



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

7 NOV 1977

In reply refer to:
I-12817/77

MEMORANDUM FOR THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Protocols I and II - Humanitarian Law during Armed Conflict

The extensive DOD Working Group review on Protocols I and II relating to the reaffirmation and development of humanitarian law applicable in armed conflicts has been completed. Copies of the analyses have been provided* to the Joint Chiefs of Staff representative on the working group.

Attached is a State Department draft Circular 175 on the U.S. position on signing the protocols. It is requested that the Joint Chiefs of Staff review and provide their views on the analyses and circular. Specifically, I would ask that you address the following:

1. Are there any objections, from a military standpoint, to United States becoming a party to these Protocols?
2. If so, what should be included in the U.S. statement upon signing? Is the State Department approach, as outlined in the draft circular, satisfactory in this respect?
3. And, what interpretations, understandings, or reservations should be proposed during the ratification process?

The Swiss government plans a signing ceremony for 12 December 1977, in Geneva. If we agree to the U.S. signature on the Protocols, it would be advantageous if we could be prepared to do so on that date. I, therefore, request that you provide us with the views of the Joint Chiefs of Staff by close of business on 2 December.

Walter Slocomba

Walter Slocomba
Principal Deputy Assistant Secretary
of Defense
International Security Affairs

Attachment 1
a/s

TO: The Secretary
FROM: L - Herbert J. Hansell
SUBJECT: Circular 175: Request for Authorization
to Sign Two Protocols to the Geneva Conventions
of 1949 for the Protection of Victims of War

*Conform to
first set of
changes*

ISSUE FOR DECISION

In accordance with Department Circular 175, authorization is requested to sign the two Protocols which have recently been negotiated to the Geneva Conventions of 1949 for the protection of victims of war. It is also requested that you sign the Full Power at Tab A to permit Ambassadors Vandenhoevel and Aldrich to sign the Protocols on behalf of the United States.

HISTORY OF NEGOTIATIONS

The Swiss Government, as depositary of the 1949 Geneva Conventions, convened in 1974 a diplomatic conference to consider two draft protocols to the Conventions which had been prepared by the International Committee of the Red Cross. The Conference held four annual sessions and concluded in June 1977, with the adoption of the texts of the two Protocols. The Final Act of the Conference and the texts of the Protocols are at Tab B. The Protocols will be opened for signature on December 12, 1977.

DESCRIPTION OF THE PROTOCOLS

The Protocols make significant advances in the protections accorded by international law to the victims of armed conflicts. Protocol I, dealing with international armed conflicts, corrects a number of deficiencies in the 1949 Conventions, for example, by providing a considerable immunity from attack to medical aircraft, by improving the procedures for the appointment of protecting powers to oversee the implementation of the law, and by requiring accounting for persons missing in action and the return of the remains of the dead. Protocol II, "dealing with non-international armed conflicts, expands dramatically the law applicable to civil wars, which at present is found largely in one article (Article 3, common to the four Geneva Conventions of 1949). Protocol II is concerned almost exclusively with the protection of basic human rights, both of combatants and non-combatants.

Perhaps as important as their positive contributions to the development of the law is the fact that the Protocols do not contain any provisions that ^{CAUTION} should ~~be~~ be ^{WITH APPROPRIATE UNDERSTANDING} acceptable to the United States. Considering the relatively recent experience of the Vietnam War and the opportunity for propaganda offered by the negotiation of the Protocols, it is a cause for considerable

satisfaction that the international conference system was able to produce such a responsible result.

Significantly, the only article that seems politically charged, Article 1 of the first Protocol which defines international armed conflicts to include wars of national liberation, was one of the very few articles adopted at the first session of the Conference in 1974. In subsequent sessions the Conference found itself more absorbed in its humanitarian tasks and less tempted by the prospect of propaganda. Moreover, the extreme language of Article 1, which defines wars of national liberation in terms of "alien occupation", "colonial domination", and "racist regimes", is explicable, not primarily as a propaganda exercise, but rather as an effort by the developing countries to ensure that this provision has no application outside of the present armed conflicts by various liberation movements in Southern Africa and by the PLO in the Middle East.

RESERVATIONS AND UNDERSTANDINGS

Although the United States does not need to make a final decision concerning any reservations or understandings until the time for ratification, it would be appropriate and probably desirable to state formally at the time of signature any reservations or understandings which we are reasonably certain will be

required. We have identified only two understandings that we should state at the time of signature with respect to Protocol I and only one with respect to Protocol II. These statements are at Tab C.

The most important statement of understanding, that excepting nuclear weapons from the new rules established by the Protocol, is arguably unnecessary, as it states a position taken throughout the Conference by the representatives of the United States, the United Kingdom, and France and ~~not~~ ^{early ONB} contradicted by ¹ any representatives. ^(INDIA) In view of the importance of clarity on this question, however, and particularly in the light of Articles 35 and 55 which prohibit means of warfare likely to cause widespread, long-term and severe damage to the national environment, it seems desirable to make this understanding for the record at the time of signature.

The understanding concerning the term "deployment" in Article 44 is necessitated by the facts that the term is of critical importance for the protection of the civilian population, and its meaning was disputed at the time the article was adopted. We must insist that a guerilla who takes advantage of his enemy by pretending to be an unarmed civilian while moving toward the position from which he is to attack forfeits his status as a legitimate combatant and prisoner of

war and may be tried and punished for any offenses he has committed. Although most representatives who spoke to this question agreed with us, a few interpreted the term "deployment" so as to require the guerilla to distinguish himself from the civilian population only just before he begins his attack. In view of this division of opinion, our understanding should be clearly and formally stated.

The understanding concerning Protocol II (to interpret certain terms as they are defined in Protocol I) is technical and results merely from the deletion of a definitive article when Protocol II was compressed at the end of the Conference.

The Department of Defense concurs in these understandings but also recommends that consideration be given to one reservation to the first Protocol. This proposed reservation, the text of which is at Tab D, would preserve the right of reprisal against an enemy's civilian population in the event of systematic and massive attacks against our civilian population in violation of Article 51 of the first Protocol. That article prohibits all attacks directed against the civilian population, expressly including attacks by way of reprisal. The Department of Defense believes that this prohibition is unrealistic and will not be

respected in practice. The State Department and the Arms Control and Disarmament Agency agree with that conclusion, but believe that a reservation by the United States on the point is neither necessary nor desirable. State and ACDA believe that such a reservation would be misconstrued and misunderstood as a statement of intention to attack civilian populations and to justify such attacks as "reprisals". Certainly it is true that those who have in the past violated the laws of war have often tried to justify their actions as legitimate reprisals. The Protocol goes too far in an effort to remove that justification, but that excess does not compel us to make a reservation. In view of our understanding concerning nuclear weapons, it would be particularly difficult to explain why we, of all nations, found this reservation necessary. In any event, since we should limit our reservations and understandings at the time of signature to those almost certain to be required, we can reconsider this question at any time prior to ratification should it seem advisable to do so.

CONGRESSIONAL CONSULTATIONS

Interested members of Congress have participated as advisors to the United States Delegation to the Geneva Conference and have been kept informed of the

progress of negotiations, but there have been no formal hearings or consultations with the Congress. Prior to signature, we intend to offer briefings to the members and staff of the Senate Foreign Relations Committee. We anticipate no significant Congressional objection to the two Protocols.

ALLIED CONSULTATIONS

Consultation with our NATO allies has, of course, occurred throughout the negotiations. A NATO Military Committee Study has recently been completed which finds the Protocol acceptable from the military standpoint, but stresses the needs (a) for all of the allies to be bound by the same rules, (b) for the rules not to affect the use of nuclear weapons, and (c) for certain ambiguous articles to be interpreted uniformly by all allies in ways we stated for the record during the closing sessions of the Conference. Further allied consultations will be held as appropriate to ensure a coherent approach to both the timing of signature and ratification and to the substance and texts of any reservations, understandings, and interpretations.

RECOMMENDATIONS

1. That you approve signature of these two Protocols on behalf of the United States

Approve _____

Disapprove _____

2. That you sign the Full Powers at Tab A.

Attachments:

Tab A - Full Powers

Tab B - Final Act and Protocols

Tab C - Statements of Understanding

Tab D - Proposed Reservation

Tab E - Memorandum of Law

Drafted:

L:GHaldrich:js 10/11/77
Ext. 28460

Concurrences:

L/T - Mr. Rovine

PM -

H -

IO -

DOD -

ACDA -

PROPOSED UNDERSTANDINGS

A. Protocol I

1. It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

2. It is the understanding of the United States of America that the phrase "military deployment preceding the launching of an attack" in Article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.

B. Protocol II

It is the understanding of the United States of America that the terms used in Part III of this Protocol which are the same as the terms defined in Article I of Protocol I shall be construed in the same sense as those definitions.

[Alternatively]

It is the understanding of the United States of America that the terms defined in Article 8 of Protocol I have the same meaning when they are used in Part III of Protocol II.

L:GHaldrich:js 10/11/77
x28460

PROPOSED RESERVATION TO PROTOCOL I

Notwithstanding the provisions of Article 51, paragraph 6, the United States of America reserves the right, in the event of massive and continuing attacks directed against the civilian population, to take reprisals against the civilian population of the State perpetrating these illegal attacks for the sole purpose and only to the extent necessary to bring the illegal attacks to an end.

L:GHaldrich:js 10/11/77
x28460

PROPOSED UNDERSTANDINGS

A. Protocol I

1. It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

2. It is the understanding of the United States of America that the phrase "military deployment preceding the launching of an attack" in Article 44, paragraph 3, means any movement towards a place from which an attack is to be launched.

B. Protocol II

It is the understanding of the United States of America that the terms used in Part III of this Protocol which are the same as the terms defined in Article I of Protocol I shall be construed in the same sense as those definitions.

[Alternatively]

It is the understanding of the United States of America that the terms defined in Article 8 of Protocol I have the same meaning when they are used in Part III of Protocol II.

L:GHaldrich:js 10/11/77
x28460

MEMORANDUM OF LAW

The accompanying Circular 175 memorandum requests authority to sign two Protocols to the Geneva Convention of 1949 for the Protection of Victims of War. These Protocols will be treated as treaties for the purposes of U.S. domestic law. They will be submitted to the Senate for advice and consent to the United States ratification.

The legal authority for the U.S. becoming a party to these Protocols is the treaty power of the Constitution (Article II, section 2, clause 2).

We do not believe that either signature or ratification of the Protocols by the United States would require an environmental impact statement as a "major federal action significantly affecting the quality of the human environment" within the meaning of the National Environmental Protection Act (NEPA). Any effect on the environment would be incidental and highly speculative. War is, of course, bad for the environment. To the extent that these Protocols moderate the use of armed force in the interests of humanity and, as in Articles 35 and 55 of the first Protocol, in the interest of the national environment, they tend to protect the environment.

An argument conceivably might be made that our proposed statement of understanding concerning nuclear weapons should require an environmental impact statement, but we do not believe such an argument would be sound. The Protocol was not intended to create new rules prohibiting or

restricting the use of nuclear weapons, and a statement formally recording that fact scarcely qualifies as a major federal action. Even if the statement were not made at the time of signature or at the time of ratification, the Protocol would still not affect the use of nuclear weapons; the purpose of the statement is simply to remove any ambiguity and prevent future arguments.

On the basis of the foregoing, there is no legal objection to United States signature of the Protocols.

George H. Aldrich
Deputy Assistant Legal
Adviser

Cleared: L/T - Mr. Rovine

Drafted: L/OES:RJBettauer:mcp

DEPARTMENT OF DEFENSE
LAW OF WAR WORKING GROUP
REVIEW AND ANALYSIS
OF
PROTOCOLS I AND II
ADOPTED
BY
THE DIPLOMATIC CONFERENCE ON
INTERNATIONAL HUMANITARIAN LAW

1977

PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I).

1. TEXT OF ARTICLE AS ADOPTED

Preamble

The High Contracting Parties,

- [1.]¹ Proclaiming their earnest wish to see peace prevail among peoples,
- [2.] Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,
- [3.] Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,
- [4.] Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimatizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,
- [5.] Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature

1. The bracketted numbers are not part of the text. They are the paragraph numbers referred to in the paragraph by paragraph analysis, infra.

or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict,

[6.] Have agreed on the following:

2. REFERENCES

- a. Protocol I, Article 1, Paragraph 2.
- b. Protocol I, Article 1, Paragraph 4.
- c. Protocol I, Article 96, Paragraph 3.
- d. Hague Convention No. IV, Preamble.
- e. United Nations Charter, Article 2, Paragraph 4.
- f. United Nations Definition of Aggression.
- g. Protocol II, Preamble.

3. RELATION TO U.S. POSITION

The Preamble is consistent with the U.S. position. An important change in the United States position for the 1977 Conference was that the last paragraph of the draft ICRC Preamble (the De Martens clause) had to be modified. The reason for this was that the draft Preamble indicated that in cases not covered by conventional or customary international law, the civilian population and combatants remained under the protection of the principles of humanity and the dictates of the public conscience. It was the U.S. position that under customary law, as reflected in the Preamble to the Hague Convention, individuals do not remain directly under the protection of factors such as public opinion. The Hague Preamble refers to international law principles, as they result from principles of humanity and the public conscience. It was also the U.S. position that a De Martens clause was also superfluous, given the adoption of Article 1, paragraph 2, by Committee I at the first session of the Conference. This was remedied by the deletion of the equivalent Preamble clause by Committee I. In addition, it was the U.S. position that it would be highly desirable to contain a clause on non-discrimination in the treatment of individuals based on the causes espoused by the party to which they belong. This was also eventually agreed to by Committee I.

4. COMMENTS

a. Background. The preamble was negotiated in an informal working group consisting of delegates from Committees I and III. The preamble was a provision under the purview of Committee I, and was dealt with by Working Group C (chaired by Justice Hussain of Pakistan). Representatives from Algeria, Yugoslavia, Vietnam, the Soviet Union, Madagascar, France, the German Democratic Republic, the Federal Republic of Germany, the United Kingdom, and the United States, were in the informal working group throughout its four or five sessions. Mexico participated at the final meeting of the informal working group. Syria was invited to participate at the final meeting, but not attend. Algeria chaired the informal working group.

The preamble was negotiated within the framework that both the Socialist bloc and the Western group desired a specific paragraph in the preamble. The Socialist bloc desired a reference to the concept of aggression. The Western group wanted a reference to the non-discriminatory treatment of individuals based on charges that the soldiers involved or their State had committed "aggression." It was within this background that the preamble was negotiated. The Soviet group had proposed, at the Second Session, a new article to precede Article 33 (CDDH/III/284) that would have accomplished their main goal (see Inclosure 1). In addition, they introduced an amendment to the preamble that would have mentioned the United Nations General Assembly Definition of Aggression (Resolution 3314(XXIX)). The Socialist countries made it very clear that they would drop their proposal for an amendment to Article 33 if they could achieve a reference to aggression in the preamble. This was presented as a request to mention the U.N. Definition on Aggression. Despite the Socialist countries' request, several countries, including many of the nonaligned, felt that a preamble was not necessary. Given this background, it was quite likely that a blocking third could have been formed to defeat an attempt to have a preamble that contained only a reference to aggression, especially since Western countries suspected that such a clause would be used to deny prisoner of war rights and the full application of the law to those who were charged with being aggressors. Consequently, the preamble was negotiated in an environment in which it was clear that a "package deal" had to be agreed to which would be

acceptable to all of the delegations involved. The essential trade-off was that there would be a reference to aggression and a reference to non-discriminatory treatment based on the causes of the conflict.

The United States approached the preamble from the perspective that it was an opportunity to correct some of the deficiencies of Article 1, Paragraph 4, on wars of national liberation. The United States opposition to that article had been largely based on the fact that it permitted the inference that individuals fighting for a just cause could be granted more protection than other individuals, and the concomitant implication that those fighting wars of national liberation could apply the law in a one-sided or discriminatory manner. The preamble was an avenue to dilute substantially that implication.

The informal working group was able to draft a preamble which was later presented to the full Committee Plenary. However, an agreed text was arrived at only minutes before the official Committee Plenary that was to discuss the Preamble met, and no delay could be obtained. The clause most insisted upon by the United States was objected to by some Arab and African nations which had not been briefed by Algeria and Madagascar on the acceptability of the provision, and consequently the relevant language desired by the United States was placed in brackets. The working group met again and achieved a new agreement, which was found acceptable in the plenary of Committee I, adopted by consensus, and was later adopted by consensus in the full Conference Plenary.

b. Paragraph-by-Paragraph Analysis of the Preamble

i Paragraphs 1 and 2. The first paragraph is essentially the ICRC text and was not objectionable. The second paragraph is taken essentially from Article 2, Paragraph 4, of the United Nations Charter. This was a clause taken from the Socialist bloc amendment. The final text adopted is essentially that of the U.N. Charter, except that the word "sovereignty" is used. The word sovereignty is also used in Article 1 of the definition of aggression (see Inclosure 3). It was insisted upon by the Yugoslavia, and the Socialist negotiators and the non-aligned agreed to it. The Western negotiators agreed to it, some reluctantly (U.S.), and others in the knowledge that its omission or attempting to delete it in the full plenary would have invited a certain defeat. The second part of

the phrase ("or in any other manner inconsistent with the purposes of the United Nations"), which is a part of the U.N. Charter, was not requested by the Socialist bloc. It was introduced in the Committee Plenary at the request of Mexico, which did not understand why it was not included. There was no objection to introducing the phrase.

During the negotiation on this paragraph, France expressed strong concerns about it and previous versions. The reason was their interpretation of the relation between the U.N. Charter and international law. Although difficulties were encountered and the French opposed the paragraph, France did eventually join in the consensus.

ii Paragraph 3. The paragraph on reaffirming and developing the provisions of the existing law was adopted from the ICRC text, and is not objectionable.

iii Paragraph 4. This was the one most insisted upon by the Socialist bloc. Their original proposal (see Inclosures 1 and 2) would have included a reference to the United Nations definition of aggression, the inclusion of which was objected to by most Western countries. This objection was based, in part, on the unacceptability of citing a United Nations resolution in the preamble to this treaty, and secondly, on a basic discontent with the definition itself. The arguments put forth by the Socialist and nonaligned delegates was that they could not explain to their own people how the law of war relates to the law on the initiation of force and aggression. There was concern among the Western delegates that the Socialist countries were trying to find a mechanism

whereby a discriminatory treatment of their enemies could be justified. This is reflected in their draft proposal to amend Article 33, which would have stated that no discrimination could be applied to the "victims of the conflict", which indicated a preference for stating that the victims of aggression would get all of the benefits of the law, while implying that those charged with aggression could be denied the equal treatment of the laws. The proposal actually adopted in the Preamble is essentially the same as that drafted by the United States and the Netherlands, at previous sessions, and is reflected in the 1976 and 1977 U.S. Position Paper. It also reflects the language desired by the Eastern bloc. It was a definite pre-condition to Western agreement to the provision, however, that it had to be counterbalanced by the following

paragraph. The substance of the paragraph is consistent with the fundamental premises that the law of war itself is applicable regardless of the legitimacy of the initial use of force and the fact that one party or both is acting in violation of the prohibition against aggressive wars.

iv Paragraph 5. This paragraph was insisted upon the most by the United States and the other Western countries. The original proposal of the United States and the Netherlands draft was as follows:

Reaffirming further that the rights and duties of parties to a conflict under the present Protocol are equally valid for all of them and that the provisions of the Geneva Conventions of 1949 and of the present Protocol must be applied impartially to all persons, without any adverse distinction, based on the causes espoused by the parties to which they belong or any political, ideological, racial, religious, or similar criterion.

This clause was changed many times. The phrase reproduced above was used as the negotiating text. Certain of the clauses introduced in the final text were placed in for specific purposes. The phrase "all persons who are protected by those instruments" was inserted for precision. The original draft proposal would have covered all individuals, regardless of the fact that the Protocol itself might not have been applicable to the relevant situation. This was objected to by the Socialist countries. It was indicated privately that their main objection was that this language could be construed as nullifying the Socialist reservations to Article 85 of the Geneva Prisoners of War Convention, since the Socialist countries contended that those convicted of war crimes were not entitled to the full treatment of that Convention. When this was expressed by one of the Socialist countries (Vietnam), the Western countries indicated that that position was inconsistent with the 1949 Convention law and the Protocol itself. However, it was clear that only those who were protected by the Conventions, by its express terms, were covered and, therefore, the phrase "who are protected by those instruments" was inserted to specify further the precise parameters of the provision. It was also the stated Western position that the Socialist position was inconsistent with the objects and purposes of the Conventions and the

Protocol, and that this was a matter that was clearly covered by the substance of the law. Only reservations could be used to attempt to nullify this concept, and these reservations would be invalid.² All of the Western countries thought the additional phrase was necessary for clarity.

The phrase "must be applied in all circumstances" was also a compromise phrase. The "all circumstances" language was inserted at the request of Syria. The final clause of the last paragraph was the subject of great dispute. The original U.S. proposal, which contained certain specified criteria, such as political and ideological ones, was thought to be unnecessary and quite lengthy, given the fact that this language was also reproduced in several provisions of the 1949 Conventions and indeed in the Protocol, itself. It was determined that this was not necessary, since the discrimination clauses were already in the text of the Protocol. What was truly desired was the expression of the concept that an accusation by one belligerent that the other belligerent is engaging in aggression cannot be used to justify the self-serving exclusion of prisoner-of-war rights and other protections of the law to the enemy. The final phrase used in the provision consists of two different concepts. The preamble stresses that there should be no adverse distinction based, first, on the nature or origin of the armed conflict or, secondly, on the causes espoused by, or attributed to the parties to the conflict. The phrase "nature or origin" of the conflict was a compromise for two different phrases. The phrase originally suggested by the Western countries was "legality or justifiability" of the use of force. A compromise formula was adopted to use the word "legitimacy" of the use of force. This was suggested by

2. It is noted that a Socialist bloc proposal to codify the Socialist reservations to Article 85, GPW, and which would have excluded those convicted of war crimes from the full protection of the Conventions and the Protocol (proposed new Article 78 bis), was withdrawn by its sponsors. This occurred after the preamble negotiations. The Soviets were aware that Western nations were quite prepared to speak against it, and that the Arab States were going to strongly oppose it on the basis that it was an amendment or curtailment of Article 44 (Committee III, Article 42). A Soviet attempt to send the proposal to a working group was rejected at the Third Session.

the representative of Madagascar. At the formal Working Group level, however, this word received negative responses from several delegations, including those of Iraq, Syria, Oman, Kenya, and Mexico. It was put in brackets, and, thus, the small informal working group decided to find an acceptable alternative. The attempt to reach a further consensus compromise consisted of reconvening the small group and inviting Syria and Mexico to participate. The phrase "nature or origin", which had previously been suggested by Vietnam, was adopted. The Federal Republic of Germany and the United Kingdom were especially happy with this phrase. It was their view that, given the legal literature in Socialist countries, this phrase meant exactly the same thing that the Western countries desired. Although they interpreted the phrase as they thought Socialist countries interpreted the phrase, the U.S. representative was not content with it, on the basis that it was not enough. The U.S. delegation insisted on a phrase such as "causes espoused by or attributed to" parties to the conflict. This phrase was received negatively by the Socialist group, and the Western group supported it, but felt that it was not necessary. The impasse was broken, however, when Mexico lent its full support to the U.S. proposal (which is found in the U.S. position paper for 1977). Mexico insisted that it was absolutely indispensable to have the phrase "attributed to" because, in many cases, propaganda charges are made accusing the other belligerent of being an aggressor. It was necessary in that context to ensure that frivolous or false charges could not be used to deny combatants their protections. The non-Western countries ended their objections after Mexico made its strong statement.

On balance, the provision was stronger than the United States originally hoped for. The Socialist countries and other nations negotiating the provision felt that it was a sufficiently balanced preamble so that they would be able to justify it to their own constituents. Some negative response was expressed privately by some delegates, who indicated a preference for a better treatment for the victims of aggression. However, they indicated that such a position would not be acceptable in public.

5. MILITARY IMPLICATIONS

This provision benefits military operations in that it reaffirms the basic principle that individuals cannot be denied their legal rights, including prisoner of war

status, on the allegation that they are engaged in wars of aggression or are committing war crimes. It is particularly relevant to the behavior of captors or detaining powers who have prisoners of war or others in their custody. It stresses the fact that the laws of war are applicable in a conflict regardless of how the conflict originated and regardless of whether or not one side claims that it is fighting a just war. It increases the legal arguments that can be used to exert pressure and to influence public opinion when a belligerent systematically fails to implement the law. It does not burden military operations in any manner.

6. RECOMMENDED U.S. ACTION

None. The text is acceptable to the United States, and does not require any implementing legislation or further action through other international organizations.

PART III - METHODS AND MEANS OF COMBAT -
PRISONER-OF-WAR STATUS

SECTION I - METHODS AND MEANS OF COMBAT

NEW ARTICLE TO BE INSERTED BEFORE ARTICLE 33 - AGGRESSION AND
NON-DISCRIMINATORY APPLICATION OF
HUMANITARIAN LAW*

CDDH/III/284

4 April 1975

Original: English/
Russian

Algeria, Bangladesh, Bulgaria,
Byelorussian Soviet Socialist
Republic, Czechoslovakia,
Democratic People's Republic of
Korea, Democratic Republic of
Viet-Nam, Egypt, German Democratic
Republic, Hungary, Iraq, Mongolia,
Poland, Sudan, Ukrainian Soviet
Socialist Republic, Union of Soviet
Socialist Republics, Yugoslavia,
Palestine Liberation Organization

Insert a new article before article 33 worded
as follows:

"The High Contracting Parties recognize the importance of the definition of aggression as adopted by the United Nations General Assembly at its twenty-ninth session, which inter alia serves to save the humanity from the horrors of the war and to strengthen the protection of the civilian population and civilian objects and affirm their conviction that acceptance of the rules of international humanitarian law set forth in the Geneva Conventions and this Protocol cannot be construed as justifying and legitimatizing in any way acts of aggression.

They agree that the protections accorded by the Geneva Conventions on the protection of victims of war of 1949 and by this Protocol shall be extended without any discrimination to all victims of the conflict without regard to the causes espoused by the party to which they belong."

* Provisional title proposed by the Secretariat.

CONFÉRENCE DIPLOMATIQUE
SUR LA RÉAFFIRMATION ET LE DÉVELOPPEMENT
DU DROIT INTERNATIONAL HUMANITAIRE APPLICABLE
DANS LES CONFLITS ARMÉS

Distr. GENERAL

CDDH/I/337
21 April 1977

Original: ENGLISH

DIPLOMATIC CONFERENCE

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

CONFERENCIA DIPLOMÁTICA

SOBRE LA REAFIRMACIÓN Y EL DESARROLLO DEL
DERECHO INTERNACIONAL HUMANITARIO APLICABLE
EN LOS CONFLICTOS ARMADOS

ДИПЛОМАТИЧЕСКАЯ КОНФЕРЕНЦИЯ
по вопросу о подтверждении и развитии международного
гуманитарного права, применяемого в период
вооруженных конфликтов

المؤتمر الدبلوماسي
لتأكيد وتطوير القانون الدولي الإنساني
الطبقي في النزاعات المسلحة

BULGARIA, BYELORUSSIAN S.S.R., CUBA, CZECHOSLOVAKIA,
DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, GERMAN DEMO-
CRATIC REPUBLIC, HUNGARY, MONGOLIA, POLAND, SOCIALIST
REPUBLIC OF VIETNAM, UKRAINIAN S.S.R., U.S.S.R.

DRAFT ADDITIONAL PROTOCOL I

PREAMBLE

Add as paragraph 2

Recalling that every State has the duty to refrain in
its international relations from the threat or use of
force against the territorial integrity or political
independence of any State,

Add as paragraph 4

Bearing in mind the fundamental importance of resolution
3314 (XXIX) on the definition of aggression adopted by
the United Nations General Assembly, wish to reaffirm
their conviction that nothing in the Geneva Conventions
and this Protocol may be construed as justifying or
legitimizing acts of aggression or other acts which are
contrary to international law.

Press Release USUN-32(74), Apr. 12, 1974; Dept. of State Bulletin, Vol. LXX, No. 1819, May 6, 1974, pp. 498-501. The following is the text of the draft definition adopted by the Special Committee:

The General Assembly,

*Basin*g itself, on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of states under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

Reaffirming also that the territory of a state shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another state in contravention of the Charter, and that it shall not be the object of acquisition by another state resulting from such measures or the threat thereof.

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim.

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is, nevertheless, desirable to formulate basic principles as guidance for such determination,

Adopts the following definition:

ARTICLE 1*

Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

ARTICLE 2

The first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may in conformity with the Charter conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

ARTICLE 3**

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:

(a) The invasion of another state, or any such invasion or attack of another state or of another state;

(b) Bombardment of another state or the attack of another state;

(c) The blockade of another state;

(d) An attack by marine and air forces of another state with the conditions provided in such territory beyond

(e) The sending of mercenaries or mercenaries of such gravity as to merit therein.

(f) The action of disposal of another's aggression against

(g) The sending of mercenaries or mercenaries of such gravity as to merit therein.

The acts enumerated determine that other Charter.

No consideration or otherwise, may rise to international No territorial acquisition shall be recognized

Nothing in this definition shall be interpreted as affecting the scope in which the use of

Nothing in this definition shall prejudice the right to from the Charter, of the Declaration on Principles and Cooperation, United Nations, parties forms of alien actions and to seek at the Charter and in conformity

In their interpretation and each provision shall

*Explanatory note: (a) is used without is a member of the UN (b) includes the concept On the recommendation Apr. 12 to include in the Explanatory notes on Article 1. With reference to that the expression

Incl. 3

Bulletin, Vol. LXX,
text of the draft ment.

(a) The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof;

(b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;

(c) The blockade of the ports or coasts of a state by the armed forces of another state;

(d) An attack by the armed forces of a state on the land, sea or air forces, marine and air fleets of another state;

(e) The use of armed forces of one state, which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

ARTICLE 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

ARTICLE 5*

No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

No territorial acquisition or special advantage resulting from aggression are or shall be recognized as lawful.

ARTICLE 6

Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter including its provisions concerning cases in which the use of force is lawful.

ARTICLE 7

Nothing in this definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

ARTICLE 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

**Explanatory note:* In this definition the term "state"

(a) is used without prejudice to questions of recognition or to whether a state is a member of the United Nations, and

(b) includes the concept of a "group of states" where appropriate.

**On the recommendation of its working group, the committee agreed on Apr. 12 to include in its report to the General Assembly the following explanatory notes on Articles 3 and 5:

1. With reference to Article 3, paragraph (b), the Special Committee agreed that the expression "any weapons" is used without making a distinction be-

tween conventional weapons, weapons of mass destruction and any other kind of weapon.

2. With reference to Article 5, paragraph 1, the Committee had in mind, in particular, the principle contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations according to which "No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state."

3. With reference to Article 5, paragraph 2, the words "international responsibility" are used without prejudice to the scope of this term.

4. With reference to Article 5, paragraph 3, the Committee states that this paragraph should not be construed so as to prejudice the established principles of international law relating to the inadmissibility of territorial acquisition resulting from the threat or use of force.

On October 18, 1974, Mr. Rosenstock made another statement on the draft definition to the Sixth Committee of the U.N. General Assembly, during its debate on the subject. With respect to the effect and significance of the definition, as adopted by the Special Committee, Mr. Rosenstock said:

* * *

What the Special Committee has forwarded to the Assembly is not a substitute for the type of definition one would seek in a dictionary. That would serve no useful purpose; we are not defining a term in the abstract but seeking to provide guidance for the understanding of the meaning and function of the term as set forth in Article 39 of the Charter of the United Nations.

The definition, moreover, does not and should not seek to establish obligations and rights of states for that is not the function of Article 39 of the Charter. The United Nations has already completed a major exercise in the field of rules concerning use of force when it adopted the Friendly Relations Declaration. The Definition of Aggression neither adds to nor subtracts from that important Declaration. The draft text underlines this fact in its preambular reaffirmation of the Friendly Relations Declaration.

The draft before us is a recommendation by the General Assembly designed to provide guidance for the Security Council in the exercise of its primary responsibility under the Charter to maintain, and where necessary, to restore international peace and security. The second, fourth and tenth paragraphs of the Preamble and Articles 2 and 4 clearly reflect the intention of the drafters to work within the framework of the Charter which grants discretion to the Security Council. There is nothing the General Assembly or the Security Council can do under the Charter to alter the discretion of the Council. The Assembly can provide suggested guidance to the Security Council and since the Membership of the Council is drawn from the Membership of the Assembly, there is every reason to assume the Security Council will give due weight to this important recommendation.

We believe the draft definition which is the product of the many years of careful work deserves unanimous acceptance by the General Assembly. In expressing this view we are mindful of the need not to place too great an emphasis on what we have accomplished. The

Security Council whether aggressive expeditions are "threat to the do far more harm and cause any taken.

* * *
Press Release U

On December adopted without the Special Committee Assembly's Security Permanent statement to the

The United Nations definition ninth General Assembly after so many our view, an in large measure Special Committee

We indicate explicit and of violence. indeed cover to the expressed forth in Article stressed the expands now

We believe and large of which, after so since, as nothing in the Security the General Assembly powered to derived from

We are affects the of it.

The United of these are functioning and thus t

562-750-

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 1, General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.
4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

2. REFERENCES

a. Common Articles 1 and 2, Geneva Conventions of 12 August 1949, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, [1956] 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, [1956] 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S.; Geneva Convention Relative to the Treatment of Prisoners of War, [1956] 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention

Relative to the Protection of Civilian Persons in Time of War, [1956] 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

b. Preamble, Hague Convention No. IV Respecting The Laws and Customs of War and Land, 18 October 1907, 36 Stat. 2277, T.S. No. 539.

c. United Nations Charter, Articles 1, 2, and 51.

d. Protocol I: Preamble; Article 96 (Paragraph 3) and Article 44.

e. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, October 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. 28 at 121, U.N. Doc. A/8028 (1970).

f. Basic principles of the legal status of the combatants struggling against colonial and alien domination and racists regimes, G.A. Res. 3103, 28 U.N. GAOR Supp. 30, at 142, U.N. Doc. A/9030 (1974).

g. Protocol II, Article I.

3. RELATION TO U.S. POSITION

The United States supported paragraphs 1, 2 and 3 of this provision. At the Committee level, it opposed paragraph 4 in the strongest of terms. Nevertheless, this provision was adopted by a large majority in Committee I. The reasons for the American opposition are stated in Part IV of this review and analysis. The United States instructions for the U.S. Delegation for the fourth session stated that it could refrain from opposing Article 1, including paragraph 4, if certain changes were made in the Protocol. The most important change was that any implication stemming from Article I that would reinstate the "just war" concept (in the sense that combatants could be treated unequally based on the cause for which they are fighting within a given war) had to be negated. In other words, the Protocol had to state clearly that the law was equally binding on all parties to the conflict. Article 96, paragraph 3, now contains an express statement that the rights and duties of the Protocol apply to all the parties to the conflict. The preamble also states expressly that combatants cannot be treated in a

discriminatory fashion based on the causes for which they are fighting. Consequently, the most essential change that was deemed imperative by the United States Delegation was made. The other necessary conditions were also made.

4. COMMENTS

A. General.

Paragraph 4 of this article was, until the fourth session of the Conference, paragraph 2 of Article 1.

B. General background

The first three paragraphs of this article were not controversial. Paragraph 4 was the most controversial article in the Protocols. The negotiations on this article occupied the major part of the first session of the conference. The negotiation took place in atmosphere of confrontation, and all of the major parties claimed that their opponents were politicizing the humanitarian law of the Geneva Conventions and the Protocol by virtue of their stance on this paragraph. The main negotiations on Article 1, which occurred in March of 1974, resulted in a clear impasse and an apparently irreconcilable confrontation between the Third World, which was allied with the East Bloc and most of Latin America, versus the West. The differences were widely apart and the majority finally closed the debate and put the issue to a vote. The article was adopted at the 14th meeting of Committee I by a vote of 70 in favor, 21 against, and 13 abstentions. The voting list by roll call is an inclosure. The United States and its NATO Allies, with the exceptions of Norway and Turkey, voted against this provision. A resolution was later adopted by the Conference welcoming the adoption of this article by the committee.

The adoption of the article in such a divisive fashion in Committee I resulted in a careful negotiation during the subsequent sessions by key delegations of different regional groups. The purpose of these talks was to determine how the Protocol could be made acceptable to those opposing Article I, paragraph 4. This proceeded on the realistic assumption that Article 1 would remain in the Protocol. It was clear to those who favored the provision that some of the major military powers, including the United States, would refuse to accept the Protocol if the key dangers they envisaged in this provision were

not remedied. The basic position of the Western countries was that the other provisions had to be meaningful and reasonable, and they had to take into account Article 1 in such a manner that the obligations on the parties were non-discriminatory. As a result of the careful and successful work of this group, certain new articles were adopted, in particular Article 96 and the preamble. The vote on Article 1 in the plenary of the Conference at the final session was markedly different as a result of the changes made due to the Western opposition to Article 1's implications. The vote was 87 favor, 1 against, and 11 abstentions. (See inclosures.) The United States abstained in the final vote. However, it had requested during the plenary that the country requesting a vote on this provision, Israel, withdraw its request so that the provision could be adopted by consensus. It thus indicated clearly to the majority that it was not prepared to try to defeat this provision. When the vote was insisted upon, the United States abstained.

c. Paragraph by Paragraph Analysis of Article I

1. Paragraph 1. This provision is based on common Article 1 of the 1949 Geneva Conventions, and restates the general obligation to perform the obligations established in the Protocol and to exert influence to ensure that others do so also.

2. Paragraph 2. This paragraph is a modern statement of the De Martens Clause that is found in the Hague Convention No. IV of 1907. It was considered to be important enough to insert into the text of the law as a provision of the Protocol, rather than leave it to the preamble. However, the draft preamble had such language inserted in it even after Article I was adopted. It is noted that this provision, like the 1907 one, speaks of individuals under the law rather than under the principles of humanity or dictates of public conscience in themselves. It was an important United States objective to ensure that this remained so.

3. Paragraph 3. This provision indicates clearly that the Protocol is a "supplement" to the Conventions. It does not replace the Conventions, nor is it an additional separate Convention. The provisions are to be construed in accordance with the law in the preceding treaties.

4. Paragraph 4.

a. General. This paragraph is one of the most important ones in the Protocol. The fundamental differences at the Conference between Western Countries and Third World Countries was never more evident than in this paragraph. The paragraph had its origin in amendments by Third World Countries to the very short Article 1 that was proposed by the I.C.R.C. which would have stated that the Protocols supplemented the 1949 Geneva Conventions. Three proposals were submitted initially with respect to wars of national liberation. The first proposal was one by Algeria, Norway, Australia, and Egypt and ten other states (CDDH/I/11). There was a Soviet bloc proposal (CDDH/I/5) and a proposal by Rumania (CDDH/I/13). Each of these would have had the effect of making the law governing international conflicts applicable to certain wars fought for self-determination. These three proposals were subsequently withdrawn in favor of a somewhat amplified proposal that was sponsored by fifty-one states (CDDH/I/41). This was incorporated with another amendment to Article I proposed initially by Argentina, Honduras, Mexico, Panama, and Peru. This amendment of Article 1 received wide-spread support from the States of the Third World and the Soviet Bloc, and most of the Latin American countries. The argument forcefully made by these states is presented in the subsequent subparagraphs.

b. Position of the Western Countries. The position of the United States and most of its European allies, with the exception of Norway and Turkey,¹ was that the proposal re-introduced the just war concept into the humanitarian law of war. The introduction of such a subjective criteria, which in itself depended on the justice of the cause for which a war was being fought, introduced a dangerous and discriminatory element into what has been a neutral and evenhanded body of law. This was deemed likely to lead to an unequal treatment of the victims of a conflict depending on whether the cause for which the key fought was recognized as a "just" one. This objection was the key one posed by the West. Other arguments pointed out

1. It is noted that among NATO, Belgium, Denmark, Greece, Luxembourg, the Netherlands, Norway, Portugal, and Turkey voted in favor of Article I at the final session. The U.K., the F.R.G., Canada, France, Italy, and the U.S. abstained.

its inherent structural difficulties. It was argued for example, that national liberation movements lack the material means of giving full effect to the law of war. In other words, they could not possibly assume all of the obligations stated in the 1949 Geneva Conventions, some of which pertain to the treatment by a State of its own nationals and some provisions which deal with courts and other tribunals. It was argued that wars of national liberation are only a temporary phenomenon and that the entire structure of the law should not be distorted in order to accommodate them. It was stated that the adoption of this concept would call for a complete revision of the United Nations Charter since it purported to justify certain wars as legal ones. It was also pointed out that the definition of "peoples" is unclear and that it might require a State to treat an ethnic minority as an international entity protected by the international law of war. These arguments rested largely on the basis that under existing international law, wars of national liberation were not international wars. They fell into the category of internal or civil wars.

c. Position of the Third World Countries. To comprehend the background of this provision, it is necessary to understand the view point of the Third World and some of the reasons why they did not accept the arguments put forward by the United States and other countries. This is especially important since the provision is now in the Protocols and will become part of treaty law in the near future. It is also important in that the recommendation for United States action with respect to Article 1 will be based largely on the interpretation that should be given to the provision. This in turn depends on what those who wanted Article 1 stated it meant and the negotiating record of the provision.

Paragraph 4 had its origin in the Third World's discontent with the scope of the 1949 Geneva Conventions and the meaning of "international" in Article 2 common to those Conventions. These countries generally recognized that wars of national liberation were not a world wide phenomenon in 1949, and that the traditional law of war established two kinds of categories, international and internal wars. Wars of national liberation, the meaning of which is discussed infra, came under the category of civil wars in the traditional law. The rights that accrue to combatants are markedly lesser in internal wars. To take one important right only as an example, there is no

immunity from criminal prosecution for acts of war in the case of the civil wars. People fighting against the established government can be executed for doing so whereas those who meet the established criteria of combatants fighting international wars cannot be punished unless they have committed war crimes. The Third World argued that the Diplomatic Conference on Humanitarian Law had a dual purpose. It was to reaffirm and to develop international humanitarian law. It was their view that the development of the law required that wars of national liberation be made "international" rather than remain mere internal ones for purposes of the law of war.

This theory rested on the assumption that wars of national liberation are "international" within the meaning of general international law. The main thread or motif in their arguments was that these wars, in their simplified form, are conflicts by foreign governments against the local population of a foreign country. They are anti-colonial wars and are deemed to not be truly local conflicts. They were deemed to be wars that were generally fought between Europeans and Africans or Asians. The involvement of the foreign nation which colonized the territory or had in some other way established a presence in a foreign country was deemed to inject an international element into the conflict which removed the situation from the category of purely internal wars. An internal war, in their view, involved only those situations in which the same population was fighting another part of the same population (for example, the American Civil War, Russians fighting Russians, Nigerians fighting other Nigerians). It was their claim that the Protocol had to be conformed with reality. This claim in itself rested on factors such as the interpretations given by the United Nations on colonialism. It was their view that under the United Nations Charter, colonies or non-self-governing territories are given a separate status and are recognized not to be identical or equal parts of the metropolitan country administering them. Secondly, the claim rested on the view that most nations, including the United States, urged decolonialization, and that colonialism was deemed to be improper in the modern world. The Third World argued that a series of United Nations resolutions, such as those granting independence to colonial people, constituted the progressive march of history and law. A corollary of this was the view that under the United Nations Charter, peoples had a "right to self-determination," which is mentioned in Article 1 of the United Nations Charter and the

Declaration on Friendly Relations. In their view, the phrase self-determination in the United Nations Charter meant freedom to govern their own country. It was their position that foreign colonialists prevented the exercise of this right and they should therefore be entitled to struggle against them by armed conflict. In their perception, the Declaration on Friendly Relations permitted them to fight such wars. Their argument thus rested on the view that they had a right to independence against foreign rule and therefore should enjoy the same rights which they would have as a State but for the fact that foreign troops were present in their country.

One of the most articulate spokesman for this view argued that the meaning given to "international" armed conflicts in the existing Geneva Conventions was discriminatory, and embodied in itself a "just war" theory. In this view, only wars between European powers or other states qualified as international. Thus, only those fighting in these wars received the benefits of the law of war. Individuals captured by their enemy who qualify as legitimate combatants are generally accorded prisoner of war status, and consequently, enjoy the key immunity from prosecution for legitimate acts of war. If the war is an internal one, there is only a requirement of humane treatment of the captured rebels. In the view of the Third World, such treatment was gratuitous and not sufficient. Those fighting in wars of national liberation should not be punishable for common crimes. The Western countries were perceived as trying to preserve a system of law that benefited them but which minimized the rights of their opponents. This, in the view of the Third World, placed the movements most favored by these countries at a disadvantage and in a lesser tactical position. Their perception was that justice demanded that the humanitarian rules of warfare be expanded and that it give recognition to the key concerns of the rest of the world.

In addition to the line of thinking that was invoked in response to Western concerns about a new "just war" theory, certain key delegations behind the amendment to Article 1 addressed directly the United States complaint about the potential unequal treatment of combatants within a given war. In addition to the arguments noted in the preceding paragraphs, certain delegations, including Egypt, Norway, and Yugoslavia, stated explicitly that the adoption of Article 1 would not imply a discriminatory treatment of combatants of the party that was not the liberation

group. For example, Norway, which was a leading sponsor of the amendment, stated that such a proposal "...did not contemplate introducing any form of discrimination between the parties." CDDH/I/SR. 4, at 32.² The delegate of Egypt, Mr. Abi-Saab, pointed out that "other delegations had criticized the proposal on the ground it confuses the jus ad bellum with the jus in bello. That would be true if it sought to give preferential treatment to one of the parties to a conflict."³ The Yugoslavian delegate, Mr. Obradovic, stated that "he did not agree that the insertion of a text of that kind [paragraph 4] in Protocol I would lead to the introduction of a concept of discrimination between the parties engaged in such conflicts and he fully supported that views expressed...by the Norwegian representative on the subject." CDDH/I/SR.6, at 48. At a later meeting, the Norwegian ambassador, Mr. Ofstad, pointed out that the adoption of paragraph 4 "did not amount to acceptance of the so-called "just war" concept. It was intended to assure equal protection of all victims on both sides in wars of national liberation." CDDH/I/SR.14, at 106. The delegate of Nigeria, Ambassador Clark, stated that the paragraph "did not speak of "just" or "unjust" wars" and appeared to suggest that it was an objective criteria and was not based on the cause on for which a war is being fought. CDDH/I/SR.14, at 110. It is important to emphasize, however, that several other delegations referred consistently to wars of national liberation as just and legal wars. The specific statements about equality of treatment were not challenged during the debates on Article 1. It is clear from the records of the Conference as a whole that some delegations wanted the Protocols to contain the concept that discriminatory

2. In addition, the delegate from Norway, Mr. Longva, stated that "the problem involved might be compared with that of upholding the equality between the occupiers and the occupied, a problem which had never prevented military occupation from being regarded as international conflicts in the sense of the Geneva Conventions." Id., CDDH/I/SR.4, at 32.

3. CDDH/I/SR.5, at 34. The Egyptian delegate also pointed out that "yet it was the existing system that gave preferential treatment to one of the parties, by refusing protection to the national liberation movement; on the contrary, according to the amendment..., humane treatment should be afforded equally to both parties."

treatment could be applied, especially the Vietnamese. However, in the negotiations on Article 1, this concept did not find a place in the negotiating record and paragraph 1 should not be interpreted in that light.

The Third World countries made several responses to the western position that wars of national liberation were ad hoc historical phenomena and that consequently such special situations should not be inserted into a Protocol that was to deal with situations for many years. They did not accept the complaint that the law should not be changed to accommodate peculiar historical situations of political significance to certain countries and which were generally confined to limited geographical areas. The countries favoring paragraph 4 responded that the law of war, as it is currently codified, reflects in its scope of applicability those special circumstances that have been of peculiar importance only to Western countries. For example, it was their position that after the 1874 Franco-Prussian war, franc-tireurs and levee en masse were given special recognition in the 1899 Hague Convention. Yet this was only deemed a historical phenomena. It was deemed necessary to rectify the claimed injustice caused in the 1874 war against those resisting the invasion of their country. Likewise, it was their position that organized resistance movements of World War II, such as the Yugoslavian and Italian partisans, could not obtain prisoner of war status because they did not meet the requirements of the 1907 Hague and the 1929 Geneva Conventions. Consequently, the 1949 Diplomatic Conference changed the law so that this peculiar historical situation could be also be accomodated. They claimed that this was done even though such groups could not possibly apply all of the law codified in those treaties. (However, the fact that the State to which these movements belonged could apply all of the law was not recognized.) In their view, the Western countries had no reservations to accommodating the humanitarian law treaties to peculiar situations that affected European wars. The attempt to defeat the expansion of this preferential treatment to those fighting wars of national liberation was deemed to reflect a lack of sympathy and compassion. This was reinforced by claims that the West realized that the concept of levee en masse was no longer a necessary one because of different historical circumstances. Consequently, it was their view that just as the law was changed in past years to accommodate political concerns of victorious and major military powers, so should the law be changed now to accommodate the strong desires of the Third World.

The Western concern that those fighting wars of national liberation could not implement all of the obligations of the Conventions was responded to with several arguments. The most important argument was that, as stated in the preceding paragraph, not all of the individuals entitled to protection under the 1949 Geneva Convention could in fact implement all of the obligations of the law. Nevertheless, this was not deemed sufficient to block these groups from achieving prisoner of war status in 1899, 1907, and 1949. However, their arguments centered on their belief that most of the obligations could be met in those wars of national liberation in which the leadership group assumed the obligations of the law. It was a question of good faith application of the law. These claims were always made confidently and coupled with the claim that the Western powers were not respecting the law and had committed massive violations. If the Western powers violated the law, they argued, they should not be entitled to claim that a potential violation by group fighting wars of national liberation should prevent such a group from enjoying the law's protection if they were willing to apply it.

