what its terms should be.

11. Mr. PICTET (Vice President, International Committee of the Red Cross) said he wished to refer to article 39 of draft Protocol II which had given rise to such complicated debates and the results of which caused the ICRC serious concern.

12. Having taken an active part in the Diplomatic Conference of 1949 for the Establishment of International Conventions for the Protection of Victims of War, he had seen the predecessors of those now present solemnly sign the Geneva Conventions and the famous common Article 3, which already marked a considerable advance in the development of humanitarian law, but which had been only a first step towards protecting the victims of non-international conflict. Should those who had succeeded the law makers of 1949 - who deserved well of humanity - now take a retrograde step? He did not wish to believe that because it would be a deplorable setback and an abdication.

2/ For the text of article 38 as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 110).

Humanitarian law must never retreat. It should not be forgotten that the present Diplomatic Conference had been convened to reaffirm and develop humanitarian law and not to weaken or diminish it.

13. The ICRC, in order to perform its difficult and often thankless task, needed a minimum of written legal bases to work on. The text of article 39, the draft of which was before the Committee and was so full of square brackets, reflected the full debates which had taken place and a certain marked interest of delegations, but it seemed to the ICRC that it raised real difficulties and, frankly, did not give the ICRC satisfaction.

14. Thus, a provision calling for the joint agreement of the parties to the conflict would paralyse any appeal, because experience had shown how difficult it was - in fact almost impossible - to conclude an agreement during hostilities, especially between parties that did not recognize one another. In practice such appeals had always been unilateral and independent, even if following action by the ICRC they finally became concordant. Furthermore, the ICRC thought that to mention national Red Cross Societies was not a happy idea or one likely to facilitate the activity of the Societies - that was the subject of article 35 which the Committee would soon examine.

15. After a careful study, the ICRC had reached the conclusion that the proposed text (CDDH/I/323) should be dropped and not put to the vote. Rather than a complicated and obscure article and one of problematical application, the ICRC suggested that the simple and modest wording of Article 3 common to the Geneva Conventions of 1949 should be used: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict", but if an even more simple phrase was desired - "The ICRC may offer its services. etc." or such as that proposed in document CDDH/I/GT/103: "The International Committee of the Red Cross may offer its services to the parties to the conflict." The ICRC would have no objection to that. In short, it was simply a question of confirming the traditional right of initiative of the ICRC without imposing any obligation on the parties which always remained free to accept or not to accept the offer.

16. The assistance of the ICRC in applying the Geneva Conventions had been recognized for the first time in the Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War. In 1949 such assistance had been mentioned in the four Conventions and also in common Article 3 in the case of non-international

armed conflicts. Article 5 of draft Protocol I adopted in Committee at the second session of the present Diplomatic Conference, also mentioned the ICRC and it was hard to understand the absence of any mention of the ICRC in draft Protocol II - such disequilibrium, such silence, could not be explained.

17. Common Article 3 certainly existed: it had not been weakened by draft Protocol II, article 1 of which specified that it did not "modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949." But some had deduced that the express mention in draft Protocol II of the offer of the services of the ICRC was superfluous on the grounds that it went without saying - but to quote Talleyrand's dictum - among the things that went without saying there were some which went even better if they were said.

18. Indeed, draft Protocol II expanded common Article 3 considerably - it consisted of 40 basic articles instead of one. The ICRC was mentioned in common Article 3, but did not appear once in the Protocol of 40 articles.

19. Lastly, it should not be forgotten that draft Protocol II did not cover all the cases envisaged in common Article 3 - its field was more restricted.

20. He felt that he could say that during the quarter of a century that had elapsed since 1949 the ICRC had not taken advantage of the fact that it was mentioned in common Article 3 and had never attempted to interfere in matters concerning the sovereignty of States. An error had perhaps been made here and there - that was human as in all actions in which man intervened. But that was purely accidental. The ICRC had never deviated from its policy of neutrality, its impartiality or its discretion. No one present had ever questioned that fact. The ICRC had done its best in the many armed conflicts which had broken out in order to relieve distress and to assist Governments to solve the delicate problems to which detention gave rise. He firmly believed that all States needed a moderating and apolitical body and that their interest lay in allowing the ICRC to act within its limited sphere of competence.

21. The ICRC was convinced that its appeal would be heard by all delegations which during the course of three sessions had shown proof of their spirit of humanity and of their desire to support the relief action of the ICRC. He thanked all delegations for their understanding.

22. The CHAIRMAN said he thought that as article 39 had been fully discussed in Working Group B there was no need to reopen the debate, and invited the Committee to take a decision on the ICRC proposal.

23. Mr. PICTET (Vice President, International Committee of the Red Cross) replying to a question by Mr. HUSSAIN (Pakistan), explained that ICRC's proposal was for the Committee to adopt either the provision in paragraph (2) of Article 3 common to the Geneva Conventions of 1949, or the more concise wording contained in working paper CDDH/I/GT/103.

24. Mr. HUSSAIN (Pakistan) said he was prepared to support the text contained in the working paper, as it mentioned only the ICRC. He wished to take the opportunity of reiterating his country's confidence in work of the ICRC, with which there was every reason to be satisfied.

25. Mr. de ICAZA (Mexico) said that he had listened to the statement by the Vice President of the ICRC with all the greater pleasure in that his delegation had submitted in Working Group B a proposal whereby the parties to a conflict might call upon the ICRC to help in the observance of the provisions of Protocol II, and the ICRC might also offer its services to the parties in question.

26. Nevertheless, the text proposed by Working Group B deserved attention. The parts in square brackets were important, particularly those referring to national Red Cross Societies. Besides, the two alternative texts proposed by the ICRC were to be found almost word for word in the last sentence of the Working Group's proposal.

27. However that might be, the Committee was no longer concerned with discussing the substance but had to take a decision on whether to keep article 39 or not.

28. The CHAIRMAN, after a brief procedural discussion, ruled that the ICRC proposal should be put to the vote, i.e. the text appearing in working paper CDDH/I/GT/103, and asked if anyone wished to challenge that decision.

29. Mr. MISHRA (India) said he considered that, as the Committee no longer had to decide on the draft submitted by Working Group B (CDDH/I/323) but on a new text, it should be allowed an interval of twenty-four hours before taking a decision.

30. Mr. de BREUCKER (Belgium), speaking on a point of order, said that the two texts proposed by the ICRC were familiar to all. One was an extract from Article 3 common to the Geneva Conventions of 1949 to which members could easily refer. The other was the text reproduced in working paper CDDH/I/GT/103. The Committee could therefore reach a decision in full awareness of what was involved.

31. Mr. MILLER (Canada), speaking on a point of order, observed that the text proposed by the ICRC was not new, since it had already been confirmed in the last sentence of article 39 (CDDH/I/323), which had been available to all delegations for several days.

32. His delegation shared the feelings of concern of the ICRC about the text of article 39, submitted by Working Group B. It was indeed to be feared that it represented a retreat from what had already been achieved in Article 3 common to the Geneva Conventions of 1949. Such a retrograde step would be unacceptable. The high spirit of humanitarianism in which ICRC fulfilled its task must be reaffirmed in Protocol II. The best solution would be to reiterate the provision relating to ICRC in common Article 3. In the light of the Working Group's discussions, however, his delegation considered that it would be preferable to vote on the text submitted in working paper CDDH/I/GT/103.

33. Mr. MISHRA (India) said he wished to object to the procedure followed in the discussion. The Committee could not be called upon to decide there and then on a text which had not been agreed to in the Working Group and which, in addition, appeared between square brackets. Any fresh proposal, if it was to receive proper consideration, should be submitted in a document circulated bearing a Committee I symbol. Or was it to be understood that all working papers were Committee documents and, if so, were they all to be put to the vote?

34. Mr. HUSSAIN (Pakistan), speaking on a point of order, pressed for a vote to be taken on the text reproduced in working paper CDDH/I/GT/103 without further delay.

35. The CHAIRMAN said that all documents produced by the Working Group could be considered Committee documents and that, in the present case, the vote would concern only the text submitted in working paper CDDH/I/GT/103 and was repeated in the last sentence of the text submitted in document CDDH/I/323. Nobody was unaware of its purport.

36. Miss. POMETTA (Switzerland) moved the suspension of the meeting.

The motion for suspension was adopted by 41 votes to 2, with 5 abstentions.

The meeting was suspended at 4.20 p.m. and resumed at 4.35 p.m.

37. The CHAIRMAN, in reply to the point raised by the representative of India, asked the Committee whether it approved his decision to put to the vote the text suggested by the ICRC (and repeated in the last sentence of article 39 reproduced in document CDDH/I/323): "The International Committee of the Red Cross may offer its services to the parties to the conflict" (the word "also" being deleted).

The Chairman's decision was approved by 23 votes to 22, with 6 abstentions.

38. The CHAIRMAN put the text of article 39, as amended, to the vote.

Article 39, as amended, was adopted by 34 votes to 17, with 2 abstentions. 3/

39. The CHAIRMAN, replying to Mr. Kun PAK (Republic of Korea), who explained that his delegation would have preferred to adopt the text proposed by Canada and added that his country had consistently supported ICRC's activities, and to Mr. de ICAZA (Mexico) on a point of order, reminded the Committee that explanations of votes would be given only on the following Monday, after consideration of the reports before the Committee.

New article 10 (CDDH/225 and Corr.1, CDDH/226 and Corr.2; CDDH/I/317/Rev.2) (concluded)

40. Mr. OBRADOVIC (Yugoslavia) Chairman of Working Group B, recommended that the Committee should adopt new article 10 paragraph by paragraph, thus following the same procedure as that used at the sixty-first meeting (CDDH/I/SR.61) in dealing with earlier articles.

41. Mr. TORRES AVALOS (Argentina) warned the Committee of the dangers of adopting paragraph 2 by consensus, and asked that a separate vote should be taken on paragraph 2 (c).

3/ For the text of article 39 as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 114).

Paragraph 1

42. Mr. GLORIA (Philippines) pointed out that article 10 had no title, and that paragraph 1 would have no point unless it was made into a title. The Committee should settle that question before referring the text to the Drafting Committee.

43. The CHAIRMAN explained that the Drafting Committee of the Conference was alone responsible for the question of titles.

44. Mr. GRAEFRATH (German Democratic Republic) said that, if he understood correctly, the Philippine delegation was proposing that paragraph 1 should be deleted and turned into a title. That would in fact raise an issue of substance, upon which the Committee would have to decide.

45. Mr. de BREUCKER (Belgium), supported by Mr. BETTAUER (United States of America), observed that titles had no legal force. If the Working Sub-Group of which he was Chairman had wished to provide a title, it would quite simply have chosen: "Prosecution and punishment of criminal offences relating to the armed conflict". In any event, paragrpah 1 indicated what the whole point of new article 10 was and there could be no question of deleting it.

46. Mr. GLORIA (Philippines) said he questioned the validity of that line of argument. The Committee could not take the risk of adopting the article without a title, since it would be the only case in the whole of Protocol II. His delegation had already proposed in the Working Sub-Group that paragraph 1 as a whole should be turned into a title.

47. Mr. de ICAZA (Mexico), speaking as Rapporteur, assured the Phillippine representative that his delegation's point of view would be recorded in the report of Committee I. If the Committee wanted to adopt a title, it could take the title proposed by the representative of Belgium; but that would not necessarily involve the deletion of paragraph 1. If the Drafting Committee thought the title too long, it could always change it.

48. Mr. GIRARD (France) said that he mistrusted long titles running over several lines, and suggested the phrase "Penal prosecutions", which was unambiguous and quite sufficient.

49. Mr. MILLER (Canada) said that he was in favour of keeping paragraph 1 as submitted by Working Group B, since it had the merit of being simple and direct and indicated what the article applied to. In the Anglo-Saxon system, anyway, titles never formed part of the article itself. But if the Committee still wished to adopt a title, the phrase "Penal prosecutions" would do perfectly well; it had indeed been proposed by the ICRC itself.

50. Mr. KEITH (New Zealand) welcomed the Canadian proposal and agreed with the delegations which wanted to keep paragraph 1. In regard to the title, the Committee might use the title of article 9, "Principles of penal law", which covered a wider field than "Penal prosecutions" and was closer to the wording of the various paragraphs.

51. Mr. de BREUCKER (Belgium) agreed with the representative of Canada regarding the need for paragraph 1 and reminded the Committee that his delegation had requested its inclusion in the text. In regard to the title, the French proposal was the best, since it presented the matter from the standpoint of procedure, which was in fact the point at which the rules of penal law came into play.

52. Mr. de ICAZA (Mexico) said that he had never requested the deletion of paragraph 1, which he regarded as indispensable. The sole purpose of his proposal was to avoid a debate on matters of drafting. There were too many delegations for the Committee itself to be capable of drafting a title. The only solution was to adopt paragraph 1 as it stood or to suspend the meeting in order to draft a new paragraph.

53. Mr. EIDE (Norway) thought it best for the Committee to decide first of all on the text as submitted (CDDH/I/317/Rev.2) and then to refer the various suggestions about the title to the Drafting Committee.

54. Mr. KUSSBACH (Austria) agreed with the previous speaker and supported the title proposed by the French delegation. If the delegation of New Zealand would agree to withdraw its proposal, the best course would be to ask the Committee if it opposed the French proposal.

55. Mr. KEITH (New Zealand) withdrew his proposal.

56. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) considered paragraph 1 essential. As regards the title, the Committee should not accept any of the proposals submitted by the various delegations. At previous sessions it had never taken any decisions on the drafting of titles. The best course was to refer the question of the title to the Drafting Committee, and to record delegations' observations in the report or in the summary record.

57. Mr. FREELAND (United Kingdom), noting that a wide variety of opinions had been expressed on the title, requested that the text of paragraph 1 should be put to the vote and that the Drafting Committee's attention should be drawn to the proposals regarding the title.

58. The CHAIRMAN suggested that the text of paragraph 1 should be adopted and that the question of the title of article 10 should be referred to the Drafting Committee.

Paragraph 1 was adopted by consensus, and the question of the title of article 10 was referred to the Drafting Committee.

Paragraph 2 - preamble

The preamble to paragraph 2 was adopted by consensus.

Paragraph 2 (a)

Paragraph 2 (a) was adopted by consensus.

Paragraph 2 (b)

Paragraph 2 (b) was adopted by consensus.

Paragraph 2 (c)

59. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, pointed out a typing error towards the end of foot-note 1, where the text should read "of sub-paragraph (c)" and not "of sub-paragraph (d)". He also reminded the Committee that some delegations had called for the deletion of paragraph 2 (c) if the words "under national or international law" were retained.

60. Mr. MURILLO RUBIERA (Spain) suggested that the meaning of the words "national law" needed to be more closely defined. Did they refer only to national law in force before the outbreak of hostilities and still applicable during the conflict?

61. Mr. de ICAZA (Mexico), speaking on a point of order, observed that the text of paragraph 2 (c) had already been discussed at great length. In his opinion the Committee should confine itself to taking a decision on the substance of the paragraph, on the understanding that each delegation would be able, when explaining its vote, to indicate whether it accepted the wording of the text as it stood.

62. Mr. GRAEFRATH (German Democratic Republic) proposed that the words "under national or international law" should be replaced by the words "according to the applicable domestic or international law".

63. Mr. REIMANN (Switzerland) said that he would not oppose the text being put to the vote, but that he could not agree to the proposal by the representative of the German Democratic Republic. Since the present debate was not concerned with the substance of the text, he would refrain from explaining his position.

64. The CHAIRMAN put paragraph 2 (c) to the vote.

Paragraph 2 (c) was adopted by 35 votes to 3, with 4 abstentions.

Paragraph 2 (d)

65. Mr. GLORIA (Philippines) proposed that in the English text of paragraphs 2 (d) and (e) the word "everyone" should be replaced by the word "anyone".

66. Mr. PARTSCH (Federal Republic of Germany) said that the Working Group had decided on the word "everyone" because it was generally used in the Geneva Conventions.

67. Mr. GLORIA (Philippines) replied that the word "anyone" was the preferred term in the penal legislation of civilized countries, whatever the term used in the Conventions.

68. Mr. BLIX (Sweden) supported the proposal by the representative of the Philippines, and noted that the representative of the Federal Republic of Germany had not in fact objected to the proposal.

69. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said it should be made clear that the amendment related solely to the English text.

Paragraph 2 (d) was adopted by consensus.

Paragraph 2 (e)

Paragraph 2 (e) was adopted by consensus.

Paragraph 2 (f)

Paragraph 2 (f) was adopted by consensus.

Paragraph 3

Paragraph 3 was adopted by consensus.

Paragraph 4

70. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, said that some delegations had entered reservations to article 10, paragraph 4.

71. Mr. MILLER (Canada) said that the text of paragraph 4 represented a compromise which did not appear to satisfy some delegations. In order to avoid a separate vote on some of the wording in the paragraph, he suggested, on the basis of consultations with a number of delegations, that the whole paragraph should be deleted and that at the end of paragraph 6 the following sentence should be added: "In no such case shall a death penalty be carried out until the end of the armed conflict."

The proposal was adopted by consensus.

Paragraph 5

72. Mrs. LISBOA DE NECER (Venezuela) said that her delegation could not associate itself with the adoption by consensus of paragraphs 4 and 5 concerning the death penalty, since it was prohibited by the Venezuelan Constitution.

73. The CHAIRMAN asked if any delegation insisted on a separate vote on the words "and mothers of young children", which were in square brackets.

74. Mr. KUNUGI (Japan) formally requested that a separate vote should be taken on those words.

The Committee decided to retain the words "and mothers of young children" by 37 votes to 2, with 9 abstentions.

Paragraph 5 was adopted by consensus.

Paragraph 6

75. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that the Russian text did not fully correspond to the English and French texts. His delegation would therefore submit a revised text to the Secretariat.

Paragraph 6, with the additional sentence proposed earlier by the representative of Canada, was adopted by consensus.

Paragraph 7

Paragraph 7 was adopted by consensus.

Paragraph 8

Paragraph 8 was adopted by consensus.

New article 10 as a whole, as amended, was adopted by consensus. 4/

New article 10 bis (CDDH/I/302, CDDH/I/320/Rev.2)

76. Mr. OBRADOVIĆ (Yugoslavia), Chairman of Working Group B, said that Committee I could not take a decision on the text of the article, since Committee III had not yet adopted all the provisions in Part V of draft Protocol II.

77. The CHAIRMAN proposed that the Committee should take note of the report of Working Group B. When Committee III had completed its consideration of the provisions in Part V, Committee I could adopt the text of new article 10 bis.

It was so agreed.

78. The CHAIRMAN thanked the members of the Committee for their valuable co-operation.

79. Mr. MILLER (Canada) congratulated the Chairman for having enabled the Committee to complete its work successfully.

80. Mr. de ICAZA (Mexico) and Mr. JOMARD (Iraq) associated themselves with the congratulations addressed to the Chairman.

The meeting rose at 6 p.m.

4/ For the text of new article 10 as adopted, see the report of Committee I (CDDH/234/Rev.1, para. 95).

SUMMARY RECORD OF THE SIXTY-FOURTH MEETING

held on Monday, 7 June 1976, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Articles 74 and 76 of draft Protocol I, articles 36 to 39 and new article 10 of draft Protocol II, adopted by Committee I (CDDH/I/306, CDDH/I/317/Rev.2, CDDH/I/320/Rev.2, CDDH/I/321/Rev.1, CDDH/I/323/Rev.1, CDDH/I/324)

Explanations of vote

1. The CHAIRMAN invited representatives who wished to explain their votes on the articles adopted by the Committee to do so. The articles concerned were articles 74 and 76 of draft Protocol I and articles 36 to 39 and new article 10 of draft Protocol II.

2. Mr. NGUYEN VAN HUONG (Democratic Republic of Viet-Nam) said that his delegation, being too small to split up, had unfortunately not been able to participate in the proceedings of Committee I and its Working Groups. He expressed his gratification at the agreement reached on new article 74 (CDDH/I/324), which contained a well-chosen list of grave breaches of Protocol I. He noted, however, that some grave breaches of importance had been omitted.

3. Referring first to breaches of articles 33, 34 and 46, which had been adopted by Committee III at the second session and whose purport he described, he observed that those articles reaffirmed the principles of the Declaration of St. Petersburg of 1868 and of The Hague Conventions concerning the Laws and Customs of War on Land. The people of Viet-Nam had endured terrible sufferings as a result of grave breaches of those principles. The same remarks applied to the peoples of Asia, Africa and Latin America, who had suffered from colonial, neo-colonial and racist wars, in which the aggressor was inescapably driven to genocide and to violation of the principles set forth in those three articles, undeterred by any threat of reprisals on the part of peoples who, though weak and ill-armed, refused to give in. That type of war was liable to recur in the future. In view of the serious omissions from article 74, steps should be taken to remedy the situation at plenary meetings during the fourth session.

4. He could not, at the present stage in the discussion, call for the inclusion in article 74 of certain categories of particularly grave acts enumerated in article 65 of draft Protocol I, but he would refer to the remarks made by the representative of the ICRC when introducing the latter article at the forty-third meeting of Committee III (CDDH/III/SR.43), concerning "the inhumane treatment all too often meted out to persons who ... fell into the power of the adverse party, not to mention the arbitrary manner in which a party to the conflict might easily treat its own nationals should they pose a threat to its security". The civilian population of South Viet-Nam had found itself in that situation when in the power of the foreign army of occupation and puppet rulers. He described the inhumane treatment of those who had refused to submit. Such acts should be considered "grave breaches".

5. Article 74 derived its importance from the fact that it was to provide a yardstick of modern humanitarian conscience, and the legislators on humanitarian law assembled at the Diplomatic Conference were responsible for ensuring that the yardstick was an accurate one. For that reason, pursuing the same line of thought as, for instance, the Egyptian delegation, which was aware of the heavy consequences involved in the possible omission of some grave breach, he called upon the Committee to give thought to a form of words to be proposed at the fourth session which would expressly stipulate that the list of grave breaches set forth in article 74 was given only by way of illustration and was in no way exhaustive.

6. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) said that his delegation had joined in the consensus on article 74, and gave its support in principle to paragraph 5 of that article. All grave breaches of the Geneva Conventions and Protocols should, in fact, be condemned and punished as war crimes, since the most serious among them were forms of inhuman and degrading treatment, which were harmful to the health or to the physical and mental state of a human being. Paragraph 5 should be further added to, having regard to the fact that deliberate massacres and torture were becoming increasingly cruel. In expressing his support for paragraph 5, he made specific reference to paragraph 4 (c) concerning apartheid and racial discrimination - deplorable practice which should be prohibited. In that connexion, he supported the proposals made by the United Republic of Tanzania and Uganda at an earlier meeting.

7. In his view, paragraph 5 of article 74 should adequately reflect the aims and wishes of peoples who had suffered aggression by colonialists, imperialists and racists. War crimes like those committed by the imperialists during the late war in Korea must never be repeated.

8. Mr. Kun PAK (Republic of Korea), speaking on a point of order, said that since the representative of the Democratic People's Republic of Korea had spoken about the late war in Korea, he wished to exercise his right of reply and reserved the right to do so when the explanations of votes had been concluded.

9. Mr. KUSSBACH (Austria) said he had joined in the consensus on article 74 despite some reservations about the feasibility of some of its provisions. The point was that the grave breaches covered by the article were defined too loosely and vaguely and would be bound to have a variety of constructions placed on them, so that there would be considerable difficulties in integrating them into municipal law and wide divergencies in the decisions given by courts in different countries, which was undesirable. He was particularly concerned about paragraph 4 (c) and paragraph 5, but purely from the legal aspect, his Government had of course always condemned the inhuman and degrading practices of apartheid, to which it was firmly opposed.

10. It was also the legal aspects that concerned him with regard to war crimes (paragraph 5), since he considered that two different areas were involved - firstly, grave breaches of international humanitarian law and, secondly, war crimes coming under the rules of war - and it would be difficult to amalgamate them because of their structural differences.

11. With regard to paragraph 3 (c), he approved of the underlying idea but thought it regrettable that the principle of proportionality should be introduced into the idea of grave breaches.

12. Despite those reservations, he had joined in the consensus on article 74 in a spirit of compromise.

13. In connexion with paragraphs 5, 6 and 7 of new article 10 of draft Protocol II (CDDH/I/317/Rev.2), he pointed out that there was no death penalty in Austrian criminal law and that the provisions relating to it would have no practical effect on Austrian law.

14. Finally, he welcomed the adoption of article 39, reaffirming the right of the ICRC to offer its services to the parties to the conflict, which was already provided for in Article 3 common to the four Geneva Conventions of 1949.

15. Mr. PARTSCH (Federal Republic of Germany) said that he was gratified by the spirit of collaboration and compromise shown by delegations even on difficult points.

16. With regard to the articles at present being considered, article 37 (CDDH/I/323/Rev.1) appeared in a very abbreviated form and no longer contained any mention of means of dissemination. However, that did not mean that the obligations involved were in any way reduced. Since the goal to be achieved was stated, his delegation could support article 37.

17. With regard to article 38, the reciprocal declarations referred to did not imply any previous agreement, nor did they need to be made simultaneously. The results achieved by Working Group B (CDDH/I/323/Rev.1) showed that parallel declarations would be sufficient.

18. With regard to article 39 (CDDH/I/323/Rev.1), he was convinced that the solution finally reached would enable the ICRC to continue its valuable work in bringing the parties to the conflict together. The new and shorter wording should not prevent parties to the conflict from soliciting the services of the ICRC.

19. New article 10 contained a general clause in the first part of paragraph 2 (CDDH/I/317/Rev.2) making it unnecessary to give an express indication of all the guarantees laid down in the International Covenant on Civil and Political Rights (United Nations General Assembly resolution 2200 (XXI)) for a fair trial. When ratifying the Covenant his country had felt obliged to make minor reservations to Articles 14 and 15 because of existing provisions in its Constitution and legislation. He therefore reserved his Government's position on the corresponding provisions of draft Protocol II.

20. Mrs. CHEVALLIER (Holy See) had joined in the consensus on new article 10 as a whole and in particular on paragraphs 4 and 5 (CDDH/I/317/Rev.2). She had also voted in favour of removing the square brackets, as a step forward in the development of humanitarian law. She had not wanted to prevent the adoption of that provision by consensus but felt obliged to point out that she had accepted it as a lesser evil; the fundamental opposition of her delegation to capital punishment was well known. She therefore requested that her reservation to paragraphs 4 and 5 of new article 10 of draft Protocol II should be noted in the record.

21. On article 39, she had supported the minimum formula in document CDDH/I/GT/103 (subsequently issued as document CDDH/I/330*) for procedural reasons. She would much have preferred the original ICRC draft or else the text of Article 3 common to the four Geneva Conventions of 1949.

22. While respecting the reasons for some delegations' reservations, she had been moved by the ICRC representative's appeal at the sixty-third meeting (CDDH/I/SR.63) to delegations' humanitarian spirit, and was concerned to note that it had not completely prevailed and that the solution adopted represented a step backwards from the Geneva Conventions of 1949: the present text of article 39 (CDDH/I/323/Rev.1) not only failed to specify that the parties to the conflict could appeal to an impartial body such as the ICRC but also omitted any mention of humanitarian bodies other than the ICRC, so that the texts adopted fell short of the 1949 provisions.

23. Far from developing humanitarian law, the Committee had not even reaffirmed it. Her delegation noted the setback with some distress, for from a genuinely humanitarian viewpoint a provision as flexible as the one in the original ICRC text should not have produced so many reservations.

24. Mr. de STOOP (Australia) was pleased to have participated in the preparation of article 74, which represented a delicately balanced consensus between different approaches on grave breaches.

25. His delegation extended its congratulations to the delegations that had helped to draft an article as complex and controversial as article 74, and in particular to the representative of Pakistan, for the firm and impartial way in which he had steered the Working Sub-Group through the most difficult part of its deliberations.

26. Although his delegation was satisfied with many aspects of article 74, it felt obliged to express its concern about some of the provisions. At the second session of the Conference his delegation had submitted an amendment listing breaches of the Geneva Conventions and the Protocols that should be considered grave breaches. During the debates in Working Group A at the current session his delegation had been prepared to modify, or even withdraw, some of its proposals, for the sake of precision, clarity of expression, and realism. He feared, however, that some of the provisions of the agreed text of article 74 were not only vague and impracticable, but also quite removed from the most basic principles of criminal law shared by a large number of countries all over the world.

27. His delegation considered that any behaviour that could give rise to punishment on the basis of universal jurisdiction should, among other things, be carefully defined. Not only should the nature of the offence be clear to any reasonable person, but the subject and object of the offence should also be clearly identifiable. In the theatre of war, in particular, it was essential that those who participated should know clearly what constituted a grave breach of the Geneva Conventions or Protocol I.

28. His delegation feared that some of the provisions in article 74 did not embody the degree of specificity essential if abuse and injustice were to be avoided. It was also concerned because some of those provisions were not clearly and directly related to the Geneva Conventions or the Protocol, despite claims to the contrary. For example, paragraph 4 (a) of article 74 was not an accurate reflection of Article 49 of the fourth Geneva Convention of 1949. Another example was "practices of apartheid", covered by paragraph 4 (c), which were not even mentioned in the Geneva Conventions or draft Protocol I, and should not be deduced from the existing provisions. His delegation, which had strongly condemned apartheid in Working Group A, adhered to and confirmed that condemnation. However, the introduction of political ideologies, hateful as they might be, into the system of grave breaches was not to reaffirm and develop humanitarian law but to distort it.

29. His delegation would not have been able to support the inclusion of such provisions if a separate vote had been taken on them. Nor could it have supported paragraph 5 of article 74, which in its view likewise represented a distortion of the Geneva Conventions and gave an explicit political and emotional coloration to every grave breach. His delegation had not asked for a separate vote on each of those provisions solely because it did not wish to upset protracted and delicate negotiations, the product of which was enshrined in article 74. He could only express his hope that the article would be interpreted and applied as rationally as possible, and with as much concern for the rights of persons accused of war crimes as for their victims. Greater precision would give better protection both to victims of grave breaches and to those alleged to have committed them.

30. Mr. NASUTION (Indonesia), explaining his delegation's vote on the report of Working Group B (CDDH/I/323/Rev.1), said that he had difficulty in accepting certain provisions of draft Protocol II. Like all other independent States, Indonesia adhered to the principles of sovereignty, territorial integrity, non-intervention and other principles of international law. Many provisions relating to those principles were embodied in its national laws.

31. Therefore his delegation found that new article 10 (CDDH/I/317/Rev.2), which thus far had not been given any title, dealt with a principle not familiar in the penal law of Indonesia. Moreover, article 10 bis (CDDH/I/320/Rev.2), even without a title, stated that the provisions of Parts II, III and V of draft Protocol II must not be violated "even in response to a violation of the provisions of the Protocol". His delegation regretted that it had serious reservations to both those articles.

32. Regarding article 37, he said that his delegation had supported the proposal made by Brazil at the sixty-second meeting (CDDH/I/SR. 62) to delete the phrase "and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population"; it appeared unnecessary, since only a State was competent to provide for such a procedure in its legislation.

33. His delegation also entertained reservations to article 38, since it appeared superfluous for a High Contracting Party to bring into force all or part of the provisions of the Geneva Conventions and Protocol II by means of agreements or reciprocal declarations.

34. For article 39, Indonesia supported the compromise text, namely, the last sentence of the text in document CDDH/I/323/Rev.1, "The International Committee of the Red Cross may also offer its services to the parties to the conflict". The new text was an improvement on Article 3 common to the Geneva Conventions of 1949.

35. He had some doubts about the role of humanitarian bodies other than the ICRC, but could accept the role of the ICRC, in addition to the national Red Cross Societies, in the carrying out of humanitarian tasks.

36. However, he wished to state for the record that his delegation's vote in no way reflected its position with regard to draft Protocol II as a whole.

37. Mr. BEAT de FISCHER (Observer for the Sovereign Order of Malta), speaking at the invitation of the Chairman, said he had actively participated in the work on the protection of cultural objects. He noted that the terms "safeguard", "protect" and "respect" were used in the Geneva Conventions and the Protocols for both persons and cultural objects without distinction, and he considered that the use of the terms should be more specific according to whether they applied to persons or objects.

38. Mr. de BREUCKER (Belgium) welcomed the adoption of article 39 in a form that reproduced, to the benefit of the ICRC, the provision concerning that organization in paragraph (2) of Article 3 common to the Conventions. The drafting of the provision had raised no small difficulty, and in the Sub-Group his delegation had submitted a draft text of which the first lines reproduced the text of Article 3. The final wording adopted, referring only to the ICRC, should be interpreted as an expression of thanks to that humanitarian organization, and a formal recognition of its unique competence. However, paragraph (2) of common Article 3 of the Geneva Conventions would, of course, continue to apply, as would Article 3 as a whole.

39. Turning to new article 10 on penal prosecutions, he said that he welcomed the adoption of the text (CDDH/I/317/Rev.2) resulting from the amalgamation of earlier proposals, new proposals and elements borrowed from the International Covenant on Civil and Political Rights (United Nations General Assembly resolution 2200 (XXI)). He regretted that it had not been possible to give a precise formulation in the article of the rule non bis in idem.

40. Mr. FREELAND (United Kingdom) said that his delegation had been able to join the consensus on paragraph 5 of new article 10 of draft Protocol II. However, the addition of the reference to the death penalty in that paragraph had not been without concern to the United Kingdom delegation. Had the matter been pressed to a vote, he would have had to abstain. The United Kingdom had for many years taken the view that matters affecting the availability of the death penalty were for the individual consciences of members of Parliament and not for the policy of a Government as a whole. Some members of Parliament would not necessarily be persuaded that humanitarian principles were best served by the prospects of the death penalty being carried out confronting someone for an indefinite period.

41. His delegation had adopted a similar approach to paragraph 4 of new article 10 although its difficulties there had gone further. It had voted against the inclusion of the reference to "mothers of young children".

42. He reminded the Committee that in the United Kingdom the death penalty had been abolished except for treason. The United Kingdom delegation had also withdrawn its reservation to Article 68 of the fourth Geneva Convention of 1949 concerning the imposition of the death penalty in occupied territory. But the form of words now included in paragraph 4 had caused particular concern to his delegation as a result of the departure from the wording of Article 6 of the International Covenant on Civil and Political Rights. That wording represented the full extent of agreement which it had so far been possible to achieve among the international community in that field. Article 6 of the Covenant in referring to pregnant women was clear and precise. The same could not be said of the phrase "mothers of young children" because of the uncertainty about the exact meaning of the words "young children". That was surely an area in which precision was desirable.

43. Nor was his delegation persuaded of the humanitarian justification for extending that protection to mothers and not to other persons who might have the care of young children.

44. For all those reasons his delegation had expressed serious doubts in the Working Group, in company with other delegations about the addition of the words in question and had felt constrained to vote against their inclusion when the vote had been taken in the Committee.

45. Mr. MARTIN HERRERO (Spain) said that his delegation maintained the reservations it had expressed concerning article 74 of draft Protocol I and new article 10, and articles 10 bis and 39 of draft Protocol II. He had joined the consensus in a spirit of conciliation and because Spain objected to some aspects only of the provisions which had been adopted.

46. His delegation nevertheless reserved its right to criticize, at a plenary meeting of the current session or of the fourth session, the methods adopted in Working Group B, in the Committee and in relations between the two, which, in his view, could seriously affect the meaning and scope of the consensus.

47. Mr. OBRADOVIĆ (Yugoslavia) pointed out that the Committee had adopted only seven articles at the current session. The subjects considered had admittedly been most complicated and the adoption of virtually all the provisions by consensus was quite encouraging. The Committee would nevertheless do well to quicken its pace at the fourth session in 1977.

48. His delegation had had no difficulty in supporting the articles which had been adopted. The provision concerning grave breaches (article 74) was far from perfect, particularly as far as the drafting was concerned, but it was satisfactory on the whole. His delegation had hoped that the list of grave breaches would include the illegal use of methods and means of combat and had supported the proposal made by the Philippine representative at the sixty-first meeting (CDDH/I/SR.61) to that effect. The Committee's decision left the matter open and Yugoslavia would continue to follow it with great interest.

49. The reference to article 42 bis in paragraph 2 of article 74 strengthened and filled out that article very nicely. It was also important that in the text violations of Article 49 of the fourth Geneva Convention of 1949 and discriminatory practices against protected persons, such as apartheid, were regarded as grave breaches, the more so as such practices still existed in the world today. Paragraph 5 removed all ambiguity on that score. Under it grave breaches of the Geneva Conventions and of the Protocol were to be regarded as war crimes. As far as his delegation was concerned, the concept of war crimes was quite clear in the light of the Nürnberg Charter and the subsequent development of

international law. Under Yugoslav law all grave breaches of the Geneva Conventions were regarded as war crimes. His delegation was therefore happy to note that a majority of the Committee shared that view and that the last paragraph of article 74 was quite clear on the subject.

50. Mr. JOMARD (Iraq) expressed reservations concerning article 10 bis. Its provisions were at variance with a number of existing regulations in the domestic legislation of some countries.

51. Mr. MOHIUDDIN (Oman) said that, while he fully appreciated ICRC's humanitarian work, article 39 of draft Protocol II was unnecessary as long as Article 3, common to the four Geneva Conventions of 1949, remained in force.

52. He welcomed the adoption of article 74 of draft Protocol I. The list of grave breaches, while neither complete nor satisfactory to all delegations, nevertheless represented a remarkable achievement.

53. Mr. TORRES AVALOS (Argentina) said that his delegation had been in favour of draft article 74 submitted by the ICRC, while believing that the wording could be improved through amendments submitted to the Committee. The discussions in Working Group A had shown how difficult it was to arrive at a minimum general agreement, by reason of the diversity of legal concepts and of political positions. Although the text adopted was not perfect, it none the less appeared to be acceptable.

54. The Argentine delegation had certain reservations on the text of paragraph 2 (c) of new article 10, since the term "national law" could not fail to induce serious confusion when the provision came to be applied. It was indeed unlikely that a Government which was a party to a non-international conflict, would recognize the ideas of rebels as "national law". The Argentine delegation's reservations referred only to that point, since it unreservedly upheld the principle nullum crimen sine lege, which was an axiom of criminal law and represented a fundamental step forward in contemporary jurisprudence.

55. Mr. ABI-SAAB (Egypt) said that, although he had voted for the proposal set out in document CDDH/I/GT/103, he would have preferred to see the formula of Article 3, common to the four Geneva Conventions of 1949, re-stated in article 39.

56. Certain delegations had voted against the proposal precisely because of its divergence from Article 3. But as the armed conflicts covered by Protocol II were merely a species of those covered by

Article 3, he considered that Article 3 applied to them as well, including the paragraph in question.

57. Mr. ORTEGA JUGO (Venezuela) said that his delegation would have abstained if article 38 had been put to the vote, for the mention of "agreements or mutual declarations" (CDDH/I/323/Rev.1) was tantamount to granting the status of belligerents to irregular armed groups acting on the fringe of the law in an endeavour to overturn legitimate Governments. The only possible way of changing the political system in any country was by popular elections and general consent. In any case, the legislation of Venezuela included protective rules derived from principles of humanitarian law already contained in draft Protocol II.

58. The Venezuelan delegation had voted against article 39 of draft Protocol II, which in its opinion should be deleted. Nor did it approve the recapitulation in that article of some of the final provisions of Article 3 common to the Geneva Conventions of 1949. It was pointless to repeat them in draft Protocol II when they already appeared in the Conventions. In any case they had formed part of the legislation of Venezuela for the last twenty years. The Venezuelan delegation entertained serious doubts as to the impact that the text would have. At the same time it would like to express its deep respect for the ICRC, which had already done so much good to mankind in every conceivable circumstance. Venezuela had always called upon the Venezuelan Red Cross, which provided every guarantee of efficiency and impartiality.

59. In regard to new article 10 (CDDH/I/317/Rev.2) of draft Protocol II, he explained that his delegation had abstained from voting on paragraphs 4 and 5, because the death penalty had been abolished in Venezuela more than 100 years ago. The Venezuelan delegation was therefore unable to approve any provision which recognized the right to pronounce sentence of death.

60. Mr. BRING (Sweden) explained that his delegation had joined in the adoption of article 76 by consensus, though it did not wholly approve the text. It failed to see why it had been necessary to make a distinction between "repression" and "suppression".

61. In regard to the second paragraph of article 76 (CDDH/I/324), it had been essential for the Conference to reach consensus on a provision that reaffirmed and developed the principle of responsibility of superiors for breaches committed by subordinates. A principle of that kind had played a role during the Nürnberg trials and had been further elaborated at the trial of General Yamashita, which however, had been held, not under the auspices of

the International Military Tribunal for the Far East, but by a national military tribunal. That second judgement had, moreover, had a considerable impact on international criminal law, and international reaffirmation of the principle was beyond doubt desirable.

62. One of the reasons for including the concept of negligence in the second paragraph of article 76 was a practical one. It would often be extremely difficult in practice to prove that a commander actually knew what was going on, which would deprive the provision of some of its deterrent effects. It would have been desirable that a commander should be held responsible for acts which he, as a commander, should know were taking place. If he were made so responsible, there would be an inducement for the commander to ensure that he was at all times kept fully informed and thereby enabled to prevent breaches.

63. The words "or had information which enabled them to conclude" were so restrictive that negligence on the part of the commander was not prevented. The same difficulties of proof would remain. The Swedish delegation would have preferred a wording more in line with the original United States amendment (CDDH/I/306), where the wording used was "or should reasonably have known".

64. Mr. SAARIO (Finland) expressed his satisfaction that the Committee had been able finally to reach a consensus on such a controversial issue as that covered by article 74. That result gave evidence of the spirit of co-operation which had prevailed throughout the Conference.

65. Although the Finnish delegation had joined the consensus, it was not fully satisfied with the final wording of the article. In its opinion some of the breaches mentioned ought not to have been included among "grave breaches", because of the consequences which might ensue. On the other hand there were some breaches which constituted a serious menace to the civilian population and which ought therefore to have been included in the list of "grave breaches". In regard to the use of prohibited means and methods of combat, the Finnish delegation hoped that it would be possible to include breaches of that prohibition in article 74 at the fourth session of the Conference.

66. The motives for adopting the humanitarian principles set out in article 74 paragraphs 4 (a), (b) and (c) were fully understood. It was doubtful, however, whether those sub-paragraphs were drafted in sufficiently precise terms to allow of implementation in practice. Some of the breaches were described in such vague terms that it would be difficult to transpose them into national laws - an indispensable condition for their application under criminal law.

67. Despite all those difficulties, however, the Finnish delegation welcomed the fact that the Committee had succeeded in reaching a consensus on such a difficult subject and that the difficulties which remained were not insurmountable.

68. Mr. GIRARD (France) explained that his delegation had expressed certain doubts on paragraph 3 (d) of article 74 regarding demilitarized zones, that it had not joined in the consensus on paragraphs 4 (a), (b) and (c); and that it had publicly stated its own interpretation of paragraph 5. It was not opposed to the consensus on the article as a whole, but it had clearly stated that if a vote had been taken it would have abstained. He also explained that his delegation could not take a definite stand on article 74 until that article was submitted in its final form.

69. Mr. BIALY (Poland) said he attached great importance to article 74. It was the task of the Conference not only to reaffirm but also to develop, the provisions of the Geneva Conventions of 1949 and the Committee had certainly succeeded in that task, particularly by agreeing to regard grave breaches as war crimes. That provision was fully in accordance with international law and with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted in 1968 by the General Assembly of the United Nations (resolution 2391 (XXIII)). His delegation was particularly satisfied with the provisions of paragraph 4 (c), concerning apartheid and inhuman and degrading practices based on racial discrimination, and with those of paragraph 4 (d), dealing with attacks on historic monuments and places of worship.

70. It was unable, on the other hand, to support article 39 of draft Protocol II. In its existing form that article clearly fell short of common Article 3 of the Geneva Conventions of 1949 which also dealt with non-international armed conflicts. His delegation regretted, furthermore, the failure to include any reference to the national Red Cross societies, which were the bodies that could render most service to the parties to a non-international conflict.

71. Mr. MILLER (Canada) said that he, too, considered it encouraging to find that the Committee had been able to adopt by consensus the articles before it. He paid a tribute to the Committee Chairman and to the Chairmen of Working Groups A and B and Sub-Groups which had made that possible.

72. His delegation's position on article 74 would depend on the form that article finally assumed, for it had some doubts as to the wisdom of including an article relating to the use of certain methods of combat and certain weapons. It was grateful to the Philippine delegation for not pressing its amendment pending such time as the decisions of the Ad Hoc Committee on Conventional Weapons became known.

73. With reference to new article 10 (CDDH/I/317/Rev.1), he was pleased to note that, under paragraph 5, a death penalty could not be carried out until the end of the armed conflict.

74. In implementing article 36 (CDDH/I/323/Rev.1), his Government would have to take account of the legal systems applied by the Federal Government and by the provincial administrations.

75. His delegation took article 39 (CDDH/I/323/Rev.1) to mean that Article 3 common to the four Geneva Conventions of 1949 would apply in all situations in which Protocol II applied, and that the terms used in common Article 3 with reference to the ICRC and the other organizations would equally apply in Protocol II.

76. Mr. BETTAUER (United States of America) said that his delegation shared some of the reservations concerning article 74 which had been expressed by the Belgian, Netherlands and United Kingdom representatives, and later by the representatives of Australia and Canada. His delegation had participated in the adoption by consensus, however, because it thought the article as a whole was generally acceptable.

