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RESPECT FOR HUMAN RIGHTS  
IN ARMED CONFLICTS

Report of the Secretary-General

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## I. INTRODUCTION

1. This report follows the report of a preliminary character bearing the same title (A/7720), which was presented by the Secretary-General to the General Assembly at its twenty-fourth session in pursuance of Assembly resolution 2444 (XXIII) of 19 December 1968. It will be recalled that the International Conference on Human Rights, held in Teheran in 1968, during the International Year for Human Rights, had adopted resolution XXIII on human rights in armed conflicts which requested the General Assembly to invite the Secretary-General to study:

"(a) steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

"(b) the need for additional humanitarian international conventions or of possible revision of existing conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts, and the prohibition and elimination of the use of certain methods and means of warfare." 1/

At its twenty-third regular session, the General Assembly examined the resolutions adopted at the Conference and, in resolution 2444 (XXIII) of 19 December 1968 on the respect for human rights in armed conflicts, the Assembly invited, inter alia, the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to undertake the study requested by the International Conference on Human Rights. 2/

2. At its twenty-fourth session, the General Assembly included in its agenda item 61 entitled "Respect for human rights in armed conflicts: report of the Secretary-General", which was referred to the Third Committee, on whose recommendation the Assembly adopted resolution 2597 (XXIV) on 16 December 1969 on "Respect for human rights in armed conflicts".

3. In the preambular part of the resolution the General Assembly noted with appreciation the report of the Secretary-General, and also noted the relevant resolutions concerning human rights in armed conflicts adopted at the XXIst International Conference of the Red Cross. 3/ The General Assembly noted however that there had not been enough time at its twenty-fourth session for the

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1/ See Final Act of the International Conference on Human Rights (United Nations publication, Sales No.: E.68.XIV.2), chapter III.

2/ Sub-paragraph (b) concerning the subject matter of the study entrusted to the Secretary-General was reworded as follows in the resolution: "The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare".

3/ For resolutions adopted at the XXIst International Conference of the Red Cross, see document A/7720, annex I, part D.

consideration in depth of the item "Respect for human rights in armed conflicts" and recognized that the study requested in resolution 2444 (XXIII) should be continued with a view to including further data and developments, thus facilitating the presentation of concrete recommendations for the full protection of civilians, prisoners and combatants in all armed conflicts and for the prohibition and limitation of the use of certain methods and means of warfare.

4. In operative paragraph 1 of resolution 2597 (XXIV), the General Assembly requested the Secretary-General to continue the study initiated under General Assembly resolution 2444 (XXIII) and to give special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts. The Secretary-General was requested to consult and co-operate closely with the International Committee of the Red Cross in regard to the studies being undertaken by the Committee on the question of human rights in armed conflicts. In operative paragraph 3, the General Assembly requested Member States to extend all possible assistance to the Secretary-General in the continuation of the study. In operative paragraph 4, it decided to transmit the first report of the Secretary-General to the Commission on Human Rights and to the Economic and Social Council for their comments which were to be submitted to the General Assembly at its twenty-fifth session. In operative paragraphs 5 and 6, the General Assembly decided to give the highest priority to the question of human rights in armed conflicts at its twenty-fifth session, and invited the Secretary-General to submit a further report on this subject to the General Assembly for that session.

5. In pursuance of operative paragraph 4 of resolution 2597 (XXIV), the report of the Secretary-General on respect for human rights in armed conflicts (A/7720) was transmitted to the Commission on Human Rights and to the Economic and Social Council for their comments. The observations of the Commission on Human Rights are contained in chapter VI of the report of its twenty-sixth session to the Economic and Social Council <sup>4/</sup> and are reproduced in annex II below. A summary of the consideration of that question by the Economic and Social Council at its forty-eighth session is contained in chapter IX of the report of the Council to the General Assembly at its twenty-fifth session. <sup>5/</sup>

6. On the recommendation of the Commission on the Status of Women, <sup>6/</sup> the Economic and Social Council, also at its forty-eighth session, adopted resolution 1515 (XLVIII) entitled "Protection of women and children in emergency or war time,

<sup>4/</sup> Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816).