In summary, the Third World position was that the existing legal system was discriminatory. The claimed obstinate attitude of key Western countries, especially the United States, United Kingdom, and Belgium, was deemed to be based on an unwillingness to grant people allegedly fighting for their independence the right to enjoy the special privileges enjoyed by Europeans during their wars. From their perspective, the only thing that these countries were willing to grant to those allegedly fighting for their independence was the minimum treatment accorded to individuals in civil wars. In their view, this disposition did not take into account modern reality, modern law, and the fact that the majority of nations clearly thought that these wars should be deemed to be international ones.

d. Definition of Wars of National Liberation

The language used in the fourth paragraph was intended to refer to wars of national liberation, and this view was never disputed in the Conference even though the terms are not used in the treaty. As pointed out by one delegation, the term "wars of national liberation" had been deliberately avoided and had been replaced by a reference to the right of self-determination. The claimed

reason was that the latter was generally an accepted legal concept. CDDH/I/SR.2, at 8. The words that were later inserted into the provision about colonial and alien occupation and racist regimes were justified on the basis that various resolutions of the United Nations used these phrases. In the view of those favoring the language, it was part of general international law. The phrases are used, for example, in the Declaration on Friendly Relations, which was adopted by consensus in the United Nations General Assembly (a consensus not opposed by the United States) and was used in the United Nations resolution on the status of combatants in wars of national liberation. This argument was not accepted by most Western countries.

A key objection of the United States to paragraph 4 was that the phrase was subjective, and thus could not be interpreted in an objective manner. An equally or more serious objection was that the language was of a political nature, and that it did not therefore belong in a humanitarian treaty. It was the view of the Western countries that while the concept may be of value in a political forum such as the United Nations, it had no place in humanitarian law. This interpretation was definitely in the minority.

Given the fact that the provision is in the Protocols, it is necessary to determine how it should be interpreted. The provision could, for example, be interpreted in a broad manner so that it encompasses every war fought for self-determination. In other words, the words "alien, racial, and colonial" are deemed to be merely illustrative of wars fought for the of self-determination. The other possibility is that these examples reflect the only kinds of wars falling within the ambit of the provision. Paragraph 4 would thus be interpreted narrowly. On the basis of the long negotiating record on Article 1, it appears that the provision must be interpreted narrowly.

There are several reasons for this. The original amendments proposed to the short, one paragraph Article 1 proposed by the I.C.R.C. used only the phrase "self-determination" as a reference point to define what wars would be included. The words "alien, colonial, and racial" were not used. Several countries objected to such a wide wording of the right of self-determination, and several of these Third World countries indicated that they could only support the provision if it was indeed limited to

specific wars of national liberation. This included countries such as India, Brazil, and Indonesia. Once the amendments were made, other countries which did not support the provision, such as Greece and the Federal Republic of Germany, also pointed out that the provision was indeed too narrow. The negotiating record on this point is not ambiguous in any manner. All wars for self-determination are not included. Rather, it appears that those favoring the provision interpret the word self-determination in a fairly narrow manner.

Although such a subjective phrase cannot be adequately defined, several supporters of the language tried to do during the debates. Perhaps the best example of what is meant by a war of national liberation within the meaning of paragraph 4 was given by Ambassador Clark of Nigeria at the first meeting that discussed the substance of paragraph 4. Ambassador Clark stated that

[h]e understood the right of self-determination not as encouraging secessionist and devisive subversion in multi-ethnic nations, but as applying to a struggle against colonial and alien domination, foreign occupation and racist regimes.

CDDH/I/SR.2, at 13 (emphasis added). Such a statement was reinforced several times throughout negotiations. It indicated a strong preference for excluding the type of civil strife by secessionist groups which is deemed to be a particular and dangerous threat to many Third World nations. Thus, the Egyptian delegate pointed out that "delegations which were afraid that the principle would apply to all States where there was a variety of races, languages or religions need not be alarmed; according to the Declaration [of Friendly Relations], it applied only in cases where such grounds were used as a basis for systematic discrimination." CDDH/I/SR.5, at 34. The representative of Guinea-Bissau stated that in such wars, "...the adversaries were different people of different races from different geographical backgrounds." CDDH/I/SR.5, at 38. The delegate of the United Republic of Cameroon, Mr. Mbaya, stated that it was unacceptable to adopt a description of national liberation movements as a collection of individuals in rebellion against their own government. In his view, such a description would apply to a group of Portuguese in rebellion against the Portuguese government, but could not possibly apply to

movements in Africa seeking to end foreign domination. CDDH/I/SR.14, at 110. He continued by stating that "national liberation wars were not civil wars; the inhabitants of southern Africa were not Portuguese. It was clear, therefore that the victims of those wars must receive the protection of Draft Protocol I." Perhaps the longest description of what a war of national liberation is, although certainly not a precise one, was given by the delegate of the Pan-Africanist congress who stated that

The Africans of Mozambique, Angola, and Guinea-Bissau were nations, and totally different nations from the Portuguese nation, not part of it. The same applied to the inhabitants of all the islands which surrounded the African continent and were under foreign domination, to the African inhabitants of south Africa, Rhodesia, and Namibia and to the Palestinians. Separate and independent national existence of the peoples subject to foreign domination was recognized by the entire international community, except of course by the alien groups which exercise authority over them.

CDDH/I/SR.6, at 46. In other words, it appears the almost unanimous view of those arguing for this revision that the wars described were those fought against "...the colonial armies...from Europe-they were not local forces. The struggle waged by colonized peoples against the invaders therefore could not be included among the situations envisaged in draft Protocol II." CDDH/I/SR.5, at 37. They were deemed to be, as Mexico put it, "anti-colonial wars." These wars all had a distinct foreign element in them.

The phrase "alien occupation" deserves special attention. In the initial drafts of this provision and, indeed, in the various United Nations documents that were used to support this provision, the phrase generally used was "foreign and alien domination". One of the delegates had proposed that the phrase alien occupation be used. Ireland, which abstained in both in the Committee I vote and at the final session, thought that this language was ambiguous. It pointed out to the assembled delegates that if one was to use a phrase such as that, his country would indeed be sympathetic because "Ireland had itself been

the victim of colonial and quasi-colonial domination for over 700 years." However, he did not lend his support to the provision because it was still too vague. CDDH/I/SR.4, at 26. One delegation pointed out that there was a distinct problem in having the phrase occupation in this provision because occupations were generally included in the concept of international armed conflicts as defined in Article 2 common to the 1949 Geneva Conventions. The change that was made in the Protocols from the original language of "foreign and alien domination" to "colonial domination and alien occupation" seems to have been a drafting one rather than a substantive one. Changing the language to the form currently made was proposed by India. CDDH/I/SR.13, at 99. The precise reasons were not given. However, in a previous statement, the delegation of Argentina stated that the phrase that was eventually used was selected as a compromise between the texts of the different proposals for paragraph 4. It is thus legitimate to interpret the provision as a compromise between different languages stating evidently the same thing. CDDH/I/SR.13, at 99. At a preceding meeting, the delegate of Morocco pointed out that "a distinction should be drawn between "occupation" and "alien domination" resulting from a colonial regime. And that his delegation would not object if there was a "specific mention of the armed struggle of peoples under colonial and alien domination and racial regimes." CDDH/I/SR.3, at 19.

It seems that the majority of speakers gave the word occupation a meaning roughly equivalent to that used in the United Nations resolution on the claimed illegal occupation of Mozambique by Portugal that was in effect in 1974. General Assembly Resolution 3061, Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic, 28 U.N. GAOR Supp. 30, at 2, U.N. Doc.A 9030 (1974). Under this resolution, alien occupation is deemed essentially equivalent to colonial occupation. It does not encompass traditional military occupation as that is understood in Article 42 of the Hague Regulations of 1907 or in the Fourth Geneva Convention. One will have to interpret the phrase in the same manner it is used in the Declaration on Friendly Relations, upon which this right is purportedly based. Under the declaration.

The territory, colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.

When read in conjunction with this paragraph, the word occupation should be interpreted to mean strictly colonial occupation. Territories in which individuals, regardless of their background, have equal rights would not fall into this particular division. Consequently, territories such as Puerto Rico, where an attempt was made to determine the will of the people, would not fall under this provision. People there have exercised, according to the United States Government, their right of self-determination. In addition, a territory such as the United States would not be considered to be an alien occupation versus the Indians because, inter alia, the conditions specified in the declaration of Friendly Relations are met. A situation such as the South African presence in Namibia would perhaps be the best example of the kind of occupation that is involved. It appears, in consequence, that the phrase is largely unnecessary in that the authors of it intended it to mean essentially what foreign colonialism means, but with a particular emphasis on the fact they do not acquire title by a long period of presence in a foreign territory.

To summarize the discussion above, the majority of countries that spoke in favor of Article 1, paragraph 4, gave a distinctly narrow interpretation of what wars of national liberation are. These countries were adamant in their view that not all wars fought for self-determination were covered. As stated by the representative of Romania, he could not accept a general reference to the right of self-determination alone because "existing United Nations practice in that field covered only one aspect of the right of peoples to self-determination." CDDH/I/SR.2, at 15. The delegate of Brazil gave what was perhaps a more complete picture of the concept being expressed.

Such struggles might be deemed to be internal when the governments in power control the entire territory and assume full responsibility for its international relations. On the other hand, as soon as the national liberation movement exercised effective control over part of the territory and was recognized by members of the international community, the conflict was international.... The Brazilian delegation could agree to the inclusion within the purview of Protocol I only of struggles to achieve self-determination carried by territories in the strict meaning of Chapter XI of the Charter of the United Nations-- in other words, territories that did not belong to the State controlling them.

CDDH/I/SR.4, at 31. The kinds of conflict that nations deemed covered by the general phrase wars of national liberation were those fought against the foreign element in Viet-Nam, Guinea-Bissau, Angola, Palestine, southern Africa, and Mozambique.

The argument that the phrase "wars of national liberation" should be interpreted narrowly is perhaps the only legitimate one given the fact there is a Protocol II. If all wars for self-determination were to be included within the category of Protocol I, Protocol II would not make any sense. Indeed, Norway seemed to suggest this in its insistence that there should be only one Protocol, and that the law of wars should apply to all kinds of war fought when there is a sufficient degree of violence.

The narrow interpretation suggested above appears to be one that is in the United States interest. The United States has built a careful negotiating record on many provisions in the Protocol. It has the right to interpret them in the light of the meaning given to them by the negotiators and which was clearly placed into the record. Consequently, a deviation from the normal method of treaty interpretation would not only be contrary to the rules of treaty interpretation, but would weaken the United States argument that other provisions in the Protocol would have to be interpreted in the light of their negotiating record. In other words, in order to ensure the interpretation given to other provisions is consistent with what the negotiators intended, the United States should insist that Article 1 be interpreted in the light of this negotiating record.

In the United States position paper for the final session, the United States delegation had the authority to interpret the provision in a broad manner. Part of the reason for this was that the conjunctive is used between the words "alien, racist, colonial" rather than the disjunctive, which was used in an original version of the provision. However, the change of the words into the conjunctive does not mean that every war has to be against all three of these particular key words. It was in the nature of a drafting change. Thus, although the situation in southern Africa may not be a "colonial" one, it would be considered to be a racist one. The situation of foreign domination, which was intended to mean Portugal, which no longer has a presence in Africa of the kind it had at the first session at the conference, would apply regardless of whether or not there was also a racist regime. It is clear, however, that some nations believe that those they are fighting meet all three criteria. The Palestine Liberation Organization, for example, stated that Israel fell within all three categories.

It is clear that the concept of "wars of self-determination" is a subjective one, and will not lend itself to clear decisions on whether a conflict is or is not covered by this phrase. This problem is closely related to that of recognition which is discussed in the following paragraph.

e. Recognition

It is likely that many other countries, especially the Third World, will interpret the provision in a narrow

manner. It was the United States expectation that if a broad interpretation were given to the Article, some of these nations would be less enthusiastic about it because it would possibly make Protocol I applicable to their own country. It appears that many of these countries now take the view that in order to be a real war of national liberation, there must be recognition by certain other countries in the world. This view was suggested at the first session of the conference. Turkey's delegate, who supported the provision on wars of national liberation, stated that "his delegation had proposed the objective criterion of recognition of the national liberation movements by the regional intergovernmental organizations concerned. There was no other way of avoiding wrong interpretations of an untoward nature which would constitute interference in the internal affairs of States." CDDH/I/SR.5, at 39. Brazil also suggested this at the first session when it said that a "national liberation movement exercised effect control over part of the territory and was recognized by the international community, and [therefore] the conflict was international." CDDH/I/SR.4, at 31. Indeed, it appears that many of the countries thought that only such groups had any status. This is based in part on the fact that for purposes of the United Nations, recognition of a national liberation movement by the appropriate intergovernmental regional organization is deemed necessary. Only those national liberation movements recognized by such groups were invited to the Diplomatic Conference under the Rules of Procedure (Rule 58). Indeed, in informal meetings, many delegates of the Third World expressed surprise that anyone could suggest that those groups not recognized by the appropriate regional group were covered by Protocol I.

During the final session of the Conference, it became very evident that many of these Third World countries were very concerned about the possible application of Protocol I to internal rebellions in their own countries that were based on the claim that the conflicts were one for self-determination. Thus, when speaking on Article 96, paragraph 3, which deals with unilateral declarations by national liberation movements that they will undertake to apply the Protocol, several delegations stated expressly that recognition was necessary. For example, the delegate of Mauritania stated that only "genuine liberation movements" had status, and that in the light of Rule 58 of the Rules of Procedure, Article 96 and Article 1 "should only apply to the authorities representing genuine

liberation movements recognized by the regional intergovernmental organizations concerned." CDDH/I/SR.67, at 14. (Emphasis added) The delegate of Indonesia stated that it applied only to the groups "which were recognized by their regional grouping." CDDH/I/SR.68, at 3. The delegate of Turkey repeated his stance of the first session to the effect that "his country had traditionally supported the action of national liberation movements recognized by regional intergovernmental organizations. His delegation had accordingly voted in favor of paragraph 3..." CDDH/I/SR.68, at 5. The delegate from Oman stated that he fully supported the views of the delegate of Mauritania, and, in particular, his statement that the provisions [on wars on national liberation], were applicable to liberation movements which had been recognized by international and regional inter-governmental organizations." CDDH/I/SR.68 at 7. The delegate of Zaire stated that it supported "...authentic liberation movements. The rights granted under that paragraph, however, should be enjoyed by liberation movements recognized by regional and international organizations and should not be extended indiscriminately to subversive movements." CDDH/I/SR.68, at 8.

The vote on Article 1 in the final conference plenary was not marked by many such statements. In the vote on Article 1, the Government of Turkey repeated its position and stated that "in its view, the Article applied to armed conflicts recognized by regional bodies, such as the League of Arab States or the Organization of African Unity, which were widely accepted." CDDH/SR.36, at 23. The Government of Indonesia stated that it voted in favor of Article 1 "with the understanding that the liberation movements referred to in paragraph 4 of Article 1 are limited only to those liberation movements which have been recognized by the respective regional inter-governmental organizations concerned, such as the OAU and the League of Arab States. By making our vote conditional to the factor of recognition by these regional inter-governmental organizations, we endeavor to insert an element of objectiveness in evaluating whether a movement can be regarded as a liberation movement or not." CDDH/SR.36, Annex at 4.

These numerous statements suggest that the provision will be construed narrowly by several Third World Governments. It is not unlikely that some countries might make formal understandings that they interpret it in such

a manner. Whether or not such an interpretation that recognition is necessary is a good one is unclear, but it will perhaps mean, if applied, that countries on the American continent will have to recognize a national liberation movement in the Americas by way of the Organization of American States in order for a group to fall under Article 1. Thus, the utility of Article 1 in its practical implementation would be further reduced even more.

f. Meaning of Armed Conflict.

It is of paramount importance considering Article 1 to emphasize that it applies only to "armed conflicts." It does not apply whenever a group claims that it is fighting a war of national liberation. The provision could have clearly stated otherwise if States so desired. The atmosphere of confrontation in which the Article was negotiated and the fact that anyone with a proposal was able to insert the essential elements of his proposal into paragraph 4 suggests that States had a full opportunity of stating otherwise if they had wanted to. The words "armed conflict" import a certain intense degree of violence or at least a capability to engage in such violence. States have such a capability, and the Conventions and the Protocol apply when States are engaged in military operations against each other. It is noted in this connection that during the final debate on Article 1, the United Kingdom made a statement to this effect.

He [Mr. Freeland] wished to make a general point of interpretation which applied not only to the class of armed conflicts referred to in paragraph 4 but also to the traditional class of inter-State conflicts referred to in paragraph 1. In either case, for the Protocol to apply, there must be armed conflict. That term was defined neither in the Conventions of 1949 nor in Protocol I. His Government considers, however, that the term "armed conflict" in that context implied of itself a certain level of intensity of fighting which must be present before the Conventions or the Protocol could apply in any situation.

In Article 1 of Protocol II, dealing with internal armed conflicts, Committee

I had defined the level of intensity which must be reached before Protocol II could apply. That definition, which had been adopted by consensus, had been worked out carefully and after long debate. In his delegation's view, the armed conflict to which Protocol I could apply could not be of less intensity than those to which Protocol II would apply. His delegation would accordingly interpret the term "armed conflict" as used in Protocol I in that sense.

CDDH/SR.36, at 16. A similar statement was made by the Government of Australia, which pointed out that "Australia understands that the Protocol will apply in relation to armed conflicts which have a high level of intensity." CDDH/SR.36, Annex at 2. The oral statement of the United Kingdom and the written statement of Australia were not contested by any of the other delegations at the Conference. Riots, isolated acts of violence, or fighting by a group which does not control a sufficient amount of territory or which is not able to conduct sustained and concerted military operations, would not qualify as meeting the minimum degree of violence necessary for the conflict to be an "armed conflict" within the meaning of the Protocol II. An analogous standard can be deemed to be applicable to wars of national liberation under Protocol I.

This particular interpretation of the threshold needed for the Protocol to apply is important in one respect which was not mentioned in the course of discussions of Article 1. This is the issue of how the law of belligerency is related to the Geneva Conventions or the Protocol. It is noted in this connection that during the 1949 Diplomatic Conference, a resolution was passed by the conference to the effect that the adoption of the rules contained in the Geneva Conventions did not prejudice the law on the recognition of belligerency. This should be considered in the light of the fact that at least according to one view, if a state of insurgency eventually becomes a state of belligerency, and the belligerency is recognized by third nations, then the entire law of war applies to the particular conflict. This theory, which has been espoused by Lauterpacht and others, has not been accepted fully by the United States. However, it should be recognized that recognition of belligerency does not occur in the modern day as such. Under the traditional law,

however, a high threshold of violence was necessary in order for States to be permitted to recognize belligerency. As a practical matter, it is not yet certain whether Article 1, paragraph 4, would not in fact cover situations of violence that could in the past have been deemed to be classic belligerencies in which the entire law of war would apply if third states recognized them as such. In this connection, one theory that should not be discounted is that recognition by regional organizations, as suggested by some Third World countries in relation to Article 1, serves the same function as the recognition of belligerency did in earlier days. However, these matters were not definitively settled in the Conference and the interpretation to be given by the United States should be on a case-by-case basis.

g. Summary on Article 1.

Article 1, paragraphs 1, 2 and 3, are not troublesome. Paragraph 4, which has been offensive to most Western countries and the United States, contains a central difficulty. This difficulty, which was noted by the Government of Israel in its explanation of vote on Article 1, is that it has a built-in nonapplicability clause. No State will in effect concede that it is a racist, colonial, or alien regime in any war and thus will not apply the Protocol on that basis. Countries against which this provision was aimed, such as Rhodesia, South Africa, and Israel, are highly unlikely to become parties to this instrument, and even if they did, there is a high likelihood that they would enter reservations to all the troublesome provisions in the Protocol. Consequently, although paragraph 4 is a definite political victory for the Third World countries in terms of substance, it will not confer greater protection to those engaged in such conflicts. From the standpoint of the Article's main utility, it will provide a political avenue for Third World countries to put pressure on the governments concerned to apply the law. On the other hand, a certain amount of political leverage will be available for their opponents. For example, acts directed against civilians in violation of the provisions of the Protocols by groups claiming to be national liberation movements would no longer be "common crimes" for which the persons committing them could be tried as common criminals. In many cases, they would be deemed to be "war crimes" or grave breaches under the Protocol. As such, they will be extraditable offenses. Consequently, this provision may serve as a further device

for the countries concerned to engage in political controversies over the actions of the other party.

Viewing the provisions of paragraph 4 in the light most favorable to the Third World countries, the provision has the advantage of placing equal rights and obligations on those engaged in wars of national liberation. The Palestine Liberation Organization delegate at the conference stated that it was strange that certain countries opposed the provision because the people who would benefit by making those fighting wars of national liberation bound by the obligations of the law would be their enemies and the civilian population. If one does not consider the problem of dissemination of the law and the necessity to educate the members of the armed forces in the legal obligations established, this position is tenable. However, the main value of Article 1, paragraph 4, is that in the eyes of the Third World, it constitutes the minimum degree of "justice" that was needed to update the law of war. As stated by one delegate, the Third World countries participating in the Conference were not willing to accept a codification of the law of war that only benefitted the Western powers. The adoption of Protocol I's new scope of applicability, in their view, conforms to reality and meets their minimum interest. 4

4. Perhaps the view of the Third World countries can be conveyed in a favorable manner by an example that is sometimes used to define what a war of national liberation is. Under this example, the American war of independence is deemed to be a war of national liberation. It is clear that Article 1 would only apply to contemporary conflicts. However, the American Revolution provided the Third World countries, in their literature, the quintessential reason why they should make international conflicts. If one assumes that the revolt of the American colonies that occurred in 1776 were to occur today, in the absence of Article 1, paragraph 4, the colonial state could have stated that the rebels were not entitled to prisoner of war status. At best, the combatants were entitled to the minimum humanitarian standards established in the law on internal wars. Due to this, captured American colonials would not be entitled to prisoner of war status, and could be tried for treason, common crimes such as murder for killing enemy soldiers and sabotage for destroying their property. Under the American Declaration of Independence, the colonials claimed that they were not any longer under British rule. This was based on

5. EFFECT ON U.S. COMMANDERS

This provision would obligate United States military commanders to apply the Geneva Conventions and the Protocols in any war fought against a recognized national liberation group. The decision on whether such a group would be entitled to this status would have to be made at the highest level of the United States Government. However, certain provisions of the 1949 Conventions are based on a fundamental premise that differs from a central premise in Article 1. This deals with nationality. Thus, Articles 4 and 118 of the Fourth Convention are based on the view that those entitled to protection are not nationals of the Detaining Power. However, those engaged in wars of liberation may have the same nationality as that conferred by the government they are fighting. In addition, each party might claim that the provisions dealing with belligerent occupation are not applicable to them since they are on their own territory, and are dealing with their own nationals. Consequently, U.S. commanders will be expected to apply the Conventions and the Protocols with practical reconciliation of the Conventions' terms and those of the Protocols (*i.e.*, they will have to apply the Conventions mutantis mutandis in the light of Article 1).

6. RECOMMENDED U.S. ACTION

A. No United States understanding or reservation

(Footnote Continued)

several theories, including the view that the colonials had inalienable rights to determine their own Government. In modern parlance, to use President Woodrow Wilson's phrase, they had a right to self-determination. However, under the existing regime of law that exists independent of the Protocol, the law of war does not grant to those seeking their claimed independence any substantial right to fight without the danger that once captured, they can be executed. The claim that was made by Americans in their revolutionary war that they should be treated honorably as prisoners of war, which was made at the time, would not be acceptable under the 1949 Geneva Conventions. It would under paragraph 4 of Article 1. In the Third World's perspective, the equity is compelling in favor of wars in national liberation, and the American Revolution was claimed to a perfect example of this.

is desirable or needed. A reservation would be deleterious to United States interests.

Given the significant United States opposition to this article in the past, the following reasons are given for this recommendation.

i. The course of action recommended is based largely on the fact that it was a stated, public United States view that Article 1, paragraph 4, was objectionable due primarily to the possibility of the unequal treatment within a given war of the combatants based on the causes for which they were fighting. In response to this concern, and in recognition of the fact that the West had to be accommodated on this view, the Conference adopted Article 96, which states explicitly that "The Conventions and this Protocol are equally binding upon all parties to the conflict." The phrase "parties to the conflict" is used in substantive provisions to refer to groups covered by Article 1. In addition, the preamble to the Protocol states explicitly that the provisions of the Geneva Conventions and the Protocol "...must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict." A reservation would thus be deemed by many countries to be a hypocritical act. It would be interpreted as confirming the suspicion of some Third World countries that the United States opposition was based on ulterior motives and that it was due to support for colonialism. It could also be seen as a decision to not apply minimum human rights in armed conflicts in which the United States might be engaged.

ii. Given the necessary conclusion that Article 1, paragraph 4, will, in accordance with its well-established negotiating history, have to be interpreted narrowly, this provision should not injure United States interests. Reasonable interpretations of this provision will exclude sporadic acts of violence or terrorist activities from the category of "armed conflicts." Even if one makes the questionable assumption that the United States would find itself involved in a conflict that could fit the description of paragraph 4, it is doubtful that it would not find itself applying the entire law of war. The major reason for this is that in the past, it has been the United States policy to apply the law of war applicable

in international conflicts to what were essentially civil conflicts. This was true during the American Civil War and it was true in Viet-Nam. (However, those provisions that were not legally applicable even assuming that the war was international, such as those on military occupation during Viet Nam, were not applied.) Doubtlessly, if the United States were to be engaged in a conflict that other countries thought was a war for national liberation, the political pressure exerted on the United States to apply the law would be extremely intense. Under those circumstances, the United States would find itself on the defensive and perhaps making the policy decision to apply the humanitarian provisions of the Protocol. It is noted in this connection that from the standpoint of the scope of applicability of paragraph 4, the narrow interpretation given by several states that recognition by a regional organization is necessary would reduce the effectiveness of paragraph 4 even more. Recognition of a conflict in the Americas would apparently require the recognition of the Organization of American States. It is thus unlikely that this provision would ever be legally applicable to the United States.

iii. Perhaps the most important reason why the United States should not consider a reservation is that a large number of countries, if not the majority, would consider it to be a reservation that is incompatible with the object and purpose of the treaty, and would thus result in rejections of the United States reservation. It is not unlikely that some States rejecting the U.S. reservation would consider it to be so fundamental that the United States would not be treated as a party to the treaty. Countries can be expected to reject treaty relations with the U.S. with respect to the Protocol under Articles 20 and 21 of the Vienna Convention on the Law of Treaties. It is noted in this connection that several countries indicated in the plenary of the full conference after the defeat of the proposed articles on reservations that Article 1 should not be deemed to be reservable because it was, from their perspective, the main object and purpose of the treaty to include wars of national liberation within the scope of the humanitarian law applicable to international armed conflicts.

iv. It should be noted that the main substantive objection to the provision is the politicized nature of the language used from the standpoint of Western countries. However, the contents are not, taken in context with the

remainder of the Protocol, of a nature to require a United States reservation. A reservation would serve only the function of expressing displeasure with the language used. It would not be worth the potentially serious consequences that would be likely to ensue. It is noted that the deletion of the politicized language was a possibility at the beginning of the Conference. The Egyptian, Norwegian, and Algerian draft of Article 1 would have only used the relatively neutral words of "self-determination." However, due to the very serious opposition of the United States and other countries, this particular paragraph did not receive sufficient support. Consequently, once it became clear to the Conference that no provision on this subject was acceptable to most countries in the West, the more objectionable language entered into the new paragraph. An attempt to rectify this situation at this particular time would not be appropriate.

B. No implementing legislation is needed for this provision.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 2, Definitions

For the purposes of this Protocol:

- (a) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) "rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;
- (c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;
- (d) "substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

2. REFERENCES

- a. Protocol I, Article 8, Terminology
- b. Protocol I, Article 5, Appointment of Protecting Powers and of their substitute

3. RELATION TO U.S. POSITION

Consistent. It was an important U.S. change to delete a proposed subparagraph (c) that would have defined "protected persons" and "protected objects". The reason for this was that the use of these terms was to be avoided in the Protocols as a whole. This was due to the ambiguity and confusion that their use has resulted in. This was accomplished. It was also a U.S. goal to have definitions of a "party to the conflict" and of authorities under Article 1 representing those engaged in wars of national liberation. This was not pursued at the conference for two reasons. First, the Conference Secretariat indicated beginning of the Fourth Session that the definitions Article was to be limited to the subject matters already proposed or already in the provision. The main reason for this appears to have been to avoid an unnecessary expenditure of time. Second, a proposal defining those entitled to protection or recognition under Article 1 could have led to a more negative outcome than that posed by Article 1. It was anticipated that the definition clause could be use to include or exclude certain groups that may or may not be entitled to the status of liberation groups, thus resulting in an additional political controversy. Most important, however, was the fact that the adoption of Article 96 (Committee Article 84, Paragraph 3) made it largely unnecessary to have an express definition of those engaged in wars of national liberation. The reason for this is that the proposed U.S. definition would have been based on the fact that only those groups that made declarations under a specified procedure would be entitled to the benefits of the Protocol. It should also be noted that it was deemed probable to the Western delegates consulted that a definition of wars of national liberation would have been opposed by a large number of States.

4. COMMENTS

This provision is a self-explanatory one. The definition of "substitute" provides merely a cross-reference to Article 5, which provides a full definition in paragraphs

4 and 7.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No United States action is necessary on this provision.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 3, Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

(a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol;

(b) The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

2. REFERENCES

- a. First Geneva Convention of 1949, Article 5.
- b. Third Geneva Convention of 1949, Article 5.
- c. Fourth Geneva Convention of 1949, Article 6.
- d. Protocol I, Article 85, Paragraph 4(b), Repression of breaches of this Protocol.

3. THE RELATION TO U.S. POSITION

Consistent. The additions proposed by the U.S. in CDDH/I/49 are covered in paragraph 2 of the adopted article. Paragraph 2 refers to persons who continue to benefit from relevant provisions of the Conventions and the Protocol (e.g., Articles 4 and 5, Geneva Civilians Conventions, and Article 5 of the Prisoners of War Convention and the Convention on the Wounded and Sick).

4. COMMENT

This provision specifies the time period during which the Protocol is applicable. Whether or not the Protocol is applicable is governed by Article 1 of the Protocol. The individuals who are protected beyond the clause of hostilities include generally civilians in occupied territory and prisoners of war who have not yet been finally repatriated or released. This provision reaffirms the existing concept that the law of war does not cease to be applicable on the basis that military activities have ended if a territory is occupied. It reaffirms the view that the law on occupation must be applied throughout the period of occupation, which generally means the time until a final agreement is reached on the occupied territories.

Paragraph 2 contains a cross-reference to those provisions noted above which explicitly extend protection to certain classes of persons beyond the general close of military operations. This article in effect amends the third paragraph of Article 6, GCC, by eliminating the reference to termination of the application of the GCC in occupied territory one year after the general close of military operations. Israel desired a cross-reference to Article 41 (referring to enemy hors de combat) which was not incorporated in the present article.

Paragraph 2 raises the issue of whether those individuals otherwise qualifying for PW status who fall into the hands of the adversary belligerent after the general close of hostilities are to receive PW status. The other possibility is that only

those individuals whose PW status had vested prior to that period have that status. After the unconditional surrenders of World War II, the Allies maintained that surrendered troops were not entitled to PW status. The pertinent language of the 1929 Geneva Prisoners of War Convention (those who were "...captured by the enemy") was changed at the 1949 Geneva Conference so that PW status would vest even if there had been a surrender. The phrase used in the GPW is "...those who have fallen" into the hands of the adversary. On the other hand, the 1949 GCC uses the phrase "...general close of military operations" when discussing the end of the application of certain provisions of that Convention. This latter phrase is similar to the one used in Article 3 of Protocol I. From a plain meaning interpretation of Article 3, taken in isolation from the rest of the Protocol, it could be concluded that those who fall into the hands of the adversary after the close of military hostilities are not to receive PW status. Article 42 of Protocol I, however, employs the phrase used in the GPW, i.e., "fallen into the hands of the adversary." Given the fact that the express intention of this language was to ensure that PW status would vest even after the close of military operations, a plain meaning interpretation of Article 42 would lead to the conclusion that PW status would vest for those individuals otherwise entitled to it even after the close of military operations. Under general international law, apparently contradictory provisions in a treaty are to be interpreted reasonably and in such a manner that they can be reconciled. Consequently, Article 3 of the Protocol should not be interpreted as a curtailment of the express language of Article 42. So long as the phrase "fallen into the hands of the adversary", with its well established meaning, remains in Article 42, Article 3 cannot reasonably be construed as depriving individuals who fall into the hands of an adversary after the general close of military operations of their PW status if they are otherwise entitled to that status.

5. EFFECT ON U.S. COMMANDERS

This provision will benefit U.S. commanders administering occupied territory for periods longer than one year by confirming their powers for the duration of the occupation.

6. RECOMMENDED U.S. ACTION

This provision does not require any statement of understanding or other action.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 4, Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

2. REFERENCES

- a. Geneva Conventions of 1949, common Article 3.
- b. Draft Protocol II, Committee Article 3.

3. RELATION TO U.S. POSITION

Consistent.

4. COMMENTS

This provision reflects the well accepted view that the application of the Conventions or the Protocol does not affect the legal status of the Parties to the conflict. This includes the status of resistance movements or other such groups. The provision is in essence designed to nullify what would otherwise be a lack of incentive to apply the law of war. If the application of humanitarian law standards were to be a serious political liability, such as implying recognition for those who are in revolt against the established government, countries would try to avoid the application of the law more adamantly.

Article 4 of Protocol I is based in essence on common Article 3 of the 1949 Conventions which deals with civil wars. Its inclusion in the Protocol reaffirms this concept both as to states fighting each other (e.g., if there is no diplomatic recognition between them as in the Arab-Israeli situation) and in the new case of wars of national liberation.

The second sentence of Article 4 represents a compromise with the Arab group. It desired an explicit reference to occupied territory in this provision. This sentence is consistent with existing international law, and is therefore not harmful. The primary reason why the Arab countries wanted this concept to be stated explicitly is that it has been largely only implicit in the existing codified law of war. It is found in those provisions on occupied territory which indicate that the occupant cannot change certain laws and that the occupant is a mere transitory government. It is also implicit in certain provisions of the 1949 Civilians Convention, such as Article 149. This provision prohibits the settling of occupied territories. Taken as a whole, such provisions have traditionally been interpreted as prohibiting the alteration of an occupied territory's status. Arab group desired the express reference primarily because the Israeli occupation authorities have annexed Jerusalem and have performed activities in the West Bank of the Jordan which they deem are aimed at changing the status of the occupied Arab territories. This is especially true in what the Israeli Government now refers to as Judea and Samaria, or the West Bank of the Jordan. Although the United States and almost all other nations have supported the Arab contention in the United Nations and other forums, the fact that the Israeli Government has made claims challenging the status of the occupied territories prompted the Arabs to achieve an explicit text on this issue. Israel did not oppose the provision.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No United States understanding or reservation is needed on this provision. No implementing legislation is required.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 5, Appointment of Protecting Powers and of their substitute.

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may inter alia ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists.

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict: every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

2. REFERENCES

a. First, Second, and Third Geneva Conventions of 1949 1949, common Articles 8-11.

b. Fourth Geneva Convention of 1949, Articles 9-11.

3. RELATION TO U.S. POSITION

Article 5 is generally consistent with the U.S. position. The obligation to accept the I.C.R.C. as a substitute is not as strong as was desired by the U.S.

a. Article 5 has been the focus of U.S. attempts to strengthen the system of Protecting Powers and substitutes. In particular, the U.S. and other western States have desired to provide for a mechanism which would ensure that in the event Protecting Powers could not be obtained, the Parties would at least agree in advance to accept the I.C.R.C. as a substitute.

b. There are two common articles in each of the 1949 Geneva Conventions which establish a mechanism for obtaining Protecting Powers or substitutes and which appear to be quite strong. (Common Articles 6 and 10 of the First, Second, and Third Conventions; Articles 9 and 11 of the Fourth Convention.)

Paragraph 3 of common Article 10 of the first three Conventions (Article 11 of the Fourth Convention) is, however, qualified by the phrase ". . . subject to the provisions of this article"

This language can be interpreted as making the obligation in paragraph 3 subject to the first paragraph of the common article, which provides that the "High Contracting Parties may at any time agree to entrust to an organization . . . the duties incumbent on the Protecting Powers" (Emphasis added.) Read in this fashion, the acceptance of a substitute (in the case of paragraph 3 of the common article) requires consensual agreement by the parties and is not, therefore, necessarily mandatory. This interpretation is consistent with the Soviet and Eastern bloc reservations to Article 10 of the first three Conventions and Article 11 of the Fourth Convention. These reservations specifically require the consent of the Parties before a neutral State or a humanitarian organization may undertake the functions performed by the Protecting Power.

c. The U.S. hoped that Article 5 would go beyond this strictly consent based approach by incorporating a provision whereby States would consent in advance to accept the I.C.R.C. as a substitute if no other Protecting Power or substitute could be agreed upon. Article 5 falls short of fully attaining this objective. It does, however, significantly strengthen the Protecting Power system. It makes it more difficult for Governments to refuse to have either a neutral government or

an impartial humanitarian organization (such as the I.C.R.C.) observe the treatment accorded to prisoners of war.

d. Article 5 clearly sets forth the duty of the Parties to secure the supervision and implementation of the Geneva Conventions and the new Protocol by the application of the system of Protecting Powers. Each Party to the Conflict is under the duty to designate and to accept Protecting Powers. The article also provides that the I.C.R.C., without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties with a view to the designation without delay of Protecting Parties. For that purpose, it may ask each Party to provide a list of at least five States which it would accept. Finally, if there is no Protecting Power, Article 5 provides that the Parties to the conflict must accept an offer made by the I.C.R.C. or other impartial humanitarian organization to act as a substitute for the Protecting Power. The functioning of the substitute is expressly made conditional upon the consent of the Parties to the conflict.

COMMENT.

a. Even before the beginning of the Conference, the U.S. urged that the Protecting Power system be improved. It argued that this system was the most critical element in ensuring that the law would be implemented. In June 1971, at the First Conference of Government Experts, the U.S. experts submitted a draft procedure for the appointment of Protecting Powers. In 1972, the U.S. experts submitted a formal amendment on this matter. These ideas proved to be the genesis of draft article 5 of Protocol I, as proposed by the I.C.R.C. The draft article contained a series of procedures to facilitate the appointment of Protecting Powers, including a mechanism for the submission of lists to the I.C.R.C. In its crucial paragraph, however, the I.C.R.C. draft presented two alternatives. One provided that the Parties to the conflict would have to accept, as a final, mandatory fallback, an offer made by the I.C.R.C. to act as a substitute for the Protecting Power. The other alternative provided that the I.C.R.C. could assume the functions of a substitute provided that the Parties to the conflict so agreed. The U.S. favored the former solution because, in its view, it was the only way to ensure that, if all else failed, the functions of a Protecting Power would in fact be performed.

b. There are lengthy discussions and negotiations concerning Article 5. Eastern bloc countries, France, and some other countries were insistent that there must be an agreement of

the Parties involved on any Protecting Power or substitute, and that it was both undesirable and unrealistic to impose a Protecting Power, or substitute without the consent of the States involved. On the other hand, the U.S. and a number of other Western European countries took the position that it was possible for States to agree, in becoming Parties to the new Protocol, that they would accept an impartial organization, such as the I.C.R.C., as a final, fallback substitute for the Protecting Power.

c. The final compromise on this point provides that the Parties to the conflict " . . . shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy . . . to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; all efforts shall be made by the Parties to facilitate the operation of a substitute in fulfilling its tasks " The second sentence of this paragraph, which requires the consent of the Parties for the "functioning" of the substitute, does not qualify the basic obligation to accept an offer made by an appropriate organization to act as a substitute. Rather, it recognizes the obvious fact that the Parties, especially the detaining Power, must give its consent in order for the substitute to operate effectively. The cooperation of the Parties in matters such as obtaining visas and transportation for representatives of the substitute will therefore be essential. While the U.S. Delegation would have preferred a stronger formulation, the compromise text was considered by the U.S. Delegation to be a significant strengthening of the Protecting Power system.

5. EFFECT ON U.S. COMMANDERS

No major direct effect. It is anticipated that this provision will be of major assistance to those in charge of prisoner of war compounds, and should enable them to perform their activities in a manner that will meet U.S. interests. If fully implemented, this provision should enable the better treatment of prisoners of war and other detained individuals during wars in which the Protocol will be applicable.

6. RECOMMENDED U.S. ACTION

No U.S. understanding or reservation is needed to this article. It is noted in this connection that the present article is the strongest formulation which could have been achieved at the Conference without resulting in widespread reservations to the article. It was an important U.S. goal to ensure that if there was an article on reservations in the Protocol, Article 5 should be non-reservable. Consequently, since this provision is not strictly mandatory under all circumstances due to the desire to accommodate States which would not accept a fully mandatory system, any reservations to this provision by other countries should be presumed to be invalid and be rejected.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED

Article 6, Qualified Persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the National Red Cross (Red Crescent, Red Lion and Sun) Societies to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.
2. The recruitment and training of such personnel are within domestic jurisdiction.
3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the list of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
4. The conditions governing the employment of such personnel outside the national territory shall in each case be the subject of special agreements between the Parties concerned.

2. REFERENCES

- a. Hague Convention Number IV, Article 1.
- b. Geneva Conventions of 1949, common Articles 47/48/127/144.
- c. Protocol I, Part V, Execution of the Conventions and of this Protocol, Articles 80-84.

3. RELATION TO U.S. POSITION.

Consistent.

4. COMMENT

This provision is essentially a best efforts clause to train individuals who are qualified to apply the

Protocol. It is based on similar provisions in the 1949 Geneva Conventions which also deal with the training of individuals. It is also related in part to Article 1 of Hague Convention Number IV, which deals with the instruction of military personnel. It is noted that the original version of this provision made the obligation now stated in paragraph 3 a mandatory one. As finally adopted, this obligation is no longer mandatory.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No United States reservation or understanding is needed in this provision. The training of qualified individuals in the military is already a part of the military's responsibilities. The training of individuals in the civilian society will perhaps be a responsibility that other agencies of the U.S. Government or the Red Cross may have to assume if the Protocol recommendation is to be fully implemented.

PROTOCOL I, PART I, GENERAL PROVISIONS

1. TEXT OF ARTICLE AS ADOPTED.

Article 7, Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the applications of the Conventions and of this Protocol.

2. REFERENCES

- a. Protocol I, Article 97, Amendment
- b. Article 98, Revision of Annex I

3. RELATION TO U.S. POSITION

Consistent.

4. COMMENT

This provision provides authority to the Swiss Government to convene a conference to consider problems relating to the application of the Protocol. It does not provide for the amendment of the Protocol, which is provided for in Article 97. However, it does provide a forum for considering problems relating to the implementation of the law, and will perhaps provide an avenue to convene a meeting under the Swiss Government rather than the United Nations if the United States were to find it advantageous to consider problems relating to the Protocols at an international meeting.

The reference "general problems" is intended to discourage meetings for the purpose of discussing particular political problems. The article does not permit the International Committee of the Red Cross to call such meetings on its own initiative.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No U.S. understanding or reservation is needed on this provision, nor is implementing legislation needed.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

ARTICLE 8. - Terminology

1. TEXT OF ADOPTED ARTICLE.

Article 8 - Terminology

For the purposes of this Protocol:

(a) "wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

(b) "shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

(c) "medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under sub-paragraph (a) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;
- (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
- (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2;

(d) "religious personnel" means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- (i) to the armed forces of a Party to the conflict;
- (ii) to medical units or medical transports of a Party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph (k) apply to them;

(e) "medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely: the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked; or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

(f) "medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

(g) "medical transports" means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

(h) "medical vehicles" means any medical transports by land;

(i) "medical ships and craft" means any medical transports by water;

(j) "medical aircraft" means any medical transports by air;

(k) "permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel", "temporary medical units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories;

(l) "distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;

(m) "distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

2. REFERENCES.

See Par. 2 in Review and Analysis of component subparagraphs on following pages.

3. RELATED TO U.S. POSITION.

Except as stated in the subsequent review and analysis of component subparagraphs, this Article conforms to the U.S. position.

4. COMMENT.

a. The title of the Article was changed from "Definitions" to "Terminology" at the recommendation of the Drafting Committee in order to avoid confusion with Article 2, which covers broader definitions.

b. At the recommendation of the Drafting Committee, Article 8 was consolidated with Article 21 (Definitions Relevant to Medical Transport). This action was consistent with the U.S. position which recognized this possibility and interposed no objection, unless the effort would interfere with higher priority work of the Drafting Committee.

c. In order to facilitate the translation of the Article into Russian, the Drafting Committee, at the urgent insistence of the Soviet Delegation,

numbered the subparagraphs instead of using lower case letters as was done in shorter enumerations. (Apparently the 1949 Diplomatic Conference had similar problems, cf III Convention, Art. 4; I Convention, Art. 16; Annex I, Art. 4). It is noted that the July 1977 text prepared by the Secretariat used lower case letters. As it is not known which system will be used in the final text, the ensuing text will be prepared with reference to both.

d. Detailed discussions as to the substantive provisions of the definitions appear as follows:

<u>Paragraph</u>		<u>Description</u>	<u>Page</u>
<u>Original Text</u>	<u>Secretariat Txt</u>		
(1)	(a)	Wounded and Sick	I-8-5
(2)	(b)	Shipwrecked	I-8-7
(3)	(c)	Medical Units)	I-8-9
(5)	(e)	Medical Personnel)	
(4)	(d)	Religious Personnel	I-8-12
(6)-(10)	(f)-(j)	Medical Transportation	I-8-14
(11)	(k)	Permanent-Temporary	I-8-16
(12)	(l)	Distinctive Emblem	I-8-18
(13)	(m)	Distinctive Signal	I-8-18

5. MILITARY IMPLICATIONS.

See subsequent review and analysis.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8. - Terminology; (a)-(1) -- "Wounded" and "Sick"

1. TEXT OF ADOPTED ARTICLE.

Article 8 - Terminology

For the purposes of this Protocol:

(a) "wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.

2. REFERENCES.

I Convention, Arts. 12, 13.

II Convention, Arts. 12, 13.

IV Convention, Art. 16.

Protocol I, Arts 9, 10, 13, 14, 16, 17, 22-31, 37, 41, 44, 85.

3. RELATION TO U.S. POSITION.

a. The definition of "wounded" and "sick" is consistent with the U.S. position. The use of the quotation marks in "wounded" and "sick" in the first sentence is intended to promote flexibility in referring to the "wounded and sick" or to "wounded, sick and _____" in other articles.

b. The original U.S. position was that only those who are in "serious need of medical assistance and care should be considered to be "wounded and sick," (CDDH/II/27). It was the U.S. view that the objective "serious" would screen out such trivial trauma as a simple cut, or such ailments as a simple headache. This proposal was met with substantial resistance from medical members of Committee II, who pointed out that a simple cut might lead to tetanus, and a headache might be a symptom of meningitis. Under circumstances, the U.S. and UK withdrew their proposal. In doing so,

the U.S. and UK representatives expressed the understanding that the word "need" excluded trivial and nondisabling ailments. (CDDH/II/SR 5, pp 36-38).

c. The second sentence is substantially consistent with the U.S. position. The drafting change is intended to clarify the reasons for assimilating the words "wounded" and "sick" to persons who are neither wounded or sick in the popular sense, but whose physical condition is nevertheless such that there is a high probability they they will be in need of immediate medical care and assistance. Accordingly, such persons are deemed to be entitled to the same protection and respect as those suffering from trauma or disease.

4. COMMENT.

The definition of wounded and sick, which broadens the classes of persons entitled to respect, protection, assistance and care under the conventions is particularly significant in relation to Article 10, Protection and Care, as well as those dealing with entitlement to conveyance in medical transports, Articles 21, 22, 23, 24, 25, 26, 28, 30 and 31.

5. MILITARY IMPLICATIONS.

See par. 4 under Article 10.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation required.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (b)-(2) - Shipwrecked

1. TEXT OF ADOPTED ARTICLE.

Article 8 - Terminology

For the purposes of this Protocol:

* * *

(b) "shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

2. REFERENCES.

II Convention, Arts. 12, 13, 18.

III Convention, Art. 16.

Pictet Commentary, II Convention, p. 89.

3. RELATION TO U.S. POSITION.

a. The adopted text is consistent with U.S. position. The variances are clarifying drafting changes.

b. As a drafting change, the U.S. proposed that the essentials of the definition include those "who are in peril at sea or other waters because they have fallen overboard or as a result of the destruction, loss or disablement of the vessel or aircraft in which they are traveling." It also proposed that "shipwrecked" shall be construed to include those who have been rescued until they are established ashore or acquire another status provided they continue to refrain from any act of hostility. The Committee concurred in the objectives of the U.S. proposal but as a matter of style preferred the phrase "as a result of misfortune affecting either them or the vessel or aircraft carrying them" as encompassing both those

who have fallen overboard and those whose peril results from destruction, disablement or loss of the vessel or aircraft. The variance as to the second sentence is not substantive.