77. Mr. de ICAZA (Mexico) said that his delegation had participated in the consensus on article 74 because it considered that if an acceptable text was to result, concessions must be made by the delegations representing various trends of thought. He regretted, however, the inclusion in paragraph 3 (e) of the principle of proportionality, for it would limit the scope of paragraph 3 (c), on installations containing dangerous forces. His delegation had endorsed article 74, on the understanding that at the fourth session of the Conference Committee I could reconsider the possibility of including prohibited forms of combat among grave breaches, in the light of the work of the Ad Hoc Committee on Conventional Weapons.

78. As to article 36, 39, new article 10 and 10 bis of draft Protocol II, the fact that his delegation had taken part in the discussions and work on them was without prejudice to its position on draft Protocol II as a whole.

79. His delegation had abstained from voting on paragraph 2 (c) of new article 10, because the notion of "national law" was vague, and no clear idea of it had emerged from the debate.

80. His delegation had opposed the adoption of article 10 bis, because it introduced the notion of reprisals in internal conflicts, which was unacceptable.

81. As to articles 36 to 39 of draft Protocol II it was his delegation's understanding that they contained nothing which limited the scope of article 4 of that Protocol or could be construed as authorizing interference in a State's internal affairs.

82. Mr. KUNUGI (Japan) explained that his delegation had voted against the inclusion in new article 10, paragraph 5, of a provision prohibiting the imposition of the death penalty on "mothers of young children". It did not consider the inclusion of such a provision in the Protocol desirable. It also considered that difficulties of implementation would arise in connexion with such a vague term as "young children". It was to be hoped that if that idea was finally adopted by the Conference, the terms of the provision would be made more precise.

83. Mr. DIXIT (India) reserved his delegation's right to explain its position on article 39 of draft Protocol II at a plenary meeting of the Conference, when the report of Committee I was considered.

84. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that his delegation had participated in the consensus in favour of article 74 of draft Protocol I, as it considered that the provisions of the article were of great importance to the development of contemporary humanitarian law, and even of international law as a whole. In addition, they helped to fill the gaps in the Geneva Conventions of 1949 and extended additional protection to the victims of armed conflict, particularly the wounded, prisoners of war and the civilian population. His delegation accordingly failed to see why the terms used in article 74 with reference to war crimes should be difficult to reconcile with the concepts of humanitarian law. It considered that article 74, which was the end result of some complex and difficult work, was a well-balanced text, and that any attempt that might have been made to alter it could have had unfortunate results.

85. As to new article 10 of draft Protocol II, his delegation, being anxious to facilitate an agreement, had refrained from opposing the deletion of paragraph 4. None the less, it was convinced that the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.

86. His delegation had opposed the adoption of article 39, on the already-stated grounds that it considered the article unnecessary, since its provisions were already to be found in Article 3 common to the Geneva Conventions of 1949.

87. Mr. ABDINE (Syrian Arab Republic) said that although his delegation had joined the consensus on article 74, it did not consider the article altogether satisfactory, since the conditions attached to it greatly weakened its scope or rendered its stipulations inoperative. The reason for that was that, with some delegations, political considerations had prevailed over considerations of humanitarian law. That had resulted in the drafting of confused texts, which might well give rise to divergent interpretations, or even leave loopholes.

88. He reminded the Committee that the second paragraph of article 76 had been amended at the request of his delegation, which took the article to mean that a superior could not be inculpated or held penally responsible on the grounds of a presumption.

89. Mr. EIDE (Norway) said that although his delegation welcomed the adoption by consensus of article 74, it still had misgivings about the many limitations contained in the list of grave breaches and wished to issue a warning against the distortions to which the article might give rise in practice. The text should not under any circumstances be construed to mean that breaches other than those mentioned in the article were unimportant. All breaches should be repressed firmly and with determination, and there was no excuse for the authorities concerned not to impose respect also for obligations with regard to breaches that were not listed as grave.

90. It was disturbing to note that the list of grave breaches did not include systematic violations of article 48 of draft Protocol I, which was one of the most important articles relating to protection of the civilian population, and the attacks to which that article referred had occurred extensively in the past. So far as concerned the proposal made at the sixty-first meeting (CDDH/I/SR.61) by the Philippine delegation with a view to the inclusion of violations of the prohibition of the use of certain means of combat in the list of grave breaches, his delegation welcomed the agreement that the issue might be taken up again at the fourth session outside the context of article 74, possibly in the form of a new article 75.

91. He congratulated Working Group B which had drafted article 10 bis and noted with satisfaction that the Committee had decided to consider the issue further at the fourth session on the basis of paragraph 3 of the Group's report (CDDH/I/320/Rev.2). Finally, it was distressing to see how limited the scope of article 39 had become; his delegation had far preferred the ICRC draft. Even after the adoption of article 39, however, Article 3 common to the four Geneva Conventions of 1949 would continue to be applicable in all internal conflicts.

92. Mr. GLORIA (Philippines) said that at the sixty-third (CDDH/I/SR.63) meeting he had drawn attention to the unfortunate absence of a title for new article 10 and to the need to make good that omission. His comments, however, had apparently been ignored and there was no mention of his suggestion in the report of the Working Group B (CDDH/I/317/Rev.2). The Committee would be shirking its duty if it left the Drafting Committee to find a title for the article; it would also be entrusting the Drafting Committee with an additional task which, with co-operation and understanding, Committee I could well perform itself.

93. In general terms, the main difficulty encountered in the case in question arose from the fact that, even in the matter of purely humanitarian provisions, too much emphasis had been placed on group teamwork, thus relegating the Conference's main objective to a secondary role. It was certainly for that reason that difficulties had arisen in the drafting of new article 10, resulting in violation of the elementary rules which traditionally governed the construction of such articles. Thus, new article 10 was the only article in draft Protocol II without a title; it was also the only article which contained an introduction describing its scope (paragraph 1), even though, according to the rules of statutory drafting, only a complete set of texts needed an introduction describing their content. Moreover, neither the Parts nor the Sections or Chapters of draft Protocol II were preceded by an introduction. Why should new article 10 be treated differently? In submitting its proposal, his delegation had been motivated by a desire to save the Committee embarrassment.

94. Turning to article 39, he stressed that his firm objection to the Belgian and Canadian proposals at the sixty-third meeting (CDDH/I/SR.63) was based on moral and ethical considerations. The true intent of the ICRC was disregarded in the text which had been adopted, with the result that article 39 had become a mere replica of Article 3 common to the four Geneva Conventions of 1949. That was why his delegation had not been able to join the consensus. No amount of reasoning could evade the truth without seriously violating the ethics of the legal profession. Since, however, the Vice-President of the ICRC had expressed his preference for the text which had been adopted, he would refrain from raising any further objections.

95. Mr. de ICAZA (Mexico), Rapporteur, said that the Committee had decided by consensus that new article 10 should bear the same title as former article 10, namely, "Penal prosecutions".

96. Mr. GLORIA (Philippines) proposed that new article 10 should be entitled "Prosecution and punishment of criminal offences", in accordance with the wording used in its paragraph 1.

97. Mr. de ICAZA (Mexico), Rapporteur, observed that a formal proposal had just been made to alter a decision taken by the Committee.

98. The CHAIRMAN suggested a brief suspension of the meeting so that an informal exchange of views could be held between the representative of the Philippines and the Rapporteur.

The meeting was suspended at 12.7 p.m. and resumed at 12.15 p.m.

99. Mr. de ICAZA (Mexico), Rapporteur, said that the exchange of views had served to clarify the situation. He would see to it that the Committee's report accurately reflected the discussion which had taken place on the title of new article 10, by indicating that the following three proposals had been made to the Committee: first, that the article should be entitled "Prosecution and punishment of criminal offences", and that paragraph 1 should be deleted and the other paragraphs renumbered; secondly, that the title of new article 10 should be the same as that of former article 10, namely, "Penal prosecutions"; thirdly, that the title of new article 10 should be the same as that of article 9. The third suggestion had been withdrawn in favour of the second, and the Committee had decided to retain paragraph 1. The Drafting Committee would decide whether the article should carry the title suggested under the first proposal.

100. Mr. GLORIA (Philippines) said that he was satisfied with the Rapporteur's statement.

101. Mr. MORENO (Italy) said that he had approved article 74 of draft Protocol I as a compromise, since the preparation of a list of grave breaches had been one of the most difficult tasks facing the Committee and since no text, obviously, could satisfy everyone.

102. His delegation, however, could not consider the list which had been drawn up as exhaustive. It was also not unlikely that a number of difficulties might arise when the time came to introduce certain rules, in the form in which they had been drafted, into national legislation.

103. His delegation attached great importance to the protection accorded by article 74, paragraph 4 (d), to historical monuments, places of worship and works of art. The Italian delegation had been the originator of that article and hoped that it would be

interpreted as broadly as possible. Furthermore, his delegation was obliged to maintain the reservations it had expressed in regard to article 74, paragraph 5, which was out of place in an instrument designed to strengthen humanitarian law.

104. His delegation had willingly associated itself with the consensus in favour of the other articles adopted by the Committee, despite slight doubts about the form or substance of some of them. It attached great importance to articles 36, 37 and 38, and it welcomed, in particular, the compromise which had been reached in regard to article 39, which, although not fully satisfactory, recognized the praiseworthy role already assigned to the ICRC in Article 3 common to the Geneva Conventions of 1949.

105. New article 10 was not fully satisfactory: if the earlier paragraph 4 (CDDH/I/317/Rev.2), which mentioned war crimes and crimes against humanity, had not been withdrawn at the sixty-third meeting (CDDH/I/SR.63), his delegation would not have been able to join in the consensus. Even in its present form new article 10, which contained a reference to the death penalty, posed a number of problems, since that penalty had been abolished in his country and was unacceptable to its legal conscience.

106. Mr. Kun PAK (Republic of Korea) asked to take the floor in order to exercise his right of reply.

107. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), speaking on a point of order, said that all delegations had the right to explain their vote. The representative of the Democratic People's Republic of Korea had explained why he had supported, in particular, paragraph 5 of article 74 of draft Protocol I; he had said that he had based his views on his country's experience during the Korean War, but he had not mentioned any country by name. Consequently, he (Mr. Rechetniak) questioned the right of the representative of the Republic of Korea to reply, since the statement made by the representative of the Democratic People's Republic of Korea had to in fact contained any element calling for a reply. He therefore urged the Chairman to rule that that the request made by the representative of the Republic of Korea to take the floor in order to make what he alleged to be a reply was out of order.

108. The CHAIRMAN inquired whether the representative of the Republic of Korea would be willing to refrain from speaking.

109. Mr. Kun PAK (Republic of Korea) said that the representative of the Ukrainian Soviet Socialist Republic had been right to state that the vote in question had to be explained on the basis of his country's experience. Nevertheless, in his statement, the speaker

in question had referred on several occasions to "imperialists" and to "war crimes". Those were "emotional" terms; thus what was involved was not merely an explanation of vote, but political propaganda.

110. In the Korean War the only imperialists were those who had committed aggression against his country by unleashing an unprovoked armed attack.

111. Mr. KAKOLECKI (Poland), speaking on a point of order, pointed out that the representative of the Ukrainian Soviet Socialist Republic had questioned the right of the representative of the Republic of Korea to take the floor in order to make an alleged reply.

112. Mrs. DARIIMAA (Mongolia) regretted that the representative of the Republic of Korea had used the excuse of an explanation of vote in order to make accusations against certain delegations, thereby disturbing the atmosphere of understanding in which the discussions had taken place.

113. Mr. DJANG Moun Seun (Democratic People's Republic of Korea) insisted that, in his explanation of vote, he had merely referred to his legitimate hopes, as a human being, that the catastrophes and suffering caused by the Second World War and by the Korean War would not recur.

114. Mr. PAMIR (Turkey) said that his delegation had followed with great interest the progress of the work of drafting the two Protocols. In view of the introduction of material and concepts which had modified the original basic text, his delegation associated itself with those who had expressed reservations concerning the Protocols.

The meeting rose at 12.40 p.m.

SUMMARY RECORD OF THE SIXTY-FIFTH (CLOSING) MEETING

held on Wednesday, 9 June 1976, at 4.10 p.m.

Chairman: Mr. OFSTAD (Norway)

ADOPTION OF THE REPORT OF COMMITTEE I (CDDH/I/332)

1. Mr. de ICAZA (Mexico), Rapporteur, drew attention to a few corrections to be made in the draft report: on the contents page, under the heading "Annex", the words "and amendments" should be inserted after the word "articles"; in paragraph 3, the number of meetings should be amended; in the last sentence of paragraph 4, to the list of articles also considered should be added article 10 bis of draft Protocol II; the heading "Article 74 bis of draft Protocol I", at present appearing between paragraphs 16 and 17, should be put between paragraphs 15 and 16; in paragraph 46, it should be made clear that the Chairman of the Sub-Group was Mr. J. M. Hussain (Pakistan); in paragraph 71, only the new sub-paragraph (g) should be placed between inverted commas. Between paragraphs 74 and 75, a new paragraph should be inserted, worded as follows: "One delegation dissociated itself from the consensus on paragraphs 4 (a), (b) and (c); in paragraph 115, the reference to new article 78 bis should be deleted and a reference to article 76 bis included; on page 1 of the annex, the references to article 2, (a) and (b) should be deleted.

2. Mr. ABU-GOURA (Jordan), supported by Mr. EL-FATTAL (Syrian Arab Republic), deplored the fact that the Committee's draft report had not been circulated in Arabic and asked if the Arabic version would be available before the end of the session.

3. The CHAIRMAN replied that the Arabic version of the draft report was being translated and would be available at any moment. He invited members of the Committee to consider the draft report.

I. Introduction

Paragraphs 1 to 10

4. Mr. PARTSCH (Federal Republic of Germany) said that he thought the reference to article 10 bis of draft Protocol II in the last sentence of paragraph 4 might lead to a certain confusion as the situation was not quite the same in the case of article 10 bis as in that of the other articles listed. It would, therefore, be preferable to say "The Committee will have to give further consideration to article 10 bis of draft Protocol II".

It was so agreed.

5. Mrs. DARIIMAA (Mongolia) drew attention to the lack of concordance between the various versions of paragraph 5: some referred to articles 63 to 65 and 67 to 69 of draft Protocol I while others cited articles 63 to 69.

6. Mr. de ICAZA (Mexico), Rapporteur, replied that the English version which referred to articles 63 to 65 and 67 to 69 was the correct one and that the others would be changed accordingly.

7. Mr. KEITH (New Zealand) suggested that at the end of paragraph 4 relating to article 10 bis of draft Protocol II the words "(see paragraphs 97 and 98)" should be added.

It was so agreed.

Paragraphs 1 to 10, as amended, were adopted.

II. Continuation of work

A. Discussion of articles by the Committee.

Paragraphs 11 to 15

Article 74 of draft Protocol I

Paragraphs 11 to 15 were adopted.

Paragraphs 16 and 17

Article 74 bis of draft Protocol I

Paragraphs 16 and 17 were adopted.

Paragraphs 18 to 21

Article 75 of draft Protocol I

Paragraphs 18 to 21 were adopted.

Paragraph 22

Article 75 bis of draft Protocol I

8. Mr. de ICAZA (Mexico), Rapporteur, in reply to a comment by Mr. HUSSAIN (Pakistan), suggested that the second sentence of paragraph 22 should be worded as follows: "The Committee examined it and referred it to Working Group A".

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraphs 23 and 24

Article 76 of draft Protocol I

Paragraphs 23 and 24 were adopted.

Paragraph 25

Article 76 bis of draft Protocol I

Paragraph 25 was adopted.

Paragraphs 26 and 27

Article 77 of draft Protocol I

Paragraphs 26 and 27 were adopted.

Paragraphs 28 and 29

Article 78 of draft Protocol I

Paragraphs 28 and 29 were adopted.

Paragraphs 30 and 31

Article 78 bis of draft Protocol I

9. Mr. GREEN (Canada) pointed out that the last sentence in paragraph 31 was somewhat ambiguous as it stood: it was not very clear what proposal had been rejected.

10. After an exchange of views, in which Mr. HUSSAIN (Pakistan), Mr. PARTSCH (Federal Republic of Germany), Mr. GIRARD (France), Mr. SHELDOV (Byelorussian Soviet Socialist Republic) and Mr. GREEN (Canada) took part, Mr. de ICAZA (Mexico), Rapporteur, suggested that the last sentence of paragraph 31 should be worded as follows: "The proposal to refer article 78 bis to Working Group A was rejected by 29 votes to 23, with 12 abstentions."

It was so agreed.

Paragraphs 30 and 31, as amended, were adopted.

Paragraphs 32 and 33

Article 79 of draft Protocol I

Paragraphs 32 and 33 were adopted.

Paragraphs 34 and 35

Article 79 bis of draft Protocol I

11. Mr. HUSSAIN (Pakistan), referring to the second sentence in paragraph 35, pointed out that the representative of the ICRC had explained its position at the fifty-sixth and fifty-eighth meetings, and not at the fifty-seventh.

Paragraphs 34 and 35, as amended, were adopted.

Paragraphs 36 and 37

Article 36 of draft Protocol II

Paragraphs 36 and 37 were adopted.

Paragraphs 38 to 40

Article 37 of draft Protocol II

Paragraphs 38 to 40 were adopted.

Paragraphs 41 and 42

Article 38 of draft Protocol II

Paragraphs 41 and 42 were adopted.

Paragraphs 43 and 44

Article 39 of draft Protocol II

Paragraphs 43 and 44 were adopted.

B. Results of the work of Working Groups A and B

Paragraphs 45 to 47

Article 74 of draft Protocol I

Paragraphs 45 to 47 were adopted.

Paragraph 48

Article 76 of draft Protocol I

Paragraph 48 was adopted.

Paragraphs 49 to 52

Articles 9 and 10 of draft Protocol II

Paragraphs 49 to 52 were adopted.

Paragraphs 53 to 56

Article 10 bis of draft Protocol II

12. Mr. PARTSCH (Federal Republic of Germany) pointed out that it was twice stated that the Working Sub-Group had been under the chairmanship of Mr. Keith, so that the reference in paragraph 55 might be deleted.

Paragraphs 53 to 56 were adopted, subject to that correction.

Paragraphs 57 and 58

Article 36 of draft Protocol II

Paragraphs 57 and 58 were adopted.

Paragraphs 59 and 60

Article 37 of draft Protocol II

Paragraphs 59 and 60 were adopted.

Paragraphs 61 and 62

Article 38 of draft Protocol II

13. Mrs. DARIIMAA (Mongolia) said she would like the symbol of the amendment "relating to it" to be given in paragraph 61.

14. Mr. de ICAZA (Mexico), Rapporteur, observed that the symbol already appeared in the report, and that there was no reason to give it again in paragraph 61.

15. Mr. GREEN (Canada) requested that the words "with some corrections" be moved to the end of the first sentence of paragraph 62.

Paragraphs 61 and 62 were adopted subject to that correction.

Paragraphs 63 to 67

Article 39 of draft Protocol II

Paragraphs 63 to 67 were adopted.

C. Results of the work of the Committee

Paragraphs 68 and 69

Article 74 of draft Protocol I

Paragraphs 68 and 69 were adopted.

Paragraph 70

16. Mr. BLOEMBERGEN (Netherlands) asked whether the Chairman had yet seen the Chairman of Committee II.

17. The CHAIRMAN replied that he was to meet the Chairman of Committee II in the course of the afternoon.

Paragraph 70 was adopted subject to the outcome of the interview between the two Chairmen.

Paragraph 71

18. Mr. BETTAUER (United States of America), supported by Mr. GLORIA (Philippines), said that the sentence which began "Several representatives ..." was inaccurate. In fact three points of view had been put forward in the discussions. Consequently the third sentence should begin with the words "Still others ...".

19. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) pointed out that the Russian translation of parts of paragraph 71 did not correspond to the English text, and should be corrected.

20. Mrs. DARIIMAA (Mongolia) endorsed that remark.

21. Mr. GIRARD (France) noted that he had already asked for the English word "objectives" to be translated into French as "mobiles".

Paragraph 71 was adopted subject to those corrections.

Paragraph 72

Paragraph 72 was adopted.

Paragraph 73

22. Mr. GIRARD (France) noted that several delegations had entered reservations in respect of article 74, paragraph 3 (d). His delegation, for its part, had entered reservations regarding the inclusion of demilitarized zones, but it would not wish consideration of the report to be held up on that account.

23. Mr. de ICAZA (Mexico), Rapporteur, said he would be glad if the French delegation would let him have a text at the end of the meeting.

Paragraph 73 was adopted subject to that correction.

Paragraph 74

Paragraph 74 was adopted.

Paragraph 75

24. Mr. de ICAZA (Mexico), Rapporteur, replying to a question by Mr. GIRARD (France), said that, in introducing the report, he had mentioned the fact that one delegation had not participated in the consensus on paragraphs 4 (a), (b) and (c).

Paragraph 75 was adopted.

Paragraph 76

25. Mr. KEITH (New Zealand) asked if the comma after the words "for example" in the English text could be removed.

Paragraph 76 was adopted subject to that correction, which also applied to the Spanish text.

Paragraph 77

26. Mr. de BREUCKER (Belgium) pointed out that paragraph 77 omitted to mention certain comments, including those of his delegation, and proposed that the following sentence should be inserted after the last sentence: "One delegation pointed out that the term 'war crimes', as used in article 74, paragraph 5, was alien to the terminology of the Geneva Conventions, and did not affect the implementation of the Conventions and the present Protocol."

27. Mr. GIRARD (France) regretted that an attempt had been made to link two different ideas: crimes against humanity and war crimes. The text would reflect his delegation's viewpoint if the words "or war crimes" were deleted, and if the words proposed by the Belgian representative were added.

28. Mrs. SUDIRDJO (Indonesia) commented that the Rapporteur had failed to take account of the reservations entered by her delegation at the sixty-first meeting (CDDH/I/SR.61) on 3 June. Several delegations had questioned the value of article 74, paragraph 5.

29. Mr. de ICAZA (Mexico), Rapporteur, agreed that his attempts to summarize the different views had not been successful, and asked the Indonesian delegation to let him have a text. That would enable his views and those of the two previous speakers to be in the report.

30. Mr. MORENO (Italy), supported by Mr. DIXIT (India), pointed out that he, too, had entered reservations, and endorsed the remarks of the Indonesian delegation.

Paragraph 77 was adopted subject to those corrections.

Paragraph 78

31. Mr. ABU-GOURA (Jordan), proposed the deletion of the brackets round the words "Red Crescent, Red Lion and Sun" in paragraph 3 (f). In the Geneva Conventions those words were not in brackets.

Paragraph 78, as amended, was adopted.

Paragraph 79

Article 75 of draft Protocol I

Paragraph 79 was adopted.

Paragraph 80

Article 75 bis of draft Protocol I

Paragraph 80 was adopted.

Paragraphs 81 to 83

Article 76 of draft Protocol I

Paragraphs 81 to 83 were adopted.

Paragraphs 84 to 95

Articles 9 and 10 of draft Protocol II

32. Mr. FREELAND (United Kingdom) proposed that paragraph 86 should be deleted, since the same subject was dealt with much more fully in paragraphs 92 and 93.

It was so agreed.

33. Mrs. LISBOA DE NECER (Venezuela) said that when new article 10 had been adopted at the sixty-third meeting (CDDH/I/SR.63), her delegation had stated that it could not join in the consensus on paragraphs 4, 5 and 6. She therefore asked that a sentence should be inserted, in either paragraph 90 or 91, indicating that one delegation had not been able to join in the consensus on paragraphs 4, 5 and 6 of new article 10.

34. Mr. de GRAFFENRIED (Switzerland) said that when new article 10 had been adopted the Committee had considered that the problem of collective penalties should be dealt with in the context of article 6. That should be mentioned in one of the paragraphs now under review.

35. Mrs. DARIIMAA (Mongolia) said that in the first sentence of paragraph 87, the English and Russian texts referred to sub-paragraphs (a), (b), (e) and (f), whereas the French text referred to sub-paragraphs (a), (b), (c) and (f).

36. Mr. de ICAZA (Mexico), Rapporteur, replied that the reference in the French text should be to sub-paragraph (e), not (c).

37. Mr. TORRES AVALOS (Argentina) said that the third sentence in paragraph 87 did not reflect his delegation's position correctly. He proposed that it should be replaced by the following wording: "A vote was taken on sub-paragraph (c) because one delegation thought that the expression 'national law' might give rise to serious problems of interpretation."

It was so agreed.

38. Mr. BLIX (Sweden) said that in the English text of paragraph 89 the part in inverted commas should be amended to read: "In no such case shall a death penalty be carried out until the end of the armed conflict".

39. Mr. GREEN (Canada) pointed out that the same correction should be made in the last sentence of paragraph 5 of article 10, which was reproduced in paragraph 95 of the draft report.

40. Mr. de ICAZA (Mexico), Rapporteur, thought a mistake had been made in translation and said that the English text would be corrected.

41. Mr. de BREUCKER (Belgium), referring to the comment by the representative of Switzerland, said he wished to make it clear, as Chairman of the Working Sub-Group, that the Sub-Group had not dealt with the question of collective penalties, considering that it was beyond the Sub-Group's competence. He therefore suggested that a paragraph 85 bis should be inserted in the report, indicating that Working Group B on articles 9 and 10 had taken the view that it was not called upon, under its terms of reference, to consider the question of collective penalties referred to in paragraph 2 (b) of document CDDH/I/262, and that the subject should be dealt with in an appropriate article in draft Protocol II.

42. Mr. de ICAZA (Mexico), Rapporteur, said that the question of collective penalties had not been referred to in the report of Working Group B, and that the Committee had never been informed of the decision taken on that point by the Working Group. However, he said he would include in the report the additional text proposed by the representative of Belgium.

43. Mr. FREELAND (United Kingdom) thought that in paragraph 87 the reference to sub-paragraph (e) should be in the second sentence, and not in the first. In the English text the word "everyone" had been replaced by the word "anyone" in both sub-paragraphs (d) and (e). Accordingly, the beginning of paragraph 87 should read: "The preamble to paragraph 2 was adopted by consensus, together with sub-paragraphs (a), (b) and (f). Sub-paragraphs (d) and (e) were also adopted by consensus ...".

It was so agreed.

44. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) regretted that the Secretariat had not followed the Russian text which he had given it. In paragraph 89, and in paragraph 5 of article 10 as reproduced in paragraph 95, the words "In no such case" had been translated in the Russian text by a word meaning "never".

45. The CHAIRMAN said that the Russian text would be corrected.

46. Mr. JOMARD (Iraq) said that when new article 10 had been adopted some delegations, including his own, had voiced reservations. That fact was not mentioned in the draft report.

47. Mr. de ICAZA (Mexico), Rapporteur, said that the delegations that had voiced those reservations had not asked that they should be referred to in the report. However, he could add a sentence saying that several delegations had voiced reservations about the article.

Paragraphs 84 to 95, as amended, were adopted.

Paragraphs 96 to 98

Article 10 bis of draft Protocol II

48. Mr. KEITH (New Zealand), referring to paragraph 97, said that the Committee had not only decided to take note of the report of Working Group B, and not to adopt the text of article 10 bis until after Committee III had concluded its consideration of the provisions of Part V of draft Protocol II, but had also decided to return to the question when Committee III had concluded its consideration of the provisions of Part V. There was no reference to that last decision. He therefore asked that such a reference should be added at the end of paragraph 97, and that the two decisions of the Committee should also be included in the following paragraph.

It was so agreed.

49. Mr. de GRAFFENRIED (Switzerland) considered it would be desirable to include the proposed text of article 10 bis in the Committee's report, if possible in paragraph 97.

It was so agreed.

Paragraphs 96 to 98, as thus amended, were adopted.

Paragraphs 99 to 101

Article 36 of draft Protocol II

Paragraphs 99 to 101 were adopted.

Paragraphs 102 to 106

Article 37 of draft Protocol II

Paragraphs 102 to 106 were adopted.

Paragraphs 107 to 110

Article 38 of draft Protocol II

Paragraphs 107 to 110 were adopted.

Paragraphs 111 to 114

Article 39 of draft Protocol II

Paragraphs 111 to 114 were adopted.

Paragraph 115

50. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) noted that the list in paragraph 115 consisted of the articles considered by the Committee and subsequently referred to the Working Groups, which had been unable to examine them. As pointed out in paragraph 31 of the draft report, article 78 bis had been considered by the Committee at its fifty-fifth meeting. The Committee had decided, by a vote, not to refer it to Working Group A. It would therefore be wrong to delete it from the list, as suggested by the Rapporteur. For the sake of greater accuracy, the words "except for article 78 bis" should be added at the end of the introductory section of paragraph 115.

51. Mr. de ICAZA (Mexico), Rapporteur, said that while he saw the point of the Byelorussian proposal, the list did not contain all the articles considered in plenary but only those to be examined by the Working Groups at the fourth session. He therefore suggested that the introductory section of paragraph 115 should be replaced by the following text: "The Working Groups will have to study the following articles and amendments at the fourth session."

52. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) agreed to the wording suggested by the Rapporteur, the effect of which would be to delete the first sentence of the introductory section and to keep the second largely in its present form.

53. Mr. PARTSCH (Federal Republic of Germany) and Mr. BOBYLEV (Union of Soviet Socialist Republics) considered the Rapporteur's proposal to be satisfactory.

54. Mr. de ICAZA (Mexico), Rapporteur, replying to a remark by Mr. PARTSCH (Federal Republic of Germany), said that new article 75 bis should be deleted from the list in paragraph 115 while new article 76 bis should be included in it.

55. Mrs. DARIIMAA (Mongolia), referring to "New Section III" at the end of the list, took it that the Section related to the code of war crimes. If memory served her right, it had never been considered by the Committee nor had it been referred to a Working Group.

56. Mr. GLORIA (Philippines) said that the point raised related to a proposal made by his delegation regarding a draft Code of International Crimes in violation of the Geneva Conventions of 1949 and the draft additional Protocols (CDDH/56/Add.1 and Corr.1), which would form Section III of Part V of Protocol I. The Committee had considered the proposal in conjunction with article 74. However, it had decided to postpone its decision on the matter without referring it to a Working Group.

57. Mr. de ICAZA (Mexico), Rapporteur, suggested that, in the interests of harmony, the reference to new Section III should be deleted.

Paragraph 115, as amended, was adopted.

58. Mr. de ICAZA (Mexico), Rapporteur, reminded the Committee that the words "and amendments" should be inserted after "List of articles" in the heading of the annex. In addition, the reference appearing underneath "Preamble to Article 2, sub-paragraph (a)" and "Article 2, sub-paragraph (b)" should be deleted.

59. Mr. KAKOLECKI (Poland) asked that Poland should be listed among the sponsors of document CDDH/I/233 and Add.1 relating to articles 84 and 88.

60. Mr. BETTAUER (United States of America) proposed that article 7 should be deleted as Committee III had already adopted a text on it.

61. Mr. ABU-GOURA (Jordan), speaking on behalf of the Arab delegations at the Conference, referred to the statement made at the second session (CDDH/I/SR.41, para.104) by the representative of the Syrian Arab Republic on behalf of the Arab delegations in which those delegations had made certain reservations concerning the provisions of the Protocols **en** which agreement had been reached and which were the subject of the report of Committee I on its second session (CDDH/219/Rev.1).

62. Mr. de ICAZA (Mexico), Rapporteur, said that practical difficulties might prevent the Secretariat from distributing the final text of the Committee's report before the end of the session. If that were the case a corrected text would be issued incorporating all the changes made.

The draft report (CDDH/I/332) as a whole, as amended, was adopted.

CLOSURE OF THE SESSION

After the usual exchange of courtesies, the CHAIRMAN declared the third session of Committee I closed.

The meeting rose at 6.55 p.m.

FOURTH SESSION

(Geneva, 17 March - 10 June 1977)

COMMITTEE I

SUMMARY RECORDS OF THE SIXTY-SIXTH TO SEVENTY-NINTH MEETINGS

held at the International Conference Centre, Geneva,

from 14 April to 21 May 1977

Chairman:	Mr. E. F. OFSTAD	(Norway)
Rapporteur:	Mr. A. E. de ICAZA	(Mexico)

CONTENTS

Page

Page

SUMMARY RECORD OF THE SIXTY-SIXTH (OPENING) MEETING

held on Thursday, 14 April 1977, at 3.15 p.m.

Chairman: Mr. OFSTAD (Norway)

OPENING STATEMENT BY THE CHAIRMAN

1. The CHAIRMAN welcomed the members of Committee I.

2. Recalling the statement made by the President of the Conference at that morning's plenary (thirty-fifth) meeting, he stressed the need for a fairly rigid time-table for the Committee's work, in order to ensure that the work of the Conference was completed on time. Articles 77, 78 and 79 had yet to be finalized, several proposals relating to the implementation of the Geneva Conventions of 1949 and Protocol I needed further consideration, while the Committee had not yet started to discuss the Final Provisions of the two Protocols. Consultations with the President of the Conference, within the General Committee and within the bureau of Committee I had revealed an important current of opinion in favour of establishing a third Working Group C, whose terms of reference would be to consider the Final Provisions of the two Protocols. In accordance with rule 48 of the rules of procedure, he proposed the establishment of such a Group, which would be open to participation by all interested delegations and would elect its own officers.

3. Several of the new proposals still to be discussed, notably proposals for new Articles 70 bis, 74 bis and 79 bis, although differing in approach were concerned with strengthening the machinery of implementation of the Conventions and the Protocol. It might therefore be advisable to deal with them together. He invited comments on that suggestion.

4. The two existing Working Groups had already achieved important results and the fact that they would continue to work under the same Chairmen as before augured well for their success. As many more articles had been referred to Working Group A than to Working Group B, it might be assumed that the latter would complete its work before the former. He wondered, therefore, whether the articles relating to implementation might be transferred from Working Group A to Working Group B.

5. He drew attention to the draft programme of work for the Committee for the fourth session (CDDH/I/334), which was based on the assumption that the ideas he had just outlined would prove acceptable to the Committee. The programme was, of course, only of an indicative nature and was not intended to constitute a reference document for the deliberations of the Working Groups.

6. The next meeting of Committee I was scheduled for 22 April. He hoped that all amendments and new proposals relating to the Final Provisions would be submitted before that date and that delegations which had submitted such amendments or proposals would be ready to introduce them at that meeting.

ORGANIZATION OF WORK (CDDH/I/334)

7. Mr. CAMPONOVO (Legal Secretary) announced that the Norwegian delegation had withdrawn its proposal in document CDDH/I/86 in favour of that in document CDDH/I/233.

8. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) noted that according to the draft programme (CDDH/I/334) Working Group A was scheduled to complete its work during the first week. That being so, he wondered whether it was necessary to have a new Working Group C, for the work intended for it could perhaps be undertaken by Working Group A. Moreover, as many of the delegations were small, it would not be possible for them to send representatives to both Working Groups if they met simultaneously. It was not clear from the draft programme whether or not they would do so.

9. Mr. SADI (Jordan) and Mr. SHERIFIS (Cyprus) associated themselves with the views expressed by the previous speaker.

10. Mr. SHERIFIS (Cyprus) asked why a third working group was being established and pointed out that the proliferation of working groups made it difficult for small delegations to attend to the work of the Conference in a constructive manner. He asked that the working groups should not meet simultaneously.

11. The CHAIRMAN said that it was intended that Working Group A should meet in the mornings and Working Group B in the afternoons.

12. Mr. van der KLAAUW (Netherlands) pointed out that Working Groups B and C would apparently be meeting simultaneously on the afternoon of 22 April.

13. Miss MARTIN (Legal Secretary) said that on that date the two groups could meet consecutively.

14. Mr. MILLER (Canada) expressed his gratitude to the officers of the Committee for the detailed draft programme of work. He suggested that the headings should be included beside the numbers of the articles, in order to show what subjects they covered.

15. He supported the proposal for the establishment of a Working Group C to consider the Final Provisions of both Protocols, for that should lead to a unified approach, and he thought that the Group might also consider both Preambles. With regard to the suggestion that those items might be entrusted to Working Group A when it had completed its own work, experience had taught him that such an arrangement was unwise, since unforeseen difficulties might arise to hamper that Group's progress. He agreed with previous speakers that the Groups should not meet simultaneously.

16. Mr. AL-FALLOUJI (Iraq) said that the Preamble and Final Provisions were extremely important and required careful study by a separate group. He therefore supported the establishment of a third Working Group and endorsed the Canadian representative's remarks in that connexion.

17. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that, while he agreed in principle with the draft programme of work, he considered that it might be advisable to allow a little extra time for Working Group A to complete its work. He agreed that the Working Groups should not meet concurrently, even if a third were established.

18. Mr. SHERIFIS (Cyprus) was grateful for the clarification given in the light of which he could support the establishment of a third Working Group.

19. Miss EMARA (Egypt) said that her delegation supported the establishment of a third Working Group, for the reasons stated by the representatives of Canada and Iraq.

20. Mr. FREELAND (United Kingdom) said that, in view of the technical nature of certain articles and of the heavy burden resting on the two existing Working Groups, he too favoured the establishment of a third Group. He fully agreed, however, that the Groups should not meet concurrently.

21. Mr. ROBERT (Federal Republic of Germany) expressed his support for a third Working Group and his agreement with the United Kingdom representative's remarks.

22. Mr. MORENO (Italy) said that the draft programme of work and the suggestion that a third Working Group should be established were acceptable to his delegation.

23. Mr. PAOLINI (France) said that the draft programme of work was well conceived and augured well for the outcome of the session. While he agreed on the usefulness of a third Working Group, he wondered whether it should not meet a little earlier, in view of the need to approve the Final Provisions as quickly as possible.

Moreover, too little time had perhaps been allocated to Working Group A, given the complex nature of certain articles and in particular Article 78. He would therefore suggest that the third Working Group should meet as soon as possible and that Working Group A should meet again later, if necessary.

24. The CHAIRMAN said that the officers of the Committee would consider that suggestion at their next meeting.

25. Mr. de BREUCKER (Belgium) agreed to the draft programme of work, which, he understood, could be adjusted to take account of any unforeseen circumstances that might arise. He also agreed to the establishment of a third Working Group; the exact dates of its meetings should be left to the Chairman and the officers of the Committee to decide in the light of the progress made.

26. Mr. GRAEFRATH (German Democratic Republic) noted that, under the draft programme of work, no meeting was scheduled for 29 April. He also noted that only part of one meeting of the third Working Group, on 28 April, would be devoted to the Preamble; in his opinion, discussion on the Preamble should start on 27 April at the latest.

27. Mr. GLORIA (Philippines) said that, although the intention to complete the work within a period of four weeks was praiseworthy, the draft programme of work did not include certain important proposals which had been left pending at the end of the third session. Their omission was a matter of grave concern to his delegation, which would like to know whether they were to be ignored.

28. The CHAIRMAN replied that the matter would be discussed at the next meeting of the officers of the Committee. All matters would, of course, be treated with equal care.

29. Mr. MILLER (Canada) thanked the author of the draft programme for including in the agenda for 22 April the submission of the new Article 8 bis of draft Protocol II. The proposal itself, concerning interned families, had been put forward by his delegation and appeared on page 91 of the English version of document CDDH/241. He suggested that, in order to gain time, it might be discussed in the Working Group rather than in Committee I.

30. The CHAIRMAN welcomed that idea.

31. He suggested that, in accordance with the Committee's discussion, a new Working Group C should be established to deal with the Final Provisions of draft Protocols I and II.

It was so agreed.

The meeting rose at 4.10 p.m.

SUMMARY RECORD OF THE SIXTY-SEVENTH MEETING

held on Monday, 25 April 1977, at 10.25 a.m.

Chairman: Mr. OFSTAD (Norway)

ORGANIZATION OF WORK

1. The CHAIRMAN said that if the Committee were unable to take decisions at the current meeting, the proposals and amendments for consideration would have to be referred to a working group. He pointed out that some time had also been set aside for explanations of vote

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1)

Draft Protocol I

Part V bis - Obligation to make reparation for breaches of the present Protocol (CDDH/I/335 and Add.1 and 2)

2. Mr. VAN LUU (Socialist Republic of Viet Nam), on behalf of his delegation and those of Algeria and Yugoslavia, the co-sponsors, introduced the amendment to draft Protocol I, dated 18 April 1977, concerning the obligation to make reparation for breaches of that Protocol (CDDH/I/335 and Add.1 and 2).

3. The amendment provided for the addition of a new article before Article 80 of draft Protocol I. Paragraph 1 re-stated the principle of reparation contained in Article 3 of the Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land. The second paragraph affirmed the principle of non-exoneration from responsibility, a principle already stated in articles common to the four Geneva Conventions of 1949 (namely, Article 51 of the first Convention, Article 52 of the second, Article 131 of the third, and Article 148 of the fourth).

4. The sponsors had thought of the destruction and ravages resulting from the wars of colonial and neo-colonial aggression inflicted on the home territory of weak and ill-armed people in Asian countries, as had happened in Viet Nam and in some African countries. That included material damage, either immediately perceptible or apparent only later on; lasting damage to natural resources and the environment; direct damage to agricultural areas and industrial plant; and indirect damage, leading to delays prejudicial to the development of the country's economy. The obligation to make reparation for breaches of the provisions of international humanitarian law must be respected in order to allow the peoples victimized by such wars to return to normal living.

5. As the Diplomatic Conference had taken as its objective the reaffirmation and development of international humanitarian law, it was particularly appropriate that the new draft Protocol should reaffirm the principle of reparation, expressly recognized ever since the days of the 1907 Hague Conventions. International humanitarian law would thus be raised to the level of the new law of international organizations, which aimed at establishing a new international economic order. The United Nations General Assembly, at its sixth special session held in May 1974, and the non-aligned countries at the Conference of Heads of State or Government of Non-Aligned Countries, held in Colombo in August 1976, had called for reparations for the developing countries victims of foreign occupation, which had caused them serious losses in life and property while reducing and degrading the natural and other resources of such States, territories and peoples.

6. The CHAIRMAN suggested that the amendment to draft Protocol I submitted by the Socialist Republic of Viet Nam, Algeria and Yugoslavia (CDDH/I/335 and Add.1 and 2) be referred to the appropriate working group.

It was so agreed.

Part VI - Final provisions

Draft Protocol II

Part VIII - Final provisions

7. Mr. ZIMMERMANN (International Committee of the Red Cross), introducing the final provisions of the two draft Protocols, said that the provisions of Part VI of draft Protocol I reflected the two sources on which they were based: first, where they existed, the corresponding provisions of the 1949 Conventions, and secondly general principles, many of which had been codified by the Vienna Convention of 23 May 1969 on the Law of Treaties.

8. Briefly, Part VI governed the way in which States showed their will to bind themselves and the form of their commitment, the entry into force of the instrument, the formal relationships established upon entry into force, the amendment and denunciation procedures, the notifications for which the depositary was responsible, registration, authentic text and official translations.

9. In that Part there was no article dealing in a detailed manner with the relationship between the draft Protocol and pre-existing law. The reason for the absence of such a provision was that the draft Protocol indicated clearly, by using the term "additional" in its first article, that its essential aim was to supplement the

1949 Geneva Conventions. Those Conventions, in Articles 59 of the first Convention, 58 of the second Convention, 134 and 135 of the third Convention and 154 of the fourth Convention, established their relationship with earlier Geneva and Hague Conventions.

10. The 1949 Conventions as supplemented by draft Protocol I would be valid for the Parties to the Protocol, while those Rules of Law of The Hague that were not reproduced in the Protocol would remain in force either as treaty law or as customary law, in accordance with the opinion of the Nürnberg International Military Tribunal.

11. In the case of draft Protocol II those questions were dealt with in Part VIII, of which the provisions were for the most part similar to those in draft Protocol I. The whole text had, however, been simplified, and not all the provisions of draft Protocol I had been included.

12. Referring to Article 80 - Signature, which corresponded to Article 40 of draft Protocol II, he said that it reproduced the essentials of Articles 56 of the first Convention, 55 of the second Convention, 136 of the third Convention and 151 of the fourth Convention, common to the Conventions. The Conventions were opened for signature by participants in the 1949 Diplomatic Conference and, where appropriate, to any Party to the various previous instruments; given the additional nature of the Protocol, the solution had been replaced by one opening the Protocol to signature by Parties to the Conventions.

13. To take account of the various opinions expressed, the 1949 Diplomatic Conference had held an official signature meeting on 12 August 1949, the day of its closure and another on 8 December of the same year. In addition, the Conventions had been open to individual signature for a six-month period from 12 August 1949 to 12 February 1950.

14. The Committee's task was to complete the draft before it. He referred to the report presented by the President of the Conference on the work of the Drafting Committee at the opening (thirty-fourth) plenary meeting of the current session.

15. Regarding the date as from which the Protocols should be open for signature, the President of the Conference had indicated that some participants had suggested that the Protocols should be open for signature immediately at the end of the Conference, while others preferred that several months should elapse before they were opened to signature. He had indicated that whatever decision was taken, the Protocols would remain open to signature for a certain period, perhaps a year, and that whatever decisions were taken by the Conference on the Committee's report, the host country and the Secretariat would make all the necessary technical arrangements so that the Protocols could be open for signature at the time chosen by the Conference.

16. Turning to Article 81 - Ratification, he said that it was modelled on the texts of Articles 57 of the first Geneva Convention of 1949, 56 of the second Convention, 137 of the third Convention and 152 of the fourth Convention. The article came logically after Article 80, which dealt with signatures subject to ratification. It confirmed the depositary function performed by the Swiss Confederation ever since the beginning of the Geneva legislative era.

17. Article 82 allowed accession to the Conventions by any Party which had not signed the Protocol under conditions which the Conference would specify in Article 80.

18. Contrary to the stipulations in the Geneva Conventions in common Articles 60 of the first Convention, 59 of the second Convention, 139 of the third Convention and 155 of the fourth Convention, the possibility of accession to the Protocol would be offered even before its entry into force, according to Article 83.