<sup>5/</sup> For the report of the Economic and Social Council, see Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 3 (A/8003). The discussion in the Council is reflected in the relevant summary records of the Social Committee of the Council (E/AC.7/SR.636-641, 643-645) and of the plenary meeting of the Council (E/SR.1693).

<sup>6/</sup> The debate on the item under which the Commission on the Status of Women adopted a draft resolution and recommended it for adoption by the Economic and Social Council is summarized in chapter V of the report of the Commission on its twenty-third session (Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 6 (E/4831).).

fighting for peace, national liberation and independence." In sub-paragraph (a) of operative paragraph 3 of that resolution, the Council requested the Secretary-General to give particular attention, in pursuing his study on respect for human rights in armed conflicts, to the question of protection of women and children in emergency or war time.

7. As requested by General Assembly resolution 2597 (XXIV), the Secretary-General continued the study, as defined by that resolution, giving special attention to the question referred to in operative paragraph 1. As provided in operative paragraph 2 of the resolution, he has consulted and co-operated as closely as possible with the International Committee of the Red Cross. Liaison and contacts were maintained with the Committee and there have been frequent exchanges of views, information and data concerning the studies respectively undertaken by the Secretariat of the United Nations and the Committee. Harmonious and fruitful co-operation between the Secretary-General and the International Committee of the Red Cross is continuing.

8. In the context of the preparation of the study, the Secretary-General has also had the benefit of the views and contributions of experts of high international reputation drawn from various legal systems and qualified in the relevant branches of international law or other pertinent disciplines who either met informally at United Nations Headquarters or were consulted by correspondence.<sup>7/</sup> The Secretariat has kept abreast of studies and deliberations of Conferences held outside the United Nations, which were relevant to the subject of the study, such as the Colloquium on Humanitarian Law and Armed Conflicts, sponsored by the International Law Centre of the University of Brussels and held in that city from 28 to 30 January 1970, and the Fifth International Congress of the International Society for Military Law and the Law of War, held in Dublin from 25 to 30 May 1970, and discussions held by national and international associations of war veterans.

9. While the Secretary-General has sought and obtained assistance and co-operation from various competent sources, he retains the sole responsibility for the present study.

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<sup>7/</sup> Among these experts were: Professor G. Abi-Saab (United Arab Republic), Graduate Institute of International Studies, Geneva; Professor R. Baxter, (United States of America), Law School of Harvard University; Mr. M. Bianchi (Chile), Member of Inter-American Commission on Human Rights; Professor I. Blishchenko (Union of Soviet Socialist Republics), Institute of International Relations, Moscow; Professor G.I.A.D. Draper (United Kingdom of Great Britain and Northern Ireland), University of Sussex; Dr. F. Feliciano (The Philippines), Attorney at Law; Professor B. Jakovljevic (Yugoslavia), Legal Officer, International Relations Service, Yugoslav Red Cross, Central (Federal) Committee; Mr. B. Munyama (Zambia), Barrister and Solicitor; Professor R. Pinto (France), University of Paris; and Mr. L. G. Weeramantry (Ceylon), Barrister in Law and Advocate. The Secretary-General also benefited from the valuable advice of Mr. H. Saba, Assistant Director-General of UNESCO; Mr. R. J. Wilhelm, Deputy Director of the International Committee of the Red Cross; Major-General Prem-Chand, Commander, United Nations Force in Cyprus; Dr. E. Schwelb, Former Deputy Director, Division of Human Rights, United Nations; Lt. Col. L. Koho, Military Liaison Officer, Executive Office of the Secretary-General; and other officers of the Secretariat.