4. COMMENT.

a. Under Article 12, Second Convention, the word "shipwrecked" was limited to members of the armed forces and the limited class of civilians mentioned in Article 13, Second Convention. The applicability of that article was also limited to the shipwrecked at sea. Article 8(b) broadens the definition by extending its applicability to (1) all persons, whether military or civilian, provided they are in peril and refrain from any act of hostility, and to (2) internal waters.

b. While considering articles dealing with medical transport (Arts 22-31) it was noted that the provisional definition of "shipwrecked" omitted those who had fallen overboard. It was also noted that a literal reading of the definition would exclude persons who had been taken aboard a rescue vessel because such persons are no longer in "peril at sea or other waters". (See report of working group which considered medical transport, CDDH/II/296). This might have raised a technical question as to whether it is lawful for such person to be conveyed aboard a medical transport if they are neither sick nor wounded. (See Article 8(f) and (g)). The changes made by Committee II are intended to preclude such narrow technical constructions. The second sentence makes it clear that shipwrecked persons taken aboard a medical ship or craft, or aboard a medical aircraft, will continue to be eligible for such transportation during the entire rescue process. Thereafter, their status will be either wounded, sick, PW, civilian or member of the armed forces of the side which rescued them.

c. Except to the extent that Article 8(b) is explicitly applicable in internal waters, there is no substantive change in the obligation to search for rescue and assist the shipwrecked as provided in the Second and Fourth Conventions. See Article 18, Second Convention, and Article 16, Fourth Convention. These articles were considered to remain applicable and were not restated in Protocol I, cf, Art 8, Protocol II.

5. MILITARY IMPLICATIONS.

This definition restates present U.S. understanding and is consistent with existing U.S. practice in a broad construction of the provisions of Second and Fourth Conventions.

6. RECOMMENDED U.S. ACTION. No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (c)-Medical Personnel and (e)-Medical Units,
Art. 8(3) and (5)

1. TEXT OF ADOPTED ARTICLES.

Article 8 - Terminology

For the purpose of this Protocol:

* * *

(c) "medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under subparagraph (e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term includes:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the first and Second Conventions, and those assigned to civil defence organizations;
- (ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;
- (iii) medical personnel of medical units or medical transports described in Article 9, paragraph 2.

* * *

(e) "medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.

2. REFERENCES.

- I Convention, Arts 19, 24-27, 33, 35.
- II Convention, Arts 22, 24-27, 37.
- IV Convention, Arts 18, 20.
- Protocol I, Arts 12, 13, 15, 18, 21-31, 61, 66.

3. RELATION TO U.S. POSITION.

With minor modifications of a nonsubstantive nature, Committee II adopted these definitions as proposed by the U.S. Delegation:

(a) The only variance in Art 8(e) is the insertion of the parenthetical remark that first-aid treatment is one of the medical purposes for which a medical unit may be organized.

(b) Minor clarifying changes were made with respect to Art 8(c).

COMMENT.

a. Under the First and Second Conventions, military medical units and their personnel have extensive and detailed protection. They may display the distinctive emblem at all times. Under the Fourth Convention, comparable protection is provided only to civilian hospitals and their personnel. But hospitals may display the distinctive emblem only in war time while their personnel have that privilege only in occupied territories and zones of military operations. One of the major purposes of Part II, Protocol I, is to extend comparable protection to other civilian medical units and their personnel. The definitions of "medical units" and "medical personnel" lays the foundation for the accomplishment of this purpose in Articles 12, 13, 14, 15, 18, 19 and 20. They are also relevant to entitlement to be conveyed in medical transport (Articles 21-31).

b. The medical purposes identified in Article 8(e) are based on those listed in Article 24, First Convention, and Article 20, Fourth Convention. The terms "diagnosis" and "first-aid treatment" were added at the insistence of several delegations. The U.S. Delegation believed that both diagnosis and first-aid treatment are included within the term "treatment" but did not object to the apparent redundancy if others believed that it would enhance clarity. It is also to be noted that the Committee's report makes it clear that the medical purposes mentioned in Article 8(c) and (e) include dental treatment and that the term "hospital and other similar units" includes convalescent or physical rehabilitation centers providing medical treatment. (CDDH/II/396, p. 5).

c. In Article 8 the word "operation" was omitted from the term "operation and administration of medical units" which had appeared in the provisional definition adopted at the 1974 session. The omission was based on the belief of Committee II that the operations of medical units consist of the functions inherent in "medical purposes" as used in Article 8(e) and that, therefore, the use of "operation" in relation to "medical units" is a redundancy. On the other hand the purpose of transports is to provide transportation and therefore the use of "operation or administration of medical transport" is necessary to include medical transport crews within the coverage of "medical personnel".

The committee also noted that its interpretation of the term "those persons assigned * * * exclusively * * * to the administration of medical units" includes persons who look after the administration of medical units and establishments, without being directly concerned in the treatment of the wounded and sick. This would include office staff, transport drivers, plumbers, cooks and other skilled workers. They form an integral part of the medical units and establishments which could not function properly without their work.

d. Article 8(c)(ii) is the functional equivalent of Article 26 of the First Convention and extends also to the medical personnel of national Red Cross Societies and other national voluntary aid societies serving the civilian population.

e. With respect to Article 8(e) the reference to "medical and pharmaceutical stores" pertains only to such property as belonging to or is used and stored by the units. There was no intention to provide special protection to such supplies in the possession of the pharmaceutical industry or in the process of distribution. It was recognized that the pharmaceutical industry is closely collocated with the chemical industry which may be a military objective, and that a country's normal distribution system was not such that medical supplies would have their own supply line and distribution. Accordingly, it would be impossible to protect all medical stores in a country.

5. MILITARY IMPLICATIONS.

Extension to new classes of civilian medical units and personnel of special protection and entitlement to display the distinctive emblem may impose a requirement for additional controls and measures to prevent abuse. On the other hand, organization of additional civilian medical units and personnel tends to relieve the requirement for medical personnel support to civilian wounded and sick inherent in Article 10.

6. RECOMMENDED U.S. ACTION. No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (d)-(4) - Religious Personnel

1. TEXT OF ADOPTED ARTICLE.

Article 8 - Terminology

For the purposes of this Protocol:

* * *

(d) "religious personnel" means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- (i) to the armed forces of a Party to the conflict;
- (ii) to medical units or medical transports of a Party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under subparagraph (k) apply to them.

2. REFERENCES.

I Convention, Arts 24, 28, 40.

II Convention, Arts 36, 37, 42.

Protocol I, Arts 15, 18, 61, 66, Annex, Arts 1, 2, 4.

3. RELATION TO U.S. POSITION.

The adopted definition of religious personnel differs from that proposed by the U.S. in CDDH/II/313 in that recognition is accorded to religious personnel attached temporarily to the armed forces or to medical units. The proposal was based on the earlier action of Committee II in Article 15

which limited the designation and the incidental entitlement to wear the distinctive emblem to permanent religious personnel. The adopted definition also takes cognizance of the inclusion of religious assistance as a civil defence task.

During the Third Session, the Holy See, supported by Austria, France, Nigeria, Nicaragua, and the U.K., launched a determined drive to broaden the scope of religious personnel commensurate to the broadening of civilian medical personnel by the entitlement of temporary personnel to display the distinctive emblem. The Holy See's proposal prevailed over the view that the proliferation of entitlement to wear the distinctive emblem increases the danger of abuse and would diminish the respect accorded the distinctive emblem. The Holy See's proposal was ultimately adopted by Consensus.

4. COMMENT.

a. Compared to the proliferation of entitlement to wear the distinctive emblem inherent in the extension of the privilege to a large class of temporary civilian medical personnel, the addition of chaplains temporarily attached to the armed forces or medical units is minimal. Several delegations mentioned that, although Chaplains attached to the armed forces had been entitled to wear the distinctive emblem since 1929, they seldom avail themselves of this privilege.

b. Conforming changes were adopted by consensus with respect to Article 15 and Chapter I of the Annex.

5. MILITARY IMPLICATIONS.

See par 4a.

6. RECOMMENDED U.S. POSITION.

No understanding or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (f)-Medical Transportation, (g)-Medical Transports,
(h)- Medical Vehicles, (i)-Medical Ships and
Craft, (j)-Medical Aircraft. Art 8 (6)-(10)

1. TEXT OF ADOPTED ARTICLES.

Article 8 - Terminology

For the purposes of this Protocol:

* * *

(f) "medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

(g) "medical transports" means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

(h) "medical vehicles" means any medical transports by land;

(i) "medical ships and craft" means any medical transports by water;

(j) "medical aircraft" means any medical transports by air;

2. REFERENCES.

I Convention, Arts 35, 36.

II Convention, Arts 22, 24-27, 38-39, 43

IV Convention, Arts 21-22.

3. RELATION TO U.S. POSITION.

Except for minor drafting changes of a nonsubstantive nature, Committee II adopted, as Article 21, the text proposed in CDDH/II/79 by the U.S., Belgium, Canada, and the U.K. The drafting committee decided to consolidate Article 8 and Article 21 dealing with definitions for medical transportation.

4. COMMENT.

a. The provisions of the Protocol dealing with ships and craft will apply not only at sea, but on other waters as well. This basic policy decision was made in 1974 by Committee II, provisionally in Article 8(b), the definition of shipwrecked. This policy was confirmed when Article 8(b) was adopted finally at the 1976 session.

b. Religious personnel have been added to the authorized passengers of medical transports. The term "religious personnel" is defined in Article 8(d).

5. MILITARY IMPLICATIONS.

Entitlement to protection and the use of the distinctive emblem is clarified.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (k) - Permanent-Temporary, Art 8(11).
(Formerly Arts 8(e) and 21)

1. TEXT OF ADOPTED ARTICLE.

Article 8 - Terminology

For the purposes of this Protocol:

* * *

(k) "permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel", "temporary medical units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories.

2. REFERENCES.

I Convention, Arts 25, 29, 35-36.
II Convention, Arts 36-39.
IV Convention, Arts 20, 21.

3. RELATION TO U.S. POSITION.

This Article was based on the U.S. position for Article 8(e) and Article 21(b) of the texts adopted by Committee II. The consolidation is consistent with U.S. position.

4. COMMENT.

With respect to Art (k), it should be noted that permanent medical personnel, units, and transports are "assigned exclusively" to medical purposes, whereas temporary personnel, units and transports are "devoted exclusively" to such purposes.

In this connection, it should be noted that assignment "by a Party to the conflict exclusively to medical purposes" is required for all medical personnel whether they be permanent or temporary (Art 8(c)).

The use of the term "devoted exclusively" with respect to temporary units and personnel is intended to make it clear that their protection and entitlement to display the distinctive emblem occurs only when they have in fact ceased to do any work other than medical work, and that it continues only so long as the person, unit or transport remains exclusively devoted to medical work. It was considered that assignment to medical work (receipt of an order to perform medical work) and the actual cessation of nonmedical activities may not coincide in time.

5. MILITARY IMPLICATIONS.

The emphasis on temporary medical personnel, units and transports, although not novel in practice, will impose a requirement for additional controls and measures to prevent abuse.

RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 8 - Terminology; (1) - Distinctive Emblem, (m) - Distinctive Signal. Art (12) and (13).

1. TEXT OF ADOPTED ARTICLES.

Article 8 - Terminology

For the purposes of this Protocol:

* * *

(1) "distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies.

(m) "distinctive signal" means any signal or message specified for identification exclusively of medical units or transports in Chapter I of Annex I to this Protocol.

2. REFERENCES.

I Convention, Art 38.

II Convention, Arts 41,43.

IV Convention, Art 18.

Protocol I, Arts 18, 21-28, 37, 38, 85, Annex I, Chapters II and III.

Resolutions #6 & 7, 1949 Diplomatic Conference.

Resolutions #17-19 (IV) 1974-1977 Diplomatic Conference.

3. RELATION TO U.S. POSITION.

a. The Conference adopted the U.S. proposal for the distinctive emblem, but changed the conjunctive "and" to the disjunctive "or" in the last line. The change is an improvement.

b. Article 8(m) is entirely consistent with the U.S. proposal.

4. COMMENT.

a. The provisional definition of distinctive emblem did not distinguish between the protective use of the emblem (Arts 39, 43, First Convention; Arts 41-44, Second Convention; and Art 18, Fourth Convention) and the indicative use for showing affiliation with national or international Red Cross organization (Arts 44,53, First Convention). Committee II used the term so defined in Articles 18 (2),(3),(4),(5),(7),(8), 28, Annex I, Articles 1-4, 5. An explicit distinction between the protective use and the indicative use became necessary because the text of Article 38, Recognized Emblems, adopted by Committee III, prohibits the "improper use of the protective emblem of the Red Cross, Red Crescent, and Red Lion and Sun," In reconsidering Article 8(1) in the light of Committee III's action, Committee II decided to retain the term "distinctive emblem" but revise its definition so as to make it clear that only the protective use of the emblem is relevant to Protocol I. The indicative use of the emblem is amply protected under Articles 44 and 53 of the First Convention. The Conference modified Article 38 to conform to Committee II's terminology.

b. Article 8(m) is in full harmony with Article 18 (5) and (6) and Chapter III of the Annex by providing that the signals identified in Chapter III are for the exclusive use of medical units or transports.

5. MILITARY IMPLICATIONS.

See par 5 under Articles 18, 26 bis, and 30.

6. RECOMMENDED U.S. POSITION.

a. No U.S. understanding is required.

b. For follow-on actions concerning establishment of distinctive signals, see Discussion under Annex I, Articles 6, 7, and 8, Resolutions 17(IV), 18(IV), 19(IV) of the Diplomatic Conference.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 9 - Field of Application

1. TEXT OF ADOPTED ARTICLE.

Article 9 - Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian purposes:

(a) by a neutral or other State which is not a Party to that conflict;

(b) by a recognized and authorized aid society of such a State;

(c) by an impartial international humanitarian organization.

2. REFERENCES.

I Convention, Arts 3, 12, 27.

II Convention, Arts 3, 12, 25.

III Convention, Arts 3, 16.

IV Convention, Arts 3, 13.

Protocol I, Arts 10, 75.

Protocol II, Art 2.

3. RELATION TO U.S. POSITION.

a. Par 1, as amended by Committee II at its ninety-ninth meeting (CDDH/II/SR 99) is consistent with the U.S. position.

(1) The Committee II substitution of the words "all those affected by a situation referred to in Article 2 common to the Conventions." is not a substantive variance from the proposed U.S. language: "all combatants and non-combatant military personnel of the parties to a conflict and to the whole of the civilian population of the parties to a conflict." For consistency with the formulation used by Committee I, the drafting committee substituted "Article 1 of the Protocol" for "Article 2 common to the Conventions."

(2) At the First and Second Sessions the U.S. had strongly urged that an illustrative list of criteria upon which adverse distinction may not be made in relation to medical care be included in this article or in Article 10, similar to that which is included in Article 3, common to the Conventions, and in Articles 12/12/16/13 of the respective Conventions, (CDDH/II/50). Committee II, however, favored the deletion of this list for fear that criteria not included therein might be disregarded notwithstanding the clear showing that the list was only illustrative (CDDH/II/40 sponsored by Australia).

b. At its last substantive meeting Committee II considered and adopted a proposal co-sponsored by Australia and the U.S. (CDDH/II/435) to reconsider and revise Par 1 by the insertion of an illustrative list identical to the one used by Committee III in Article 75, Par 1, Protocol I, and by Committee I in Article 2, Protocol II. (CDDH/II/SR 99).

4. COMMENT.

a. Par 1 serves a function similar to that of IV Convention, Article 13, by making it clear that Part II of the Protocol applies comprehensively to all persons, including a Party's own nationals, affected by armed conflict or occupation, for the purpose of ameliorating the condition of the wounded, sick and shipwrecked. Thus, it applies not only to those persons who are wounded, sick and shipwrecked but also to those whose duty it is to help them and those who are in a position to affect their condition in any way. The restoration of the comprehensive nondiscrimination clause and the illustrative list of criteria irrelevant to the care of the wounded and sick is a welcome clarification.

b. Par 2.

(1) Article 27 of the First Convention establishes the procedures whereby a recognized society of a neutral country can provide medical units and personnel to a Party to the conflict. These procedures are:

- (a) Consent of its own government,
- (b) Units must be under the control of a Party to the conflict,
- (c) The Neutral Government shall notify its consent to the adversary of the Party accepting the assistance,
- (d) The Party accepting the assistance must also notify the adversary before actually employing the units.

(2) These procedures were used by Commission I in the 1972 Conference of Government Experts as a convenient means for controlling outside assistance by medical aircraft. Article 9 extends those procedures, to the extent that they are relevant, to the provision of permanent medical units, their personnel, and transports by neutral states, recognized and authorized aid societies, and by impartial international humanitarian organizations.

(3) Article 25 of the Second Convention governs the procedure under which hospital ships are made available. This is reaffirmed and developed in Article 22, Protocol I.

(4) The deletion of the reference in Par 2(c) to the ICRC and the League of Red Cross Societies, at the request of the two organizations, broadens the sources from which medical units and transports may be obtained. The United States Delegation supported this result inasmuch as it provides a possible source of medical assistance for developing countries, particularly with respect to medical aircraft. It was the U.S. position since 1972 that so long as medical aircraft are under the control of a responsible authority, the source of the medical aircraft is not important.

5. MILITARY IMPLICATIONS.

Minimal. Par 1 and Par 2a are merely reaffirmation of existing law. Par 2b is consistent with the practice of States. To the extent that application of Par 2 improves an adversary's medical service, it tends to relieve the strains on U.S. medical care for disabled enemy combatants.

6. RECOMMENDED U.S. ACTION.

No statement of understanding or implementing legislation is necessary at this time.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 10 - Protection and Care

1. TEXT OF ADOPTED ARTICLE.

Article 10 - Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

2. REFERENCES.

- I Convention, Arts 12, 15.
- II Convention, Arts 12, 18.
- III Convention, Art 13.
- IV Convention, Arts 6, 13, 16.
- Protocol I, Arts 8(a), (b), 9, 75.
- Protocol II, Arts 7, 8, 17.

3. RELATION TO U.S. POSITION.

a. Par 1 is not inconsistent with the U.S. position. The variance is a clarifying drafting change.

b. Par 2 as adopted was a compromise between those who wished to state that medical care shall be accorded "without any discrimination" (CDDH/II/40) and those who preferred to provide guidance with respect to nondiscrimination by providing an illustrative list enumerating criteria which are irrelevant to medical care and assistance. The U.S. favored the latter course (CDDH/II/50). The revision of Art 9(1) noted in the review of that article now provides the necessary guidance, as does the last sentence of Par 2 of Article 10.

. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

2. REFERENCES.

I Convention, Arts 12, 50
II Convention, Arts 12, 51
III Convention, Arts 13, 130
IV Convention, Arts 32, 147
Protocol I, Arts 75, 85(3)
Protocol II, Arts 4(2)(a); 5(2)(e)

3. RELATION TO U.S. POSITION.

a. Pars 1 and 2 are consistent with the U.S. position as proposed in CDDH/II/43. It should be noted that, notwithstanding the Fourth Session revision of par 4, (excluding a Party's own nationals from being the object of the grave breach denounced in par 4), the U.S. expressed its understanding that pars 1 thru 3 (and inferentially pars 5 and 6) apply not only to persons in the power of an adverse Party, but also to any other person, including a Party's own nationals, who are in any way deprived of liberty as a result of armed conflict or occupation. (See Discussion in par 4; CDDH/SR 37, Annex P4).

b. Par 3 is consistent with that position except that donations of skin for grafting was included to the permissible donations at the suggestion of the USSR and other medical delegates who expressed the view that such skin donations are useful in the treatment of burn cases.

c. Par 4 was added in order to obtain a consensus for pars 1-3. See comments below. The revision proposed by France in the Fourth Session was adopted by consensus with the support of the U.S.

d. Par 5 was the result of a compromise with Arab States who maintained pressure for the adoption of a provision requiring written consent for all surgical interventions.

e. Par 6 was also a safeguard necessary for achieving a consensus for pars 1-3.

4. COMMENT.

a. The first three paragraphs are based on CDDH/II/42, co-sponsored by Australia, Austria, Netherlands, Poland, Sweden, Switzerland, United Kingdom, U.S. and U.S.S.R. Poland's co-sponsorship was significant because that delegation had previously led opposition to any medical or pharmaceutical testing on humans. It had also opposed any qualification by words imparting criminality, such as "unjustified" to the prohibition against acts or omissions which endanger the health of persons protected by the article. The U.S., on the other hand, considered that some word imparting criminality such as "unlawful" or "unjustified" was indispensable.

b. Par 1. The first sentence states the general principle prohibiting unjustified acts or omissions which endanger the physical or mental health of persons protected by the Third and Fourth Conventions (i.e., persons in the power of an adverse Party). As it was noted that Art 65(c) of the ICRC draft (now Art 75) included an inartfully drafted provision providing similar protection for persons who would not receive more favorable treatment under the Conventions and the Protocol including the Parties' own nationals, the U.S. proposed, and Committee II adopted, the view that the application of Article 11 cover both classes of persons.

In response to a Canadian statement which suggests "that paragraph 4 in its /amended/ form limits the application of the Article to a country's own nationals (CDDH/SR 37, p. 7). The U.S. delegation made the following explanatory statement:

"My delegation was a co-sponsor of the formula adopted as Article 11, Protection of Persons. My Government believes it important that its understanding of paras 1 and 2 be stated as a matter of record.

Paras 1 and 2 apply to:

- (1) 'Persons who are in the power of an adverse Party.'
Prisoners of War, and all civilians protected by the Fourth Convention, whether in the territory of the Detaining Power or in Occupied Territory. It includes those who are relatively free to pursue their normal pursuits, as well as those who are interned or otherwise deprived of liberty. It applies also to
- (2) other persons, including the Party's own nationals, who are interned, detained, or otherwise deprived of liberty as a result of hostilities or occupation.

It is the further understanding of my Government that the evils against which this article is directed are 'unjustified acts or omissions, by or on behalf of the occupying or Detaining Power or by any Detaining Authorities that endanger the physical or mental health or integrity of the persons described in Par 1.' (CDDH/SR 37, Annex, pp. 3-4)"

The second sentence prohibits the application of medical procedures to the persons described in the Article:

(1) Which are not indicated by the state of health of the patient. This is a reaffirmation of the standards clearly expressed with respect to Prisoners of War in Article 13 of the Third Convention and the extension of that principle to other persons described in Article 11.

(2) Which is not consistent with the generally accepted medical standards applied in the community to free persons under similar medical circumstances. This standard is an innovation and is intended to prevent the use of experimental procedures with respect to persons described in the article, even if intended for therapeutic purposes, if the procedure is not approved by the governing medical standards of the community for application to patients generally.

Several delegations expressed the understanding that among the procedures prohibited are the administration of mind altering drugs not intended for therapeutic purposes for the benefit of the subject.

c. Par 2. The prohibitions in paragraph 2 implement and provide emphasis to the general prohibitions in paragraph 1 against medical procedures which are not indicated by the state of health of the person concerned. Thus, the prohibition against mutilation does not preclude surgical procedures including amputations which are judged by responsible doctors to be essential to the health of the patient, and which are consistent with accepted medical standards.

In response to an expression of concern that par 2b could be construed as stopping all reasonable and appropriate medical or pharmaceutical testing by the medical profession and the pharmaceutical industry in occupied territory, the U.S. representative in Committee II expressed the following understanding:

"It is our understanding that the prohibition in par 2b, within any occupied territory, applies with full force to any such experiment conducted by or on behalf of the occupying authorities, but has no effect on reasonable medical or scientific experiments conducted within the occupied community by its own medical and scientific profession under generally accepted research standards for testing on human subjects.

"It is our further understanding that no medical or scientific experiment, may be conducted on any person, who is interned, detained, or deprived of liberty as a result of hostilities or occupation, whatever his nationality or affiliation may be, wherever he may be if such medical or scientific experiment is not indicated by the state of health of the person concerned and if it is not consistent with accepted medical standards which would be applied to free persons under similar medical circumstances.

"Our understanding is based on our recognition that full, free and informed consent is a necessary prerequisite to medical and scientific testing on human subjects.

"Such consent cannot be presumed in any relationship between occupying authorities and the people of occupied territory, nor with respect to any person who, in connection with the hostilities or occupation is deprived of his liberty by internment, detention, or any other form of restraint." (Statement made in Committee II Drafting Committee, 1975 Session).

d. Par 3 provides a narrow exception to the prohibition of par 2c, whereby the persons described in par 1 may make voluntary donations of blood for transfusion or of skin for grafting under rigid safeguards. This exception was proposed in recognition that these two life saving substances are available only from human sources.

e. The fragile consensus for CDDH/II/43 was almost upset when the USSR and Poland joined Mali and Bangladesh in opposing Par 3 for fear that a Detaining Power would use PWs and other detainees as living blood banks for the Detaining Power's armed forces notwithstanding the carefully prescribed safeguards under which donations of blood would be accepted.

Working group achieved a consensus by proposing that violations of the standards in pars 1-3 be a grave breach of the Protocol and by proposing the record keeping provisions of par 6.

f. The U.S. Delegation accepted par 4 only after it was modified by making willfulness an element of the offense, and after the proscription of the paragraph was limited to acts or omissions which seriously endanger the persons protected by the article. It is consistent with par 1, Art 13, Third Convention. In accepting par 4, however, Committee II agreed to review it after it had an opportunity to examine Article 85, Repression of Breaches, of the present Protocol (CDDH/221/Rev.1). As adopted by Committee II at the Second Session, Par 4 referred to "any person described in par 1", thus including within the scope of the grave breach acts against a Party's own nationals. During the Third Session, Committee I completed its work on Article 85. It refers to Article 11 as having defined a grave breach. In relevant part, the Report of Committee I states:

" . . . a number of delegations pointed out that the acts or omissions defined in Article 11, paragraph 4, ought not, technically speaking, to create a grave breach if committed against a country's own nationals. The delegations concerned asked the Chairman of the Committee to raise the matter with the Chairman of Committee II."

Inasmuch as a Party's own nationals may be objects of the grave breaches denounced by the First and Second Convention, Committee II did not consider it unusual to draft paragraph 4 so as to include all persons protected under pars 1-3 within its scope. Nevertheless, Article 11 is broader than other provisions for the protection of the wounded and sick. It was deliberately broadened so as to encompass the scope of ICRC draft Article 65 c, which is intended to protect "persons who would not receive more favorable treatment under the Conventions or the Present Protocol including a Party's own nationals." It is noteworthy that, in Article 85(2), Committee I limited the scope of grave breaches against the wounded, sick or shipwrecked "to such persons of the adverse Party protected by this Protocol, or against medical or religious personnel, medical units, or medical transports under the control of the adverse Party" By this action, Committee I excluded from the scope of the additional grave breaches, civilian wounded and sick and medical personnel who are not ~~in the hands of~~ UNDER THE CONTROL OF an adverse Party.

For consistency with the policy adopted by Committee I, the U.S. delegation supported the effort of Belgium, France and the Netherlands to reconsider par 4 and to amend it so as to exclude a Party's own nationals as objects of the grave breaches denounced in par 4. The French proposal was adopted by consensus (CDDH/II/438; CDDH/II SR 99).

g. Par 5 was adopted by consensus after the Arab co-sponsors of CDDH/II/70 agreed to the formula stated in lieu of their original proposal which would have required written consent as a prerequisite to any surgical

intervention of any wounded or sick person. The U.S. position was to oppose the Arab proposal. By turning the substance around to an endeavor clause for obtaining a written refusal of surgery, the objectionable features of the original proposal were avoided. Moreover, the adopted formula does not interfere with U.S. practice of compelling its military personnel to undergo needed surgery over the patient's objection, if such involuntary surgery is directed by a medical board.

f. With regard to par 6, it should be noted that an occupying power is required to keep records on donations made under the responsibility of that power. It would have been unreasonable to expect the occupying power to maintain records with respect to donations made by individuals in occupied territory within their own medical facilities and under the direction of the medical personnel of the occupied territory.

5. MILITARY IMPLICATIONS.

There are created some administrative procedures for the Commander of a PW camp or the military commander of an occupied territory with respect to keeping records. Medical service to persons detained on account of the armed conflict will have to be closely monitored to ensure compliance with standards provided in this article.

6. RECOMMENDED U.S. ACTION.

a. Oppose any effort on the part of U.S. allies to construe Article 11 as excluding protection to a Party's own nationals, except to the extent that Par 4 has that effect. If any States interpose expressions of understanding similar to that made by Canada, the U.S. statement of understanding noted in Par 4 should be repeated at the time of signature.

b. As Pars 1-3 and 5-6 are self-executing, no new legislation is required at this time, except as to par 4. Implementing legislation as to par 4 should be considered along with implementing legislation as to Art 85.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 12 - Protection of Medical Units

1. TEXT OF ADOPTED ARTICLE.

Article 12 - Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - (a) belong to one of the Parties to the conflict;
 - (b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
 - (c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.
3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

2. REFERENCES.

- a. As to Pars 1-3:
 - I Convention, Art 19
 - II Convention, Arts 22-25, 27-28
 - IV Convention, Art 18
 - Protocol I, Arts 21, 22-23, 24-27

- b. As to Par 4:
 - I Convention, Art 19
 - III Convention, Art 23
 - IV Convention, Arts 18, 28

3. RELATION TO U.S. POSITION.

Although some drafting changes were made, Article 12, as adopted, is entirely consistent with the U.S. position. The added reference to Article 9, par 2, is a needed improvement.

4. COMMENT.

a. The distinction, drawn in par 1 of the ICRC text, between permanent and temporary medical units, became redundant when the Committee adopted a definition of "permanent medical units" and "temporary medical units". See Article 8(k).

b. The second sentence of par 4 is a reaffirmation of the second par Article 19, First Convention. The qualification "whenever possible" takes account of the fact that frequently mobile units must be in areas of danger in order to perform their medical mission.

5. MILITARY IMPLICATIONS.

This article reaffirms U.S. practice of not attacking medical units, military or civilian, and not using medical units to protect military objectives from attack.

6. RECOMMENDED U.S. ACTION.

No statements of understanding or implementing legislation are required.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 13 - Discontinuance of Protection of Civilian Medical Units

1. TEXT OF ADOPTED ARTICLE.

Article 13 - Discontinuance of protection of civilian medical units

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

2. The following shall not be considered as acts harmful to the enemy:

- (a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
- (b) that the unit is guarded by a picket or by sentries or by an escort;
- (c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
- (d) that members of the armed forces or other combatants are in the unit for medical reasons.

2. REFERENCES.

I Convention, Arts 21-22, 35
II Convention, Arts 34, 35

Protocol I, Arts 29, 51(3), 65
Protocol II, Art 11

3. RELATION TO U.S. POSITION.

a. Pars 1 and 2(b), (c) and (d) are consistent with the U.S. position.

b. Par 2(a) was added. It is similar to Art 22(1), First Convention, applicable to the personnel of military medical units. It should be noted in this connection that Article 21, First Convention, does not specify that the arms carried by military medical personnel may only be "small arms" or "light individual weapons", this latter qualification was inserted on the insistence of Mexico.

4. COMMENT.

a. The provision dealing with loss of protection and warning is substantially similar to Articles 21 and 22, First Convention; Articles 34 and 35, Second Convention; and Article 19, Fourth Convention.

b. The U.S. did not oppose the addition of par 2(a), but indicated, in accordance with negotiating instruction, that the provision is without prejudice to the right of the Party in control of the area to disarm the personnel if this is deemed necessary as a security measure.

The debate in Committee III and the Plenary concerning Article 44 (formerly 42) emphasizes the importance of carrying arms openly which may be the sole criteria for distinguishing between combatants and civilians under some types of war. The implications of this development have had a significant impact on Committee II in its deliberations on the conditions under which civil defence personnel may be entitled to special protection in the ground combat zone. Several delegations which supported Art 13(2)(a) by analogy to Article 21, First Convention, expressed second thoughts to the effect that changing rules as to entitlement to privileged combatant status, warrants reconsideration of par 2(a). As Committee II, after extensive debate and prolonged consideration ultimately adopted a compromise solution which permits civil defence personnel to carry light individual weapons for the restoration and maintenance of order in distressed areas and for self defense, it was not feasible to reconsider Art 13. The Committee's action with respect to Art 65, par 3, resulted in expressions of understanding adopted by the Committee, as well as statement of understanding by delegations one of which was supported by the U.S. Two of these understandings are equally relevant to Art 13. See Discussion as to Art 65(3) under pars 4g (Page I-65-8, I-65-13,14).

(1) The term "light individual weapons" is not well understood. According to the Mexican representative who participated in the deliberations concerning Art 65(3), the term probably is intended to exclude the types of weapons issued to heavy weapons sections of Infantry Platoons, or those of

the heavy weapons Platoon of an Infantry Company in the 1920s and 1930s. This would exclude such weapons as mortars, and 50 cal. machine guns. It was probably intended to refer only to rifles and handguns. Although no committee understanding emerged except cross reference to Art 13, (which provides no guidance), several delegations concurred in an understanding that the term excludes "fragmentation grenades and similar devices as well as weapons which cannot be effectively handled or fired by a single individual, and those which are basically intended for materiel targets." (CDDH/II/SR 95, p. 11; CDDH/II/467, par 73).

(2) An agreed note sought to clarify the matter by explaining the purpose for which civil defense personnel may be armed. This expressed the understanding that civil defense personnel may be armed for self defense against marauders and other criminal individuals or groups. They may not engage in combat against the adverse Party and may not use force to resist capture. If, however, they are unlawfully attacked by individual members of the adverse Party's forces, they may use their weapons in self defense after having made a reasonable effort to identify themselves as civil defense personnel. (CDDH/II/467, par 78). See also FM 27-10, The Law of Land Warfare, par 223b.

c. Par 1 might be construed to restrict the ability of military elements to defend themselves against attack from weapons operating within civilian medical units. In this connection the rule under Article 21, First Convention, and Article 34, Second Convention, pertaining to military medical units, is identical. Nevertheless, direct attack endangering the military element would invoke the right of self defense and would justify an immediate response if necessary for the safety of the military element under attack. The requirements for warning is qualified by the term "whenever appropriate", thus affording justification for dispensing with a waiting period if the threat is urgent and immediate. See Art 51(3).

d. During the Third Session, Committee II reconsidered par 3(d) by consensus and changed the formulation by using "medical reason" instead of "medical treatment". This formulation was considered more reasonable because there are many legitimate reasons for military persons to be within a medical unit or establishment other than to receive treatment. For example, they may be in such a unit for a periodic physical examination, to receive immunization shots, to donate blood, bring in patients, and others.

5. MILITARY IMPLICATIONS.

The article is consistent with present law and merely sets out rules which protect civilian medical units unless they commit acts harmful to the enemy.

6. RECOMMENDED U.S. ACTION.

In order to adapt the significant understandings expressed with respect to Art 65(3) to the analogous problems presented by Art 13(2)(a), the U.S. should express understanding along the following lines at the time of signature:

(1) It is the understanding of the United States that the term "light individual weapons" as used in Article 13 excludes fragmentation grenades and similar devices as well as weapons which cannot be handled or fired by a single individual, and those which are basically intended for materiel targets such as armored vehicles or aircraft.

(2) It is the understanding of the United States that medical personnel may be armed only for their own defense or for that of the wounded and sick in their charge against marauders and other criminal individuals or groups. They may not engage in combat against the adverse Party and they may not use force to resist capture. If, however, they are unlawfully attacked by individuals of the adverse Party's forces, they may use their weapons in self defense and in defense of the wounded and sick in their charge after having made a reasonable effort to identify themselves.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL INFORMATION

Article 14 - Limitations on Requisition of Civilian Medical Units

1. TEXT OF ADOPTED ARTICLE.

Article 14 - Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.
2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their material or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population or for the continuing medical care of any wounded and sick already under treatment.
3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
 - (a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
 - (b) that the requisition continues only while such necessity exists; and
 - (c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

2. REFERENCES.

1907 Hague Regulations, Art 52
IV Convention, Arts 55; 57

3. RELATION TO U.S. POSITION.

a. The U.S. position, which was to support the ICRC text with a clarifying amendment relative to prisoners of war, was rejected in favor of a stronger limitation on requisitions (CDDH/II/21, Austria, Canada, Finland, Sweden, and others).

b. Par 1 is a brief reaffirmation of Article 56, Fourth Convention.

c. Par 2 is not inconsistent with Article 57, Fourth Convention.

d. Par 3 is inconsistent with the U.S. position in the following respects:

(1) It eliminates the personnel of the occupation administration from those entitled to benefit from requisitioned medical units. (The U.S. proposal that prisoners of war be specifically mentioned as being in the permitted class was accepted.)

(2) An unambiguous priority for the retention by the civilian population of adequate medical care was established without regard to the urgency of the need for medical facilities of the wounded and sick of the Armed Forces.

4. COMMENT.

a. The U.S. was successful in blocking an effort to provide civilians a priority for the same standard of medical care as that enjoyed prior to the requisition. So long as the standard is limited to adequate medical care, the article is acceptable.

b. The deletion of "member . . . of the occupation administration" is probably consistent with Article 52, Hague Regulations, as requisitions must be for the matter of the "Army of occupation".

c. The adoption of Article 14 with respect to civilian medical units does not alter the effect of the Fourth Convention, Article 57 with respect to civilian hospitals.

5. MILITARY IMPLICATIONS.

The military commander of an occupied territory may be somewhat circumscribed in the requisition of civilian medical units but no adverse effect to the U.S. is foreseen.

6. RECOMMENDED U.S. ACTION.

No statements of understanding or implementing legislation are necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 15 - Protection of Civilian Medical and Religious Personnel

1. TEXT OF ADOPTED ARTICLE.

Article 15 - Protection of civilian medical and religious personnel

1. Civilian medical personnel shall be respected and protected.
2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.
3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of these functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.
4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.
5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

2. REFERENCES.

- I Convention, Arts 24, 27.
- II Convention, Arts 36, 37.
- IV Convention, Arts 20, 56, 58.

3. RELATION TO U.S. POSITION.

a. Pars 1, 3, and 4 of the Committee text are, subject to minor drafting changes, consistent with the U.S. position.

b. Par 2 of the ICRC draft, which the U.S. supported, was deleted as it became unnecessary when the definition of civilian medical personnel (Art 8(c)) was clarified by the adoption of Art 8(k). This provision makes it clear that temporary medical personnel are "medical personnel" only when they are "devoted exclusively to medical purposes"

c. Par 2 (formerly 3). The term "If needed all available help" was substituted for "All possible help". Because the term "combat zone" was found to be a military term of art which may have different connotations in different countries, a relevant nontechnical description of the area where civilian medical personnel may need assistance from the Parties was used.

d. Par 5. At the instance of the Holy See, strongly supported by Austria, the Committee deleted reference to "other persons performing similar functions." The deleted words were intended to provide protection to civilian spiritual advisers of a non-religious nature. The U.S. supported the ICRC text as drafted which reflected the position of the Netherlands. At the Third Session, the Holy See, supported by Austria and others, persuaded Committee II to reconsider the second sentence and to delete the word "permanent", thus extending equivalent status to chaplains temporarily attached to civilian medical units. At the Fourth Session, the provision was amended again to align the text to the definition of religious personnel in Par 8(d).

4. COMMENT.

a. Concerning par 3, the Committee elected not to follow the recommendation of a mixed working group of Committees II and III members whose task it was to study different terms used in the Conventions and the draft Protocols for areas where military operations were in progress. The decision to use non-technical and relevant descriptive language seems to be appropriate. It will, however, require that, in connection with other articles (18, 26, 59), great care be exercised in the selection of relevant language to describe the area or place in which a rule of the Protocol shall apply.

b. At the Third Session, the last sentence was changed for consistency with the formula adopted by Committee II in Article 9, Protocol II. The new formulation prohibits compelling medical personnel to carry out tasks which are not compatible with their humanitarian mission. This was considered to be more reasonable than the previous formulation which protected their compulsory employment on tasks unrelated to their mission.

c. Par 5, civilian religious personnel. Under Articles 24, 28, and 40 of the First Convention, chaplains attached to the armed forces are accorded the same protection and status as medical personnel. This includes the right to wear the distinctive emblem. Par 5 as redrafted in line with the definition in Art 8(d) now extends the same protection to chaplains attached to medical units, medical transports and civil defense organizations.

5. MILITARY IMPLICATIONS.

There is established a requirement to give, if needed, all available help to civilian medical personnel in combat areas. However, use of the word "available" qualifies the help to be given and should not impede combat requirements. Such help tends to relieve the requirement for medical personnel support implicit under Article 10.

6. RECOMMENDED U.S. ACTION.

There is no need for any statement of understanding or implementing legislation.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION, GENERAL PROTECTION

Article 16 - General Protection of Medical Duties

1. TEXT OF ADOPTED ARTICLE.

Article 16 - General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.
3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

2. REFERENCES.

ICRC Report, Conference of Govt Experts, 2d Session (1972), Report on Art 19, Pars 1.47-1.56.

Protocol I, Arts 8c, 11, 15 & 17.

Protocol II, Art 10.

3 OCT 1977

3. RELATION TO U.S. POSITION.

This article as adopted is fully consistent with the U.S. position.

4. COMMENT.

a. This article applies to all "persons engaged in medical activities". It thus is not limited to "medical personnel" as defined in Article 8(c). It covers private practitioners, nurses, medical attendants, as well as members of military and civilian medical units.

b. As it emerged from the drafting committee, par 2 is difficult to read. As an aid for construction, the following is provided:

"Persons engaged in medical activities shall not be compelled

(a) to perform acts or to carry out work contrary to

(1) the rules of medical ethics designed for the benefit of the wounded and sick, or to other rules designed for the benefit of the wounded or sick,

(2) the conventions,

(3) this Protocol, or

(b) to refrain from performing acts or from carrying out work required by the rules of medical ethics designed for the benefit of the wounded and sick, other medical rules designed for the benefit of the wounded and sick, the conventions or this Protocol."

The origin of this paragraph must be traced to the Second Conference of Government Experts in which the U.S. experts expressed a concern that many rules of medical ethics, particularly those designed to enhance the status and economic well being of the medical profession, prohibit members of the profession from cooperating with and training, uncertified personnel in the performance of medical procedures. Although such rules may be appropriate in some communities, they would preclude members of the profession from training paramedical personnel of the armed forces, who may be required by circumstances to perform, independently, minor surgery or other medical procedures in the absence of a licensed physician.

Recognition of the problem occasioned by lack of medical doctors aboard ships and in isolated military units caused Commission I to limit the scope of the comparable provision to "professional rules designed for the benefit of the wounded and sick."

In this connection, Par 1.53 of English and French versions of the Report of Commission I, Second Conference of Government Experts, erroneously indicates that an amendment to accomplish this was not adopted. The actual report of Commission I contained the following relevant remarks:

1.53. The attention of the commission was drawn to the fact that in some small ships or isolated units or places, urgent medical acts, including small surgery, may be performed also by skilled personnel who are not professionally trained medical personnel, in cases where there are no medical personnel available, and that such practice may be contrary to some professional rules. An amendment was formulated to cover this situation. However, after discussion a new formulation of paragraph 3 was adopted which sufficiently covered the above mentioned situation.

The record of what actually happened was established during the Second Session of the Diplomatic Conference. See CDDH/II/SR 16, paras 46-47.

c. With respect to par 3, the original ICRC draft provided that "No person engaged in medical activity may be compelled to give to any authority of the adverse Party information concerning the wounded and sick" The ICRC commentary construed "adverse Party" to refer to "the side opposed to that to which the wounded and sick belong." As it was the understanding of most delegations, including that of the U.S., that the ethical duty of nondisclosure is subject to the requirements of the medical person's national law, a debate on the subject was conducted during the Second Session. By a vote of 27-1 with 10 abstentions, Committee II adopted a U.K. proposal to change the opening phrase to read "No person engaged in medical activities shall be compelled to give to any member of the party adverse to him information concerning the wounded and sick" See Discussion under Article 10, Protocol II, with respect to this issue raised at the Second Session with respect to par 3 of that Article.

d. During Drafting Committee's consideration of Article 16, the ICRC representative sought to change the French and Spanish texts by deleting their equivalent to "adverse to him" for linguistic reasons. When it was pointed out that this drafting change affects a substantive issue which had been determined deliberately by Committee II, a working group of the Drafting Committee developed the new version which makes it clear that the prohibition against compulsory disclosure applies to anyone belonging either to (1) an adverse Party, or (2) his own Party except as required by the law of his Party. All members of the Drafting Committee, except the delegation of France, were willing to accept the formulation as a drafting change. Under the practice of the Drafting Committee, a single objection to a change as being substantive precludes Drafting Committee changes. Accordingly, the revision was referred to Committee II which adopted the new formulation by consensus. Thereafter, Norway and the USSR expressed reservations as to the substance indicating that the prohibition of compulsory disclosure should not be subject to national law under any

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 17 - Role of the Civilian Population and of Aid Societies

1. TEXT OF ADOPTED ARTICLE.

Article 17. - Role of the Civilian Population and of Aid Societies

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed.

2. REFERENCES.

I Convention, Art 18
II Convention, Art 21
IV Convention, Art 63
Protocol I, Art 41
Protocol II, Art 18

2. RELATION TO U.S. POSITION.

a. Although substantially reorganized, paragraphs 1 and 2 incorporate the substance of U.S. proposals.

b. In lieu of "shelter, care and assistance" used by the ICRC, or "shelter and care", the Committee elected to use "care" believing that this includes all types of humanitarian aid to the wounded, sick and shipwrecked whether medical or relief.

c. The U.S. had also supported a par 3 which was patterned in part on Article 21, Second Convention. In substance, it provided that a Party to the conflict may appeal to commanders of civilian ships to take on board and care for the wounded, sick and shipwrecked, and to collect the dead. It also provided for special protection and facilities to ships and craft responding to such an appeal. Because Australia wished to amend par 3 by applying its principles to civilian aircraft as well, Committee II deferred action on that paragraph until the Committee had completed its work on medical aircraft. The U.S. delegation opposed the Australian amendment because it would create a class of protected aircraft which were not bound by the carefully negotiated conditions for medical aircraft laid down in Articles 24-31. During the debate on this matter at the Third Session, the U.K. delegations expressed the view that the principles of par 3 were incorporated in the broad terms of par 2 and that par 3 was, therefor, redundant and unnecessary. An oral amendment proposed by the U.K. to delete the 3d paragraph was adopted by a vote of 22-11 (u.S.) with 13 abstentions.

4. COMMENT.

a. The relation of this Article to Articles 15 and 16 should be borne in mind:

(1) Article 15 deals with the protection of "civilian medical personnel" as defined in Article 8, i.e., those who are members of medical units. They are entitled to wear the distinctive emblem.

(2) Article 16 refers to "persons engaged in medical activities" and provides protection for their medical or professional standing. It would apply to "medical personnel" as defined in Article 8 as well as all other persons engaged in medical work, such as private practitioners, nurses, medical attendants, etc. The latter are not entitled to wear the distinctive emblem.

(3) Article 17 deals with the voluntary aid provided by the civilian population spontaneously or pursuant to an appeal for help and by voluntary relief societies. Except for the medical members of relief societies who are recognized and authorized as "medical personnel" under Article 8, they do not wear the distinctive emblem. Their protection consists of their status as civilians, their exemption from punishment for their humanitarian activity, and assistance in the performance of such activity.

b. Although the U.S. supported the substance of par 3, its deletion on the ground of redundancy does not change the underlying principle that civilian ships and craft may be solicited to perform humanitarian tasks at sea or on other waters. Rather than risk the revival of Australian

proposal to introduce a class of protected aircraft outside the regime established for the use, protection and control of medical aircraft, the U.S. delegation acquiesced the deletion of par 3.

c. Relevant to par 1, at its 99th meeting Committee considered a request contained in the report of Committee III, dealing with Article 38 bis (now Art 41), Safeguard of an enemy hors de combat (CDDH/III/361, par 25, p. 9), which states in relevant part:

"Committee I (sic) should be asked to consider whether Article 17, which it has already adopted, should be amended by adding a reference to the protection of persons hors de combat. Certainly it seems that such persons should be respected by the civilian population. The Committee believes that the proper place for this is to be stated in Article 17, rather than in Article 38 bis."

In response to the Committee III proposal, the U.S. representative stated:

Article 38 bis /now 41/ provides in par 1 that persons who are, or should be recognized as hors de combat shall not be made the object of attack. The same article provides that a person is hors de combat if,

- "(a) he is in the power of an adverse Party (PW or protected civilian); or
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself."

The relevant provisions of Article 17 provides:

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

"Attacks" is defined in Art 44(2) (now Art 49) as "acts of violence against the adversary whether in defense or offense." Accordingly, Art 17, which prohibits acts of violence against the wounded, sick and shipwrecked, covers the class of hors de combat persons contemplated by Art 38 bis(2)(c).

During the Second Session, Committee II had occasion to consider a proposal by Israel for inserting the words "and combatants who are hors de combat" after "wounded and sick", (CDDH/II/14). During the

debate on Article 17 several delegations indicated their objection to the proposal. Some argued that it was not within the competence of Committee II which was limited to the protection of the wounded, sick and shipwrecked. Other opposed it on the ground that a person who is hors de combat, but who is neither a prisoner of war nor wounded, sick or shipwrecked cannot be put on the same footing as persons protected under the First Convention. No delegation, except the sponsor, supported the proposal, although some expressed the view that Article 38 is the appropriate place for its consideration. The sponsor thereupon withdrew the proposed amendment (CDDH/II/ SR 17, par 33, 41, 46, 51, 56, 58). The withdrawal of the proposal was justified:

(1) Persons who are hors de combat by reason of being "wounded, sick or shipwrecked" are covered by Article 17.

(2) Persons who are in the power of an adverse Party are already protected against unjustified violence by either military or civilian persons under the Third Convention, if they are PWs, or under the Fourth, if they are civilians.

(3) Persons who are hors de combat under Art 38 bis2(b) because they expressed an intent to surrender are entitled to respect and protection from the adverse Party, which Art 38 bis already covers, but not from their own side. A healthy combatant who wishes to defect or desert to the other side may be forcibly restrained from doing so by his military comrades and by the civilian police. As the wounded and sick are entitled to respect and protection whether they are friend or foe, Article 17 is not the appropriate place to specify the protection which Art 38 bis, par 1 implicitly provides. (CDDH/II/SR 99, pars 14-15).