19. Articles 41 and 42 of draft Protocol II corresponded to Articles 81 and 82 of draft Protocol I.

20. Referring to Article 83 - Entry into force, he said that the provision specifying the number of instruments of ratification required for entry into force and the time-limits fixed was based on the corresponding articles of the Conventions (common Articles 58 of the first Convention, 57 of the second Convention, 138 of the third Convention and 153 of the fourth Convention).

21. Although many recent multilateral treaties required the deposit of a greater number of instruments of ratification - from 20 to 35 according to circumstances - for a treaty to come into force, the ICRC considered it desirable to keep the minimum number of two Parties so that the Protocol might come into force as quickly as possible. There were two reasons for that position.

22. First, it was to be hoped that prompt entry into force would speed up the pace of ratifications and accessions. It might, in particular, influence Parties to a possible conflict that were not bound by the Protocol to follow the example of Parties which had ratified or acceded to it.

23. Secondly, that persuasive effect would have the advantage of reducing the diversity of the treaty communities. If the group of Parties to the Conventions alone and the group of Parties to the Protocol were heterogeneous there would be bound to be in practice some uncertainty as to the law applicable to any particular relationship.

24. A special clause of the Conventions specified (common Articles 62 of the first Convention, 61 of the second Convention, 141 of the third Convention and 157 of the fourth Convention) that the fulfilment of the conditions for implementation (common Article 2) should give immediate effect to ratifications deposited and accessions notified by the Parties to the conflict, thus shortening or eliminating the normal six-month period. The ICRC had not considered it necessary to repeat that clause in the Protocol; however, on further reflection, it would prefer it to be reaffirmed and would welcome the opinion of the Committee on the point.

25. The foregoing remarks did not apply exactly to the corresponding article of draft Protocol II (Article 43) because of the special character of the treaty community of the States Parties to Protocol II.

30. Referring to Article 84 - Treaty relations upon entry into force of the present Protocol, he said that paragraph 1 followed normally from the relationships linking the Protocol to the Conventions.

27. Paragraph 2 was a repetition of Article 2, paragraph 3, common to the Conventions. The Protocol applied to the mutual relations of States which were Parties to it even if another Party to a particular conflict was not bound by it; consequently, "universal participation" was not required. Further, acceptance and application by a Party to the conflict not bound by the Protocol made the Protocol applicable to relations between the latter Party and the other Parties which had ratified or acceded to it.

28. The ICRC draft did not indicate how the movements mentioned in Article 1, paragraph 2, could express their willingness to apply the instrument. A proposal for filling the gap had been made and would certainly be submitted by its sponsors later on.

29. Article 84 had no corresponding provision in draft Protocol II because of the "loose link" existing between the Conventions and draft Protocol II, the latter being relatively independent of Article 3 common to the Conventions, whose existing conditions it did not modify, as stated in its Article 1.

30. Turning to Article 85 - Reservations, he said that the Conventions made no provision for reservations. In the light of recent trends in international law and realizing the difficulty of debarring reservations altogether - which might theoretically have seemed to be the only solution for an instrument of humanitarian law - the ICRC had endeavoured in its draft paragraph 1 to provide an intermediate solution be enumerating articles to which reservations would not be admissible, all these articles actually representing fundamental rules in respect of which States should not limit their commitment.

31. If the notion of such a list was accepted, it would of course need revision in the light of the work of the Conference. In the first place, it would have to be verified, from a purely formal point of view, that the articles listed still related to the same subject, which was not always the case. It would then be necessary to make sure that, as regards the substance, no fundamental rule, either of the original draft or of subsequent proposals, was omitted from the list. Examples of such rules might be Article 65 (Fundamental guarantees) of Protocol I and the rules on the protection of women and children (Articles 67 to 69).

32. Because of the novel character of the provision, the ICRC had thought it necessary to hold consultations. Most of the delegations consulted by the ICRC since the preparation of the draft had considered that there should not be any reservations clause. One of the arguments put forward was the difficulty delegations would have in reaching agreement on the articles to appear on the list. The ICRC, which also wished to bring the work to a close would be prepared to drop the idea of inserting an article on reservations. In that event Protocol I would, like the Geneva Conventions, be governed by the rules of general international law in the matter of reservations.

33. It should also be noted that draft Protocol II had no article on reservations.

34. Referring to Article 86 - Amendments, of which the counterpart in draft Protocol II was Article 44, he said that it dealt with the procedure for amending the Protocol. It should be distinguished from Article 7, which related to meetings of the High Contracting Parties to study general problems concerning the application of the Conventions and Protocol.

35. Paragraph 1 outlined the procedure to be followed. The initiative of proposing one or more amendments would come from one or more of the High Contracting Parties. The depositary would submit the proposal to all the High Contracting Parties and to the ICRC and decide after those consultations whether a conference should be convened to consider the proposed amendment. The procedure had deliberately been left flexible: neither the criteria which should guide the depositary in its decision nor the mode of adoption or entry into force of an amendment was specified.

36. Since Parties to the Conventions not signatories to the Protocol would be entitled to accede to it, it had seemed advisable to specify in paragraph 2 that they too would be invited to the Conference contrary to Article 7.

37. He pointed out that according to a foot-note by the Drafting Committee in document CDDH/CR/RD/15, Article 18 bis - Revision of Annex, might be included in Part VI, possibly after Article 86.

38. Referring to Article 87 - Denunciation, he said that no Party to the Conventions had ever exercised the option of denouncing them under common Articles 63 of the first Convention, 62 of the second Convention, 142 of the third Convention and 158 of the fourth Convention. However, since customary law recognized in any case that the parties to a treaty had that option, it had seemed preferable to mention it, while at the same time making an exception in the event of an armed conflict or occupation or their consequences involving the denouncing Party. In view of Article 1 of the Protocol as adopted by the Committee, it might be advisable to replace the reference to Article 2 common to the Conventions by a reference to Article 1 of the Protocol.

39. It had not seemed necessary, on the other hand, to state, as the Conventions did, that certain rules continued to apply even after the denunciation had come into force; the draft preamble and the Article 1 adopted by the Committee made the necessary provision for the purposes of the Protocol.

40. There was no corresponding article in draft Protocol II.

41. Turning to Article 88 - Notifications, he said that the depositary was to communicate to the High Contracting Parties as well as to the Parties to the Conventions, whether or not they were signatories of the Protocol, particulars concerning:

(a) signatures affixed and the deposit of the instruments of ratification and accession (Articles 80, 81 and 82);

(b) the date of entry into force (Article 83);

(c) communications and declarations received under Articles 73, 85 and 86 - i.e. official translations made by the High Contracting Parties; laws and rules on application; reservations; objections to reservations and withdrawals of reservations, and proposed amendments.

42. The corresponding article in draft Protocol II was Article 45 - Notifications.

43. Referring to Article 89 - Registration, and Article 90 - Authentic texts and official translations, he said that they were modelled on some of the final provisions of the Conventions - Articles 64 and 55 of the first Convention, 63 and 54 of the second Convention, 143 and 133 of the third Convention and 159 and 150 of the fourth Convention. The registration procedure was provided

for in Article 102 of the United Nations Charter and in Article 80 of the Vienna Convention on the Law of Treaties. The official translations referred to, on the other hand, were not those indicated in Article 73 but those arranged for by the depositary.

44. The corresponding articles of draft Protocol II were Articles 46 and 47.

Preambles

45. He then commented on the two draft Preambles to the Protocols. Since a Preamble was by its nature part of an international instrument and an aid to its interpretation, it would probably be better to postpone consideration of the text until the Protocols had been completed, so that the Preambles might be studied in the light of the Protocols as a whole.

46. The first point to mention was that, on the advice of experts, the ICRC had drafted extremely short Preambles stating a few general ideas.

47. The draft Preamble proposed by ICRC for Protocol I did not call for lengthy comment: it was a brief and simple text designed to make three points:

(a) The first paragraph expressed a general wish which was in keeping with the Charter of the United Nations.

(b) In the second paragraph, in view of the impossibility of preventing all armed conflict, the High Contracting Parties proclaimed a double need: first, the need to reaffirm and develop the provisions protecting the victims of such conflicts and, second, the need to reinforce their application.

(c) The third paragraph, based on the famous "Martens clause" which appeared in the eighth paragraph of The Hague Convention No. IV of 1907, pointed out that where the law was silent the civilian population and combatants remained under the protection of universal principles. Since a clause similar to that in the third paragraph of the Preamble was contained in Article 1, paragraph 4, the Committee would have to decide whether or not it should be retained in the Preamble.

48. The Preamble to draft Protocol II referred to the relationship, first, with common Article 3 - the existing conditions for the application of which were confirmed by Article 1 of the Protocol itself - and, second, with the Human Rights Covenents that had come into force in 1976, which in many respects were similar in nature to Protocol II, although the various instruments naturally kept their own fields of application.

49. The CHAIRMAN suggested that the texts of the Articles and Preambles should be referred to Working Group C.

It was so agreed.

Introduction of amendments (CDDH/241/Add.1 and Corr.1; CDDH/I/74, CDDH/I/229 and Add.1, CDDH/I/233 and Add.1-4)

50. Mr. ABDINE (Syrian Arab Republic) introduced his delegation's amendments to Articles 84 and 85 (CDDH/I/74).

51. With regard to Article 84, he said it was not changed merely to extend the application of the Conventions; the Conference should also provide for the eventuality of conflicting obligations as between the provisions of the Protocols and those of the Conventions, by clearly affirming that the Protocol prevailed over the Conventions. It was also essential to stress that the Protocols prevailed over The Hague Conventions.

52. In the case of Article 85, his delegation was opposed to any reservation to the rules of humanitarian law, which were peremptory and inviolable. Moreover, the Vienna Convention on the Law of Treaties of 1969 did not authorize reservations tending to frustrate the application of treaties. The fact that the Vienna Convention was not yet in force in no way meant that its provisions could not be followed. Failing a text prohibiting all reservations, his delegation could, in a spirit of conciliation, accept one debarring the formulation of reservations to certain fundamental provisions. The list drawn up in 1974, however, was inadequate and should be extended.

53. The CHAIRMAN suggested that if there was no objection the Syrian amendments should be referred to Working Group C.

It was so agreed.

54. Mr. LE (Socialist Republic of Viet Nam) introduced the amendment sponsored by his own delegation and that of Qatar (CDDH/I/229 and Add.1) which aimed at strengthening the Parties' commitments under the Protocol by providing that if one of the Parties to the conflict was not bound by the Protocol the other Parties would be bound with respect to that Party without having to wait for an official reaction from it.

55. The CHAIRMAN suggested that if there was no objection the amendment submitted by Qatar and the Socialist Republic of Viet Nam should be referred to Working Group C.

It was so agreed.

56. Mr. LONGVA (Norway) introduced on behalf of the sponsors amendments CDDH/I/233 and Add.1-4 to Articles 84 and 88.

57. The purpose of the amendments was to establish a procedure whereby national liberation movements would have the same rights and obligations as the High Contracting Parties to the Geneva Conventions of 1949 and to Protocol I. They should therefore be regarded as a technically necessary complement to Article 1, paragraph 2, as adopted by Committee I at the first session of the Conference.

58. The new paragraph 3 proposed to be added to Article 84 provided that a national liberation movement could address to the depositary of the Conventions a unilateral declaration for the purpose of applying the Geneva Conventions and Protocol I with regard to the conflict in question. Upon receipt by the depositary, that declaration would have the following legal consequences:

> The Conventions and Protocol I would enter into force for the national liberation movement as a Party to the conflict with immediate effect;
>
> The national liberation movement would assume the same rights and obligations as those assumed by a High Contracting Party to the Conventions and Protocol I;
>
> The Conventions and Protocol I would be equally binding upon all Parties to the conflict.

59. The new paragraph 3 would apply solely to conflicts of the type referred to in Article 1, paragraph 2 of Protocol I, to the exclusion of the conflicts to which Protocol II related, or of any other non-international armed conflict.

60. The new paragraph (d) which the sponsors proposed adding to Article 88 laid down that declarations received by the depositary under that procedure should be communicated to the High Contracting Parties by the quickest methods.

61. The amendments in document CDDH/I/233 and Add.1-4 were the result of a compromise reached, after prolonged negotiations, by an informal working group comprising representatives of various geographical regions and political persuasions, as well as representatives of national liberation movements. The extent of participation in the work of the group and the list of sponsors showed that the amendments enjoyed wide support. That had been confirmed in the consultations held by the sponsors in the past few days. He therefore proposed, on behalf of the sponsors, that the Committee should vote on the amendments at that meeting, without further discussion. The sponsors hoped they would be adopted by consensus.

62. Mr. SHERIFIS (Cyprus) said that his delegation wished to be included among the sponsors of the amendments. He supported the proposal by the Norwegian representative.

63. Miss AL-JOUA'N (Kuwait), Mr. ABDINE (Syrian Arab Republic), Mr. SADI (Jordan) and Mr. ABADA (Algeria) likewise supported the proposal by the Norwegian representative.

64. Mr. MBAYA (United Republic of Cameroon) proposed that the amendments should be referred to Working Group C, which was an official body.

65. Mr. OBRADOVIĆ (Yugoslavia), Mr. AL-FALLOUJI (Iraq), Mr. ABDINE (Syrian Arab Republic) and Mr. SHERIFIS (Cyprus) requested the representative of the United Republic of Cameroon to withdraw his proposal, in order to enable the Working Group to make progress.

66. Mr. MBAYA (United Republic of Cameroon) agreed to do so.

67. Mr. KUNUGI (Japan), who was supported by Mr. AL-FALLOUJI (Iraq), Mr. de ICAZA (Mexico) and Mr. OBRADOVIĆ (Yugoslavia), said that while it was not necessary to refer the amendments to Working Group C, it would nevertheless be premature for the Committee to take an immediate decision on them. He therefore suggested that they should be considered at a later meeting together with the other final provisions.

68. The CHAIRMAN put to the vote the proposal that the Committee should consider forthwith, at the current meeting, the amendments in document CDDH/I/233 and Add.1-4.

The proposal was adopted by 57 votes to 4, with 14 abstentions.

69. A procedural discussion followed, in which Mr. DIXIT (India), Mr. McRAE (Canada), Mr. MORENO (Italy), Mr. MBAYA (United Republic of Cameroon) and Mr. LONGVA (Norway) participated, on the advisability of having a separate vote on the amendment to add a new paragraph 3 to Article 84 (leaving aside paragraphs 1 and 2).

The meeting was suspended at 12.5 p.m. and resumed at 12.20 p.m.

70. The CHAIRMAN said that a final decision on Article 84 would be taken later.

71. Meanwhile, he would put to the vote amendment CDDH/I/233 and Add.1-4 proposing the addition of a new paragraph 3 to Article 84 and the addition of a new sub-paragraph (d) to Article 88, the present sub-paragraph (d) becoming sub-paragraph (e).

Amendments CDDH/I/233 and Add.1-4 were adopted by 50 votes to none, with 14 abstentions.

Explanations of vote

72. Mr. PAOLINI (France) said that his delegation had not meant to speak on the substance; it could not vote, however, when the situation was confused. If paragraphs 1 and 2 of Article 84 were to be referred for consideration to Working Group C, Committee I should not have taken a decision on the new paragraph 3 proposed for that article.

73. Mr. MBAYA (United Republic of Cameroon) agreed with the representative of France. His delegation had no objection to the substance of amendments CDDH/I/233 and Add.1-4 but considered that the voting had taken place in a confused situation and that it was illogical to begin by adopting the last paragraph of Article 84. The proposal by the representative of Iraq that the adoption of the text should be deferred ought to have been accepted.

74. Mr. AL-FALLOUJI (Iraq) said that as a sponsor of CDDH/I/233 and Add.1-4 he naturally supported its adoption. However, the vote just taken on paragraph 3 of Article 84, a delicate and important matter, seemed to him regrettable. He hoped that when the vote was taken on Article 84 as a whole all representatives would have the opportunity to explain their points of view in detail.

75. Mr. OULD CHEIKH (Mauritania) said that his delegation had voted in favour of the amendment to Article 84 of Part VI (Final provisions), as contained in document CDDH/I/233 and Add.1-4 relating to the accession of liberation movements to the Protocol.

76. His delegation's position, which it intended to maintain, was in accordance with the traditional policy of support for genuine liberation movements adopted by the Islamic Republic of Mauritania since it had gained its sovereignty. It wished, however, to draw attention to one point, namely, that in the light of rule 58 of the rules of procedure the text in question, which was based on the preparatory work preceding its final drafting, should only apply to the authorities representing genuine liberation movements recognized by the regional intergovernmental organizations concerned.

77. Mr. de ICAZA (Mexico) said that his delegation had voted in favour of document CDDH/I/233 and Add.1-4 because it supported the provisions it contained. Nevertheless, the new paragraph 3 of Article 84 in no way affected the immediate application of the Protocol to situations envisaged in Article 1, paragraph 2.

78. He regretted that so important an amendment should have been adopted without discussion, thus giving rise to abstentions. That state of affairs could have been avoided if the vote had been deferred to a later meeting of the Committee.

79. Mr. DIXIT (India) said that his delegation had abstained in the vote on amendments CDDH/I/233 and Add.1-4. The Committee had introduced a procedural innovation and delegations had not been able to examine in detail the provisions contained in the document. His country had not been consulted, nor had it received the few explanations it had requested, particularly with regard to the meaning of the word "also" in paragraph 3 i.

80. It was surprising that representatives of the countries attending the Conference should be given no reply or explanation that would help them to understand those provisions more clearly.

81. The rules of procedure had not been observed. No provision stipulated that a proposal could be put to the vote without discussion; only rule 25 mentioned the closure of debate.

82. He wished to make an appeal to all non-aligned countries, since he believed that, intentionally or otherwise, an attempt had been made to divide them. The summary records showed clearly that India had always been in favour of protecting the rights of liberation movements. The text of amendments CDDH/I/233 and Add.1-4 was, indeed, intended to protect those movements, and if, therefore, the proposal by the representative of Iraq had been accepted, the amendment could have been adopted by consensus.

83. In his view, any delegation which had difficulty in interpreting a text should be allowed time to give it thought and ask for instructions; consequently, his delegation could not understand the haste with which the vote had just been taken.

84. His delegation had not been able to study the proposal in detail, but would proceed to do so. It reserved the right to change its vote at the plenary meeting, especially since the adoption of amendments CDDH/I/233 and Add.1-4 limited the scope of Article 1, paragraph 3.

85. Mr. MORENO (Italy) said that in abstaining his delegation had not intended to pass judgement on the substance of a proposal whose inspiring principles had the full sympathy of his country. He would have liked the vote to have been conducted in a less confused atmosphere. He noted that Article 84 as a whole had been referred to Working Group C, and reserved the right to revert to the different paragraphs of the article at a later stage in the discussion which would take place in that Group.

The meeting rose at 1 p.m.

SUMMARY RECORD OF THE SIXTY-EIGHTH MEETING

held on Tuesday, 26 April 1977, at 3.25 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Article 84 - Treaty relations upon entry into force of the present Protocol (CDDH/1; CDDH/I/233 and Add.1-4)

Paragraph 3

Article 88 - Notifications

Sub-paragraph (d)

Explanations of vote

1. Mr. PARTSCH (Federal Republic of Germany) said that his delegation deeply regretted that at the sixty-seventh meeting (CDDH/I/SR.67) it had had to abstain in the vote on the new paragraph 3 of Article 84 of draft Protocol I, for it attached the utmost importance to a provision whereby liberation movements could make unilateral declarations with a view to putting into effect the Geneva Conventions and Protocol I and to assuming thereby the same rights and obligations as those which had been assumed by a High Contracting Party. In that way a sound legal basis would be created for the humanitarian protection of liberation movements, for the new text was something more than a technical supplement to Article 1, paragraph 2, of draft Protocol I.

2. The reasons for his delegation's abstention were primarily procedural and were those already explained by the French representative. Moreover, his delegation would have liked to have more information on the legal bearing of the new provisions. The Norwegian representative, when introducing amendment CDDH/I/233 and Add.1-4, had not only qualified it as a technical supplement but had stated that it had no relevance to conflicts covered by draft Protocol II. It could be concluded from that statement that during the periods prior to the making of such declarations the protection of draft Protocol II was not available to liberation movements. The delegation of the Federal Republic of Germany would have been glad to hear a specific statement by the sponsors to the effect that in the initial period up to the moment when the declaration was made pursuant to Article 84, paragraph 3, there

would be no legal lacuna or lawless situation. The wording of Article 84, paragraph 3, did not imply, as the Mexican representative had stated, that Protocol I would enter automatically into force when a liberation movement became active. That declaration had a constituent character, creating rights and obligations. In the view of the delegation of the Federal Republic of Germany, in the period before the declaration was made only the provisions of common Article 3 of the Geneva Conventions of 1949, with its relatively poor minimum standard, would apply. That minimum standard applied to all situations not otherwise covered, and it was not relevant that in common Article 3 such situations were defined as being of a non-international character. If that modern interpretation of common Article 3 of the Conventions had been denied, then his delegation would have had to revise its position, but it had voted on the basis of that interpretation.

3. Had the Committee been requested to reach a consensus, his delegation would have joined in and would have expressed its views afterwards.

4. Mr. NASUTION (Indonesia), referring to the question whether Article 84, paragraph 3, should have been considered in Committee I or in the Working Group, said that his delegation would have liked to state its views on the articles of the Final Provisions as a whole in Committee I. In a spirit of compromise, however, it had agreed to postpone the discussion on the substance in the Working Group. It had therefore found it rather difficult to adopt a specific position on Article 84, paragraph 3, before the text had been discussed in the Working Group and it had abstained when the vote had been taken in the Committee.

5. His delegation had no difficulties regarding the principles embodied in amendment CDDH/I/233 and Add.1-4, since it supported the rights of liberation movements which were recognized by their regional grouping. It would have been better, however, if, before the text had been put to the vote, certain delegations desiring clarification could have been heard.

6. Mrs. LIDDY (Ireland) said that her delegation had agreed that, in view of the broad basis of its sponsorship, amendment CDDH/I/233 and Add.1-4 could be considered in the Committee rather than in a Working Group. Two preceding amendments, however, one proposing a different paragraph 3 and the other proposing an amendment to a preceding paragraph, had been referred to a Working Group. In those circumstances it would have been logical to await the Working Group's decision on those two amendments before taking a final decision on paragraph 3. Her delegation had abstained on those procedural grounds and its abstention did not reflect its attitude towards the substance of the matter.

7. Mr. KUNUGI (Japan) said that his delegation had had to abstain in the vote because it had considered that, as a matter of principle, it was not advisable to adopt any proposal at the level of a main Committee without discussing it either in the Committee itself or in its Working Group, even if it appeared obvious that there was wide support for the proposal. In fact, specific questions had been raised by some delegations before the vote and they had unfortunately been left unanswered by the sponsors of the proposal. For that reason his delegation fully shared the view expressed by a number of delegations which had had to abstain mainly because of the way in which the proposal had been put to the vote amid some confusion.

8. Furthermore, having heard some statements made by various delegations giving their interpretation of the meaning of the proposal, his delegation had no choice but to confirm its position of abstention as to the substance, since some of those interpretations differed considerably from his delegation's understanding of the text.

9. His delegation hoped that the clarifications required would be obtained, as far as possible, before the proposal was discussed in the plenary Conference and that it would then be in a position to join in the adoption of the proposal by consensus.

10. Mrs. ROULLET (Holy See) said that despite the undeniable value of amendment CDDH/I/233 and Add.1-4, which was likely to contribute to the development of international law and to extend its field of application, her delegation had had to abstain because of the atmosphere in which the vote had been taken. It was regrettable that the requests for a postponement of the vote had not been accepted. It would also have been more logical to vote on paragraph 3 of Article 84 after the adoption of paragraphs 1 and 2. The work of the Committee and of the Conference as a whole would not benefit from votes taken amid such confusion.

11. Her delegation hoped that the vote on Article 84 as a whole would provide an opportunity to dispel the disquiet felt by a number of delegations and that the adoption of amendment CDDH/I/233 and Add.1-4 would not be used as an excuse to reject draft Protocol II.

12. Mr. MARTINEZ KANE (Argentina) explained that his delegation's vote should be understood within the context of the procedure followed. Any decision taken by the Committee should be preceded by the necessary analysis and discussion which would make it possible to arrive at compromise texts acceptable to all. In the present case a vote had been taken on paragraph 3 of an article of which neither the Committee nor the Working Group had yet considered paragraphs 1 and 2. That procedure had probably prevented the Committee from adopting the text by consensus.

13. Mr. BOSCH (Uruguay) said that his delegation had supported amendment CDDH/I/233 and Add.1-4 as a token of sympathy for the principles it embodied, without prejudice to any changes that might be made when it was considered in the plenary Conference. It was regrettable that delegations had not been given an apportunity to study the amendment more thoroughly.

14. Mr. ABDINE (Syrian Arab Republic) explained that his delegation had voted in favour of paragraph 3 because it confirmed an international practice concerning the 1949 Geneva Conventions. There had already been instances of liberation movements making declarations of that kind. The absence of a unilateral declaration should not be interpreted as a diminution of the obligations resulting directly from the acceptance of the Geneva Conventions and Protocol I. The declarations were to be interpreted as purely declaratory statements. The remarks made regarding the adoption of paragraph 3 before the discussion of paragraphs 1 and 2 were incorrect: there was no rule of procedure to prohibit it, and in any case the content of paragraph 3 was quite separate.

15. Mr. ALTUG (Turkey) observed that Article 84, paragraph 3, was a compromise formula achieved as a result of co-operation and understanding among all delegations represented in the Committee. His country had traditionally supported the action of the national liberation movements recognized by regional intergovernmental organizations. His delegation had accordingly voted in favour of paragraph 3, which it understood in relation to Article 42 of draft Protocol I.

16. Mr. LE (Socialist Republic of Viet Nam) said that his delegation, a sponsor of amendment CDDH/I/233 and Add.1-4, had voted in favour of it because it provided a logical follow-up to Article 1, paragraph 2, of draft Protocol I and was of benefit to peoples fighting for national liberation. In the case of his own country, it had been extremely difficult for the former Provisional Revolutionary Government of South Viet Nam to obtain the protection of the Conventions because the High Contracting Party concerned had refused to regard it as the Government of a State. The extension of humanitarian law provided for in paragraph 3 would do away with such unjust situations. His delegation was grateful to all the delegations which intended to vote in favour of the amendment when it was considered in the plenary Conference. It considered, moreover, that national liberation movements should be given full rights of participation in the Conference as Parties to the Conventions and Protocols.

17. Mr. FREELAND (United Kingdom) said that his delegation had voted in favour of the texts in document CDDH/I/233 and Add.1-4 because they represented a delicately balanced compromise. It was regrettable that, largely because of procedural difficulties which had arisen at the sixty-seventh meeting, a consensus had not been obtainable, but he hoped that it might be forthcoming at a subsequent stage.

18. His delegation had been able to give its support to those compromise texts because they seemed to provide a logical and acceptable machinery to accommodate the provisions of amended Article 1. That support, however, should not be taken to prejudge his delegation's attitude to the amended Article 1 when it came to be considered in the plenary Conference. That attitude remained to be determined in the light of the eventual contents of the Protocol as a whole.

19. The meaning of the texts in document CDDH/I/233 and Add.1-4 was sufficiently clear in itself. His delegation was not, therefore, to be regarded as acquiescing in any interpretations of those texts which might be put forward by other delegations in the Committee.

20. Mr. DONOSO (Ecuador) explained that, although his delegation was not opposed to the substance of the amendment, it had been obliged to abstain because of the unfortunate confusion in which the vote had been taken. If the procedure suggested by the the representatives of Iraq and Mexico at the sixty-seventh meeting had been followed, a consensus might have been reached.

21. Mr. CUMMINGS (United States of America) said that his delegation had voted in favour of the amendment to Article 84. It did not favour the inclusion of Article 1, taken in its entirety, in the Protocol. If Article 1 was to remain in the Protocol, however, it was necessary to discuss treaty relations, as was now done in Article 84, and notifications, as was done in the new paragraph added to Article 88. It was necessary to deal with the problems covered by the amendments themselves. Such important matters should not be left to inference or conjecture.

22. The texts adopted at the sixty-seventh meeting were not ambiguous. His delegation associated itself with the view expressed by the United Kingdom representative regarding the interpretative statements made by other delegations. Since it believed that the provisions adopted at the sixty-seventh meeting were both needed and straightforward, his delegation had supported their inclusion in Protocol I.

23. Mr. MARTIN HERRERO (Spain) said that his delegation had been obliged to abstain for reasons both of procedure and of principle. Apart from the atmosphere of confusion in which the vote had been taken, the proceedings had been irregular from the start. While work should not be held up by procedural points, neither should it ever be rushed. The function of a working group was to prepare the ground, not to reach final decisions. The several stages involved in the consideration of an item should allow time for reflection and, if necessary, for making the required changes. His delegation would state its final attitude in the plenary Conference.

24. Mr. ARMALY (Observer for the Palestine Liberation Organization) thanked all the delegations which had voted in favour of amendment CDDH/I/233 and Add.1-4. Thanks were also due to the delegations which had abstained because they wished to reflect upon the scope of paragraph 3; he was sure that they would all support the text at a later stage of the work of the Conference, since they represented countries which had consistently supported the struggle of peoples fighting against colonial domination, foreign occupation and racism and had always upheld texts providing liberation movements with adequate and equitable treatment.

25. Representatives of many liberation movements had attended the various sessions of the Conference as observers and some of them now represented sovereign and independent States. In the course of its work the Conference had considered certain texts which recognized the legitimacy of their struggle and afforded support and comfort to all those who were fighting for their independence against an enemy which flouted the norms of humanitarian law. Article 84, paragraph 3, was one such text; it supplemented other important texts such as Article 1, paragraph 2, and Article 42. From now on the authority representing a people engaged in an armed conflict of the type mentioned could make a unilateral declaration to the depositary of the Conventions. The Committee could rest assured that the PLO, as the sole legitimate representative of the Palestinian Arab people, would study the matter in due course and would doubtless declare its adherence, as it had done in the case of the 1949 Conventions. It remained to be seen whether its enemy, which had so far refused to apply the Geneva Conventions, would change its attitude, having regard to the fact that the last sentence of amendment CDDH/I/233 and Add.1-4 provided that "the Conventions and the present Protocol are equally binding upon all Parties to the conflict".

26. The CHAIRMAN said that he could entertain no further requests to speak in respect of the amendments in document CDDH/I/233 and Add.1-4, since the list of speakers had been closed at the sixty-seventh meeting with the Committee's consent.

27. Mr. VANDERPUYE (Ghana) observed that he had not yet been invited to speak despite the fact that his name had been on the list read out by the Chairman at the sixty-seventh meeting.

28. After a procedural discussion in the course of which Mr. PARTSCH (Federal Republic of Germany), Mr. HUSSAIN (Pakistan), Mr. AL-FALLOUJI (Iraq), Mr. PAOLINI (France) and Mr. de ICAZA (Mexico) contended that no delegation wishing to explain its vote could be denied its right to do so, and after Mr. VANDERPUYE (Ghana) had waived his right to take the floor, the CHAIRMAN inquired whether any other delegations wished to explain their vote on the amendments in document CDDH/I/233 and Add.1-4.

29. Mr. MOHIUDDIN (Oman) said that his delegation, which had voted in favour of the amendments, fully endorsed the explanation of vote given by the representative of Mauritania at the Committee's sixty-seventh meeting and, in particular, his statement that the provisions of Article 84, paragraph 3, were applicable to liberation movements which had been recognized by international and regional intergovernmental organizations.

30. Mr. LUKABU (Zaire) said that his delegation had voted in favour of Article 84, paragraph 3, because it had a duty to support authentic liberation movements. The rights granted under that paragraph, however, should be enjoyed only by liberation movements recognized by regional and international organizations and should not be extended indiscriminately to subversive movements. He reserved his delegation's right to revert to the subject at a plenary meeting of the Conference.

31. Mr. McRAE (Canada) said that his delegation had voted in favour of amendment CDDH/I/233 and Add.1-4 in spite of its reservations about the procedure which had been followed. It was anomalous that the last part of an article should have been approved before the first part had been considered, and he trusted that such a practice would not be repeated. The delegations that had wished to discuss the proposal in order to obtain clarification should have been given the opportunity to do so, in the interests of reaching a consensus on the question.

32. Mr. de BREUCKER (Belgium) said that his delegation had voted in favour of the proposal, which was a logical and humanitarian outcome of the adoption of Article 1, paragraph 2, at the first session of the Conference. The text of the proposal - the essence of which hinged on a unilateral declaration of commitment - was perfectly clear and devoid of ambiguities. He paid a tribute to the efforts made by the delegations of Norway and Algeria to gain support for the proposal and expressed regret that, owing to the procedure followed, it had not been possible for the Committee to reach general agreement on the matter.

33. Mr. SABEL (Israel) said that his delegation would make a fuller statement on Article 84, paragraph 3, to the plenary Conference. At the present stage he wished merely to state that the provisions of the article applied only to declarations relating to commitments or obligations undertaken in good faith, since that was a general requirement of international law.

Final provisions and Preamble

Introduction of amendments

New Article 84 bis (CDDH/I/230)

34. Mr. LE (Socialist Republic of Viet Nam) said that since cases not covered by the Conventions or by draft Protocol I were dealt with under Article 1, paragraph 4, which had been adopted by Committee I at its thirteenth meeting (CDDH/I/SR.13) on 22 March 1974, his delegation could withdraw amendment CDDH/I/230 even though it was not fully satisfied with the provisions of that paragraph.

Article 85 - Reservations (CDDH/1; CDDH/I/87)

35. Mr. GRAEFRATH (German Democratic Republic), introducing amendment CDDH/I/87, said that the proposal to delete paragraph 2 of Article 85 had been submitted at the first session. His delegation now considered that the provisions of the 1969 Vienna Convention on the Law of Treaties relating to reservations could be considered to constitute the international law on the subject, even though that Convention had not yet entered into force, and that there was no need to include any such provisions in draft Protocol I. Consequently, his delegation now wished to propose that the whole of Article 85 should be deleted.

New Article 86 bis (CDDH/I/340 and Add.1-3)

36. Mr. de ICAZA (Mexico), introducing document CDDH/I/340 and Add.1-3 on behalf of the sponsors, said that the object of the proposed new article was to ensure the continuing development of the basic rules of international humanitarian law applicable in armed conflicts through the establishment of a committee of States Parties to Protocol I. Even if the prohibition or restriction of the use of certain conventional weapons might not seem to be feasible immediately, some sort of machinery was needed which would permit negotiations to take place when more favourable conditions obtained. The proposal in document CDDH/I/340 and Add.1-3 did not prejudge the result of the negotiations under way in the Ad Hoc Committee on Conventional Weapons, nor was it connected in any way with the follow-up to be given to that Committee's work after the current session of the Conference.

The sponsors regretted that, as a result of the decision taken at the sixty-seventh meeting (CDDH/I/SR.67), the Committee would not have the opportunity to discuss a text which many delegations appeared to support, and they hoped that those delegations would be able to express their views fully in the Working Group to which the document had been referred. The sponsors' attitude towards the composition, election procedure and terms of reference of the proposed committee was flexible, since their main concern was to ensure that a link was maintained between humanitarian law and the use of certain types of weapon.

37. Mr. PAOLINI (France), speaking on a point of order, said that the proposal introduced by the representative of Mexico related to matters that were not within the competence of Committee I. He proposed that the question should be referred to the Ad Hoc Committee on Conventional Weapons.

38. Mr. MORENO (Italy) said that he shared the French representative's misgivings about the propriety of considering the proposal in Committee I. His Government had always doubted that the cause of the prohibition or restriction of the use of certain weapons could be furthered through the multiplication of negotiation forums. The Committee was not, however, competent to discuss the substance of the proposal, and he moved that the debate on it should be adjourned.

39. Mr. OBRADOVIĆ (Yugoslavia) said that his delegaiton endorsed the principle underlying proposed new Article 86 bis. The fact that the Conference had decided to consider the weapons issue demonstrated that the latter was indeed linked to humanitarian law, and he therefore opposed the point of order raised by the French representative.

40. Mr. de ICAZA (Mexico) observed that proposed new Article 86 bis was related to Article 33, which had been adopted by Committee III, even though that Committee was not responsible for questions relating to weapons. It was not within the competence of the Ad Hoc Committee on Conventional Weapons to consider an article which was proposed for inclusion in draft Protocol I and which, moreover, had some bearing on the possible future revision of the Protocol itself. Such an article should find its place among the Final Provisions, which were being considered by Committee I.

41. Mr. FREELAND (United Kingdom), supported by Mr. PARTSCH (Federal Republic of Germany), said that the substance of the proposal was so clearly related to certain of the topics under discussion in the Ad Hoc Committee that it should be referred to that Committee for consideration before Committee I took any further action on it.

42. Miss EMARA (Egypt) said that, though not wishing to discuss the substance of the proposal, she agreed with the representatives of Mexico and Yugoslavia that the matter came within the competence of Committee I.

43. Mr. HUSSAIN (Pakistan) said he shared that view. He felt, however, that as the proposed article concerned implementation measures, it might be preferable to insert it before or after Article 79 bis rather than in the Final Provisions.

44. Mr. GREEN (Canada), on the other hand, supported the views expressed by the representatives of the United Kingdom, France and the Federal Republic of Germany, since a problem might well arise if Committee I and the Ad Hoc Committee both discussed questions of follow-up and came to different conclusions.

45. Mr. MARTIN HERRERO (Spain) considered that to refer the proposal to the Ad Hoc Committee would lead to a deadlock, since that Committee was not empowered to deal with the Final Provisions, nor could it refer the matter back to Committee I. Some way must be found to prevent the proposal from simply being discarded.

46. Mr. KIRALY (Hungary) expressed surprise that the proposal should have been submitted to Committee I, which so far had not dealt with matters of that kind. A quick reading of document CDDH/I/340 and Add.1-3 convinced him that it came closer to the matters discussed in the Ad Hoc Committee, to which he considered it should be referred.

47. Miss POMETTA (Switzerland) said she did not wish to discuss the substance of the proposal at that point, but agreed with the representatives of Mexico and Yugoslavia that Committee I was the correct forum for its discussion.

48. Mr. BRING (Sweden) welcomed the basic ideas behind the proposal. As to procedure, he felt that the Ad Hoc Committee was concerned with immediate follow-up of the weapon issues now under discussion in that Committee, whereas the proposal in question was concerned with longer-term implementation and revision of future regulations. Clearly Committee I was competent to discuss that problem.

49. Miss AL-JOUA'N (Kuwait) endorsed the views expressed by the representatives of Egypt, Mexico, Sweden and Switzerland.

50. Mr. ALEXIE (Romania) said that he, too, agreed that the proposal should be discussed by Committee I, in the context of the Final Provisions.

51. Mr. ABADA (Algeria) considered that the proposal should not simply be passed from one Committee to another. He supported the ideas contained in document CDDH/I/340 and Add.1-3 and agreed that it should be discussed in Committee I. As a matter of courtesy, the Committee should at least be willing to consider the proposal now submitted to it.

52. Mr. BOSCH (Uruguay) said he was in favour of the matter being discussed in Committee I, for the reasons put forward by the representatives of Mexico, Spain and Sweden.

53. Mrs ROULLET (Holy See) endorsed that view.

54. Mr. MUDARRIS (Saudi Arabia) said he agreed with the representatives of Mexico and Yugoslavia. It was within the Committee's competence to discuss any matter which could strengthen the work of the Conference.

55. Miss FLEYFEL (Lebanon) said she agreed that Committee I should discuss that proposal, especially in view of the links, referred to by the representative of Mexico, between the proposed new Article 86 bis and Article 33.

56. Mr. CLARK (Nigeria) strongly supported the sponsors of the proposal. The terms of reference of the Ad Hoc Committee's Working Group set out in document CDDH/IV/221, contained nothing to suggest that the Ad Hoc Committee could discuss a proposal of that kind. Committee I should therefore discuss it immediately or decide to postpone the debate to a later meeting.

57. Mrs. LISBOA DE NECER (Venezuela) said she agreed with the basic idea of the proposal and recognized its utility; it should be discussed in Committee I.

58. Mr. AL-FALLOUJI (Iraq) said that the proposal was inspired by purely humanitarian considerations and envisaged a development of international law. He was willing, if necessary, to make a formal proposal that the amendment should be discussed in Committee I.

59. Mr. PAOLINI (France), speaking on a point of order, reminded the meeting that the representative of Italy had moved the adjournment of the debate on the question of competence, and that motion should be put to the vote.

60. Mr. de ICAZA (Mexico) said that it was the first time that he had heard of the postponement of a discussion on a point of procedure. In view of the large number of speakers from different regional groups who were in favour of the proposal being discussed in Committee I, he appealed to the representatives of France and Italy to agree to the question of competence being put to the vote.

61. Mr. CLARK (Nigeria) asked for a clear ruling whether the discussion to be postponed was the discussion on the competence of Committee I to deal with the proposal, or the discussion on the substance of the proposal. As many delegations felt that Committee I was indeed the correct forum for the debate, he suggested that the Chairman might close the procedural discussion.

62. The CHAIRMAN said that his intention was to adjourn the discussion on the question of competence, in the light of the motion by the representative of Italy. He therefore suggested that the debate on that subject should be adjourned to the sixty-ninth meeting.

It was so agreed.

The meeting rose at 5.50 p.m.

SUMMARY RECORD OF THE SIXTY-NINTH MEETING

held on Wednesday, 27 April 1977, at 3.50 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Final provisions and Preamble (continued)

Introduction of amendments (CDDH/I/340 and Add.1-3)(concluded)

1. The CHAIRMAN said that since the sixty-eighth meeting (CDDH/I/SR.68), he had held informal talks on the best way of approaching document CDDH/I/340 and Add.1-3. Those talks had led him to believe that a consensus would be possible on the following procedure:

The proposal in document CDDH/I/340 and Add.1-3 would be debated in Committee I in accordance with the procedure adopted for all draft articles and proposed amendments.

The proposal would be referred to Working Group C on the understanding that the Group would first examine draft articles and amendments submitted before 26 April 1977 and adopt its report on those articles and amendments, including the Preamble. Thereafter, it would carry out its consideration of the proposal in document CDDH/I/340 and Add.1-3 and embody its conclusions on the proposal in an addendum to its report. The report and its addendum would be submitted simultaneously to the Committee for consideration in the normal way.

That decision would be without prejudice to discussion of related topics in the Ad Hoc Committee on Conventional Weapons in the meantime. The Ad Hoc Committee was requested to communicate immediately to Committee I any outcome of any such discussion.

2. Mr. VANDERPUYE (Ghana) observed that it was the task of Working Group C to consider the Preamble and the Final Provisions of Protocols I and II, and that the new Article 86 bis proposed in document CDDH/I/340 and Add.1-3 would be better placed among the substantive articles.

3. Mr. AL-FALLOUJI (Iraq) said that he had no objection to a consensus on the Chairman's proposal, but he would like to know whether there was any difference from the point of view of legal validity between a report and an addendum to that report. If not, he wondered why the distinction was made.

4. The CHAIRMAN explained that the addendum would have the same legal validity as the report itself.

5. Mr. AL-FALLOUJI (Iraq) suggested that, to avoid misconception, it should be specified in the report that the addendum would have exactly the same legal validity as the report itself.

6. Mrs. LISBOA DE NECER (Venezuela) said that her delegation wished to join the sponsors of document CDDH/I/340 and Add.1-3.

7. The CHAIRMAN said that if there were no objections he would consider that his proposal was adopted by consensus.

It was so agreed.

8. Mr. BLOEMBERGEN (Netherlands) said that his delegation supported the principle behind the Mexican proposal (CDDH/I/340 and Add.1-3) and was glad that the procedural problem facing the Committee had been solved.

9. Mr. GLORIA (Philippines) said that, as he had already explained at the sixty-sixth meeting, he deplored the omission from the working programme of Committee I of some important proposals left in abeyance at the end of the third session. They included the oral proposal his delegation had submitted at the third session (sixtieth meeting on 3 June 1976) to insert in paragraph 3 of Article 74 a new sub-paragraph worded as follows:

> "(g) the use of weapons prohibited by the law of war, such as asphyxiating, poisonous or other gases and analogous liquids, materials or devices, dum-dum bullets, and those weapons that violate the traditional principles of international law and humanitarian rules, such as biological weapons, blast and fragmentation weapons;".

On the proposal of the Norwegian delegation, Committee I had decided not to consider that proposal at the third session but to hold it in abeyance until the fourth. The Philippine delegation had therefore assumed that its proposal would be discussed in the Committee at the current session, and had been very disappointed to learn that it had been referred to Working Group B for approval.

10. His delegation had agreed to be a sponsor of document CDDH/I/340 and Add.1-3 because the new Article 86 bis proposed therein resurrected the principle of its proposal concerning Article 74, which had been intended to secure the regulation or prohibition, as the case might be, of the use of certain weapons in armed conflict. His delegation fully shared the view put forward by the Mexican delegation at the sixty-eighth meeting, and supported by other delegations, that it was Committee I and not the Ad Hoc Committee on Conventional Weapons which had jurisdiction to consider document CDDH/I/340 and Add.1-3, for it dealt with matters relating to Protocol I, in particular Article 74 on the repression of breaches of the Conventions and of Protocol I. It was not within the competence of the Ad Hoc Committee to determine the place of the new article if and when it was adopted. That Committee's jurisdiction was limited to determining what conventional weapons might be used in armed conflict, the extent of injury caused by certain types of weapon when used in certain areas of operation, and which weapons or means of combat should be totally banned. It was not within the province of the Ad Hoc Committee to assert that the use of this of that weapon constituted a grave breach.

11. The Committee should therefore discuss document CDDH/I/340 and Add.1-3 without further delay; there could be no doubt as to its competence to do so.