## II. GENERAL OBSERVATIONS AND GUIDELINES OF THIS REPORT

10. The present report constitutes a continuation of the preliminary report (A/7720), which should be read in conjunction with it. The earlier report contained a brief summary of the origin and nature of United Nations concern in the field of human rights in armed conflicts, a short historical review of relevant international instruments and certain observations on some of their provisions in their relation to United Nations instruments in the field of human rights. This documentary part was followed by a survey of steps which might be envisaged to secure respect for human rights in armed conflicts through the better application and reaffirmation of existing humanitarian conventions and rules, the adoption of additional legal instruments and other measures. The preliminary report also reproduced replies from Governments of Member States containing information, suggestions or comments regarding the preparation of the study which had been received by 20 November 1969. <sup>8/</sup> In the present report repetition of passages from the earlier report has been avoided, but references to them have been made where such references were considered useful or necessary.

11. From indications received by the Secretariat, it appeared that the preliminary report presented by the Secretary-General in document A/7720 was received with interest and elicited a generally favourable reaction, not only from the United Nations organs concerned, but also from the numerous organizations, personalities and experts who are studying the problem of ensuring a greater degree of humanity during armed conflicts still breaking out in our times. The present report, therefore, does not present any major departures from the approaches and suggestions contained in A/7720. Its main purpose is to analyse in greater depth and detail some of the issues which were identified and formulated in the preliminary report, and to elaborate and amplify some of the tentative suggestions for action which were first broached in that report.

12. Whatever may be the purport or nature of the suggestions made, it should be clearly understood that nothing in this report is meant to condone resort to armed conflict in any form, outside the limited categories where the Charter of the United Nations authorizes resort to force. On the contrary, it is the belief of the Secretary-General that resort to force or armed conflict would not be necessary if Governments and responsible individuals everywhere complied with the principles and purposes of the United Nations Charter and with the decisions of the United Nations organs taken in pursuance of the relevant Charter provisions, in particular those relating to procedures for peaceful settlement of disputes. It may be recalled that resolution XXIII of the International Conference on Human Rights states that "peace is the underlying condition for the full observance of human rights and war is their negation". <sup>9/</sup> The maintenance of peace and security remains the basic purpose of the United Nations and all activities of the organization, whether in the area of the protection of human rights, that of economic and social development or other fields, are aimed, inter alia, at enabling the Organization to achieve this primary objective.

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<sup>8/</sup> Replies received after that date are reproduced in annex III of the present report.

<sup>9/</sup> See Final Act of the International Conference on Human Rights (United Nations publication, Sales No.: E/68.XIV.2), ch. III.

13. It is the understanding of the Secretary-General that the purpose of the General Assembly in examining the question of respect for human rights in armed conflicts is a humanitarian one, independent of any political considerations which may relate to specific conflicts. It is an endeavour to provide a greater degree of protection for the integrity, welfare and dignity of those who are directly affected by military operations pending the earliest possible solutions of such conflicts. This approach corresponds in the opinion of the Secretary-General to the concern clearly expressed by world public opinion, which shows great sensitiveness and reprobation at news of inhuman practices which accompany armed conflicts and make a very great number of innocent victims. While admitting the difficulties presented by conditions of modern warfare, excesses should nevertheless be avoided at all costs. The aim of the United Nations and of the Governments concerned should be to prevent such conflicts from breaking out, but when they erupt to make all possible efforts by national and international measures to limit as far as possible unnecessary sufferings to human beings.

14. One of the conclusions reached by the Secretary-General in the course of the study which confirmed the observations made in the preliminary report is that the text of the existing four Geneva Conventions of 1949 should, as far as possible, remain untouched. These Conventions contain valuable provisions and procedures which have been ratified by a very large number of States. They should be better applied and adapted to the developments in the methods used in armed conflict since 1949. One of the basic objectives of United Nations efforts would appear therefore to be the strengthening of the impact of the Geneva Conventions, encouraging their full application and assisting in making their provisions better known in order that they may afford more effective protection to those whom they are designed to benefit.