The proposal was rejected by consensus. For Israeli understanding see CDDH/SR 37, Annex, p. 5, to the effect that the protection of Art 17 applies also to persons parachuting from aircraft in distress and other persons hors de combat.

5. MILITARY IMPLICATIONS.

This article is of benefit to military commanders. It requires civilian population to respect the wounded and sick of both sides and authorizes the Parties to the conflict to appeal to the civilian population to provide such care.

RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 18 - Identification

1. TEXT OF ADOPTED ARTICLE.

Article 18 - Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.
2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.
4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.
5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.
6. The application of the provisions of paragraphs 1 to 5 of this Article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify medical units and transports specified in that Chapter.

7. This Article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.

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

2. REFERENCES.

I Convention, Arts 30, 40, 41.

II Convention, Arts 41-43.

IV Convention, Arts 18, 20.

Protocol I, Arts 8 (1), (m), 37, 38, 85.

Annex I, Chapters I-III

Protocol II, Art 12.

Resolutions #6 & 7, 1949 Diplomatic Conference.

Resolutions #17-19 (IV), 1974-1977 Diplomatic Conference

3. RELATION TO U.S. POSITION.

a. Paras 1 and 2 incorporate the U.S. proposal for par 1 of the ICRC text.

b. Par 3 was drafted along the lines indicated in Article 20, Fourth Convention. The Committee rejected requirement for documentation of civilian medical units, but agreed to retain a requirement that those who wear the distinctive emblem should also carry an identity card which could be used to verify their status as medical personnel.

c. Par 4 clarifies the rules as to marking of medical units and ships along the lines of Article 39, First Convention; Articles 41, 43, Second Convention; and Article 18, Fourth Convention.

d. Par 5 is substantially consistent with the U.S. proposal except that the authority to use distinctive signals without also displaying the distinctive emblem was left for determination in connection with the Annex. See Annex I, Art 5(2).

e. Par 6 is consistent with the important change proposed in the U.S. position (Par 5; ICRC Draft).

f. Par 7 is useful clarification of the limitation on the use of the distinctive emblem in time of peace.

g. Par 8 is consistent with the U.S. position.

4. COMMENT.

Article 18 provides the basis for the system of identification and marking prescribed in detail in the Annex.

5. MILITARY IMPLICATIONS.

Commander will retain authority to determine the extent to which his own medical personnel and units are identifiable. He will have to endeavor to install and maintain measures to ensure that his forces recognize the adversary's medical units and transports using the distinctive emblem and distinctive signals. See also Article 29.

RECOMMENDED U.S. ACTION.

There is no need for any statement of understanding or implementing legislation at this time.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 19 - Neutral and Other States Not Parties to the Conflict

1. TEXT OF ADOPTED ARTICLE.

Article 19 - Neutral and other States not Parties to the conflict

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

2. REFERENCES.

- I Convention, Art 4.
- II Convention, Art 5.
- III Convention, Art 4b(2).

3. RELATION TO U.S. POSITION.

The U.S. proposal to insert "the Conventions and" before "this Protocol" was not adopted because it was believed that the provision of Article 4, First Convention, and Article 5, Second Convention, adequately provides for the application of the relevant Conventions to military wounded, sick and shipwrecked. Although the categories of wounded, sick and shipwrecked protected under the Protocol is broader than those protected under Articles 4, I, and 5, II, of the Conventions, the protections provided for in Protocol I (particularly Articles 11, 44, 72-78) are sufficient to ensure humanitarian treatment for any person not covered by the First and Second Conventions.

4. COMMENT.

- a. "Persons protected by this part" is the equivalent of "the wounded, sick, and shipwrecked persons and medical and religious personnel".

b. The term "relevant provisions of the Protocol" was chosen by the Drafting Committee as a satisfactory substitute for the ambiguous "by analogy" or the pedantic "mutatis-mutandis". See Articles 9 and 68.

5. MILITARY IMPLICATIONS.

As the U.S. may frequently be a State which is not a Party to a conflict, there will be a requirement for training and awareness of responsibility under the Protocol for the handling of persons protected by Part II who may be received or interned within U.S. territory and any dead found in U.S. territory. In this connection, it must be noted also that such a training requirement is also indicated with respect to Federal and State authorities who will have the ultimate responsibility for the treatment of wounded and sick civilians and perhaps even for interned belligerent combatants.

6. RECOMMENDED U.S. ACTION.

No statements or implementing legislation are necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION I, GENERAL PROTECTION

Article 20 - Prohibition of Reprisals

1. TEXT OF ADOPTED ARTICLE.

Article 20 - Prohibition of reprisals

Reprisals against the persons and objects protected by this Part are prohibited.

2. REFERENCES.

I Convention, Arts 21-22, 46.
II Convention, Arts 34-35, 47.
III Convention, Art 13.
IV Convention, Arts 19, 33.
Protocol I, Arts 13, 23, 27, 31, 51(3), 65.

3. RELATION TO U.S. POSITION.

This Article conforms to the U.S. Position.

4. COMMENT.

a. Article 20 reaffirms existing law. Under the First and Second Conventions, reprisals against military wounded, sick, shipwrecked, medical personnel, medical units transports and their property, are prohibited under all circumstances. Article 13 of the Third Convention prohibits reprisals against prisoners of war or retained medical and religious personnel. Article 33 of the Fourth Convention prohibits reprisals against protected civilians (including civilian medical personnel), hospitals and medical transports. The only development of this principle is to extend the prohibition against reprisals to the adverse Party's civilian wounded, sick and shipwrecked, his civilian medical and religious personnel, and

his civilian medical units while they remain under the hostile Party's control.

b. The prohibition against reprisals against medical units and transports is valid only so long as they remain protected. Provisions for loss of protection if the protected unit or object is used for hostile acts or other acts harmful to the enemy is expressly provided in I Convention Arts 21, 22, II Convention Arts 34, 35, IV Convention Art 19, and Protocol I, Arts 13, 23, 27, 31, and 65. Similarly the wounded, sick and shipwrecked are protected only so long as they refrain from acts of hostility (Arts 8(a) and (b), 51(3)).

c. In view of the adequate provisions for cessation of protection, it would seem that the extension of the Convention prohibitions of reprisals against civilian wounded, sick, shipwrecked, medical personnel, units and transports is unobjectionable even if the prohibition is not predicated on reciprocal observance by the adversary. The protected persons and objects are not capable of making any significant contribution to the enemy's war effort. Nevertheless, the delegation of Egypt interposed the following reservation during the Plenary:

"The Egyptian delegation considers that the application of Article 20 of Protocol I makes it imperative that both Parties to the conflict should equally abide by it. In the case of a breach by a Party to the conflict of the provisions of Article 20, the other Party shall be entitled to take action accordingly." (CDDH/SR 37, Annex, P.3).

It is probable that Egyptian delegation sought not only to reserve against the limited extent to which Article 20 enlarges the prohibition now contained in the First, Second and Fourth Conventions, but against the application of Articles 46 I/47 II/ and 33IV under the Conventions themselves. As a belated reservation to the 1949 Conventions through a purported reservation to their reaffirmation is not admissible, it is hoped that Egypt may be persuaded to refrain from making such a reservation at the time of signature. It is possible that the U.S. and others may interpose reservations to the less meritorious prohibitions in Articles 51 and 52, without in any way affecting existing norms against reprisals. Reservations, such as Egypt's reservation to Article 20 would discredit her more meritorious reservations should she elect to make them against the reprisal prohibitions of Articles 51 and 52.

5. MILITARY IMPLICATIONS.

None. This Article restates existing international law except as stated Par 4a above.

6. RECOMMENDED U.S. ACTION

a. Seek to persuade Egypt not to press its reservation to the Article.

b. If Egypt makes the reservation at time of signature, the U.S. should expressly reject it, particularly to the extent that it purports to modify Egypt's existing obligations to observe, in all circumstances, the provisions of Article 46 of the First Convention, Article 47 of the Second Convention, and Article 38 of the Fourth Convention.

c. No implementing legislation is required.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

1. COMMITTEE II ACTION DELETING CERTAIN ICRC DRAFT ARTICLES.

ICRC Draft Articles 22-Search for Wounded, 23-Application, 24-Protection, and 25-Notification, within a chapter entitled Joint Provisions, were deleted. Chapter headings within the Section were also eliminated.

2. RELATION TO U.S. POSITION.

The deletion of ICRC Draft Articles 22, 23, and 24 were proposed by the U.S. and its co-sponsors. With some modification, they were willing to accept ICRC Draft Article 25, Notification. Committee II, however, considered that, except for Article 21, Definition, the articles carried in the Joint Chapter were unnecessary and confusing.

3. COMMENTS.

a. Section II of the ICRC draft sought to unify all provisions pertaining to medical transport. It was organized into two chapters, one dealing with joint provisions applicable to all forms of medical transport by land, sea and air, and the second dealing with exclusively with medical air transport.

b. Based on the proposals of the U.S. and its co-sponsors (CDDH/II/80), Committee II found that there were too many differences inherent in the nature of land, sea, and air transports to justify the technique of unification proposed by the ICRC. The articles in the ICRC draft joint chapter tended to be statements of general rules, modified by exceptions applicable to sea and air transport. The result was both confusing and inaccurate.

c. Accordingly, the Committee elected to treat land, water and air transport separately stating the conditions of protection, and loss of protection in articles pertaining to transport in each element. With respect to the article on Notification, the Committee concluded that detailed provisions applicable to water and air transport were required and should be provided. Notification was not, however, a necessary practice with respect to land transport. For these reasons, ICRC Article 25 (Art 22 in CDDH/II/80) was also deleted.

4. MILITARY IMPLICATIONS.

The deletions save interminable confusion and ambiguities.

RECOMMENDED U.S. ACTION.

No action is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 21 - Medical Vehicles (22)

1. TEXT OF ADOPTED ARTICLE.

Article 21 - Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

2. REFERENCES.

I Convention, Arts 19, 21-22, 35

IV Convention, Arts 18-19, 21

Protocol I, Arts 8(f), (g), (h), 12-13, 18, Annex Arts 3-7

Protocol II, Art 11.

3. RELATION TO U.S. POSITION.

There is no substantive difference between the U.S. position for medical vehicles (proposed as Article 23) and that adopted. The Committee, however, shortened the text by stating a general rule applicable to all medical vehicles instead of separating them into military and civilian medical vehicles and referring to the specific rules applicable to each.

4. COMMENT.

Inasmuch as the Conventions provide different provisions for the protection and loss of protection of military medical mobile units (Articles 19, 21, 22, First Convention) and that of civilian mobile medical units (Articles 18, 19, 21, Fourth Convention; Articles 12 and 13, Protocol I), there is some loss of clarity in the adopted text. This can be corrected by insuring that the military manuals address the distinction between military and civilian vehicles.

5. MILITARY IMPLICATIONS.

No significant impact.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 22 - Hospital Ships and Coastal Rescue Craft (23)

1. TEXT OF ADOPTED ARTICLE.

Article 22 - Hospital ships and coastal rescue craft

1. The provisions of the Conventions relating to:
 - (a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
 - (b) their lifeboats and small craft,
 - (c) their personnel and crews, and
 - (d) the wounded, sick and shipwrecked on board,shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.
2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:
 - (a) by a neutral or other State which is not a Party to that conflict; or
 - (b) by an impartial international humanitarian organization,provided that, in either case, the requirements set out in that Article are complied with.

Small craft described in Article 17 of the Second Convention shall be protected even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

2. REFERENCES.

I Convention, Art 20
 II Convention, Arts 14-17, 22-35, 36, 43
 IV Convention, Art 21
 Protocol I, Arts 8(f), (g), (i), 9, 23, 44(8).

3. RELATION TO U.S. POSITION.

Although substantial drafting changes were made to the U.S. proposal in CDDH/II/80, the substantive provisions of the U.S. proposal are incorporated in the adopted text. These are:

a. Reaffirmation of the provisions of the Second Conventions relative to the Status and Protection of State Owned Hospital Ships (Convention II, Art 22); Hospital Ships of National Relief Societies and Private Individuals (Convention II, Art 24); Hospital Ships Lent by Relief Societies of Neutral States (Convention II, Art 25); and Coastal Rescue Craft (Convention II, Art 27); their lifeboats and small craft; their personnel and their crew (Convention II, Art 36); and the immunity of all such ships and craft from attack from land. (Convention I, Art 20).

b. Clarification of their authority to serve civilian wounded, sick and shipwrecked as well as the persons listed in Article 13, Convention II. (See Article 35, Convention II).

c. Special provision restricting capture at sea of civilian patients of hospital ships who are not subject to PW status under Article 13, Convention II.

d. Elimination of the 10 days notice requirement for coastal rescue craft (Par 3).

e. Extension of the categories of authorized sources of hospital ships consistent with Article 9, Par 2, to neutral or other States not Parties to the conflict and to impartial international humanitarian organizations.

COMMENT.

a. See Par 2. The adopted text is consistent with the U.S. proposal. Except for a relaxation of the notification requirements for coastal rescue craft, this Article is a reaffirmation of the Second Convention and Article 21 of the Fourth Convention.

b. As Article 13, Convention II, (which enumerates those protected by that Convention in the same terms as Article 4, Convention III, lists those entitled to PW status) includes several classes of civilians, it was considered necessary to expressly provide protection to other classes of civilians.

No reference is made to Articles 43 or 44 as no new classes of civilians entitled to PW status are created.

There is certainly no reason for exempting the new combatants mentioned in Articles 43 and 44 from the provisions of Article 14, Second Convention, authorizing warships at sea to remove the wounded, sick and shipwrecked provided they are in a fit state to be moved and the warship can provide adequate facilities for necessary medical treatment. In this connection, Par 8 of Article 44 provides that the First and Second Conventions apply to new categories of combatants.

c. See Analysis of Article 9, Par 4b(4) for a discussion of the request the ICRC and the League of Red Cross Societies to amend Article 23(2)(b) by deleting reference to these two organizations. The U.S. supported the deletion.

5. MILITARY IMPLICATIONS.

As this is largely a reaffirmation of existing law, it has minimal impact except for clarifying ambiguities in present law.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 23 - Other Medical Ships and Craft (24)

1. TEXT OF ADOPTED ARTICLE.

Article 23 - Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

4. A party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.

5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.

6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any of the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

2. REFERENCES.

Report of the US Delegation to the ICRC Meeting of Experts on Signalling and Identification Systems for Medical Transports by Land and Sea, February 1973

I Convention, Articles 19, 21-22, 35

II Convention, Arts 14-17, 34-35, 37, 38, 43

Protocol I, Arts 8(f), (g), (i), 22, 43-44

IV Convention, Arts 4, 19, 21

3. RELATION TO U.S. POSITION.

a. Although substantial drafting changes were made with respect to U.S. proposals in CDDH/II/80, the substantive provisions of the original U.S. proposals are incorporated in the text as adopted. This text was based on the work of a working group which met during the 1975 Session (CDDH/II/305; CDDH/225, p. 36). Subject to minor drafting changes, the U.S. supported the working group text.

b. Variances, all of which are considered to be acceptable, are:

(1) Nonsubstantive reorganization of paragraphs.

(2) The provision that such ships and craft "obey every navigational order given them from a visible warship of an adverse Party" was clarified and elaborated in par 2.

(4) The U.S. proposal that medical ships of over 2000 tons gross shall comply with the notifications procedure of Article 22, Second Convention, was not accepted. Instead, optional notification procedures were formulated in par 4.

4. COMMENT.

a. Basically Article 23 implements the proposal of the Meeting of Experts on Signalling and Identification Systems for Medical Transports by Land and Sea, 5-9 February 1973, that:

(1) The Second Convention be reaffirmed; except that

(2) Cosatal rescue craft under Article 27, Second Convention, be relieved of the notification requirement of Article 22; and that

(3) Some provision be made for temporary medical ships and craft at sea and on other waters.

b. The text provides that such temporary ships and craft remain subject to the law of war; i.e., that they be subject to seizure if they fall into the hands of an adverse Party, (see Art 35, First Convention), but they may not be diverted from their mission in a manner prejudicial to the wounded and sick aboard. The exemption from capture accorded to hospital ships was not deemed appropriate to vessels which could be converted into general purpose ships after they had completed a medical voyage. Hospital ships, on the other hand, cannot be used for nonmedical purposes for the duration of the armed conflict.

c. The medical and religious personnel of such ships and craft are treated like other medical personnel under Article 37, Second Convention, or Article 28, First Convention. They may be retained for as long as necessary to care for the wounded and sick.

d. Civilians wounded and sick who fall into the hands of an adverse Party shall have the status of civilians under the Fourth Convention. (See Article 4, Fourth Convention).

e. The concept of temporary medical ships is not novel. Article 21, Fourth Convention, provides in relevant part:

" . . . specially provided vessels on sea, conveying wounded and sick civilians, . . . shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem"

Pictet's Commentary to Article 21, IV, states in part:

"The discussion which took place on the subject in the Plenary Assembly of the Diplomatic Conference brought out quite clearly that the word 'provided' . . . does not necessarily mean permanently provided; it will suffice if the vessels are provided temporarily. In order to enjoy protection under Article 21, it

is not necessary for those concerned to be conveyed to sea in hospital ships proper, . . .; any merchant vessel used temporarily as a hospital ship is protected under the provisions."

f. It follows that the principal change which would be effected by Article 22 is to permit temporary military medical ships and craft to be used routinely for military wounded, sick and shipwrecked, as well as for civilians. Under Article 19, Fourth Convention, the presence of military wounded and sick in a civilian hospital does not result in loss of protection.

g. The substance of the comment at par 4.b. of the Analysis of Article 22 is equally application to the second sentence of par 6.

5. MILITARY IMPLICATIONS.

In view of the present state of the law as indicated in par 4.e. and f., the impact on U.S. commanders is minimal. Art 23 merely clarifies the present law and provides implementing details.

6. RECOMMENDED U.S. POSITION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II. WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 24 - Protection of Medical Aircraft (26)

1. TEXT OF ADOPTED ARTICLE.

Article 24 - Protection of medical aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

2. REFERENCES.

I Convention, Art 36

II Convention, Art 39

IV Convention, Art 22

Protocol I, Arts 8 (f),(g),(j), 18, 25-31, Annex I, 3-13.

3. RELATION TO U.S. POSITION.

a. The article is substantially consistent with the U.S. proposal in CDDH/II/82.

b. The statement in the U.S. proposal that protection of medical aircraft is subject to the provisions of the proposed chapter on medical transport (Articles 21-33) was expanded to a reference to the entire Part. The Committee believed that the provisions of the articles on General Protection including Article 18 as well as those dealing with the wounded, sick and shipwrecked, and medical personnel, were relevant.

c. The reference to "Party to the conflict" was deemed unnecessary because the definition of medical transport in Art. 8(g) includes the element of "control by a Party to the conflict".

4. COMMENT.

a. This is the basic article on protection of medical aircraft. Its significance is that it eliminates the provision in Articles 36 I, 39 II, 22 IV, limiting protection for medical aircraft "while flying at heights, time, and route specially agreed upon between the belligerents concerned."

b. In lieu of the requirement of agreed flight plan, a more rational regime is provided which takes into account the relative danger to the aircraft and of abuse of protected status within (1) areas controlled by friendly forces, (2) in the contact zone and areas where control is not clear, and finally (3) while operating over enemy controlled areas. It also takes into account feasible methods for improving identification of medical aircraft and thus reducing the danger of misidentification.

5. EFFECT ON U.S. COMMANDERS.

a. The regime established by Articles 24-31 does not insure that medical aircraft will never be lost as a result of misidentification. If implemented through the use of distinctive signals and reasonable systems for their recognition, good faith application of the rules will reduce the risk to acceptable limits.

b. The system for recognition of medical aircraft provided in the Annex presupposes that Parties will establish and maintain recognition systems commensurate with their capability to engage and destroy aircraft. Thus, the degree of sophistication required for recognition depends on the range and sophistication of surface to air weapons systems.

c. See Discussion under Article 18.

6. RECOMMENDED U.S. ACTION.

No understandings or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 25 - Medical Aircraft in Areas not Controlled by an Adverse Party (26 bis)

1. TEXT OF ADOPTED ARTICLE.

Article 25 - Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, and in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of enemy surface-to-air weapons systems of the adverse Party.

2. REFERENCES.

I Convention, Art 36
II Convention, Art 39
IV Convention, Art 22
Protocol I, Arts 8(f), (g), (i), 24, 26-31.

3. RELATION TO U.S. POSITION.

The adopted text is consistent with the U.S. position as reflected in CDDH/II/82. The situation in which the optional notification is appropriate is emphasized by the illustration of medical aircraft flights within range of enemy surface-to-air weapons systems. This clarification was proposed by Norway.

4. COMMENT.

a. Article 25 explicitly frees medical aircraft from the requirement for flight plans in land areas under the physical control of friendly forces and

sea areas not controlled by adverse forces. Medical evacuation flight in rear areas, the communication zone and intercontinental evacuation are thus generally protected without any formality.

b. Medical evacuation flights in the battle area, however, particularly within range of enemy's surface-to-air weapons system are less secure. Accordingly, notification of the flight plan is a recommended precaution in addition to the display of the distinctive emblem and distinctive signals.

c. Article 25 makes a necessary distinction between land and sea. On land there are usually well defined areas under the physical control of a Party. Most of the sea, however, is free for neutral or humanitarian ships and aircraft, but there may be areas of the sea which the adversary controls, such as the sea around island bases or that adjacent to defended areas of the territorial sea or along straits. Thus, a reasonable regime at sea is to permit flights without agreement except over areas controlled by the adverse Party.

d. The term "physical control" is used to avoid terms having legal connotation, which might cause confusion with the degree of control deemed necessary for occupied territory under Hague Regulations, Art 42.

MILITARY IMPLICATIONS.

Assuming that the distinctive signal provision of Annex I are worked out and implemented, air defense commanders in forward areas will have the additional duty to install and maintain appropriate systems for recognizing the visual and electronic signals. Radio communications, which are contemplated for the notification provision of Article 25 (as well as the agreement provisions of Articles 26, 27, 28 and 31), will require that either an air defense station or a medical dispatcher guard the frequency or frequencies which will be used for medical communications between the parties concerned. The command and control system must also be capable of alerting all units which can engage protected medical aircraft of its medical character. It is to be noted that these procedures are critical only with respect to weapons systems which acquire targets by electronic means. Where target acquisition or engagement is by visual means, it is expected that visual identification, i.e., the distinctive emblem and lights, will afford sufficient opportunity to prevent engagement of protected medical aircraft.

6. RECOMMENDED U.S. ACTION.

No understanding or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 26 - Medical Aircraft in Contact or Similar Zones (27)

1. TEXT OF ADOPTED ARTICLE.

Article 26 - Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.

"Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

2. REFERENCES.

I Convention, Art 36
II Convention, Art 39
IV Convention, Art 22
Protocol I, Arts 8(f), (g), (i), 24, 25-27, 31

3. RELATION TO U.S. POSITION.

a. The article is consistent with the U.S. position as set forth in CDDH/II/82.

b. For origin of statement that medical aircraft operate at their own risk in the areas affected by Article 26, see Par 4(c).

4. COMMENT.

a. This article reflects realistic recognition that medical battlefield evacuation in the forward part of the battle area, and in areas where control is disputed, involves high risk of misidentification. Although it is recognized that the Parties have a juridical right to conduct medical air evacuation within the areas under their control and that such medical aircraft are protected if recognized, it nevertheless acknowledges the risk and recognizes that effective protection depends on an agreement.

b. At the 1972 Conference of Government Experts, Article 25, Removal of the Wounded from the Battle Area, was the most hotly debated provision within Commission I (1972 Report, para 1.80 - 1.84). The U.S. urged that, as in rear areas, no requirement for an agreement be stated. It argued that the use of light medical aircraft, well marked and emitting distinctive light and electronic signals, should be sufficient for recognition in the battle area. Others, however, insisted that protection in the forward part of the battle area must be contingent on a specific agreement. The text adopted after exhaustive debate was a compromise worked out by the UK, Sweden and GDR. It provided that, in the forward part of the battle area under the control of friendly forces, the protection of medical aircraft "can be effective only by agreement between the local military authorities. Nevertheless, even if prior agreement has not been achieved, a medical aircraft shall not be the object of attack by any person who has positively recognized it as a medical aircraft."

c. At the 1975 Conference, it became evident that the consensus achieved in 1972 was relatively stable. The GDR, however, introduced an amendment deleting the last sentence of the ICRC draft article dealing with protection of recognized medical aircraft operating in the absence of an agreement. After extensive debate, the drafting committee worked out the language of the last sentence of Article 27, Par 1. This was adopted by the Committee by consensus. (CDDH/II/SR 52).

d. Although Egypt had participated in the consensus adoption of the Article in Committee II and by the plenary (CDDH/SR 39, p. 3), Egypt submitted a written statement pointing out that Article 26 is a change to rather than a development of I Convention, Article 36.

"The Egyptian delegation believes that, for the protection of medical aircraft, prior agreement is absolutely necessary for aircraft to fly over contact or similar zones."

In connection with the Egyptian statement, it should be observed that under Article 36 of the First Convention, prior agreement is required for the protection of medical aircraft in any area, not just the combat zone or the contact zone. Article 6 of the First Convention contemplates special agreements as to Article 36 and other provisions. For those States who become Parties to Protocol I, Articles 24-31 may be construed to be special agreements in the sense of Article 6, First Convention.

e. The definition of "contact zone" was influenced by an article by LTC Frederic de Mulinen, Swiss Army, in which he aptly described the forward part of the battle area:

". . . in the 'forward part' are to be found units in direct contact with enemy vision and hence to direct firing. In the 'rear part' of the battle areas are the units belonging to the second echelon and the reserve levels of troops in hostile contact. They are less exposed to enemy vision and firing, and there is, therefore, greater freedom of movement." (Signaling and Identification of Medical Personnel and Materiel, International Review of the Red Cross, Sept 1972).

5. MILITARY IMPLICATIONS.

a. Agreement will continue to be difficult to achieve. (See Art. 29 below). Present doctrine pertaining to battlefield evacuation by air does not contemplate pickups from points under enemy ground observation and direct fire. Accordingly, Art 25 will be more relevant to air evacuation from medical collecting stations.

b. To the extent that air evacuations take place from the contact zone, the problems of recognition and communications noted with respect to Art 25 will be acute.

6. RECOMMENDED U.S. ACTION.

No understanding or implementing legislation is necessary.

PROTOCOL I, PART I, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 27 - Medical Aircraft in Areas Controlled by an Adverse Party (28)

1. TEXT OF ADOPTED ARTICLE.

Article 27 - Medical aircraft in areas controlled by an
adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.

2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

2. REFERENCES.

I Convention, Art 36

II Convention, Art 39

IV Convention, Art 22

Protocol I, Arts 8(f), (g), (i), 24-26, 28-31.

3. RELATION TO U.S. POSITION.

a. Par 1 is consistent with the first sentence of the U.S. proposal for Art 28 (CDDH/II/82).

b. Except for clarifying changes, par 2 is consistent with the balance of the U.S. proposal. The "other measures to safeguard the interests of the said Party" mentioned in the last sentences are intended to be orders to leave the area, change course, etc.

4. COMMENT.

a. Articles 36 I/39 II/22 Iy prohibit "flights over enemy or enemy-occupied territory". Accordingly, under the Convention, such overflight is a breach of the Convention. Under Article 28 such overflight gives rise to loss of protection. Nevertheless, before taking the extreme measures of attacking a medical aircraft, the Parties are urged to order it to land or take other less drastic measures. The disposition of offending medical aircraft, their crew and patients is elaborated in detail in Article 30.

b. Efforts by some delegations to specify the military or political level at which agreements are to be effected were rejected by the Committee. It was believed that each Party should have the authority to specify what authorities are competent to authorize such flight.

5. MILITARY IMPLICATIONS.

a. The surface-to-air and air-to-surface communications problem mentioned with reference to Articles 25 and 26 is relevant to Article 27.

b. The principal utility of the Article involves encircled areas, beach-heads and established airheads. Agreement of a humanitarian nature in such situations are traditional and may be easier to achieve on the basis of scheduled medical flight and prescribed corridors than those contemplated in Article 26.

6. RECOMMENDED U.S. ACTION.

No understanding or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 28 - Restriction on Operations of Medical Aircraft (29)

1. TEXT OF ADOPTED ARTICLE.

Article 28 - Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.

2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, subparagraph (f). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

2. REFERENCES.

I Convention, Art 36

II Convention, Arts 34, 39

IV Convention, Art 22

Protocol I, Arts 8(f),(g),(j), 12-13, 24-27, 29-31.

RELATION TO U.S. POSITION.

a. Article 29 is fully consistent with the U.S. position proposed in CDDH/II/82.

b. Drafting changes have been made for consistency with other Articles adopted by Committee II. (See Art 12, par 4, and Art 13).

4. COMMENT.

a. Apart from the fear that the safety of medical aircraft could not be assured against attack from distances which exceed the capability to recognize the distinctive emblem, an important factor for the limitations on protection of medical aircraft under present law was concern over the security threat posed by abuses of protected status. This same concern was evidenced during the debate on medical aircraft in the 1972 Conference. (Report, VOL I, Para 1.67, 1.79, 1.80.)

b. The pattern of measures in the Convention intended to ensure against abuse of medical protected status are:

(1) Loss of protection when the threat to security is moderate. Articles 21, 22, and 35 of the First Convention and Articles 34 and 35 of the Second Convention simply provide for loss of protection if medical units "are used to commit, outside their humanitarian duties, acts harmful to the enemy."

(2) With respect to extremely dangerous threats to security, however, the conventions impose explicit prohibition. Because of the threat to security of warships, Article 34 prohibits the possession of secret codes by hospital ships. Articles 36 of the First Convention and 39 of the Second Convention prohibit overflight of enemy occupied territory. These explicit prohibitions imply that their violation is a breach of the conventions, not merely a condition entailing loss of protection.

c. Agreements on the basic protection of medical aircraft without the inflexible necessity of an agreed flight plan was achieved only by strengthening the conditions intended to insure that medical aircraft will not be used for acts harmful to the enemy and to minimize its capability to perform such acts. These conditions as they appeared in the 1972 Commission I text are listed below:

(i) Prohibiting parties to use their medical aircraft in order to acquire any military advantage (Art. 24(3)).

(2) A statement that medical aircraft may not be used to shield military objectives, based on Article 23(1), Third Convention, and Article 28, Fourth Convention (Art. 24(3)).

(3) Prohibition against carrying intelligence gathering equipment (Art. 24(4)).

(4) Prohibition against carrying persons, supplies, or equipment not necessary to the performance of the medical mission (Art. 24(4)). Thus, their passengers were limited to medical personnel and the sick and wounded. Their supplies and equipment are limited to those necessary for collection, transport and care of the wounded and sick.

(5) Prohibition against carrying arms other than those belonging to the wounded and sick or necessary for the defense of the medical personnel and the wounded and sick (Art 24 (5)).

(6) Exclusion of search as a part of the medical air mission on land unless agreed to by the adverse Party (Art 23 (d)) was intended to preclude the flying of a search pattern in the battle area which would undoubtedly be considered by the enemy to be a reconnaissance flight.

5. EFFECT ON U.S. COMMANDERS.

a. The restrictions of this article are prohibitory in nature. It follows that effective command action and frequent inspection are required in order to prevent violations.

b. The foregoing is particularly important with respect to temporary medical aircraft. General purpose aircraft used for medical evacuation frequently carry mixed loads of both patients and other personnel. Some equipment not associated with medical mission is not removable. Such aircraft may continue to be used to carry the wounded and sick, medical personnel and equipment, but it may not be designated or marked as a medical aircraft. To the extent that long haul medical evacuation cannot comply with the requirement of this article, they cannot be protected as medical aircraft.

6. RECOMMENDED U.S. ACTION.

No understanding or implementing legislation is required.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 29 - Notifications and Agreements Concerning Medical Aircraft (30)

1. TEXT OF ADOPTED ARTICLE.

Article 29 - Notifications and agreements concerning medical aircraft

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification.

A Party which receives a request for prior agreement under Articles 26, 27, 28 (paragraph 4), or 31 shall, as rapidly as possible, notify the requesting Party:

(a) that the request is agreed to;

(b) that the request is denied; or

(c) of reasonable alternative proposals to the request. It may also propose a prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.

4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.

5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct the units regarding the means of identification that will be used by the medical aircraft in question.

2. REFERENCES.

I Convention, Art 36

II Convention, Art 39

IV Convention, Art 22

Protocol I, Arts 8(f), (g), (i), 18, 24-28, 30-31; Annex I, Arts 7, 9.

3. RELATION TO U.S. POSITION.

a. Pars 1, 2, 3, and 5 are consistent with the U.S. position reflected in CDDH/II/82.

b. Par 4 is a needed recognition that in relation to notification and agreement concerning medical air missions, particularly in battle situations, speed is essential.

4. COMMENT.

a. This article emphasizes the importance of communications between adversaries to the effectiveness of the regime developed for medical air transport in battle situations. Thus, the development of a feasible system for such communications by radio, as contemplated in Articles 7 and 9 of Annex I, is very significant.

b. Established distress frequencies have limited application. They can be used only under the emergency circumstances provided in ITU regulations. It does not appear feasible, in the foreseeable future, to provide a family of internationally designated frequencies for this type of communication. The only feasible presently available system is for states to designate and publish the frequencies which they have provided for this purpose. The Parties can then communicate on the frequencies each has designated unless they agree to a common frequency.

c. The rudimentary communication system now available may be improved in the future as experience and coordination with the International Telecommunications Community improve. Accordingly, it is important that amendments of the Annex be relatively easy to effect. Article 98 is thus an extremely important one.

5. EFFECT ON U.S. COMMANDERS.

See Par 5, Review of Article 25. This article will require development of doctrine for maintaining communication with an adverse Party pertaining

to medical aircraft and alerting units which can engage aircraft in the area covered by notification or an agreement.

6. RECOMMENDED U.S. POSITION.

a. No understanding or implementing legislation is necessary.

b. See action to be taken at the 1979 World Administrative Radio Conference of the ITU to facilitate radio communications discussed under Articles 7 and 9 of Annex I.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 30 - Landing and Inspection of medical aircraft (31)

1. TEXT OF ADOPTED ARTICLE.

Article 30 — Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.
2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.
3. If the inspection discloses that the aircraft:
 - (a) is a medical aircraft within the meaning of Article 8, subparagraph (j),
 - (b) is not in violation of the conditions prescribed in Article 28, and
 - (c) has not flown without or in breach of a prior agreement where such agreement is required,the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.

4. If the inspection discloses that the aircraft:

- (a) is not a medical aircraft within the meaning of Article 8, sub-paragraph (f),
- (b) is in violation of the conditions prescribed in Article 28, or
- (c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

2. REFERENCES.

I Convention, Art 36
 II Convention, Art 39
 IV Convention, Art 22
 Protocol I, Arts 8(f),(g),(i), 24-29, 31.

3. RELATION TO U.S. POSITION.

a. Pars 1 and 2 conform substantially with the U.S. position as proposed in CDDH/II/82, Rev 1 (Belgium, Canada, France, Netherlands, Norway, UK and USA).

b. Par 3 was modified to make it clear that the adverse Party may take off wounded prisoners of war belonging to its own forces or those of an ally.

c. Par 4 incorporates the scope of Par 5 of CDDH/II/82 Rev 1 with respect to medical aircraft which had flown without or in breach of a prior agreement where such agreement is required. The proposal of the U.S. and its co-sponsors stated explicitly that such aircraft may be seized but only if the Party seizing the aircraft can provide adequate facilities for necessary medical treatment of the wounded and sick aboard. This provision was deleted because several delegations felt that the distinction drawn between the situation in 4(c) and 4(a)-(b) implied a lesser degree of care.

for the patients in the latter situations. As the same high degree of care is mandated by Article 10, Protocol I, for all wounded and sick, it was deemed unwise to draw the distinction. The U.S. delegation joined in the consensus adoption of par 4. (CDDH/II/SR 58, 59).

In explanation of its participation in the consensus, the U.S. representative made the following statement:

"The U.S. delegation had joined in the adoption by consensus of the new paragraph 4 of Article 30 because of the general obligation laid down in Article 10, adopted at the second session, for the sick and wounded to be treated humanely and in all circumstances, and that they should receive to the fullest extent practicable and with the least possible delay, the medical care required by their condition. It had felt that to lay down that under certain circumstances aircraft carrying wounded might be seized only if good medical treatment could be provided for its occupants would constitute a diminution of the provisions applicable in other situations. The relevant provisions of the third Geneva Convention of 1949 oblige the capturing Power, in those rare instances on land where adequate facilities for the provision of medical treatment were not available, to make the necessary arrangements, even if that involved transfer to a neutral Power or repatriation." (CDDH/II/SR 59, Par 11)

4. COMMENT.

a. This Article makes explicit what is implicit in the 4th paragraph of Article 36, First Convention.

b. Because this article will have to be implemented by inspection parties in remote airfields, it was considered necessary to provide detailed guidance, almost in check sheet form as to the circumstances in which medical aircraft must be permitted to continue their journey and when they may be seized on account of a violation of the rules.

c. It should be noted that, under Par 1, an order to land for inspection is limited to situations when a medical aircraft flies over land or water under the physical control of an adverse Party or over areas the control of which is not clearly established. This article does not authorize ordering the landing of a medical aircraft flying in the relevant part of the contact zone.

d. It is noted that in the latest text prepared by the Secretariat, the cross reference to the definition of medical aircraft in Article 30(3)(a) is to Article 8(j), "Medical aircraft", but the comparable reference in Article 30(4)(a) is to Article 8(f), "Medical transportation". As adopted

1 NOV 1977

by Committee II, the Drafting Committee, and the Plenary, the correct cross reference is to the definition of "medical aircraft" not to that of "medical transportation".

The short definition of "medical aircraft" (any medical transport by air) incorporates the definitions of both "medical transport" (Art 8(g)) and "medical transportation" (Art 8(f)). By referring only to "medical transportation" the Secretariat's text eliminates two essential elements found in Art 8(g), namely that the medical aircraft must be "assigned exclusively to medical transportation" and that it must be "under the control of a competent authority of a Party to the conflict." (Art 8(g)). For this reason and because Paragraphs 3 and 4 must complement each other exactly, the erroneous cross reference in Art 30 (4) should be corrected in the final text. A message to that effect has been dispatched to the Secretariat via the U.S. Mission.

5. MILITARY IMPLICATIONS.

The clarification of procedures should facilitate landing and inspection practice when medical aircraft of an adverse Party are ordered to land.

6. RECOMMENDED U.S. ACTION.

a. No additional statement of understanding and no implementing legislation is necessary.

b. Take necessary action to correct error in par 4(a).

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED

SECTION II, MEDICAL TRANSPORTATION

Article 31 - Neutral or Other States not Parties to the Conflict (32)

1. TEXT OF ADOPTED ARTICLE.

Article 31 - Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal.

If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.

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

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

2. REFERENCES.

I Convention, Art 37
II Convention, Art 40
Protocol I, Arts 8(f), (g), (i), 24-30
Hague Convention No. V, Arts 2, 14

3. RELATION TO U.S. POSITION.

- a. Par 1 is in substantial conformity to the U.S. position.
- b. Par 2 was rewritten to conform closely to par 2, Art 28.
- c. Par 3 was rewritten to be consistent in substance with procedures prescribed in Art 31, pars 3 and 4.
- d. Par 4 is consistent with the U.S. position. It clarifies the ambiguous use of "disembarked" as used in the third par, First Convention.
- e. Par 5 is consistent with the U.S. position.

4. COMMENT.

a. This article reaffirms Art 37 I/40 II, but conforms it to the procedures prescribed in Articles 27, 29 and 30. In substance, it stems from CDDH/II/82 Rev 1, proposed by the U.S. and others, and CDDH/II/290 proposed by Austria, Finland, Sweden, Switzerland, and Yugoslavia.

b. The requirement for seizure of aircraft shown not to be medical aircraft is consistent with neutral obligation under Hague Convention No V of 1907 not to permit material or war to pass through its territory. An aircraft which carries persons or cargo not encompassed within the definition of medical transportation in Art 8(f) is not a medical aircraft.

c. It is made clear in par 4 that the provision requiring internment of wounded and sick persons under the provisions of Article 14, Hague Convention No. V, does not apply to those temporarily removed from a medical aircraft in connection with the inspection. The requirement applies only to those who are hospitalized in the neutral state and are not able to depart with the medical aircraft.

d. It should be noted, however, that wounded and sick prisoners of war carried aboard the transport passing through neutral territory must be interned (FM 27-10, par 543).

5. MILITARY IMPLICATIONS.

This article may impose a special training requirement for U.S. personnel involved in air defense, clearance, air traffic control, and inspections in armed conflict situations in which the U.S. is not a Party to a conflict.

6. RECOMMENDED U.S. ACTION.

No statement of understanding or implementing legislation is necessary.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED, SECTION
III, MISSING AND DEAD PERSONS

1. TEXT OF ARTICLE AS ADOPTED.

Article 32, General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

2. REFERENCES

- I Convention Article 15
- II Convention Article 19
- III Convention Article 122
- IV Convention Article 140
- UNGA Resolution 3220 (XXIX)

3. RELATION TO U.S. POSITION

This article was developed at the 1976 session. Prior to that time the U.S. had no position on it but the U.S. found it "not inconsistent with U.S. policy and objectives."

4. COMMENT

This article merely serves as an introduction to the following two articles. It does state a principle that, heretofore, had not been recognized in international law i.e., the right of families to know the fate of their relatives.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No statements of understanding or implementing legislation is required.

1. TEXT OF ARTICLE AS ADOPTED.

Article 33, Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
 - (a) Record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
 - (b) To the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.
4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

2. REFERENCES

UNGA Resolution 3220 (XXIX)

3. RELATIONS TO U.S. POSITION

The substance of this article is entirely consistent with the U.S. position. This article was not included in the basic ICRC text and its origin was the text of a US, FRG, UK proposal (CDDH/II/56) made at the first session of the Conference. The article as drafted creates an affirmative duty of the parties to respond to requests from another party for information about persons reported missing. It also requires parties to record information on persons who are detained for two weeks or who die in detention. The final paragraph encourages the parties to permit search teams (who will be protected) to seek and recover the dead from battlefields.

4. COMMENT

The text as adopted is consistent with the initial U.S. proposal and reflects a strong U.S. desire to strengthen the accounting requirement for the missing and dead. It is a major step forward in humanitarian law. One of the main features of the article is that it is not limited in application to a category or person, e.g. prisoners of war, but rather applies to any person reported missing, any person detained for more than two weeks or died during detention, etc. Thus a party can not avoid its responsibility under this article by asserting that a certain person or group of persons do not within the application of the article.

5. EFFECT ON U.S. COMMANDERS

No direct effect on battlefield commanders but it must be noted that the parties are encouraged to arrange for teams, including, if appropriate personnel of the adverse party to search for, identify, and recover the dead. The administrative requirements to record information on certain person does not affect the battlefield commander.

6. RECOMMENDED U.S. ACTION

No U.S. understanding or reservation is required on this provision.

PROTOCOL I, PART II, WOUNDED, SICK AND SHIPWRECKED, SECTION III, MISSING AND DEAD PERSONS

1. TEXT OF ARTICLE AS ADOPTED.

Article 34, Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

- (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
- (b) to protect and maintain such gravesites permanently;
- (c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the gravesites referred to in this article are situated shall be permitted to exhume the remains only:

- (a) in accordance with paragraphs 2 (c) and (3), or

- (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.

2. REFERENCES

- III Convention Articles 120-124
IV Convention Articles 129, 130, 131, 136-141

3. RELATION TO U.S. POSITION

The article as adopted substantially agrees with the U.S. position. Changes from the U.S. position are basically drafting and style changes which do not change the substance of the article.

4. COMMENT

The article provides for four situations. First there is a reaffirmation, and broadening of Article 130 of the Fourth Convention with respect to the respect, maintenance and marking of gravesites. Secondly, the article albeit limited by the term "[A]s soon as circumstances and the relations between the adverse parties permit," provides for the concluding of agreements to allow visits to the grave, permanent protection and maintenance of the grave and the return of the remains. Thirdly, the article provides for the situation in which agreement can not be reached and imposes an obligation on a party to wait at least five years before proceeding to treat the gravesites under its own laws. Finally the article puts severe restrictions on exhumation of remains of persons covered by the article.

5. EFFECT ON U.S. COMMANDERS

None.

6. RECOMMENDED U.S. ACTION

No reservation or understanding is required on this article.

Some question has arisen as to whether temporary battlefield graves are included within the provisions of paragraph 4(b) of this article. The remarks of the Acting Rapporteur of this section's working group are considered pertinent and controlling. On page 4 of CDDH/II/SR. 76 dated 1 June 1976. The Acting Rapporteur noted:

"Paragraph 4(b) relates to exhumation for reasons of public necessity, "necessity" in that context being intended to cover the need to protect graves. Thus, where adequate protection and maintenance was not otherwise possible - for instance, in the case of scattered and temporary graves made during a battle - exhumation for the purpose of regrouping graves in one location would be a matter of public necessity."

12 SEP 1977

Article 35 -- Basic rules

Protocol I, Part III, Section I, Methods and Means of Combat

1. TEXT OF ADOPTED ARTICLE.

Article 35 - Basic rules (previously Art. 33)

1. In any armed conflict, the right of Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is forbidden to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

2. RELATED PROVISIONS.

Para 1 - Similar to Article 22, 1907 Hague Regulations

Para 2 - Similar to Article 23(e), 1899 Hague Regulations and 1907 Hague Regulations

Para 3 - Similar provision in Article 55, Protocol I. (Compare Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.)

3. RELATION TO US POSITION. No substantial difference.

4. COMMENT.

Because of the subject matter, weapons, this article was one of the most potentially troublesome articles at the Conference. It was one of the most hard fought articles at the second session at Committee level.

Paragraph 1 is derived from the well established Hague Principle "The right of belligerents to adopt means of injuring the enemy is not unlimited."

Paragraph 2 represents an attempt to phrase more accurately the existing Hague Rule represented in the 1899 and 1907 French text (propres a causer des maux superflus)

12 SEP 1977

by reverting to the 1899 English text language except for adding the 1907 phrase "unnecessary suffering." As such, this text strongly supports the view that no substantive change in meaning to existing legal requirements is intended or effected. Indeed, the Federal Republic of Germany stated explicitly that they joined in the text on the understanding that paragraphs 1 and 2 reaffirmed customary law. India noted that it believed these rules applied to all weapons of whatever type. The ICRC proposed language (adopted from the 1868 Petersburg Declaration and troublesome to some) was rejected.

Paragraph 3 was adopted in an effort to protect the natural environment against certain methods of warfare which caused extreme damage to it. The 1975 U.S. Delegation Report notes as to this paragraph:

"According to the Report of Committee III 'long term' was considered by some to be measured in decades, with reference made to twenty to thirty years as a minimum, and it appeared to be a widely shared assumption that battlefield damage incidental to conventional warfare would not normally be proscribed by the provision. The provision covers such damage as would be likely to prejudice the continued survival of the civilian population over a long term or risk long term major health problems."

The committee report to the effect that "battlefield damage incidental to conventional warfare would not normally be proscribed by the provision" and the reference to "long term major health problems" suggests that nuclear weapons might be affected by Arts 35(3) and 55. Depending on the intensity of fallout, some long term health and genetic effects may be expected from Cesium 137 and Carbon 14. This emphasizes the necessity of an express understanding that the Rules of the Protocol do not affect the use of nuclear weapons.

The United States did make an express statement on the application of the Protocol to nuclear weapons at the Plenary.

"As I mentioned earlier, the Government of the US considers that the Protocol is designed to afford the greatest possible protection to civilians and other victims of war during international armed conflict. To that end

it imposes a number of significant restraints on the use of means and methods of warfare. From the outset of the conference, it has been our understanding that the rules to be developed have been designed with a view to conventional weapons. During the course of the conference we did not discuss the use of nuclear weapons in warfare. We recognize that nuclear weapons are the subject of separate negotiations and agreements, and further that their use in warfare is governed by the present principles of international law. It is the understanding of the United States that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. We further believe that the problem of regulation of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements." (Statement of Ambassador Aldrich, 9 June 1977 before Plenary at time of adoption of Protocol I by consensus.)

Great Britain and France made similar statements. These were not disputed by other countries, although India had declared earlier they joined the consensus on this Article ". . . with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons." [SR 39, Annex, pg. 2.]

With respect to paragraph 3, a number of states at the Plenary pointed out that the meaning of these words (protecting the environment) was entirely different from the meaning of similar words ("widespread longlasting or severe") contained in the Convention prohibiting military use of environmental modification techniques. In some cases, they expressly declared that they did not want their position on that Convention compromised by adoption of this text. The FRG explicitly declared that the meaning of those words in paragraph 3 ("widespread, long term and severe") had to be consistent with the line of thought in Committee III, and in no case interpreted in the light of different instruments of international law (SR 39, Annex, pg. 1). The UK regarded the inclusion of paragraph 3 as an unnecessary repetition of language in Art 55, and would construe it the same as Art 55 (SR 39, Annex, pg. 3).

Thus, the negotiating record including the Committee Report and Plenary Statements gives substantial meaning to the words of paragraph 3 and avoids confusion with the separate Convention on Hostile Use of Environment Modification Techniques. In view of this clear negotiating record, it appears unnecessary to express an understanding or reservation on this point. Indeed, it may be unwise to do so. It might offer other States an opportunity to contest this clear record. However, if other NATO States express a need for a common understanding on this point, the U.S. should consider doing so.

5. MILITARY IMPLICATIONS.

This article is expected to have a negligible impact on US military operations. Paragraphs 1 and 2 simply reaffirm long-standing principles.