12. The CHAIRMAN said that he would consult the General Committee about the point raised by the representative of the Philippines and would inform the Committee of the result at the seventieth meeting.

Article 90 - Authentic texts and official translations (CDDH/1; CDDH/I/53, CDDH/I/74, CDDH/I/336 and Add.1, CDDH/I/337 and Add.1, CDDH/I/339 and Add.1, CDDH/I/341)

13. Mr. BOBYLEV (Union of Soviet Socialist Republics) introduced amendment CDDH/I/53 of 18 March 1974, of which his delegation was a sponsor and which proposed the replacement of the words "French and English texts" by "French, English and Russian texts". It was quite natural that the Russian text of the Protocol should be equally authentic with the French and English texts, since Russian was an official language not only of the United Nations but also of the Conference.

14. He was prepared to support the similar amendment proposed by the Arabic-speaking delegations (CDDH/I/341) and the Spanish-speaking delegations (CDDH/I/339 and Add.1).

15. Mr. ABDINE (Syrian Arab Republic) said that his delegation would withdraw its amendment CDDH/I/74 of 20 March 1974 in favour of amendment CDDH/I/341 of 26 April 1977, of which it was a sponsor. Since the Conference had agreed to Arabic being one of its working languages, the logical consequence was that the Arabic text of the Protocol should be equally authentic.

16. He supported the similar proposals concerning the Spanish and Russian texts.

17. Mr. MARTIN HERRERO (Spain), introducing amendment CDDH/I/339 and Add.1, said that other Spanish-speaking countries could join the sponsors, the list of whom was not restricted. The use of Spanish for the authentic texts and official translations of the Protocol was not being claimed for reasons of prestige or on emotional grounds. It was merely a question of adapting the text to the facts. Spanish was already one of the official languages of the United Nations and of all international conferences and was therefore of a universal character.

18. He supported amendments CDDH/I/336 and Add.1 and CDDH/I/341, concerning the use of Russian and Arabic respectively for the authentic texts of the Protocol.

19. Miss MORALES HERNANDEZ (Costa Rica) said that her country intended to join the co-sponsors of amendment CDDH/I/339 and Add.1.

20. Mr. ROMAN (Chile) said that his country, too, would like to become a sponsor of amendment CDDH/I/339 and Add.1, but had an addition to propose. In Article 47 of draft Protocol II, the words "the French and English texts" in paragraph 1 should be replaced by "the French, English and Spanish texts".

21. Mr. de ICAZA (Mexico) said that the representative of Chile should introduce his proposed addition in accordance with the rules of procedure.

22. Mr. CAJINA MEJICANO (Nicaragua) expressed his country's wish to join the sponsors of amendment CDDH/I/339 and Add.1.

23. Mr. MARTIN HERRERO (Spain) said that he had no objection to the Chilean proposal, but he, too, considered that the representative of Chile should submit his amendment in writing.

24. Mr. GLORIA (Philippines), speaking on amendment CDDH/I/56, said that he was ready to agree to a compromise and to accept the decisions of the Committee.

Preamble (CDDH/1; CDDH/I/337 and Add.1)

25. Mr. GRAEFRATH (German Democratic Republic) submitted an amendment to the Preamble to draft Protocol I on behalf of the sponsors of amendment CDDH/I/337 and Add.1. The purpose of the two new paragraphs proposed was to determine more clearly the place and the function of the Protocol in present international law, which prohibited the use of force by States in international relations. At the present time the maintenance of peace must not be just a wish of parties to a contract; it had to be a jus cogens rule of international law. The prohibition of the use of force must be reaffirmed unambiguously in the Preamble so as to prevent public opinion gaining the impression that the Protocols were intended simply to regulate warfare. The proposed paragraph 2 therefore had a preventive purpose. In order to avoid any lengthy discussion on its wording, the sponsors of the amendment had taken over, word for word, part of Article 2, paragraph 4, of the United Nations Charter. Moreover, the insertion of the proposed paragraph 2 would provide a link with the third paragraph of the Preamble to Protocol I, which referred to the need to protect the victims of armed conflicts. With regard to the proposed paragraph 4, he recalled that, after negotiations lasting many years, the United Nations General Assembly had adopted by consensus a definition of aggression. The definition specified the criteria of aggression and stated that aggression was a crime for which its instigators were responsible internationally and that no special advantage resulting from aggression was or should be recognized as lawful. Nothing in the Protocol should be able to be construed as restricting that definition. To exclude all doubts, therefore, the sponsors of amendment CDDH/I/337 and Add.1 had considered it necessary to add paragraph 4 to the Preamble and to word it in a manner acceptable to all delegations.

Report of Working Group A on Articles 76 bis, 77, 78 and 79 (CDDH/I/338/Rev.1 and Add.1)

26. Mr. de ICAZA (Mexico), speaking as Chairman of Working Group A, said that his Group, having adopted its report, was submitting it to Committee I for consideration and approval. It lay with the Committee to come to a decision on the conclusions in the report. The Working Group had adopted the new Article 76 bis proposed by the United States delegation and requested the Committee to take note of its work on that subject.

27. The CHAIRMAN pointed out that the questions dealt with in the Working Group's report had already been considered at great length at the third session of the Conference. He saw no need for a fresh discussion on the various points.

Article 77 - Superior orders (CDDH/1)

28. Mr. ABDINE (Syrian Arab Republic) asked that, in accordance with rule 37 of the rules of procedure, the retention of Article 77 should be put to a vote by roll-call. His delegation opposed the adoption of the article and would be able later to give an explanation of its vote concerning the text.

29. Replying to a question by Mr. de ICAZA (Mexico), Chairman of Working Group A, Mr. ABDINE (Syrian Arab Republic) stated that he was asking first of all for a vote on the retention or deletion of Article 77; there would be another vote after that, if necessary, on the text of the article.

30. Mr. FRUCHTERMAN (United States of America) said that it would be difficult for the Committee to rule on the retention of Article 77 before the text had been finally established; in particular, a decision should be taken on the insertion of the word "grave" before "breach" in paragraphs 1 and 2.

31. Mr. DIXIT (India), supported by Mr. OBRADOVIĆ (Yugoslavia), considered that, before discussing the text, the Committee should vote on the retention of the article.

32. Mr. MBAYA (United Republic of Cameroon) and Mr. DOUMBIA (Mali) agreed.

33. Mr. HUSSAIN (Pakistan) said that he, too, shared that view. He pointed out that that procedure would be in conformity with the rules of procedure.

34. Mr. SADI (Jordan) said that he saw no need for a double vote. If the text itself was put to the vote immediately, those against it could just as well show by a negative vote that they did not wish an article on "superior orders" to be adopted.

35. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), referring to rule 40 of the rules of procedure, pointed out that, when two or more amendments were moved to a proposal, the Conference should first vote on the amendment furthest removed in substance from the original proposal. The proposal that the article itself should be deleted was in fact the furthest removed from the original proposal. A vote should therefore be taken first of all on the principle of an article relating to "superior orders", then, if necessary, on the insertion of the words placed between square brackets and, finally, on the whole text.

36. Mr. FREELAND (United Kingdom), speaking on a point of order, said that he understood that the Committee would be invited to vote first on the principle of whether there should be an article on "Superior Orders", in which case his delegation would abstain, because it did not consider that the question could usefully be answered in the abstract. The Committee would then vote on the words placed between square brackets in the proposed text, and finally on the text as a whole. In that last case, his delegation would cast a negative vote. He wished to be sure that his delegation would have an opportunity to cast its vote on the whole text.

37. The CHAIRMAN made it clear that no vote would be taken on the whole text unless the first vote was in favour of retention of the article.

38. The CHAIRMAN, replying to a question by Mr. RECHETNIAK, (Ukrainian Soviet Socialist Republic) on the subject of the vote, stated that delegations which favoured the inclusion of the provision in question would vote "yes" and those against it would vote "no".

At the request of the representative of the Syrian Arab Republic, the vote on the inclusion of a provision relating to "superior orders" (Article 77) was taken by roll-call.

Afghanistan, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Belgium, Bulgaria, United Republic of Cameroon, Canada, Chile, Cyprus, Costa Rica, Cuba, United States of America, Finland, France, Greece, Hungary, Ireland, Israel, Japan, Mexico, Mongolia, Norway, Netherlands, Peru, Philippines, Poland, Portugal, German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, Holy See, Union of Soviet Socialist Republics, Venezuela, Yugoslavia, Zaire.

Against: Saudi Arabia, Australia, India, Iran, New Zealand, Oman, Pakistan, Syrian Arab Republic, Switzerland.

Abstaining: Afghanistan, Algeria, Germany (Federal Republic of), Argentina, Austria, Brazil, Colombia, Ivory Coast, Denmark, Egypt, United Arab Emirates, Spain, Ghana, Indonesia, Iraq, Italy, Socialist People's Libyan Arab Jamahiriya, Jordan, Kuwait, Lebanon, Madagascar, Mali, Mauritania, Mozambique, Nigeria, Panama, Qatar, Republic of Korea, Romania, United Kingdom of Great Britain and Northern Ireland, Senegal, Sudan, Tunisia, Turkey, Democratic Yemen.

The Committee decided, by 34 votes to 9, with 35 abstentions, to include in Protocol I a provision relating to "superior orders" (Article 77).

39. The CHAIRMAN pointed out that the vote in no way implied that any particular wording of Article 77 had been adopted.

40. Mr. ABDINE (Syrian Arab Republic) contested the result of the vote, stressing that, according to the rules of procedure, the decision should have been adopted by a simple majority of the "representatives present", i.e. at least 40.

41. Mr. GRAEFRATH (German Democratic Republic) disputed the grounds for that submission and read out rule 36 of the rules of procedure, which stated that representatives who abstained from voting should be considered as not voting.

42. Mr. FRUCHTERMAN (United States of America) said that, according to rule 35, paragraph 3, of the rules of procedure, the Chairman must rule immediately on the point raised by the Syrian Arab Republic.

43. The CHAIRMAN, after a short break in the meeting, read out rules 50 and 36 of the rules of procedure and confirmed the result of the vote on the inclusion in Protocol I of a provision relating to "superior orders".

The meeting rose at 6 p.m.

SUMMARY RECORD OF THE SEVENTIETH MEETING

held on Thursday, 28 April 1977, at 3 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Report of Working Group A on Articles 76 bis, 77, 78 and 79 (CDDH/I/338/Rev.1 and Add.1) (concluded)

Article 77 - Superior orders (concluded)

1. The CHAIRMAN invited the Committee to vote on the text of Article 77 as reproduced in the report of Working Group A (CDDH/I/338/Rev.1 and Add.1).

2. Mr. ABDINE (Syrian Arab Republic) said that in order to expedite the Committee's work he would no longer insist on a vote by roll call on Article 77.

3. Mr. SCHUTTE (Netherlands) said that before a vote was taken he would like to submit an oral amendment to paragraph 2 of Article 77, an amendment which in fact was identical to the widely-supported proposal he had submitted to Working Group A. As had been rightly pointed out, it was precisely because the proposal had been made just as Working Group A had been about to adopt its report that no reference to it had been made in the report, on the understanding that it could be submitted to the Committee before it voted on Article 77. His proposal was to replace the word "wilfully" which appeared between square brackets in the first line of paragraph 2 by the word "mere" to be inserted before the word "fact" at the beginning of the paragraph. The French text would then begin with the words "Le seul fait d'avoir agi sur l'ordre ..." and the English text with the words "The mere fact of having acted pursuant to an order ...". He pointed out that the amendment was merely one of style which in no way affected the substance of the paragraph.

4. The CHAIRMAN said that he would put Article 77 to the vote paragraph by paragraph. He asked the Committee to vote first on retention of the word "grave" which appeared between square brackets in paragraph 1.

It was decided to retain the word "grave" by 35 votes to 15, with 13 abstentions.

5. Mr. FRUCHTERMAN (United States of America) said that he had not interrupted the vote that had just taken place because that would have been against the rules of procedure. He wished to know, however, whether, as with the vote on the word "grave" it was the Chairman's intention to put to the vote each article without discussion.

6. The CHAIRMAN replied in the affirmative. He put to the vote paragraph 1 as a whole.

Article 77, paragraph 1, as a whole was adopted by 36 votes to 19, with 15 abstentions.

7. The CHAIRMAN invited the Committee to vote on the oral amendment made by the representative of the Netherlands. The amendment was to insert the word "mere" before "fact" at the beginning of paragraph 2, which would then start with the words "The mere fact of having acted pursuant to an order ...".

8. Mr. GREEN (Canada), speaking on a point of order, said that he had understood the oral amendment submitted by the representative of the Netherlands to involve deletion of the word "wilfully" between square brackets in the first line of paragraph 2 as well as insertion of the word "mere" before "fact".

9. The CHAIRMAN said that that was so. He put to the vote the amendment submitted by the representative of the Netherlands.

The Netherlands amendment was adopted by 44 votes to one, with 18 abstentions.

10. Mr. HUSSAIN (Pakistan) said that the Chairman's reply to the representative of Canada had been quite clear. However, at the time of the actual vote, the Chairman had asked the Committee to decide on the insertion of the word "mere" alone. It might be better to have the Committee vote also on the deletion of the word "wilfully". The record of the debate would then clearly show what the Committee had actually voted upon.

11. The CHAIRMAN, in deference to the wish expressed by the representative of Pakistan, asked the Committee whether it wished to vote on the deletion of the word "wilfully". He concluded that the Committee did not apparently wish to do so.

12. Mr. GREEN (Canada) pointed out that he had specifically asked whether a vote to insert the word "mere" entailed deletion of the word "wilfully" and that the Chairman had replied in the affirmative.

13. The CHAIRMAN, replying to Mr. SADI (Jordan) and Mr. de BREUCKER (Belgium), observed that he had asked members of the Committee whether they wished to vote on the deletion of the word "wilfully" and that no one had indicated that they did.

14. Mr. GLORIA (Philippines) said he distinctly remembered that the original proposal by the representative of the Netherlands had been to insert the word "mere" before the word "fact" and to delete the word "wilfully" appearing in square brackets. He had voted for the proposal on the understanding that the word "wilfully" was deleted, since if it were not the sentence would be incorrect and would make no sense from the legal standpoint.

15. After an exchange of views involving Mr. NUÑEZ (Cuba), who agreed with the representative of Canada, Mr. DIXIT (India), who confirmed that no one had indicated any wish to vote for the deletion of the word "wilfully", Miss AL-JOUA'N (Kuwait), who thought that rule 40 of the rules of procedure should be applied to settle the question, Mr. SADI (Jordan), who proposed that a formal vote should be taken on whether or not the word "wilfully" should be kept, Mr. HUSSAIN (Pakistan), who repeated his original statement, Mr. MUDARRIS (Saudi Arabia), who thought that the simplest course would be to vote on the deletion of the word "wilfully", and Mr. MBAYA (United Republic of Cameroon), who noted that no one had indicated any wish to vote for the deletion of the word "wilfully", the CHAIRMAN ruled that the Committee had decided, by virtue of the vote it had just taken, to insert the word "mere" before the word "fact" at the start of paragraph 2, and to delete the word "wilfully" appearing in square brackets in that paragraph. He declared that the Chairman's ruling settled the question.

16. The CHAIRMAN then put to the vote the retention of the word "grave" appearing in square brackets in paragraph 2.

It was decided to retain the word "grave" by 41 votes to 12, with 15 abstentions.

17. Miss MARTIN (Legal Secretary), at the request of the Chairman, read out the text of paragraph 2 as thus amended, as follows:

> "2. The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment."

Article 77, paragraph 2 was adopted by 40 votes to 9, with 28 abstentions.

18. The CHAIRMAN put to the vote Article 77 as a whole.

Article 77 as a whole was adopted by 38 votes to 22, with 15 abstentions.

Article 76 bis

19. The CHAIRMAN suggested that to save time explanations of votes might follow after the Committee had taken its decision on the four articles under consideration, and proposed moving straight on to Article 76 bis. He reminded the Committee that the Working Group had adopted the article by consensus, and wondered if the Committee could do the same.

20. Mr. de GOUTTES (France) said that he must with regret oppose the adoption of the article by consensus, as his delegation considered it essential for the various paragraphs of Article 76 bis to be put to the vote separately. He was ready if asked to explain to the Committee the reasons for his request.

21. The CHAIRMAN put to the vote Article 76 bis, paragraph 1.

Article 76 bis, paragraph 1, was adopted by 69 votes to none, with one abstention.

22. Mr. VANDERPUYE (Ghana) expressed surprise that the total number of votes cast varied so much from one vote to another.

23. The CHAIRMAN replied that he had to abide by the figures arrived at by the Secretariat, and had no way of checking whether each delegation had in fact voted.

24. The CHAIRMAN put to the vote Article 76 bis, paragraph 2.

Article 76 bis, paragraph 2, was adopted by 72 votes to none, with 2 abstentions.

25. The CHAIRMAN put to the vote Article 76 bis, paragraph 3.

26. Mr. FRUCHTERMAN (United States of America), speaking on a point of order, pointed out that earlier in the meeting he had asked the Chairman if the items to be voted on could be discussed at all, and had been told that they could not. He asked the Chairman to state whether that decision still held.

27. Mr. de GOUTTES (France), also speaking on a point of order, said he merely wished to clear up one point. It was not his delegation's aim to query paragraph 3 as a whole. It merely wished to request that the end of the sentence, reading "and, where appropriate, to initiate disciplinary or penal action against violators thereof.", should be voted on separately and that there should then be a second vote on the paragraph as a whole. He was prepared to give his grounds for making that request.

28. The CHAIRMAN considered that there was no need to hear the reasons for the proposal, and agreed to proceed as the French representative requested. He put to the vote the last part of Article 76 bis, paragraph 3, reading "and, where appropriate, ... thereof".

The last part of Article 76 bis, paragraph 3, was adopted by 56 votes to one, with 11 abstentions.

29. The CHAIRMAN put to the vote Article 76 bis, paragraph 3, as a whole.

Article 76 bis, paragraph 3, as a whole was adopted by 70 votes to none, with 3 abstentions.

30. The CHAIRMAN put to the vote Article 76 bis as a whole.

Article 76 bis as a whole was adopted by 72 votes to none, with 3 abstentions.

Article 78 - Extradition

Article 79 - Mutual assistance in criminal matters

31. Mr. GREEN (Canada), speaking on a point of order, observed that the Working Group had considered Article 79 before Article 78. He wondered whether the Committee should not do likewise, since the vote on Article 78 could depend on the outcome of the vote on Article 79.

32. Mr. de GOUTTES (France) considered that it would be more logical to put Article 78 to the vote first, since it dealt with the question of extradition, which was taken up again in paragraph 2 of Article 79. That was, moreover, the order proposed by the Rapporteur of the Working Group.

33. The CHAIRMAN, noting the opposition of the French delegation and the recommendation by the Rapporteur of the Working Group, said that, if there was no objection, he would put Article 78 to the vote first and then Article 79.

34. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) formally requested that the question should be put to the vote.

35. The CHAIRMAN invited the Committee to vote on the Canadian proposal.

36. Mr. de GOUTTES, speaking on a point of order, said that since in its report the Working Group had adopted the articles in the normal order, to be consistent the Committee should adopt Article 78 before Article 79. He found it surprising that the content of the report should be called in question.

37. Mr. PARTSCH (Federal Republic of Germany) pointed out that the end of paragraph 10 of the report read "In the event of the text of Article 78 being adopted by the Committee, it would be for the Drafting Committee to decide on the order and the place in which Articles 78 and 79 should be inserted". There was thus nothing to prevent the Committee from adopting the articles in the order it thought most appropriate.

38. The CHAIRMAN, replying to a question by Mr. OBRADOVIĆ (Yugoslavia), explained that he had invited the Committee to vote on the Canadian proposal in a desire to avoid too many procedural motions; if the Canadian proposal was adopted, Article 79 would be put to the vote before Article 78.

The Canadian proposal was adopted by 41 votes to 4, with 14 abstentions.

39. Mr. GLORIA (Philippines) said that, in the circumstances, he took it that the adoption of Article 78 would depend on the decision that would be taken on Article 79.

40. The CHAIRMAN asked the Committee whether it wished to vote forthwith on Article 79 as a whole.

41. Mr. SCHUTTE (Netherlands) suggested that the article should be adopted by consensus.

42. Mr. de GOUTTES (France) said that he was regretfully obliged to ask for a separate vote on each paragraph.

43. The CHAIRMAN put Article 79 to the vote, paragraph by paragraph.

Article 79, paragraph 1 was adopted by 69 votes to none, with 3 abstentions.

Article 79, paragraph 2 was adopted by 65 votes to 2, with 3 abstentions.

Article 79, paragraph 3 was adopted by 70 votes to none, with one abstention.

Article 79 as a whole was adopted by 70 votes to none, with 3 abstentions.

44. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, pointed out that the Drafting Committee had taken no decision concerning the titles of Articles 78 and 79. It seemed to him that the titles in the ICRC draft were appropriate, but he would like to have precise instructions from Committee I on that point. Furthermore, the Drafting Committee had begun to consider both the placing of the articles, which it had envisaged merging, and also the order of the paragraphs, which was not without difficulty, as had been indicated by the representatives of Canada and France at the current meeting. The Drafting Committee would like Committee I to give it a mandate to continue considering the matter, and to authorize it, if need be, to merge the two articles in a single one - which might be entitled "Mutual assistance in criminal matters and extradition" - and to arrange its paragraphs in a more satisfactory order. Committee I's report should make express mention of that mandate.

45. Mr. de ICAZA (Mexico), Chairman of Working Group A, said he thought it would be extremely useful for the Committee to take a position on the points which the Chairman of the Drafting Committee had just mentioned.

46. Mr. ABI-SAAB (Egypt) pointed out that there was a discrepancy between the English and French texts in paragraph 3 of Article 79. The Working Group had, in fact, deleted some words in the first sentence, which, owing to a technical slip, had been retained in the French text; the phrase in question read: "pour l'exécution d'une demande d'entraide", and should accordingly not appear.

47. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, said that, when considering Article 79, the Working Group had decided to delete the phrase in question. For order's sake, and in order to facilitate the Drafting Committee's task, he would like to have confirmation that the text adopted by the Committee did not include those words.

48. Mr. de ICAZA (Mexico), Rapporteur, confirmed that a technical mistake had crept into the French text of Article 79, paragraph 3, appearing on page 5 of the French version of the Working Group's report (CDDH/I/338/Rev.1), and that it was the English text which reflected the consensus reached by the Working Group. That fact would be mentioned in the report.

49. Mr. de GOUTTES (France) said that his delegation had agreed to the deletion of the words "pour l'exécution d'une demande d'entraide", because it considered that paragraph 3 was thus made more general in scope.

50. Mr. AL-FALLOUJI (Iraq), Chairman of the Drafting Committee, asked the representative of France to explain what he meant by "more general in scope". If it was a question of adding something to paragraph 3, it would be preferable for that to be clearly stated before the Committee in order to avoid difficulties in the Drafting Committee.

51. Mr. de GOUTTES (France) pointed out that the Spanish text, like the French one, included the phrase "para la ejecución de una petición de ayuda". His delegation considered that, if that phrase were deleted, the provisions in question would apply in "the field of mutual assistance in criminal matters and extradition".

52. Mr. SCHUTTE (Netherlands) said that there could be no question of adding the words "and extradition" after the words "mutual assistance in criminal matters" in the second sentence of paragraph 3. In the first place, the Working Group had taken no decision along those lines and, furthermore, the phrase was taken word for word from Article 10, paragraph 2, of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; as such, it should not be changed.

53. Mr. de ICAZA (Mexico), Rapporteur, expressed the view that the guiding consideration should be what had happened in the Working Group. The article and the paragraph in question had been discussed at length, and the representative of France had agreed to a compromise solution; that was reflected in the English text set forth in the report of Working Group A (CDDH/I/338/Rev.1), which had just been voted upon by the Committee. It was owing to a technical slip that the French and Spanish texts contained a phrase which should have been deleted. He accordingly proposed that the English text should be considered the one adopted, and that it should be left to the Translation Services to draft correct French and Spanish versions, taking care not to include the words that had been deleted.

It was so agreed.

54. The CHAIRMAN put draft Article 78 to the vote, paragraph by paragraph.

Paragraph 1 was rejected by 27 votes to 7, with 39 abstentions.

Paragraph 2 was rejected by 41 votes to one, with 29 abstentions.

Article 78 as a whole was thus rejected.

Addendum to the report of Working Group A (CDDH/I/338/Rev.1/Add.1)

Part V bis - Obligation to make reparation for breaches of the present Protocol (CDDH/I/335 and Add.1 and 2). (concluded)

55. Mr. de ICAZA (Mexico), Rapporteur, drew attention to document CDDH/I/338/Rev.1/Add.1, which was an addendum to the report of Working Group A. The Working Group had considered the new Part V bis proposed by Algeria, the Socialist Republic of Viet Nam and Yugoslavia (CDDH/I/335 and Add.1 and 2) and had adopted by consensus the text appearing in paragraph 3 of the addendum.

56. The CHAIRMAN suggested that the Committee should adopt that text by consensus.

It was so agreed.

The meeting rose at 6.5 p.m.

SUMMARY RECORD OF THE SEVENTY-FIRST MEETING

held on Friday, 29 April 1977, at 3.20 p.m.

Chairman: Mr. OFSTAD (Norway)

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Explanations of vote

1. Mr. OBRADOVIĆ (Yugoslavia) said that in the view of his delegation Article 77, concerning superior orders, codified an existing rule of international law. It resolved the dilemma which soldiers might face in time of war, when they received orders which were contrary to law, justice and morality. It endorsed the judgement pronounced by the international community on accused persons who had offered military discipline as an excuse for their crimes. The adoption of Article 77 was particularly welcomed by Yugoslavia, which had been the victim of many war crimes in 1940-1945 and had subjected those responsible to severe punishment. It was nevertheless true that military discipline had to be observed in any army. For that reason his delegation had taken the view that Article 77 should be applied to grave breaches only.

2. Article 76 bis consisted of provisions which were already in the military codes of all countries. Nevertheless, in view of the interest expressed in the item by some delegations, his delegation had accepted the majority opinion and had voted in favour of the insertion of that text.

3. With reference to Article 78, his delegation had stated at the third session that it was in favour of a clause which reflected the ICRC's proposal. It had abstained in the vote, however, because it felt that the version submitted by the Working Group was meaningless.

4. On the other hand, it had voted in favour of Article 79 because it considered that the article represented the maximum that States could accept and that its provisions would facilitate mutual assistance in criminal matters in respect of grave breaches.

5. The Yugoslav delegation also welcomed the adoption by consensus of the new Part V bis (CDDH/I/335 and Add.1 and 2), of which it was a sponsor, since it confirmed the validity of a rule already stated in The Hague Convention No.IV of 1907 concerning the Laws and Customs of War on Land.

6. Lastly, his delegation regretted the fact that only Article 79 had been adopted by consensus and it hoped that in future Committee I would make every effort to ensure that decisions by consensus were arrived at more often.

7. Mr. SCHUTTE (Netherlands) said that his delegation had voted against the insertion of the word "grave" in both paragraphs of Article 77 but had nevertheless voted in favour of the article as a whole as put to the vote because it was its understanding that the text adopted did not prejudice the validity of current written and customary law according to which the mere fact of having obeyed an order did not absolve those accused of violations of the laws and customs of war from individual responsibility under international law, whether or not such violation constituted a grave breach of the 1949 Geneva Conventions or of Protocol I.

8. Mr. LE (Socialist Republic of Viet Nam), speaking on behalf of his own delegation and the co-sponsors of the amendment in document CDDH/I/335 and Add.1 and 2, thanked the members of the Committee for their unanimous support.

9. The consensus marked a victory for the concept of humanity based on justice because, by reaffirming the principle of the obligation to make reparation for breaches of the Conventions and of Protocol I, a principle already embodied in The Hague Convention No.IV of 1907, the Committee was helping to heal the deep wounds inflicted upon peoples fighting for their national and social emancipation. It also represented the triumph of a new spirit: that of the historical realism and good will with which the Committee was imbued. Indeed, whether they had unreservedly supported the proposed text or had wished to amend it in some way, all delegations had shown themselves to be in favour of its substance. His delegation saw in that attitude a good omen for the Committee's future work.

10. His delegation had voted in favour of Articles 76 bis, 77 and 79, for two reasons.

11. In the first place, it had supported them because it felt that they were likely to increase the effectiveness of measures for the application of the Geneva Conventions and of Protocol I, as also the prevention and suppression of breaches, particularly

grave breaches, of those instruments. By prescribing, by a large majority, that the Parties to the Conventions and to conflicts must clearly define the duties and responsibilities of military commanders (Article 76 bis) and ensure that their internal law penalizing disobedience to orders was in accordance with the requirements of a just and effective suppression of grave breaches of the Conventions and of Protocol I (Article 77), and by stating that the High Contracting Parties must afford one another the greatest measure of assistance in connexion with criminal proceedings and co-operate on matters of extradition in respect of grave breaches (Article 79), the Committee had proved equal to the task of developing a new international humanitarian law.

12. Secondly, Article 77 provided an opportune extension of the principles of Nürnberg by bringing in the principle of non-indictability for disobedience to orders constituting a grave breach of the Conventions or Protocol I, and the principle of non-immunity from penal responsibility for grave breaches committed in execution of superior orders. The type of war most likely to occur during the next few decades was undoubtedly the colonial, neo-colonial and racist war of aggression. The article would effectively protect the members of the armed forces of aggression - soldiers or officers - who might refuse to carry out orders constituting grave breaches of the Conventions and of Protocol I. It would help them not to act like robots, but to listen to the voice of their human conscience and to stop before they committed an irreparable act.

13. Mr. de GOUTTES (France) said that his delegation favoured the adoption by consensus of general texts on which an agreement in principle posed no problems, but for texts of a particularly technical and complex nature, such as those of Articles 77, 78 and 79, it considered it preferable to vote paragraph by paragraph.

14. Furthermore, since each delegation took its decision on the basis of the version issued in the official language which it used, and since all the versions had the same legal force, his delegation deplored the differences which had been pointed out on two occasions at the seventieth meeting (CDDH/I/SR.70) between the French and English versions of texts, which had led to some ambiguity in the votes cast. In Article 76 bis, for example "le cas échéant" had not the same meaning as "where appropriate". In Article 79, paragraph 3, the French text stated: "Dans tous les cas, la loi applicable pour l'exécution d'une demande d'entraide est celle de la Haute Partie contractante", while the English read: "The law of the High Contracting Party requested shall apply in all cases". The scope of the provision was no longer the same in the two versions and the consistency of the whole paragraph was thereby undermined. His delegation asked that the Committee should specifically instruct the Drafting Committee to restore the balance and consistency of the final texts.

15. His delegation had voted in favour of Article 77 as a whole, because it appeared to strike a satisfactory balance between, on the one hand, the necessary principle of the responsibility of subordinates who participated in the commission of a grave breach on the order of an authority or a superior and, on the other, the legitimate requirements of military discipline.

16. Furthermore, his delegation had interpreted the Netherlands oral amendment made at the seventieth meeting, for which it had voted, as meaning that the mere fact of having acted under orders did not in itself constitute a reason for absolving an accused person from penal responsibility, but that the other reasons for absolving a person from responsibility laid down in the general penal legislation could, where appropriate, still apply in each individual case, including cases of force majeure.

17. Regarding Article 76 bis, he said that the French delegation had asked for a vote paragraph by paragraph and had voted against the retention of the last phrase of paragraph 3. The French version, which differed from the English version, seemed to his delegation unacceptable for two reasons: first, it could be interpreted as tending to transfer certain responsibilities - mainly in the field of disciplinary or penal action - from the level of governments to that of commanders in zones of military operation; secondly, it did not allow of respect for the principle that the responsible authorities must be free to decide on the advisability of a prosecution, and it might thus encroach on the right of the judicial authorities to exercise their judgement in that respect. The French delegation had therefore voted against the retention of the last phrase of paragraph 3, although it had not voted against the article as a whole.

18. With regard to the former Article 78 - Extradition, the French delegation had voted in favour of paragraph 1 because that provision, in the very flexible wording it had been given as the result of a difficult compromise, appeared to be the minimum text necessary to fill the gap remaining in Article 50 of the second Geneva Convention of 1949. That gap arose from the fact that States that did not allow extradition in the absence of a treaty could always refuse extradition if there were no treaty, whereas the States allowing extradition on the basis of their domestic legislation in the absence of a treaty were more firmly bound by the principle of aut dedere aut judicare. Paragraph 1 of Article 78, although much less comprehensive than the initial text proposed by the ICRC - which was in turn based on the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal, 23 September 1971 - would make it

possible to fill the gap by making the Geneva Conventions and the Protocol the legal basis for extradition, and thus empowering every State to grant extradition, whatever its extradition legislation, even in the absence of a bilateral treaty. On the other hand, the French delegation had voted against paragraph 2, considering it irrelevant in so far as it reserved the rights of States not parties to the Conventions and to the Protocols, and dangerous in so far as it appeared to run counter to the principle of the non-extradition of nationals.

19. With regard to Article 79, the French delegation had voted in favour of paragraph 1, which recapitulated the original text of Article 79 submitted by the ICRC, and which enunciated the principle of the greatest possible measure of mutual assistance in criminal matters. It had abstained in the vote on paragraph 2 for the reasons which it had explained in the Working Group. It considered, in fact, that the paragraph on extradition, reintroduced artificially in an article which had initially been designed to cover only mutual assistance in criminal matters, was, on the one hand, wrongly placed, since it should have appeared in a separate article on extradition, and, on the other, inadequate so far as its substance was concerned, since it was drafted in very imprecise terms and failed to fill the gaps in the 1949 Conventions concerning extradition, as the former Article 78 had done. Lastly, in voting in favour of paragraph 3, his delegation had based itself on the official French text, which was the original version and one with which the Spanish version corresponded, but from which the English version deviated by making the scope of the provisions embodied in the paragraph more general.

20. Mr. FREELAND (United Kingdom) said that his delegation had abstained in the votes on the various proposed changes to paragraphs 1 and 2 of Article 77 because it considered that, whatever the outcome of those votes, the terms of the two paragraphs would not be satisfactory. His delegation had voted against each of the two paragraphs and against the article as a whole because of its serious misgivings about their terms, although it had at one stage been favourable to the inclusion of provisions on the subject of superior orders and had contributed actively to the work performed by the Working Group and the Committee on the subject.

21. Its main difficulty arose from the fact that the article would establish one system of law for the category of breaches to which it applied, whereas other types of breaches of the Conventions or the Protocol, as well as breaches of other Conventions or of customary law, would remain subject to a different system - the existing system of customary law. That could clearly give rise to confusion.

22. Secondly, his delegation had doubts about the system which would be established by the article. In particular, the words "or should have known" in paragraph 2 could give rise to troublesome uncertainty. If they were to be understood as meaning only that a person must be taken to know the law, and that a mistake of law could not amount to a defence to a criminal charge, they caused no difficulty although the need for them was questionable. If, on the other hand, they were to be understood as applying to knowledge of factual circumstances, they might cause serious difficulties. It was clearly quite impracticable for a soldier to be expected to carry out his own detailed investigation on the facts of a situation before complying with an order given to him.

23. In view of the seriousness of its doubts on both these aspects, his delegation had reached the conclusion that it would be better for the Protocol to include no provision at all with regard to superior orders, and for the position as a whole to continue to be regulated by the existing rules of international law on the subject, with which, of course, national legislation would have to comply. Particularly in view of the relative narrowness of the majority by which the article had been adopted and the substantial number of votes against it, his delegation hoped the outcome might still be the omission of the article.

24. Mr. SABEL (Israel) said that his delegation had voted in favour of retaining Article 77 and in favour of the article as a whole. The principle enunciated in Article 77 was embodied in Article 125 of the Israel Military Justice Law, which provided that a soldier who refused to obey a manifestly illegal order did not incur penal or disciplinary responsibility.

25. His delegation had voted in favour of the retention of the word "grave" in paragraph 1 which, in its view, in no way signified denying penal responsibility for any violation, however minor it might be. The Conventions had, in fact, been incorporated into the standing regulations of the Israel Army and any violation thereof, however trivial or slight, was considered to constitute a military offence. The case of a minor offence against Article 18 of the third Geneva Convention of 1949 might, for example, be cited: the order to place sums of money owned by prisoners in a special account should be given by an officer; if, however, that order were given by a non-commissioned officer (NCO), it would constitute a breach of the said Convention and Israel would then prosecute the NCO involved and would expect other States to do so in similar circumstances. His delegation did not think, however, that there would be grounds for prosecuting the ordinary soldier for obeying the orders of the NCO. Indeed, it was the commander giving the order who would incur penal responsibility and not the soldier who obeyed it. In that connexion it should be stressed that Article 77

applied only to breaches of the Conventions and of Protocol I, and that any other violations of the laws and customs of war, such as a violation of The Hague Regulations, continued to be covered by the customary international law concerning superior orders.

26. Finally, his delegation reaffirmed that in the case of a grave breach, it was up to the soldier, however junior in rank he might be, to refuse to obey illegal orders and that he was not exempt from penal responsibility if he should carry them out.

27. Mr. RUUD (Norway) said that his delegation had voted in favour of Article 77 although it had not found the wording completely satisfactory. It had hoped that Article 77 would restate in terms of international law the principle of non-absolution from penal responsibility clearly enunciated at Nürnberg and which now formed part of general international law. It had thought, however, that the article could be useful even in the adopted form.

28. Doubts had been voiced whether paragraph 2 might represent a step backward in relation to the above-mentioned Nürnberg principles in that it applied only to grave breaches of the Conventions and of Protocol I. The question was whether the fact that Article 77 made no mention of other breaches meant that such breaches committed pursuant to an order of a superior would not entail penal responsibility. His delegation considered that the text ruled out any possible a contrario interpretation and that the Nürnberg principles would continue to apply to these other breaches.

29. His delegation considered, however, that the words "knew or should have known" in the same paragraph were ambiguous and it would have preferred the words "or should have known" to be deleted. If what was meant was ignorance of the law, the wording was acceptable, but if it meant ignorance of the facts, the problem was more complex. Any person acting in ignorance of the facts, however, was not wilfully committing a grave breach. It seemed, therefore, that the term in question referred only to ignorance of the law.

30. With regard to paragraph 1, his delegation hoped that States would extend the scope of application of that provision, in order that a soldier would not have to choose between a refusal to carry out an order - an act that would most certainly entail penal prosecution - and obedience, with the possibility of prosecution as a war criminal.

31. Mr. MBAMBU (Zaire) said that his delegation had abstained in the vote on Article 77 because that text required the undertaking by the High Contracting Parties to bring into line their internal law penalizing disobedience to orders of a superior which were

considered to deviate from the relevant provisions of the Conventions and of Protocol I. Such an undertaking raised problems of legal adjustment in practice, the more so since the code of military conduct of some States was extremely severe on the subject, especially in the case of armed conflict.

32. Furthermore, in view of the fact that under the national Constitution the principle that a rule of conventional international law took precedence over domestic law was very clearly defined, his delegation, which was not irrevocably opposed to Article 77, had preferred to abstain. It also considered that it could express reservations with respect to the application of that article at the time of the signature and ratification of Protocol I, in the requisite legal form, until such time as the necessary conditions for an undertaking had been met.

33. Mr. SHARIF (Oman), explaining the vote of his delegation on Article 77, said that paragraph 1 was unacceptable because it raised serious difficulties in the relationship between internal law and international law. He wondered whether that paragraph could replace domestic law in cases of disobedience when a grave breach had been committed and whether it placed an obligation on the High Contracting Parties to amend their internal law. There was some ambiguity there and it was for that reason that his delegation had voted against the article.

34. His delegation had no objection to the contents of paragraph 2, but thought that they could have been considered sufficient.

35. Mr. NASUTION (Indonesia) explained his delegation's vote on Articles 77, 76 bis, 78 and 79 of draft Protocol I.

36. With regard to Article 77, his delegation had declared itself in favour of the inclusion of the word "grave" in paragraphs 1 and 2 concerning superior orders. Article 77 applied only to grave breaches which could endanger mankind, while breaches of the provisions of the Conventions and of Protocol I would always be governed by the internal law of the State concerned.

37. In the case of Article 76 bis, relating to the duty of military commanders, his delegation had abstained in the vote on each of the three paragraphs and on the article as a whole. It wished to draw the attention of the Committee to the problems which might arise in many countries, especially developing countries, in carrying out the obligation to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and the Protocol. The problem of facilities, dissemination, and so forth should be solved beforehand. Moreover, his delegation considered that there was no need to enumerate the duties of a commander in the Protocol.

38. His delegation had voted against Article 78 concerning extradition. It thought that there should be an extradition treaty between the State requesting extradition and the State to which that request was made before one or more refugees within the territory of the latter State, having committed a crime in some other country, could be handed over. If such a treaty existed, the decision to extradite was still subject to certain conditions which had to be fulfilled by the requesting State. That was why his delegation had abstained when Article 79 had been put to the vote.

39. Mr. GLORIA (Philippines) said that his delegation had voted against draft Protocol I, Article 77, paragraph 1 because the application of that article might give rise to confusion.

40. Paragraph 1 of Article 77 involved at least two systems of law, namely, the internal law of the Contracting Parties, and the Geneva Conventions and Protocol I, which were obviously a part of international law. As the text stood, paragraph 1 of Article 77 was applicable only in cases of grave breaches. Thus, it was only in cases constituting grave breaches of the Conventions and the Protocol that the High Contracting Parties would ensure that their internal law penalizing disobedience to orders would not apply. Conversely, in cases constituting less serious breaches, the internal law could apply. That was the situation to which the Philippine delegation objected, because the legal basis for the usefulness of the paragraph was questionable. He recalled that at the Twentieth International Conference of the Red Cross, held in Vienna in 1965, the countries represented, numbering more than 100, had been exhorted to enact legislation penalizing breaches of the Geneva Conventions. After several years, only ten countries had done so. At the ICRC Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held at The Hague in 1971, it had been noted that no appreciable results had been obtained. Paragraph 1 of Article 77 did not therefore seem to take account of realities.

41. In the view of his delegation, the word "grave" characterized the nature of the breaches; it related rather to the administration of evidence than to the rule of law, and served merely to determine the penalty. It therefore seemed illogical to apply the provisions of paragraph 1 only to grave breaches. Since the breaches referred to in paragraph 1 were violations of international law, the internal law of the High Contracting Parties should give way to international law in the matter of penal sanctions, regardless of the gravity of the breach, unless the internal or military law of the High Contracting Parties provided for the suppression of such breaches, which was, to say the least, doubtful.

42. Mr. ABDINE (Syrian Arab Republic) said that his delegation had voted against Article 77 because it was contrary to international law. That article sought to regulate a question of discipline in the relations of the subject with his Government or with the authority to which he was linked, a matter that fell essentially within the exclusive competence of the State. It was neither appropriate nor useful for an international convention to lay down obligations arising from the relationships established by the internal law of States. His delegation's second objection had to do with the somewhat doubtful assumption on which Article 77 was based, the assumption that any subordinate was able, in critical circumstances, to distinguish between a licit and an illicit act and, consequently, to form a valid judgement on whether the order he had received was allowable - a hypothesis that often fell entirely within the realm of fiction. Subordinates were seldom acquainted with the legal niceties of very long texts, and if they did have an elementary knowledge of the Conventions and Protocol I, which would already be a considerable achievement, such elementary knowledge would not enable them to form a valid judgement.

43. Thirdly, the article could lead to abuses, under cover of humanitarian law. It implicitly encouraged disobedience to orders, which was contrary to the military codes of most States. Lastly, since in the final analysis it was a matter of the responsibility, at the international level, of the subject of international law, whether State or authority, there would be little point in retaining a provision dealing with a culpability which, in the absence of agreement to the establishment of an international tribunal competent to deal with it, was left by the Protocol to be determined by the instances of internal law.

44. Mr. AINA (Nigeria) said that his delegation had voted in support of Article 77 because the provisions of the article were in line with the principles laid down at Nürnberg. It would have preferred the word "grave" to be deleted from the two paragraphs of the article, however, because it could be difficult for a soldier to distinguish between a grave breach of the Protocol and a breach that was not grave: a soldier should not be empowered, under cover of superior orders, to commit breaches of the Conventions and the Protocol. He could not for the moment imagine what practical effect, on the battlefield, a soldier's refusal to carry out orders would have.

45. His delegation had voted for Article 76 bis because it felt that it was a step in the right direction. It was not only necessary to disseminate the provisions of the Conventions and the Protocol to soldiers and commanders, but it was also very pertinent to see that when there was a breach of the Conventions and the Protocol, the authorities concerned were informed and the necessary measures taken at grass-roots level.

46. His delegation had abstained from voting on Article 78 because it believed that extradition was a matter that should be dealt with by bilateral arrangments between States. It could be seen from the voting that very many delegations were not in favour of the article as it had developed from the ICRC text.

47. His delegation had voted for Article 79 because it had always supported the principle of mutual assistance in criminal matters. Co-operation in that field between the High Contracting Parties would do much to facilitate the application of the Conventions and the Protocol.

48. Mr. FRUCHTERMAN (United States of America) recalled that his delegation had previously voted affirmatively on the issue of whether in principle there should be an article on superior orders in Protocol I. At the Committee's seventieth meeting the preceding day, however, his delegation had been forced to vote against the article. That decision had been necessitated by the final language of both operative paragraphs of Article 77, which limited the application of humanitarian principles to "grave" breaches, instead of extending it to all breaches. That retreat was unworthy of the Conference. In addition, paragraph 2 of Article 77, as adopted by Committee I, was a step backwards from existing customary law. Existing law, as applied at Nürnberg, did not permit the use of the defence of "superior orders" to justify any violation whatsoever of the Conventions. By its vote the preceding day the Committee, in effect and unless some corrective action were taken, had implied that the defence of superior orders was permitted when the crime against the Conventions or Protocol I was less than a grave breach. His delegation could not accept that implication and agreed entirely with the observations made on that score by the delegation of the Netherlands.