15. Nevertheless, as indicated in the preliminary report and confirmed by those who were consulted by the Secretary-General, the existing instruments show certain imperfections, inadequacies and gaps which the international community should endeavour to rectify and remedy. Furthermore, differences of views as to whether specific provisions of the existing instruments apply to given situations lead to negative attitudes which result at times in the complete absence of international protection for those concerned. Some of the reservations made by States Parties at the time of their ratification of the Conventions may also affect the system of protection.

16. The observations made in the preliminary report on the applicability, in time of armed conflict as well as in time of peace, of the instruments concluded under the auspices of the United Nations during the first twenty-five years of the Organization's existence, e.g. the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide on the International Covenants on Human Rights, have attracted much attention. United Nations instruments already in force and those which still require ratifications in order to become fully operative may be invoked to protect human rights at all times and everywhere and thus complete in certain respects and lend support to the international instruments especially applicable in conditions of war or armed conflicts.

17. There appears to be strong support for finding ways of giving expression to the international concern for the victims of armed conflicts by strengthening the role of international institutions already existing and by setting up new ones whose purpose it would be to facilitate and verify the observance of international human rights norms relating to such conflicts. An effort should be made to eliminate some of the obstacles now encountered by the International

Committee of the Red Cross in the exercise of the humanitarian functions which it undertakes under its terms of reference, while institutionalizing, through United Nations organs or otherwise, other international efforts, specially in fields in which the International Committee cannot operate, humanizing to the fullest extent possible the treatment of persons affected by armed conflicts and minimizing the damaging effects they entail.

18. In the light of the observations made earlier on the advisability and importance of preserving the provisions of the Geneva Conventions while improving or up-dating by way of interpretation or additions those parts of these Conventions which give rise to difficulties of application and extending their scope to all forms of armed conflict as envisaged by the General Assembly, the following formal steps, consistent with United Nations practices, might be resorted to. The adoption by the General Assembly, as is generally recognized, of resolutions on various matters of importance relating to respect for human rights in armed conflicts would undoubtedly enhance the provisions of existing Conventions and point the way to international measures which might be undertaken. Other matters might, after study and negotiation, be the subject of protocols additional to the existing conventions. Such protocols might be concluded, after appropriate preparation, by a conference or conferences convened by interested States or upon decision of the General Assembly.

19. The present study, in response to the General Assembly's request for facilitating the presentation of concrete recommendations for the full protection of civilians, prisoners and combatants in all armed conflicts and for the prohibition and limitation of the use of certain methods and means of warfare, includes some of the matters which, in the opinion of the Secretary-General, might be dealt with by either of these methods or by a combination of them, that is, resolutions of the General Assembly followed by the adoption of more solemn declarations or the conclusion of specific protocols. It is not claimed that the suggestions contained in this study cover the entire field of protection of human rights in armed conflicts. It is hoped, however, that they may constitute an appreciable advance in this important field and provide a foundation for further advances in the future. It is also hoped that they will promote international co-operation and generate new ideas for protection.

III. PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICTS DERIVED FROM  
THE GENERAL INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS  
ADOPTED UNDER THE AUSPICES OF THE UNITED NATIONS

20. As was indicated in chapter III of the preliminary report of the Secretary-General (A/7720) and in paragraph 16 above, and as generally agreed by the experts consulted by the Secretary-General, the international instruments on human rights adopted under the auspices of the United Nations afford a measure of protection of certain important rights of all persons involved in all armed conflicts which complements and strengthens and to some extent even exceeds, the protection derived from the rules of the Geneva Conventions and other humanitarian instruments which were expressly designed to apply solely to situations of armed conflict.

21. This subject provoked considerable interest, particularly at the twenty-sixth session of the Commission on Human Rights, the members of which, pursuant to operative paragraph 4 of General Assembly resolution 2597 (XXIV), commented on the interim report of the Secretary-General. The view was shared in the Commission that "a more detailed study of the relevant instruments concerning human rights in armed conflicts in their relationship to the general norms of respect for human rights as set out in the United Nations Charter, the Universal Declaration of Human Rights and other international instruments might be useful". 10/

22. Responding to this suggestion, the Secretary-General has prepared a study of the type envisaged in the Commission dealing with the general norms concerning respect for human rights in their applicability to armed conflicts (see annex I).