However, paragraph 3 represents an innovation-relevant particularly to research, development and acquisition of new weapons -- rather than to field commanders. The only weapons used by the U.S. in recent conflicts seriously argued to have such effects were particular herbicides allegedly causing long term genetic defects and long term devastation of land (herbicide orange). The U.S. stopped use of this herbicide. In connection with ratification of the 1925 Geneva Gas Protocol, the U.S. has renounced unilaterally, as a policy measure, the first use of herbicides in war (except certain uses not pertinent here).

The impact of this limited provision protecting the environment will ultimately depend upon state interpretations of its provisions particularly state practice. It is not expected to have any significant military impact and is consistent with overall U.S. security interests. The acceptability of paragraph 3 is contingent on an understanding along the lines suggested below.

6. RECOMMENDED U.S. ACTION.

a. Express U.S. Understanding or Reservation (on entire Protocol).

"It is the understanding of the United States that the Rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. The use of nuclear weapons continues instead to be governed by the present principles of international law."

2 NOV 1977

b. No implementing legislation or other action is necessary.

Article 36 -- New Weapons

1. TEXT OF ADOPTED ARTICLE.

Article 36 - New weapons (previously Art 34)

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

2. REFERENCES.

See Arts. 35 and 51, this Protocol. As examples of other rules of international law on weapons, see (a) 1925 Geneva Protocol For the Prohibition of the Use in War of Asphyxiating Poisonous, other Gases, and of Bacteriological Methods of Warfare; (b) Article 23(a), 1907 Hague Regulations (prohibiting poison).

3. RELATION TO U.S. POSITION.

No substantial difference (but see Comments).

4. COMMENTS.

The US long urged a provision along these lines:

a. To emphasize the responsibility of the Party developing or using the weapon, means or method in determining its legality.

b. To attempt to defuse the weapons issue.

The US, partly in response to congressional desires, has already instituted such a review procedure (DOD Instruction 5500.15, 16 Oct 74) which applies to acquisition as well as research and development. The use of the term "means" in the text, while redundant, ensures that all means of warfare are covered by the review requirement which is consistent with the US Directive. The US Delegation preferred to omit any reference to the rest of the Protocol (other than Article 35). Doubtless some will argue that various articles in the rest of the Protocol do prohibit or restrict certain specific weapons. Since the reference is a general reference to the rest of the Protocol) and since both Article 35 and

12 SEP 1977

Article 51 (particularly as to weapons which are incapable of being directed at a military objective) are relevant, the text is acceptable.

When the Article become effective as a treaty obligation on other States, it may be appropriate for the U.S. to point out to these States their obligation to implement this review procedure during peacetime. There is no need for an understanding to this Article. The Article was adopted in Committee III and Plenary by consensus.

The use of the words "some or all circumstances" is extremely beneficial in recognizing that limitations on use (such as first use of chemical weapons under the 1925 Geneva Gas Protocol) are more significant than total prohibitions. It supports long-standing U.S. and Western positions stressing restrictions on certain uses rather than inherent prohibitions.

5. MILITARY IMPLICATIONS.

The Article, as such, does not have any significant military impact. The substance of what is required has already been instituted, by DOD Instruction, within the Department of Defense.

6. RECOMMENDED U.S. ACTION

- a. No understandings are necessary.
- b. No legislation is required (however, minor changes may be required in current DOD Instruction governing weapons reviews).

Article 37 -- Prohibition of Perfidy

1. TEXT OF ARTICLE ADOPTED.Article 37 - Prohibition of perfidy (previously Article 35)

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

(b) the feigning of an incapacitation by wounds or sickness;

(c) the feigning of civilian, noncombatant status; and

(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

2. REFERENCES.

Related Articles include:

(a) Article 39 - Emblems of Nationality (which prohibits misuse of neutral emblems, insignia or uniforms);

(b) Article 44 - Combatants and Prisoners of War (which defines circumstances in which combatants must distinguish themselves from civilians);

12 SEP 1977

(c) Article 46 - Spies;

(d) Article 51 - Protection of the Civilian Population.

The 1907 Hague Regulations, Article 23 (b), states it is forbidden ". . . to kill or wound treacherously individuals belonging to the hostile nation or army."

3. RELATION TO U.S. POSITION.

Consistent. No substantial differences.

4. COMMENT.

Perfidy and treachery are already forbidden by the law of war. This article defines the existing Hague and customary law prohibition more precisely so as to clarify its meaning and scope. The line between perfidy and unlawful ruses has been somewhat indistinct. The text adopted has several advantages over previous proposals. First, the prohibition is clearly tied to "kill, injure or capture," not a specific prohibition on perfidy per se. Second, the concept of protection under the international law of armed conflict is used, thus avoiding concern that a broader term might include such general matters as the UN Charter or local bilateral agreements. Third, the narrowing of a "situation of distress" to "incapacitation by wounds or sickness" ties the concept of protection much more closely to the 1949 Geneva Conventions protecting wounded and sick. Fourth, the added prohibition against feigning neutral or UN status is also useful.

The prohibition of the Hague Regulations, Article 23b, against the treacherous killing of an enemy combatant or civilian is broader than the killings denounced by this Article. For example, hiring a member of the armed forces of an enemy State to assassinate his commander would be prohibited under H.R., Article 23, although such an act would not involve any reliance by the victim on confidence that international law protects him against the acts of his own troops. Article 37, Protocol I does not supersede H.R. Article 23b to the extent that the latter is broader.

The Article, adopted by consensus, is fully consistent with U.S. views.

5. MILITARY IMPLICATIONS

Negligible. The Article as adopted will not have any adverse impact upon the U.S. It is a clarification of

12 SEP 1977

existing law. U.S. interests and effective observance of humanitarian law are considerably enhanced by the prohibition against feigning civilian, non-combatant status. A normal consequence of capture of combatants in civilian clothing is denial of PW status. This proposed treaty adds an additional specific treaty consequence, that it is perfidy and thus a law of war violation. However, acts by combatants dressed in civilian clothing who comply with the minimum standards prescribed under Article 44(3) are not perfidious within the meaning of Article 37, paragraph 1(c).

6. RECOMMENDED U.S. ACTION.

No U.S. understandings are necessary. Implementing legislation to make it an offense to feign civilian, non-combatant status in order to kill, injure or capture may be appropriate.

Article 38 -- Recognized emblems

1. TEXT OF ADOPTED ARTICLE.Article 38 - Recognized emblems (previously Article 36)

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

2. REFERENCES.

The following are related Articles of this Protocol:

(a) Article 8(12) (defines "distinctive emblem" and "distinctive signal").

(b) Article 18 - Identification (various provisions on distinctive (medical) signs and signals).

(c) Article 56 - Protection of works and installations containing dangerous forces (establishes special sign of three bright orange circles for such works and installations).

(d) Article 59 - Nondefended localities (Parties may agree on sign to identify).

(e) Article 60 - Demilitarized zones (Parties may agree on sign to identify).

(f) Article 66 - Identification (the distinctive sign of civil defense is an equilateral blue triangle on an orange background).

(g) Article 67 - Members of the armed forces and military units assigned to civil defense organizations (as a condition to protection, they must prominently display international distinctive sign).

12 SEP 1977

(h) Article 85 - Repression of breaches of this Protocol (makes perfidious use a grave breach).

(i) Annex I - Regulations Concerning Identification (several provisions relate to the distinctive emblem, and other protective emblems, signs or signals).

The following are related provisions of the 1949 Geneva Conventions:

(a) Article 36, GWS and Article 39, GWS-SEA.

(b) Chapter VII - The Distinctive Emblem (Articles 38 to 44) of the 1949 GWS and Chapter VI, The Distinctive Emblem (Articles 41 to 45) of the 1949 GWS-SEA.

(c) Article 18, 1949 GC (provision for marking civilian hospitals).

(d) Article 20, 1949 GC (civilian medical personnel identification).

(e) Article 21, 1949 GC (marking of medical convoys).

(f) Article 22, 1949 GC (marking of medical aircraft).

(g) Article 6, Annex 1, 1949 GC (provision for marking Hospital or Safety Zones by oblique red bands on a white background).

(h) Article 23, 1949 GPW (marking of PW camps).

The following are related provisions of other international agreements:

(a) Article 23(f) - 1907 Hague Regulations (forbids misuse of distinctive badges of Geneva Convention).

(b) Article 27 - 1907 Hague Regulations (notes it is duty of besieged to indicate presence of cultural and charitable buildings and monuments by distinctive and visible signs and notify adversary of such signs) (similar provision in Article 5, Hague Convention IX (Bombardment by Naval Forces in Time of War) which establishes protective sign as rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower white).

(c) Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact, 1935) (establishes distinctive sign for these as red circle with a triple red sphere in the circle on a white background).

(d) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 (U.S. not party) (establishes distinctive sign as certain blue and white shield).

3. RELATION TO U.S. POSITION.

Consistent. U.S. supported text adopted.

4. COMMENT.

This provision:

(a) reaffirms the existing prohibition against misuses of the distinctive emblems of the red cross (red crescent and red lion and sun);

(b) prohibits misuse of other signs provided for by the Conventions (particularly oblique red bands on a white background);

(c) prohibits misuse of other emblems; signs or signals established by the Protocol (for example see, References to Articles 56 (Dangerous Forces), 66 (Civil Defense) and Annex I (example: medical aircraft signals);

(d) prohibits misuse of other internationally recognized protective emblems, signs or signals (see References).

A U.S. reservation to the 1949 Geneva Conventions permits continued use of the red cross by pre-1905 users provided the emblem is not used on aircraft, vessels, vehicles, buildings or structures or upon the ground (6 UST 3214). This reservation was adopted by the Senate to preserve a few limited commercial uses (e.g., Red Cross shoes). It involves no uses indicating a protected status.

5. MILITARY IMPLICATIONS.

Beneficial. This Article imposes no substantial burdens on military operations. Since special protection is accorded (under existing law and the Protocol) to a variety of limited

1 2 SEP 1977

persons and objects, it is important to the military that they be recognizable as having a special status. Hence, provisions for identification are made as noted in the References (paragraph 2).

It is equally important that there be expressed prohibitions against misusing these methods of identification (for example, marking a military storage area as a hospital). Such misuse puts combat forces in a difficult position and needs to be specifically prohibited. This Article does that job, and thus will be beneficial militarily.

6. RECOMMENDED U.S. ACTION.

No understandings or legislation are necessary.

Article 39 -- Emblems of Nationality

1. TEXT OF ADOPTED ARTICLE.

Article 39 - Emblems of nationality (previously Article 37)

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

3. Nothing in this Article or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

2. REFERENCES.

The following Articles of the Protocol are relevant:

(a) Article 37 - Prohibition of Perfidy (which forbids feigning protected status by use of neutral or United Nations signs, emblems or uniforms).

(b) Article 46 - Spies (excludes protection to those not acting in their own uniform).

Also relevant is Article 23(f), 1907 Hague Regulations which declares it is forbidden to ". . . make improper use . . . of the military insignia and uniform of the enemy."

3. RELATION TO U.S. POSITION.

a. As an important change, the U.S. desired to change "shield, favor or impede military operations" in paragraph 2 to "while engaging in attacks." The Conference rejected this change and used both formulations (including adding protect). This is a substantial difference from the U.S. position; but the Article was adopted at the Plenary by consensus.

b. Otherwise the Article is generally consistent with U.S. views. The specific exclusion in paragraph 3 was modified

12 SEP 1977

to reflect the U.S. position that the law of espionage was not affected by this Article.

4. COMMENT.

a. Neutral. Existing customary law prohibits misuse of neutral flags, insignia, uniforms, etc., although no existing general treaty rule so provides. This prohibition explicitly does so.

b. Adversary. The existing Hague Regulations (Article 23f, HR) prohibits "improper use . . . of the national flag, or of the military insignia and uniform of the enemy" Opinions among states strongly differ over the scope of the existing Hague prohibition. The U.S. view (reflected in paragraph 54, FM 27-10) is that such use is not prohibited as a ruse except during combat. In a sense, the Committee's action will perpetuate this uncertainty by substituting for "improper" the term "shield, favor, impede or protect military operations." It is noted that no particular humanitarian purpose is served by this prohibition. Rather differences exist over what "honor" requires in warfare, and this Article is thus related generally to Article 37, Perfidy. For example, some regard it as perfidious to infiltrate behind enemy lines in enemy uniforms preparatory to attacks while others do not.

c. Relations with other Articles. Under existing law, spying is not a war crime, but the spy is not entitled to PW protection. He may be sentenced to death under municipal law in order to increase the risk of spying and thereby to deter it. By prohibiting use of uniforms of adverse parties to shield, favor, protect or impede military operations, this article might have been interpreted to make certain types of espionage a war crime. However, any such interpretation is specifically negated by the inclusion of paragraph 3 (i.e., nothing shall affect the existing generally recognized rules applicable to espionage . . .).

5. MILITARY IMPLICATIONS.

The Article could have some impact on U.S. Commanders. It would have only slight impact upon the actual participants dressed in enemy uniforms captured behind enemy lines since they already may be rightfully denied PW status as spies or saboteurs. Commanders would be denied the opportunity of

12 SEP 1977

...ing enemy uniforms to infiltrate for sabotage purposes) yet would gain the benefit of enemy obligations to comply with the rule. Also, Commanders who know and permit use would be in violation of Article 87. However, such persons would frequently be engaged in espionage as well as sabotage, and thus it could reasonably be argued as a legitimate ruse provided they did not actually engage in conflict in enemy uniforms. If they did, that would be a violation even under existing rules.

6. RECOMMENDED U.S. ACTION.

a. No U.S. understandings or reservations are necessary for this Article.

b. No implementing legislation is required.

Article 40 -- Quarter

1. TEXT OF ADOPTED ARTICLE.

Article 40 - Quarter (previously Article 38).

It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis.

2. REFERENCES.

(a) Article 41 (Protocol I) - Safeguard of an enemy hors de combat.

(b) Article 23(d), 1907 Hague Regulations.

3. RELATION TO U.S. POSITION.

Consistent.

4. COMMENT.

Refusal of quarter has long been prohibited in warfare. 1907 Hague Regulations, Article 23(d), states that it is forbidden "to declare that no quarter will be given," Article 40, adopted by consensus, reformulates the prohibition in more modern language. It thus prohibits orders that there will be no survivors, or threats to that effect as well as confirming the prohibition against conducting hostilities on such a basis.

5. MILITARY IMPLICATIONS.

None. Prohibition is fully consistent with modern U.S. military tradition.

6. RECOMMENDED U.S. ACTION.

None. No understandings or follow on action are necessary.

Article 41 -- Safeguard of an enemy hors de combat

1. TEXT OF ADOPTED ARTICLE

Article 41 - Safeguard of an enemy hors de combat
(previously Article 38bis)

1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:

- (a) he is in the power of an adverse Party;
- (b) he clearly expresses an intention to surrender; or
- (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

2. REFERENCES.

The following Articles of Protocol I are relevant:

- (a) Article 8(1) defines "wounded" and "sick."
- (b) Article 37 - Prohibition of perfidy (forbids feigning incapacitation by wounds or sickness to kill, injure or capture an adversary).
- (c) Article 42 - Occupants of aircraft (application of rule to air environment).

(d) Article 85 - Repression of breaches of this Protocol (willfully making a person the object of attack in the knowledge that he is hors de combat is grave breach).

There are a variety of provisions in the 1949 Geneva Conventions for the Protection of War Victims that are relevant such as Article 12, GWS and Article 13, GWS-SEA. Article 5, 1949 GPW provides that the GPW Convention ". . . shall apply . . . from the time [such persons] fall into the power of the enemy and until their final release and repatriation.

Article 23(c), 1907 Hague Regulations, declares it is especially forbidden ". . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;"

3. RELATION TO U.S. POSITION.

Consistent.

4. COMMENT.

Article 41 proved fairly difficult to agree upon as illustrated by a variety of amendments to the prior ICRC text. After considerable discussion at Committee level, it was adopted by consensus both at the Committee and at Plenary.

One issue was whether to include persons who had fallen into the power of the enemy within the hors de combat definition. Although such persons are hors de combat, protection for such persons was left to other agreements such as the 1949 GPW.

The object of attack formulation was used in lieu of kill, injure, or capture. As the Committee noted, "This change was designed to make clear that what was forbidden was the deliberate attack against persons hors de combat not merely killing or injuring them as the incidental consequence of attacks not aimed at them, per se." Protection was also limited to situations where they were recognized or, under the circumstances, should be recognized as hors de combat.

As adopted, the text in paragraphs 1 and 2 improved the accuracy and clarity of the rule (compared with the prior ICRC text) and was fully consistent with U.S. views.

The third paragraph (relating to capture and release), which proved quite difficult to draft, is intended to deal with the situation where military exigencies do not permit compliance with the 1949 GPW. For example, a patrol some distance from its lines might capture prisoners which it cannot evacuate. Clearly, under existing law the patrol must either evacuate them or release and repatriate them. Another alternative might be to refrain from capturing them in the first place.

Paragraph 3 now requires that "all feasible precautions shall be taken for their safety," a reasonable, though flexible, requirement. Additionally, it removes any possible claim that a combatant is in violation of the GPW if he releases PWs without evacuating and processing them in accordance with the 1949 GPW Convention.

5. MILITARY IMPLICATIONS.

Negligible. This Article will not have a substantial effect on U.S. military operations. The general intent of Article 41 is to define more precisely the well recognized principle that persons hors de combat are protected. Existing U.S. views and treaty commitments fully support the principle. Here, the object of attack formulation, as well as the requirement that such persons abstain from any hostile act and not attempt to escape, fully recognizes military necessities involved. The third paragraph is a welcome addition to the law. It clarifies the obligation as to evacuation or release and repatriation by relaxing the requirements when it is impossible to evacuate or repatriate. It does require feasible precautions for the safety of the PWs prior to release.

6. RECOMMENDED U.S. ACTION.

None. No U.S. understandings or follow on action are necessary.

12 SEP 1977

1. TEXT OF ADOPTED ARTICLE.

Article 42 - Occupants of aircraft (previously Article 39)

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

2. REFERENCES.

U.S. military publications recognize the specific rule of this Article as a rule of existing customary law. See for example:

- a. USAF, AFP 110-31, at 4-1.
- b. U.S. Army, FM 27-10 (paragraph 30).
- c. U.S. Navy, NWIP 10-2, Article 511(c).

3. RELATION TO U.S. POSITION.

Consistent.

4. COMMENT.

The hors de combat principle applies to warfare in all environments, but its exact application to air warfare has been imprecise. AFP 110-31 at 4-1 recognizes the customary law protection reflected in this Article. U.S. Army, FM 27-10, paragraph 30, states: "The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute

12 SEP 1977

from disabled aircraft may not be fired upon." Article 511(c), U.S. Navy, NWIP 10-2, states: "It is forbidden to refuse quarter to an enemy who has surrendered in good faith. In particular, it is forbidden either to continue to attack enemy warships and military aircraft which have clearly indicated a readiness to surrender or to fire upon the survivors of such vessels and aircraft who no longer have the means to defend themselves." (Emphasis supplied.)

The discussions in the Committee resulted in strong differences of opinion, and the Article was revised at the last session, and adopted in its present form by Committee III. The vote was 52-4-22. At the Plenary, two amendments were pressed to a vote. A Philippine proposal to weaken was defeated by a vote of 29(U.S.)-27-34. An Arab proposal to eliminate protection for airmen descending over their own territory was rejected by a vote of 47(US) to 22 with 26 abstentions.

In explaining their position, a number of States (particularly Arab States) argued that airmen were not and should not be protected. Although temporarily disabled, they could rejoin the fight later. Most States including all Western European States and Eastern Bloc States disagreed, and the Article was finally adopted by a vote of 71 (US) to 12 with abstentions.

Because this Article was the hardest fought Committee III Article at the Plenary, some States may take reservations or exceptions to it. Thus, it may be necessary for the U.S. to reaffirm (in the face of any reservations or understandings) our view of existing protection (irrespective of the Protocol).

5. MILITARY IMPLICATIONS.

Beneficial. This Article recognizes an existing rule of law already reflected in U.S. doctrine and practices. It is beneficial to have it reflected in the Protocol, and accepted by more States.

6. RECOMMENDED U.S. ACTION.

None (at the moment). In the face of expected objection from a few States (such as Syria, Iraq,), it may be necessary to have a U.S. understanding reflecting that the requirements of this Article codify existing international law and thus cannot be the subject of reservations.

Article 43 -- Armed Forces

Protocol I, Part III, Section II, Combatant and Prisoner-of-War Status

1. TEXT OF ADOPTED ARTICLE

Article 43 - Armed forces (previously Article 41)

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

2. REFERENCES.

The following Articles of Protocol I are relevant:

a. Article 2 - Definitions (defines the term "rules of International law applicable in armed conflict").

b. Article 44 - Combatants and prisoners of war (covers obligations of combatants to distinguish themselves - including irregulars and PW status).

c. Article 45 - Protection of persons who take part in hostilities (additional guarantees to all who take part in hostilities whether combatants or not).

d. Article 46 - Spies (references the armed forces).

- e. Article 47 - Mercenaries (special provision).
- f. Article 50 - Definition of civilians and civilian population (excludes members of the Armed forces).
- g. Article 67 - Members of the armed forces and military units assigned to civil defense organizations (under limited conditions they have protection . . . if they do not participate directly in hostilities).

Also, Article 4 of the 1949 GPW (which defines who is entitled to PW status) and Articles 1, 2 and 3 (qualifications of belligerents) of the 1907 Hague Regulations are relevant.

3. RELATION TO U.S. POSITION

Consistent. The text adopted (substantially expanded from the prior ICRC text) defines armed forces and combatants, and requires notice if police forces are incorporated into the armed forces. The definition of armed forces adopted is similar to that proposed by the United States for inclusion in Article 44.

COMMENT.

In explaining the term armed forces, this Article stresses the role of organization and discipline. Organization and effective internal discipline are essential prerequisites to an effective fighting force. Effective internal discipline and organization in an armed force are also absolutely indispensable to ensuring observance of the law of war. Article 43 specifically imposes treaty requirements of organization and discipline on all armed forces. Such internal disciplinary systems must, among other things, enforce compliance "with the rules of international law applicable in armed conflict" (law of war). Article 2 defines that term.

The existence of a disciplinary system which enforces the law of war would arguably be a condition for PW status. However, Article 43 does not specify that compliance with the laws of war is a condition for PW status. The only direct comment on that issue in relation to Article 43 at the Plenary was by Israel. They asserted that it is not sufficient that the armed forces be subject to an internal disciplinary system which can enforce compliance, but there has to be effective compliance in the field. (SR 39, Annex, pg. 3). That issue is discussed in the analysis of Article 44.

12 SEP 1977

The definition of the term "armed forces of a party to a conflict" is useful because it includes irregular combatants, e.g., guerrilla forces. This provision is beneficial to overall U.S. interests in stressing the requirement of organization and discipline for such irregular forces -- as well as underlining the general obligation of armed forces to enforce compliance with the law of war.

Paragraph 2 of the adopted text reaffirms the right of members of the armed forces to participate directly in hostilities (apart from medical personnel and chaplains who are noncombatants). There is no objection to this provision. Moreover, to the extent that it denies (by necessary implication) to persons who are not members of the armed forces the right to participate directly in the hostilities, it is beneficial.

The third paragraph affirms the right of a state to incorporate a paramilitary or armed law enforcement agency into its armed forces. However, notice of such action is required to be given to the other parties to the conflict. This notice requirement will be beneficial in clarifying the status of paramilitary police forces which are common in some countries.

The title to the Article was changed in the Plenary by consensus from "organization and discipline" to the present title.

This Article is closely related to Article 44 of the Protocol.

This Article was adopted by the Committee and at the Plenary by consensus.

5. MILITARY IMPLICATIONS.

Beneficial. The importance of organization and discipline in the armed forces (both to ensure an effective armed force and to ensure compliance with the law of war) are already well recognized by the U.S. This Article reinforces these requirements, and may result in additional training and educational efforts in other countries to reemphasize both military discipline and compliance with the law of war. The Article benefits U.S. Commanders by reemphasizing requirements of organization, discipline, and compliance for all armed forces including irregular combatants.

1 2 SEP 1977

6. RECOMMENDED U.S. ACTION.

No U.S. understandings or follow-on actions are necessary for this Article (however, U.S. understandings for Article 44 are necessary and relevant to this Article).

12 SEP 1977

Article 44 -- Combatants and prisoners of war

1. TEXT OF ADOPTED ARTICLE.

Article 44 - Combatants and prisoners of war
(previously Article 42)

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- a. during each military engagement, and
- b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall,

12 SEP 1977

nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offenses he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

2. REFERENCES.

See references for Article 43, Armed Forces.

3. RELATION TO U.S. POSITION.

Generally consistent. The March 1977 U.S. position listed no imperative or important changes to the text adopted. However, three drafting changes were proposed including: (a) revising paragraph 1 to refer to the Article on spies; (b) adding "preserve and" before the words "promote the" in paragraph 3; and (c) changing the word "protection" to "treatment" in paragraph 4. Although DOD believed the last change (c) to be substantially important, DOD agreed it would be unwise to press for the change by returning the Article to the Working Group. (Enclosure 1, to Dep Sec Def Letter). None of the changes proposed were adopted.

During the Plenary adoption of the Article, the U.S. Representative expressed the following understandings:

". . . The basic rule contained in the first sentence of paragraph 3 meant that throughout their military operations combatants must distinguish themselves in a clearly recognized manner. . . .

As regards the second sentence of paragraph 3, it was the understanding of his delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I. In those situations, a combatant who failed to distinguish himself from the civilian population, though violating the law, retained his combatant status if he lived up to the minimum requirements set forth in that sentence. On the other hand, the sentence was clearly designed to ensure that combatants, while engaged in a military operation preparatory to an attack, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants. That meant that they might be tried and punished for acts which would otherwise be considered lawful acts of combat. That was justified because such combatants necessarily jeopardized the civilian population whom they were attempting to serve.

As regards the phrase "military deployment preceding the launching of an attack," in paragraph 3, his delegation understand it to mean any movement towards a place from which an attack was to be launched. In its view, combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched." (SR 41, at 13.)

4. COMMENT.

12 SEP 1977

a. Background. The circumstances under which irregular combatants, i.e., other than members of the regular armed forces, acquire PW status has been the subject of continuing controversy. Extensive debates arose at both the 1907 Hague Peace Conference and the 1949 Geneva Conference for the Protection of War Victims. Articles 1 and 2, 1907 Hague Regulations, Annex to Hague Convention IV, provide as follows:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Article 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war. [levee en masse]

The 1949 Geneva PW Convention (GPW) in Article 4 essentially reiterated the four 1907 Hague tests. However, it noted the requirement that combatants belong to a party to the conflict and included a reference to "organized resistance movements" to ensure that it was understood that "other volunteer groups" included "organized resistance movements."

There are somewhat differing views in the international community over the effect of these provisions in the 1907 Hague Regulations and the 1949 Geneva Conventions. For example, some urge that regular members of the armed forces are obligated to comply with requirements for irregular combatants. A few deny this view. In the U.S. view, the specific requirements of the Hague and Geneva Conventions are applicable both to regular and irregular forces.

12 SEP 1977

Failure to distinguish oneself as a combatant causes loss of entitlement to PW status. U.S. Army FM 27-10, Law of Land Warfare, paragraph 74 states:

"Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

Most commentators believe that combatants who fail to distinguish themselves, thereby forfeiting PW status, are simply unprivileged belligerents. Because of their lack of immunity as combatants, their activities can be made punishable under municipal law. However, their act of engaging in hostilities is not itself an offense under international law.

Article 17, 1949 GPW, requires a Party to a conflict to furnish an identity card to persons under its jurisdiction likely to become PWs. Possession of an identity card is not, however, a condition of PW status. The requirements of Article 17, 1949 GPW, do not appear to be affected by this Article.

b. Broad Issues. The broad issues involved in Article 44 included: (a) what terminology should be used to refer to irregular combatants; (b) what requirements should be established for irregular combatants to qualify for PW status; and (c) should these requirements apply also to regular combatants?

c. Relationship to other articles.

Article 37. Prohibition of perfidy. The feigning by a combatant of civilian, noncombatant status is an example of perfidy. This does not apply to combatants who distinguish themselves as required by paragraph 3, Article 44, but it does remain applicable to those who fail to so distinguish themselves. It is forbidden to kill, injure, or capture an adversary by resort to perfidy under Article 37.

12 SEP 1977

Article 39. Emblems of nationality. Article 39 forbids, inter alia, the use of enemy flags, emblems or uniforms while engaging in attacks or in order to shield, favor, protect or impede military operations.

Article 46. Spies. Article 46 reaffirms that members of the armed forces who engage in espionage have no right to PW status and may be treated as spies. A member of the armed forces is not considered as engaging in espionage if he wears the uniform of his own forces. Special rules are provided for combatants who are residents of occupied areas.

Article 43. Armed forces. Article 43 affirms that the armed forces of a party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates. Article 43 requires that such armed forces be subject to an internal disciplinary system which shall enforce compliance with the law of armed conflict. Article 43 also affirms that members of the armed forces (aside from medical personnel and chaplains) are combatants and have the right to participate directly in hostilities.

Article 45. Protection of persons taking part in hostilities. The text of this article reinforces protection of PWs and others who engage in hostilities and are captured. Persons that engage in hostilities and are captured are presumptively entitled to PW status based on their claim, their Party's claim, or appearance of entitlement. Creation of the right to have PW status relitigated at any trial for alleged offenses is also provided. Otherwise the article reaffirms basic human rights and judicial safeguards for captured persons regardless of their PW status.

d. Terminology issues The issue of acceptable terminology to refer to irregular forces plagued the Diplomatic Conference for several years. The ultimate solution, which used politically neutral terminology, was acceptable to all.

e. Requirements.

(1) Application to all types of forces. A significant feature is to make all requirements specifically applicable to regular forces as well as irregular forces. This is consistent with the U.S. position. It represents a significant departure from both the 1907 Hague Regulations and the 1949 Geneva Conventions which contain only explicit requirements for irregular forces.

(2) Party to the conflict. The majority of states believed that any group asserting entitlement to PW status should belong to or be of a party to a conflict. The language adopted "of a party to a conflict" in Article 43 satisfied this requirement.

(3) Command. The 1907 Hague Regulations and the 1949 Geneva Conventions both require that irregular forces be commanded by a person responsible for his subordinates. The language adopted: "Under a command responsible to that party for the conduct of its subordinates" was included in Article 43. This, in effect, emphasized institutional responsibility. Individual responsibility is explicitly reaffirmed in Article 87 - Duty of commanders.

(4) Comply with laws of war. The requirement that irregular forces "conduct their operations in accordance with the laws and customs of war," as a condition for PW status, presents some problems. Both the 1907 Hague Regulations and the 1949 Geneva Conventions contain such a condition.

Few dispute the proposition that all armed forces, regular or irregular, are required by international law to fight in accordance with the law of war. Article 43 explicitly reaffirms this requirement. The difficulty arises over whether alleged failures to observe the law should be a reason for denial of PW status. Since the conditions are explicit for both regular armed forces and irregular forces, the potential for abuse (thereby wrongfully denying PW status) could be substantial.

During the Southeast Asia conflict, attempts were made to deny PW status to U.S. forces on the allegation that the U.S. did not conduct its operations in accordance with the laws of war, that this was a condition for PW status, and that accordingly members of the U.S. armed forces were not entitled to PW status. Compliance with the law of war is a frequent central propaganda issue in any conflict. Inevitably, in any conflict, differing contentions are made about the requirements of the law and the degree of compliance therewith. If PW status is tied to such contentions, opportunities for subjective evaluation are present. Opposing forces will argue, or at least be in a position to argue, the right to deny PW status because of asserted violations or failure to observe the law. This remains true whether denial is based on individual or group violations.

1 2 SEP 1977

Article 44 now omits a precise requirement that the law be observed as a condition for grant or denial of PW status. Article 43 does contain an explicit requirement that ". . . such armed forces shall be subject to an internal disciplinary system, which inter alia shall enforce compliance with the rules of international law applicable in armed conflict." Article 44 reaffirms the requirement to comply with the rules of war. However, it establishes that assertions of violations cannot be used to deny PW status (aside from failure to distinguish oneself from civilians in certain situations).

This approach is consistent with the U.S. position. The U.S. should resist any interpretation which makes compliance with the rules of international law a condition for PW status (with the exception of the requirement to distinguish combatants from the civilian population).

(5) Combatants distinguished from the civilian population. The 1907 Hague Regulations, as well as the 1949 Geneva Conventions, both contain a specific requirement that irregular combatants wear a fixed distinctive emblem and carry their arms openly. This is a condition for PW status. This requirement is directly related to effective protection of the civilian population. The requirement was very controversial at the conference. Many states asserted firmly that they could not accept any provision which continues this requirement regardless of the nature of the conflict. Many developing countries saw the requirement as unrealistic in the context of wars of liberation against colonialist powers on the African continent. Yet the current criticism is not restricted to these concerns. For example, France declared:

"There is another category which interests us greatly, namely the underground fighters. They are organized into networks but their characteristic is that precisely nothing distinguishes them and must not distinguish them from the civilian population We cannot disregard the resistance fighter and I speak of interstate conflicts -- the civilian who refuses to agree to the occupation of his country by a foreign army -- by approving an Article 42 which would exclude such resistance fighters and place them outside the law." (Statement made by French representative, Mr. Girard, 24 March 1975, found in CDDH/III/SR 33-36, Annex, at 93-94.)

Norway expressed similar views denying that the requirement to distinguish oneself should be a reason for denial of PW status. Norway did recognize the importance of the requirement in terms of civilian protections (CDDH/III/SR 33-36, Annex, at 37).

Other states expressed a wide variety of views which preceded committee adoption.

The net result was an Article which reaffirmed in the first sentence of paragraph 3 the basic obligation to distinguish oneself "while engaged in an attack or in a military operation preparatory to an attack." This phrase would include logistics or administrative activity. Violators could be tried and punished for breaching this obligation. However, as Committee III noted,

"With one narrow exception, the Article makes the sanction for failure by a guerrilla to distinguish himself when required to do so to be merely trial and punishment for violation of the laws of war, not loss of combatant or prisoner of war status."
(CDDH/III 408 at 7.)

The exception is covered by the second sentence of paragraph 3. In that situation, the loss of PW or combatant status is an additional sanction to the possibility of trial for failure to distinguish oneself from civilians.

Paragraph 3 of Article 44 thus explicitly recognizes the linkage with effective protection of the civilian population. Many states emphasized this linkage in discussions of the Article both at Committee and at the Plenary. However, it recognizes that in some situations combatants cannot (or will not) so distinguish themselves. PW status is still granted provided the combatants carry their army openly during any military engagement and immediately preceding the launching of an attack. Many NATO states expressed their understanding of the term deployment in paragraph 3 (second sentence) as including any movement towards a place from which an attack was to be launched. Some other states such as Japan agreed. Other states such as Egypt disagreed with this interpretation believing that the second sentence of paragraph 3 applied only immediately before the outbreak of a firefight. The Committee III report noted:

12 SEP 1977

"The one question on which the explanations of vote revealed a clear difference of opinion was the meaning of the word deployment. Some delegations stated that they understood it as meaning any movement towards a place from which an attack is to be launched. Other delegations stated that it included only a final movement to firing positions. Several delegations stated that they understood it as covering only moments immediately prior to attack."

This compromise proposal does not meet all of the needs of the various states involved at the diplomatic conference. Yet it is clear from the debate that a more stringent requirement on combatants to distinguish themselves from civilians was viewed by many states as impracticable.

The U.S. can accept this Article if a satisfactory interpretation is established construing broadly the critical phrase "engaged in a military deployment preceding the launching of an attack." A proper construction of the phrase "deployment" includes such activities as movement to an assembly area, an approach march or infiltration to an assembly site. If construed too narrowly, this limitation would not provide sufficient distinction between combatants and civilians to make it reasonably possible to protect civilian populations under the Protocol.

It is also important that it be made clear that the special circumstances in which combatants cannot distinguish themselves be limited to either occupied territories or conflicts covered by Article 1, paragraph 4 of the Protocol.

f. Other features of Article.

(1) Equivalent protections. Paragraph 4 provides that combatants who fail to distinguish themselves from the civilian population and are captured should nonetheless be granted equivalent protections. "Equivalent protection" according to the Working Group which proposed the Article, means that:

"They are not to be prisoners of war (and under paragraph 3, they will have forfeited their combatant status), but they shall benefit from procedural and substantive protections equivalent to those accorded to prisoners of war by the Third Convention and Protocol."

12 SEP 1977

Equivalent procedural and humane treatment is acceptable because they would otherwise be entitled to privileges under the 1949 Geneva Convention Protecting Civilians which parallel, in important respects, protections under the 1949 GPW. However, there is a possibility that the term "equivalent protection" may be misinterpreted to suggest basic combatant immunity under the 1949 GPW Convention. To preclude such misunderstanding, the U.S. declared that combatants:

" . . . using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants. That meant that they might be tried and punished for acts which would otherwise be considered lawful acts of combat."

Other NATO States also declared it was their understanding that paragraph 4 did not preclude loss of combatant status (and trial as unprivileged belligerent) for violation of the second sentence of paragraph 3. The Committee III report noted:

"Thus in that extreme case (referring to a violation of the second sentence of paragraph 3), but in that case only, the sanction for failure to comply with the requirement of distinction is that the individual may be tried and punished for any crime he has committed as an unprivileged belligerent. Even then he must be given treatment in captivity equivalent in all respects to that to which prisoners of war are entitled." (CDDH/III/408 at 8.)

Equivalent protections would probably include provisions on manner of treatment, places of confinement and prisoners representation. The burden would be on the detaining power to explain different treatment to justify that it was, in fact, equivalent in all respects. This provision does not preclude their trial for engaging in hostilities contrary to municipal law, provided the fair trial guarantees of the 1949 GPW are respected.

(2) Prior activities. Paragraph 5 of the Article contains an explicit limitation on denial of PW status by reason of past activities. Although it can be argued that the offense is a completed offense, the Committee intended

1 2 SEP 1977

to restrict the captor's ability to punish PWs for their past failure to distinguish themselves. This provision is comparable to similar rules on denial of PW status for spying. See Articles 29-31, 1907 Hague Regulations and Article 46.

(3) Effect on 1949 Geneva Wounded and Sick Conventions. Paragraph 8, in effect, extends the protection of those Conventions to all members of the armed forces (as defined in Article 43). This is consistent with the definition of wounded and sick in Article 8(1).

(4) Saving clauses. Paragraphs 6 and 7 are self-explanatory savings clauses which are appropriate in view of the language of the article. Paragraph 6 was previously included in the recommended U.S. language. Paragraph 7 clearly expresses an intention not to affect the existing State practice of regular armed forces wearing uniforms while engaged in military operations. The situation of regular members of the armed forces assigned as advisers to guerrilla forces will doubtless be covered by State practice. The likely outcome is they will share the fate of the guerrillas whatever that may be. The Article does not penalize regular forces when irregular forces are not penalized.

5. MILITARY IMPLICATIONS.

The Article has both advantages and disadvantages in terms of impact on military operations.

The disadvantages include:

- a. Relaxation of the strict requirements of the Hague and Geneva Conventions on irregular combatants for qualification of PW status.
- b. Tendency to blur distinction between civilians and military by weakening of requirement to wear uniforms, or carry arms openly.

The advantages include:

- a. A clear linkage between civilian protections and distinguishing oneself (first sentence - paragraph 3);

12 SEP 1977

- b. A clear affirmation (paragraph 2) that neither combatant nor PW status can be denied based on violations of rules of war (with exception of failure to distinguish self from civilians in certain situations).

The effect of the disadvantages listed can be effectively blunted by stating again at time of signature understandings of this Article along the following lines:

POSSIBLE UNDERSTANDINGS

ARTICLE 44

- (1) The situations described in the second sentence of paragraph 3 are very exceptional and can exist only in occupied territory or in armed conflicts described in Article 1, paragraph 4 of this Protocol.
- (2) The phrase in paragraph 3 "military deployment preceding the launching of an attack" means any movement toward a place from which an attack is to be launched, and
- (3) Failure to meet the requirements of the first sentence of paragraph 3 is a breach of Protocol I which tends to endanger the civilian population. Any combatant who is guilty of such a breach may be tried and punished for the offense of failing to distinguish himself from the civilian population.
- (4) Combatants who fail to meet the minimum requirements of the second sentence of paragraph 3 forfeit their combatant status and may be tried and punished accordingly.

The traditional practice of U.S. forces has been quite liberal in the granting of PW status. This has been done for a variety of reasons including; (a) internal U.S. political pressures; (b) reciprocity (failure to grant PW status inevitably leads to reciprocal denials by the opposing force); and (c) humanitarian reasons.

6. RECOMMENDED U.S. ACTION.

- a. Express understandings as drafted in paragraph 5. In view of the divergent views expressed as to the meaning

12 SEP 1977

of deployment, consideration should be given to expressing the US understanding as a reservation. Our understanding may be regarded by others as a reservation in any event.

b. Legislation in the form of prohibition on carrying out combat activities while dressed as civilians.

ARTICLE 45 -- Protection of persons who have taken part in hostilities

1. TEXT OF ADOPTED ARTICLE.

Article 45 - Protection of persons who have taken part in hostilities (previously Article 42bis)

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power, or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offense arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offense. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

2. REFERENCES.

12 SEP 1977

The following Articles of Protocol I are relevant:

- a. Article 43 - Armed forces (explains basic concepts of "armed forces" "combatants" including requirements).
- b. Article 44 - Combatants and prisoners of war (explains when lack of compliance can cause loss of PW status particularly as to irregular forces).
- c. Article 46 - Spies (one of category of persons directly benefited by Article 45).
- d. Article 47 - Mercenaries (another category of persons who benefit from Article 45).
- e. Article 75 - Fundamental guarantees (additional protections to Article 45 which benefit all persons particularly those not protected by 1949 GPW).

The following Articles of the 1949 Geneva Conventions are relevant:

- a. Article 4, 1949 GPW (who is entitled to PW status).
- b. Article 5, 1949 GPW (cases of doubt).
- c. Article 7, 1949 GPW (Prohibits renunciation of PW status).
- d. Article 105, 1949 GPW (Rights during trial).
- e. Article 5, 1949 GC (internment of persons who are threats to security).

3. RELATION TO U.S. POSITION.

Consistent. The ICRC Draft did not contain a similar article. However, several governments, including the U.S., were vitally concerned over providing a minimum level of protection to every person who takes part in hostilities and is captured. The U.S., along with several other countries sponsored this article.

1 2 SEP 1977

The final text, adopted by consensus, varies somewhat from the proposal made by the U.S. Although consistent with U.S. views, it does not go as far as the U.S. wished (particularly dealing with rights of the protecting power and ICRC).

4. COMMENT.

Paragraph 1 creates a presumption that a person who engages in hostilities and is captured is entitled to PW status if he claims such status, appears entitled to it, or his Party claims it for him. Failure of a person to claim PW status cannot however be taken as justification, in itself, for denial of such status. (See Article 7, 1949 GPW.) Paragraph 1, as Committee III notes "also follows Article 5 of the Third Convention (1949 GPW) in stating that, should any doubt arise, he must be treated as a PW unless and until a competent tribunal determines otherwise. As in the case of Article 5, such a tribunal may be administrative in nature." This provision is fully consistent with U.S. views.

Paragraph 2 creates a new procedural right for persons not considered to be PWs who are to be tried for a criminal offense arising out of the hostilities. Such a person will have a right to assert entitlement to PW status, de novo, and have the issue decided by a judicial tribunal. Because of differing national judicial procedures, this does not necessarily have to occur prior to the trial for the offense. Whenever possible, however, determination of status should occur first since jurisdiction of the tribunal may hinge on this issue. As the Committee notes, "the provisions of the right of the representatives of the protecting power to attend the proceedings is copied from Article 105 of the Third Convention [1949 GPW]."

Paragraph 3 is a straightforward reference to Article 75 which contains minimal safeguards and judicial guarantees for persons regardless of their status. The second sentence of paragraph 3 expands rights of communication otherwise restricted under Article 5 of the 1949 Geneva Convention Protecting Civilians (1949 GC).

One further matter warrants comment. Under paragraph 4, Article 44, certain combatants (not otherwise entitled to PW status) are entitled to "protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol." This may initially appear to be inconsistent with Article 45(3). Article 45(3) provides

12 SEP 1977

lesser trial standards for persons who have taken part in hostilities but are not entitled to PW status. There is in fact no inconsistency. Article 44 is simply a particularized guarantee of higher standards for a limited class of persons. If absolutely necessary, a U.S. understanding to this effect may be expressed along the following lines:

"It is the understanding of the US that Article 45, paragraph 3, cannot be construed to restrict fair trial guarantees under the Third Convention and this Protocol which are secured to certain persons under Article 44, paragraph 4."

5. MILITARY IMPLICATIONS.

This article should benefit U.S. Commanders. It affirms that persons who engage in hostilities and are captured are presumptively entitled to PW status based on their claim, Party claim or appearance of entitlement. (Also see Article 5, 1949 GPW.) Creation of the right to have that status relitigated at any trial for alleged offenses (paragraph 2 of text) is also beneficial. Affirmance of basic human rights and judicial safeguards (paragraph 3) is also consistent with U.S. views.

This Article is not expected to have any adverse impact upon U.S. forces. Requirements, particularly stress on the importance of judicial guarantees, are generally consistent with past U.S. practices and principles.

6. RECOMMENDED U.S. ACTION.

No U.S. understandings or follow-on actions are necessary. However, consideration can be given to an understanding along the lines discussed in paragraph 3 relating to fair trial guarantees.

1 2 SEP 1977

Article 46 -- Spies

1. TEXT OF ADOPTED ARTICLE.

Article 46 - Spies (previously Article 40)

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretenses or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

2. REFERENCES.

The following Articles of Protocol I are relevant.

a. Article 39 - Emblems of nationality (forbids misuse of enemy insignia - provides that existing rules on espionage are not affected).

b. Article 43 - Armed forces (explains and establishes general requirements).

12 SEP 1977

c. Article 44 - Combatants and prisoners of war (general requirements applicable to uniforms).

d. Article 45 - Protection of persons who have taken part in hostilities (procedural guarantees).

e. Article 75 - Fundamental guarantees (applies to all who do not have more favorable protection).

Other treaties are relevant as follows:

a. Article 5, 1949 GC (internment of persons who are threat to state security including spies and saboteurs).

b. Articles 29-31, 1907 Hague Regulations (reflects customary law rules applicable to spies and espionage).

3. RELATION TO U.S. POSITION.

Generally consistent. The text adopted (by consensus) varies substantially in form and content from the previous ICRC draft text. Paragraph 1 and 2 are changed (but consistent with U.S. views). Paragraphs 3 and 4 are new.

4. COMMENT.

Although the ICRC text dealt with both espionage and sabotage, Committee III determined it was unnecessary to deal with sabotage.

"Since Articles 43 and 44 are now so structured that a captured member of armed forces is or is not entitled to be a prisoner of war, depending upon his compliance with the standards of these articles, it was unnecessary to deal separately with sabotage."

As to spies, Articles 29-31 of the 1907 Hague Regulations currently express the law on this subject. The Committee expressed no intention to change that existing law regarding espionage. The term espionage refers to spying as that term is used in Article 29, 1907 Hague Regulations. This may be defined as obtaining or trying to obtain, by clandestine means or by false pretense, information in territory controlled by one Party with the intention of communicating it to the hostile Party.

12 SEP 1977

Essentially the text affirms a state's right to treat a member of the enemy armed forces who is captured while engaging in espionage as a spy, but denies any right to treat him as a spy "if while so acting, he is in the uniform of his own armed forces."

Paragraphs 3 and 4 of the text represent an effort to protect members of the armed forces who are resident in enemy occupied territory. U.S. allies in Europe who supported this concept felt it important to protect members of their armed forces (e.g., resistance movements) by formulating specific rules of espionage in occupation situations. First, it was felt that such persons (members of the armed forces ordinarily resident in enemy occupied territory)

". . . will almost necessarily in their everyday life come across information of value to the armed forces to which they belong, and this should not make them spies or serve as a pretext for denying them protection as prisoners of war."

Any protection, however is lost if this is done through an act of false pretenses or deliberately in a clandestine manner (e.g., forged pass, concealment of cameras, clandestine radio transmitter, disguised courier, etc.)

This primarily involves members of organized resistance movements who otherwise qualify as combatants under the 1949 GPW or Article 44. But such protection would be subject to other limitations. As the Committee III report indicated:

"For example, the resident who observes military movements while walking along the street or who takes photographs from his residence would not be engaged in espionage; whereas the resident who uses a forged pass to enter a military base or who, if lawfully on the base, illegally brings a camera with him, would be engaging in espionage."

A member of the regular armed forces who happens to be a domiciliary of occupied territory might theoretically qualify for protection under this Article in some situations. His need for deception would depend upon the laxness of the occupying force. However, if he were infiltrated into

12 SEP 1977

occupied territory for the purpose of engaging in espionage, and then engages in espionage, the use of deception (such as a disguise) disqualifies him from protection. The Article does not protect persons other than members of the armed forces (as defined in Article 43). Thus, it does not protect or concern civilian residents of occupied territory.

Under Articles 29-31, 1907 Hague Regulations, a member of the armed forces who engages in espionage (without a uniform), then rejoins his unit and is thereafter captured, cannot be punished as a spy. The text recognizes the necessity for a similar rule in the occupation situation for those members of the armed forces, e.g., members of resistance movements, who are ordinarily resident in the occupied territory. The result is that they lose their right to be a PW and can be treated as a spy only if captured while engaging in espionage. Paragraph 4 then specifies the normal rule (return to unit) as the test for those members of the enemy armed forces not resident in occupied territory. This is consistent with the Hague Regulations on the subject.