49. Paragraph 1 of Article 77 contained the same defect. In directing the High Contracting Parties to ensure that their own internal law permitted a soldier to refuse to obey an order the execution of which would constitute a grave breach, the Committee had not gone far enough. His delegation had urged that the paragraph should be extended to protect a soldier who refused to obey any order which would involve a breach of the Conventions, regardless of the gravity of that breach. The article would not affect military discipline, and it was illogical for nations which had agreed "to respect and ensure respect" for the Conventions to suggest that a soldier could not refuse to commit a breach of those Conventions.

50. In Article 74 of Protocol I, the Committee had imposed a duty on the High Contracting Parties to repress grave breaches and take measures necessary to suppress all other breaches. The Committee's decision the day before had restricted the application of that provision. ' His delegation had therefore voted against Article 77.

51. Mr. GHARIBA (United Arab Emirates) informed the meeting with reference to Article 77, of the principles applied by his country: not to betray, have recourse to falsehood, mutilate corpses, kill the wounded or fell fruit-bearing trees, and to respect religious practices. As a soldier, he did not think there could be any exceptions to the principles of military discipline and obedience to superior orders.

52. All armies consisted of commanders and subordinates; it was difficult, however, to make a clear distinction between them, for a commander could at the same time be subject to orders from a superior officer. He wondered how it could be possible to dispense a subordinate from obeying orders received. It would first have to be assumed that he knew the provisions of the Conventions and of Protocol I. And then, it was questionable how the commanders of any army could allow their orders to be discussed, or even any hesitation to be shown in carrying them out.

53. It should be remembered that the punishment for failure to obey orders, especially in cases of armed conflict, was very severe; and that was why it would be more appropriate that the responsibility for orders should rest with the military commander who issued them. It was for him to assess their results and consequences. The assumption would then of course be that military commanders were aware of the provisions of the Geneva Conventions and Protocol I, which was not always the case. Lastly, Article 77 constituted interference in the internal legislation of States and a restriction of their sovereignty.

54. Mr. GREEN (Canada) explained that his delegation had voted for the retention of an article on superior orders, anticipating that Article 77 would eventually appear in a form that his country would be able to support. It had, however, voted against the final text, which was limited to grave breaches and implied the existence of perhaps three different legal systems. In the first place, Article 77 would govern grave breaches of the Conventions and Protocol I. Secondly, though his delegation did not necessarily agree, it might be arguable that some other system would govern in the case of violations not amounting to grave breaches, while the system of Nürnberg would continue to operate for what might be described as war crimes and crimes against

humanity in the traditional sense. Moreover, the adoption of the article in that form might even make it doubtful whether the defence of superior orders would be open by way of extenuation or mitigation to any person charged with other than a grave breach.

55. As to the insertion of the word "mere" in the opening phrase of paragraph 2, he regarded that as purely stylistic, adding nothing to the substance of the paragraph.

56. Further, the words "knew or should have known" in paragraph 2 were the equivalent of what had been established by Nürnberg and the series of war crimes trials that had occurred after both world wars, namely, "ignorantia juris neminem excusat", meaning that an order which obviously entailed the commission of a criminal act should not be obeyed. The adoption of Article 77, which his country had voted against, in no way changed what Canada understood to be the law and would continue to apply.

57. As to Article 78, on extradition, his delegation was in favour of a provision in accordance with the trend in modern treaty practice, as exemplified by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1971), whereby the Protocol could be used as an optional instrument by States which had no extradition treaty and whose legislation required such an instrument. Since, however, the proposed text made no reference to any specific extraditable offences, nor to the absence or inadequacy of treaties, and was expressed in optional terms, his delegation had abstained, particularly as it had felt that the article had been made redundant by the reference to extradition in Article 79.

58. Mr. VALLARTA (Mexico) said that his delegation had voted for Article 77, which reaffirmed and developed the principle of the responsibility of subordinates in obeying superior orders which, if carried out, would constitute a violation of international law. At the same time, it was to be regretted that those provisions applied solely to grave breaches, not to all breaches.

59. Mr. LHO (Republic of Korea) expressed appreciation of the humanitarian and moral significance of Article 77, but said that his delegation had abstained because the text did not strike a proper balance between the requirements of humanitarian law and those of military discipline. Furthermore, the provisions of Articles 76 and 76 bis, both of which his country had wholeheartedly supported, would suffice to achieve the aim of the proposed Article 77, particularly since the obligation not to comply with an unlawful order was a generally accepted principle of law. His delegation had abstained from voting on Article 78, while supporting

Article 79, because it believed that the latter article was sufficient for the suppression of grave breaches of the Conventions and the Protocol, and at the same time resolved the question of extradition.

60. Mr. BRING (Sweden) said that his delegation had voted for Article 77 as a whole, although it was not completely satisfied with the wording: it would have liked to see the word "grave" deleted, and had voted accordingly in the votes on paragraphs 1 and 2. Be that as it might, the article was a necessary and useful complement to Article 76, which stated a general principle that had been applied in the Manila Tribunal during the trial of General Yamashita. Moreover, Article 77 was based on principles recognized in the Charter and Judgement of the Nürnberg Tribunal, principles which had been later confirmed by resolutions of the United Nations General Assembly. Together, Articles 76 and 77 reaffirmed the principles of international penal responsibility that were developed after the Second World War.

61. As to paragraph 2 of Article 77, his delegation deplored that that reaffirmation had not been made more explicit. The limitation to grave breaches might open the door to a contrario interpretations, thereby indicating a deviation from the Nürnberg principles. Such interpretations would be untenable. It was the task of the present Conference to develop and reaffirm international humanitarian law, not to change or restrict the scope of principles generally recognized. For that reason, his delegation considered that Article 77 had been adopted on the understanding that it did not constitute a change in existing customary law.

62. Miss EMARA (Egypt) said that her delegation had voted for the English text of Article 79, and had noted with satisfaction that the Chairman-Rapporteur of Working Group A had stated the previous day that the English text would constitute the consensus text of the article, with which the French and Spanish texts would have to be brought into line. Her delegation had also noted that no objection to that procedure had been voiced at the meeting in question.

63. Mr. TSUCHIYA (Japan) said that his delegation had voted for Articles 76 bis, 77 and 79, which were necessary for the application of Protocol I and the Geneva Conventions. It had abstained, however, in the vote on Article 78, paragraph 1, and voted against paragraph 2. In the matter of extradition, the common article of the Geneva Conventions of 1949 was adequate to secure the punishment of offenders, not only because it adopted the principle of universal jurisdiction and provided for extradition of criminals, but also because it served as a legal basis for extradition. Thus, Article 78 neither improved nor supplemented the extradition system

already provided for in the common article of the Geneva Conventions. Since some delegations had expressed the view that the common article might not be sufficient as a legal basis for extradition under their national law, his delegation had abstained in the vote on Article 78 as a whole out of respect for a view it did not share.

64. Mrs. LIDDY (Ireland) said that her delegation had voted in favour of Article 77 although it would have preferred the word "grave" to have been deleted. The article developed and reaffirmed humanitarian law without prejudicing the application of the principles of customary law.

65. Her delegation had voted in favour of Article 76 bis for similar reasons and because, like the delegation of Nigeria, it believed the provisions to be a rational corollary to the duty of dissemination set forth in Article 72.

66. In relation to Article 79, her delegation had voted in favour of each paragraph and of the adoption of the article as a whole. Under paragraph 2 of that article, grave breaches of Protocol I were clearly to be understood as being covered by the provisions of the Geneva Conventions relating to trial and extradition. In addition, the phrase "the High Contracting Parties shall co-operate on matters of extradition" was understood by her delegation to mean that any State for whom an extradition agreement was a pre-condition to extradition would be obliged to co-operate with other States requesting the conclusion of such an agreement. The paragraph fully met the preoccupations behind proposed paragraph 1 of Article 78, which left States free to choose the Protocol as the legal basis for extradition, but was not mandatory.

67. Her delegation had abstained in the vote on Article 78, paragraph 1, as an expression of the fact that it had no objection to the principle, although it regarded that text as unnecessary, but it had voted against paragraph 2 of the same article because not only did it consider it unnecessary but it felt that it was inappropriate for Protocol I to deal with the rights and obligations of States not Parties to the Conventions and the Protocol.

68. Miss AL JOUA'N (Kuwait) said that her delegation had voted against Article 77 because, as the representatives of the United Arab Emirates and of the Syrian Arab Republic had pointed out, the effect of the article would be to assume that subordinates were familiar with the provisions of the Conventions and of Protocol I. The article gave rise to difficulties, expecially in regard to interference in the internal law of countries.

69. Mr. NUÑEZ (Cuba) said that he had voted in favour of Article 77, which he considered to be a mainstay of international humanitarian law. He considered that the deletion of the word "wilfully" in paragraph 2 made the wording more straightforward.

70. His delegation had also voted in favour of Article 79, an anomalous text, since mutual assistance would be granted in any proceedings relating to grave breaches of the Conventions or of Protocol I.

71. Mr. AULAQI (Democratic Yemen) said that his delegation had voted against Article 77, paragraph 1, on the grounds that it interfered with the sovereignty of States and their domestic legislation and disregarded international agreements and humanitarian law. It had also voted against paragraph 2 of that article according to which responsibility lay with the person who gave the order, which was contrary to the Conventions and draft Protocol I. The whole of Article 77 was vague. For example, it was not expressly stated whether the order was given to a subordinate who was conversant with the provisions of the Conventions and of Protocol I, and for that reason his delegation had voted against the article.

72. Mr. VANDERPUYE (Ghana) stated that his delegation had voted in favour of the retention of the word "grave" in Article 77, paragraph 1, because it felt that not every minor breach could rank as grounds for refusing to obey orders. If military personnel had to learn all the details of the provisions of Protocol I and the Conventions, that would lay a heavy burden on them.

73. His delegation had abstained in the vote on paragraph 2 early in the seventieth meeting because it felt that the addition of words like "mere" or "wilful" served no purpose except to duplicate the idea of knowledge, which had been catered for already in the same paragraph.

74. It had also abstained in the vote on the article as a whole because it felt that the provisions did not provide a wholly satisfactory solution to the dilemma of obedience to international and national law.

75. The provisions of Articles 76 and 76 bis struck the right balance necessary to ensure respect for humanitarian law and for national legislation. His delegation had voted in favour of Article 76 bis because it felt that the duties of military commanders would reduce the gap between the undertakings entered into by States under the Conventions and Protocol I and the duty imposed on the individual to refrain from grave breaches.

76. His delegation had voted in favour of Article 79 because it deemed the provisions regarding legal co-operation to be adequate for the settlement of extradition problems.

77. For the same reason it had abstained in the vote on Article 78, basically because it was not opposed to the extradition of war criminals and made no distinction in regard to extradition.

78. Mr. KAKOLECKI (Poland) said he was satisfied with the outcome of the vote. Generally speaking, Article 77 reaffirmed the principles of the Statutes of the Nürnberg Tribunal, as adopted.

79. He agreed with the previous speakers that a contrario reasoning was out of place in connexion with less serious violations.

80. His delegation had abstained from the vote on Article 78 because it considered that the wording weakened the principles set out in similar provisions such as those of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

81. The speaker wished to thank all those who had taken part in the discussion, which had made it possible to reach a compromise on paragraph 2 of Article 79.

OTHER BUSINESS

82. The CHAIRMAN said that the question raised at the sixty-ninth meeting (CDDH/I/SR.69) by the Philippine representative concerning the amendment submitted by his own delegation for a new paragraph 3 in Article 74 had been discussed by the officers of the Committee at their meeting on the morning of 29 April 1977.

83. A decision had been taken by Committee I at the third session concerning the procedure to be followed with respect to the Philippine proposal. That decision was indicated in paragraph 71 of the report of Committee I on the third session (CDDH/234/Rev.1).

84. In conformity with that decision, he suggested that the Philippine proposal should be discussed during the plenary meetings of Committee I to be held between 12 and 14 May. That suggestion met with the approval of the officers of the Committee. Unless there was any objection, he would consider that suggestion adopted.

It was so agreed.

85. Mr. MILLER (Canada) expressed warm thanks to Mr. de Icaza (Mexico), Rapporteur of Committee I and Chairman of Working Sub-Group A.

86. His delegation admired the way in which Mr. de Icaza had guided Working Sub-Group A; he had been performing that difficult task since 1975, and it was thanks to him that the long discussions on thorny articles had led to satisfactory solutions. In 1975, for instance, there had been Article 5 in Part I of Protocol I; in 1976, Section I of Part V, on grave breaches, considered by a Working Sub-Group under the chairmanship of Mr. Hussain, on which a consensus had been reached; in 1977, divergent opinions had been expressed concerning Section II of Part V, Articles 76 bis to 79, but thanks to good will and to the diligence and judgement of Mr. de Icaza, who had been able to accomplish his task in a cordial atmosphere, most of the questions had been settled by consensus.

87. Mr. de ICAZA (Mexico), Rapporteur, thanked the Canadian representative for his kind words. He also thanked all those who had worked on Working Sub-Group A over the past three sessions, and especially the representatives of Sweden and Pakistan, who had acted as Chairmen of the Sub-Groups.

The meeting rose at 5.10 p.m.

SUMMARY RECORD OF THE SEVENTY-SECOND MEETING

held on Friday, 13 May 1977, at 3.20 p.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Obradović (Yugoslavia) Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Report of Working Group B (CDDH/I/349/Rev.1 and Add.1)

1. The CHAIRMAN invited the Committee to consider the report of Working Group B (CDDH/I/349/Rev.1 and Add.1).

New Article before Article 70 - Grave violations

Article 70 bis (b) - Reprisals

Article 74 bis - Exceptional measures in the event of grave breaches

2. Mr. FRUCHTERMAN (United States of America) said he understood that some of the sponsors of the proposals discussed by the Working Group were ready to offer a compromise.

3. Mr. PAOLINI (France) said that, in response to the appeal by the representative of Iraq, he would withdraw his proposal concerning Article 74 bis (CDDH/I/GT/107/Rev.1) (paragraph 10 of the report). He hoped that the Polish representative would show a similar spirit of compromise.

4. Mr. KAKOLECKI (Poland) said that he was prepared to withdraw his proposal on reprisals, namely, paragraph 1 of the proposed new article before (or after) Article 70 (CDDH/I/GT/113) (paragraph 11 of the report), provided that other delegations were willing to compromise on the other controversial question by agreeing that the proposed fact-finding commission should be optional. Otherwise, his delegation might return to its proposal on reprisals in plenary. He thanked the delegations, in particular that of the Holy See, which had supported his proposal. His withdrawal was without prejudice to paragraph 2 of the proposed article, which was the original proposal by the Syrian Arab Republic.

5. Mr. ABDINE (Syrian Arab Republic) said that he had not been consulted on the Polish representative's withdrawal and was surprised by it. His Government's instructions gave him no latitude for compromise, and he must insist on paragraph 2 being put to the vote.

6. Mr. LONGVA (Norway) said that his proposal on Article 70 bis (CDDH/I/348) (paragraph 12 of the report) had been submitted as a basis for possible compromise. Since a compromise seemed to have been reached on another basis, he withdrew his proposal.

7. The CHAIRMAN invited the Committee to vote on paragraph 2 of the proposed new article before (or after) Article 70, which would now be the complete article.

Paragraph 2 was approved by 41 votes to 18, with 17 abstentions.

8. The CHAIRMAN said that the Drafting Committee would decide on a title for the new article.

9. Mr. AL-FALLOUJI (Iraq) commended the representatives of France and Poland on their co-operative attitude. With reference to the Polish representative's appeal, he said he hoped, for humanitarian reasons, that no precedent would be set for making conditional concessions or linking attitudes on different articles. That would be contrary to the spirit of the Conference.

10. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that, as he understood it, the representative of Poland had merely appealed for co-operation in a compromise on Article 79 bis.

11. Mr. KAKOLECKI (Poland) said that his decision to withdraw his proposal had been a difficult one; it had been made in an effort to reach a compromise and speed up the Committee's work. He had therefore appealed to other delegations to show a similar spirit of compromise.

Article 79 bis - International Enquiry Commission

12. The CHAIRMAN said that, as indicated in the report (paragraphs 27-30), there were now three texts before the Committee. Since the proposal in document CDDH/I/GT/114 was now incorporated in document CDDH/I/GT/119 (corrected), he proposed that the Committee should vote first on the latter proposal and then on the proposal in document CDDH/I/GT/118.

13. Mr. OUATTARA (Ivory Coast) proposed that the Committee should vote on the question of principle, as agreed in the Working Group.

14. The CHAIRMAN, referring to paragraph 26 of the report, said that he had explained, and the Working Group had concurred, that the Working Group could not vote on a question of principle. Any such proposal should be made to the Committee.

15. Mr. FRUCHTERMAN (United States of America) proposed that the Committee should vote on the text in document CDDH/I/GT/119. With regard to paragraph 2, he proposed that the second version should be taken first, as being the furthest removed from the original. With reference to paragraph 2 of the report on the work of Working Group B (CDDH/I/349/Rev.1 and Add.1), he said that, unfortunately, a consensus had not yet been achieved.

16. Mr. DOUMBIA (Mali) proposed that the Committee should first see whether it agreed on the principle of a fact-finding commission.

17. Mr. MBAYA (United Republic of Cameroon) supported the proposals of the representatives of the Ivory Coast and Mali. If the principle were adopted, he would propose that the Committee should vote on each paragraph and sub-paragraph separately.

18. Mr. SIDERIS (Greece) pointed out that the Conference had agreed on the principle of a fact-finding commission by the very fact of referring the question to Working Group B.

19. Mr. SHERIFIS (Cyprus) said he considered that the Committee should vote on the text in document CDDH/I/GT/119. He suggested that the versions of paragraph 2 should be voted on in chronological order, in accordance with rule 41 of the rules of procedure. As to the United States representative's suggestion, he said that in his opinion the only original text was that provided by the ICRC, and the ICRC had not produced a draft for Article 79 bis.

20. Mr. SADI (Jordan) said that he did not see how it was possible to vote on the principle without knowing the substance. A vote on document CDDH/I/GT/119 would involve both principle and substance.

21. Mr. HUSSAIN (Pakistan) said that the Committee had decided the question of principle at the third session by referring the question to the Working Group. The only question to decide now was the kind of commission to be established.

22. Mr. OTOBO (Nigeria) said that the question of principle would be decided when the Committee voted on the article as a whole.

23. Mr. MBAYA (United Republic of Cameroon) said he had not been convinced by the arguments against a vote on the principle. It was only logical to decide whether there should be a fact-finding commission before deciding on its composition, terms of reference and so forth.

24. Mr. ABI-SAAB (Egypt) endorsed the views of the representatives of Pakistan and Jordan. On the question of the two versions of paragraph 2, he agreed with the representative of Cyprus that they should be voted on in the order in which they had been submitted.

25. Mr. SADI (Jordan) moved the closure of the debate in accordance with rule 25 of the rules of procedure, and suggested that the Committee should vote on document CDDH/I/GT/119.

26. Mr. DOUMBIA (Mali) opposed the motion on the grounds that the representative of the Ivory Coast had already proposed a vote on the principle.

27. The CHAIRMAN invited the Committee to vote on the motion by the representative of Jordan.

The motion was adopted by 62 votes to 6, with 11 abstentions.

28. The CHAIRMAN invited the Committee to vote on the text of document CDDH/I/GT/119 (corrected) as reproduced in paragraph 30 of the report (CDDH/I/349/Rev.1) paragraph by paragraph. He suggested that it should vote first on those paragraphs in which there were alternatives.

It was so agreed.

Title

29. The CHAIRMAN put to the vote the proposal by the delegation of Zaire for a new title: "Standing International Fact-Finding Commission on the Application of Humanitarian Law."

The proposal was rejected by 44 votes to 18, with 16 abstentions.

Paragraph 1

Sub-paragraph (b)

30. The CHAIRMAN put to the vote the proposal by the delegation of France for the replacement of "those" by "the".

The proposal was adopted by 20 votes to 17, with 24 abstentions.

Sub-paragraph (d)

31. The CHAIRMAN put to the vote the proposal by the delegation of France for the replacement of "the electors" by "the High Contracting Parties".

The proposal was adopted by 50 votes to 6, with 10 abstentions.

Paragraph 1, as a whole, as amended, was adopted by 70 votes to 3, with 5 abstentions.

Paragraph 2

32. The CHAIRMAN said that there were two proposals relating to paragraph 2, the second being in square brackets. In accordance with the report of Working Group B (CDDH/I/349/Rev.1 and Add.1), the United States representative would submit some changes to the bracketed version of paragraph 2, which his delegation felt might obtain a consensus in the Committee.

33. Mr. FRUCHTERMAN (United States of America) said that the existing paragraph 2 (a) should be replaced by the following text:

> "2 (a). At the request of a Party to the conflict, the Commission shall institute an enquiry with the consent of the other Party or Parties concerned in relation to any alleged violation of the Conventions or of this Protocol."

A new paragraph 2 (e) should be inserted after paragraph 2 (d), reading as follows:

> "2 (e). Subject to the foregoing provisions of this paragraph, the provisions of Article 52, Article 53, Article 132 and Article 149 common to the Conventions shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol."

34. Mr. ABDINE (Syrian Arab Republic), rising to a point of order, said that he was not questioning the right of the United States representative to submit his proposal to the Committee directly, but he could not vote on a text which had not been circulated in writing 24 hours before the meeting.

35. The CHAIRMAN drew attention to the last sentence of rule 29 of the rules of procedure and said that he was prepared to act on it.

36. Mr. GRAEFRATH (German Democratic Republic) pointed out that the United States amendment to paragraph 2 (a) of the proposal by his delegation was not one of substance, and he was in agreement with it. Nor was there anything of substance which was new in the proposed paragraph 2 (e).

37. After a procedural discussion, in which Mr. ABDINE (Syrian Arab Republic), Mr. SADI (Jordan), Mr. SHERIFIS (Cyprus) and Mr. ABI-SAAB (Egypt) spoke in favour of voting first on the earlier of the two versions of paragraph 2, i.e. that which appeared on page 8 of the report of Working Group B (CDDH/I/349/Rev.1), while Mr. PAOLINI (France), Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), Mr. GRAEFRATH (German Democratic Republic) and Mr. FRUCHTERMAN (United States of America) expressed the view that a vote should first be taken on the later, bracketed, version as proposed by the German Democratic Republic and with the United States of America amendment accepted by the German Democratic Republic, the CHAIRMAN ruled that the bracketed version, as amended, should be put to the vote first.

38. Mr. ABI-SAAB (Egypt), speaking on a point of order, appealed against the Chairman's ruling.

Having been put to the vote the motion was rejected.

39. The CHAIRMAN suggested that paragraph 2 should be voted on sub-paragraph by sub-paragraph.

40. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), referring to rule 39 of the rules of procedure, objected to a vote sub-paragraph by sub-paragraph, since paragraph 2 formed an integral whole.

41. Mr. MBAYA (United Republic of Cameroon) explained that he wished for a divided vote in view of the excessive powers given to the Commission in paragraph 2 (b).

42. Mr. HUSSAIN (Pakistan) suggested that it might be sufficient to take a separate vote on the proposed new sub-paragraph (e) and not on the other sub-paragraphs.

43. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that he would not object to a separate vote on sub-paragraph (e) if the representatives of the German Democratic Republic and the United States agreed.

44. The CHAIRMAN put to the vote the proposal that paragraph 2 should be voted on sub-paragraph by sub-paragraph.

The proposal was rejected by 51 votes to 9, with 16 abstentions.

45. The CHAIRMAN noted that a proposal by Mexico for a roll-call vote on paragraph 2 had been withdrawn.

46. The CHAIRMAN invited the Committee to vote on paragraph 2 as a whole, as amended.

Paragraph 2 as a whole, as amended, was adopted by 41 votes to 30, with 11 abstentions.

Paragraph 3

47. The CHAIRMAN invited the Committee to vote on the proposal by Israel to insert in sub-paragraph (i) of paragraph 3 the words appearing in square brackets in the text: "and who are nationals of States having diplomatic relations with the Parties to the conflict".

The proposal was rejected by 50 votes to 3, with 21 abstentions.

48. The CHAIRMAN invited the Committee to vote on the French delegation's proposal to insert the words appearing in square brackets in the text: "with the agreement of the Parties concerned".

The proposal was rejected by 42 votes to 28, with 12 abstentions.

49. The CHAIRMAN invited the Committee to vote on the inclusion of the phrase appearing in square brackets at the end of sub-paragraph (i) "following consultation with the Parties to the conflict".

The proposal to include the phrase was adopted by 39 votes to 28, with 14 abstentions.

50. The CHAIRMAN invited the Committee to vote on the French delegation's proposal to delete from the paragraph its sub-paragraph (b), appearing in square brackets.

The proposal to delete sub-paragraph (b) was rejected by 43 votes to 15, with 15 abstentions.

Paragraph 4

51. The CHAIRMAN invited the Committee to vote on the Australian delegation's proposal to replace the second sentence in paragraph 4 (a) by the alternative wording given in square brackets at the end of the sub-paragraph.

The proposal was rejected by 50 votes to 13, with 15 abstentions.

52. The CHAIRMAN said that a linguistic problem had arisen in connexion with the French proposal to replace the word "témoignages" by the word "preuves", as indicated in sub-paragraphs (a), (b) and (c), since it appeared that no corresponding change could be made in the other languages. He suggested that the Committee, instead of attempting to vote on the point, might leave it to the Drafting Committee to settle.

53. Mr. AL-FALLOUJI (Iraq) pointed out that the Committee could not take a vote in which only French-speaking representatives would be qualified to participate.

54. After a brief discussion in which Mr. HUSSAIN (Pakistan), Mr. ABI-SAAB (Egypt), Mr. OTOBO (Nigeria), Mr. ABDINE (Syrian Arab Republic), Mr. PAOLINI (France), Mr. CARIAS (Honduras) and Mr. de BREUCKER (Belgium) took part, the CHAIRMAN said he understood that the Committee would be willing to consider the text with the word "preuves" in French, "evidence" in English, "pruebas" in Spanish, and the corresponding terms in Russian and Arabic.

It was so agreed.

55. The CHAIRMAN invited the Committee to vote on the wording for paragraph 4 in the various language versions that he had indicated.

The wording in the various languages, as indicated by the Chairman, was adopted by 65 votes to none, with 10 abstentions.

56. The CHAIRMAN invited the Committee to vote on paragraph 4, as a whole, as amended.

Paragraph 4 as a whole, as amended, was adopted by 69 votes to none, with 9 abstentions.

Paragraph 5

57. The CHAIRMAN invited the Committee to vote on the French delegation's proposal to delete from sub-paragraph (a) the words "with such recommendations as it may deem appropriate".

The proposal was rejected by 45 votes to 19 with 9 abstentions.

58. The CHAIRMAN invited the Committee to vote on the French delegation's proposal to amend sub-paragraph (c) to read "The findings of the Commission shall not be the subject of any publicity unless the Parties consent thereto".

The proposal was rejected by 26 votes to 24, with 16 abstentions.

59. The CHAIRMAN invited the Committee to vote on the Swiss delegation's proposal to amend sub-paragraph (c) to read "The Commission shall not publicly report its findings unless all the Parties to the conflict have requested the Commission to do so".

The proposal was adopted by 29 votes to 25, with 16 abstentions.

60. The CHAIRMAN pointed out that as the Committee had now adopted the Swiss text of sub-paragraph (c), the original text was thereby rejected. He invited the Committee to vote on paragraph 5 as a whole, as amended.

Paragraph 5 as a whole, as amended, was adopted by 49 votes to none, with 21 abstentions.

Paragraph 6

61. The CHAIRMAN invited the Committee to vote on paragraph 6.

Paragraph 6 was adopted by 64 votes to 1, with 10 abstentions.

Paragraph 7

62. The CHAIRMAN invited the Committee to vote on the proposal by the German Democratic Republic to insert at the end of the first sentence of paragraph 7 the words "which made declarations under paragraph 2".

The proposal was adopted by 37 votes to 24, with 13 abstentions.

63. The CHAIRMAN invited the Committee to vote on paragraph 7 as a whole, as amended.

Paragraph 7 as a whole, as amended, was adopted by 48 votes to 2, with 20 abstentions.

64. The CHAIRMAN then invited the Committee to vote on the new article as a whole, as amended.

The new article as a whole, as amended, was adopted by 40 votes to 18, with 17 abstentions.

The meeting rose at 6.55 p.m.

SUMMARY RECORD OF THE SEVENTY-THIRD MEETING

held on Monday, 16 May 1977, at 11.25 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Clark (Nigeria), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol II

Report of Working Group B (CDDH/I/349/Rev.1 and Add.1) (concluded)

1. The CHAIRMAN invited the Committee to resume its consideration of the report of Working Group B (CDDH/I/349/Rev.1 and Add.1).

Article 6 - Fundamental guarantees

Paragraph 2 (b)

2. The CHAIRMAN said that the point at issue was whether paragraph 2 (b) of Article 6, referring to collective penalties, should be included. The Working Group had reached a consensus in favour of its inclusion.

3. Mr. DIXIT (India) said that before adopting articles the Committee should consider whether they were applicable. In many countries the concept of collective penalties was outmoded and was not relevant to internal conflicts. His delegation was therefore opposed to its inclusion in Protocol II.

4. The CHAIRMAN reminded the meeting that the matter had been discussed at length in the Working Group. It would be preferable if the Committee could reach a consensus. He asked the representative of India if he wished the matter to be put to a vote.

5. Mr. DIXIT (India) said that, although the concept was alien to his country's way of thinking, he would not press for a vote.

The inclusion in Article 6 of paragraph 2 (b) referring to collective penalties was adopted by consensus.

Paragraph 3

6. Mr. REIMANN (Switzerland) reminded the meeting that Article 6, paragraph 3, was linked with Article 10 bis (Prohibition of reprisals). He suggested that consideration of that paragraph should be postponed until the Committee had taken a decision on Article 10 bis. If Article 10 bis was adopted, the inclusion of Article 6, paragraph 3, would be unnecessary.

7. The CHAIRMAN asked the Committee if it was willing to pass on to the discussion of Article 10 bis before resuming its consideration of Article 6, paragraph 3.

It was so agreed.

Article 10 bis - Prohibition of reprisals

8. The CHAIRMAN invited the Committee to consider whether the reference to Articles 26 bis, 27 and 28, placed in square brackets, should be included in the text of Article 10 bis.

9. Mr. GREEN (Canada) said that, as his delegation regarded the concept of reprisals as appertaining to international law, it considered that there was no place for that concept in Protocol II. There was a risk that the introduction of such a concept in Protocol II might increase the danger of reprisals followed by counter-reprisals and result in an escalation of hostilities. Its conclusion might also inhibit some States from becoming Parties to the Protocol. His delegation was therefore in favour of deleting the phrase in square brackets.

10. Mr. GRAEFRATH (German Democratic Republic) said that his delegation strongly supported Article 10 bis, with the inclusion of the reference to Articles 26 bis, 27 and 28. When the question of reprisals had arisen in Committee III, that Committee had decided to wait for the conclusions of Committee I on those articles before making any pronouncement (CDDH/III/SR.59). It would be against the general approach of Committee III not to include the reference to those articles and he hoped that Committee I would act in conformity with that approach.

11. Mr. KAKOLECKI (Poland) supported that statement.

12. Mrs ROULLET (Holy See) said that her delegation was in favour of Article 10 bis as a whole, including the phrase in square brackets.

13. Mr. VALLARTA (Mexico) said that, as stated in paragraph 43 of the report, his delegation objected to any provision that would authorize reprisals either directly or a contrario. It was therefore in favour of the deletion of the whole of Article 10 bis and requested that that article should be put to the vote.

14. Miss QUINTERO (Colombia), supported by Mr. NASUTION (Indonesia), supported the view that Article 10 bis should be deleted.

15. Mr. AMIR-MOKRI (Iran) supported the Canadian representative's view that the concept of reprisals should not be included in Protocol II.

16. Mr. SHELDOV (Byelorussian Soviet Socialist Republic) said that his delegation had expressed its view clearly in the Working Group. He fully supported the representatives of the German Democratic Republic and of Poland in favour of Article 10 bis, including the phrase in square brackets.

17. Mrs. ROULLET (Holy See), speaking on a point of order, said that if Article 10 bis was to be put to the vote rather than adopted by consensus, she would ask for a vote to be taken first on Article 6, paragraph 3.

18. Mr. GLORIA (Philippines) drew attention to the fact that Article 6, paragraph 3, referred to persons only.

19. Mr. REIMANN (Switzerland) thought that Article 10 bis should be dealt with first. Once the Committee had taken a decision, the effect of that article on the others would become clear.

20. Mrs. MANTZOULINOS (Greece) supported the views expressed by the representative of Mexico. She thought that the Committee should vote forthwith on Article 10 bis.

21. Mr. FREELAND (United Kingdom) suggested that the Committee might first address the issue of whether or not the phrase in square brackets should be deleted. He therefore requested that the inclusion of the phrase in square brackets should be put to the vote first.

22. The CHAIRMAN asked the Committee to vote on the inclusion of the reference to Articles 26 bis, 27 and 28 in Article 10 bis.

The Committee decided by 29 votes to 11, with 39 abstentions, to include the reference to Articles 26 bis, 27 and 28 in Article 10 bis.

23. The CHAIRMAN put to the vote Article 10 bis with the inclusion of the reference to those articles.

Article 10 bis was adopted by 33 votes to 15, with 28 abstentions.

Article 6 (concluded)

Paragraph 3 (concluded)

24. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) said that, since the Committee had already adopted Article 10 bis, there was no need for a vote on Article 6, paragraph 3, which could be deleted by consensus.

25. Mrs. ROULLET (Holy See) said that her delegation was utterly opposed to reprisals and that Article 6, paragraph 3, was more explicit in that respect than Article 10 bis. She was therefore of the opinion that a vote should be taken.

26. Mr. GRAEFRATH (German Democratic Republic) said that it was his understanding that, if a separate article dealing in general with the subject under consideration was included in the Protocol, there would be no need to have specific provisions regarding that subject in other articles. Thus the decision on Article 6, paragraph 3, was already covered by the decision adopted on Article 10 bis and there was no need for a vote.

27. Mr. GLORIA (Philippines) said that Article 10 bis did not necessarily cover the same subject-matter as Article 6, paragraph 3; he proposed that the latter should be voted on as it stood.

28. Miss EERIKAEINEN (Finland) pointed out that the paragraph under consideration had originally been proposed by her delegation. She agreed with the representative of the German Democratic Republic that, since Article 10 bis had already been adopted, Article 6, paragraph 3, was unnecessary.

29. Mr. NUÑEZ (Cuba) agreed that the Committee should decide by consensus to delete paragraph 3. He appealed to those who had requested a vote not to press the point.

30. Mr. CONDORELLI (Italy) said that a vote on paragraph 3 might be embarrassing to some members. He appealed to the representative of the Holy See not to press for a vote.

31. Mr. PAOLINI (France) said that his delegation would respect the Chairman's ruling on the issue. If, however, any member requested a vote, a vote had to be taken.

32. Mgr. LUONI (Holy See) said that he was prepared to follow any procedure which the Chairman considered appropriate, although his delegation, too, had been embarrassed on the occasion of certain earlier votes, when it had had to decide on matters with which it had not been fully acquainted.

33. Mr. GLORIA (Philippines) said that he, too, would abide by whatever procedure the Chairman considered appropriate.

34. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee decided, by consensus, to delete Article 6, paragraph 3.

It was so agreed.

35. The CHAIRMAN said that, if he heard no objection, he would take it that Article 6, as amended, was adopted by consensus.

It was so agreed.

36. Mrs. ROULLET (Holy See), supported by Mr. GRAEFRATH (German Democratic Republic), said that it was her understanding that Article 32 concerning measures in favour of children would be included in Part II of Protocol II.

37. The CHAIRMAN suggested that the positioning of articles or paragraphs should be left for the Drafting Committee to determine.

It was so agreed.

PROCEDURE CONCERNING EXPLANATIONS OF VOTE

38. The CHAIRMAN suggested that those delegations which wished to make statements in explanation of vote should submit them in writing to the Secretariat.

39. Mr. PAOLINI (France) enquired whether that procedure would apply also to explanations of vote which delegations had been unable to make at the seventy-second meeting.

40. Mr. de ICAZA (Mexico), Rapporteur, pointed out that unless it was agreed that written explanations of vote would be submitted in a maximum of three pages by noon on Tuesday, 17 May, the Committee would have to hold night meetings.

41. Mr. PAOLINI (France) and Mr. ABDINE (Syrian Arab Republic) supported the Chairman's suggestion.

42. Mr. SHERIFIS (Cyprus) enquired whether the three pages would be reproduced in full or in summary form.

43. Mr. de ICAZA (Mexico), Rapporteur, replied that three pages on all the articles dealt with in the report of Working Group B was the maximum length if full reproduction was desired. Texts of more than three pages would be summarized.

44. Mr. DIXIT (India) said that any reasonable proposal enabling delegations to explain their vote if they so desired would be acceptable to his delegation. He asked whether the procedure outlined by the Chairman would be applicable only to the case under discussion or whether it would remain valid in the future.

45. Mr. AREBI (Libyan Arab Jamahiriya) said that it was important for delegations to have timely knowledge of the position of other delegations on articles or paragraphs that were put to the vote. He asked whether delegations had the right to make explanations of vote before a vote was taken and whether the procedure that had been outlined would apply only to explanations made after voting had taken place.

46. The CHAIRMAN said that the procedure would apply only to explanations of vote on the articles in the report of Working Group B (CDDH/I/349/Rev.1 and Add.1), which had been discussed by the Committee at its seventy-second meeting as well as at the present meeting. Any decision to apply the same procedure to explanations of vote on other texts or subjects or to allow such explanations to be made before voting took place would have to be taken at the appropriate time.

47. Mr. de BREUCKER (Belgium) suggested that, for the sake of uniformity of presentation, delegations might be invited to draft their explanations of vote in reported speech.

48. Mr. OBRADOVIĆ (Yugoslavia), speaking as a Vice-Chairman of the Committee, said that he wished to provide further particulars concerning the somewhat unusual procedure which had been suggested in order to speed up the Committee's work. Delegations were requested to limit the length of their written explanations of vote, which would be annexed to the summary record of the current meeting, to the equivalent of three typewritten pages in order to obviate the need to summarize the texts. The Committee was free to accept the suggestion or to decide to follow the normal procedure governing explanations of vote, but if it chose the latter course night meetings would have to be scheduled for that purpose.

49. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee agreed that explanations of vote on the articles in the report of Working Group B (CDDH/I/349/Rev.1 and Add.1) should be submitted to the Secretariat in the form of written statements the length of which should not exceed the equivalent of three typewritten pages and which might be drafted in either direct or reported speech.

It was so agreed.

The meeting rose at 12.45 p.m.

ANNEX

to the summary record of
the seventy-third meeting

EXPLANATIONS OF VOTE

AUSTRIA Original: FRENCH

Article 79 bis of draft Protocol I

The Austrian delegation had voted in favour of Article 79 bis as a whole, as amended, chiefly on account of the amendment proposed by the delegation of the German Democratic Republic, although originally, as a co-sponsor of the proposal in document CDDH/I/GT/114, it was in favour of a compulsory Fact-Finding Commission. I must point out that my delegation still feels that a compulsory system would have been better. It emerged very clearly from the general debate, however, that a binding solution was unacceptable to a large number of delegations. In fact, some of them left no doubt that the inclusion of a compulsory clause might make their signature of Protocol I problematical. That trend was already clearly shown by the large majority which supported the Chairman's proposal that document CDDH/I/GT/119 should be given priority.

In view of the considerable difficulties which the proposal in document CDDH/I/GT/114 created for a number of delegations, and realizing at the same time that even an optional provision represented a step forward, however small, my delegation, in a spirit of compromise, finally came to the conclusion that Article 79 bis, in spite of its weaknesses, was deserving of support even in its present form.

For the same reasons, my delegation preferred to abstain rather than vote against the amendment concerning paragraph 2 of the article. We did not wish to stand in the way of attempts to arrive at a compromise. It is to be hoped that Article 79 bis will not share the fate of its predecessors and become, like them, a dead letter.

BELGIUM Original: FRENCH

Article 79 bis of draft Protocol I

Mr. de BREUCKER (Belgium) welcomed the successful outcome of the Committee's work on the Fact-Finding Commission, which was the subject of Article 79 bis.

The article had the merit of providing, outside the framework of any conflict, for the establishment of a standing body, whose dual function would be to investigate an action alleged to be a breach of the Conventions or of the Protocol and, by making its good offices available, to facilitate a return to an attitude of respect for the provisions of those instruments. The draft article carefully outlined the procedure to be followed for that purpose. Its description of the Commission's functions and of the procedures to be followed did not, despite the search for evidence which the latter implied, convert the Commission into a body with jurisdictional competence.

A number of delegations would no doubt have liked a Fact-Finding Commission with binding authority in any international conflict. That wish had not been met in the present article. It was specified that the agreement of the other Party to the conflict was required before the Commission could become operative. It was none the less clear that the specific obligation to start an investigation at the request of one of the Parties to the conflict, an obligation affirmed in the four 1949 Geneva Conventions, was still binding, irrespective of modalities of agreement, on which the two Parties had to try and reach an understanding. The Commission provided a judiciously balanced set of procedures and functions.

CANADA Original: ENGLISH

Article 79 bis of draft Protocol I

The Canadian delegation fully understands and supports the desire to preserve the humanitarian principles that have motivated the whole of the discussions on Protocol I and the need to maintain the fullest possible protection for civilians and other innocent victims of armed conflict. Nevertheless, we are aware of the fact that breaches of the Conventions and Protocol are likely to occur and that, whatever the mechanisms built into the Protocol, there will be occasions when the only action open to the victim of a breach will be by way of reprisals aimed at the termination of the

wrongdoing. It was for this reason that the Canadian delegation was in favour of the broad outlines of the French proposal embodied in Article 79 bis, based as it was on safeguards, restrictions and preconditions. Equally, it was impossible for us to accept either the Polish or Syrian proposals in their original or revised forms. We voted against the Syrian proposal because we feel that, in view of the political manner in which that institution must operate, the United Nations might not be able to deal with such issues as violations of the Protocol in the expeditious way victims of such violations would have a right to expect if they are to refrain from taking unilateral action in response to a violation.

With the withdrawal of the French and Polish proposals, it is the view of the Canadian delegation that customary international law continues to govern recourse to reprisals, except where specifically forbidden by treaty.

While the Canadian delegation is committed to the fundamental principles of humanitarian law, it reserves the right to re-examine in the plenary Conference all those articles which at present contain a ban on reprisals.

The reason for our abstention on Article 79 bis is quite simple. We were in favour of the proposal for an Enquiry Commission with mandatory powers and supported the establishment of a Commission. When, however, it became clear that the Commission would only operate on an optional basis, the Canadian delegation had doubts as to its practical value and therefore abstained.

Article 8 bis of draft Protocol II

Finally, the Canadian delegation wishes to explain why it withdrew the proposed Article 8 bis to Protocol II. Since this proposal was first put forward in March 1975, a number of articles concerning the protection of women and children and the detention of families have been adopted. The aim of our proposal has therefore been met, and there is no longer any need for this proposal.

CYPRUS Original: ENGLISH

Article 79 bis of draft Protocol I

My delegation maintains that the establishment of an International Fact-Finding Commission will prove to be of paramount significance for the attainment of the twofold objective which this Conference is set to achieve, namely (a) the bringing of the

provisions of the Geneva Conventions into line with present realities and (b) the adoption of adequate guarantees for the enforcement of the provisions of the Geneva Conventions and of the Protocol we are about to adopt.

For, no one can really argue that this Conference will have accomplished its task, were it to concentrate exclusively on the drafting of the guiding principles which the Parties to a conflict would have to observe, while passing over in silence the all-important question of an enforcement machinery in relation thereto; or, at least, of an adequate procedure to ascertain the facts, in case of allegations that a Party to a conflict has committed grave breaches or other serious violations of the Conventions and the Protocol.

Recent and less recent history furnishes examples where provisions of the Geneva Conventions were ignored and others where these provisions were flagrantly violated, while the machinery provided by the Conventions proved grossly inadequate even for the official establishment of the facts, let alone for the correction of the situation which was thus created.

Bitter experience has proved that the adoption of articles, however skilfully drafted, will not suffice; declarations, however solemn, will not do, unless coupled with enforcement machinery.

It was therefore, in the opinion of my Government, imperative and urgent for the Conference to work in this direction. That is why my delegation played an active part both in the Working Group and in the informal consultations concerning draft Article 79 bis on the establishment of an International Fact-Finding Commission. It may be recalled, in this respect, that we supported all along the view that the Commission should be of a mandatory nature. We did so, inter alia because we believe that a guilty party to a conflict will never give its consent to the institution of a Fact-Finding Commission which will establish the truth of the allegations made against it. That is why we voted against the proposal providing for an "optional" Commission. We regret the fact that this proposal met with the approval of the majority of the delegations present and voting in Committee I and is now paragraph 2 of the article. We note, however, that it was a majority much less than the two thirds required in the plenary meeting of the Conference.

The proponents of this proposal based their position on the argument that a "mandatory" Commission would constitute an infringement of sovereignty of the party which declined to give its consent to the institution of the enquiry.