23. Inasmuch as the salient elements and the thrust of this study are of relevance to, and may contribute to a better comprehension and understanding of, the issues and suggestions dealt with in the remainder of this report, the present section seeks to reflect succinctly the essence of this study and place it in the context and perspective of the report as a whole.

24. There are instances in which the autonomous protection ensured by the human rights instruments of the United Nations is more effective and far-reaching than that derived from the norms of the Geneva Conventions and other humanitarian instruments oriented towards armed conflicts. These instances relate to scope and applicability as well as to substance.

25. One aspect of the question of scope and applicability concerns the types of armed conflict to which the instruments which are being compared apply. As stressed in the preliminary report, and as is reiterated in the study contained in annex I, provisions of the human rights instruments of the United Nations, including, in particular, the provisions of the International Covenant on Civil

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10/ Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816), para. 95 (b).



and Political Rights from which derogation is not permitted in accordance with article 4, paragraph 1, of that Covenant, are intended to apply always and everywhere, in time of peace as well as in time of war, and to the full range of conceivable armed conflicts, irrespective of whether or not they are of an international character, while the application of many important provisions of the Geneva Conventions is confined to international conflicts, with conflicts which are not of an international character being governed by common article 3 of the Conventions, which in its generality affords substantially reduced protection. To the extent, therefore, that the Geneva Conventions make the protection of certain rights dependent upon the character of the armed conflict concerned, the protection derived from the United Nations instruments with respect to the rights in question is more encompassing.

26. Another aspect of applicability relates to the personal scope of the instruments concerned. The International Covenant on Civil and Political Rights, and certain other human rights instruments of the United Nations, apply to all individuals subject to qualifications which are less restrictive than those provided for under some of the Geneva Conventions which make the application of certain of their provisions contingent upon criteria devised by the Conventions which relate, for example, to the possession of a certain type of nationality or of the status of belligerent combatant. The difference on this matter between the Covenant and the Conventions is elaborated in annex I below (passim).

27. In some cases, the human rights instruments of the United Nations, and in particular, the International Covenant on Civil and Political Rights, go beyond the Geneva Conventions as regards the substance of the protection accorded. The Covenant contains certain substantive provisions protecting some rights of all persons in all types of armed conflict which, either do not find their counterpart in the Geneva Conventions at all or, are included in some of the Conventions only in regard to international armed conflicts. Examples of such provisions are those relating to the prohibition of the imposition of sentence of death for crimes committed by persons below eighteen years of age and the stipulation that sentence of death shall not be carried out on pregnant women (article 6, para. 5 of the Covenant); the express prohibition of slavery, the slave trade and servitude (article 8, paras. 1 and 2 of the Covenant); the prohibition of the enactment and application of retroactive criminal legislation (article 15 of the Covenant); the right of everyone to recognition everywhere as a person before the law (article 16 of the Covenant); and the right to freedom of thought, conscience and religion (article 18 of the Covenant), in particular, the prohibition that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice (article 18, para. 2) and the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (article 18, para. 4).

28. A detailed comparison between the Covenant and the relevant Geneva Conventions as regards the substance, scope and applicability of the foregoing rights, may be found in annex I below (passim). The net effect of this comparison is to support the conclusion that, as far as these rights are concerned, the protection derived from the Covenant is wider and more extensive.

29. One of the obvious conclusions to be derived from the observations made above is that the International Covenant on Civil and Political Rights being a main source of protection, respect for the rights of all persons in all armed conflicts

would be strengthened by the acceleration of the process of ratification of the Covenant so that it might enter into force and its provisions become fully operative at the earliest possible time. It may be useful to recall in this respect that the Covenant contains a system of measures of implementation, including in particular a Committee on Human Rights to be established for the purpose of examining reports by States Parties and conducting other activities; this system may prove of value in regard to periods of armed conflict. Accordingly, the General Assembly may wish, in connexion with the resolutions which it might adopt on the subject of the ratification of the Covenant, to take this important consideration into account and to draw the attention of Governments to the beneficial effect, particularly on respect for human rights in armed conflicts, of the early entry into force of that important instrument.