5. MILITARY IMPLICATIONS.

This Article should not have any substantial adverse impact on military operations. Paragraphs 1 and 2, as indicated, are merely a reformulation in more modern language of existing rules and principles and are fully consistent with U.S. military practices. Paragraphs 3 and 4 are specific applications of these principles to the military occupation situation. The text adopted does restrict the ability of an occupier to treat members of enemy armed forces as spies in such situations. The greatest impact will be on wars of national liberation as provided in paragraph 4, Article 1. However, in view of past U.S. practice to be fairly liberal in granting PW status, and in view of U.S. personnel being improperly denied PW status, the general approach of limiting denial of PW status in paragraphs 3 and 4 is consistent with overall U.S. interests.

6. RECOMMENDED U.S. ACTION.

a. The U.S. should consider an understanding along the following lines:

12 SEP 1977

"It is the understanding of the U.S. that the elements of espionage, as that term is used in Article 46, are the same as those listed in Article 29 of the Hague Regulations Annexed to Hague Convention No. IV of 1907."

b. No follow-on action is necessary.

12 SEP 1977

Article 47 -- Mercenaries

1. TEXT OF ADOPTED ARTICLE.

Article 47 - Mercenaries (previously Article 42, Quater)

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

- a. is specially recruited locally or abroad in order to fight in an armed conflict;
- b. does, in fact, take a direct part in the hostilities;
- c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e. is not a member of the armed forces of a Party to the conflict; and
- f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

2. REFERENCES.

The following Articles of Protocol I are relevant:

a. Article 43 - Armed Forces (basic requirements on armed forces).

b. Article 44 - Combatants and prisoners of war (entitlement to PW and combatant status).

c. Article 45 - Protection of persons who have taken part in hostilities (fair trial guarantees - presumptive right to PW status).

d. Article 75 - Fundamental Guarantees (rights guaranteed to those not otherwise protected).

Also, Article 4 of the 1949 GPW (which defines who is entitled to PW status) and Articles 1, 2 and 3 (qualifications of belligerents) of the 1907 Hague Regulations are relevant.

3. RELATION TO U.S. POSITION.

Consistent with general U.S. views.

4. COMMENT.

Many third world states strongly urged that an Article in Protocol I deal specifically with mercenaries. Their perception is that trained armed groups, hired privately or without formal state sponsorship, have caused significant problems on the African continent for several decades. Although a draft Article was extensively debated in Committee II, no consensus emerged at the third session. (For discussion, see CDDH III 361, Add. 1.) Recent events in Africa intensified their concern with this problem. An example is a raid on Benin in January 1977 by an unidentified armed band. This incident prompted a UN Security Council investigation. Additionally, Zaire was invaded by a group of Katangan gendarmes described by Zaire as mercenaries (*i.e.*, not belonging to the Armed Forces of a particular state). The problem of unlawful combatants in warfare is longstanding. Irregular forces which do not identify themselves as combatants or do not belong to a party to a conflict have traditionally been denied PW status under the law of war. One traditional method of distinguishing unlawful combatants (*i.e.*, those not entitled to PW status) is that they frequently fight for private ends and purposes. Past terms used to describe such irregular armed groups include bandits, brigands, buccaneers, bushwackers, franc-tireurs, guerrillas, marauders, partisans, robbers and pirates.

The adopted Article was carefully drafted and negotiated to insure that it did not permit classification of regular combatants as mercenaries. The first paragraph declares, consistent with Article 44, that mercenaries are not legal

12 SEP 1977

combatants. The definition has three positive tests for mercenaries involving recruitment, conduct and motivation. It then excludes three categories who cannot be mercenaries including nationals or residents of a Party to the conflict, a member of their armed forces, or persons sent by a State (not a Party) on official duty as a member of its armed forces. This includes advisers of all types. Although criticized by some African and other states for being too rigid, it generally met the concerns of all states at the Conference and was adopted by consensus.

The United States fully recognizes the need for standards for PW status (see Article 44). U.S. policy discourages U.S. citizens from becoming privately involved in foreign conflicts. Under U.S. law, it is a criminal offense for any person to recruit an American citizen in the U.S. for service as a soldier in foreign Armed Forces or for any American citizen to enlist in the U.S. for such services. The article is consistent with U.S. interests and policy.

The lack of a specific reference to Article 75 - Fundamental guarantees - as being applicable to mercenaries prompted several statements by Western delegates at the Conference. The U.S. at Committee level expressed its understanding to this effect. The application of Article 75 to mercenaries was readily agreed at the Conference, and no further expression on this point is necessary.

5. MILITARY IMPLICATIONS.

Negligible. The recognition that mercenaries, as defined in this Article, are not entitled to PW status is not inconsistent with other provisions of the Protocol. The definition should prove useful in disproving claims, made from time to time by various states, that members of regular armed forces can be classified as mercenaries and improperly denied PW status.

6. RECOMMENDED U.S. ACTION.

None. No U.S. understandings or follow on action is necessary.

12 SEP 1977

PART IV. CIVILIAN POPULATION

SECTION I - GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER I. BASIC RULE AND FIELD OF APPLICATION

Article 48 -- Basic rule

1. TEXT OF ADOPTED ARTICLE.

Article 48 - Basic Rule (previously Article 43)

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

2. REFERENCES.

a. Protocol I

(1) Article 43 - Armed Forces (explains that term)

(2) Article 50 - Definition of civilians and civilian population (explains the term civilians)

(3) Article 52 - General protection of civilian objects (explains the term "civilian objects" and "military objectives")

b. Articles 25-27, 1907 Hague Regulations

c. 1907 Hague Convention IX Concerning Bombardment by Naval Forces

d. UN Resolutions 2444 and 2675 concerning protection of civilians.

3. RELATION TO U.S. POSITION.

Consistent.

12 SEP 1977

4. COMMENT.

The alterations made by Committee III in 1974 (from the 1973 ICRC text) were largely of drafting character as reported in the 1974 U.S. Delegation Report. The Article incorporates a basic principle of warfare, namely that military operations must be directed toward military objectives rather than simply the entire enemy country. It was adopted by consensus both in Committee and in the Plenary. The terms used in the Article are explained in various Articles of the Protocol as indicated by the References.

5. MILITARY IMPLICATIONS.

This Article will not have any significant impact upon U.S. military operations. Current U.S. military tactics and technology, as well as U.S. political objectives in any conflict, have long recognized the principle of distinction between military objectives and combatants and civilians and civilian objects. The cited references all recognize the principle.

RECOMMENDED U.S. ACTION.

None. No specific understandings or follow-on legislation are necessary on this Article.

Article 49 -- Definition of attacks and scope of application

1. TEXT OF ADOPTED ARTICLE.Article 49 - Definition of attacks and scope of application (previously Article 44)

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

2. REFERENCES.

- a. Article 48 to 67 (Section I, Part IV of Protocol)
- b. Article 54, Protocol I-Objects indispensable to the survival of the civilian population
- c. Part II, 1949 GC (General protection of populations against certain consequences of war)

3. RELATION TO U.S. POSITION.

Consistent. Existing law applicable to conflict at sea or in the air (aside from bombardment of land targets) is not affected by this Section. (Para 3). This fully met U.S. objectives.

4. COMMENT.

Paragraph 1 is a straight forward definition of attacks which will be useful. Paragraph 2 was originally adopted in connection with a separate Article on objects indispensable to the survival of the civilian population. A few States (notably the USSR) did not believe that a State had obligations toward civilians in its own territory but under control of an adversary. The U.S. disagreed and proposed language similar to that adopted in paragraph 2. Both paragraphs 1 and 2 are relevant to the entire Protocol.

Although paragraph 3 proved very difficult, it was eventually decided

" . . . that it would be both difficult and undesirable in the time available to try to review and revise the law applicable to armed conflict at sea and in the air. It was also widely recognized that care should be taken not to change that body of law inadvertently through this paragraph." (1975 Committee III Report (CDDH/215/Rev 1).

The paragraph was ultimately adopted in Committee III by a vote of 60 to 0 with 7 abstentions. The Article was adopted by consensus in Plenary.

Paragraph 4 emphasizes the relation of Section I of Part IV to Part II of the Fourth Convention (1949 GC). Part II of the Fourth Convention is applicable to the whole of the population of the countries in conflict. Otherwise, paragraph 4 is a safeguards clause designed to prevent inadvertent changes in existing law.

5. MILITARY IMPLICATIONS.

Negligible. The Article does not define any substantive conduct required of armed forces. Instead, it defines the scope of application of the section of the Protocol providing general protection to civilians from the effect of hostilities. Paragraph 3 expressly limits Protocol protection to civilians on land. It thus excludes application of this Section of the Protocol to air to air, air to sea, sea to air, land to sea, or sea to sea situations. It does recognize that civilians in sea or air environments are protected by rules of international law without specifying what the rules are or modifying them. This is entirely consistent with expressed U.S. views on the subject.

12 SEP 1977

6. RECOMMENDED U.S. ACTION.

No specific understandings or follow on legislation are necessary.

CHAPTER II. CIVILIANS AND CIVILIAN POPULATION

Article 50 -- Definition of civilians and civilian population

1. TEXT OF ADOPTED ARTICLE.Article 50 - Definition of civilians and civilian population (previously Article 45)

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(a)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

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

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

REFERENCES.

- a. Article 43 - Armed forces
- b. Article 44 - Combatants and prisoners of war
- c. Article 48 - Basic rule
- d. Article 51 - Protection of the civilian population
- e. Article 4A, 1949 Geneva Convention protecting prisoners of war [herein 1949 GPW - also referred to as Third Convention]
- f. Article 5, 1949 GPW

3. RELATION TO U.S. POSITION.

Consistent. In the plenary, the United States did express an understanding to Article 57 (which also applies to Article 50).

"Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions

on the basis of their assessment of the information from all sources which is available to them at the relevant time. This of course is appropriate for the entire section including Articles [50] and [52]." (CCDH/SR 42/2 June 1977 at Annex, pg. 6.)

4. COMMENT.

Generally, the changes made in this text from the prior ICRC text were minor drafting changes. An exception relates to the word "presumed" which was deleted and replaced with the present language (referring to cases of doubt) in the last sentence of paragraph 1. The original wording might have been construed to conflict with Article 5, 1949 GPW. The 1974 U.S. Delegation report noted:

"The language of presumption was removed from the text, and it was concluded that in connection with attacks, the person of doubtful status is to be considered a civilian, while after he has fallen into the hands of the enemy, the presumption is to be one of prisoner of war status."

This Article is related to Article 43 which defines armed forces and Article 44 which explains the basic obligations of combatants to distinguish themselves from civilians.

If persons become combatants (either under Article 4, 1949 GPW or Article 43, this Protocol), they no longer have any protected status as civilians. If civilians take a direct part in hostilities (but still deny they are combatants under Article 43) nonetheless they lose any protection under this Section of the Protocol while they are taking a direct part in hostilities. (See paragraph 3, Article 51.)

Article 50 does not contain any express standard to be applied to resolve doubts if a person appears to be a civilian. Under these circumstances, only a reasonableness test can be applied. Decisions necessarily have to be made on the basis of a personal assessment of information available at the relevant time. This U.S. understanding, referenced earlier, supports a view that doubts are resolved based on honest belief.

5. MILITARY IMPLICATIONS.

Negligible. This is a fairly noncontroversial definition article which will not impact significantly upon military

12 SEP 1977

operations. It is consistent with U.S. views; and some of the text language was proposed by U.S. experts.

6. RECOMMENDED U.S. ACTION.

a. Express understanding (to entire Section) along lines of that in paragraph 3.

b. No legislation or other follow up action is necessary.

12 SEP 1977

Article 51 -- Protection of the civilian population

1. TEXT OF ADOPTED ARTICLE.

Article 51 - Protection of the civilian population
(previously Article 46)

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

12 SEP 1977

- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

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

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

2. REFERENCES.

a. Protocol I

- (1) Article 37 - Prohibition of perfidy (forbids feigning of civilian, noncombatant status)
- (2) Article 48 - Basic rule (basic requirement to distinguish between civilians and combatants/military objectives)
- (3) Article 50 - Definition of civilians and civilian population
- (4) Article 52 - General protection of civilian objects
- (5) Article 57 - Precautions in attacks
- (6) Article 58 - Precautions against the effects of attacks

- (7) Article 85 - Repression of breaches of this Protocol (certain willful violations of Article are listed as grave breaches)

b. Other references

- (1) Articles 25-27, 1907 Hague Regulations
- (2) 1907 Hague Convention IX Concerning Bombardment by Naval Forces
- (3) UN Resolutions 2444 and 2675 concerning protection of civilians

3. RELATION TO U.S. POSITION.

Generally consistent. The prior ICRC text was significantly revised. This generally satisfied U.S. objections to the prior ICRC text. Paragraph 1 was newly added, but is consistent with U.S. views. Paragraph 2, as adopted, replaced "methods" with "attack;" and refers to "the primary purpose of which" in lieu of "intended." In paragraph 3, "Section" replaced "Article" which satisfied an imperative U.S. change.

In Committee III, paragraph 4 was substantially revised. It now defines the term "indiscriminate attacks" in depth. Paragraph 5a was redrafted and generally satisfied U.S. views. The term "populated area" was refined to "city, town, village or other area containing a similar concentration of civilians." The more precise term "clearly separated and distinct" was added. Various improvements were made in the text of paragraph 5b.

In paragraph 6, the U.S. had sought to avoid the prohibition on reprisals. However, the Conference strongly favored this protection for the civilian population. Other changes, consistent with U.S. views, were made in the remainder of the Article.

In connection with the adoption of the entire Protocol, the U.S. expressed its understanding that

". . . the Rules established by the Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons . . ." [For context, see Analysis for Article 35.]

The U.S. also expressed an understanding (with respect to Articles 51 and 57) concerning the term military advantage (see Comment, para 5, for discussion).

4. COMMENT.

This Article prompted prolonged discussion at the Conference at the first and second sessions in Committee III. At the fourth session, it was reconsidered by Committee III, and amended by consensus, to add the word "similar" before "concentration of civilians or civilian objects" in paragraph 5(a). This change, sponsored by the UK, satisfied some concerns by the FRG, UK and U.S. Thereafter, the Article was adopted in plenary by a vote of 77 (U.S.) to 1 (France) with 16 abstentions. Comments hereafter are by paragraph.

Paragraph 1. Originally, this was an introductory provision, added to the text by Committee III. While the remaining paragraphs illustrate the principle, they are not intended to limit its effect. Hence, a specific reference to other applicable rules of international law was included.

Paragraph 2. According to the Committee III Report, the prohibition in the second sentence involves:

"intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful." (Emphasis supplied.)
(CDDH/215/Rev 1.)

The final text (somewhat altered from the ICRC text in the second sentence) is fully consistent with U.S. views. Article 33, 1949 GC already prohibits "all measures of intimidation or of terrorism" against civilians in occupied territories or enemy aliens in one's own territory.

Paragraph 3. The concept of this paragraph, codified for the first time, is critically useful in limiting protections to civilians customarily afforded by law, but it does not change their status. They are civilians (not lawful combatants) who lose protection and may be punished for a violation of the laws of war.

Paragraph 4. The final text substantially met all prior U.S. concern with the ICRC text. However, substantially new language was adopted defining the concept of "indiscriminate attacks" which are prohibited. As to this definition, the Committee Report noted:

12 SEP 1977

"There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that this definition was not intended to mean that there are means or methods of combat the use of which would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack." (Emphasis supplied.)

The prohibition against "indiscriminate attacks" can be said to reflect existing law. The requirement that weapons be capable of being directed at a military objective simply prohibits "blind weapons." An example of past use of such a weapon is Japanese incendiary ballons, during World War II, regarded as unlawful (as well as militarily ineffective) at the time. Since the U.S. (for sound military reasons) has always stressed accuracy in weaponry including the capacity of being specifically directed at military objectives, this requirement is consistent with current and projected U.S. weaponry concepts.

In explaining their votes, several NATO States expressed understandings with respect to paragraph 4. For example, the UK delegate stated:

". . . the definition of indiscriminate attacks in paragraph 4 was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of any means of combat depended upon the circumstances." (CDDH/SR 41 at 29.)

Almost identical understandings were expressed by Italy, the Federal Republic of Germany and Canada.

Other States, while not disputing this understanding, noted the importance of the definition of indiscriminate attacks. These included Poland, the German Democratic Republic, Byelorussian S.S.R., Ukrainian SSR, and Sweden.

The second requirement (effects of which cannot be limited as required by this Protocol) is more significant. In paragraph 5b, Article 51, and Article 57, the Protocol recognizes that incidental civilian casualties are not prohibited provided it is not apparent that such casualties will be ". . . excessive in relation to the concrete and direct military advantage anticipated." Thus, a weapon whose use would necessarily cause disproportionate casualties would be prohibited as an indiscriminate weapon. Many regard widespread use of biological weapons as such a weapon. Certainly, in the U.S. view this is not true of nuclear weapons although in a situation of general nuclear warfare it would be impracticable to apply the rules of the Protocol relating to protections of civilians. The U.S. should continue to adhere to its understanding on the relationship of the Protocol to nuclear weapons. (For text of this understanding and discussion, see Analysis for Article 35.)

Notwithstanding this clear interpretive history, some might urge that the text of this definition can be read as requiring that the effects of attacks must be strictly confined to the military objectives attacked. In addition to being impracticable, such an interpretation would render most of Article 57 meaningless, and is contrary to the clear language of Article 51. This unreasonable interpretation relies on imprecise language in Article 52. For discussion of how to handle this, see Analysis for Article 52.

The Committee report, quoted previously, as well as the actual text of the language adopted, could be extremely useful in resisting attempts to read very much into the prohibition.

Paragraph 5a. This subparagraph prohibits the treatment of an entire area as a single military objective for bombardment purposes under certain situations; namely, when there is a concentration of civilians or civilian objects and the area contains. . ." a number of clearly separated and distinct military objectives." The language is less precise than the U.S. wished to obtain. Target area bombing in concentrated civilian areas as practiced by the Germans,

British and on some occasions by the U.S. during World War II would be prohibited under this. In general, the U.S. preferred bombing of specific targets and emphasized the technology of precision bombing. Usually the necessity for such area bombing is a response to complex concealment techniques. If there are no "clearly separated and distinct" objectives, the restriction does not apply. Likewise states are responsible themselves if they misuse their own civilian population by attempting to shield military objectives from attack.

This restriction appears acceptable in view of changed military tactics since World War II which rely less upon area bombardment. In the vote on this Article in Committee, the U.S. did insure that the negotiating history reflected a view that the restriction is principally concerned with area bombardments now rendered obsolescent by technological developments. The following U.S. statement was made:

"We voted in favor of the Article and support it. In Article 46(3)(a) [now 51(5)(a)] the term 'clearly separated and distinct military objectives' is used. It is the position of the United States delegation that the words 'clearly separated' refers not only to a separation of two or more military objectives which can be observed or which are visually separated, but also includes the element of a significant distance. Further, that distance must be at least of such a distance that will permit the individual military objectives to be attacked separately."

Paragraph 5b. This represents the first concrete codification of the principle of proportionality as it applies to collateral civilian casualties. It is repeated in Article 57, paragraph 2 (iii).

In connection with the term military advantage, a number of NATO states expressed an understanding. For example the U.S. stated:

". . . The reference in Articles [51] and [57] to military advantages anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack." [CCDH/SR 42/Annex at pg 6.]

Almost identical understandings on this point were also given by the UK, Netherlands, FRG, and Italy. This codification of the proportionality principle is very useful. It explicitly recognizes the U.S. (and others) view that civilian casualties are inevitable in armed conflict. It also implicitly recognizes that collateral damage to objects specifically protected (e.g. hospitals) may be unavoidable. In addition, the understanding on the term "military advantage" should include an interpretation of the phrase "concrete and direct" in order to avoid a narrow interpretation of that phrase. "Military advantage" also includes consideration of the security of attacking troops, and this can be covered as well.

Paragraph 6. This prohibition against reprisals was included in the original ICRC text. Prohibitions in later Articles were added by Committee III. Many states viewed this prohibition to be of fundamental importance. They include Poland, GDR, Byelorussian SSR, and Ukrainian SSR, and Sweden. Efforts by the French to militate against the effect of the prohibition by a separate Article regulating reprisals was abandoned in the course of the Conference.

Egypt, in the course of explaining its vote on a later Article, stated:

"The Articles adopted by the Conference left very few major objects against which reprisals could be taken, apart from military forces. Particular consideration should be given to the lot of victims of illegal reprisals taken by an adversary who disregarded his obligations. . . . His delegation recognized the interdependence of the clauses on reprisals and, in the event of violation by an adversary, would reconsider its position on them."
[CCDH/SR 42/at 8.]

Qatar agreed, noting that the provisions of Articles [51 to 56], which prohibit certain reprisals, are interdependent [CCDH/SR 42/Annex at 15.] Australia specifically objected to the prohibition of reprisals in various Articles (other than Article 51). [CDDH/SR 42/Annex, pg 1.]

The threat of reprisals has been said to be an essential means for deterring violations of the law of war. When carried out, reprisals have frequently led to counter-

reprisals, and the escalation of conflicts through reprisals and counter reprisals (and consequent massive violations of the law) is a substantial reason for decline in the use of reprisals. Also, they are not particularly efficient militarily to the extent that vital resources are diverted away from attacks against military objectives. Another problem with reprisals is the substantial existing requirements of law which regulate their execution.

It would appear unlikely that the U.S. would have to resort to reprisals against civilian populations, as such, except in situations involving nuclear weapons. Since there is a specific U.S. understanding excluding nuclear weapons from the Protocols no further U.S. statement on reprisals appears absolutely necessary. Moreover, a specific attempt to reserve the right to take reprisals might undercut the strength of the U.S. nuclear understanding. The result could be a weakening of the U.S. nuclear deterrent if it was tied to the legal doctrine of reprisals. On the other hand, it is possible that the U.S. might want to preserve the right of reprisal in some types of widespread conventional warfare.

If a reservation of rights on this point can be made -- without undercutting the U.S. understanding which excludes the Protocol's application to nuclear weapons -- then it might be desirable to do so. A reservation along the following lines could be considered for this purpose.

"Notwithstanding the provisions of Article 51, paragraph 6, the United States of America reserves the right, in the event of massive and continuing attacks against the civilian population, to take reprisals against the civilian population of the State perpetrating these illegal attacks for the sole purpose and only to the extent necessary to bring the illegal attacks to an end. These measures shall not include any of the actions which are otherwise prohibited by the Geneva Conventions of 1949 or this Protocol."

Paragraph 7. The paragraph explicitly recognizes a long-standing problem in warfare. U.S. experts originally proposed similar language. If properly interpreted, it is extremely beneficial that the Conference adopted the concept and included it specifically in Article 51. The Federal Republic of Germany noted that this paragraph applies insofar

as the civilian population and individual civilians enjoy protection against military operations. Italy stated that the provision could, in no case, be interpreted as preventing or hindering a state that wished to do so from organizing an effective system of defense. Thus, the negotiating record is fully consistent with the view that the first clause of the first sentence reflects the evil against which the paragraph is directed and that evacuation of civilians or restrictions on movements (which are imperatively demanded by the necessity of military operations) are not prohibited.

Paragraph 8. This paragraph recognizes the inter-relationships of the paragraphs of Article 51 and the relationship of Article 51 and Article 57. If para 7, Article 51, is violated, an attacking force is still obligated to take precautionary measures set forth in Article 57.

5. MILITARY IMPLICATIONS.

Any impact on actual military operations will come in the area of para 5a assuming a correct interpretation of the introductory language in paragraph 4. The other provisions can be regarded as a simple codification of existing legal requirements. In fact, both Canada and the UK noted in the Plenary that many of its provisions were simply codifications of existing applicable law.

The meaning and scope to be given to these paragraphs (4 & 5) depends upon the future practice of states in actual conflicts as well as possible varying interpretations of the text. In general, any bombardment involves a pattern: What is prohibited in para 5a is treatment as a single military objective an area of concentrated civilian activity containing "separate and distinct military objectives." The language adopted and the negotiating history supports the U.S. view that it must be reasonably possible to attack them individually.

Paragraph 6, which prohibits reprisals against the civilian population, is less significant than might initially appear. Although the threat of reprisals may be important, the U.S. generally has avoided the execution of reprisals in past conflicts.

Although troublesome in some respects, the Article, as a whole, has the following favorable features:

(a) It recognizes explicitly the principle of proportionality (para 5b).

(b) The condition in para 3 and the prohibition in para 7 are contained in exactly the context of the other prohibitions (Article 51).

(c) It defines "indiscriminate warfare" in para 4 in such a way as to be useful to counteract unfounded allegations concerning certain U.S. weapons (e.g., CBU's) which are clearly capable of being directed at military objectives and whose effects are within the proportionality limitations otherwise established by the Protocol.

Notwithstanding these beneficial features, Article 51 is very troublesome if it is misread to suggest a requirement that the effects of an attack must be strictly confined to the military objectives attacked. A specific understanding as to Article 52 will avoid such an interpretation.

6. RECOMMENDED U.S. ACTION.

a. Express U.S. understanding on entire Protocol that the Rules established by the Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. (For discussion, see Analysis, Article 35.)

b. A U.S. understanding as to Article 51 [and Article 57] concerning the term military advantage should be reaffirmed along the following lines:

"It is the understanding of the U.S. that the reference in Articles 51 and 57 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack. The term 'military advantage' involves a variety of considerations including the security of attacking forces. It is further the understanding of the U.S. that the term 'concrete and direct military advantage anticipated' used in Articles 51 and 57 means an honest expectation that the attack will make a relevant and proportionate contribution to the purposes of the attack."

2 NOV 1977

c. Consider a reservation preserving the right to take reprisals against civilians (provided this can be done without undercutting the U.S. understanding excluding the application of the Protocol to nuclear weapons).

CHAPTER III. CIVILIAN OBJECTS

12 SEP 1977

Article 52 -- General protection of civilian objects

1. TEXT OF ADOPTED ARTICLE

Article 52 - General protection of civilian objects
(previously Article 47)

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

2. REFERENCES.

a. Protocol I

- (1) Article 48 - Basic rule (basic obligation to distinguish between military objectives and civilian objects)
- (2) Article 53 - Protection of cultural objects and of places of worship
- (3) Article 54 - Protection of objects indispensable to the survival of the civilian population
- (4) Article 55 - Protection of the natural environment

12 SEP 1977

- (5) Article 56 - Protections of works and installations containing dangerous forces
- (6) Article 57 - Precautions in attack

b. Other Treaties

- (1) Articles 22-27, 1907 Hague Regulations (e.g., Article 23(g) forbids parties "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war")
- (2) 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War

3. RELATION TO U.S. POSITION

Generally consistent. This Article was substantially redrafted in Committee, and the revised version was much improved. Objectionable references to "installations and means of transport" were removed. However, the prohibition on reprisals in paragraph 1, was added by Committee III.

The U.S. made the following statements of understanding regarding this Article at Plenary.

"Article [52] is a significant and important development in the humanitarian law applicable in armed conflict. The distinction between civilian objects and military objectives will be made easier to identify and recognize. In that regard it is the understanding of the United States that a specific area of land may be a military objective if, because of its location or other reasons specified in Article [52] its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

"The first sentence of Article [52] paragraph 2 prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives. [CDDH/SR 41/Annex pg 6.]

ART
52

In connection with Article 57, the U.S. also stated:

"Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. This of course is appropriate for the entire section including Articles 50 and 52. [CCDH/SR 42/Annex pg 6.]

4. COMMENT.

This Article was adopted originally at the second session by Committee III. It was amended by consensus at the last session to add the words "a place of worship" to paragraph 3. It was adopted in the Plenary by a vote of 79 (US) to 0 with 7 abstentions.

Although the term "military objective" is referred to constantly (including use in treaties to which the U.S. is a party), it has never been satisfactorily defined. The text adopted is much improved over the ICRC text and substantially meets all prior U.S. objections. It will be valuable in countering efforts to unreasonably limit attacks to "pure military targets," such as combatants, military encampments and fortifications.

As the Committee III Report notes,

"Account is taken of the fact that military objectives include objectives other than military objects - such as troops, their equipment and ground - and of the fact that objects may be neutralized or captured as well as destroyed."
[CDDH/214, Rev 1, 15 Dec 75 at pg 19.]

A specific understanding that land may be a military objective is also useful in the context of this definition.

One difficulty relates to the requirement (in para 2) that attacks ". . . be limited strictly to military objectives." Article 48 requires Parties to direct their operations only against military objectives. Article 51 protects civilians from being objects of attack as such.

Under the circumstances the sentence in Article 52(2) is either redundant, or a more particularized application

of the Article 48 principle, or suggests that the effects of attacks must be confined to military objectives. The last construction is incompatible with the U.S. view that collateral damage is to be expected despite efforts made to minimize it. It is also inconsistent with Article 57 and can only be considered as entirely unreasonable. Nonetheless, in order to avoid any misunderstanding, a specific U.S. understanding (that Article 52, para 2, does not deal with the question of collateral damage) is appropriate.

The prohibition on reprisals was adopted in Committee III by a vote of 58 to 3 with 9 abstentions. The overwhelming consensus at the Conference was to retain the prohibitions on reprisals in Articles 51 through 56. For discussion of U.S. nuclear understanding and the possibility of a reservation on reprisals, see analysis of Article 51).

5. MILITARY IMPLICATIONS.

The text adopted should not have any significant impact on military operations. The definition adopted stresses military necessity. Objects which by their "nature, location, purpose, or use make an effective contribution to military action" are military objectives and those which do not are civilian objects. In virtually all cases the destruction, capture or neutralization will provide a "definite military advantage" or it is a waste of limited military resources. However, it is necessary to insure that the Article is interpreted not to require that the effects of attacks have to be limited to the specific objectives attacked.

6. RECOMMENDED U.S. ACTION

a. Reaffirm understandings of this Article as indicated in paragraph 3, this Analysis.

b. No follow on legislation is necessary.

Article 53 -- Protection of cultural objects and of places
of worship

1. TEXT OF ADOPTED ARTICLE.

Article 53 - Protection of cultural objects and of
places of worship (previously Article
47 bis)

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- (a) To commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) To use such objects in support of the military effort;
- (c) To make such objects the object of reprisals.

2. REFERENCES.

a. Protocol I

- (1) Article 37 - Prohibition of perfidy
- (2) Article 38 - Recognized emblems
- (3) Article 52 - General protection of civilian objects
- (4) Article 57 - Precautions in attack
- (5) Article 85 - Repression of breaches of this Protocol

b. Article 27, 1907 Hague Regulations (protects cultural, religious, and charitable buildings and monuments)

c. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954.

d. Roerich Pact - Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, 15 April 1935.

3. RELATIONSHIP TO U.S. POSITION.

Generally consistent. The U.S. supported this Article but preferred a more specific formulation on loss of protection. Loss of protection results when the objects are used in support of the military effort. The Article also contains a specific prohibition on reprisals.

In connection with the U.S. joining a consensus on this Article, the following understanding was expressed:

"We are pleased to see that the nations represented at this Conference so overwhelmingly endorse and support a special recognition for objects of cultural or spiritual heritage of mankind. It is the understanding of the United States that this article was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects. Rather the article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the special heritage of mankind. Other monuments, works of art or places of worship which are not so recognized, nonetheless represent objects normally dedicated for civilian purposes and are therefore presumptively protected as civilian objects in accordance with the provisions of Article 47."

"We note that the use of these objects in support of the military effort is a violation of this article. Should they be used in support of the military effort it is our clear understanding that these objects will lose the special protection of this article."
[CDDH/SR 42/Annex at pg 6.]

4. COMMENT.

This Article was adopted by consensus both by Committee III and at the Plenary after a proposal by Greece, the Holy See, Jordan, Uruguay and Venezuela. A difference of opinion existed in the Committee over whether all places of worship were protected or simply those which constituted part of the "cultural heritage of peoples." It was the intent of Committee III at the time of adoption that the article applied only to places of worship which were a part of the "cultural heritage of peoples." At the last session this intention was more clearly expressed by adding the word "the" before "historic monuments." Additionally the phrase "or spiritual" was added.

The text of this article is not drafted precisely to indicate that protection is lost when the objects are used "in support of the war effort" although this is clearly implied. For these reasons a specific understanding (on loss of protection) was expressed by the U.S. Similar understandings were expressed by other NATO allies (e.g., Netherlands, Canada, FRG and the UK). No delegation disagreed with the clear statement that use of the objects in support of the military effort caused loss of protection under the Article. In this situation (loss of protection), attacks are permissible because of the misuse of the objects "in support of the military effort," and need not be justified as "reprisals." A few delegations notably from the Arab world stressed the importance of protecting all places of worship.

Other delegations (eg., Canada and Belgium) stressed the importance of the Hague Convention on cultural property (reference (c)).

For example, the Belgium Delegate declared:

"Throughout the discussions his delegation had made no secret of its fears that the Article might derogate from the Hague Convention on Cultural Property. But in the end the text, as it now stood, did not justify those fears. It was nevertheless true that the Convention must remain the basic instrument on the subject and ought to be put into practice everywhere."
[CCDH/SR 42/at 4.]

Belgium, Greece, Italy, Netherlands and Poland thereafter sponsored a resolution of the Conference which (a) welcomed Article 53; (b) acknowledged the paramount importance of the Hague Cultural Convention; and (c) noted that the Convention was not prejudiced by the Article and urged states to become Parties to the Convention. The Resolution was adopted by a vote of 53-0 with 33 (U.S.) abstentions. The U.S. is not a party to this Hague Convention.

Violation of Article 53 may, under very limited conditions, constitute a grave breach of the Protocol when "special protection has been given by special arrangement" to the objects listed in Article 53. Also to be a grave breach there must be no evidence of a violation of subparagraph (b) (use in support of military effort) and such objects must not be located in the immediate proximity of military objectives.

5. MILITARY IMPLICATIONS.

This Article will not have any substantial impact on military operations. The objects listed are now protected generally as civilian objects (see Article 52) and are specially protected under Article 27, 1907 Hague Regulations. This special protection is lost under both the Article and the Hague Regulations when the objects listed are used in support of the military effort. It is militarily important that the U.S. express a clear understanding to this effect.

6. RECOMMENDED U.S. ACTION.

a. Express understanding along the following lines. It is the understanding of the U.S. that:

(1) This Article does not replace existing customary law prohibitions expressed in Article 27 of the 1907 Hague Regulations - rather the Article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the special heritage of mankind.

(2) Use of the objects listed in support of the military effort is a violation of the Article.

(3) Such a violation causes the objects to lose the special protection of this Article.

b. No legislation or other follow on action is necessary.

Article 54 -- Protection of objects indispensable to the survival of the civilian population

1. TEXT OF ADOPTED ARTICLE.

Article 54 - Protection of objects indispensable to the survival of the civilian population
(previously Article 48)

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

- (a) as sustenance solely for the members of its armed forces; or
- (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissible whether or not the area produces food, but the deliberate destruction of food producing areas in order to prevent the enemy from growing food is forbidden. Similarly, cutting down a field of crops in order to clear a field of fire or to prevent the enemy from using it for cover is permissible, but cutting it down to prevent the enemy from consuming the crops is forbidden. . . ." (Emphasis supplied.) [CDDH/215/Rev. at 21.]

Committee III's intention was more clearly expressed as a result of the Drafting Committee work at the last session. Numerous minor changes were made then. The most important were adding "specific" before purpose and using the term "sustenance value" (in lieu of "as such") in paragraph 1.

As to paragraph 3, Committee III noted:

"Subparagraph (a) was intended to apply only to those objects which clearly are assigned solely for the sustenance of the armed forces. The term 'civilian population' referred to in subparagraph (b) was not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the size of the area was not defined."

The general intent of the proviso clause in para 3b ("provided, however, that in no event" etc.) was to safeguard the essential rights of the civilian population against starvation. This proviso must be read in conjunction with the other provisions of Article 54 as well as the entire Protocol. Although the proviso purports to prohibit attacks on certain objects (even though such objects are used in direct support of military action), the limitation is that civilian starvation or forced movement will result. As indicated in a working group report, concerns about the scope of Article 54, ". . . will be defined by other relevant articles in the Protocol, particularly those dealing with relief actions."

(CDDH/III/1264/Rev. 1, 18 March 1975, at 2-3). Articles 69 and 70 on relief impose extensive obligations of relief on both Parties in order to avoid civilian starvation. The obligations of the proviso of Article 54 can be satisfied if the Party attacking can and will implement the separate relief obligations under Articles 69 and 70.

It is also clear that the phrase "or force its movement" at the end of para 3b is limited to forced movement to avoid starvation and not forced movement for any other purpose.

Paragraph 4 contains a specific prohibition on reprisals which was desired by an overwhelming majority of states. This prohibition is acceptable to the U.S. in view of the limited nature of the objects protected and other considerations. (For further discussion see analysis for Article 51.)

The right to resort to scorched earth practices by retreating forces within their own territory is important. As a result of a U.S. amendment, paragraph 5 was added to this Article at the last session. As to this, the Committee III Report noted:

" . . . it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a state were being forced to retreat within the national territory of that state, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48(2) only where required by imperative military necessity. . . ."
[CDDHIII/408 at pg 17.]

This change generally satisfied objections by U.S. Allies to the prior ICRC text.

5. MILITARY IMPLICATIONS.

Hopefully, any codification of law that is written should be simple, straightforward and capable of easy interpretation. Unfortunately, the law in this area is of necessity complicated by its nature. If written in too general terms, such as the existing Hague prohibition against

"unnecessary suffering," it is so vague that all sorts of proper military conduct is argued to be unlawful. For these reasons, the Geneva Conventions were drafted in 1949 in more concrete, elaborate terms to adequately account for demands of military necessity as well as minimum standards of civilization. This Article continues that trend. As drafted, the Article does not impact significantly upon U.S. Commanders since attacks to starve civilians are inconsistent with U.S. political military objectives in any reasonably foreseeable conflict. Moreover, the technology to do so is vastly inhibited by the limitation on the use of herbicides expressed in Executive Order 11850, 8 April 1975.

6. RECOMMENDED U.S. ACTION.

No understandings or legislation are required for this Article.

I-54-5

(Added - 9 January 1978)

including the general purpose of preventing the enemy from advancing. Thus, bombarding an area to prevent the advance through it of an enemy is permissible whether or not the area produces food, but the deliberate destruction of food producing areas in order to prevent the enemy from growing food is forbidden. Similarly, cutting down a field of crops in order to clear a field of fire or to prevent the enemy from using it for cover is permissible, but cutting it down to prevent the enemy from consuming the crops is forbidden. . . ." (Emphasis supplied.)
[CDDH/215/Rev. at 21.]

Committee III's intention was more clearly expressed as a result of the Drafting Committee work at the last session. Numerous minor changes were made then. The most important were adding "specific" before purpose and using the term "sustenance value" (in lieu of "as such") in paragraph 1.

As to paragraph 3, Committee III noted:

"Subparagraph (a) was intended to apply only to those objects which clearly are assigned solely for the sustenance of the armed forces. The term 'civilian population' referred to in subparagraph (b) was not intended to mean the civilian population of a country as a whole, but rather of an immediate area, although the size of the area was not defined."

The general intent of the proviso clause in para 3b ("provided, however, that in no event" etc.) was to insure that paragraph 3 was not misread so as to authorize actions expected to starve the civilian population or force its movement.

It is also clear that the phrase "or force its movement" at the end of para 3b is limited to forced movement to avoid starvation and not forced movement for any other purpose.

Paragraph 4 contains a specific prohibition on reprisals which was desired by an overwhelming majority of states. This prohibition is acceptable to the U.S. in view of the limited nature of the objects protected and other considerations. (For further discussion see analysis for article 51.)

The right to resort to scorched earth practices by retreating forces within their own territory is important. As a result of a U.S. amendment, paragraph 5 was added to this Article at the last session. As to this, the Committee III Report noted:

" . . . it would be impossible to prohibit completely the conduct of a scorched earth policy where the armed forces of a state were being forced to retreat within the national territory of that state, and the best protection on which agreement was possible was to permit derogation from the rules of Article 48(2) only where required by imperative military necessity. . . ."
[CDDHIII/408 at pg 17.]

This change generally satisfied objections by U.S. Allies to the prior ICRC text.

5. MILITARY IMPLICATIONS.

Hopefully, any codification of law that is written should be simple, straightforward and capable of easy interpretation. Unfortunately, the law in this area is of necessity complicated by its nature. If written in too general terms, such as the existing Hague prohibition against "unnecessary suffering," it is so vague that all sorts of proper military conduct is argued to be unlawful. For these reasons, the Geneva Conventions were drafted in 1949 in more concrete, elaborate terms to adequately account for demands of military necessity as well as minimum standards of civilization. This Article continues that trend. As drafted, the Article does not impact significantly upon U.S. Commanders since attacks to starve civilians are inconsistent with U.S. political military objectives in any reasonably foreseeable conflict. Moreover, the technology to do so is vastly inhibited by the limitation on the use of herbicides expressed in Executive Order 11850, 8 April 1975.

6. RECOMMENDED U.S. ACTION.

No understandings or legislation are required for this Article.

Article 55 -- Protection of the natural environment

1. TEXT OF ADOPTED ARTICLE.Article 55 - Protection of the natural environment
(previously Article 48 bis)

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

2. REFERENCES.

- a. Article 35, Protocol I - Basic Rules (similar provision)
- b. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

3. RELATION TO U.S. POSITION.

No substantial difference.

4. COMMENT

This Article was adopted both in Committee III and at the Plenary by consensus. It was added to the ICRC text as a result of proposals by Australia and three Soviet bloc states. The first sentence, para 1, establishes the principle that ". . . care must be taken. . . ." The second sentence adopts the same standards as Article 35, Protocol I, to which this Article relates. Thus, this Article is designed to protect the natural environment against widespread, long-term and severe damage as it relates to the survival of the civilian population. (For additional discussion of standards and relation of this Article to the Convention on Environmental Modification Techniques (reference §2b), see analysis for Article 35).

The second paragraph, prohibiting reprisals, is related to a similar prohibition in Article 51 (for analysis see Article 51).

12 SEP 1977

5. MILITARY IMPLICATIONS.

For discussion, see Analysis, Article 35.

6. RECOMMENDED U.S. ACTION.

Acceptable subject to understanding as to nuclear weapons (see Analysis Article 35).

Article 56 -- Protection of works and installations containing dangerous forces

1. TEXT OF ADOPTED ARTICLE.

Article 56 - Protection of works and installations containing dangerous forces (previously Article 49)

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

- (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
- (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
- (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the

12 SEP 1977

protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works of installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this Article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

2. REFERENCES.

- a. Article 38 - Recognized emblems (prohibits misuse of distinctive signs including the special sign for objects containing dangerous forces).
- b. Article 51, Protection of the civilian population

- c. Article 57 - Precautions in attack (variety of measures to protect civilians)
- d. Article 85 - Repression of breaches of this Protocol (willful launching attack against objects protected, with knowledge that excessive loss of civilian life will result, is listed as grave breach)
- e. Article 16 Annex - International special sign (details on special sign used to designate objects protected by this Article)

3. RELATION TO U.S. POSITION.

Generally consistent. The U.S. viewed the ICRC draft Article as unacceptable. After extensive revision in Committee, and consideration of many separate amendments, the current text was adopted by consensus both in Committee III and at the Plenary. This text substantially satisfied U.S. concerns, with the exception of the prohibition on reprisals. It was amended at the final session to provide a special sign (three bright orange circles - see Article 16, Annex) to designate the objects protected by the Article.

4. COMMENT.

The language adopted, although complicated, proved necessary in view of the requirements to adequately account for military necessity. First, the Article applies only to a narrow class of objects -- "works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations." Efforts to expand this to include oil storage areas were defeated. Second, the objects, if they qualify as military objectives under Article 52, may be still attacked when such attack does not ". . . cause the release of dangerous forces and consequent severe losses among the civilian population." Independent study has demonstrated that the objects listed, particularly nuclear electrical generating plants, can be attacked in many circumstances and rendered useless to produce power without releasing dangerous forces. Thus, attacks in that mode are not prohibited. Third, any limited protection ceases if the object is ". . . used for other than its normal function and in regular, significant and direct support of military operations." Then they may be attacked even though severe losses may result if this is the only feasible way to terminate such support. In that case, "all practical precautions" must be taken in an effort to avoid release of

forces. The defending party may erect installations for the sole purpose of defending the protected works. Such installations must not participate in hostilities (aside from defending the works from attack) and are limited in their armament to ". . . weapons capable only of repelling hostile action against the protected works or installations."

Committee III noted that Article 56 proved quite difficult and required considerable work and effort before general agreement was reached. One term used in the Article which requires interpretation is "normal function." The Committee notes: "Thus, if a dam or dyke is used for no purpose other than holding back water or being ready to hold back water, e.g., it is not made part of a fortified line or used as a road, the immunity provided in paragraph 1 cannot be lost." [CCDH/215/Rev. at 25.]

As to what is "regular, significant and direct support" Committee III noted "it seems clear that production of arms, ammunition and military equipment would qualify as direct support of military operations, but the production of civilian goods which may also be used by the armed forces probably would not qualify in the absence of most unusual circumstances." Attacks against such objects (where release of forces would cause severe losses among civilians) are restricted to special situations where the objects are significant military objectives.

The Article authorizes a special sign to identify the objects protected. Details on the use of this sign are specified in paragraph 7 of the Article, and in Article 16 of the Annex. Misuse of the sign is forbidden specifically by Article 38. (Recognized emblems) of the Protocol. In addition, the perfidious use of this special sign (in violation of Article 37 - Prohibition of perfidy) could be a grave breach of the Protocol (Article 85).

The Article also contains a prohibition on reprisals which is related to similar prohibitions in Articles 51-55. The U.S. opposed this Prohibition along with the other restrictions on reprisals. The Conference decided otherwise. For discussion see Analysis for Article 51.

5. MILITARY IMPLICATIONS.

This Article would have a substantial impact as to a very limited class of objects. These objects, which present

such great risks to the civilian population, can be easily identified at the outset of hostilities and treated as a special group of targets.

Protection only extends to those dams, dykes and nuclear electrical generating plants that present the risk of severe civilian losses if the forces are released. All other dams, dykes, and nuclear electrical generating plants can be attacked on the same basis as any other object (i.e., meets the military objective test and rules against excessive incidental civilian losses). Care would have to be taken in preplanned attacks against such objects to insure the strict requirements were met. Also care would be necessary in attacks against targets of opportunity in their vicinity in order not to violate the protections specified. Doubtless some abuses might occur. Contrasted with this is the fact that friendly allied governments including the FRG as well as many others in the Western European area have large numbers of dams and dykes. Generally, projections of future power demonstrate that the West (including the U.S.) will be much more heavily dependent upon nuclear power in decades to come than the Communist world. Thus, to the degree limited protection is given, it favors the Western world and highly developed technology. This is a strong plus.

This Article is very complex in its wording. This should pose no obstacle since attacks against such objects are invariably and thoroughly preplanned. This complexity was necessary to adequately preserve essential military requirements while still preserving a degree of protection.

6. RECOMMENDED U.S. ACTION.

a. No understandings or reservations as to this specific Article are needed (aside from general Nuclear understanding).

b. No follow on legislation is necessary.

CHAPTER IV. PRECAUTIONARY MEASURES

Article 57 -- Precautions in attack

1. TEXT OF ADOPTED ARTICLE.

Article 57 - Precautions in attack (previously Article 50)

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

- (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
- (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

- (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
- (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

2. REFERENCES.

a. Protocol I.

- (1) Article 50 - Definition of civilians and civilian population
- (2) Article 51 - Protection of the civilian population (cross reference to Article 57)
- (3) Article 52 - General protection of civilian objects (explains military objectives and civilian objects)
- (4) Article 56 - Protection of works and installations containing dangerous forces (cross reference to Article 57)

- (5) Article 58 - Precautions against the effects of attacks (related Article in Section)
 - (6) Article 85 - Repression of breaches of this Protocol (makes wilfully launching an indiscriminate attack knowing that excessive loss of civilian life will result [as defined in Article 57] a grave breach of Protocol)
- b. Articles 22 to 27, 1907 Hague Regulations (contains variety of requirements on land warfare which are reaffirmed by this Article)
 - c. Hague Convention IX Concerning Bombardment by Naval Forces in Time of War of 1907 (contains variety of requirements reaffirmed by this Article)

3. RELATION TO U.S. POSITION.

Consistent. The text adopted contains a variety of improvements and changes, urged by the U.S., from the prior ICRC text. For example, the term "do everything feasible to verify" was used in para 2(a)(i) in lieu of "ensure." "Direct and substantial" was changed to "concrete and direct" in para (a)(iii). All "necessary precautions in the choice of weapons" was changed in paragraph 2a(ii) to "all feasible precautions in the choice of means and methods of attack." Paragraph 4 was added to the original text. It reinforces U.S. views that this section of the Protocol does not apply to sea conflict or air conflict not involving attacks against land targets. Paragraph 5 was also added by Committee III.

In connection with its vote on this Article, the U.S. made the following statement:

"It is the view of the United States that Article [57] represents a major step in the reaffirmation and development of humanitarian law applicable in armed conflict. Not only does it codify for the first time the rule of proportionality but it also gives to military commanders uniformly recognized guidance on this responsibility to civilians and the civilian population in carrying out attacks against military objectives.

"Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. This of course is appropriate for the entire section including Articles [49] and [52].

"The reference in Articles 51 and 57 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack."

"It is the understanding of the United States that the word feasible when used in this Protocol, for example in Articles 57 and 58, refers to that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations." [CDDH/SR 42 Annex 6.]

COMMENT.

This Article was adopted by a vote both in Committee III and in the Plenary. The vote in Plenary was 90 (U.S.) to 0 with 4 abstentions. Para 2(a) required much time and effort to work out, but the rest of the Article was fairly quickly adopted.