I shall not use the limited time allocated to me for the discussion of this line of argument. I shall rather ask those who advanced it: if an enquiry is requested by a country whose territory or part thereof is under occupation, with reference to violations committed in relation to such territory, is that not in exercise of its sovereignty? And should we not proceed with the institution of an enquiry, despite the lack of consent by the Occupying Power?

Who will rise in this Humanitarian Conference to defend such a right for an Occupying Power, Sir? Who will find it easy to do so?

DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA — Original: ENGLISH

Article 79 bis of draft Protocol I

I should like to clarify briefly the stand of the delegation of the Democratic People's Republic of Korea in relation to Article 79 bis.

It is of great importance to take measures for the prevention of acts in violation of the Conventions and the present Protocol.

It will be by no means a bad thing if the International Fact-Finding Commission makes a practical contribution to the observance of the main rules of the Conventions and the present Protocol.

The Conventions and the present Protocol should be based on the truth that one must cherish mankind and maintain the dignity and value of man.

The Government of the Democratic People's Republic of Korea attaches the greatest importance to people in all matters, serves them and deems the life and health of people to be most precious.

From this point of view, our delegation expresses its support for the basic spirit of the main articles including Articles 1, 33, 34, 42, 46 and 65 of Protocol I and Article 6 of Protocol II adopted by the Diplomatic Conference.

Our people, as all progressive peoples the world over, long for genuine peace. The progressive peoples of the whole world oppose imperialist and colonialist rule and demand the firm guarantee of human rights and humanitarianism, for they dearly value man's dignity and worth.

To this end, we consider that racial régimes and non-humanistic régimes should not be supported, but should be denounced and isolated. This is the very urgent demand of the present time.

The International Fact-Finding Commission should carry out its functions in conformity with this demand of the times.

All the available facts have proved that the achievements of science are misused against mankind by criminals, and the brutal nature of their crimes far surpasses that of earlier criminals.

Through the prosecution of the war criminals of the Second World War, we came to know about the brutality of such criminals. We learned, for example, that the criminals had prepared for bacteriological warfare and committed criminal and brutal experiments on living persons.

But today also, the criminals are preparing for bacteriological warfare and conducting tests with living men as their object.

Certain criminals of the present time are openly clinging to large-scale tests of bacteriological weapons against their own nation and their fellow-countrymen. The gravity of this criminal act becomes greater and greater.

Nothing can justify these criminal acts in view of the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare as well as recent international agreements. Such criminal acts must be checked at once for the sake of peace, humanitarianism and national interests.

The main source of all the misfortune and sufferings of mankind is the war of aggression committed by the imperialists. This is a historical lesson and warning for today as well as for tomorrow.

When the International Fact-Finding Commission conducts its activities on the basis of equality, independence and non-interference in domestic affairs of others among the States which are the fundamental guarantee for eradicating racialism and non-humanistic crimes, it will be able to carry out its mission correctly.

Independence is the inherent right of every person and every nation as well as the natural right which everyone should enjoy. The infringement of independence would impose sufferings and misfortune on people.

We consider that all progressive forces loving peace and humanitarianism should unite their efforts and energetically wage an effective struggle on a world-wide scale to shackle the hands and feet of the criminals who roughly violate man's virtue and conscience and humanitarianism and bring suffering and misfortune upon mankind.

DENMARK Original: ENGLISH

Article 79 bis of draft Protocol I

After the debate in Committee I on the subject of a new Article 79 bis dealing with the establishment of an Enquiry Commission, the Danish delegation voted against the oral amendment proposed by the United States delegation to the amendment regarding an optional clause submitted by the delegation of the German Democratic Republic and already incorporated in working paper CDDH/I/GT/119 prepared by the Chairman of the Working Group.

The Danish delegation did so because it was, and still is, of the view that any system of enquiry procedure which rests both on an optional clause and on a proviso, as proposed by the delegation of the United States of America, which requires the agreement of both sides to engage in such a procedure, will not offer any form of guarantee of respect for the rules laid down in the Geneva Conventions and the two additional Protocols. The Danish delegation feels that such a system will be an inadmissible weakening of the idea of a proper enquiry procedure and wishes to point out that no such idea had been envisaged in any of the various proposals submitted to the Committee before its debate on this subject.

In view of the wide acceptance of the proposal of the United States delegation and taking into account the advantage of the existence prior to any dispute of a certain machinery, however imperfect, the Danish delegation found it possible to cast an affirmative vote on the whole text of Article 79 bis as amended.

EGYPT Original: ENGLISH

Article 79 bis of draft Protocol I

The Egyptian delegation has staunchly supported the idea of an Inquiry Commission in the field of humanitarian law ever since it was first proposed, i.e. since the Conference of Government Experts. It is with a heavy heart that we have voted against paragraph 2 of the present text and consequently against the article as a whole.

The reason for our enthusiasm was our general policy of trying to perfect to the utmost the mechanisms of implementation of the Conventions and the Protocol, to render them as fool-proof and as compulsory as possible in order to ensure their functioning in all cases and at all times. This is why we have exerted our utmost during the examination of Article 5 of the present Protocol to establish the principle of the automatic and compulsory appointment of a substitute for the Protecting Power in case the Parties to the conflict did not agree on the appointment of the latter. This we unfortunately failed to achieve. Once again, the sovereignty reflex of States, especially the high and the mighty, prevailed over the humanitarian ideal.

We had hoped that, through the creation of compulsory commissions of enquiry, part of the gap left by the disappointing Article 5 would be filled. It had even been said that the functions of enquiry and reporting of the Protecting Power or its substitutes might prejudice their carrying out their other functions such as relief and day-to-day protection which depend on the co-operation and goodwill of the Detaining or Occupying Power, and that the attribution of the functions of enquiry and reporting to another entity might facilitate the acceptance and appointment of Protecting Powers in the future. But even in the absence of a Protecting Power or a substitute, the proper functions of the ICRC and other humanitarian organizations under the Conventions and the Protocol on the one hand, and the functioning of the compulsory enquiry commission on the other, would cover much if not almost all of the gap.

Our disappointment was great when we discovered that once again the same forces which caused the dilution of Article 5 to its present weak state were doing the same thing to the idea of an enquiry commission, reducing it to a purely optional institution; thus not adding much to what we already have in the Conventions, and which never functioned precisely because of its optional character.

We thus consider the article as it emerged as much ado about nothing: another verbal exercise in evading the real issues and obstacles which have caused the present relative ineffectiveness of humanitarian law and which provided the raison d'être of this whole Conference. That is why we considered it more honest and forthright to vote against the text of Article 79 bis in the truncated version which finally prevailed.

FRANCE Original: FRENCH

Articles 70 bis (b) and 74 bis of draft Protocol I

The French delegation is aware that the notion of "reprisals" shocks feelings that have remained very sensitive in the countries which have suffered the most from the last World War and from the conflicts that have occurred since. Most of these countries, however, have recognized the intention and humanitarian scope of our proposal.

We have tried to reconcile the prohibitions of reprisals in principle, already adopted by Committees I and II, with a humanitarian regulation of the exceptional measures which no country whatever will hesitate to take if, during a conflict, it is the victim of grave, manifest and deliberate violations of humanitarian obligations under the Protocol.

It would be unrealistic to claim the contrary, and it was running the risk of doing a disservice to humanitarian law itself to lay down, as did the draft Article 70 bis (b), submitted by Poland, a categorical and absolute prohibition which would have given the aggressor a kind of premium by prohibiting in advance, the only measures which a Government can take to put a stop to such violations and safeguard the very survival of the nation in the exceptional circumstances that may arise.

Judging from the discussions at the Conference, it would seem that the time has not yet arrived to place the problem of sanctions for grave violations of humanitarian law inside a legal framework. This fact is clearly brought out by the double withdrawal of the French and Polish proposals. In the opinion of the French delegation, the existing rules of international law on the subject continue, therefore, to apply.

Article 79 bis of draft Protocol I

In the various votes taken on Article 79 bis, the French delegation has determined its position in the light of two main concerns:

1. The first was to avoid setting up a compulsory system of enquiry parallel to and in competition with the system of Protecting Powers and the ICRC, which have done all the work of supervising the application of humanitarian law since the Geneva Conventions of 1949.

That is why we voted in favour of the amendment of the German Democratic Republic to paragraph 2, with the changes proposed by the United States delegation. The amended paragraph 2 reaffirms that the enquiry may be opened with the consent of both Parties; enables States to recognize in advance the competence of the International Fact-Finding Commission; and reaffirms the validity of the common article of the Geneva Conventions relating to enquiry in the event of a violation of humanitarian law.

2. The French delegation's second concern was to avoid anything which might give the Fact-Finding Commission the character of a jurisdictional or political body. The French delegation regrets that its amendment to paragraph 3 aimed at ensuring that the five members of the Fact-Finding Commission should be chosen by the President of the Commission "with the agreement of the Parties concerned" was not approved, and that the words "with such recommendations as it may deem appropriate" were not deleted from the reference to the report on the enquiry in paragraph 5, as it had suggested. On the other hand, it is pleased that, in principle, the conclusions are not to be publicly reported "unless all the Parties to the conflict have requested the Commission to do so", (paragraph 5 (c)), in accordance with an amendment by Switzerland, for which it voted.

The French delegation voted in favour of Article 79 bis as a whole because, thanks to the amendments that were adopted, this article improves the enquiry procedure instituted by the Geneva Conventions, without detriment to the system of Protecting Powers or to the role of the ICRC, which have done all the work of supervising the application of humanitarian law in armed conflicts for the last quarter of a century.

GREECE Original: ENGLISH

Article 79 bis of draft Protocol I

In accordance with their views as expressed on several occasions in this Committee and its Working Group B, my delegation voted in favour of Article 79 bis, on the creation of an International Fact-Finding Commission, but against paragraph 2 of that article. In so doing this delegation was consistent with the basic approach of the Greek Government, which favoured the institutionalization of a procedure of a permanent and mandatory nature.

It is our belief that the provisions of Articles 52, 53, 132 and 149 common to the Conventions of 1949 do not constitute an adequate machinery of investigation and that the occasion offered by this Conference to improve and develop them into a practical and satisfactory procedure should not be lost. Indeed, we are of the opinion that the institutionalization of such a procedure would be a necessary guarantee for the implementation of humanitarian law. Even more so in that many of us, for moral or practical reasons, are unable or hesitant to accept other ways and methods in order to enforce respect for the Conventions and the Protocol.

For those reasons my delegation supported the broadest possible competence of the Commission and voted in favour of Article 79 bis as it emerged following the paragraph by paragraph voting on the bracketed text in document CDDH/I/GT/119 (corrected).

Turning to paragraph 2 of the article, I should like to assure those who were not able to share our preference for a mandatory procedure that we fully respect their views. Their main objection, as we understood it, was that a mandatory procedure would infringe the sovereignty of States. In the framework of what seemed to be an agreement at super-Power level, this view prevailed, although many of us - including this delegation - were not able to support it, the reason being that a voluntary procedure did not offer real guarantees of respect for the basic principles of humanitarian law.

In fact, it is hardly possible to imagine that any party to an armed conflict, conscious of not having used respectable ways, would ever voluntarily submit itself to a supranational jurisdiction of enquiry, in order to obtain a certificate of bad behaviour. It is in other words obvious that the procedure, as proposed by the representative of the Democratic Republic of Germany and amended by the representative of the United States of America may very well prove to be in practice no more than an exercise in futility.

For that reason, and because we believe that a mandatory procedure is the only possible way to safeguard the vital interests of the great majority of those participating in this Conference, we voted against paragraph 2.

In view, however, of what proved according to our estimate to be the feeling of a wide majority in this Committee, we think that the hope for an improvement in the nature and functioning of the Commission is not definitively lost. It is in fact not impossible for the Conference to examine the possibility of accepting a procedure according to which a party to an armed conflict may be granted the advantage of an enquiry in its own territory and at its own sole request, in a way that will not infringe its sovereignty or that of any other State. In that hope, this

delegation would like to reserve the right to reconsider its position towards Article 79 bis as adopted. Should such a possibility for the Conference not arise, or be rejected, it is our belief that the Conference will have indulged in a rather useless and costly waste of energy and time in so far as its arduous efforts to improve the provisions of humanitarian law will have failed to be more than a mental exercise and will have foundered on the rock of what I would call lack of realism and will for a minimum of real and effective implementation.

HOLY SEE Original: FRENCH

Article 79 bis of draft Protocol I

The delegation of the Holy See is pleased that the principle of an International Commission of Enquiry has been accepted. It strongly supported this proposal when it was discussed in Working Group B. Nevertheless, when the final vote was taken on Article 79 bis, the Holy See abstained, for two reasons.

First, because it favoured a Commission which would be mandatory. As it emerged from Friday's vote, the Commission no longer has any real substance. In most cases - and precisely those in which it would be needed most - it is very likely to remain a mere cipher. Can anyone seriously expect that a Party to a conflict, rightfully accused of a breach or breaches of the Conventions or of Protocol I, would allow the Commission to institute an enquiry into its conduct?

The Holy See delegation therefore regrets this lost opportunity to achieve substantial progress in humanitarian law on an important point.

Second, it abstained because it wished to show its disapproval on the conditions in which the voting took place.

While recognizing and praising the efforts made by some delegations to facilitate an honourable agreement on this point, the Holy See delegation was surprised to find that a number of other delegations, itself included, had not been kept informed of those negotiations but had been faced with an accomplished fact. The method chosen was far from satisfactory and did not add to the serenity, the seriousness, or the credibility of our work. It even led some delegations to talk, with justification, of a bargaining session. Such methods may be excusable in trade or politics, but not in humanitarian law, where agreement should never be achieved at the expense of the principles governing such law.

Article 6, paragraph 3 of draft Protocol II

The delegation of the Holy See finally agreed not to press for a vote on this paragraph, in order to permit a consensus. It did so purely in the spirit of collaboration it has always shown. It finds it regrettable, however, that Committee I has lost this opportunity of stating clearly, precisely and unequivocally that reprisals are prohibited by humanitarian law. It deplores the fact that, on the contrary, the adoption of Article 10 bis and the rejection of Article 6, paragraph 3, may lead to the belief - by inverse reasoning - that reprisals are permissible within the context of the articles not expressly mentioned in Article 10 bis.

INDONESIA Original: ENGLISH

Article 70 bis of draft Protocol I

My delegation abstained in the vote on paragraph 2 of Article 70 bis (namely the new article to be inserted before or after Article 70) proposed by Poland and the Syrian Arab Republic in document CDDH/I/GT/113. It was not entirely clear to my delegation why a limitation should be made in regard to measures of reprisals in situations of grave violations of the Conventions and the present Protocol, especially as regards the meaning of the words "act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

Article 79 bis of draft Protocol I

Regarding Article 79 bis concerning the International Fact-Finding Commission, my delegation reiterated that, whatever the name and whatever the motives, this Committee will deal with a matter of principle, namely the establishment of a compulsory international body. My delegation supported the proposal of several delegations that there should be no provision for such a fact-finding commission in draft Protocol I. This is the reason why my delegation was against taking a decision on the question of an International Fact-Finding Commission. Nevertheless, after considering the optional clause in the amendment by the United States of America put forward in the Committee, my delegation was in favour of including this provision in paragraph 2 of this article. But this improvement in the text did not change the position of my delegation in regard to the article as a whole; that is why my delegation was against Article 79 bis.

Article 10 bis of draft Protocol II

My delegation supported the Mexican proposal for the deletion of Article 10 bis as a whole relating to the provision for reprisals in draft Protocol II. My delegation entertains strong objections to the last part of the sentence, viz. "even in response to a violation of the provisions of the Protocol". My delegation abstained on the reference to the specific articles placed between square brackets, because of their humanitarian and technical character.

IVORY COAST Original: FRENCH

Article 79 bis of draft Protocol I

The delegation of Ivory Coast deplores the procedure for discussion and voting followed by the Committee. In the discussions in Working Group B, you had left it open to us, at the request of the delegation of Mali, to state in Committee our position on the principle of a permanent international fact-finding commission.

The vote of the Ivory Coast delegation is explained by the fact that my country is not opposed either to the principle of fact-finding or to the principle of a fact-finding commission. The Ivory Coast is opposed, however, to the principle of a commission envisaged as a permanent body.

Indeed, in view of the permanent nature of the Commission, my delegation wonders whether priority is being given to the principle of fact-finding or to the principle of a permanent fact-finding commission. Is a commission being created for the sake of having a commission?

The alterations the Committee has made to the text of the article increase the doubts of my delegation regarding the efficacy of the action of this International Fact-Finding Commission.

My delegation reiterates that it is not opposed to the creation of a fact-finding commission, but it is opposed to the establishment of a fact-finding commission on a permanent basis, inasmuch as the financial implications of such a step have not been established beforehand to enable my country to take a position in full knowledge of the facts.

JAPAN Original: ENGLISH

Article 79 bis of draft Protocol I

The delegation of Japan abstained in the vote on draft Article 79 bis as a whole, mainly because it had reservations on the amendments incorporated in paragraph 2 of the draft.

The Japanese delegation is of the view that the incorporation in paragraph 2 of the optional nature of enquiry has considerably narrowed the possibilities of implementation of Article 79 bis. It also regrets that the idea that the proposed Fact-Finding Commission should facilitate, through its good offices, repression or prevention of breaches was not incorporated in paragraph 2. It may be recalled that this idea was emphasized by the Japanese delegation at the fifty-sixth and fifty-seventh meetings of Committee I and it received the support of a number of delegations; in fact, the idea had earlier been adopted in the joint proposal in document CDDH/I/GT/114, submitted by Austria, Denmark, Japan, Norway, New Zealand, Pakistan and the United States of America.

In addition, the amendments incorporated in paragraph 2 seem to give rise to some uncertainties about the legal effects of the declarations referred to in sub-paragraph (b). For instance, questions might arise as to exactly when particular declarations would take effect and as to whether the declarations once made could subsequently be modified or withdrawn.

Despite these shortcomings, the delegation of Japan considers that the adoption of the proposal contained in draft Article 79 bis by the present Conference would constitute a modest and, it hopes, practical step towards full observance of international humanitarian law.

MEXICO Original: SPANISH

Article 74 bis of draft Protocol I

The delegation of Mexico wishes to place on record the fact that, had the proposals by France (CDDH/I/GT/107/Rev.1) and Poland (CDDH/III/103) been put to the vote, it would have voted against them. The delegation of Mexico could not have accepted that a Protocol intended to strengthen the law concerning warlike activities should authorize reprisals, even if it were claimed that the intention was to force the enemy to respect humanitarian law. Adoption of the French proposal would have led to total anarchy and merely favoured the powerful countries.

Experience shows that reprisals do not lead the enemy to respect humanitarian law, but result in an increase in violations and hostilities.

Legalization of reprisals, as proposed by France, would have enabled belligerents who were in breach of humanitarian law to claim every time that their breach was a legitimate reprisal sanctioned by international law. The delegation of Mexico believes that the mandatory nature of humanitarian law does not depend on the observance of its rules by the adverse Party, but stems from the inherently wrongful nature of the act prohibited by international humanitarian law. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, unanimously adopted by the United Nations General Assembly in its resolution 2625 (XXV) of 24 October 1970, prohibits reprisals involving the use of force. The delegation of Mexico maintains that this Declaration is a valid interpretation of the United Nations Charter, so that the prohibition in question is legally binding.

The delegation of Mexico would have voted against the Polish proposal since it might have been taken to mean a contrario sensu that reprisals against persons and objects not enjoying the protection of the Geneva Conventions were permissible.

Article 10 bis of draft Protocol II

On the same grounds, the delegation of Mexico voted against Article 10 bis of Protocol II. At the third session of the Conference, it was said that Mexico was alone in holding that Article 10 bis authorized reprisals; it is worth noting in this connexion that the deletion of paragraph 3 of Article 6 of Protocol II, which was consequent upon the adoption of Article 10 bis, shows that the latter does indeed refer to reprisals.

Article 79 bis of draft Protocol I

The delegation of Mexico voted against paragraph 2 as proposed by the German Democratic Republic for the article on the Fact-Finding Commission, since the Mexican Government has supported a mandatory fact-finding system ever since the item was first considered. The delegation of Mexico understands the misgivings of some governments when it comes to accepting mandatory jurisdiction for the settlement of disputes, the effect of which would be, in some cases, that the international law being applied would not be fair to the developing countries, which did not take any part in the formulation of this law. As the Fact-Finding

Commission, by its very nature, is not competent to determine what law is applicable, nor to hand down judgements or findings, but is solely concerned with establishing the facts, the delegation of Mexico cannot understand the reluctance of some Governments to accept an obligatory system for the Fact-Finding Commission, which would not affect State sovereignty one iota, as some delegations had said; for the point is precisely that, in the exercise of their sovereignty, States would set up a system for establishing the facts in future incidents, irrespective of where they occurred.

NEW ZEALAND Original: ENGLISH

Article 79 bis of draft Protocol I

As a co-sponsor of the original draft of Article 79 bis, the New Zealand delegation wishes to explain its abstention in the vote on the text of the article adopted in Committee I. The New Zealand delegation continues to believe that a commitment to third-party investigation of disputes relating to the application of the Geneva Conventions and of the draft Protocols would offer the best assurance of the determination of States Parties to act in conformity with the provisions of those instruments. It recognizes, with regret, that there has not so far emerged in the Conference a sufficient basis of agreement for the acceptance of such obligations, either generally or in relation to cases falling within specified categories.

In the New Zealand delegation's view, the text of the article adopted in Committee I does not even encourage a voluntary recourse to third-party investigation of disputes. In the first place, it fails to mention the possibility that the States concerned may choose to refer an outstanding dispute concerning an alleged violation to an impartial enquiry. Secondly, it appears to import the complex jurisdictional rules associated with the "optional clause" of the Statute of the International Court of Justice; one feature of those rules is that a State Party, making a general declaration of acceptance of the competence of the Commission to be established under the article, is committed even in relation to another State Party, making a later and more limited declaration of acceptance. Thirdly, it departs from the system of the International Court of Justice, and offers a further discouragement to the voluntary assumption of obligations, by making the Parties who have accepted the competence of the Commission responsible for its administrative expenses, and the Parties to an enquiry responsible for the expenses incurred in conducting that enquiry.

The New Zealand delegation nevertheless acknowledges that the draft adopted by Committee I retains one positive element. Paragraph 2 (e) extends to the Protocol the measures of protection afforded by Article 52, Article 53, Article 132 and Article 149 common to the four Conventions. If it were not for paragraph 2 (e), Article 79 bis, as adopted by Committee I, would, in the New Zealand delegation's opinion, mark a reduction in the standards achieved by the 1949 Diplomatic Conference of Geneva.

POLAND Original: ENGLISH

Articles of draft Protocols I and II relating to reprisals

In the opinion of the Polish delegation, a provision in Protocol I providing for the general prohibition of reprisals against persons and objects protected by the Geneva Conventions and by the Protocol would have been a logical development of ideals and principles contained in the Geneva Law.

Therefore, it was merely in the spirit of compromise that his delegation decided to withdraw its amendment (CDDH/I/GT/113) which envisaged such general prohibition. It also took into consideration the fact that, after all, most of the persons and objects protected by the Protocol are covered by the prohibition of reprisals contained in its particular articles.

We wish, however, to stress that if it appears that a specific group of persons and objects is not expressly covered by those prohibitions, there should be no attempt to prove by an a contrario argument that such a group is outside the prohibition of reprisals. It would be, to our mind, an argument in bad faith directed against the very spirit of the Geneva Law. It was only upon that understanding that we could withdraw our proposal.

REPUBLIC OF KOREA Original: ENGLISH

Article 79 bis of draft Protocol I

My delegation voted for Article 79 bis on the International Fact-Finding Commission as a whole, although this Committee has failed, to our regret, to reach agreement on the principle of a commission with compulsory competence.

However, we believe that this apparent shortcoming on the part of the commission could be remedied to a certain extent by the application in good faith of other relevant provisions of the Conventions and of this Protocol, for instance Article 79 of Protocol I on mutual assistance in criminal matters. In this connexion, my delegation would like to stress that, in addition to treaty obligations, co-operation between the parties concerned would be essential for the successful accomplishment of the mission assigned to this commission.

SYRIAN ARAB REPUBLIC Original: FRENCH

Article 10 bis of draft Protocol II

The delegation of the Syrian Arab Republic welcomes the adoption by the Committee of the new article which it proposed with a view to governing the action which may be taken in situations resulting from grave breaches of the 1949 Conventions and Protocol I. The point is that such action should be taken only in co-operation with the United Nations and in accordance with the United Nations Charter. There can be no question of Contracting Parties resorting to self-protection, which is in any case prohibited by Article 2, paragraph 4, of the Charter.

The Syrian delegation regrets that the Polish delegation withdrew its amendment, paragraph 1 in document CDDH/I/GT/113, concerning the express prohibition of reprisals against persons and objects protected by the Conventions and the Protocol. The reasons of expediency which prompted that withdrawal should not be interpreted, by a contrario reasoning, as opening up the possibility of such measures. Humanitarian law is dependent on jus cogens and it is therefore unthinkable that an inhuman act should provoke a similar act involving innocent persons.

Article 79 bis of draft Protocol I

The delegation of the Syrian Arab Republic voted against Article 79 bis concerning the International Fact-Finding Commission in its present form for a number of reasons. First, in providing for optional appeal to the planned Commission by the Parties to the conflict, paragraph 2 of the article adopted adds nothing to the law already existing in the 1949 Conventions. On the contrary, indeed, the wording of paragraph 2 (a) represents a retreat from the provisions of the Conventions. While Articles 52, 132 and 149 of the Conventions lay down that "an enquiry shall be instituted" where appropriate, the wording of paragraph 2 suggests that recourse to the enquiry procedure is a matter for the Parties' discretion; it has not the force of an obligation. Furthermore,

paragraph 5 (c), which makes publication of the Commission's report dependent on the agreement and request of all Parties to the conflict, means that the enquiry will be completely ineffective. As such agreement is difficult to obtain, the results of the enquiry will never see the light of day. Hence publicity, which is the only penalty resulting from the enquiry, may be prevented by the opposition of any Party to which the report attributes a breach. Such a Party will thus be able to evade public attention and opprobrium and will often continue to violate the provisions of the Conventions and the Protocol. All in all, depriving the Commission of the right to publish its report ex officio deprives the enquiry procedure of one of the most useful forms of pressure on offenders. Finally, the procedure for adopting Article 79 bis renders it null and void because it was incompatible with rule 41 of the Conference's rules of procedure, which states that "If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted". The Chairman of the Committee took a personal decision, without referring the question to the competent body, i.e. the Committee, that voting priority should be accorded to the proposal on paragraph 2 submitted by the United States of America during the meeting, at the expense of an earlier proposal contained in the report, in spite of the opposition of several delegations. Consequently, that irregular procedure renders null and void the entire procedure followed in adopting Article 79 bis. It is a rule of law common to all legal systems that the validity of an act is closely linked to the validity of its components to the extent that it seems inconceivable to sub-divide them. The Syrian delegation reserves the right to request the plenary Conference to reconsider the question by holding a new vote.

UNITED REPUBLIC OF CAMEROON Original: FRENCH

Article 74 bis of draft Protocol I

The delegation of Cameroon would have preferred the French proposal on exceptional measures in the event of grave breaches (document CDDH/I/GT/107/Rev.1). This proposal seemed to us a serious attempt to regulate one of the most difficult problems, that of reprisals, which had so far been left to the good will of the belligerents. In addition, the proposal had a deterrent aspect that would have made it more likely, of not certain, to be effective.

When the French delegation withdrew its proposal (for reasons which it did not see fit to explain in advance to those who had strongly supported it), my delegation had no option but to abstain, since the Syrian-Polish proposal, which presumes to deal in a few lines with the very serious procedure of reprisals, is singularly inadequate.

Article 79 bis of draft Protocol I

The original proposal to establish a permanent fact-finding commission with compulsory competence (although it had no means of enforcement if a State refused compliance), with powers that were clearly excessive, and whose operational costs would be met from compulsory contributions by the Contracting Parties, could not, for those very reasons, receive my delegation's support.

The text finally approved undoubtedly meets the objections referred to above, as well as certain others which my delegation pointed out during the discussions in the Working Group. Nevertheless, it still appears to my delegation to suffer from defects that would make its application difficult, so much so, in fact, that one of the strongest supporters of the fact-finding commission voted against its provisions.

For those reasons, and also as a matter of principle, my delegation could not endorse those provisions, and it therefore voted against them.

Article 6 of draft Protocol II

My delegation, while reserving its opinion on the advisability of a draft Protocol of which many delegations have stated that it could give rise to interference in the internal affairs of a State, voted in favour of the inclusion in Article 6, on fundamental guarantees, of the prohibition of collective penalties. That provision is one already accepted not only in various domestic legislations, but also in customary international law.

Article 10 bis of draft Protocol II

The delegation of Cameroon voted for this provision in the belief that a blanket prohibition of reprisals would not be feasible. No State could reasonably be asked to stand by and allow grave and repeated breaches of the Conventions or the Protocols by its adversary. The prohibition of reprisals should therefore be limited to certain well-defined cases, restrictively enumerated. The text as it stands seems judicious in that it reconciles the requirements of humanitarian law and the necessities of war.

YUGOSLAVIA Original: FRENCH

Article 10 bis of draft Protocol II

The Yugoslav delegation wishes to express its views on the decisions taken by Committee I at its seventy-second meeting on 13 May 1977.

Although the proposals by Poland (paragraph 1 of amendment CDDH/I/GT/113) and France (CDDH/I/GT/107/Rev.1) have been withdrawn, the Yugoslav delegation would still like to explain its position on the problem of reprisals in international armed conflicts.

It goes without saying - and no one has disputed it here - that reprisals are already forbidden against protected persons and objects, that is to say, against persons and objects in the power of the adversary. This rule of customary law, fully confirmed in court decisions after the Second World War, was codified in 1949 in the Geneva Conventions.

Thus, the Polish proposal reconfirmed an already existing rule. The detailed explanations provided by the Polish representative in Working Group B indicated (at least, that is how my delegation understood them) that his country's proposal was to be regarded as a step forward, that is to say, as prohibiting all reprisals in armed conflicts - in the field of application, that is, of both the Geneva Conventions and The Hague Conventions. But the text, as I have just pointed out, merely reiterated a prohibition which is already contained in the Conventions. The discussions in Working Group B during the adoption of the Chairman's report, confirmed just what that text meant, making it clear how it was to be interpreted. Be that as it may, my delegation could have supported the text, but we should still have been worried about the question of reprisals against the adversary in combat.

We still feel that, like it or not, reprisals on the field of battle against an unscrupulous adversary who uses illicit methods and means of combat remain permissible under customary law, as a last resort against lawless conduct. If matters remain as they are, my delegation would have liked the Committee to lay down and codify precisely when and under what conditions extreme measures such as reprisals may be resorted to. That is the great merit of the French proposal, since it takes the vague and general conditions of customary law and makes them into written rules which are unambiguous and more reliable. I should therefore like to pay tribute to the French delegation for this achievement. My delegation would have been willing to support its amendment, if the text did not contain something which disturbs us a great deal.

I am thinking of the reference to Articles 46-50 of Protocol I. We understand very well what France has in mind. If the enemy destroys our towns, we shall do likewise, and so on and so on, according to the "eye for an eye" principle. In view of the sad examples of past wars, this does not seem to our delegation to be an efficient method; moreover, it is always the civilians who suffer. Thus, to make an express reference to those articles, in which, in any case, reprisals are prohibited, did not seem to us to be a satisfactory approach. It might have been better to avoid any reference; or, at most, to make a general reference to Article 33, breach of which would authorize reprisals, if all the requisite conditions were met. That would allow the Government concerned to take appropriate measures against military objectives or enemy soldiers, even if the victims of the breach were its own civilians. For, I say again, it seems both unjust and pointless to make non-combatants, women and shildren, pay for breaches for which they are in no way responsible.

Since the proposals have been withdrawn, we shall not have any article on reprisals, but in practice that will not prevent countries from taking exceptional measures of that type. It is therefore to be regretted that the conditions set out in the French text were not made to cover such cases, for that still leaves us in the fog of customary law.

There now remains paragraph 2 in proposal CDDH/I/GT/113, submitted by the Syrian Arab Republic, which will now become a new article. My delegation was able to support that proposal. But we feel that the provision should be amplified somewhat for greater clarity, since it has now been taken out of its original context in document CDDH/I/GT/113. My delegation would be ready to study with the keenest attention any fresh proposals concerning this new article.

Article 79 bis of draft Protocol I

Regarding the International Enquiry Commission, my delegation has, ever since the opening of the third session, advocated that it should have mandatory competence. Yugoslavia has always been in favour of having methods for the peaceful settlement of international disputes, and this is also its general policy at home; even in an armed conflict, this approach is, we feel, fully appropriate, especially in respect of serious accusations of the type that the Enquiry Commission would be investigating. But an Enquiry Commission is not a court, nor are its conclusions a verdict. Its establishment with mandatory competence would thus merely be a means of helping to implement the Conventions and the Protocol, and would not in any way affect State sovereignty. Clearly, such a provision would be a deterrent for anyone who might be likely to commit grave breaches.

It was with regret, therefore, that we joined the majority favouring optional competence for the enquiry commissions. Our decision was also influenced by the fact that, at the present stage in the development of international law, if a considerable number of States reject a new rule (as in the case of mandatory competence), even if it is adopted by a majority, that rule will, unfortunately, remain a dead letter and never be applied. An example is to hand in common Articles 8(9) and 10(11) of the Geneva Conventions, not to go beyond the field of humanitarian law. International law is full of similar examples; let us not create fresh ones.

However, if any further efforts were made to improve this text, my delegation would be willing to give them its wholehearted support.

ZAIRE Original: FRENCH

Article 79 bis of draft Protocol I

Mr. MBAMBU: My delegation, which has tried to give the utmost support to the concept of a compulsory fact-finding Commission, abstained in the final vote on Article 79 bis for purely logical reasons arising from the fact that the result achieved is far from representing the real advantage expected.

My delegation believes, indeed, that at the present stage an international fact-finding commission, forming an integral part of the procedure for supervising the implementation of the Conventions on humanitarian law, should transcend the limits of a mere autonomous enquiry commission of the classic type envisaged by The International Peace Conference held at The Hague in 1899 and confirmed by The Hague Conference of 1907, a type which embodies the principle of optional recourse, to the detriment of the automatic application of the enquiry procedure once it has been requested by one of the Parties.

The provisions of Article 79 bis as formulated set up an enquiry body the optional nature of which is apparent at two levels of procedure, firstly at the launching of the enquiry, which is strictly subject to the consent of the Parties concerned, and secondly at the follow-up level, those Parties being left free as regards the action to be taken on the conclusions contained in the report. This greatly diminishes the Commission's modicum of authority and finally reduces it to the routine function of fact-finding, with relinquishment of the real power of making judgements on substantive questions and applying adequate pressures to put an end to violations of the relevant provisions of humanitarian law.

In my delegation's view there is no justification for the permanent existence of such a mechanism, the financing of which would increase to no purpose the financial burden on States, when an integrated ad hoc commission of enquiry, to be set up as required, would be sufficient.

My delegation is therefore convinced that an international fact-finding commission, integrated in a control system requiring impartiality and strictness in its activities, must be organized as required. The enquiry commission must, in its structure and external relations and without prejudice to the provisions of Article 9 of The Hague Convention of 1899 for the Pacific Settlement of International Disputes limiting the competence of enquiry commissions to "differences of an international nature involving neither honour nor vital interests" of the Parties, possess the conditions necessary to ensure its independence and affirm its authority. This is especially true when the function of the enquiry commission is known to be technical and not political, its objective being to see whether the facts are in accordance with a legal standard unanimously accepted by the High Contracting Parties, including the Parties concerned.

That is why my delegation had proposed that the commission should be called "Standing International Fact-Finding Commission on the Application of Humanitarian Law". It had meant in that way to describe not only the nature of the Commission but also the extent of its competence.

My delegation is not insisting unduly on this, since the observance of practice indicates a more concrete reality, that of the voluntary nature of international society.

SUMMARY RECORD OF THE SEVENTY-FOURTH MEETING

held on Monday, 16 May 1977, at 3.30 p.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1)(continued)

Draft Protocol I

Article 2 - Definitions

Sub-paragraph (c)(CDDH/1; CDDH/I/36, CDDH/I/62, CDDH/I/72)

1. The CHAIRMAN observed that three amendments to Article 2 (c) had been proposed. One had been submitted by Australia, Belgium, the United Kingdom of Great Britain and Northern Ireland and the United States of America (CDDH/I/36); it called for the deletion of sub-paragraph (c). A second, submitted by the Syrian Arab Republic (CDDH/I/62), called for clear definition, in that sub-paragraph, of the various categories of "protected persons" and "protected objects". A third had been submitted by Senegal (CDDH/I/72) - it called for the sub-paragraph to be reworded.

2. He invited the Committee to express its views first on amendment CDDH/I/36, the furthest removed from the ICRC text.

3. Mr. BLOEMBERGEN (Netherlands) said that Article 2 (c) had become pointless, since protected persons and objects were covered by Article 74 of draft Protocol I as adopted by the Committee.

4. Mr. ABDINE (Syrian Arab Republic) said he believed that, for greater clarity, it would have been better to set out the various categories of persons and objects under the protection of the Protocols. If, however, it were no longer possible, at the present stage of the work, to draw up a complete list, he would agree to withdraw his delegation's amendment (CDDH/I/62), and join a consensus for deletion of Article 2 (c).

5. Mr. DIAGNE (Senegal) withdrew his country's amendment so as to facilitate a consensus.

6. Mr. PAOLINI (France) and Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) requested further particulars as to the reasons for the proposed deletion of Article 2 (c).

7. Mr. DRAPER (United Kingdom) explained that, in the view of the co-sponsors of amendment CDDH/I/36, the definition given in sub-paragraph (c) was a truism. It added nothing to the Protocol, and did not facilitate its interpretation.

8. Mr. GRAEFRATH (German Democratic Republic) said that the reason why a definition of protected persons and objects had been given in sub-paragraph (c) was that in the ICRC text "protected persons" and "protected objects" were mentioned in Article 74. The Committee, however, did not mention them in the text it had adopted for Article 74, and consequently it was no longer necessary to define them.

9. Mr. PAOLINI (France) and Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), said that, in view of those clarifications, they saw no objection to the deletion of Article 2 (c).

Article 2 (c) was deleted by consensus.

New Article 2 bis

Sub-paragraph (a) (CDDH/I/20)

10. Mr. HUSSAIN (Pakistan) withdrew his delegation's amendment (CDDH/I/20).

Sub-paragraph (b) (CDDH/I/286)

11. Mr. ROSENNE (Israel) observed that the emblem of the Red Shield of David had long been universally known. During the last few decades, tens of thousands of sick and wounded, both Arabs and Jews, had seen the Shield of David. It had been for them a symbol of humanitarian assistance, just like the Red Crescent, which symbolized humanitarian assistance in the Islamic world, and the Red Cross or Red Lion and Sun in other parts of the world. Very recently, hundreds of persons, both Christians and Moslems, had received treatment, in tragic circumstances for them, in hospitals staffed by medical personnel bearing the Shield of David as a distinctive emblem. Under that emblem, too, aid parcels had been sent to victims of earthquakes or other natural catastrophes.

12. When the Nazi régime had wanted the Jews to be distinguishable, it had forced them to wear a distinctive yellow emblem that would be universally and immediately recognized as the symbol of Judaism: it had been the Shield of David, the Star. With that symbol on their breast, millions of Jews had been herded into the gas chambers. No one had pretended then that the Shield of David was not a distinctive emblem.

13. Since its creation, the State of Israel had made of the Shield of David (Magen David Adom) the distinctive emblem of the medical services of its armed forces, while respecting the inviolability of the distinctive signs and emblems of the 1949 Geneva Conventions. The Shield of David was recognized as a symbol of Judaism in the same way as the Cross symbolized Christianity, and the Crescent Islam. It was widely used in Jewish life, both secular and religious. As an emblem, the Shield of David did not date from the creation of the State of Israel. The report of Committee I, submitted to the Plenary Assembly of the Diplomatic Conference of Geneva of 1949, had recognized, moreover, that that emblem was very well-known and respected in those parts of the world where it was used.

14. At the 1949 Diplomatic Conference, Israel had submitted a formal proposal that, in addition to the three existing emblems, the Shield of David on a white ground should be recognized as a distinctive sign. Unfortunately, that proposal had not been adopted, but the vote had been close (21 in favour, 22 against and 7 abstentions).

15. That was why Israel had entered reservations at the time of signature and ratification of the 1949 Geneva Conventions, those reservations which, incidentally, had been entirely in keeping with customary law as codified later in the 1969 Vienna Convention on the Law of Treaties.

16. The reservation to the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was worded as follows: "Subject to the reservation that while respecting the inviolability of the distinctive signs and emblems of the Convention, Israel will use the Red Shield of David as the emblem and distinctive sign of the medical services of her armed forces". Similar reservations had been made to the second and fourth Conventions of 1949. It had not been necessary to make any reservation to the third Convention.

17. For reasons which were profoundly rooted in its religious and national traditions and history Israel had to use the Shield of David for the purposes of the Conventions, and was precluded from using any other emblems recognized at present. It did not wish to contest the opinion of those who considered that the other emblems provided for did not necessarily have any religious significance, but the fact was that in the mind of the peoples they were regarded as symbols having a religious origin or at least implication. It was unthinkable, therefore, to impose on Israel the use of any other emblem than the Shield of David.

18. Israel knew quite well that originally the Red Cross was meant to be an international, neutral emblem without any particular religious significance, and was aware of the importance of the universality of the distinctive sign. In its Commentary on the first Geneva Convention of 1949, however, the ICRC itself stated: "People may associate this cross with the Christian cross in their own minds; but such an interpretation cannot have any official or international standing ..." (page 305). It noted that the Diplomatic Conference, "while hoping that the time would come when all the countries of the world would decide to adopt the red cross on a white ground as the only distinctive emblem, was nevertheless compelled to recognize that it was impossible, for the moment, to revert to the use of a single emblem" (page 301). That was why the 1949 Conference had decided to continue to recognize the Red Crescent and the Red Lion and Sun.

19. It should be emphasized that, throughout the period of hostilities, belligerents in the Middle East had recognized the respect due to each of the emblems in use in the various armed forces: the Red Cross, the Red Crescent and the Shield of David.

20. Draft Protocol I, Article 15, paragraph 5, concerning medical and religious personnel provided an example of the kind of inacceptable anomaly arising from non-recognition of the Shield of David, for it could be interpreted to mean that civilian Rabbis, in the circumstances mentioned in Article 15, must be identified by one of the other emblems. That was not, however, the interpretation given to the article by Israel; furthermore, Israel considered that such an interpretation could not be in good faith.

21. A further anomaly resulting from the 1949 Conference was that, under pretext that the Shield of David was not a recognized emblem, the Israeli national society (Magen David Adom) was excluded from the International Red Cross. That Society, however, had all the necessary qualifications and an international reputation for the high quality of its services, its position within the community and the spontaneity of its responses to distress and catastrophe whatever their causes, and for its assistance to all those who were in need. Help was accorded without distinction of race, religion or nationality.

22. Such ostracism was not compatible either with the International Red Cross ideals of universality and equality or with the present Diplomatic Conference's aim of strengthening the role of the national societies.

23. The fact that the protection of international humanitarian law was accorded to persons and objects as such and not by virtue of the emblem in no way affected the need to resolve the outstanding questions concerning the emblem.

24. It was to remedy that obvious shortcoming that Israel had submitted, on 10 April 1975, an amendment in document CDDH/I/286 proposing the addition of an Article 2 bis (b). Those who opposed that amendment would doubtless make much of their concern to avoid the proliferation of emblems. But what proliferation was there? Had any other request for recognition been submitted to the Conference? Was there any other symbol or emblem which had been used for humanitarian aims in so many wars and given so much help to so large a number of sick and wounded and was still not recognized?

25. In order not to delay the work of Committee I, the Israeli delegation would not press for its amendment to be put to the vote at the present stage of the work, but it reserved the right to submit it in the plenary Conference.

26. Replying to a question by the CHAIRMAN, Mr. ROSENNE (Israel) confirmed that he was asking for the proposal in document CDDH/I/286 to be withdrawn from the Committee agenda and that he would submit it in the plenary Conference.

27. Mr. HUSSAIN (Pakistan) commented that, contrary to what had been stated, the Red Crescent did not symbolize Islam and was in no way a religious emblem. Its adoption had been inspired by the lunar calendar in use in Pakistan. Similarly, the Red Cross emblem did not represent any religion; if it did, Pakistan would refuse to recognize it as a distinctive sign.

28. Mr. ABDINE (Syrian Arab Republic), speaking on behalf of all the Arab delegations, said that he would not discuss the possible political considerations behind the Israeli proposal. He would merely point out that solely for reasons of national pride unconnected with the imperatives of humanitarian law, the Committee was being asked to accept a national emblem as a protective emblem. The episodes of the Second World War which had been mentioned could not divert attention from the true intentions of the sponsor of the proposal. Technically, the proposal was likely to hinder the praiseworthy efforts being made to adopt a single protective emblem.

29. Furthermore, the fact that there were a number of existing emblems was not a reason for having yet another one accepted. The existing emblems, which were not inspired by political or religious reasons, had been devised in historical circumstances to ensure the best possible protection and to avoid the confusion caused by the emblems used in earlier wars. They were in no way identified with the national emblems nor with the religious concepts of the countries using them. The proof lay in the fact that many Moslem countries preferred the cross, to the exclusion of any other emblem.

30. The adoption of the Israeli proposal would be a setback to the work of the Conference and might encourage an unnecessary proliferation of protective emblems, while all efforts were aimed at finding a solution which would lead to the unification of such emblems. The proposal under discussion should therefore be rejected.