#### IV. PROTECTION OF CIVILIANS

##### A. General

30. Paragraphs 133-155 of the preliminary report were devoted to the question of the protection of civilians. The present section further examines the measures which might be employed to ensure a better protection of civilians involved in armed conflicts on the basis of considerations which were enunciated in those paragraphs.

31. Paragraph 135 of the preliminary report referred to certain practical aspects of the problem of the protection of civilians in armed conflicts. In this connexion, it was pointed out, in paragraph 137, that the phase of armed conflict involving the actual conduct of hostilities and military operations may comprise a variety of conditions in which civilians may find themselves. Among examples given were that civilians may be located in the immediate area of fighting, or in close proximity to that area; or that they may be at some distance from sites where armed clashes take place, but may still be in danger of being suddenly drawn into an expanding or shifting battlefront; yet another possibility is that they may live in regions which, although not a scene of battle, contain targets of military importance inviting enemy attack from the air, by artillery, or otherwise.

32. It must be admitted that the circumstances of modern warfare may render difficult an adequate protection of civilians in all of the situations described above. It would seem, therefore, that, while military personnel should exercise caution and respect, to the limit of the possible, the relevant norms relating to the protection of civilians under any circumstances, the most effective way of minimizing or eliminating the risk to civilians would be to make systematic efforts to the effect that civilians do not remain in areas where the dangers outlined above would be prevalent.

33. The importance of such efforts bears emphasizing, and the cause of the protection of civilians might be enhanced if the General Assembly would consider the usefulness of including as part of an appropriate resolution a call on all authorities involved in armed conflicts of all types to do their utmost to ensure that civilians are removed from, or kept out of, areas where conditions would be likely to place them in jeopardy or to expose them to the hazards of warfare.

##### Standard Minimum Rules for the Protection of Civilians

34. Paragraph 92 of the preliminary report has indicated that, while the scope of Convention IV is very broad, it does not extend specifically to dangers to civilians resulting from military operations. This question remains covered largely by the 1907 Hague Regulations. 11/

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11/ Carnegie Endowment for International Peace, The Hague Conventions and Declarations 1899-1907 (New York, Oxford University Press, 1918).

35. During the consideration of the preliminary report, the view was expressed that a major effort should perhaps be directed to a review of the relevant 1907 Hague Regulations which relate to the protection of civilians from military operations in order to adapt them, as may be necessary, to contemporary realities. 12/

36. It will be recalled that, in resolution 2444 (XXIII), the General Assembly affirmed the following three principles for observance by all governmental and other authorities responsible for action in armed conflicts: that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; that it is prohibited to launch attacks against the civilian populations as such; that distinction must be made at all times between persons taking part in hostilities and the members of the civilian population to the effect that the latter be spared as much as possible.

37. It was suggested that the formulation of detailed standard minimum rules further elaborating and amplifying these three principles affirmed by the General Assembly in resolution 2444 (XXIII) might prove to be useful for the protection of civilians against military operations in time of armed conflicts. 13/ Studies of the International Committee of the Red Cross and the opinion of the experts consulted by the Secretary-General have also recognized the merits of such a formulation. 14/ It would be understood that the standard minimum rules would not be a substitute for, but would be complementary to, those obligations which States already have assumed, in particular under the Hague Regulations and the Geneva Conventions.

38. Before proceeding to the substance of the question, a general understanding of the term "civilians" or "civilian population" for the purposes of the applicability of the proposed standard minimum rules would have to be arrived at in order to dispel doubts and to make clear the position as to who are to be the beneficiaries of the protection. It is hoped that the following elements of clarification might facilitate the task of developing detailed rules.