Committee III noted that "feasible" was preferred to "reasonable" (U.S. view), "and it was intended to mean that which is practicable or practically possible." [CDDH/215/pg 27] The term "verify" was used in its ordinary dictionary meaning (establish the truth of) rather than in a technical arms control context.

In the Plenary, Italy and the FRG both expressed understandings of this Article very similar to the U.S. statement (see paragraph 3 of analysis).

France declared that they endorsed the aim of the Article but thought it open to restrictive interpretations hence they abstained (CDDH/SR 42/pg 9). Turkey declared that the word "feasible" should be interpreted in light of all factors present, and specifically those relating to the success of military operations. Austria ". . . considered that the precautions envisaged could only be taken at a higher level of military command . . . and not by junior military personnel. . ." (CDDH/SR 42/pg 11). India noted

that ". . . this Article does not require a Party to undertake to do something which is not within its means or methods or its capability. In its practical application, a Party would be required to do whatever is practical and possible." [CDDH/SR 42/Annex pg 8.]

These statements indicate a very pragmatic negotiating record of this Article. However, a few states (notably Madagascar [CDDH/SR 42/Annex pg. 13] and Romania [CDDH/SR 43/Annex pg. 13] believed that the victim of aggression is entitled to preference in the application of the Article both as to its means of defense and protection of its civilian population.

This Article contains the first codified recognition of the principle of proportionality, i.e., that civilian casualties which result from attacks on lawful military objectives are not prohibited if not excessive in relation to the military advantage sought to be secured (a long-standing U.S. view to which there is much objection in some Third World circles). Para 2 also contains implicit recognition that incidental damage to objects specially protected under international law (example: hospitals under the 1949 Geneva Conventions) may lawfully occur.

5. MILITARY IMPLICATIONS.

This Article should not have any substantial impact upon U.S. military operations. The first requirement (identification of military objectives) is strongly supported by military effectiveness considerations including traditional target intelligence requirements. Constant care, precautions in means and methods, and proportionality are supported by traditional military doctrines including economy of force, maximization of military advantages, concentration of effort, as well as political considerations arising from excessive collateral injury or damage to civilians or civilian objects. The requirement in 2(c) as to warnings can be viewed as a relaxation of the strict Hague requirement on warning which in actual state practice has not been followed. Paragraph 3, which has limited practical value, is not particularly difficult. The statement in paragraph 4 supports the U.S. view adopted in Article 49. Paragraph 5 of Article 57; while unnecessary, is self-evident.

6. RECOMMENDED U.S. ACTION

a. Reaffirm understandings expressed in Plenary by U.S. Delegation (for text, see paragraph 3 of Analysis). (In addition, the further understandings on "military advantage" discussed in Article 51 should be made applicable to this Article, as well.)

b. No follow on legislation is necessary.

Article 58 -- Precautions against the effects of attacks

1. TEXT OF ADOPTED ARTICLE.

Article 58 - Precautions against the effects of attacks
(previously Article 51)

The Parties to the conflict shall, to the maximum extent feasible:

- (a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) Avoid locating military objectives within or near densely populated areas;
- (c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

2. REFERENCES.

a. Protocol I

- (1) Article 50 - Definition of civilians and civilian population
- (2) Article 51 - Protection of the civilian population (para 7 prohibits using civilians to shield military objectives from attacks)
- (3) Article 52 - General protection of civilian objects (explains military objectives and civilian objects)
- (4) Article 57 - Precautions in attack (related Article in section)
- (5) Article 59 - Nondefended localities
- (6) Article 60 - Demilitarized zones
- (7) Articles 67 to 69 - Civil Defense

b. 1949 Geneva Conventions Protecting Victims of War.

- (1) Articles 19, 1949 GWS and 18, 1949 GC (locate hospitals away from military objectives)
- (2) Article 28, 1949 GC (the presence of protected person may not be used to render areas immune from military operations)
- (3) Article 49, 1949 GC (restricts forcible transfers in occupied territory)

3. RELATION TO U.S. POSITION.

Consistent. Some suggested U.S. drafting changes were accepted. In connection with Article 57 (and this Article) the U.S. declared its understanding that the word feasible refers to that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations.

4. COMMENT.

This Article was adopted by consensus in Committee III and by a vote of 83 (US) to 0 with 8 abstentions in Plenary.

The Committee III Report notes that agreement was reached fairly quickly on the text after it was revised to have the phrase "to the maximum extent feasible" modify all paragraphs. The Committee also stated: "It was clearly understood that this Article applies to all territory under the effective defacto control of a party, that is, including both its own national territory which is under its control and any foreign territory which it occupies." [CDDH/215/Rev 1, pg 27.]

The genesis of this Article can be traced back to proposals originally submitted by U.S. experts. This requirement codifies very important principles which the U.S. has long advocated. A party to a conflict which has civilians and civilian objects under its control has certain fundamental obligations in relation to their protection. These relate to avoiding, to the maximum extent practical, geographical and functional intermingling of combatants with civilians and military objectives with civilian objects. This Article is closely related to the principle of distinction in Article 48, as well as the requirements of Articles 51, 54 and 56. The consequences of a state's failure to take effective measures on behalf of its own population for their protection is a matter for concern of

that state's population - but that concern exists independently of any legal obligation imposed by the Article. The obligations of this Article are all qualified by the language "to the maximum extent feasible." This revision reflected the concern of a number of states

"[t]hat small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives. Other representatives pointed out that even large countries would find such separation difficult or impossible to arrange in many cases." [CDDH/215/Rev. 1/pg. 27.]

This qualification of - to the extent feasible - certainly encompasses more than military reasons (such as economic).

In connection with this Article, a number of other states made statements interpreting the word "feasible" along the lines of the U.S. statement (referred to in paragraph 3 of this Analysis). These include Italy, Turkey, UK, Cameroon, Canada, and the FRG. A few of these states (e.g., Italy, Cameroon) also stressed that Article 58 could not be interpreted as imposing absolute obligations restricting a state's ability to defend itself. These interpretations were unchallenged.

5. MILITARY IMPLICATIONS.

The requirements of this Article are entirely consistent with existing U.S. views as to legal requirements, as well as U.S. military tactics. It should not have any significant impact upon U.S. military operations except to support long-standing U.S. concerns and views. It will reinforce existing practical requirements to carefully consider impact on civilian protections when placing military installations.

6. RECOMMENDED U.S. ACTION.

- a. Reaffirm U.S. understanding of the term "feasible."
- b. No follow on legislation is necessary.

CHAPTER V: LOCALITIES AND ZONES UNDER SPECIAL PROTECTION

Article 59 -- Non-defended localities

1. TEXT OF ADOPTED ARTICLE.Article 59 - Non-defended localities (previously Article 52)

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

2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of hostility shall be committed by the authorities or by the population; and
- (d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol and of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection

12 SEP 1977

provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when it ceases to fulfill the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

2. REFERENCES.

- a. Article 51, Protocol I - Protection of the civilian population
- b. Article 85 - Repression of breaches of this Protocol (willful attacks against undefended localities are grave breaches of Protocol)
- c. Article 25, 1907 Hague Regulations (prohibits attacks against undefended cities, towns, villages)
- d. Articles 1 to 4, 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War (protects undefended, cities, towns, villages)

3. RELATION TO U.S. POSITION.

Consistent. The text adopted varies from the prior ICRC text in various particulars, some of which were recommended by the U.S. position. Generally it is quite improved and supports U.S. views as to the need for clarification of existing law.

1 2 SEP 1977

4. COMMENT.

Existing law (Article 25, Hague Regulations) specifies: "The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited." The text of this Article, adopted in Committee III and Plenary by consensus, clarifies in fairly precise terms the existing Hague prohibition.

The strict conditions in paragraph 2, if met and maintained, would normally mean the absence of significant military objectives. Such an inhabited area could be unilaterally declared "undefended" if the conditions in para 2 were met and if the inhabited place was in a "zone where armed forces are in contact which is open for occupation by an adverse Party." Failure to maintain the conditions would result in loss of protection under paragraph 7.

Parties could also agree that other areas not meeting the requirements of para 2 (example: absence of mobile military equipment or geographical limits) could be treated as undefended.

Since this Article serves to clarify and refine existing legal prohibitions protecting undefended localities (Hague IV, Hague IX), it is very useful. Particularly noteworthy are the conditions specified in paragraph 2.

5. MILITARY IMPLICATIONS.

The Article should not have any significant impact upon military operations since it is an acceptable delineation of existing legal requirements. In fact, the Article is extremely beneficial. It adopts a long held U.S. view that existing international law does not preclude air attacks against military objectives in the heartland even though such cities are not "defended" from air attack.

6. RECOMMENDED U.S. ACTION.

None. No understandings or implementing legislation are necessary.

1 2 SEP 1977

Article 60 -- Demilitarized zones

1. TEXT OF ADOPTED ARTICLE.

Article 60 - Demilitarized zones (previously Article 53)

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of hostility shall be committed by the authorities or by the population; and
- (d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order is not contrary to the conditions laid down in paragraph 3.

12 SEP 1977

5. The party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

2. REFERENCES.

- a. Article 51, Protocol I - Protection of the civilian population
- b. Article 85 - Repression of breaches (willful attacks against demilitarized zones are grave breaches)
- c. Article 14, 1949 Geneva Convention protecting civilians (GC) (hospital and safety zones)
- d. Article 15, 1949 GC (neutralized zones)
- e. Article 25, 1907 Hague Regulations (prohibits attacks against undefended cities, towns, villages)
- f. Articles 1-4, 1907 Hague Convention IX concerning Bombardment by Naval Forces in Time of War (prohibits attacks against undefended cities, towns, villages).

3. RELATION TO U.S. POSITION.

Consistent. Minor changes made in text, as adopted, from original ICRC text.

COMMENT.

The most controversial issue posed by this Article was the title. The title chosen has the advantage of clearly differentiating the concept from neutralization and neutrality. Both zones from which military forces have been withdrawn and those which had no military forces initially are potential areas for possible mutual agreement.

The Committee III report notes

"The Article is intended to permit the establishment both of zones which must remain demilitarized no matter which party controls the area in which they are located and also zones that may lose their demilitarized status if occupied by the adverse Party."

[CDDH/215/Rev 1 at p. 29.]

The concept behind this Article is recognized explicitly in Articles 14 and 15, 1949 Geneva Convention for Protection of Civilians, as well as general international law. It was implemented successfully during part of the Sino-Japanese conflict prior to World War II. Protection depends upon mutual agreement to confer demilitarized status. Such areas cannot be unilaterally established.

5. MILITARY IMPLICATIONS.

Any impact of this Article directly depends upon the extent to which (if at all), political and military leaders enter into specific agreements delineating such zones. Similar articles in the 1949 Geneva Convention have had no impact. The Article, since it specifies conditions normally required, may encourage such agreements. If such zones were widely adopted, it might simplify combat by narrowing the area where it occurred, thereby reducing to some degree existing functional and geographic intermingling of combatants and military objectives with civilians and civilian objects (characteristic of some recent conflicts). Speed and mobility, precision in striking power, concentrated force in small numbers, as well as enhanced reconnaissance capacity, would all be more important. Whether offense or defense would benefit is problematical since the tasks of both would, to some degree, be simplified (and perhaps complicated elsewhere).

12 SEP 1977

6. RECOMMENDED U.S. ACTION.

None. No understandings or implementing legislation are necessary.

August 17, 1977

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER VI, CIVIL DEFENSE

Article 61 - Definitions and scope (54)

1. Text of Adopted Article

For the purpose of this Protocol:

"Civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

- (a) warning;
- (b) evacuation;
- (c) management of shelters;
- (d) management of blackout measures;
- (e) rescue;
- (f) medical services, including first aid, and religious assistance;
- (g) fire-fighting;
- (h) detection and marking of danger areas;
- (i) decontamination and similar protective measures;
- (j) provision of emergency accommodation and supplies;
- (k) emergency assistance in the restoration and maintenance of order in distressed areas;
- (l) emergency repair of indispensable public utilities;
- (m) emergency disposal of the dead;
- (n) assistance in the preservation of objects essential for survival;

(o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;

"Civil defence organizations" means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under 1., and which are assigned and devoted exclusively to such tasks;

"Personnel" of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under 1., including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;

"Matériel" of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under 1.

October 25, 1977

References:

A. Protocol I, Part IV, Section 1 generally. See specifically Art. 49, Art. 50, Art. 51, Art. 52, and Art. 58. Also Article 3.

B. IV Convention, Art. 63, (a limited existing protection for civil defense organization in occupied territory.)

C. To specific tasks (lettering corresponds to tasks)

(a) Warning: Protocol I, Art. 57, para. 2(c); H.R. 26.

(b) Evacuation: Protocol I, Art. 51, para. 7; Art. 58(a)

Protocol II, Article 17.

IV Convention, Arts. 28, 49.

(c) Management of shelters: IV Convention, Art. 88.

(e) Rescue: IV Convention, Arts. 16, 20, 63.

(f) Medical services (including first aid) and religious services:

Protocol I, Part II, Arts. 8(3), (4), (5), (11), 10, 12, 15, 18, and 26-31.

Protocol II; Art. 8, IV Convention, Arts. 16, 18, and 20.

(j) Provision of emergency accommodation and supplies

Protocol I, Arts. 68-71; IV Convention, Arts. 23, 55, 59, 63, 108-111;

Protocol II, Article 18.

(k) Emergency assistance in the restoration and maintenance of order, H.R. 43.

(l) Repair of utilities, Protocol I, Art. 56, III Convention, Art. 50, IV Convention, Art. 63.

(m) Emergency disposal of dead, Protocol I, Art. 34, IV Convention, Arts. 16, 130.

(n) Objects essential for survival, Protocol I, Art. 54.

D. Other definition. See Article 8 for analogous definitions.

3. Relation to U.S. Position.

a. Par. 1.

- (1) The introduction is identical to that contained in the Nordic Text (CDDH/II/402) supported by the U.S.
- (2) The List of Tasks in the Nordic Text excluded tasks.
 - (d) Management of blackout measures;
 - (i) Decontamination and similar protective measures;
 - (l) emergency assistance in the restoration and maintenance of order in distressed areas;
 - (j) assistance in the preservation of objects essential for survival. See discussion under Par. 4.
- (3) The U.S. G. position with respect to the complementary activities mentioned was to limit task (o) to those necessary to perform the limited tasks. The text adopted refers also to the tasks mentioned in the introductory sentence. This does not effect a significant substantive departure from the U.S.

Position.

b. Pars. 2-4. The definitions of "Civil Defense Organizations," their "personnel" and "materiel" are consistent with the U.S. understanding of these terms.

c. A statement to the effect that Part II (Wounded, Sick and Shipwrecked) governs medical services and assistance - including first aid - rendered by civil defense personnel was deleted at the insistence of the French delegation. The U.S. delegation did not object to the deletion as its value was only as a cross-reference. The text of

October 25, 1977

Part II, particularly Art. 8(3)(a), as well as the negotiating record, make it clear that Part II applies to the search for, transportation, collection, treatment - including first aid - of the wounded and sick by civil defense personnel and units, both medical and non-medical. See CDDH/II/467, p. 25; and CDDH/406, p. 6.

4. Comments.

a. General.

The principal U.S. goal with respect to Article 61 was to limit the scope of protected civil defense activities to the performance of humanitarian tasks intended to help the civilian population (not the war economy or military operations) from the immediate (not long range) effects of hostilities and disasters. This was accomplished both in the text and the negotiating record.

Although the list in Par. 1 largely contains tasks traditionally associated with civil defense, Committee II realized that national policies might require civil defense organizations to perform additional tasks of a civilian, even humanitarian, nature, or to perform the tasks involved but in support of the war effort. Many tasks like firefighting are neutral. Accordingly, Committee II adopted and published in its report the following agreed note proposed by the U.S.

Civil defense organizations may, on the order of their authorities, perform other tasks not included in Article [61] provided that the tasks do not constitute acts harmful to the enemy under Article [65]. During the performance of such tasks, however, the protection granted by the chapter does not apply to them." (CDDH/II/467, para. 47, as amended by (CDDH/406).

October 25, 1977

It is to be noted that the performance of tasks in support of military operations while claiming protection under this Chapter is either prohibited while wearing the distinctive sign (Arts. 37 and 38) or results in loss of protection -- either as civil defense personnel or, in some cases, as civilians if the act amounts to taking a direct part in the hostilities (Art. 65, Arts. 51, para. 3, and 52, par. 2).

b. Par. 1.

(1) Introduction.

This Article defines civil defense organizations, their personnel, and their materiel and it describes the tasks or functions which are performed by these organizations and personnel.

The Article applies both to civilian organizations and personnel covered by Article 62 and to military units and personnel covered by Article 67.

The tasks must be performed entirely for the civilian population. They must be intended (1) to protect the civilian population from the dangers of military operations and disasters, (2) to help the civilian population recover from the immediate effects of military operations and disasters, and (3) to provide conditions necessary for survival of the civilian population. (CDDH/II/467, par. 42, as amended). Tasks

(a)-(d) are examples of measures designed to protect from the dangers of military operations and disasters. Tasks (e)-(i) are examples of measures which help to recover from the immediate effects of military operations and disasters, and (j)-(n) relate to basic survival.

Civil defense is concerned with emergency operations to save lives. It does not cover long range recovery or rehabilitation, nor does it cover day-to-day tasks of a civil government, nor economic stabilization, etc.

The term "disasters" is designed to include calamities natural or otherwise not caused by the hostilities. It thus includes natural disasters and also chemical spills, etc. Of course, the disaster must occur during the period the Protocol is in effect, i.e., from the beginning of armed conflict to the general close of military operations or termination of occupation. (See Article 3). (CDDH/II/467, Par. 41).

The task listing aids in the implementation of some other provisions of the Protocol and of the Conventions.

Article 58(c) of the Protocol, for example, states that Parties to the conflict shall, to the maximum extent feasible, take the other necessary precautions to protect the civilian population under their control against the dangers resulting from military operations. These precautions include some of the civil defense tasks mentioned in Art. 61, including the task of evacuation.

1. Specific Tasks:

October 25, 1977

- (1) Warning refers to warning the civilian population of the possibility of an attack or a natural disaster. The emphasis is on local warning (CDDH/II/467, as amended).
- (2) Evacuation refers to the removal of the civilian population from areas which might be, or have been, attacked or stricken by disaster. An Occupying Power may undertake this action under the second paragraph of IV Convention, Art. 49. Other tasks, such as maintenance of order, which includes direction of movement of refugees, are allied with evacuation. Care must be used so that evacuation is not used to render certain areas immune from military operations.
- (3) A principal civil defense protective measure is shelter. IV Convention, Art. 88 requires adequate shelters for internees. The reference in task (c) is to "management" of shelters. While this term is broad and includes various facets of shelter occupancy, it would not seem to include construction of permanent shelters, although it could include construction of immediate temporary "expedient" shelters.
- (4) Management of blackout measures is limited to those who direct, or enforce, the blackout, like air raid wardens, and does not include everybody who turns off a light. Although the task was not included in the U.S. position, its inclusion in the list is not significantly burdensome.
- (5) Rescue. This task is covered in occupied territory by IV Convention, Art. 63. It includes search for, and removal from danger of both wounded and well persons. It is closely allied to firefighting.

(6) The term "medical services" should be construed to cover "medical purposes" specified in Art. 8, Par. 5, that is, the search for, collection, transportation, diagnosis or treatment - including first aid treatment - of the wounded, sick and shipwrecked or for the prevention of disease. However, as a matter of emphasis, it is probable that the principal services will be first aid. See in this connection the discussion of Art. 66, Par. 9.

(7) Firefighting. No comment.

(8) Detection and marking of danger areas. This could include radiological monitoring activities as well as the identification of mine fields. It includes unexploded bomb reconnaissance but not bomb removal.

(9) Decontamination, etc. The term "similar protective measures" is not intended to include mine removal or bomb disposal. This task was not included within the Nordic proposal because Canada and some of the co-sponsors believed that radiological decontamination is a task beyond the capability of C.D. The U.S. had no objection, however, to the inclusion of the task as it may be relevant to chemical decontamination.

(10) Provisions of emergency accommodations and supplies. This task is not intended to include the longer range relief type activities provided for in Arts. 68-71 of this Protocol and Arts. 23, 55, and 59-63 of IV Convention.

(11) Emergency assistance in the restoration of order is addressed also. The Committee II report makes it clear that this task does not alter the position of the civil police, who are protected as civilians. Ordinary police functions are not civil defense functions, but in areas stricken by hostilities or disasters or areas in which the normal functioning of public administration has broken down, civil defense organizations may, "as an exceptional measure", assist also in the maintenance of order. Emphasis, however, is on the fact that this assistance is "emergency assistance" (CDDH/II/467, Par. 43).

(12) The term "public utilities" means services and commodities supplied to the general public, such as water, electricity, and communications. This task relates to emergency repair of installations and equipment used for supplying or transmitting the services and commodities. It thus includes, among other things, water control works, such as dams, dykes, drainage and discharge canals, outlets, sluices, locks, floodgates, and pumping installations. It should be noted also that this task is one of those currently covered by IV Convention, Art. 63 (CDDH/II/467, Par. 44).

(13) "Emergency disposal of the dead." No comment.

(14) The term "essential" was chosen in order to avoid confusion with the term "objects indispensable to the survival" used in Art. 54 and because it has a broader scope than the term

October 25, 1977

"indispensable". The "assistance" referred to, however, does not involve guard duties or require the use of weapons. An illustration of the kind of assistance intended is the temporary repair of an agricultural silo which might have been damaged (CDDH/II/467, Par. 45, as amended).

c. Par. 2. The term "civil defense organizations" includes those which are only temporarily or for a limited period of time assigned to civil defense duties, provided, however, that they are assigned and devoted exclusively to civil defense tasks during their period, however short, of assignment. As with temporary medical units, the protection for temporary civil defense organizations continues only so long as they remain exclusively devoted to civil defense work. The definitions in this paragraph are comparable to the definitions in Article 8.

5. Military Implications.

See Par. 5 under Arts. 62-67.

6. Recommended U.S. Action.

Implementing legislation is not required. The definition of civil defense under U.S. law, both at the Federal level (see 50 U.S.C. App. 2252(b)), and at the State level are quite close to this definition.

POSITION PAPER

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER VI, CIVIL DEFENCE

Article 62 - General Protection (55)

1. Text of Adopted Article

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this Section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.
2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations respond to an appeal from the competent authorities and perform civil defence tasks under their control.
3. Buildings and matériel used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use, except by the Party to which they belong.

2. References:

- A. Protocol I: Articles 17, 49, 51, 52, 73, Protocol II, Art. 17
- B. IV Convention, Arts. 13 and 63.

3. Relation to U.S. Position.

a. General.

(1) The U.S. position was to support modification along the lines of the Nordic Amendment (CDDH/II/403). To the extent that Article 55:

(a) applies only to civilian civil defense organizations and personnel;

(b) is applicable in all territories of the countries in conflict; and

(c) provides for reasonable derogations in case of imperative

military necessity

It conforms to the U.S. negotiating position.

(2) The Nordic proposal included a paragraph to the effect that civilians and civilian objects shall not suffer any diminution in the protection to which they are entitled under the Fourth Convention and Protocol I owing to their having performed civil defense tasks. This paragraph was not adopted by the Working Group because it was believed not to be necessary, in view of the first sentence of the adopted Par. 1, which provides that the protection accorded is "subject to the provisions of this Protocol, particularly the provisions of this Section". In this connection, Committee II approved an understanding that "... civil defense personnel are protected as civilians under the Protocol. The most important provisions concerning the protection of civilians and the civilian population are to be found in Section I of Part IV--..., which

includes also a reference to certain conditions and limitations on protection."

b. Title - General Protection

The ICRC draft text contemplated that this Article be applicable in "zones of military operations", by which the ICRC meant "all situations involving military operations [air or ground] including the combat zone, with the exception of occupied territory." The ultimate U.S. position was that basic protection need not be limited geographically and that it is applicable in the entire territory of the parties to the conflict, including occupied territory. The Title and Par. 1 are consistent with this position.

c. Par. 1.

(1) Except for the extent to which civilian civil defense personnel may be armed, Par. 1 is consistent with the U.S. position. The issue of arms is discussed under Art. 65.

(2) The term "respected and protected" was not in the Nordic Text. In explanation of this term, as also used in Arts. 65 and 67, Committee II adopted an understanding proposed by the U.S. delegation that the term means:

that the personnel must not knowingly be attacked or unnecessarily prevented from discharging their proper function (CDDH/II/467, Par. 79); FM 27-10, The Law of Land Warfare, Par. 225).

d. Par. 2. is consistent with the U.S. position.

e. Par. 3.

The first sentence is consistent with the U.S. position. With respect to the second sentence, the U.S. supported CDDH/II/403, which provided:

Objects used for civil defense purposes may not be destroyed or diverted from their proper use except in case of imperative military necessity.

The deletion of the military necessity clause by the Plenary complicates the application of the provision and is inconsistent with the U.S. position. See discussion under Par. 4.

4. Comment.

a. Par. 1.

(1) As to the scope of the general protection provided by Art. 62, see pars. 3.a. and b. above.

(2) During the plenary, the Egyptian delegation expressed the view that "the obligation stated in paragraph 1 concerned the adverse Party and not the Government which the personnel in question come under." (CDDH/SR 42, p. 16).

The Egyptian understanding is not supported by the context in which the Article appears as a part of Section I, Part IV.

(3) Article 49, in defining the scope of Section I, Part IV, provides:

The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly Part II thereof,***

Article 13 of the Fourth Convention provides:

The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based**, in particular on,*** nationality, and are intended to alleviate the suffering caused by war.

It follows from the scope of Section I, Part IV of the Protocol that Art. 62 imposes equal obligations on Parties to the conflict, unless a particular obligation is expressly applicable only to the adverse Party, or to the Party controlling the population.

To the extent that "respected and protected" provides immunity from being the object of attack, Par. 1 is applicable to the Party conducting an act of violence against the adverse party (Art. 49). The obligation to permit civil defense organizations to perform their civil defense tasks, however, is applicable to both sides. To the extent that the obligation does not involve attacks, the obligation is primarily on the Party which controls the civil defense organization and personnel whether that Party be an Occupying Power or the Party to which the civil defense personnel belong. (See U.S. Statement (CDDH/II/SR 91, par. 45).

(4) The Canadian delegation expressed concern that Par. 1 restricted the right of governments "to use the personnel belonging to civilian civil defense organizations as they saw fit" and expressed an understanding that the second sentence does not have that effect (CDDH/ /SR 42, p. 16).

Under Art. 61(2), "'Personnel' of civil defense organizations means those persons assigned by a Party to the conflict exclusively to the performance of civil defense tasks." It follows that so long as

October 27, 1977

Persons are so assigned, their Government is obligated to permit them to perform their civil defense tasks. There is nothing explicit in the Protocol, however, that restricts a government from relieving such personnel from their assignment.

(5) The organizations mentioned in Para. 1 must be organized or authorized by the competent authority of a Party to the conflict to perform any or all of the tasks mentioned in Art. 61, and be assigned exclusively to the performance of these tasks while the assignment is operative. (See Art. 61, Para. 2). Such assignment may be for a brief period, but during such period the organization must be exclusively devoted to the performance of some or all of the tasks mentioned in Art. 61(1) which are for the benefit of the civilian population. Thus, a firefighting organization is protected while performing a fire with the intent of stopping the fire in a needed defense plant (Art. 65). If the basic purpose is to save civilian lives, then the task is protected. Further, as civilians, subject to Article 51, para. 3, they are immune from being the object of attack even while fighting fires in the defense plant. However, their presence would not necessarily immunize the plant from attack. If the unit and its personnel go farther and take "a direct part in hostilities", they lose not only the protection under this Article, but also their protection as civilians, and they may be the object of attack (Art. 51(3)).

(6) The entitlement to perform civil defense tasks (but not immunity from attack) is subject to derogation by the competent authorities of the Party to the conflict in control of the area in which they operate, including occupied territory, only "in case of imperative military necessity." In construing the conditions which justify this derogation, due weight must be given the word "imperative". See the 1907 Hague Regulations, Art. 23g, Protocol I, Arts. 54, Para. 5 and 71, para. 3, and Protocol II, Art. 17, para. 1. (See Committee III Report (CDDH/III/408, Para. 51).

b. Par. 2.

The protection afforded by the paragraph is similar to that afforded under Art. 17 to civilians who respond to an appeal from the authorities to render care to the wounded and sick. Under this Article, however, civil defense tasks must be performed under the control of the competent authorities of a Party.

c. Par.3.

(1) The first sentence assimilates buildings and materiel used for civil defense purposes and shelters provided for the civilian population to civilian objects covered by Article 52. The status of shelters is broader than that accorded to civil defense buildings and materiel. The latter must be part of the civil defense organization. Shelters need only be provided for the civilian population and need not be associated with the civil defense organization. Shelters must, however, be available to the public-at-large.

(2) Article 52, par. 1 provides that civilian objects shall not be the object of an attack or reprisal by the adverse party. If civil defense buildings and materiel are used for the tasks described in Art. 61, for the benefit of the civilian population, and if the shelters are used by the civilian population, then they are civilian objects and are immune from attack. The Committee II report notes that this immunity is applicable only "insofar as" the objects are civilian objects. [See CDDH/11/467, Par. 53, as amended by CDDH/406; CDDH/II/SR 100, Par. 54]. Thus, if the object becomes a "military objective", as that

term is defined in Art. 52, Par. 2, it loses its immunity from being the object of attack.

(3) The term "materiel" includes the equipment, supplies, and transports of civil defense organizations. Some civil defense organizations have aircraft, including helicopters. These would have the status of any other civilian aircraft and are subject to rules in connection therewith. Thus, if identified as a civil aircraft, it should not be the object of an attack unless at the time it represents a valid military objective, such as when its presence might be deemed a military threat. The chapter, unlike the section on medical aircraft, confers no special status on civil defense aircraft.

(4) The second sentence of Par. 3 in the Nordic proposal

(CDDH/II/403 provided:

Objects used for civil defense purposes may not be destroyed or diverted from their proper use except in case of imperative military necessity.

Several delegations objected to the provision against derogation in the mistaken belief that it authorized attacks in case of imperative military necessity. The Rapporteur explained that "attacks are acts of violence against the adverse Party". Insofar as civil defense buildings and materiel remained civilian objects, they could not be the object of attack or reprisal by the enemy. Accordingly, the terms "destroyed or diverted" pertained to acts by the Party to which the objects belong, such as demolition, destruction or diversion in a defensive mode. In order to make the construction clear, "the

Words 'by the Party to which they belong' were added at the end of Par. III (CDDH/II/467, as amended). Under the Committee's version only imperative military necessity would permit a state to destroy or divert its own civil defense objects, thus creating a parallel to the scorched earth policy contemplated in Article 54(5).

(5) Believing that a Party to the conflict should not be restricted in its option to destroy or divert its own civil defense objects, including shelters, Canada moved the deletion of that phrase in the Conference Plenary (CDDH/417). The Plenary adopted the Canadians' proposal by consensus.

The Netherlands delegation which, like the U.S. participated in the consensus, expressed its view that this amendment weakens the obligation of States on behalf of the civilian population with regard to the availability of shelters and civil defense equipment.

(6) A restraint against arbitrary and unfettered destruction or diversion of civil defense objects needed for the protection of the civilian population is implicit in the provisions of Par. 1.

5. Military Implications.

a. To the extent that Article 62 provides for immunity from being the object of attack, its impact on military operations is minimal. It merely reaffirms the immunity which civilian civil defense personnel and civilian objects have under Arts. 51 and 52. Although it may be difficult, in practice, to differentiate between the protected humanitarian tasks, and unprotected activities which support the war economy or military

October 25, 1977

operations, the presence of civil defense personnel, like that of other civilians, does not immunize military objectives as such from being the object of attack. The duty of care to take precautions in attack (Art. 57), however, must be taken into account.

b. The major effect of Article 62 on military operations flows from the freedom to perform civil defense tasks, subject to derogation in the case of imperative military necessity. This obligation rests primarily on the Party in control of the territory in which civil defense personnel perform their tasks. To the extent that civil defense tasks are performed in non-occupied territory, Article 62 facilitates the performance of the civil affairs, refugee control, and relief/duties normally assigned to military commanders in the combat zone. In relation to the evacuation function and the control of refugees, care must be taken to avoid the actions prohibited by Art. 51, Par. 7. See discussion under Art. 63 as to military implications in occupied territory.

6. Recommended U.S. Action.

a. To the extent feasible, attempt to persuade Canada and Egypt not to pursue their understandings expressed in the Plenary (CDDH/42, P. 16).

b. No implementing legislation is required.

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

Article 63 - Civil Defense in Occupied Territories (56)

1. Text of Adopted Article

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no circumstances shall their personnel be compelled to perform activities which would interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.

2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.

3. The Occupying Power may disarm civil defence personnel for reasons of security.

4. The Occupying Power shall neither divert from their proper use nor requisition buildings or matériel belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civil population.

5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:

- (a) That the buildings or matériel are necessary for other needs of the civilian population; and
- (b) That the requisition or diversion continues only while such necessity exists.

6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

2. References:

Chapter VI, Part IV, Section I, and Protocol I generally.

Protocol I, Articles 14, 44, 49, 68-71.

IV Convention

Article 63 (which this article specifically supplements)

Articles 51, 54, 55, 56, 57, 59-62

Hague Regulations, Articles 52, 53

3. Relation to U.S. Position:

a. Article 63 conforms to the imperative U.S. requirement that special protection to, and status of, civil defense organizations are limited to civilian civil defense organizations only.

b. Par. 1 follows the ICRC draft text and is generally consistent with para. 1 of the Nordic proposal (CDDH/404) which was supported by the U.S.

The following variances are noted:

(1) Par. 1 of the Nordic proposal was expressly made subject to the provisions of Article 62. This provision was intended to show that Article 62, including its provision for derogation in case of imperative military necessity, apply also in occupied territory. In lieu of the express reference to Article 62, Committee II adopted an understanding.

Article [62] applies to both occupied and non-occupied territory. Article [63] is thus supplementary to Article [62] as far as occupied territories are concerned. Article 63 of the Fourth

Convention is also applicable. It was emphasized in the debate that this Article is not intended to strengthen the position of an Occupying Power. (CDDH/II/467, par. 63, as amended by CDDH/406).

The reference to Article 63 further supports the U.S. view that the special autonomous status and freedom to operate in occupied territory is subject to reasonable derogation in the event occupied territory becomes a combat zone.

(2) The obligation to provide to civil defense organizations the facilities necessary for the performance of their tasks was limited "to the extent feasible" in the Nordic proposal. This qualification was deleted in the adopted text of Par. 1.

c. Par. 2 is not inconsistent with the U.S. position. It is a corollary of the last sentence of Par. 1. This paragraph is the product of a compromise with respect to a Yugoslav proposal that "The Occupying Power shall not compel civil defense bodies to perform their activities." (CDDH/II/340).

d. Par. 3 was considered to be indispensable when Committee II adopted Art. 65(3), which authorizes civilian civil defense personnel to bear light individual weapons for the purpose of maintaining order or for self-defense.

e. Pars. 4-6 are the result of intense negotiations concerning the authority of the Occupying Power to direct or requisition civil defense buildings, materiel and civilian shelter. Although somewhat more restrictive than the Nordic proposal, the end result is a reasonable

compromise which balances the needs of the civilian population for civil defense assistance with the requirements of the Occupying Power, in the fulfillment of its obligation to satisfy other needs of the civilian population of occupied territory.

4. Comments.

a. General.

The relevant provisions of the Fourth Convention are:

(1) Art. 63, which provides that subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power, "the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population the maintenance of essential public services, by the distribution of relief and by the organization of rescues" shall be permitted to pursue their humanitarian activities. The Occupying Power may not require any changes in structure of these organizations which would prejudice their humanitarian activities.

(2) Art. 51 authorizes the Occupying Power to requisition labor for work necessary either for the needs of the army of occupation, or for public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

(3) Article 54 says the Occupying Power may not alter the status of public officials or take measures of coercion or discrimination against

em "should they abstain from fulfilling their functions for reasons of conscience". This prohibition does not prejudice the authority to requisition labor as prescribed in Art. 51, nor affect the right of the Occupying Power to remove public officials from their posts.

b. Attitudes represented in the negotiations.

The central objective of our NATO European allies was to preserve the integrity and strengthen the autonomy of their civil defense organizations in the event their country is occupied. In the view of the leaders of their civil defense organizations, who formulated their national positions relative to the civil defense articles, Art. 63 was the most important article in the chapter on Civil Defense. They were prepared, however, to make concessions, taking into account the reasonable requirements of Occupying Powers, recognizing that the only hope to achieve respect for this article is to recognize the legitimate minimum requirements of an Occupying Power. The U.S. Delegation encouraged the attitude of compromise, particularly as recent U.S. experience had been in the role of an Occupying Power. Some delegations expressed a passionate distrust of Occupying Powers and objected to any reference which might be construed as recognition of the right of an Occupying Power to safeguard its security or to perform its obligations under the Fourth Convention. (See CDDH/II/340; CDDH/II/SR 86, pars. 5 and 15; CDDH/SR 42, Annex pp. 19, 23).

The Soviet delegation, on the other hand, introduced a blunt proposal vesting control of civil defense activities in the Occupying

Power (CDDH/II/352). Realizing that such a proposal was doomed to failure, the Soviet delegation did not press its proposal but did not withdraw it.

In this environment, the Nordic proposal, together with Committee understanding preserving the right of the Occupying Power to make reasonable derogations in cases of imperative military necessity and for urgent reasons of security, proved to be the best basis for achieving consensus.

c. Par. 1. See Par. 3.b. above.

d. Par. 2. This paragraph evolved from a proposal by Yugoslavia to the effect that the Occupying Power shall not compel civil defense bodies to perform their activities (CDDH/II/340). Despite the sympathy shown by this proposal, most delegations recognized that this could frustrate a good faith effort by the Occupying Power to fulfill its obligations to provide for the security of the civilian population. Moreover, the Occupying Power could exercise its powers under Art. 51 of the Fourth Convention to requisition civilian labor to perform certain civil defense tasks. Moreover, Article 54 of the Fourth Convention affords a safeguard to those officials who abstain from the performance of their function by reason of conscience. The compromise text adopted was based on a U.S. proposal made in the Working Group.

e. Par. 3. See Par. 3.c. above.

f. Pars. 4-6.

(1) Under Hague Regulation, Art. 53, an army of occupation can take possession of all movable property belonging to the State, which

be used for operations of the war. The Geneva Conventions reaffirm the principle but impose certain limitations on the use to which medical equipment and supplies may be put. (I Convention, Art. 33).

With respect to private property and to property of municipalities, Hague Regulations, Art. 52 permit the requisition of the property of municipalities and individuals, but only for the need of the army of occupation. IV Convention, Arts. 56 and 57 impose limitations on the right to requisition food, medical supplies and medical facilities. These limitations are further extended by Art. 14, Protocol I.

(2) Par. 4 extends the principles of Art. 14, Par. (2), Protocol I to buildings and materiel belonging to or used by civil defense organizations by adding a new limitation on the powers and H.R. 52.

(3) Par. 5 is patterned upon the provisions of Art. 14, Par. 3 Protocol I and imposes additional limitations on conditions under which civil defense property may be requisitioned or diverted, and imposes limitations on the uses to which requisitioned property may be put. These purposes must be to satisfy some other need of the civilian population.

(4) Par. 6 deals with requisition or diversion of shelters. If provided for the use of the civilian population, shelters may not be diverted or requisitioned by the Occupying Power - even if they are excess to the needs of the civilian population. Shelters not provided for the civilian population, but needed by them are also immune from requisition or diversion. This paragraph may complicate the practice of Occupying Powers to requisition buildings for office space or quarters needed by

occupation forces to the extent that shelters are frequently constructed in the basement of such buildings. In theory, those portions of the building not used for public shelter remain subject to requisition, as does the building while not being used as a shelter, but the basement, if intended for the use of the public as a civilian shelter may not be requisitioned.

(5) The foregoing do not, however, limit the authority of the Occupying Power to requisition buildings or materiel not dedicated to civil defense or public shelter purposes or to requisition labor and materials for the construction of such structures as may be needed by the Occupying Power.

5. Military Implications.

a. With the understandings adopted by Committee II, the freedom and autonomy to operate by local civil defense organizations and personnel is subject to reasonable, but not arbitrary, derogations in case of urgent or imperative military necessity.

b. Requisition practices of the past with respect to civil defense property and shelter is curtailed, but no new limitation is prescribed as to the requisition or diversion of equivalent property not dedicated to civil defense purposes.

6. Recommended U.S. Action.

a. There is no need for implementing legislation.

b. As a precaution, it is advisable that the U.S. reaffirm the understanding made by Committee II as to the relationship between Article 63 and 62 as well as Art. 63 of the Fourth Convention.

It is the understanding of the United States that Article 62 applies to both occupied and non-occupied territory. Article 63 is thus supplementary to Article 62 as far as occupied territory is concerned. Article 63 of the Fourth Convention is also applicable. This understanding reflects the agreed value of Committees as reported in CDDH/II/467 as amended.

August 17, 1977

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER VI, CIVIL DEFENSE

Article 64 - Civilian civil defense organization of neutral or other States not parties to the conflict and international coordinating organizations (57)

1. Text of Adopted Article

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and matériel of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.

3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

z. References.

- a. Chapter VI, Part IV, Section I of Protocol I generally.
- b. Protocol I, Articles 9, 12, para. 2(c), 81.
- c. I Convention, Arts. 27 and 32. (This Article, according to the ICRC, is based on the provisions of Art. 27.)

3. Relation to U.S. Position.

The article applies only to civilian civil defense organizations. It grants to those groups acting outside their own country only that status which is accorded to civil defense organizations of the assisted country. Occupying powers have an adequate degree of control. Paragraphs 1 and 3 are consistent with the Nordic Amendment supported by the U.S. (CDDH/II/405). Par. 2 is new but unobjectionable.

Comments.

a. Paragraph 1 provides that civilian civil defense organizations of neutrals or other States not parties to the conflict may perform civil defense tasks in the territory of a Party to the conflict if they have the consent of that Party and act under its control. They are accorded the same protection as the assisted Party's civil defense organization and the entitlement to display the international protective sign of civil defense. Foreign civil defense personnel have already been assigned to assist a national Red Cross society and used in combat zones. The Danish Civil Defense Progress Report, 1976, lists five such assignments to Lebanon in 1976.

This provision is comparable to those provided for the availability

under Art. 9 of Protocol I and Arts. 27 and 32 of the First Convention.

(See also Article 12, par. 2(c)).

Some of the activities which could be conducted under this article are similar to the relief activities covered by Arts. 68-71. Foreign civil defense organizations are not, however, included in the humanitarian organizations referred to in paragraph 4 of Art. 81.

b. There is no requirement for the consent of the adverse parties, but they should be notified as soon as possible, for the protection of the foreign civil defense organizations. Only those parties concerned in actual combat with the assisted party, or who might interfere with the movement need be notified. There is no need to notify Parties to the conflict that are not immediately affected by the movement of the organization or its activity.

c. Paragraph 2 was the product of a compromise between Zaire and Denmark. The ICRC draft text has provided for protection similar to that provided by paragraph 1 to the personnel and materiel of "international civil defense bodies" even though it was conceded that at this time there is no international civil defense organization or emergency civilian organization with civil defense forces in being.

d. Thirty-five States are members of the "International Civil Defense Organization (ICDO) which claims a coordinating capability. It was accredited to the Conference as an Intergovernmental body and has received recognition by the Swiss Government. However, except for Spain, no Western nations and none of the Socialist Group are members. The Nordic

countries objected to any hint of recognition of a specific civil defense organization in the Protocol. Zaire and the Philippines were active in advocating positions favored by the ICDO.

Paragraph 2 calls for facilitation of international coordination of civil defense tasks in the event foreign assistance is provided in accordance with par. 2. If an international organization engages in such coordination, it is covered by the relevant provisions of Chapter VI to the same extent as neutral civil defense organizations. The Organization of American States, the United Nations or the ICDO could conceivably be good coordinating organizations.

At the suggestion of the USSR, the requirement to facilitate coordination was made non-mandatory and is applicable only to those receiving and granting assistance. There is no obligation on the adverse party to facilitate the coordination, (CDDH/II/467, pars. 66-67):

e. Par. 3. Consistent with the U.S. view, an Occupying Power can exclude or restrict the activities of those outside organizations, but only if it can ensure adequate performance either from its own resources or those of occupied territory. In adopting its Report, the Committee also adopted the following understanding:

It is understood that the activities of civil defense bodies of neutral or other States not Parties to the conflict or of any international coordinating organizations in occupied territories are subject to the consent and control of Occupying Power (CDDH/II/467, pars. 68-69).

5. Military Implications.

This article adds to the classes of persons who might be involved in

The performance of civil defense tasks under Arts. 62 and 63. It does not change any of the problems which might arise as the result of such activities which are discussed in connection with these articles.

This sort of activity is no more an "interference" in the conflict than is relief under Article 70.

6. Recommended U.S. Action.

There is no objection to this Article. No further action is required.

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

Article 65 - Cessation of Protection (58)

1. Text of Adopted Article

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and matériel are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

- (a) that civil defence tasks are carried out under the direction or control of military authorities;
- (b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
- (c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat.

3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as

istols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

2. References.

A. Chapter VI, Part IV, Section I, Protocol I generally.

B. Protocol I, Articles 13, 38, 41, 43, 44, 45, 51, 52

C. I Convention, Articles 21, 22; II Convention, Articles 34, 35;

IV Convention, Article 19.

Relation to U.S. Position.

a. Pars. 1, 2, and 4 are substantially consistent with the U.S. position.

b. The U.S. position with respect to arms carried by civilian civil defense personnel was that the Protocol should not permit the carrying of light individual weapons in the battle area. The adopted text does not conform to that position. Instead it requires Parties to take measures to restrict the weapons carried by civil defense personnel in such areas to handguns. This provision is the result of a compromise which settled a difficult and prolonged negotiation. See discussion under par. 4.

c. The deletion of par. 4 of the Nordic proposal (CDDH/II/405) is not inconsistent with the previously formulated U.S. position. See

October 26, 1977

Discussion under Par. 4.

4. Comments.

a. Par. 1.

(1) This paragraph is similar to Art. 13(1) of Protocol I and to I Convention, Art. 21, II Convention, Art. 34, and IV Convention, Art. 19.

(2) Each of the foregoing describes the condition under which the protection accorded medical units or transports ceases if used to commit, outside their humanitarian functions, "acts harmful to the enemy". The ICRC was of the view that this should be construed as "acts the purpose or effect of which is to harm the adverse party by facilitating or impeding military operations."

(3) An "act harmful to the enemy" includes "taking a direct part in hostilities," but all acts harmful to the enemy do not necessarily involve participation in hostilities. Civilian participation in hostilities results in an immediate loss of immunity from attack under Art. 51(3). The term "direct participation in hostilities" is not defined. It demands more direct involvement than "direct support of military operations". Thus, a civil defense organization which uses its transports and materiel to fight a fire in a military objective which the enemy is seeking to destroy and thus directly supports military operations loses its special protected status under the chapter while it is engaged in the performance of that activity, but they remain civilians who may not be the object of attack but who can, of course, be collateral victims. Their entitlement to display the distinctive sign also ceases while they are engaged in that activity. Such use of the sign is an improper use under Art. 38 of the Protocol, and thus a breach (CDDH/II/467, Para. 82.)

It is of note that with respect to medical units and transports

Art. 13 of the Protocol and the Conventions refer to acts "outside the humanitarian functions". The equivalent phrase in Art. 65 is "outside their proper tasks." This refers to the tasks mentioned in Art. 61. The tasks listed in Art. 61 are not a complete list of humanitarian tasks a civil defense organization could perform, but they are a complete list of tasks specially protected under the Chapter. The performance of other tasks which are not harmful to the enemy does not result in loss of civil protection but only that of the special protection afforded by Chapter VI, including the right to display the emblem.

b. Par. 2.

(1) This paragraph serves the same function as Art. 13(2), and Convention, Art. 22, II Convention, Art. 35 and IV Convention, Art. 19(2). It provides an illustrative list of acts which may not be regarded as harmful to the enemy. In Art. 65, the illustrative list serves also to clarify the permissible relationship between civilian civil defense organizations and the military authorities.

(2) Par. 2(a) recognizes the paramount control of the Military Commander in the combat zone. As he is responsible for evacuation and other measures to safeguard the civilian population, as well as the conduct of military operations, it is reasonable that he have direction, control or at least coordinating authority with respect to the activities of civil defense organizations.

October 26, 1977

(3) Par. 2(b) - Military personnel and units may perform civil defense tasks without, however, having any special protection.

Their cooperation with civilian civil defense organizations in the performance of tasks mentioned in Art. 61 is necessary, and cannot be construed as an act harmful to the enemy.

c. For technical, administrative or management purposes, military personnel (who need not qualify for protected status under Art. 67) may be attached to civil defense organizations. In some cases, they may even command these organizations. The second clause of Art. 65 recognizes the condition as an act not harmful to the enemy.

Committee II adopted an understanding that the term "some military personnel" as used in Art. 65(2b.) refers to a relatively small number (CDDH/II/467, Par. 81).

Military personnel such as reserves may be assigned to a civil defense organization. Unless they are permanently assigned to such duty for the duration of the conflict under Art. 67, they are not given any special or protected status. They remain members of the armed forces as described in Art. 43, Par. 2. According to Art. 43, they are combatants. If they fall into the hands of the adverse party, they would be prisoners of war.

The attachment provision does not apply to units. That is, a military unit cannot be attached to a civilian organization (CDDH/II/467, Par. 74).