31. Mr. ROSENNE (Israel) said that he had never said anything which could be a reason for associating the International Red Cross with any religious organization. It was, however, undeniable that in some people's minds the emblems of the Red Cross had a religious significance. He was sorry if his words had led to a misunderstanding on that point.

32. Mr. ABDINE (Syrian Arab Republic) considered that there was a procedural problem. The Israeli representative had said that he would withdraw his proposal, but the withdrawal had been conditional. In view of the considerable amount of work which the Conference had yet to accomplish, it was hard to agree that the Israeli proposal should be re-submitted subsequently.

33. He requested that, unless the Israeli representative withdrew his proposal once and for all, the matter should be put to the vote.

34. The CHAIRMAN noted that the Israeli representative had asked for his proposal to be withdrawn from the agenda of Committee I, but had reserved the right to submit it at the plenary Conference. It seemed that it was not for Committee I to decide on the latter point and that it would be difficult to determine the modalities of the vote requested by the Syrian representative. It rested with the President of the Conference to decide whether the Israeli proposal should be rejected or accepted

35. Mr. ABDINE (Syrian Arab Republic) said that an amendment had been submitted and should be put to the vote. The withdrawal requested by the Israeli representative was a conditional withdrawal allowing for later re-submission of the proposal. His delegation objected to that and considered that the question should be settled immediately.

36. The CHAIRMAN said that he failed to see how a vote could be taken on an amendment which had been withdrawn from the Committee's agenda. If it was decided to put the question to the vote, the Israeli representative would submit a point of order.

37. Mr. ROSENNE (Israel) said that, if his withdrawal proposal constituted an amendment to the agenda, it could be voted on. If, however, it was a matter of entering into a commitment on behalf of some other body of the Conference which would meet subsequently, he did not see on what basis such a commitment could be made.

38. Mr. MUDARRIS (Saudi Arabia) agreed with the Syrian representative that the discussion must be brought to an end. He would like to know what the Chairman thought about the possibility of referring the question back to a plenary meeting.

39. The CHAIRMAN, having consulted the rules of procedure and questioned the Conference Secretariat, said that the texts were not very clear on the point. In any case, he himself could not take any decision in such a delicate situation. If the Committee decided that a vote was necessary, a vote would be taken, but whatever its results the final decision would be taken in the plenary Conference.

40. Mr. SADI (Jordan) said that the Committee should terminate the discussion on the grounds that it had no longer to concern itself with an item that had been definitively withdrawn from its agenda.

41. Mr. AKASHA (Saudi Arabia) supported the proposal and added that the withdrawal should be unconditional.

42. The CHAIRMAN said that he was prepared to uphold the Jordanian representative's proposal if there was no objection to it.

43. Mr. AL-FALLOUJI (Iraq) recalled that the proposal by the Israeli delegation had been considered several times during the Conference but that the substance of it had been rejected by the competent Committees. His own delegation had invoked that rejection in opposing any further consideration of it by Committee I. It considered that a proposal which had been rejected by the various Committees could not be reconsidered in plenary Conference and it reserved the right to object to any resumption of the discussion on the matter during the forthcoming plenary meetings. He asked that the Committee should take note of that attitude.

Article 74 - Repression of breaches of the present Protocol

Paragraph 3, new sub-paragraph (g) (CDDH/I/347)

44. Mr. GLORIA (Philippines) recalled that at the sixtieth meeting of Committee I, on 3 June 1976, his delegation had proposed the insertion in Article 74, paragraph 3, of a new sub-paragraph (g) relating to the use of prohibited weapons. Several representatives had endorsed that proposal, which had been supported, inter alia, by the delegations of Indonesia and Pakistan.

45. His delegation's proposal was based on the fact that most of the weapons mentioned had for long been prohibited although so far no sanction had been contemplated. "Prohibition" on its own was nothing more than a declaration, and that was one of the weaknesses of international humanitarian law. It was the realization of that fact that had led to the setting-up of the Ad Hoc Committee to determine which types of weapons violated the principles of humanitarian law in that they were indiscriminate and caused unnecessary suffering.

46. He paid a tribute to the delegations participating in the work of the Ad Hoc Committee on Conventional Weapons, particularly those which were calling for the prohibition of incendiary weapons and flame munitions, those which proposed restrictions on the use of booby-traps and those which were against the use of blast and fragmentation weapons.

47. He referred to paragraphs 2 and 3 of Article 33 - Basic rules, and said that unless the Conference adopted the new sub-paragraph (g) which it was proposed to add to Article 74, the rules would be no more than empty and inoperative declarations of principle.

The meeting was suspended at 4.30 p.m. and resumed at 5 p.m.

48. The CHAIRMAN announced that the Philippine representative wished to make a slight amendment to his proposal (CDDH/I/347/Rev.1).

49. Mr. GLORIA (Philippines) said he would like his amendment to be considered during the meeting scheduled for the following day.

50. The CHAIRMAN said that he would nevertheless ask the Philippine representative to submit the amendment it wished to make to its proposal orally to the Committee.

51. Mr. GLORIA (Philippines) read out the amended text of Article 74, sub-paragraph 3 (g): "(g) the use of prohibited weapons such as bullets that expand or flatten easily in the human body; asphyxiating and poisonous gases; and analogous liquids, materials or devices".

Article 75 bis - Repatriation on close of hostilities

52. The CHAIRMAN pointed out that a part of paragraph 2 of Article 75 bis proposed by Pakistan (CDDH/I/22) had been inserted in Article 74. The Pakistan representative wanted paragraph 1 of the proposed article to be retained but would like it to be considered at a later meeting.

Article 78 bis - Treatment of convicted prisoners of war

53. The CHAIRMAN said that the sponsors of the new Article 78 bis appearing in document CDDH/I/312 and Add.1 had requested that their proposal should be withdrawn from the agenda.

Part V - New Section III - Draft Code of International Crimes in Violation of the Geneva Conventions of 1949 and the draft additional Protocols (CDDH/56/Add.1/Rev.1; CDDH/I/346)

54. The CHAIRMAN read out document CDDH/I/346 submitted by the Philippine delegation, which was willing not to proceed further with the deliberation of its proposal in the Committee but which wished, however, to have document CDDH/56/Add.1/Rev.1, which contained a draft code of international crimes, incorporated into the instruments of the Conference as an annex. If there were no objections, the proposal in document CDDH/I/346 would therefore be withdrawn from the agenda.

It was so agreed.

55. Mr. PAOLINI (France) said that he appreciated the spirit of conciliation shown by the Philippine delegation and took note of its intention to submit its proposal at a later date. He wished, however, to ask the representative of the Philippines for some clarification, for he did not quite see how a text already incorporated into the Acts of the Conference could be annexed to its instruments.

56. The CHAIRMAN pointed out that for the moment the proposal had been withdrawn from the agenda.

57. Mr. GLORIA (Philippines) said that the proposal not to proceed further with the deliberation of his country's proposal had been prompted by the short time at the Committee's disposal. If, however, the proposal as a whole was not adopted, he would press for an international code of war crimes to be included among the Conference documents.

58. Mr. CLARK (Nigeria) said that he too would like some explanation. "Instruments of the Conference", he noted, covered the "Protocols and their annexes". Any annex, therefore, had a legal significance and was part and parcel of the Protocols. He asked whether the text proposed by the Philippines would be annexed to the Protocols or to the Acts of the Conference.

59. The CHAIRMAN said that he understood that a document providing food for thought, but not of a compuslory nature from the legal standpoint, would be annexed to the Acts of the Conference.

60. Mr. GLORIA (Philippines) said that the text of his delegation's proposal should be incorporated into the instruments of the Conference as an annex, for subsequent reference and consideration.

61. Mr. HUSSAIN (Pakistan) said that he thought it would be annexed to the Acts of the Conference and kept in the archives for reference. In that particular context, "instruments" should be taken to mean the Conference documents. Thus understood, the Philippine proposal should not create any problems.

62. Mr. GLORIA (Philippines) endorsed the interpretation given by the representative of Pakistan.

63. The CHAIRMAN confirmed that the Code proposed by the Philippines would appear, not as an annex to Protocol I, but as a Conference document.

The meeting rose at 5.25 p.m.

SUMMARY RECORD OF THE SEVENTY-FIFTH MEETING

held on Tuesday, 17 May 1977, at 12.30 p.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Clark (Nigeria), Vice-Chairman, took the Chair.

ORGANIZATION OF WORK

1. The CHAIRMAN called for the co-operation of members in ensuring that the Committee concluded its work within the allotted time, in accordance with the appeal made by the President of the Conference.

2. He suggested that the Committee should adopt the agenda in document CDDH/I/Inf.263 for its afternoon meeting, taking up the items in the order indicated.

It was so agreed.

The meeting rose at 12.35 p.m.

SUMMARY RECORD OF THE SEVENTY-SIXTH MEETING

held on Tuesday, 17 May 1977, at 3.15 p.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Clark (Nigeria), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Report of Working Group C (CDDH/I/350/Rev.1, CDDH/I/350/Rev.1/Add.1/Rev.1)

Draft Protocol I

1. The CHAIRMAN invited the Committee to consider the report of Working Group C (CDDH/I/350/Rev.1 and CDDH/I/350/Rev.1/Add.1/Rev.1). He suggested that in order to speed up the work and thus answer the appeal made by the President of the Conference, the Committee, without concerning itself with questions of drafting, should consider for approval the articles adopted by Working Group C as they appeared in the above-mentioned documents. He further suggested that questions of drafting should be referred either to the Secretary of the Committee or to the Drafting Committee. Lastly, as Working Group C had adopted most of the articles by consensus, any explanations of vote might be communicated in writing to the Secretary of the Committee.

It was so agreed.

2. The CHAIRMAN invited the Committee to consider one by one the articles contained in documents CDDH/I/350/Rev.1 and CDDH/I/350/Rev.1/Add.1/Rev.1 beginning with the articles of Protocol I.

Article 80 - Signature

Article 81 - Ratification

Article 82 - Accession

Article 83 - Entry into force

3. The CHAIRMAN, noting that Working Group C had adopted the articles by consensus, suggested that the Committee should do likewise.

Articles 80, 81, 82 and 83 were adopted by consensus.

Article 84 - Treaty relations upon entry into force of this Protocol

Paragraphs 1 and 2 of Article 84 were adopted by consensus.

4. The CHAIRMAN recalled that at its sixty-seventh meeting, the Committee had adopted the text proposed in document CDDH/I/233 and its addenda, to constitute paragraph 3 of Article 84. He therefore suggested that Article 84 as a whole, as thus amended, be adopted by the Committee.

Article 84 as a whole, as amended, was adopted by consensus.

5. The CHAIRMAN drew the Committee's attention to document CDDH/CR/RD/88, which stated that when the Committee had adopted Article 70 on 9 April 1975 it had decided to retain in square brackets the phrase "and the Parties to the conflict until a decision was taken on Article 84. Since that Article had just been adopted by the Committee it followed that the words in brackets should be retained in Article 70.

It was so agreed.

Article 86 - Amendment

On the understanding that the words "or its Annex", placed in square brackets, would be retained or deleted by a decision of the Drafting Committee, Article 86 was adopted by consensus.

6. The CHAIRMAN said that following a proposal by Mr. de ICAZA (Mexico), the Committee could defer consideration of Article 86 bis until later.

It was so agreed.

Article 87 - Denunciation

Article 88 - Notifications

Article 89 - Registration

Article 90 - Authentic texts and official translations

7. The CHAIRMAN reminded the Committee that those articles had been adopted by consensus by Working Group C, and proposed that it should adopt them in the same way.

Articles 87 to 90 were adopted by consensus.

8. The CHAIRMAN noted that the Committee had adopted all the final provisions of draft Protocol I, except Articles 85 and 86 bis which would be considered later.

Draft Protocol II

Article 40 - Signature

Article 41 - Ratification

Article 42 - Accession

Article 43 - Entry into force

Article 44 - Amendment

Article 45 - Notifications

Article 46 - /Registration/

Article 47 - /Authentic texts and official translations/

9. The CHAIRMAN invited the Committee to adopt the corresponding articles of Protocol II, namely Articles 40 to 47.

Articles 40 to 47 were adopted by consensus.

Article 44 bis - Denunciation

10. The CHAIRMAN pointed out that the adoption by the Committee of Articles 40 to 47 of draft Protocol II implied the adoption of Article 44 bis - Denunciation, which appeared in paragraph 38 of document CDDH/I/350/Rev.1. He thought that it could be assumed that the Committee had adopted Article 44 bis by consensus.

It was so agreed.

Draft Protocol I

Preamble

11. The CHAIRMAN, noting that the Committee had completed the consideration of the final clauses of draft Protocol II, invited it to consider the Preamble to Protocol I (paragraph 36 of document CDDH/I/350/Rev.1).

12. He pointed out that the Committee should in particular decide whether to retain the last sub-paragraph of the Preamble (Martens clause) by removing the brackets or whether to delete the sub-paragraph itself.

13. Mr. FRUCHTERMAN (United States of America) proposed the deletion of the whole sub-paragraph, which was unnecessary since the clause appeared in Article 1 of draft Protocol I.

14. Mr. de ICAZA (Mexico) said that while the Martens clause was important, it was unnecessary to repeat it in the Preamble since it appeared in Article 1.

15. Mr. AMIR-MOKRI (Iran) and Mr. BLOEMBERGEN (Netherlands) were also in favour of the deletion of the sub-paragraph.

The last sub-paragraph of the Preamble to draft Protocol I was deleted by consensus.

The remaining sub-paragraphs of the Preamble to draft Protocol I were adopted by consensus.

Draft Protocol II

Preamble

16. Mr. OTOBO (Nigeria), supported by Mr. MOHIUDDIN (Oman), Mr. DIXIT (India) and Mr. JOMARD (Iraq), observed that in the Working Group, a number of delegations had considered it unnecessary to have a Preamble to Protocol II. If it was decided to retain the Preamble he would point out that the Nigerian delegation had submitted a number of amendments which would be found in paragraph 37 of document CDDH/I/350/Rev.1.

17. Mr. MBAYA (United Republic of Cameroon) said that neither Protocol required a preamble. In view of the fact that the Committee had decided to include a preamble to draft Protocol I, however, it might be best to have one in Protocol II as well. He had no objection to the amendments proposed by Nigeria.

18. The CHAIRMAN put to the vote the proposal to delete the preamble to draft Protocol II.

The proposal was rejected by 32 votes to 19, with 27 abstentions.

19. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic), supported by Mr. MBAYA (United Republic of Cameroon), considered that the amendments proposed by the Nigerian delegation, except for the proposal to delete the words "and the dictates of the public conscience" were drafting changes which did not affect the Russian text. He suggested that they should be referred to the Drafting Committee and that a vote be taken on the proposal to delete the words he had just quoted.

20. Mr. CONDORELLI (Italy) felt that not all the proposed amendments were merely drafting changes. In the French text, for example, he would like to see the word "consacrés" retained rather than have it replaced by "contenus". There was a basic difference between the two terms.

21. Mr. de BREUCKER (Belgium) agreed with the representative of Italy. The word "consacrés" implied that the principles concerned were not only stated in Article 3 of the Geneva Conventions of 1949 but that their application was recognized. While he would like to have the word "consacrés" retained he had no objection to the text being referred to the Drafting Committee.

22. The CHAIRMAN suggested that the proposed amendments set out in paragraph 37 should be referred to the Drafting Committee, except for that proposing the deletion of the last phrase, "and the dictates of the public conscience", in the last paragraph of the Preamble.

It was so agreed.

23. The CHAIRMAN then asked the Committee if it agreed to delete the phrase "and the dictates of the public conscience", which some representatives considered superfluous.

24. Mr. de BREUCKER (Belgium) said, in reply to a request for clarification from Mr. REIMANN (Switzerland), that the Martens clause had been deleted in the Preamble to draft Protocol I because it was strongly reaffirmed in Article 1, but in draft Protocol II the situation was different, and the Martens clause appeared to have some point. He therefore supported the retention of that clause.

25. Mr. MBAYA (United Republic of Cameroon) said that a preamble was not really necessary in either of the Protocols, but since the principle had been accepted for draft Protocol I, his delegation had voted in favour of the inclusion of a preamble in draft Protocol II in order to bring the two Protocols into line. However, the words "public conscience" should be replaced by the words "universal conscience". If that amendment were made, his delegation would be in favour of retaining the last phrase in the preamble to draft Protocol II.

26. Mr. GLORIA (Philippines) and Mr. D'ESTEFANO PISANI (Cuba) supported the retention of the phrase "and the dictates of the public conscience".

27. Mr. FRUCHTERMAN (United States of America) supported the Nigerian proposal to delete that phrase.

28. The CHAIRMAN put the Nigerian proposal to the vote.

The Nigerian proposal to delete the last phrase was rejected by 35 votes to 21, with 21 abstentions.

29. The CHAIRMAN said that as the last phrase was now retained, he suggested that the Committee should consider the various amendments submitted, in the first place the amendment by the United Republic of Cameroon to replace the words "public conscience" by "universal conscience".

30. Mr. LUNET (France) supported the proposal by the United Republic of Cameroon.

31. The CHAIRMAN proposed that the point should be settled by the Drafting Committee.

It was so agreed.

32. The CHAIRMAN suggested that the Committee should consider the Nigerian proposal to insert the expression "well-established" before the word "principles" in the last paragraph of the Preamble to draft Protocol II.

33. Mr. BLOEMBERGEN (Netherlands), supported by Mrs. MANTZOULINOS (Greece), said he saw no need to add those words, which might give rise to different interpretations. Furthermore, in the Preamble to draft Protocol I, which the Committee had just adopted, the reference was simply to the "principles of humanity". It would therefore be preferable not to insert the expression "well-established" in draft Protocol II.

34. Mr. OTOBO (Nigeria) said that his delegation withdrew its amendment.

35. The CHAIRMAN noted that the Preamble to draft Protocol II had not been amended. He therefore proposed that the Committee should adopt the text given in paragraph 37 of document CDDH/I/350/Rev.1, with the square brackets deleted.

It was so agreed.

Draft Protocols I and II

Titles

The title of draft Protocol I (paragraph 50 of document CDDH/I/350/Rev.1) was adopted by consensus.

The title of draft Protocol II was adopted by consensus in the English and French versions, as given in paragraph 53 of document CDDH/I/350/Rev.1.

36. Mr. de ICAZA (Mexico) entered reservations as to the Spanish titles of draft Protocols I and II.

37. Mr. JADKARIM (Sudan) said that there was a mistake in the Arabic text, which would have to be corrected.

38. The CHAIRMAN suggested, in response to a comment by Mr. MBAYA (United Republic of Cameroon), that the Committee should leave it to the Drafting Committee to review the titles in the various languages.

It was so agreed.

Draft Protocol I

Article 85 - Reservations

39. The CHAIRMAN reminded the Committee that during the discussion in the Working Group it had been proposed to delete Article 85. He therefore considered that the Committee should begin by voting on that proposal.

The proposal to delete Article 85 was adopted by 47 votes to 34, with 4 abstentions.

Article 86 bis (CDDH/I/350/Rev.1/Add.1/Rev.1)

40. The CHAIRMAN pointed out that the text presented by the Working Group contained several words and phrases in square brackets. It would be advisable to postpone consideration of the text until the seventy-seventh meeting, when the Committee would have a new and less complicated version at its disposal. That would make it easier for the Committee to come to its decisions.

41. Mr. de ICAZA (Mexico) said that he was not against postponing the consideration of Article 86 bis, provided the Committee did not take up another item. It was understood that documents CDDH/I/350/Rev.1 and CDDH/I/350/Rev.1/Add.1/Rev.1 would be considered simultaneously. The Committee could, however, now vote on the proposal to delete Article 86 bis, while reserving the right to revert to the item at the next meeting if the article were retained.

42. Mr. FREELAND (United Kingdom) said that, in his view, it would be better to consider the question of Article 86 bis as a whole and therefore to wait for the new text.

43. Mr. GREEN (Canada) announced that he was withdrawing the amendment his delegation had submitted in March 1974, to add a new article at the beginning of Protocol II (CDDH/I/37). The concept of good faith in international law was in fact clearly stated in Articles 36 and 37 of draft Protocol II.

44. Mr. de ICAZA (Mexico) said that he saw no reason why the Committee should not consider Article 86 bis on the basis of a new document; in his view, however, it would not be in keeping with the Committee's decisions to take into consideration a new amendment such as that submitted by Canada which, moreover, was not mentioned in the Working Group's report. He thought that the meeting might be adjourned.

45. Mr. GREEN (Canada) pointed out that, far from expecting the Committee to consider his amendment, he had withdrawn it. So far as he was concerned, he would rather not start immediately on Article 86 bis.

46. The CHAIRMAN suggested that the Committee should take note of the fact that the representative of Canada had withdrawn his amendment (CDDH/I/37).

It was so agreed.

47. Mr. RECHETNIAK (Ukrainian Soviet Socialist Republic) moved the adjournment of the meeting and suggested that Article 86 bis should be taken up at the seventy-seventh meeting.

48. Mr. de ICAZA (Mexico) supported the Ukrainian representative's motion.

The motion was adopted.

The meeting rose at 4.50 p.m.

SUMMARY RECORD OF THE SEVENTY-SEVENTH MEETING

held on Wednesday, 18 May 1977, at 10.15 a.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (continued)

Draft Protocol I

Report of Working Group C (CDDH/I/350/Rev.1, CDDH/I/350/Rev.1/Add.1/Rev.1) (concluded)

Article 86 bis (concluded)

Addendum to the report

Paragraph 4 (a)

1. The CHAIRMAN drew attention to two mistakes in the French version of the addendum to the report of Working Group C (CDDH/I/350/Rev.1/Add.1/Rev.1). In the French text of paragraph 4(a), the square brackets round the words "supprimer l'article 86 bis proposé" should be deleted. On the other hand, square brackets should be placed before "Article" and after "/ 33 bis 7" in paragraph 4 (b).

2. Mr. de ICAZA (Mexico) proposed a new translation for the French and Spanish versions of Article 86 bis, paragraph 4. The sentence in square brackets beginning with the words "the depositary Government" in the third line of the English original and ending with the words "a special Conference" should be translated into French as follows: "le Gouvernement dépositaire pourra convoquer une conférence extraordinaire, en consultation avec tout Etat ou tous Etats Parties qui désireraient inviter une telle conférence". In Spanish, the sentence should read: "el Gobierno depositario podrá convocar una Conferencia especial, en consulta con cualquier Estado o Estados Partes que deseen invitar tal conferencia".

3. The CHAIRMAN said that the corrections proposed by Mr. de ICAZA would be made in the French and Spanish texts of Article 86 bis.

4. Mr. FREELAND (United Kingdom), speaking as a sponsor of draft resolution CDDH/Inf.240, said that he would like to allay the doubts which some delegations had expressed regarding the sponsors' intentions. The draft resolution, which was intended to replace Article 86 bis, constituted an alternative text. It did not reflect the preferences of any particular delegation, but represented an attempt to assess what might form common ground for the continuation of work on the prohibition or restriction of the use of specific conventional weapons. The Committee was not asked now to study the

text in detail or to take any decision on it. The object of the draft resolution was to establish a concrete and realistic basis for a conference that might be given the task of continuing the search for relevant agreements, and it recommended in particular, in paragraph 6 (b), the setting-up of a mechanism for the review of any such agreements. In the last resort, the value of such a resolution, like that of any other, would depend on the political will of the States concerned; and his delegation attached importance to the engagement of will which a consensus solution would provide.

5. Mr. PARTSCH (Federal Republic of Germany), whose country was one of the sponsors of draft resolution CDDH/Inf.240, expressed satisfaction with the positive results obtained by the Ad Hoc Committee on Conventional Weapons, which had managed to clarify the points of agreement and disagreement. The fact that those discussions should have taken place within the context of the Conference was particularly encouraging. But new efforts were needed, for the question whether an organ of the Conference was competent to decide on the restriction or prohibition of specific conventional weapons was among those which were most in dispute. With regard to that matter, the position of the Federal Republic of Germany was well known. The most urgent task before all the participants was to agree upon an authority whose competence and effectiveness could not be called in question.

6. After the experience of the past few years, his country considered that recourse to an institution as impartial and pre-eminent as the United Nations was altogether desirable. The draft resolution provided for mediation by the Secretary-General of the United Nations with regard to that important question of procedure, for he, better than any one else, could obtain the support of all Governments in the search for means of reaching the common goal they had set themselves.

7. Mr. CLARK (Nigeria) approved the statements made by the representatives of the United Kingdom and the Federal Republic of Germany, while at the same time drawing attention to the fact that draft resolution CDDH/Inf.240 was not on the agenda. He drew attention to two minor errors in document CDDH/I/350/Rev.1/Add.1/Rev.1. In paragraph 2 (f), "1869" should be replaced by "1868", and in the English version of the text, in paragraph 4 (b), the square bracket in front of the inverted commas should be deleted.

8. The CHAIRMAN said that the first error would be corrected, but that the question of the square brackets would be settled automatically in the course of the discussion.

9. Mr. de ICAZA (Mexico) said that there were two ways of looking at Article 86 bis. Some delegations considered that the prohibition or restriction of specific conventional weapons was not within the competence of the Conference. He did not share that opinion, although he respected it. On the other hand, he failed to understand the arguments of those who, while considering that that question lay within the competence of the Conference, did not think that Committee I was the appropriate forum for discussing it. If it was possible, for humanitarian reasons, to call for an agreement prohibiting or restricting the use of specific conventional weapons, he did not see why that question should not come within the competence of Committee I. He also wondered why the mechanism for the adoption and review of relevant agreements could not be provided for in the Protocol. He saw no reason for having recourse to other international organizations, for that would simply be a bureaucratic expedient.

10. Article 86 bis met two specific objectives. In the first place, it created a legal link between the prohibition or restriction of the use of specific conventional weapons and the relevant principles contained in draft Protocol I. No such provision, however, was to be found in draft resolution CDDH/Inf.240. Furthermore, the objectives of the special international conference whose task it would be to seek for agreements on that issue were not clearly defined. In any case, to judge from certain unfortunate experiences in regard to the prohibition of nuclear weapons, for example, there was every reason to fear that the idea of convening such a conference was nothing but a pious hope. In the second place, Article 86 bis provided for a special mechanism for the periodic review of the relevant provisions of Protocol I, whatever the outcome of the Ad Hoc Committee's work might be.

11. The Mexican delegation intended to submit a draft resolution requesting the immediate continuation of the work of the Ad Hoc Committee on the subject of the prohibition or restriction of the use of specific categories of conventional weapons.

12. Mr. LONGVA (Norway) and Mr. de ICAZA (Mexico) pointed out a mistake in the French version of document CDDH/I/350/Rev.1/Add.1/Rev.1: it contained a paragraph 2 (g) which had been deleted in the English and Spanish versions of the report.

13. The CHAIRMAN said that the French version would be corrected accordingly.

At the request of the representative of Mexico, a vote by roll-call took place on the deletion of the proposed Article 86 bis (CDDH/I/350/Rev.1/Add.1/Rev.1, paragraph 4 (a))

Chad, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Czechoslovakia, Thailand, Union of Soviet Socialist Republics, Germany (Federal Republic of), Australia, Belgium, Bulgaria, Canada, Ivory Coast, Cuba, Denmark, United States of America, France, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Mongolia, New Zealand, Netherlands, Poland, Portugal, German Democratic Republic, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Cameroon, United Kingdom of Great Britain and Northern Ireland.

Against: Uruguay, Venezuela, Yugoslavia, Zaire, Afghanistan, Algeria, Austria, Cyprus, Egypt, Ecuador, Spain, Ghana, Guatemala, Honduras, Iran, Ireland, Socialist People's Libyan Arab Jamahiriya, Jordan, Kenya, Kuwait, Lebanon, Madagascar, Mexico, Mozambique, Nicaragua, Nigeria, Norway, Oman, Uganda, Pakistan, Panama, Peru, Philippines, Syrian Arab Republic, Republic of Korea, Romania, Senegal, Sri Lanka, Sweden, Switzerland.

Abstaining: Turkey, Argentina, Brazil, Chile, Colombia, United Arab Emirates, Finland, Mali, Morocco, Mauritania, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Holy See.

The proposal to delete Article 86 bis was rejected by 40 votes to 30, with 13 abstentions.

Paragraph 4 (b) 1

14. The CHAIRMAN asked the Committee to vote on the inclusion of the words "Consultative Board" in square brackets in the first line of the English text.

The inclusion of the words "Consultative Board" was rejected by 40 votes to 2, with 37 abstentions.

15. The CHAIRMAN asked the Committee to vote on the inclusion of the words "the Conventions or" in square brackets in the second line of the English text.

The inclusion of the words "the Conventions or" was adopted by 40 votes to 6, with 31 abstentions.

16. The CHAIRMAN asked the Committee to vote on the inclusion of the words "and adopt recommendations regarding" in square brackets in the third line of the English text.

The inclusion of the words "and adopt recommendations regarding" was adopted by 40 votes to 13, with 23 abstentions.

17. The CHAIRMAN asked the Committee to vote on the inclusion of the words "and the Committee itself" in square brackets in the fourth and fifth lines of the English text.

The inclusion of the words "and the Committee itself" was adopted by 27 votes to 14, with 31 abstentions.

18. The CHAIRMAN asked the Committee to vote on the inclusion of the words "on the basis of Article 33 of this Protocol" in square brackets in the fifth and sixth lines of the English text.

The inclusion of the words "on the basis of Article 33 of this Protocol" was adopted by 40 votes to one, with 36 abstentions.

19. The CHAIRMAN asked the Committee to vote on the inclusion of the words "that may cause superfluous injuries or have indiscriminate effects" in square brackets in the eighth and ninth lines of the English text.

The inclusion of the words "that may cause superfluous injuries or have indiscriminate effects" was adopted by 40 votes to 2, with 31 abstentions.

Paragraph 4 (b) 2

20. The CHAIRMAN observed that the figure "21" in square brackets in the second line of the English text appeared in the original text. He therefore invited the Committee to take a decision on the figure "31", also in square brackets. Adoption of the latter would of course entail deletion of the former.

The figure "31" was adopted by 39 votes to none, with 34 abstentions.

21. The CHAIRMAN asked the Committee to vote on the words "if it should consider it necessary" in square brackets in the seventh line of the English text.

The inclusion of the words "if it should consider it necessary" was adopted by 18 votes to 3, with 52 abstentions.

22. The CHAIRMAN asked the Committee to vote on the words "and shall elect its chairman" in square brackets in the last line of the English text.

The inclusion of the words "and shall elect its chairman" was adopted by 20 votes to none, with 48 abstentions.

Paragraph 4 (b) 4

23. The CHAIRMAN asked the Committee to vote on the words "the depositary Government, in consultations with any State Party or Parties that may wish to invite, may convene a special Conference" in square brackets in the third, fourth and fifth lines of the English text.

24. Mr. FRUCHTERMAN (United States of America) said that he did not understand what the words meant in the English version.

25. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he could not understand the Russian version either. More particularly, he was not sure whether it was for the depositary State or any other State Party to the Conventions or to the Protocol, or even any State member of the Committee, to convene a special conference.

26. Mr. de ICAZA (Mexico) explained that the text had been drafted in English in the Working Group by delegations none of whose mother tongue was English. The French version, as amended, was clear and the Committee might instruct the Drafting Committee to align the English version on the new French version.

27. Mr. SADI (Jordan) observed that the words "may convene a special Conference" in paragraph 4 (b) 4 should also be placed in square brackets. The Committee would have to choose between the two versions regarding the convening of a special Conference.

28. Mr. de ICAZA (Mexico) explained that the words quoted by the representative of Jordan were not in square brackets because they appeared in the original text. He had no objection to their being placed in square brackets, however, if it was agreed that the Committee should vote first on the other clause, which was furthest removed from the original text.

It was so agreed.

29. The CHAIRMAN asked the Committee to vote on the clause in square brackets in the third, fourth and fifth lines of the paragraph which he had already read out.

The inclusion of the clause was adopted by 17 votes to 16, with 40 abstentions.

30. The CHAIRMAN asked the Committee to vote on the words "that implement the principle that the Parties to the conflict do not have an unlimited right of choice of means of combat" in square brackets in the fifth, sixth and seventh lines of the paragraph.

The inclusion of the words "that implement the principle that the Parties to the conflict do not have an unlimited right of choice of means of combat" was adopted by 43 votes to none, with 33 abstentions.

31. The CHAIRMAN, referring to the introductory line of paragraph 4 (b), suggested that it should be left to the Drafting Committee to decide on the position to be given to Article 86 bis.

It was so agreed.

32. The CHAIRMAN asked the Committee to take a decision on Article 86 bis as a whole, as amended.

33. Mr. FRUCHTERMAN (United States of America), speaking on a point of order, asked if it was sufficient for two States to have ratified the Protocol - which would enable it to enter into force - to set in train the whole machinery provided for under Article 86 bis, including the obligation for the thirty-one States Parties that were members of the Committee, whether or not signatories, to carry out the functions laid down in Article 86 bis.

34. Mr. SADI (Jordan), supported by Mr. de ICAZA (Mexico), pointed out that the question raised by the United States representative was not a point of order. They asked that the Committee should proceed with the vote.

35. The CHAIRMAN agreed with that view and said that the point of order raised by the United States representative was invalid.

36. Mr. VANDERPUYE (Ghana), speaking on a point of order, said that the Committee had just voted to include an Article 86 bis in draft Protocol I. He saw no need for a further vote, which would merely be a repetition of the first vote.

37. The CHAIRMAN explained that the first vote was on the principle of an Article 86 bis, whereas the second would enable the Committee to decide on the text of the article, and in particular on the phrases standing in square brackets in the addendum to the report of Working Group C (CDDH/I/350/Rev.1/Add.1/Rev.1).

38. Mr. FRUCHTERMAN (United States of America) said that he failed to see how he could vote on a text that he did not understand and whose implications escaped him.

39. Mr. MBAYA (United Republic of Cameroon) thought that the question of substance raised by the United States representative was important.

40. Mr. FREELAND (United Kingdom) said that he thought the misgivings expressed by the United States representative were quite legitimate. He was surprised that the Committee should be expected to vote on the draft article without prior discussion of its text and without an answer being given to a question of the kind asked by the United States representative.

41. Mr. BOBYLEV (Union of Soviet Socialist Republics) asked if it might not be appropriate to vote on Article 86 bis paragraph by paragraph before voting on the article as a whole.

42. Mr. SADI (Jordan) moved the closure of the debate and proposed that Article 86 bis should be put to the vote.

43. The CHAIRMAN invited the Committee to vote on the motion put forward by the representative of Jordan.

44. Mr. de ICAZA (Mexico), referring to rule 38 of the rules of procedure, said that there was no need to vote on the motion, since the vote had already been requested. The only question that could be raised at that stage was the method of voting.

45. The CHAIRMAN, replying to the question raised by the USSR representative, said that he himself would be prepared to put Article 86 bis to the vote paragraph by paragraph, but he recalled that at a previous meeting it had been stated that the text of a resolution constituted an integrated whole and that if one part of it was deleted the text might no longer be comprehensible. Consequently he put to the vote Article 86 bis as a whole.

Article 86 bis was adopted by 50 votes to 27, with 13 abstentions.

46. Mr. LUNET (France) said that he was surprised to note that the total number of votes showed that seven more delegations had voted than in the preceding vote.

47. The CHAIRMAN explained that the counting of votes was carried out by four people in different parts of the room and that in the circumstances no error was possible.

48. Mr. ABADA (Algeria) said that one regional group was holding a meeting during the roll-call vote. The members of that group had no doubt returned to the Committee subsequently, and that might be the reason for the increase in the number of votes.

49. The CHAIRMAN said that, following a decision taken some days earlier, explanations of vote were to be submitted in writing by 1 p.m. the following day. The texts should not exceed three pages of typing or six pages of manuscript.

50. Mr. MBAYA (United Republic of Cameroon) said that he had thought that the method adopted a few days earlier for explanations of vote had been an exception, but he saw that it was now becoming customary. He regretted that he had not been able to discuss, before the vote, the important questions dealt with in Article 86 bis. He considered that several points in that article, in particular that to which the United States representative had drawn attention, needed to be clarified and that the text adopted left much to be desired. The delegation of the United Republic of Cameroon had tried in vain to discover where or at what level it could formulate its objections and obtain explanations concerning that article. Because of the short time allowed to the Conference for the completion of its work, his delegation had accepted the situation and would set forth its arguments in its explanations of vote. It feared, however, that the application of a text adopted so hastily would prove difficult.

51. The CHAIRMAN said that he had thought it best to recommend the procedure adopted recently for explanations of vote, but he was perfectly prepared to give representatives who so desired the opportunity of giving their explanations orally, even if the Committee had to hold additional meetings to make that possible. Explanations of vote submitted in writing would be fully valid, since they would be included in the summary records of the meetings.

52. He reminded the Committee that at the beginning of the current session he had proposed, in order to speed up the work, that draft proposals submitted to the Committee should not be discussed at plenary meetings, but should be referred to working groups for study and then returned to the Committee for adoption. It seemed that that procedure was less satisfactory than that used at earlier sessions, but it had been accepted by the Committee and he regretted that he could not change it.

53. Mr. de ICAZA (Mexico) said that he agreed that that procedure had not given good results. The discussions of the working groups were not recorded in the documentation of the Conference, and when an article was brought back to the Committee, there was no time to resume the discussion. Nevertheless, there was no denying that the participants were making every effort to achieve the best possible results.

54. Mr. FRUCHTERMAN (United States of America) said that he agreed with the views of the representatives of the United Republic of Cameroon and Mexico concerning that procedure.

55. Mr. CLARK (Nigeria) said that he well understood the arguments put forward by the representatives of the United Republic of Cameroon and Mexico, but he pointed out that the new decisions, imposed by the need to save time, related mainly to the method of presenting explanations of vote. Delegations had had the opportunity of explaining their views on the substance of problems at the meetings of the working groups, and if lack of time had prevented their discussing them at greater length, they had full liberty to express themselves after the vote.

56. Mr. MBAYA (United Republic of Cameroon) said that he had the impression that the Nigerian representative felt that the Cameroon statements had been directed at him. He wished to state that that was certainly not so. He had not wished to engage in polemics, but he merely regretted that there had been no opportunity to discuss the gaps that he had noted in the text proposed for Article 86 bis.

57. Mr. D'ESTAFANO PISANI (Cuba) said that he thought that the exceptional procedure dictated by circumstances would have to be accepted, and that the question of how explanations of vote were to be presented should be decided.

58. Mr. de BREUCKER (Belgium) stressed that it was above all important to save time, in view of the magnitude of the task which remained to be accomplished.

59. Mr. MBAYA (United Republic of Cameroon) said that he had spoken because he was afraid that the exceptional procedure might become habitual. He conceded, however, that that procedure could save time and he would fall in with the proposal.

60. The CHAIRMAN, replying to a question put by Mr. ABDINE (Syrian Arab Republic), said that explanations of vote could be given on all the items considered.

Article 74 - Repression of breaches of the present Protocol (continued)

Proposed paragraph 3 (g) (CDDH/I/347/Rev.1) (continued)

61. The CHAIRMAN said that, if no representative wished to speak on the proposal by the delegation of the Philippines to insert a sub-paragraph (g) in Article 74 (CDDH/I/347/Rev.1), he would put it to the vote.

62. Mr. GREEN (Canada) said that he was not in favour of an immediate vote. It was yet another example of a new proposal which had not been discussed in the Working Group. The delegations which might wish to submit amendments or to oppose the adoption of the proposal should be allowed to express their views.

63. Mr. de GABORY (France) thought that there was a mistake in punctuation in the French text which might alter its meaning to a considerable extent. In the third line of the text there was a semi-colon after the words "le corps humain", and another after the phrase "les gaz asphyxiants et toxiques". It was the second semi-colon which seemed to him misplaced, for it it were retained, the enumeration "et les liquides, matériels ou dispositifs analogues" would be applicable to the sentence as a whole. That interpretation would doubtless run counter to the intentions of the sponsors, who seemed to have based their text on the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. The second semi-colon should undoubtedly be deleted.

64. The CHAIRMAN pointed out that the same problem arose in the English text.

65. Mr. GLORIA (Philippines) explained that the phrase following the second semi-colon referred solely to gases.

66. Mr. CLARK (Nigeria) said that he would like to support the proposal of the delegation of the Philippines, but considered that there might be difficulties about inserting the proposed paragraph 3 (g) in Article 74, which dealt with "grave breaches". He wondered whether it would not be preferable to try to insert it elsewhere.

67. Mr. de ICAZA (Mexico) thought that the Drafting Committee could resolve the question of punctuation raised by the representative of France. Moreover, it seemed to him that the possible insertion of sub-paragraph (g) in Article 74 should be considered in the light of the Ad Hoc Committee's decisions. On humanitarian grounds, his delegation was strongly in favour of any use of prohibited arms being classified among "grave breaches".

68. Miss POMETTA (Switzerland) asked whether the word "matériels" in the French text, which was used to translate the English "materials", should not be replaced by the word "matières".

69. Mr. de GABORY (France) considered that suggestion most apposite, he pointed out that the word "matières" was employed in the same sense in the 1925 Geneva Protocol.

70. Mr. GREEN (Canada) expressed the view that the punctuation used in sub-paragraph (g) did not involve a simple problem of drafting. The phrase "analogous liquids, materials or devices" applied just as much to "prohibited weapons such as bullets that expand or flatten easily in the human body" as to "asphyxiating and poisonous gases".

71. Furthermore, he agreed with the representative of Nigeria that it would not be appropriate to insert a new sub-paragraph (g) in paragraph 3 of Article 74. That article had been drafted with great precision in 1976 and any recasting would run the risk of destroying a balance which had only been achieved through compromise. The weapons referred to in draft sub-paragraph (g) were already prohibited by other texts. Lastly, the term "grave breach" should be used with great caution, in order to avoid opening the way to ill-considered allegations of guilt. A member of the armed forces who used the weapons provided by his commanders was not necessarily conversant with the provisions of the Conventions and the Protocols.

Article 7 bis - Enquiry procedure concerning an alleged violation of the Convention (CDDH/I/27)

Article 7 ter - Settlement of disagreements (CDDH/I/25)

72. The CHAIRMAN announced that the delegation of Pakistan had withdrawn its proposals submitted under symbols CDDH/I/25 and CDDH/I/27.

73. Mr. BOBYLEV (Union of Soviet Socialist Republics) moved the adjournment of the meeting.

74. Mr. FREELAND (United Kingdom) supported the motion.

The motion was carried.

The meeting rose at 1 p.m.

ANNEX

to the summary record of
the seventy-seventh meeting

EXPLANATIONS OF VOTE

AUSTRIA Original: FRENCH

Article 86 bis of draft Protocol I

The Austrian delegation voted in favour of the principle underlying the proposal relating to the introduction in the text of Protocol I of a special article on the question of the prohibition or restriction of the use of certain particularly cruel weapons. As we understand it, that principle consists in the requirement to establish a link between international humanitarian law and the instruments that might be adopted in the future regarding the prohibition of the use of those weapons.

On the other hand, we abstained from voting on the content of Article 86 bis for the following reasons. In the first place, we do not believe that the insertion of such a provision in Protocol I is the only possible way of establishing the link that we, too, consider indispensable. We are rather of the opinion that that requirement could be met in several different ways. We are not convinced by the arguments adduced in favour of the content of Article 86 bis on that point. Secondly, we abstained for the further reason that two years ago we ourselves proposed a review mechanism to be set up within the Ad Hoc Committee. That proposal was explained in detail by the Austrian government experts at the second session of the Conference of Government Experts on the Use of Certain Conventional Weapons, held at Lugano in 1976. It was included in the report of that session, on page 146 of the English version. Needless to say, the text was drawn up in the form of a clause for insertion in an instrument, to be adopted at a later stage, on the prohibition or restriction of the use of the weapons in question. It was not intended to be part of Protocol I, and that was why we did not formally submit it to this Committee. Nevertheless, the review mechanism advocated in our proposal seems to us preferable to the one proposed in Article 86 bis, because it is simpler, more adequate and more realistic.

Lastly, we consider our abstention justified because, in our opinion, the confrontation of divergent approaches to the question at the stage now reached by the Conference would serve no useful purpose; in any case, it would certainly not facilitate a solution

of the weapons problem, which will remain outstanding and will require close and friendly collaboration in the future on the part of all countries, including the Great Powers.

BELGIUM Original: FRENCH

Article 86 bis of draft Protocol I

Mr. GENOT (Belgium) regretted that his delegation had been compelled to take a decision at that precise juncture on the question of machinery for the development of international law in the area of conventional weapons. As he had explained in Working Group C, his delegation considered that such machinery could only be decided on adequately, simply and realistically once the results of the work of the Ad Hoc Committee on Conventional Weapons of the Conference were known, and could only then be usefully adopted as a natural complement to those results whatever they might prove to be. Furthermore - and both the procedural discussion which had taken place on Article 86 bis and the manner of the voting had given ample evidence of this - this question, dealt with at the end of its work by a Committee pressed for time, had been settled hastily and without serious discussion. It could hardly have been otherwise. Other Committees in similar situations had preferred to abandon any attempt to deal with certain problems in such a way, feeling that it was better to have no text at all than to have rules which were too imprecise, ill-understood and reluctantly accepted by too many delegations. Moreover, the Ad Hoc Committee, which dealt with a particularly delicate matter, had throughout its difficult exercise, been able to make the progress which it had made only because, at each step, it had made sure of a wide measure of agreement without which its work would have remained a dead letter. The proposal which had just been adopted did not enjoy - and could not at that stage enjoy - such a measure of agreement, although such agreement was needed just as much.