39. For the purposes of the applicability of standard minimum rules protecting civilians from the dangers of military operations, it may be accepted that those not taking part in hostilities would be considered as civilians. The following would not be classified as civilians: members of the armed forces or of their auxiliary or complementary organizations; and persons not belonging to the forces referred to above but nevertheless taking part in the fighting or contributing directly to the conduct of military operations. Any persons not within these categories would be considered as forming part of the bona fide civilian population which should be protected from any attack, and it is for the protection

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12/ See for example E/CN.4/SR.1060, pp. 4, 5 and 6, and E/CN.4/SR.1062, pp. 2 and 4.

13/ See for example E/CN.4/SR.1060, p. 3; see also Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816), para. 95 (d).

14/ Cf. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, International Committee of the Red Cross, Second edition, Geneva, 1958.

of these persons that the standard minimum rules would be intended. The rules would be applicable irrespective of the nationality of the civilians or their status as refugees or stateless persons.

40. For the purposes of regulating the conditions of attack, taking proper precautionary measures and prohibiting reprisals against civilians, specific rules could be drawn and evolved from the three principles affirmed by the General Assembly in resolution 2444 (XXIII).

41. Concerning their applicability, these rules would apply to any situation amounting to an armed conflict, without any further qualification; in particular, they would apply irrespective of whether the conflict would be international or national. They would also apply to all acts of violence committed against the adverse party by force of arms, whether in defence or offence.

42. Concerning their substance, these rules might establish norms relating to the following matters:

(a) The prohibition of attacks directed against the civilian population, as such, whether with the objective of terrorizing it or for any other reason, and the consequential prohibition of attacks against dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population; in this connexion, consideration might be given to the specific prohibition of the use of "saturation" bombing as a means of intimidating, demoralizing and terrorizing civilians by inflicting indiscriminate destruction upon densely populated areas;

(b) The prohibition of attacks on civilian refuges, safety zones or sanctuaries especially designed for civilians;

(c) The prohibition, in all circumstances, of the use of the civilian population as an object of reprisal;

(d) The prohibition of the use of the civilian population as a shield to shelter military personnel from attacks;

(e) The obligation of the person or persons responsible for ordering or launching an attack to ensure that the objective to be attacked is not the civilian population or the dwellings, installations or means of transport, which are occupied by or for the exclusive use of civilians;

(f) The taking by the parties to the conflict of all necessary precautions, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to avoid or to reduce to a minimum, loss or damage that may be caused to the civilian population in the vicinity of the objective under attack;

(g) The taking of all necessary steps by the parties to the conflict to protect the civilian population subject to their authority, from the dangers to which they might be exposed in an attack, in particular, by removing them from the vicinity of objectives of military importance likely to be attacked (see also paragraphs 32-33 above);

(h) The undertaking by the parties to the conflict to endeavour to refrain, so far as possible, from causing the permanent presence of sizeable armed forces, and military installations, equipment and material in towns or other places where a large civilian population is located;

(i) The assumption of the obligation by all concerned that a military blockade will not be conducted in such a way as to cause unnecessary suffering to civilians by depriving them of essential food-stuffs, medical supplies, and other items necessary for survival;

(j) The entitlement of civilians to receive, under conditions acceptable to the authorities in control of the territories where the civilians find themselves, international assistance and relief, including medical supplies, essential food-stuffs and other items necessary for survival.

43. As suggested by the Commission on the Status of Women, special consideration might be given to the question of specific measures of protection relating to women and children in periods of armed conflict.

44. Should action to expand, elaborate and supplement the principles relating to the protection of civilians already affirmed by General Assembly resolution 2444 (XXIII) be deemed advisable, this task might be accomplished by the formulation of standard minimum rules which might be incorporated in a resolution or solemn declaration to be adopted by the General Assembly. In this connexion, some or all of the ideas and concepts suggested above might be reflected in the text which would emerge. The task of formulating minimum rules might be undertaken by a Conference convened by a State which may be interested in doing so or by the United Nations, or entrusted by the General Assembly to a group of experts working in consultation with the Secretary-General. The International Committee of the Red Cross because of its experience and competence should be associated in such an undertaking.