Although there is no special protection for these military personnel attached to a civilian unit, they derive a degree of practical safety while working in a civilian environment. They, themselves, would scarcely be lucrative targets. The restrictions on attack in Arts. 51 and 57 afford, for all practical purposes, an adequate protection. See discussion of Art. 67.

d. Par. 2(c) - It also is not considered an act harmful to the enemy if, as an incidental consequence of the performance of a task for the civilian population, a military victim is aided. Thus, it is not an act harmful to the enemy to rescue, from a burning hotel, a soldier on leave. This would also have application to a soldier who is "hors de combat." See Art. 41, which explains who are "hors de combat".

Par. 2(c) does not, however, extend to extricating military personnel from a bunker which is under attack, as would have been permitted under the original ICRC draft.

e. Par. 4.

Some civil defense organizations (including those of Denmark) are made up of conscripts who are drafted for civil defense service in lieu of military service. In many countries (including Switzerland and Denmark) they are organized along military lines and wear special uniforms distinguishable from those of the armed forces. Par. 4 recognizes that these factors are not to be considered as harmful to the enemy.

f. Par. 3.

(1) General.

(a) The most controversial provision of Art. 65 is Par. 3, which deals with carrying of arms. With respect to this issue, three points of view emerged:

Some delegations believed that protection should not extend to armed civil defense personnel.

Others contended that protection should be extended to such personnel if they are armed only with light individual weapons.

A third group (reflected in the Nordic proposals) advocated a middle course suggesting that juridical protection is not effective if civil defense personnel carry weapons in areas where land fighting is taking place or is likely to take place.

To resolve this issue a sub-working group consisting of advocates of each point of view was appointed. After two weeks of intense, but informal negotiation, the sub-working group agreed on Par. 3, which is essentially an elaboration of the middle course. The group also concurred in a series of understandings which became the basis of understandings adopted by Committee II. The solution is similar to the formula adopted for medical aircraft in Art. 26.

Any desired prohibition on arms was compromised by adoption of Art. 13, which allows civilian medical personnel to carry light individual weapons for their own defense and that of the patients in their care. Many felt it would be discriminatory to prohibit arms to civil defense personnel who probably could, in view of the task of assisting in maintenance of order, make a better case for possession of weapons than civilian medical personnel. Moreover, under current international

law, there is no prohibition against the carrying of weapons by civilians for self-protection, law enforcement or hunting.

In view of these circumstances, Par. 3. was the best provision which could be obtained by those delegations which wished to limit protection to unarmed civil defense personnel.

Under the provisions of Par. 3, civil defense personnel may carry light individual weapons without limitation except in areas where land fighting is taking place or is likely to take place.

Recognizing that there is a risk that they may be confused for combatants if they carry weapons in such areas, the Parties are obliged to undertake appropriate measures to limit such weapons in these areas to handguns, such as pistols and revolvers.

As there may be circumstances when such limitation cannot feasibly be effected, in a fast moving situation for example, civil defense personnel armed with other light individual weapons will nevertheless be protected if they are recognized as civil defense personnel.

g. The following understandings were expressed in the course of the negotiations.

(1) Committee II adopted an understanding that "light individual weapons" should be interpreted in the same way as Par. 2(a) of Art. 13, dealing with arms carried by civilian medical personnel (CDDH/II/463, Par. 77).

(2) As there is little, if any, guidance in the negotiating history of Art. 13 defining the term, the U.K. delegation expressed the understanding that: "The term 'light individual weapons' excludes

fragmentation grenades and similar devices, as well as weapons which cannot be fully handled or fired by a single individual and those basically intended for non human targets." This understanding was expressly accepted by Egypt, Ghana, Mexico, The Netherlands, and the U.S. (CDDH/II/SR 95, p. 11; CDDH/II/467, par. 73). It was not rejected by any delegation. This understanding obviously includes rifles and handguns but effectively excludes grenades other than those designed to use as riot control agents, all crew served weapons, antiaircraft or antitank weapons, including rocket launchers, and other weapons which may be held by a single person but require for their normal use more ammunition than can be carried by one person,

(2) The U.S. Delegation believed that the types of weapons which could be encompassed by the term can best be inferred from the allowable purposes which are limited to the maintenance of order (as further limited by Art. 61(1)(k)) or for self defense.

On the question of self defense, Committee II adopted an understanding that civil defense personnel may be armed for self defense against marauders or other criminal individuals or groups. They may not engage in combat against the adverse party and may not use force to resist capture. If, however, they are unlawfully attacked by individual members of the adverse party's forces, they may use their weapons in self defense after having made a reasonable effort to identify themselves as civil defense personnel. (CDDH/II/467, Par. 78).

(3) Committee II also adopted an understanding that the expression "respected and protected" means that the personnel must not

knowingly be attacked or unnecessarily prevented from discharging their proper functions. (CDDH/II/467, Par. 79).

(4) Finally, Committee II adopted an understanding that Art. 65, Par. 3 also has application to Art. 67. This application will be discussed in connection with that Article (CDDH/II/467, Par. 76).

h. Elimination of Par. 4, Nordic Proposal (CDDH/II/406).

Par. 4 of the Nordic proposal recognized that the tasks enumerated in Art. 61 (1) might be performed in support of military operations or in support of military objectives. The proposal provided that whenever civil defense organizations or personnel performed the enumerated tasks in support of military operations or objectives, the protection to which they were otherwise entitled under this Chapter "shall cease for the duration of such performance." Similarly, their entitlement to display the distinctive sign of civil defense would also cease.

The working group decided not to adopt this paragraph because it was already covered elsewhere. (At the Copenhagen conference, the U.S. and the FRG had expressed a similar view but acquiesced in the desires of the Nordic delegation to support the paragraph). The other provisions deemed to render the Nordic proposal unnecessary are:

The Introduction to Art. 61 and the relevant understanding expressed in CDDH/II/467, Par. 47, as amended;

The first paragraph of Art. 65;

Art. 38, regarding the misuse of internationally recognized protective signs. The report of Committee II indicates that the display of the sign while civil defense organizations and personnel

are supporting military operations or objectives is such a misuse.

Art. 37, which would make the misuse of the international protective sign the offense of perfidy under certain circumstances.

Art. 85, Par. 3(f), which denounces violations of Art. 37 as a grave breach.

Art. 51(3) which provides for loss of immunity from being the object of attack for civilians who take a direct part in hostilities.

Art. 52(2) which defines military objectives.

In view of the foregoing, as well as the explanatory negotiating record, the deletion of the paragraph is not objectionable.

5. Military Implications.

a. Par. 1 is consistent with the provisions for loss of protection of medical units and transports under the Conventions and under Art. 13. The military implications in relation to civil defense are complicated by the ambivalent character of civil defense which has the capability both of performing its tasks for the humanitarian purpose of helping the civilian population or for the purpose of supporting the war economy as well as military operations.

The circumstances in which an Art. 61 task is performed rather than the task itself determine how it should be categorized, if indeed any categorization is fully valid. For example, "emergency repair of indispensable public utilities" includes the emergency repair of communications systems. Communications systems are used by the military,

October 26, 1977

by civilians, by civil government and, of course, by civil defense, usually with the same physical equipment. It is not possible to segregate military and civil defense circuitry. An electric generating plant serves both civilians and the military. The electricity cannot be segregated and may be used by both the military and by the civilian population. These then may well be military objectives. Repairing them may well cause the organization to lose its protected status and in extreme cases, such might even be considered taking a direct part in hostilities with consequent loss of civilian status.

Civil defense as a governmental function is, in part, justified as a national program on the grounds that it contributes significantly to a government's defense effort, that is, a nation whose civilians are prepared to absorb the effects of an attack is better able to resist aggression. As a consequence, civil defense is considered in connection with other (military) elements in developing a nation's defense program and in many nations is considered to be an integral part thereof.

All things considered, paragraph 1 of this Article, the beginning of Art. 61, Arts. 51 and 52, and the negotiating record limit the other than humanitarian aspects of civil defense as well as can be done without putting civil defense workers in an impossible position. Art. 38 concerning misuse of the civil defense sign which could, in the proper circumstances, amount to perfidy under Art. 37 (see also Art. 85, para. 3(f)) provides reasonable legal sanction against abuse. Art. 51(3) and Art. 67 provide reasonable military sanctions.

As a practical matter, civilian civil defense personnel are not significantly more immune from attack than the civilian labor force which may

October 26, 1977

directly further the war economy. The presence of either in a significant military objective as defined in Art. 52(2), or in the vicinity of such an objective would not prevent an attack against the objective.

b. Par. 2 is useful in that it clarifies the permissible relationship between civilian civil defense and the military authorities.

c. The authority of civilian civil defense personnel to be armed with light individual weapons has significant military implications only in the combat zone. In the light of the consensus achieved with respect to clarifying understandings it does not appear to be as troublesome as was once feared.

There is nothing in the Conventions, the Protocol or other international humanitarian law which prohibits civilians from carrying weapons. On the other hand, Art. 44, dealing with irregular combatants provides that in certain limited circumstances the principal method of distinguishing an irregular combatant from a civilian is that the former carries his arms openly. The U.S. and its allies have expressed the understanding that this special case concerning irregular combatants pertains only in self determination situations or in occupied territory. In the latter case, personnel may be disarmed (Art. 63, para. 3). Thus, there should not be any significant military implications in bearing of arms by civil defense personnel not already present because of possession of arms by other civilians.

6. Recommended U.S. Action.

a. In order to reaffirm the significant committee understandings, the U.S. should express understandings along the following lines at the time of ratification.

October 23, 1977

- (1) It is the understanding of the United States that the term "light individual weapons" as used in Article 65 excludes fragmentation grenades and similar devices, weapons which cannot be effectively handled or fired by a single individual, and weapons which are basically designed for targets which are not human, such as armored vehicles or aircraft.
- (2) It is the understanding of the United States that civil defense personnel may be armed only for emergency assistance in the restoration and maintenance of order in distressed areas and for self defense against marauders and other criminal individuals or groups. They may not engage in combat against the adverse party and they may not use force to resist capture. If, however, they are unlawfully attacked by individuals of the adverse party's forces, they may use their weapons in self defense after having made a reasonable effort to identify themselves.

August 17, 1977

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER VI, CIVIL DEFENSE

Article 66 - Identification (59)

1. Text of Adopted Article

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and matériel, are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.
2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and matériel on which the international distinctive sign of civil defence is displayed.
3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.
4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and matériel and for civilian shelters.
5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of distinctive signals for civil defence identification purposes.
6. The application of the provisions of paragraphs 1 to 4 is defined by Chapter V of Annex I to this Protocol.

time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.

The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.

The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

2. References:

- A. Protocol I, Arts. 61-65, 67
- B. Protocol I, Annex, Articles 14 and 15
- C. Protocol I, Articles 8, 18, 37, 38
- D. GC I, Article 38-44, 53-54. (These provisions deal with the use of the Red Cross).

3. Relation to U.S. Position.

Subject to minor drafting changes, this article conforms to the Nordic proposal (CDDH/II/408? which was supported by the U.S.

4. Comments.

a. General.

This article is patterned on Art. 18 of Protocol I, which deals with the identification of medical and religious personnel, units and transports. Civil defense identification means identification of civil defense buildings, personnel, and materiel. "Personnel" and "materiel"

are defined in Art. 61, pars. and 4. It also covers identification of shelters for the civilian population whether or not these are owned by or controlled by the civil defense organization.

Insofar as civilian civil defense personnel are concerned, identification is not a legal prerequisite for protected status

In Art. 67, however, dealing with military personnel and units, the display of the international distinctive sign is mandatory. If there is a claim of protected status, the military personnel and units must distinguish themselves by displaying the distinctive sign.

b. Par. 1 is substantially based on Par. 1 of Art. 18 and has similar effect. The identification is intended to apply to civil defense organizations, their personnel and materiel only while they are exclusively devoted to the performance of civil defense tasks. As indicated in connection with Art. 61, Committee II expressed an understanding that for civil defense organizations the protection granted by Arts. 61-67 (Chapter VI) ceases while they perform tasks other than those covered by Article 61. Thus, while performing other tasks, their personnel and materiel may not display the sign. Moreover, the display of the sign under such surroundings is prohibited by Art. 38 as well as by Art. 85. Provisions for identification of civil defense personnel apply both to permanent and temporary civilian civil defense organizations and personnel without distinction. -It is probable that the persons referred to in Art. 62, Par. 2 are included within the term of "civil defense personnel."

c. Par. 2.

Article 18, Par. 2 was intended primarily to urge Parties to the conflict to install and maintain equipment capable of recognizing distinctive signals established under Annex I, Arts. 5-8. As no system of signals is established, except by agreement between the Parties to the conflict, the U.S. considered that the paragraph is not essential. The sponsors of CDDH/II/408, as well as most delegations in Committee II, believed that training in the recognition of the international distinctive sign would be encouraged through this provision.

d. Par. 3.

The term "international distinctive sign" is used to avoid confusion with the term "distinctive emblem" defined in Art. 8(g). The latter term refers to the Red Cross (Red Crescent, Red Lion and Sun).

e. Par. 4.

(1) After an extremely close vote in Committee II an equilateral blue triangle on an orange ground was chosen as the international distinctive sign of Civil Defense when used for protection of civil defense organizations, their personnel, buildings, and materiel, and for civilian shelters. Delegations of States which were members of ICDO sought to substitute the emblem of that organization (two diagonal red stripes on a yellow ground) as the sign.

This article and the annex deal only with the protective use of the distinctive sign; not with the indicative use of the sign. Amendments by Australia requiring parties to enact domestic legislation to prohibit the use of the sign even for indicative purposes were withdrawn.

(2) The distinctive sign differs from the patented U.S. official civil defense insigne authorized under the Federal Civil Defense Act.

That insigne consists of the "CD" symbol in bright red, centered within a white equilateral triangle superimposed upon a dark blue circle.

(32 CFR 1806.3(a)).

There are criminal penalties in connection with misuse of this insigne.

DCPA regulations permit variants in the color combination.

(32 CFR 1806.3(b)). In order to avoid any confusion between this U.S. insigne and the international distinctive sign, it may be desirable to amend the DCPA regulations to prohibit the use of blue on orange as a possible color combination.

There is no possibility of confusion with the registered certification mark for United States shelters. This mark consists of a circle and three inverted triangles - yellow on black.

(3) The international distinctive sign of civil defense can be used by non-civil defense organizations for commercial purposes but not for protective purposes. In this respect, it is different from the Red Cross. (See I Convention, Art 53).

However, nothing in the protocol would prohibit (or authorize) a civil defense organization, if it could do so as a matter of national law, from using the civil defense sign as an indicative emblem in its own country in time of peace. Presumably, it could, as a matter of its own law, prohibit use by others, even for indicative purposes.

f. Par. 5. authorizes Parties to the conflict to agree upon the use of "distinctive signals for civil defense identification purposes." The use of the term "distinctive signals" may create confusion with the distinctive signals defined in Art. 8(13). This provision defines "Distinctive Signal" as meaning "any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to the Protocol." Under the provision of Annex I, Art. 5, the radio signal specified in Art. 7, Annex I and the electronic signal specified in Art. 8 of that annex are specified for the exclusive use of medical transports and may not be used for any other purpose. The light signal specified in Art. 6 of Annex I may not be used by any aircraft other than medical aircraft. There is, however, no prohibition to the use of flashing blue lights by ground vehicles or ships unless the Parties to the conflict agree to use the flashing blue light as a distinctive signal for surface medical transports. No reference to distinctive signals is made in Chapter V of Annex I dealing with civil defense identification.

In order to make it clear that Art. 65, Par. 5 does not contemplate the use of any of the signals reserved for medical units or transports, even by agreement, an understanding to be made at the time of ratification would be appropriate.

g. Par. 6.

The "sign" is one of the emblems or signs provided by the Protocol, the improper use of which is prohibited, and thus a breach (Art. 38). The

October 26, 1977

Each might even, in some circumstances, constitute perfidy (Art. 37).

The paragraph obligates the Parties to supervise the display and to prevent or repress the misuse thereof.

h. Par. 9.

Medical and religious personnel, as well as medical units and transports of civil defense organizations, are covered by Part II of the protocol and hence are entitled to wear the Red Cross. Article 8(3) defines "medical personnel" as those persons assigned by a party to the conflict, exclusively to "medical purposes". The term "personnel" includes civilians including those "assigned to civil defense organizations." There is a similar reference in Article 8(4), which defines religious personnel.

"Medical purposes" are the search for, collection, transportation, diagnosis or treatment, including first aid treatment of the wounded, sick, etc.

The above civil defense medical personnel are subject to the restrictions on those who are entitled to wear the Red Cross, including the restrictions that these be "assigned" or "devoted" exclusively to medical purposes, i.e., they have no other function.

The above is fine for civil defense ambulance corps, but there may be civil defense personnel or units, such as firefighters or rescue squads, who perform these medical functions, as well as non-medical functions. Such personnel are not entitled to wear the Red Cross but may wear the civil defense sign. See Article 61.

Under the definition of civil defense (Art. 61, Para. 1(f)), medical services, including first aid and religious assistance, are civil defense

tasks. Thus, any civil defense personnel, whether such as part of their regularly assigned duties or not, can perform medical services (an enumerated civil defense task) without necessarily having entitlement to wear the Red Cross.

5. Military Implications.

This article places on Parties a best efforts requirement to ensure identification. This should be useful to military commanders in determining those who should be allowed to perform their civil defense tasks. It is a very useful addition in view of the requirements of Arts. 62-64.

6. Recommended U.S. Action.

- a. The U.S. should assure that the U.S. patented civil defense sign is not confused with the international sign. Legislation is not necessary.
- b. Paragraph 8 requires the taking of measures necessary to supervise display of the international distinctive sign and to prevent and repress misuse. New Legislation is not necessary.

Section 204 of the Federal Civil Defense Act of 1950 (50 U.S.C. App 2284 as amended) authorizes the President to prescribe insignia, etc. which may be "possessed" or "worn" by personnel engaged in civil defense activities. Pursuant to rules and regulations established by the President, possession or wearing otherwise than in accordance with these rules and regulations is unlawful and subject to fine and imprisonment.

This appears to be sufficient authority to implement par. 8 and to prescribe appropriate regulations covering "protective use". It may well be, at this time, that no use will be allowed pending a determination

October 26, 1977

on whether or not U.S. civil defense will seek to claim any special status. Certainly there is no indication the U.S. ever will change its shelter sign. However, control over the sign will be a useful device in assuring that State or local civil defense bodies act under Federal guidance.

c. As nothing in the reports, negotiating record or the like in any way indicate such, with respect to para. 5, the U.S. should, at the time of ratification express an understanding along the following lines:

It is the understanding that any signals which Parties to a conflict shall agree to use for civil defense identification purposes as contemplated in para. 5 of Article 66, shall differ from distinctive signals specified for the identification exclusively of medical units or transports in Chapter III of Annex I to Protocol I.

August 17, 1977

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION I, GENERAL PROTECTION AGAINST EFFECTS OF HOSTILITIES

CHAPTER VI, CIVIL DEFENSE

Article 67 - Members of the Armed Forces and Military Units Assigned to Civil Defense Organizations (59 bis)

1. Text of Adopted Article

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:

- (a) Such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
- (b) If so assigned, such personnel do not perform any other military duties during the conflict;
- (c) Such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
- (d) Such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;

-) Such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party;
- (f) Such personnel and such units perform their civil defence tasks only within the national territory of their party:

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in 1 (a) and 1 (b) above is prohibited.

Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

The matériel and buildings of military units permanently assigned to civil defence organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall to the hands of an adverse Party, remain subject to the laws

of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

2. References.

Protocol I - Civil Defense - Articles 61-66

Annex, Articles 14-15

Articles 37, 38, 41, 43, 51, 52, 57, 58

85

I Convention, Arts. 33-34

III Convention, Arts. 4, 17, 21, 49-52, 56, 117

Hague Regulations, 52-53

3. Relation to U.S. Position.

a. The U.S. negotiating position of 7 March 1977 listed as

Important Changes:

(1) Rejection of 8-Nation Subgroup Art. 58 bis, Alternative I, which would have provided for

(a) Immunity from attack to military units and their personnel while exclusively devoted to the performance of civil defense tasks;

(b) Neither permanence of assignment to civil defense tasks, nor notification of change of assignment;

(c) A "retained personnel status" similar to that provided for medical personnel who fall into the power of an adverse party (CDDH/II/384 Rev. 1; CDDH/II/396, Add. 1.

(2) Support for the Nordic proposal for Art. 58 bis (CDDH/II/407) which provided all members of the armed forces who are carrying out civil defense tasks at the time they come into contact with, and fall into the hands of the enemy shall be prisoners of war. They may, however, be permitted to be employed on civil defense tasks in occupied territory provided, that if such work is dangerous, they volunteer therefor.

(3) As an alternative, the U.S. delegation was authorized to support the Eight-Nation Subgroup alternative II (CDDH/II/384, Rev. 1; CDDH/II/396, Add 2). This proposal would make the status and protection to be accorded such personnel subject to agreement between the Parties to the conflict. As no support emerged for the proposal, it was not pressed.

b. Par. 1.

(1) General.

Paragraph is generally consistent with classified fallback position which accompanied the 7 March 1977 position paper. In summary, this fallback position paper was developed at the Bonn intersessional conference held in February 1977 (DAJA-1A 1977/24, 24 February 1977).

The salient points of that position were:

(a) Units and personnel must be permanently assigned, and exclusively devoted, to the performance of civil defense tasks for the duration of the armed conflict. This was based in part on The Netherlands Proposal (CDDH/II/341).

(b) Personnel and equipment of such units must be clearly distinguishable from personnel and equipment of the armed forces.

(c) Personnel and units must be unarmed, or at least unarmed in areas where land fighting is taking place.

(d) There must be an unambiguous prohibition against their committing acts harmful to the enemy (or participating directly in hostilities).

(e) They must display the international distinctive sign of civil defense.

(f) If captured, they are to be prisoners of war, but may be employed on civil defense tasks in occupied territory as outlined in the Nordic proposal.

(2) Par. 1(a), when read in conjunction with Para. 1(b), is consistent with the U.S. position. The negotiating record shows clearly that Par. 1(b) means that military civil defense units and personnel, if protected under this article, may not perform any combat or combat support duties for the duration of the armed conflict after once claiming protected status.

(3) Par. 1(c) is fully consistent with the U.S. position that protected military civil defense personnel are clearly distinguishable from other members of the armed forces.

(4) Par. 1(d) relating to bearing arms is not consistent with the U.S. position, but was nevertheless adopted by consensus. See discussion under Art. 65.

(5) Par. 1(e) and the last sentence of para. 1 were consistent with the U.S. position. It not only provides that direct participation in hostilities or the performance of acts harmful to the adverse party result in loss of protection, but also that such acts are a breach of the Protocol.

(6) Par. 1 (f) was not a requirement of the U.S. supported fallback position. It was, however, a condition by Arab States as the price for their participation in the consensus and was acquiesced in by those states which wanted protection for military personnel assigned to civil defense tasks. The U.S. supported the proposal.

c. Par. 2 is consistent with the U.S. position and the Nordic proposal (CDDH/II/407).

d. Par. 3 is consistent with the U.S. position.

e. Par. 4 is consistent with the U.S. position. Variances are clarifying drafting changes.

4. Comment.

a. General.

This article provides immunity from being the object of attack and freedom to perform civil defense tasks only to those military units and personnel who are permanently and exclusively assigned to the performance of civil defense tasks for the duration of the armed conflict, and who meet the restrictions and qualifications of the article.

There is of course no restriction on the performance of any or all civil defense tasks by other members and units of the armed forces. These

October 26, 1977

however, remain combatants (Art. 43, Para. 2), and are thus legitimate military objectives. Nevertheless, such military personnel, units, and materiel may derive some practical safety while performing civil defense tasks in a civilian environment. See Protocol I, Arts. 50, 52, para. 5(b), Para. 3, 57(2)(a)(iii) and 57(2)(b). Such military personnel, but not units, may be attached to civilian civil defense organizations without affecting the status or protection of the civilian organization (Art. 65). There is no limitation on reassignment of these temporary civil defense workers to other military duties. To the contrary, the military personnel contemplated by this article, however, are permanently precluded from performing other military duties during the armed conflict.

b. One possible approach (which did not come to fruition) was to establish, in the negotiating record, that military units and personnel derive relative safety from the provisions of Art. 57 mentioned above, as well as the other provisions of Section I, Part IV, particularly Arts. 51, 52, and 58. Art. 57, Para. 2(a)(iii) restricts attacks on military objectives to the extent that anticipated incidental civilian casualties and damage to civilian objects outweigh the anticipated military advantages. Various statements of this thought were developed but did not obtain sufficient support to form the basis for a consensus.

c. It became apparent early during the Fourth Session that the supporters of a special status for military personnel and units not only could not defeat a blocking third they could not even muster a majority. However, it also was recognized that if there were to be civil defense

October 26, 1977

articles, there must be some specific accommodation for their aspirations in the Protocol beyond that which appeared in Art. 65, Para. 2(b) concerning military personnel attached to civilian units.

d. Some attempts were made to provide a formula for defining "civilian civil defense units" in such a way that military civil defense units and personnel might be excluded from the definition of "members of the armed forces" within the meaning of Art. 43, but remain members of the armed forces within the meaning of domestic law. The key ingredient to such a solution would be an unambiguous prohibition against taking a direct part in hostilities. Although conceding that it would be theoretically possible to draw a distinction between membership in the armed forces for purposes of domestic law and international law, most delegations considered that such a solution would be too complicated.

e. Art. 43, Par. 2 was recognized early to be the key to this article. It states:

Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Art. 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Civilians do not have this right. If they are participants, they lose their protection as civilians. (Art. 51, Par. 3).

The delegations whose countries use military personnel for civil defense were informed in the working group that the majority which did not wish to provide special protection to any combatants would insist on stringent guarantees that military civil defense personnel would not exercise their right to participate in hostilities as the price for according them immunity from attack.

In most countries, but not in The Netherlands and Switzerland, military "civil defense" personnel are, for the most part, drawn from general purpose forces. Even if they are specially trained, they also have, at least, the training for combat which nonspecialist forces have. They are largely interchangeable with normal combat forces. Thus, there is real potential for abuse. The "right" to participate in hostilities is not academic.

It became crucial to the recognition of a special status for military units that they be prohibited from exercising the right to take part in hostilities.

There is some precedent for this. Nonrepatriated prisoners of war may not be employed on active military service. (Art. 117, III Convention). A person who is hors de combat must abstain from any hostile act (Protocol I, Arts. 8(1), 41, Par. 2). See also Art. 21, III Convention

f. Paragraph 1 of Art. 67 sets out a number of conditions for according members of the armed forces and military units assigned to civil defense organizations respect and protection.

(1) The term "members of the armed forces" is used in the sense of Art. 43, Par. 1. (See also Art. 4A(1)-(3)(6) of the III Convention. The term "civil defense organization" is used as defined in Art. 61, par. 2.

(2) The term "respected and protected" in the introduction to Par. 1 means that the personnel must not knowingly be attacked or unnecessarily prevented from discharging their proper functions. (See Committee II Report, Par. 99 (CDDH/II/467). This formula was used in

der to realign the text with Art. 62 and 65(3).

(3) Subparagraph (a) requires that the personnel be permanently assigned and exclusively devoted to one or more of the tasks mentioned in Art. 61. Unlike civilians, there are no temporary civil defense personnel. However, as the words "permanently" assigned may mean no more than that the assignment is for an indeterminate period (Art. 8(11) Protocol I) a more rigid requirement was necessary. This is set out in Par. 1(b).

(4) Paragraph 1(b) states that if the personnel receive such an assignment, then they cannot thereafter, until the end of the conflict, perform any other military duties. (See in this regard the interpretation of the supporting Canadian delegation in CDDH/II/SR 96, Par. 49, and that of opposing Mexico in CDDH/II/SR 96, Par. 50, and his statement in plenary session of the Conference (CDDH/II/SR 43, pp. 2-3)).

The term "any other military duties" means any duties other than civil defense tasks. The subparagraph is designed to prevent switching of military civil defense personnel to combat or combat support duties and even to the performance of purely administrative duties not related to the administration of civil defense duties or overall house-keeping duties shared by military personnel generally. However, a military member could be discharged, and returned to a civilian occupation.

(See CDDH/II/467, Par. 100, as amended, at CDDH/406).

(5) Par. 1(c)(1). Unlike civilian personnel (Art. 66, Par. 3), it is mandatory that military personnel display the international distinctive sign of civil defense in order to claim the protection. This is the method

y which they distinguish themselves from all the other members of the armed forces.

The improper use of the sign is prohibited by Art. 38.

Under some circumstances, the participation in hostilities by personnel displaying the sign could be an act of perfidy prohibited by Art. 37 and be a grave breach under Art. 85.

The identity card is in addition to the military identity card provided for in the III Convention (CDDH/II/467, Par. 101).

(6) Subparagraph 1(d), Par. 3 of Art. 65 dealing with the carrying of light individual weapons is equally applicable to protected military civil defense personnel, subject to the same limitations and to the Committee II agreed understanding. See discussion under Art. 65.

(7) Subparagraph 1(e) neutralizes the effect of Art. 43, Para. 2 by providing as a condition of protection that the right to participate in hostilities will not be exercised by protected military civil defense personnel. Moreover, loss of protection is also a consequence of their committing other acts harmful to the adverse party. As continued protection would hardly be expected in case a military civil defense unit is committed to direct participation in hostilities, the U.S. delegation insisted that:

(a) Their direct participation in hostilities be prohibited by the Protocol, making such acts a breach;

(b) They be prohibited by their Government from participating directly in hostilities.

The first of these proposals was adopted and is reflected in the last sentence of Par. 1, which prohibits the non observance of the conditions stated in subparagraph (e) by members of the armed forces bound by the conditions prescribed in 1(a) and 1(b).

The second proposal was not accepted by Committee II in the belief that it is implicit in the last sentence of Par. 1. Several delegations objected to the U.S. proposal on the ground that it would require implementing domestic legislation which would needlessly delay ratification of the Protocol. In the end, the U.S. delegation accepted the view that the last sentence was a self execution provision.

(8) Subparagraph 1(f). Under the provision, military civil defense units and personnel lose their protected status and the right to display international protective sign (but not their obligation to refrain from direct participation in hostilities) if they leave the national territory of their own country. Thus, they may not be used in occupied territory, nor may civil defense units of a neutral or other State not a Party to the conflict be used as civilian units can be under Art. 64.

g. Par. 2. The status of military personnel if they fall into the hands of the enemy was a hotly debated issue during the Third Session. Some delegations, including Switzerland and The Netherlands, suggested creation of a special status akin to the status of "retained" personnel under Art. 28 of the First Convention. Such a concept was incorporated into Alternative I drafted by the 8-Nation Subgroup and set out in the Interim Report of the Drafting Committee/Working Group (CDDH/II/384). The reason for this special status was to permit the units and their personnel to remain where they are located with their civilian population.

During intersessional consultations, it was concluded from a

legal standpoint that providing exemption from PW status and an exception from the right to be evacuated from the combat zone was an impermissible derogation from the Third Convention. Thus, the only permissible status for military personnel is that of prisoner of war.

The text adopted is based on the Nordic Text (CDDH/II/451). The second sentence is designed to provide for the performance of civil defense tasks in occupied areas. Such work may be dangerous work within the meaning of Art. 52, III Convention, and thus require that only volunteers may be so employed. The labor provision of Arts. 49-52 permit compulsory employment for only a few civil defense tasks. Some delegations thought the second sentence to be subject to abuse by the Occupying Power and that the Third Convention provisions needed no development. Nevertheless, a large majority of the Committee voted to retain the second sentence.

h. Par. 3 makes it mandatory that the buildings, major items of equipment and transports of military units assigned to civil defense organizations be clearly marked with the international distinctive sign of civil defense.

i. Par. 4 deals with the disposition of buildings and materiel of protected military civil defense units if they fall into the hands of the adverse party. The provisions are based on Art. 33 of the First Convention and should be construed in the same way. Like the equipment and supplies of military medical units, such property remains subject to the laws of war, i.e., it becomes booty of war (HR, Art. 53). Buildings may be administered by the capturing Power, who shall have the use of it (HR, Art. 55).

The second sentence, however, imposes limitations on which such property may be used. Thus, except in case of imperative military necessity, they must continue to be used for civil defense purposes in the interest of the civilian population for so long as they are needed for such purposes. Moreover, they may not be diverted, even in case of imperative military necessity, unless prior arrangements are made for adequate provisions for the needs of the civilian population.

5. Military Implications.

a. Military civil defense organizations under the control of an adverse party.

(1) In view of the constraints and limitations imposed as a condition to according immunity from being the object of attack, Art. 67 is not likely to have any significant impact on U.S. forces while such units and personnel remain under the control of their own party. Unlike other military units of the enemy and other members of the armed forces they may not be intentionally attacked but, of course, the incidental killing or wounding of such personnel due to their proximity to a military objective actually engaged by fire directed against the objective gives no just cause for complaint.

(2) The actual number of protected civil defense troops is likely to be minimal. Most military units have a capability to perform most of the tasks listed in Art. 61. The tasks mentioned are similar to those mentioned in DoD Directive 3025.10 V.C.2.d, which contains a list of tasks which U.S. military units can perform in support of civil

defense. However, the units which perform these tasks are general purpose units. It is not likely that many countries would accept the condition that large number of their military personnel be exclusively devoted to the performance of these tasks for the duration of the conflict. It is probable that most countries will claim protected status only for a few key professional civil defense specialists who would be assigned to civilian civil defense organizations.

The personnel involved are likely to be military officers assigned to civilian civil defense units, including even the direction of such units. In aggregate, this could be a large number of persons, but they would be so dispersed as to pose, as military, no significant threat. For example, in the USSR, not only each city organization but also plant organizations have military assignees. In the U.S. there are a relatively insignificant number of Mobilization Designees to civil defense. An exception to this estimate might be The Netherlands, which obtains its civil defense conscripts through the military draft.

There is a possibility of abuse, but such abuse to produce any effective result would require commission of a grave breach. The military personnel must wear the sign. The perfidious use of the sign in violation of Art. 37 is a grave breach. (See Art. 85, par. 3(f)).

b. Military civil defense personnel who fall into the power of an enemy.

Par. 2 of Art. 67 will require the development of doctrine for the processing and handling of military civil defense personnel who become

isoners of war. One issue raised by the Swiss is a wish that volunteers be permitted to continue their civil defense activities in place without the interruptions incidental to initial transfer to a prisoner of war camp and subsequent return to the place where they perform their civil defense tasks (CDDH/SR 43, Annex, pp. 18-19).

6. Recommended U.S. Action.

There is no need for any further statement of understanding or explanation. There is no reason to object to the Protocol on the basis of this article.

It is improbable that the U.S. will avail itself of the benefits of this article. Accordingly, no need for implementing legislation is necessary at this time.

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION II, RELIEF IN FAVOR OF THE CIVILIAN POPULATION

Article 68. - Field of Application (60)

1. TEXT OF ADOPTED ARTICLE.

Article 68 - Field of Application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

2. REFERENCES.

II Convention, Art 38.

III Convention, Arts 72-74.

IV Convention, Arts 23, 55, 57, 59-63, 108-111, Annex II.

Protocol I, Arts 8(6)-(10), 14, 21-31, 49, 54, 69-71.

Protocol II, Art 18.

3. RELATION TO U.S. POSITION.

Except for minor drafting changes, Article 68 is consistent with the proposal for Article 60, Field of Application, co-sponsored by the U.S., Austria, Canada, Denmark, Finland, France, Greece, Indonesia, Morocco, Netherlands, Norway, Sweden, UK (CDDH/II/398).

4. COMMENT.

Article 68 was adopted by consensus by Working Group B, Committee II, and the Plenary with little discussion.

5. MILITARY IMPLICATIONS.

a. Under the provisions of Article 43, Section I of Part IV does not otherwise affect the rules of international law applicable in armed conflict at sea" Relief, however, is covered by Section II of

Part IV. Accordingly, it modifies the law relevant to blockade and contraband, by expanding the supplies which cannot be considered to be contraband (clothing, bedding and means of shelter intended for the civilian population) as well as the class of persons for whom relief is intended (the entire civilian population). There is no material diminution, however, in the safeguards which may be imposed to insure that relief supplies are not diverted as a condition for permitting passage through a blockade. See discussion under Article 70.

b. The modification of the present law of contraband and blockade is a necessary implication from the principle adopted in Article 54(1) that "Starvation of civilians as a method of warfare is prohibited."

6. RECOMMENDED U.S. ACTION.

a. If Protocol I is otherwise acceptable to the U.S., this Article provides no basis for objection.

b. The Article requires no implementing legislation.

PROTOCOL I, CIVILIAN POPULATION

SECTION II, RELIEF IN FAVOR OF THE CIVILIAN POPULATION

Article 69. - Basic Needs in Occupied Territories (61)

1. TEXT OF ADOPTED ARTICLE.

Article 69 - Basic Needs in Occupied Territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

2. REFERENCES.

II Convention, Art 38.

IV Convention, Arts 23, 55, 57, 59-63, 108-111, Annex II.

Protocol I, Art 14, 21-31, 49, 54, 68, 70-71.

3. RELATION TO U.S. POSITION.

a. Par 1 substantially conforms to the proposed Article 60 proposed by the U.S. and its co-sponsors (CDDH/II/398).

b. Par 2 is not inconsistent with the U.S. proposal. It merely reaffirms the provisions of the Fourth Convention relating to relief for the civilian population of occupied territory. The reference to Article 71 of the Protocol merely ensures that personnel participating in relief actions in occupied territory are to have the rights and obligations of such personnel as prescribed in Art 71.

c. For U.S. statement of understanding, see Par 4.b.

4. COMMENT.

a. The ICRC proposal for Draft Art 61 sought to impose on the Parties to the conflict the obligation of ensuring, without any adverse distinction, the provision of food stuffs, clothing, medical and hospital stores and means of shelter for the civilian population, not only in occupied territory but also in any territory over which the Parties exercise power. The U.S. and its co-sponsors considered this proposal to be unrealistic in that it would preclude a state, affected by shortages, from assigning priorities for the distribution of the items in question. Accordingly, proposal in CDDH/II/398 simply reaffirmed the existing law with respect to occupied territory but extended the obligation of IV Art 55 to cover also clothing, bedding and means of shelter.

The ICRC observers, supported by Switzerland, continued to object to this limitation on the grounds that frequently there is uncertainty as to whether a territory is occupied. A large majority of Committee II concurred in the proposal made by the U.S. and its co-sponsors. The result is that Article 69 comprehensively covers the obligation of occupying powers with respect to articles needed by the civilian population either to ensure their equitable distribution from the resources of the occupied territory, the occupying power, or to arrange for appropriate relief actions.

Recognizing that in domestic territory a Party affected by serious shortages in desperate circumstances will allocate its own resources to its armed forces and to its essential labor force. Art 70 is designed to meet the basic needs of other civilians, but under sufficient safeguards to give Parties permitting the passage of relief through their territory or their blockade, reasonable assurance that they will not be diverted from their intended beneficiaries.

b. A number of Arab delegations proposed the deletion of the words "to the fullest extent of the means available to it" on the theory that these words weakened the obligation of occupying powers and might encourage evasions of that obligation (CDDH/II/70). In Committee II, the U.S. opposed the proposed deletion and expressed its views that:

(a) if the deletion did, in fact, imply a stronger obligation, the effect of the deletion would be a lesser obligation, under Article 55 of the Fourth Convention, to supply the basic needs of food and medical supplies than with respect to the secondary items of "clothing and means of shelter", covered by Article 60 of the Protocol.

(b) That "to the fullest extent of the means available to it" implies the highest possible degree of obligation.

On the basis of the U.S. intervention the Arab delegations agreed to withdraw their proposal provided the Committee report reflected consensus that the phrase implied the highest possible degree of obligation. See Committee II Report, CDDH/406, Par 114.

5. MILITARY IMPLICATIONS.

This Article affects the obligation of occupation authorities only to the extent that:

(1) Clothing, bedding and means of shelter are added to the supplies which must be provided to the civilian population of occupied territory, and

(2) There is a new requirement under Article 71 to admit, when necessary, relief personnel and to respect and protect such personnel.

6. RECOMMENDED U.S. ACTION.

a. No implementing legislation is necessary.

b. If Protocol I is otherwise acceptable, this Article provides no basis for objection.

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION II, RELIEF IN FAVOR OF THE CIVILIAN POPULATION

Article 70. - Relief Actions (62)

1. TEXT OF ADOPTED ARTICLE.

Article 70 - Relief Actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69 relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

- (a) Shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
- (b) May make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
- (c) Shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Power concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Article 70 - Relief Actions

Page 2

2. REFERENCES.

II Convention, Art 38.

III Convention, Arts 72-74.

IV Convention, Arts 23, 59.

Protocol I, Art 3(1), (6)-(10), 21-31, 49, 54, 69-69, 71.

Protocol II, Art 18.

3. RELATION TO U.S. POSITION.

a. Par 1.

(1) Under the proposal co-sponsored by the U.S. (CDDH/II/398), each Party to the conflict would have been obliged to agree and facilitate the relevant relief actions. Under the adopted text, however, there is simply a provision that relief actions shall be undertaken subject to the agreement of the Parties concerned in the relief action. This modification of the obligation of Parties to the conflict was necessary to obtain consensus. In view of the conditions which may be prescribed by any Party under par 3, there does not appear to be any practical distinction between the provisions. In this connection, it is to be noted that agreement is required only of the Parties concerned in the relief action. This does not necessarily include the adverse Party unless consignments pass through territory or waters controlled, or blockaded by that Party.

(2) Because of their special need for nutrition, "nursing mothers" were added to the illustrative list of persons who are to be given priority in the distribution of relief. Although not expressly mentioned, the wounded and sick are encompassed within the category of persons "entitled to privileged treatment or special protection" under Protocol I.

(3) Par 1 is expressly limited to nonoccupied territory, inasmuch as the Fourth Convention, supplemented by Art 69(61) adequately covers the obligation of Occupying Powers as well as other Parties concerned in relief action for occupied territory.

b. Par 2. There is no substantive difference between this paragraph and the comparable text co-sponsored by the U.S. It should be noted that reference to "this Section" instead of "Paragraph 1" (CDDH/II/398), makes this paragraph applicable to relief consignment equipment and personnel intended for occupied territory. To this extent it reaffirms Art 59(3) of the Fourth Convention.

Article 70 - Relief Actions

Page 3

c. Par 3. This paragraph is generally consistent with par 3 of CDDH/II/398. The following differences are noted:

(1) The right to search consignments is expressly included under the general term "technical arrangements" in subpar (a). This addition, which was strongly urged by the U.S.S.R., is based on Art 59(4), Fourth Convention.

(2) Because of Indonesian objection, supported by the U.S., reference to impartial humanitarian bodies was deleted from subpar (b). This deletion encourages the receiving State to permit a Protecting power or a substitute (Art 5(7)) to supervise the distribution of relief. It would also preclude a Party authorized to impose the condition from requiring supervision by a humanitarian organization which it knows to be totally unacceptable to the receiving State.

(3) The exception to the obligation stated in subpar (c) was proposed by Australia. This derogation may be applied only in case of urgent necessity and in the interest of the civilian population.

d. Par 4. Several delegations objected to the provision in CDDH/II/398 which provided that the Parties to the conflict shall guarantee the protection of relief consignments as being unrealistic in an area subject to the hazards of war. Consensus was achieved in a simple obligation to protect such consignment.

The U.S. supported an FRG proposal to add personnel and equipment to the objects entitled to protection. This was accomplished in Art 71. The U.S. delegation expressed the view that equipment is included within the term "consignment".

e. Par 5 is identical to the proposal in CDDH/II/398.

4. COMMENT.

a. Article 70 supplements Article 23 of the Fourth Convention insofar as that article provides for relief consignments destined for the civilian population of any territory controlled by a Party to the conflict other than occupied territory. Article 23 draws a distinction between two classes of relief consignments:

(1) Medical and hospital stores, and objects necessary for religious worship intended for the civilian population as a whole. These objects do not significantly reinforce the war economy of a Party to the conflict, and thus the adverse Party cannot declare them to be contraband of war.

Article 70 - Relief Actions

Page 4

(2) Essential foodstuffs, clothing and tonics, but only those intended exclusively for the use of persons presumed not to be capable of direct and significant contribution to the war making or economic potential of an enemy, namely children under 15, expectant mothers and maternity cases. Additionally, Article 38 of the Second Convention provides for the transport by specially chartered ships of equipment exclusively intended for the wounded and sick members of the armed forces or for the prevention of disease.

c. Article 70 expands the supplies for which relief actions may be furnished the civilian population to food, medical supplies, clothing, bedding, means of shelter and other supplies essential for survival. However, priority in the distribution of relief consignments is to be given to persons, such as children, expectant mothers, maternity cases and nursing mothers who are entitled to privileged treatment under the Fourth Convention and the Protocols.

d. Within the working group, the Soviet delegation expressed its doubts as to the feasibility of the proposed expansion. They contended that unimpeded passage of such supplies, even if not diverted to the armed forces of the receiving State, would relieve the pressures on that State, aid its war effort and prolong the war. Moreover, the civilian population includes the essential labor force who may be expected to have a high priority share of that country's own resources. If they also share in the distribution of relief supplies, the pressure of shortages would hardly be felt by the armed forces. This concern is expressly recognized in Article 23(2)(c) of the Fourth Convention.

e. In recognition of the policy adopted by Committee III, in Article 54 prohibiting starvation of civilians as a method of war, the Soviet delegation reluctantly accepted the principles of Article 70. They readily agreed to the provision for priority in the distribution of relief to those classes which are specially protected and which do not ordinarily make a direct contribution to the war effort. It is anticipated that to the extent that the adverse Party allows the passage of relief consignments, equipment and personnel through territory or waters under his control, it will take full advantage of the provisions of par 3 to prescribe technical arrangements to assure that the supplies are used only for the classes of persons for whom they are intended.

f. Technical arrangements, within the meaning of Par 3 include inspection and searches en route, the designation of routes and itinerary of the shipment, marking of consignments and transports, documentation of personnel and consignments. The Safeguards prescribed in Article 38 of the Second Convention are appropriate technical arrangements for shipments by sea.

Article 70 - Relief Actions

Page 5

g. For comments on par 4, see 3.d. above.

h. Par 5 was proposed in intersessional meetings of delegates representing Red Cross Organizations who have found that it is essential that there be effective international coordination of relief offered and supplied by nongovernmental humanitarian organizations and by UN agencies. Par 5 urges Parties to the conflict concerned in relief actions to encourage such coordination.

5. MILITARY IMPLICATIONS.

a. See Par 5 under Art 68 and Pars 4d to f above.

b. Implementation of Art 70 will exempt substantial flow of civilian supplies from classification as contraband and thus have some effect on blockades in traditional sense. However, the authority to prescribe technical arrangements and to require supervision of distribution by a Protecting Power as a prerequisite for allowing passage, provides sufficient leverage to minimize the risk of misuse or diversion of the supplies.

6. RECOMMENDED U.S. ACTION.

If Article 54 is acceptable to the U.S., Article 70 provides no basis for objection. In some cases, the provision of relief supplies envisioned by this Article may come within the purview of the Trading with the Enemy Act, but implementing legislation is not considered necessary because that Act provides that the President can license acts which would otherwise be prohibited (50 App. USCA § 3). Thus, the President or someone delegated by him could authorize the transfer of relief supplies.

PROTOCOL I, PART IV, CIVILIAN POPULATION

SECTION II, RELIEF IN FAVOR OF THE CIVILIAN POPULATION

Article 71. - Personnel Participating in Relief Action (62 bis)

1. TEXT OF ADOPTED ARTICLES.

Article 71 - Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

2. REFERENCES.

II Convention, Art 38.
IV Convention, Arts 23, 63.
Protocol I, Arts 69 and 70.

3. RELATION TO U.S. POSITION.

a. CDDH/II/398, cosponsored by the U.S. provided in Par 2 that the "Parties to the Conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, personnel and equipment. . . ." Par 4 provided that the Parties "shall guarantee the protection of relief consignments"

Article 71 - Personnel participating in relief action (62 bis)

Page 2

b. The U.S. position was to support an amendment offered by FRG which would have included relief personnel and equipment within the guarantee of protection in Par 4.

c. Article 71 is the product of a compromise resulting in:

(1) Substitution of an obligation to protect consignments in lieu of the guarantee of protection in Par 4 of Art 71.

(2) A separate article dealing comprehensively with relief personnel, including an obligation that they be respected and protected.

(3) Recognition of the right of the receiving State to approve the participation of relief personnel and to terminate their mission of those who do not respect the security requirement of that State.

(4) An obligation on the part of the Receiving State to assist such personnel in carrying out their mission.

(5) An obligation on the part of relief personnel to respect the receiving State's security requirements.

4. COMMENT.

a. The express reference to relief personnel in Art 70 (2) was encouraged by the U.S. as a measure which would facilitate effective utilization of relief, as well as a measure tending to prevent abuse. For some form of relief actions, such as medical relief and projects requiring construction or engineering skills, professional or technically qualified personnel are necessary. If they are present, they need protection.

b. Several delegations from developing countries, including Nigeria and Indonesia, did not wish to make any provision for personnel to accompany consignments. Others argued that the receiving Party cannot guarantee protection.

c. This contentious issue was referred to a subworking group, chaired by COL Krasnopeev, USSR, which worked out the compromise solution of a separate article which took account of the occasional necessity of relief personnel, their requirement for respect and protection and the security consideration of the receiving State. The result is a well balanced article considerably more acceptable to all points of view than an abbreviated requirement for protection in Art 70.

5. MILITARY IMPLICATIONS.

To the extent that this article will encourage more effective relief for the benefit of those for whom the relief is intended and discourage diversion, it has beneficial military and security implications. In U.S. areas of military operation relief actions and relief personnel will tend to lighten the civil affairs burden of U.S. forces without seriously increasing the security burden.

6. RECOMMENDED U.S. ACTION.

This article is acceptable. / No special statement of understanding is required. ~~By~~ implementing legislation is foreseen.