For all those reasons, because the article was premature and improvised in the context of the Committee's work, and because it could not enjoy the requisite agreement for effective implementation, his delegation had decided to vote against the article in its existing form, tenor and position.

CANADA Original: ENGLISH

Article 86 bis of draft Protocol I

The Canadian delegation might not have needed to make any statement in explanation of vote if there had been an opportunity to debate or even discuss the final text of Article 86 bis which came before the Committee. It is true that many debates took place in Working Group C, but the final text did not come before the Group.

In addition, since the co-sponsors indicated during discussion that there was no possibility of reaching a consensus, they considered that only sympathisers with their proposal should attend the meetings of their group.

As to the reason for our casting a negative vote, we have made clear repeatedly that in our view this proposal does not really fall within the framework of a Protocol devoted to Humanitarian Law applicable in Armed Conflict. In our opinion, the Protocol is concerned with the conduct of the conflict and has reference primarily to a situation in bello. The problem of the control or suppression of weapons, even if described in the context of humanitarian law rather than disarmament, is more a question ante or post bellum and should not therefore really be considered here, and certainly not in a Committee whose activities are focused on specific problems of jus in bello and whose work has not been in any way concerned with issues of weaponry, other than in reaffirmation of The Hague Regulations concerning weapons causing unnecessary suffering.

It seems irrelevant and improper to us for this Committee to have taken up this article almost at the end of our activities. We are also conscious of the fact that weaponry, as well as questions relating to follow-up, has been dealt with during this Conference by the Ad Hoc Committee, which is made up of experts who have confined themselves to consideration of problems of this kind. It seems most inappropriate to us to usurp, pre-empt or prejudge the work of the Ad Hoc Committee in this way.

The Canadian delegation is fully aware of the humanitarian motives that formed the basis of the proposed article and appreciates the need for long-term follow-up in this field. It is for this reason that we supported the view of those who considered that a recommendation or resolution on the subject was the proper means of dealing with this issue. For this reason we co-sponsored with Denmark, the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland the resolution to be found in document CDDH/Inf.240.

CUBA Original: SPANISH

Article 86 bis of draft Protocol I

The Cuban delegation deems it necessary to explain why it voted against the inclusion of Article 86 bis, submitted by the delegation of Mexico.

We should like first of all to state that the Mexican initiative was praiseworthy and inspired by motives to which we subscribe. From that point of view, we can only thank the Mexican delegation for taking it.

Our basic principle, however, is that one of the essential tasks of our day in the international field is to reach an agreement on general and complete disarmament and the cessation of the arms race. It is precisely to consider that demand on the part of mankind that the United Nations has convened, for 1978, a special session of the General Assembly, to be followed by a world conference on disarmament.

We are firmly convinced that the basic principles of international law, peaceful coexistence, collective security and the policy of détente are closely linked to the problems of general and complete disarmament and the cessation of the arms race, and that it is for that Organization to deal with the whole problem.

The creation of a committee as envisaged in Article 86 bis, a committee that would have to deal with the prohibition or restriction, for humanitarian reasons, of the use of certain conventional weapons that might cause unnecessary suffering or have indiscriminate effects, might lead even some States that have opposed the new article to endeavour, by delaying action and other methods, to divide or divert attention and frustrate proposals aimed at attaining the objective of disarmament.

Many peoples have suffered the harsh experience of destruction and death through the fault of those who have wanted to ride rough-shod over their fundamental national rights and their right to self-determination. The effects and consequences of arms policies, on the one hand, and of what general and complete disarmament could be, on the other hand, are such that there is no need to evoke them in this Conference at which there has been so much discussion and so much work for the progressive development and codification of law applicable in the matter, so intimately linked, moreover, to the objective of disarmament.

In upholding this point of view, the Cuban delegation would add that it voted for the deletion of Article 86 bis for reasons diametrically opposed to those of other delegations. In its opinion, the Mexican initiative would have been more useful if it had made an appeal to the highest international authority, namely the United Nations, on behalf of the delegations which have participated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, to the effect that the most successful outcome of our work at this Conference would be the attainment of general and complete disarmament and the cessation of the arms race.

CYPRUS Original: ENGLISH

Preamble to draft Protocol I

It may be recalled that in the course of the deliberations of Working Group C, my delegation supported the idea that Protocol I should have a concise preamble reflecting the humanitarian objectives it is destined to serve. It was our view that certain fundamental principles should be reaffirmed, such as: the duty of every State to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of other States and to avoid attitudes and policies contravening the provisions of the United Nations Charter or the dictates of the resolutions of United Nations organs; also, that reference should be made to the prohibition of interference in the internal affairs of States and of acts of aggression, under any pretext whatever.

We stated the position of the Government of Cyprus that if the above principles were strictly observed and the dictates of the United Nations and of international law were adhered to by all, then many an international conflict would have been avoided and, therefore, human suffering needlessly emanating therefrom would be much less.

It is for the above reasons that we voiced support for the proposal of the socialist delegations appearing in document CDDH/I/337 and Add.1, arguing that its essence in a reformulated way together with the ICRC text should form the basis of the preamble. My delegation is pleased because the outcome of the deliberations of Working Group C was very much on those lines and, therefore, we joined other delegations in supporting the text finally adopted by the Committee and for which we express satisfaction.

Articles 80, 81, 82, 83, 84 of draft Protocol I

The position of my delegation on Articles 80 to 84 emanates from our conviction that Protocol I, to the drafting of which so much time and effort was devoted by the international community as represented in this Conference, should enter into force at the earliest possible time.

We maintain that, inasmuch as it entrenches and develops humanitarian law, every effort should be made for its entry into force as early and as widely as possible.

EGYPT Original: ENGLISH

Article 85 of draft Protocol I

The Egyptian delegation voted against the deletion of Article 85, and would have liked to see the second alternative at least examined and seriously debated. In Working Group C, we staunchly defended the restrictive attitude to reservations in order to safeguard whatever progress may have been achieved by the emerging Protocol, as a result of years of work, debate and negotiations since the first Conference of Government Experts on the Reaffirmation and Development of International Humaitarian Law Applicable in Armed Conflicts in 1971. The articles we have adopted are almost all compromise formulae. Each delegation and each group has had to give in on certain points which it considered important in order to bring others to make similar concessions on what it considered more important. The result is a package deal within each article and in relation to the Protocol as a whole. If countries are permitted later on to enter reservations on those articles which they conceded, others may enter reservations on other articles which they accepted in order to gain the concession. We thus run the risk of eroding all the advances we have been able to achieve after long years of work and compromise. It is true that reservations can be rejected, but this again is a remedy through the erosion and not the preservation of humanitarian protection. Moreover, in the absence of a specific rule on reservations, we are referred back to general international law, which permits reservations which are not incompatible with the purposes and object of the Convention. But the weakness of this rule lies in the fact that the appreciation of the compatibility is left to the individual judgement of each Party to the Convention, which means that some may consider a reservation compatible and live with it while others may consider it incompatible and thus put an end to treaty relations with the Party making the reservation. All this would create a situation of uncertainty and perhaps chaos which would seriously prejudice the effectiveness of Protocol I.

This is why we would have preferred a general prohibition of reservations, but short of that course, which seemed impracticable, a restrictive article. We expressed in this regard a preference for the wording of the Syrian amendment (CDDH/I/74), which starts by prohibiting reservations to the fundamental humanitarian obligations of the Protocol before giving an illustrative list of articles, as against the original ICRC draft which starts by permitting reservations before providing a list of non-reservable articles as an exception. The negotiation of the illustrative list, which appears in the second alternative before us, was

rather difficult. The list may be too long. But the fact that it is merely illustrative permitted us, after the examination of the question by Working Group C, to negotiate a much shorter one consisting of five articles: 1, 42, 46, 65, 74. At one time this short list seemed to be acceptable to all groups. But as this vote has illustrated, this proved not to be the case. We have witnessed once more the same attitude which was revealed recently in the context of Article 79 bis, namely that whenever we reach the realm of real and effective commitment, some States, especially the high and mighty, balk at the threshold and refuse to cross it. And this is not the best augury for the future of humanitarian law.

FINLAND Original: ENGLISH

Article 86 bis of draft Protocol I

As my delegation has stressed on many occasions since the beginning of the Diplomatic Conference, Finland attaches high expectations and hopes to the question of prohibiting or restricting the use of certain cruel or indiscriminate conventional weapons, and we are willing to participate actively in all efforts which can pave the way for rapid and significant results in this regard. Indeed, much time and energy has already been spent on this subject and it would be extremely regrettable if our past work should prove to have been futile.

On the other hand, it has also been the consistent stand of my delegation that significant results can be achieved only in a process which does not exclude the possibility of broad agreement. As we are not fully convinced that the proposal in document CDDH/I/340 and Add.1-3 for a new Article 86 bis meets this requirement, my delegation has unfortunately not been able to support the proposal and has abstained in the voting, although it has great sympathy for the humanitarian motives underlying the proposal. At this stage, when there are promising alternatives concerning the follow-up of the work of the Ad Hoc Committee which can lead to generally acceptable solutions, we should avoid taking steps which may endanger an atmosphere of compromise and common understanding.

GREECE Original: ENGLISH

Article 86 bis of draft Protocol I

During the roll-call vote on the deletion of Article 86 bis the Greek delegation voted positvely. In so doing my delegation was bearing in mind the problems and complications which might be involved in the implementation of the Protocol in relation to

the provisions for the establishment and the functioning of the proposed committee, in view of the large number of delegations which during the debate had been sceptical as to the advisability of having such a committee.

On the other hand this delegation believed that the main objectives of this body, namely to consider and adopt recommendations for the prohibition or restriction of the use of certain conventional weapons ..., could be reached more efficiently beyond the procedural scope of Protocol I, by a Conference which would encourage implementation of proposals, conclusions and recommendations presented by the Ad Hoc Committee of the Diplomatic Conference.

On these grounds my delegation, having been unable to support Article 86 bis, abstained in every vote on the text of the draft, as well as on the article as a whole.

HUNGARY Original: FRENCH

Article 86 bis of draft Protocol I

Mr. HERCZEGH (Hungary) stated that his delegation had voted against the adoption of Article 86 bis. In that connexion, he reiterated once again that the Hungarian People's Republic attached the greatest importance to general and complete disarmament and to all measures aimed at the solution of that fundamental problem of our time. Nevertheless, the Hungarian delegation was of the opinion that the proliferation of international bodies mandated to examine the prohibition or restriction of the use of certain conventional weapons would not facilitate the solution of the problem of disarmament but could, on the contrary, make it even more difficult to solve. Therefore, the creation of the committee advocated in Article 86 bis was not warranted and it was unlikely that its work would bear fruit.

INDONESIA Original: ENGLISH

My delegation would like to explain the vote it cast in regard to document CDDH/I/350/Rev.1 and document CDDH/I/350/Rev.1/Add.1/Rev.1 regarding the Final Clauses, especially the Preamble to Protocol II, Article 85 and Article 86 bis of Protocol I.

Preamble to draft Protocol II

My delegation is in favour of the deletion of the Preamble to draft Protocol II, because we do not consider it necessary since we already have Article 3 common to the Geneva Conventions of 1949. Paragraph (1) of the Preamble to Protocol II (ICRC text) refers to this specific article.

In the view of my delegation it is rather difficult to accept the phrase "the dictates of the public conscience" in the last paragraph of the draft Preamble. This formulation is not completely clear and is confusing from the legal point of view. This is the reason why my delegation is in favour of the deletion of this phrase.

Article 85 of draft Protocol I

My delegation is in favour of the deletion of Article 85 of Protocol I, concerning Reservations, because we adhere to the general rule of international law according to which reservations may be made unless these reservations are incompatible with the object and purpose of the treaty or agreement concerned.

Article 86 bis of draft Protocol I

My delegation entertains some doubts about the effectiveness of a Committee consisting of States, as proposed in Article 86 bis, to consider and adopt recommendations regarding the prohibition or restriction of the use of certain conventional weapons. My delegation is in favour of the deletion of this article. Since this deletion was not achieved, my delegation abstained on the article as a whole.

JAPAN Original: ENGLISH

Article 85 of draft Protocol I

The delegation of Japan voted for the deletion of Article 85, as it considered this preferable to an amendment to the ICRC text proposed by the informal group.

If the list of non-reservable articles appearing in the proposed amendment were acceptable to a very large majority, if not all, of the delegations, the amendment could possibly avoid troublesome disputes on the validity of reservations which would otherwise emerge. However, it became clear during the debates in

Working Group C that the delegations failed to reach a general agreement on what articles should or should not be included in the list. If the amendment were to be adopted under these circumstances, this would probably constitute an additional factor causing States to hesitate in ratifying or acceding to Protocol I. Consequently, the foreseeable result, that the Parties to the Protocol would be considerably less in number, would hamper not only the universal application of the Protocol but also the development of humanitarian law.

Secondly, it is doubtful whether all the articles enumerated in the list are more important than other fundamental humanitarian articles that are not included in the list in terms of prohibition of reservations. In other words, it is clear that there are many other rudimentary articles which should have been included in the list of those to which reservations are prohibited. Moreover, to pick out only specific articles to which reservations could not be made, even if there existed other more important articles, would render it more difficult to decide whether or not the reservations to other articles not included in the list are incompatible with the humanitarian object and purpose of the Protocol.

It is indeed a wise solution not to incorporate in Protocol I any provision on reservations, leaving the question of reservations to the widely accepted rule of customary law as stated in Article 19 of the Vienna Convention on the Law of Treaties.

NEW ZEALAND Original: ENGLISH

Article 86 bis of draft Protocol I

For reasons explained in the meetings of Working Group C, the New Zealand delegation voted for the deletion of Article 86 bis and against the adoption of that article.

These votes do not imply any lack of support for the continuation of the work begun in the Ad Hoc Committee of the Conference, and at the Conferences of Government Experts held at Lucerne and at Lugano, respectively. The New Zealand Government, which has been represented at each of these meetings, attaches great importance to maintaining the initiatives taken to reach agreements prohibiting or restricting the use of weapons on humanitarian grounds. It considers, moreover, that the decision of the United Nations General Assembly to devote a special session to questions of disarmament is not in itself a sufficient assurance that matters within the scope of the Ad Hoc Committee of the present Conference will continue to receive the attention they deserve in an appropriate forum.

The New Zealand delegation notes that a wide measure of agreement, in relation to certain specific topics, has already emerged from the discussions held in the Ad Hoc Committee. It believes that the present Conference should, as far as possible, make provision both for the completion of this work and for renewed efforts to extend the areas of discussion and agreement.

The New Zealand delegation recalls, however, that from the inception of this Conference it has been thought wise to maintain a distinction between the work of the Ad Hoc Committee and that of the other main Committees which have contributed to the elaboration of the texts of the two draft Protocols. The New Zealand delegation believes that this distinction is in practice a useful one, which cannot be abandoned in the last days of the Conference without prejudicing both the success of Protocol I and progress towards the objectives of the work of the Ad Hoc Committee.

Finally, the text of draft Article 86 bis has, in the New Zealand delegation's opinion, been made even less acceptable by relating the composition of the committee to be established under the article to participation in the Geneva Conventions of 1949, as well as in Protocol I. It appears that the effect of the article would be to constitute the proposed committee as soon as Protocol I has been brought into force by the adherence of two States. It would follow that the Committee would at first be composed largely of the representatives of States not Parties to Protocol I, and there could be no assurance that this situation would be a transitory one.

OMAN Original: ENGLISH

Preamble to draft Protocol II

The delegation of Oman opposed the inclusion of the Preamble to Protocol II for the following reasons:

1. In the context of Protocol II this was hardly necessary when the Geneva Conventions were adopted without a preamble.

2. The first preambular paragraph refers to the common Article 3, which is itself embodied in Article 1 of the Protocol.

3. However, even allowing its mention in the first paragraph, the purported wording "... humanitarian principles enshrined" or the expression "... constitute the foundation of respect" is too high a compliment than is justified for a single article. After all, we are not talking about the Koran or Bible or any other sacred book to justify the sacred connotation of these expressions.

Humanity has of course known far more superior, comprehensive and sacred principles than those contained in this Article 3 common to the Geneva Conventions of 1949. One may agree that this article is the first reference in modern treaty law to non-international conflicts but the concept of non-international conflicts today is very different from what it was in 1949.

With reference to the fourth paragraph, our delegation also took exception to the last phrase "... the dictates of public conscience". This is one of the phrases of the well-known Martens clause. The Martens clause refers to the principles of international law derived from:

(i) established custom,

(ii) principles of humanity,

(iii) dictates of public conscience.

If the non-international conflicts cannot be placed under the principles of international law, how can one justify first of all the Martens clause inclusion in this Preamble, and as "established custom" could not be included, why are the "dictates of public conscience" allowed to remain? The "principles of humanity" appearing all alone would not have made a fundamental difference and would not have entailed direct reference to the Martens clause.

The delegation of Oman would hope that the Drafting Committee would modify the text as proposed by the delegation of Nigeria.

POLAND Original: ENGLISH

Article 85 of draft Protocol I

The Polish delegation could not support the proposed Article 85 on reservations, for the following main reasons:

1. The problem of reservations is already regulated by the clearly established rules of general international law, as recently reflected in Article 19, sub-paragraph (c), of the Vienna Convention on the Law of Treaties of 23 May 1969. The above rules proved to be sound on various occasions and have received wide support both in doctrine and in practice;

2. The long list of articles covered by prohibition of reservations, as proposed in Article 85, could endanger the universality of Protocol I which - as an important humanitarian instrument - should find the largest possible international acceptance;

3. The recent main humanitarian treaties, such as the Geneva Conventions of 1949 or the International Covenants on Human Rights, do not contain any provision on reservations - and it seems advisable to follow this well-established pattern in the field of humanitarian law.

REPUBLIC OF KOREA Original: ENGLISH

Article 85 of draft Protocol I

My delegation voted for Article 85 of Protocol I as contained in document CDDH/I/350/Rev.1 prohibiting reservations incompatible with the humanitarian object and purpose of this Protocol. My delegation thinks that, even in the absence of provisions to this effect, the principle of customary and treaty international law should be upheld that fundamental provisions of an international instrument should not be subject to reservations in a manner contrary to the basic objective and purpose of that instrument.

Article 86 bis of draft Protocol I

As regards Article 86 bis in document CDDH/I/350/Rev.1/Add.1/Rev.1, we opposed the deletion of the draft article and voted for the text under sub-paragraph (b) of paragraph 4 of the said document. In our view, the establishment of a body as envisaged in the proposal would contribute to the prohibition and restriction of the use of conventional weapons which may cause superfluous injuries or have indiscriminate effects. We also see a need for the early implementation of the principle that the Parties to the conflict should be limited in their means of combat.

ROMANIA Original: FRENCH

Article 86 bis of draft Protocol I

The Romanian delegation voted in favour of the inclusion of Article 86 bis in Additional Protocol I. It has from the outset given its full support to the proposal to establish a committee of States Parties to the Conventions or to this Protocol to consider and adopt recommendations regarding any proposal that one or more States Parties may submit for the prohibition or restriction, for humanitarian reasons, of the use of certain conventional weapons that may cause superfluous injuries or have indiscriminate effects.

My delegation's affirmative vote on the principle of including a provision of this kind in Protocol I and on Article 86 bis itself is consistent with Romania's position of principle on the question of disarmament. It is well known that disarmament is a major concern in my country's foreign policy. The Socialist Republic of Romania has consistently urged the adoption, as a matter of urgency, of specific disarmament measures, and, above all, nuclear disarmament.

The disarmament negotiations have unfortunately failed so far to produce satisfactory results and the arms race continues to gain momentum at a most alarming pace, endangering peace and international security.

Romania attaches great importance to the special session of the United Nations General Assembly on disarmament which is to be held in May-June 1978. We hope that specific measures, aimed at achieving general and complete disarmament, particularly nuclear disarmament, will be adopted at that session.

While my delegation gives absolute priority to nuclear disarmament, we consider that specific measures should be taken at the same time to prohibit other types of weapons, including some conventional weapons.

That is why the proposal to establish machinery to continue the work of our Conference on the problem of prohibiting or restricting the use of certain conventional weapons that may cause superfluous injuries or have indiscriminate effects is, in our opinion, both laudable and constructive.

The Romanian delegation particularly appreciates the principles which led the sponsors to present their proposal, which is aimed chiefly at establishing a specific legal link between international humanitarian law and the prohibition or restriction of the use of certain conventional weapons.

In our view, the establishment of the Committee envisaged in Article 86 bis could contribute to the implementation of the provisions of Additional Protocol I.

Concerning the composition of the committee, my delegation would have preferred membership in it to be open to all States Parties to Protocol I, so as to allow any interested State to participate directly in the activities of the proposed committee.

SWEDEN Original: ENGLISH

Article 86 bis of draft Protocol I

My delegation voted in favour of the proposal to add Article 86 bis because it is convinced that a mechanism is needed to facilitate the review in the future, on humanitarian grounds, of the question of prohibition or restriction of the use of specific conventional weapons.

We have always taken the view that the presence in the Protocols of specific articles prohibiting the use of weapons which cause unnecessary suffering or superfluous injury and means and methods of warfare which are indiscriminate in their effects makes it perfectly logical to discuss in this humanitarian law context which these weapons are. We have insisted upon that discussion at all sessions of this Conference and we think it is not unreasonable that Protocol I itself should provide a way of bringing about such discussions in the future. Indeed, considering the reluctance or outright resistance to the discussion of this subject which we have met at times at the present Conference, perhaps an article on review is indispensable. We are aware, of course, how rarely such reviews have occurred in the past. The latest - before this Conference - was in the early 1930s.

It was suggested that a resolution by the Conference on immediate follow-up of the weapons issues might be an alternative to the Article 86 bis just adopted. My delegation is rather of the view that different needs are fulfilled by Article 86 bis and by a resolution. Article 86 bis provides a mechanism to satisfy the long-term, need for review, while the draft resolution circulated by Canada, the United Kingdom of Great Britain and Northern Ireland, Denmark and the Federal Republic of Germany is essentially an attempted response to the short-term need for follow-up action. Thus, we see the two initiatives more as complementary than as competing.

Having said this, I must add that neither Article 86 bis just adopted nor the draft resolution to which I have referred appear to my delegation to be satisfactory responses to the need for mechanism for long-term review and for immediate follow-up.

My delegation has always sought to advance by consensus on the weapons issues. Some of our friends have felt that as a result, there has been more consensus than advance. We must admit there is some truth in that. Nevertheless, the need for consensus is also acute if we want to reach meaningful results. The way to attain both consensus and advance, I continue to hold, is accommodation.

My delegation regrets that negotiations have not succeeded in reconciling the different positions. We do so all the more in view of the fact that there seems to exist at least some measure of agreement on the need for immediate follow-up action and mechanisms for long-term review.

We would express the hope that efforts could be made between now and the decisions in the plenary to work out consensus solutions to both the need for a resolution on immediate follow-up and the need for long-term review. In our view it ought to be possible for all delegations at least to accept as a specific article of Protocol I a general provision stating the principle that there shall be periodic review of the weapons issue. We ask ourselves, on the other hand, whether one could not agree on the precise procedure for such review in a separate resolution - or voeu. Such procedure could probably be both simpler and clearer than the present text of Article 86 bis. A third indispensable element in a consensus solution would be a resolution about the immediate follow-up. We intend with other delegations to table a text of this kind.

To conclude my explanation, my delegation voted in favour of Article 86 bis in despair arising out of the constant difficulties in the way of advancing the weapons issue. Our despair is not so great, however, that we would not continue our traditional role of urging negotiation, reconciliation and consensus results.

SYRIAN ARAB REPUBLIC Original: FRENCH

The conclusion reached by the Committee regarding Articles 80, 84, 85 and 87 is not satisfactory to the Syrian Arab Republic.

Article 80 of draft Protocol I

The provision of two periods in Article 80, one of six months for reflection before the opening of the Protocol for signature, and the other of twelve months for signature, seems pointless and has an important drawback. It is pointless because it will have the effect of preventing, for no valid reason, those States participating in the Conference which have studied the texts sufficiently from signing the Protocols immediately. The drawback lies in the length of the total period of eighteen months allotted, since there is a danger that Protocol I will be forgotten by the Foreign Ministries concerned. It would have been more reasonable to open Protocol I for signature immediately after the signature of the Final Act, and to shorten the periods laid down.

Article 84 of draft Protocol I

As to Article 84, it appears inadequate on certain points. While it takes over the rules of some provisions of The Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land together with the Geneva Conventions of 1949, it confines itself to governing the treaty relations of the Protocol with the

Geneva Conventions, without dealing with the relations of the Protocol with The Hague Conventions with regard to the scope of application. Moreover, it passes over in silence the question of the case of conflict between the obligations of the Parties by virtue of the Geneva Conventions and the Protocol and their obligations by virtue of any other international agreement. The delegation of the Syrian Arab Republic proposed an amendment for the purpose of making good this omission and emphasizing the primacy of the former as imperative rules of international law. It is regrettable that the Committee did not take the Syrian amendment into consideration.

Article 85 of draft Protocol I

It is also regrettable that the Committee did not see fit to retain an article on reservations in Protocol I, which would have been the Article 85 proposed by the Syrian delegation. That attitude should in no way be taken to mean that there could be any reservations by the Contracting Parties regarding the fundamental humanitarian obligations of the Conventions and the Protocol. Any other interpretation would be contrary to the provisions of Article 19 of the 1969 Vienna Convention on the Law of Treaties and the consistent line followed in the decisions of the International Court of Justice. The Syrian delegation is firmly convinced that there could be no articles subject to reservation in treaties establishing rules of humanitarian law.

Article 87 of draft Protocol I

The Syrian delegation considers that Article 87 is completely pointless. It makes no sense to accept the institution of denunciation in treaties on humanitarian law. Denunciation is incompatible with the very nature of that law. It cannot be too often repeated that we are dealing with rules relating to international public order. There can be no grounds for departing from those rules, on whatever pretext, including denunciation.

UNITED REPUBLIC OF CAMEROON Original: FRENCH

Articles 86 bis and 85 of draft Protocol I, Preamble to draft Protocol II

Article 86 bis

This text submitted for consideration to the Committee seemed to us to have too many shortcomings which may make it extremely difficult to apply. For instance:

1. "A Committee of States Parties to this Protocol shall be established ...". We should like to note first of all that the sponsors use the future tense, which implies compulsion. Does that mean that every State Party to the Conventions or to the Protocol is bound to join the Committee, or even that the mere fact of being a Party to the Conventions is equivalent to joining? Such an idea seems to us to be unacceptable, since it is basically incompatible with the sovereignty of States and freedom in the matter of treaties. Furthermore, there is no indication as to who would in practice be responsible for setting up this famous Committee.

2. "The Committee shall consist of representatives of 31 States Parties, elected ... by the States Parties to this Protocol by means of notifications addressed to the depositary Government."

The first sentence of paragraph 1 would seem to indicate that the Committee is to be set up by all the States Parties to the Geneva Conventions or to the Protocol. Such does not, however, appear to be the case, since in practice the Committee is to consist of or comprise only the representatives of thirty-one States. In point of fact, is this all one Committee or can it be that two different bodies are envisaged, one larger than the other?

Here, in our opinion, we are faced with a not inconsiderable difficulty, which calls for a clear and straightforward solution.

Paragraph 2 raises another problem. What exactly do the words "by means of notifications ..." refer to? Do they modify "elected"? What exactly is that supposed to mean? At all events, the contemplated election procedure seems a very odd one.

Moreover, this interpretation does not tally with the following sentence, which refers to the election of members of the Committee at a meeting!

The depositary Government appears to have discretionary power to convene the meeting for electing the members of the Committee. What if, in the exercise of this right, it does not convene such a meeting? What remedy is there against such a situation?

This discretionary power seems to be denied so far as other meetings are concerned, as for example when a meeting is requested by one third of the members of the Committee. What, by the way, is one third of 31? Is it 10 or 11?

Paragraph 3 states that the ICRC "shall participate" in the work of the Committee. But in what capacity is not stated. Would it be as an observer or as a full member? Presumably, rather as an observer. But it would have been better to say so expressly, to avoid any misunderstanding.

Over and above these criticisms of the form of the proposal, there is one more basic criticism to be made: it concerns the very principle of setting up such a committee. In this connexion, objections based on the lack of competence of the Committee or the Conference as regards weapons seem to me groundless. Given the undeniable humanitarian considerations underlying this text, we feel that first this Committee and then the Conference are fully entitled to discuss the subject.

What particularly matters to us is the usefulness of this Committee. And from this point of view our delegation feels that a body instructed to address "recommendations" (to whom, is not mentioned) is neither necessary nor even useful! It was probably out of the question to go any further, but if that is so, our view is that we could have been spared an additional body and have made do with the countless recommendations which, to be honest, already exist on the subject!

On all these grounds our delegation felt obliged to vote against the Mexican draft.

Article 85

Our delegation spoke against the insertion of an Article 85 on reservations, simply because it considers that the provisions of current international law on the subject are quite sufficient. In addition, we felt that, apart from the difficulty of reconciling a total or partial prohibition on reservations with the principle of the sovereignty of States and freedom to enter into contracts, such a prohibition would be likely to turn a number of States from signing or acceding to the Protocols, thereby impairing their universality.

Preamble to draft Protocol II

One final point. We welcome the idea of including a preamble to Protocol II (subject to the replacement of "public conscience" by "universal conscience"), so as to make the two Protocols more symmetrical.

ZAIRE Original: FRENCH

Article 85 of draft Protocol I

The Zaire delegation voted against the deletion of Article 85 - Reservations, when it was put to the vote.

In its view, the highest aim to which the present Diplomatic Conference could aspire would be to ensure a wide operational scope for the provisions of the present Protocol. This aim, however, could be achieved only in so far as the overwhelming majority of States were to sign or ratify or accede to the Protocol in accordance with the provisions of their own constitutions. It would, therefore be preferable to allow States Parties to the present Protocol, or wishing to become Parties thereto, the possibility of making reservations.

However, a latitude of this kind would have to embody an express restrictive condition and not be tolerated if it covered a number of essential provisions, the automatic non-application of which would make the Protocol pointless and thus prevent it from performing its expected protective function.

It was in this spirit that my delegation not only proposed a text for Article 85 but also participated in the small working sub-group set up to prepare a restrictive list of the provisions not subject to reservations, set forth in paragraph 45 of the report of Working Group C (CDDH/I/350/Rev.1) of 13 May 1977. The same idea lay behind my delegation's suggestion of, and support for, the principle of the legal insertion of a clause specifying renewal of reservations by tacit agreement for those States which had entered into them on the basis of articles other than those on the restrictive list, in order to ensure that a State Party to the Protocol should not be deemed to have abandoned its reservation because of the slowness of its administrative procedures.

My delegation does not support the belief that the provisions of Article 19 of the Vienna Convention on the Law of Treaties make any article on reservations superfluous.

Since that Article 19 includes a rather ambiguous descriptive condition which is too broadly worded and likely to be capable of more than one interpretation in a given set of circumstances, my delegation remains convinced that it would have been easier for the Parties or third Parties to the present Protocol to proceed logically if an explicit, and therefore express, clause on reservations was available to them than if they had to refer in every case to the provisions of the Vienna Convention.

SUMMARY RECORD OF THE SEVENTY-EIGHTH MEETING

held on Wednesday, 18 May 1977, at 3.25 p.m.

Chairman: Mr. OFSTAD (Norway)

In the absence of the Chairman, Mr. Obradović (Yugoslavia), Vice-Chairman, took the Chair.

CONSIDERATION OF DRAFT PROTOCOLS I AND II (CDDH/1) (concluded)

Draft Protocol I

Article 74 - Repression of breaches of the present Protocol (CDDH/I/347/Rev.1) (concluded)

1. The CHAIRMAN invited the Committee to continue its consideration of the Philippine proposal (CDDH/I/347/Rev.1) for a new sub-paragraph (g) in paragraph 3.

2. Mr. CUMMINGS (United States of America) said that his delegation was in sympathy with the concern expressed by the representative of the Philippines at the Committee's seventy-fourth meeting when introducing his proposal (CDDH/I/347) concerning the insertion of a new sub-paragraph (g) in Article 74, paragraph 3, which that representative had now revised (CDDH/I/347/Rev.1). The United States delegation had expressed the same view at the third session of the Conference at the time the representative of the Philippines had submitted an oral amendment which the United States had been unable to accept (CDDH/I/SR.60). The adoption of the proposal now before the Committee would endanger the entire delicate consensus reached on Article 74, and would make it impossible for the United States of America to sign Protocol I.

3. The revised text of the amendment (CDDH/I/347/Rev.1) did not remove any of the serious difficulties that his delegation had had with the amendment submitted at the third session and with Article 4 of the revised draft Code of International Crimes in Violation of the Geneva Conventions of 1949 and the draft Additional Protocols (CDDH/56/Add.1/Rev.1) submitted by the delegation of the Philippines in 1976. The changes made in the revised amendment, consisting merely of the deletion of some of the examples of weapons appearing in the original proposal (CDDH/I/347), had not removed any of the flaws which his delegation felt were inherent in the provision.

4. The text of amendment CDDH/I/347/Rev.1 was much too vague to be included in any list of grave breaches of Protocol I - a list which was designed to serve as a guide to legislators in making their criminal law consistent with certain obligations of Protocol I. The text was so ambiguous that it would hardly provide a basis for bringing a charge of a grave breach. All the existing sub-paragraphs of paragraph 3 were based on lengthy and specific provisions in other parts of Protocol I, which had been carefully negotiated at the Conference. The brevity of Article 74 was set off by the greater complexity of other parts of Protocol I. There was a considerable degree of precision in the other provisions in question, and that was why paragraph 3 stated explicitly that the grave breaches were "committed in violation of the relevant provisions of this Protocol."

5. The amendment, by contrast, was not based on other provisions in Protocol I. The only provision directly related in the Protocol was Article 33, paragraph 2, which was a restatement of customary law and not a specific listing of weapons. The amendment would have to be interpreted by reference to general international law and it thus lacked the necessary precision. It referred to "prohibited weapons", but there was no universal and exhaustive list of prohibited weapons that was generally accepted. The basic purpose of having an article on the repression of grave breaches would thus be lost. Grave breaches of Protocol I must be uniformly prohibited under the domestic law of all States Parties to that Protocol; that, however, would be absolutely impossible so far as amendment CDDH/I/347/Rev.1 was concerned, because the reference to "the use of prohibited weapons" was much too broad.

6. There was, in fact, considerable disagreement among States as to what weapons were prohibited. The two sessions of the Conference of Government Experts on the Use of Certain Conventional Weapons had made that clear. Prohibited weapons were not defined in draft Protocol I. From the examples given by the Philippine representative, it would seem that all mines would be deemed to be illegal. Few, if any, of the participants in the Conference accepted that view in their treaty relations or their practice. The Philippine oral amendment to Article 74 submitted at the third session of the Conference (CDDH/I/SR.60) would have banned blast and fragmentation weapons, which presumably would have included all artillery and hand grenades. The present revised amendment (CDDH/I/347/Rev.1) would cause a vast diversity in municipal legislation as to what weapons were actually prohibited. States would disagree on whether certain weapons were indeed prohibited and might suddenly find that weapons they considered legal were prohibited by another country.

7. To make matters worse, one of the weapons listed in the Philippine amendment was not considered a prohibited weapon in all circumstances. It would, indeed, be a difficult matter to interpret the prohibition on gas warfare. It was admittedly forbidden to use asphyxiating gas, but given the large number of reservations to the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, that actually amounted to a prohibition of first use. The response by the belligerent subjected to the illegal use of such weapons would thus not be a reprisal. The reason was that the illegal use by one State of a weapon that was prohibited should not work to the tactical disadvantage of its adversary; and, if only one State used chemical weapons, it would gain a tactical advantage. Amendment CDDH/I/347/Rev.1 could be construed as making action taken in self-defence that was legal under existing law into a criminal act.

8. Turning to the question of extradition, he pointed out that a reasonable interpretation of amendment CDDH/I/347/Rev.1 was that any State which agreed to it was in fact agreeing to extradite or punish individuals for acts that could be construed as violating the provision it contained. Extradition was a sensitive subject. What would happen if a situation arose in which the State requesting extradition held a list of prohibited weapons which differed from the list held by the State which was requested to surrender a certain individual? One possible interpretation was that the State to which the extradition request was directed would still have to extradite or punish offenders. He doubted, however, whether the judicial authorities of many States would endorse Protocol I if it did not involve the concept of "double criminality". Another reasonable interpretation was that the State to which the extradition request was made might refuse to comply on the grounds that it disagreed with the list of weapons prohibited by the requesting State. But that would nullify the whole object of having a specific list of extraditable offences, i.e. uniformity and certainty in municipal legislation as to universal crimes. As a result the whole point of Article 74 would be called in question.

9. The Philippine amendment would thus make Article 74 unacceptable to his delegation. It could jeopardize future attempts to reach agreement on weapons in various forums and might make it difficult for some delegations to accept Protocol I itself. The United States delegation therefore opposed the amendment (CDDH/I/347/Rev.1) and hoped that the representative of the Philippines would not press it to a vote.

10. Mr. BLOEMBERGEN (Netherlands) said that his delegation, while sympathizing with the reasons behind the Philippine proposal, would be unable to support it. It considered the use of poison gas or dum-dum bullets to be a crime but it did not think that such crimes should be listed as "grave breaches" under Article 74. It was against listing too many breaches of combat law, particularly those that were ill-defined, because of the danger of multiple interpretation. A soldier serving in the field had a right to know exactly what his position was. The Philippine proposal was vague, and the Netherlands delegation would have to vote against it.

11. Mr. DIXIT (India) agreed that the Philippine proposal was too vague to receive the Committee's support.

12. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that his delegation well understood the aims that lay behind the Philippine amendment. The problems it was concerned with were, however, already dealt with in various international agreements, and particularly in the Geneva Protocol of 1925. Its provisions were so worded as to lend themselves to differing interpretations, which could result in the prosecution of innocent persons. Furthermore, Article 74 was the result of a carefully balanced compromise which had taken a whole month to achieve at the third session. The text had been adopted by consensus, and any attempt to add to it was fraught with danger. In particular, the phrase "such as" in the Philippine amendment would make the situation quite unclear, since it meant that the list of weapons was merely illustrative. His delegation would therefore be unable to support the amendment and urged the Philippine delegation not to press it.

13. Mr. de BREUCKER (Belgium) said that he, too, shared the humanitarian concern expressed by the Philippine representative, but felt that amendment was unsatisfactory. It was vague, and did not make it clear just what was prohibited. In cases of extradition, States from which extradition was requested would have to judge them on the basis of their own criteria, and especially on the basis of the Geneva Protocol of 1925. There was also the problem of who precisely - the ordinary soldier or his commander - would be responsible for the "grave breaches" referred to in Article 74.

14. Mr. DRAPER (United Kingdom), after praising the humanitarian considerations on which the Philippine proposal was based, said that his delegation was regretfully unable to support it for the same reasons which had been advanced by the preceding speakers. Article 74 had been worked out with infinite care at the preceding session and with due regard for the obligations of States. The question of "grave breaches" was one which might be of serious concern to any soldier acting in the heat of combat. The Philippine proposal was an attempt to sum up, in one short sub-paragraph, laws relating to war crimes which had grown up over a period of more than two centuries. It also introduced the question of weaponry into an area where it was irrelevant.

The meeting was suspended at 3.55 p.m. and resumed at 4.20 p.m.

15. Mr. HUSSAIN (Pakistan) said that it had become fashionable at the Conference for representatives to make laudatory remarks about the high ideals and humanitarian principles which prompted delegations to submit proposals, and then to demolish those proposals by argument. He failed to understand how a proposal could be both humanitarian and non-humanitarian. He had been unable to understand the argument that, although Article 74 was based on the highest humanitarian principles and was acceptable to everyone, the addition of one clause would make it so non-humanitarian that certain countries would no longer be able to accept it and might even refuse to sign Protocol I. States were represented at the Conference not by obligation but because they were moved by humanitarian principles. If delegations considered the proposal to be a humanitarian one, as they had said, they should ensure that it was adopted. The claim that it was not the duty of the Conference to limit the methods and means of combat was in direct contradiction with the principles the Conference had enunciated and was endeavouring to uphold.

16. He appealed to members to refrain from any threat of refusing to sign the Protocol or to accept particular articles. Such threats to demolish all that had so far been achieved amounted to moral coercion and as such were inadmissible.

17. While fully supporting the Philippine proposal, however, he wondered whether it would be right at the present late stage of the Committee's work to go back on the compromise which had been reached on Article 74, particularly since it had been decided to delete the reference to methods and means of combat from the working paper submitted to the Working Sub-Group which had dealt with the article. He would therefore appeal to the Philippine representative not to press his proposal at the present stage, in view of the danger of jeopardizing Article 74 as a whole.

18. Mr. GLORIA (Philippines) said he had been deeply moved by the Pakistan representative's comments. After having laboured for four years on the drafting of the two additional Protocols, the Conference should ensure that they had the necessary force.

19. The question of responsibility for crimes committed on the battlefield, about which some delegations had expressed concern, was an administrative matter for the Governments concerned and not a matter of international law. Articles had already been adopted on the duties of commanders and of legal advisers to the armed forces in that respect. It was the duty of the legal advisers in the field to inform commanders of the weapons that were prohibited by the Geneva Conventions and the Protocols. There was also an article providing for the dissemination of the Conventions and Protocols by such legal advisers.

20. Having received his legal education in the United States of America, he was surprised at the apprehension expressed by the United States representative about the proposal. He could see no objection to the fact that the prohibitions it contained had already been covered by earlier instruments, bearing in mind that the functions of the Conference were to reaffirm and develop humanitarian law applicable in armed conflict. He failed to understand why the United States representative had singled out the proposal as one that would particularly affect the question of extradition, bearing in mind that other parts of Article 74 would have similar implications. New solutions would eventually have to be found to the problems raised by extradition.

21. In response to the Pakistan representative's appeal, he would refrain from pressing his delegation's proposal in the Committee. He would not withdraw it, however, but would resubmit it for consideration in plenary session.

22. Mr. HUSSAIN (Pakistan) thanked the Philippine representative for having refrained from pressing his proposal in the Committee, and said it was understood that he had the right to do so at a later stage.

23. Mr. AL-FALLOUJI (Iraq) said that care should be taken not to give the impression that the withdrawal of any important proposal meant a retreat from humanitarian principles. It was essential to prohibit certain weapons and to regard their use as a grave breach. Certain countries had protected themselves by a policy of co-existence which relied on the possession of nuclear weapons. Iraq was alarmed at the fact that the status quo was maintained by such dangerous means, since countries which had no such weapons would be the victims. The tendency to back away whenever the subject of weapons was raised was regrettable. The Conference should face up to its responsibilities in that respect. He therefore appealed to all delegations to support the Philippine proposal in plenary session.

Article 75 bis - Repatriation on close of hostilities (CDDH/I/22) (concluded)

24. Mr. HUSSAIN (Pakistan) said that, since paragraph 2 of the new Article 75 bis proposed by his delegation had been adopted by the Committee as part of Article 74, and since paragraph 1 also appeared to be covered by that article, his delegation withdrew its proposal (CDDH/I/22).

The meeting rose at 4.45 p.m.

SUMMARY RECORD OF THE SEVENTY-NINTH (CLOSING) MEETING

held on Saturday, 21 May 1977, at 10.20 a.m.

Chairman: Mr. OFSTAD (Norway)

ADOPTION OF THE DRAFT REPORT OF COMMITTEE I (CDDH/I/381)

1. Mr. de ICAZA (Mexico), Rapporteur, introduced the draft report of Committee I (CDDH/I/381). He observed that the Committee had approved one article at the first session of the Conference, eighteen at the second session, seven at the third session and thirty, as well as the Preambles and Titles of both draft Protocols, at the current session. During the first three sessions the texts of the articles considered and the amendments proposed to them had been discussed in great detail by the Committee, whereas at the current session it had been decided that, owing to lack of time, texts and amendments would be referred directly to the Committee's three Working Groups as soon as they had been introduced. Consequently, the related discussions did not appear at all in the summary records of the Committee's meetings and only in short form in the Working Groups' reports. A number of delegations had opposed that procedure, which, they considered, might well entail lengthy discussions in the plenary meetings of the Conference.

2. Miss. MARTIN (Legal Secretary) read out corrections to paragraphs 3, 5, 7, 9, 11, 56, 65, 93 and 155 of the draft report.

3. The CHAIRMAN, replying to a question by Mr. BRECKENRIDGE (Sri Lanka), said that all the modifications and corrections made to the draft report would be issued as printed corrigenda.

4. Mr. HUSSAIN (Pakistan), supported by Mr. DIXIT (India), proposed that the Committee should consider the draft report as a whole rather than paragraph by paragraph, in order to save time.

It was so agreed.

5. Mr. BOBYLEV (Union of Soviet Socialist Republics) said that he would submit certain technical corrections to the Russian text to the Secretariat in writing.

6. Mr. LUNET (France) considered that paragraph 75 of the report was not entirely accurate, since the amendment to which it referred concerned the substance rather than the style of Article 84, paragraph 2.

7. Mr. de ICAZA (Mexico), Rapporteur, said that paragraph 75 was identical with paragraph 14 of the report of Working Group C (CDDH/I/350/Rev.1), which had already been adopted by the Committee.

8. Mr. FREELAND (United Kingdom) said that the words "of the Conventions" should be inserted after the words "made the provisions" in the first sentence of paragraph 40.

9. Mr. de ICAZA (Mexico), Rapporteur, concurred.

The draft report of Committee I (CDDH/I/381) as a whole, as amended, was adopted.

CLOSURE OF THE SESSION

10. After the usual exchange of courtesies, the CHAIRMAN announced that Committee I had completed its work at the fourth session of the Conference.

The meeting rose at 10.45 a.m.