#### B. The establishment of refuges or sanctuaries for the protection of civilians

45. It was suggested in the preliminary report (paragraph 145) that one possible method of increasing the protection afforded to civilians in time of armed conflict was to gather and place under a designated shelter a part of the civilian population, especially women, children, the elderly, the sick and as many as possible of those who do not participate in the armed conflict, nor contribute in any way to the pursuit of military operations. This might be achieved by adopting and developing, on a larger scale than provided at present, a system of refuges or sanctuaries which would offer special protection and agreed immunity from attack. Paragraph 148 stated that this question might deserve special study with a view to envisaging the possible conclusion of an appropriate international instrument.

46. When the preliminary report was considered by the Commission on Human Rights, this idea was generally favoured and views were expressed that it was worth pursuing. The experts consulted by the Secretary-General were invited to give their views on this question. There appeared to be agreement among them as

regards the usefulness of such an undertaking. Some of them drew attention to the arrangements for refuges and centres for the protection of movable and immovable cultural properties under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 15/ and recommended that the possibility might be looked into of making similar arrangements for civilians.

47. This section deals with some of the basic issues with respect to the establishment of civilian refuges or sanctuaries, bearing in mind the suggestions and comments received by the Secretary-General and the practical experience of UNESCO in matters relating to the execution of the 1954 Hague Convention

#### Main objectives of establishing civilian refuges or sanctuaries

48. The system under the Geneva Conventions relating to the establishment of hospital and safety zones and localities has already been outlined in paragraph 146 of the preliminary report. It may be recalled that the zones and localities may be established in peacetime or at the outbreak of a conflict. 16/ The Conventions do not however impose any obligation on the parties to the Geneva Conventions to establish them. Even when they are established, they are not recognized as such by the belligerents, unless and until the parties concerned have actually concluded written agreements to that effect. Such agreements may be concluded upon the outbreak or during the course of hostilities. To the First Convention is annexed a draft agreement on hospital zones and localities and to the Fourth Convention is annexed a draft agreement on hospital and safety zones and localities. These agreements are in the nature of model texts and may be modified by negotiation between the parties. Under the provisions of the draft agreements, one or more special commissions may be appointed to exercise control in the zones in question. Article 15 of the Fourth Convention also provides for the establishment of neutralized zones which may be established by the belligerents during hostilities in the regions where fighting takes place. No draft agreement on neutralized zones is annexed to that Convention.

49. In view of the experience showing that the conclusion of such treaties after the outbreak of hostilities involves considerable difficulties, it has been suggested that it might be advisable to supplement and develop the relevant provisions of the Geneva Conventions to the effect that the zones and localities might be recognized prior to the outbreak of an armed conflict. 17/ This suggestion, together with the fact that the arrangements envisaged in the Geneva Conventions are of a limited character and scope, would seem, however, to indicate the need for a new approach to the question. The fact that the existing provisions for hospital and safety zones and localities have not so far been utilized would tend to demonstrate further the need for examining the question in a new light.

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15/ United Nations, Treaty Series, vol. 249 (1956), No. 3511, p. 215.

16/ See article 23 of the First Geneva Convention (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949) and article 12 of the Fourth Geneva Convention (Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949). Both Conventions will be found in United Nations, Treaty Series, vol. 75.

17/ See A/7720, para. 10 and annex I - A, reply of Austria.

## Terminology

50. The Geneva Conventions use the terms "hospital zones and localities", "hospital and safety zones and localities" and "neutralized zones". The first is designed to protect the wounded and sick members of the armed forces. 18/ The second, to shelter "wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven"; 19/ and the third, to protect the wounded and the sick, combatants and non-combatants, as well as members of the civilian population who are in the area but do not take part in the hostilities. 20/ "Hospital and safety zones and localities" seem to be of a relatively permanent character in comparison with the temporary character of "neutralized zones" which may be established in the regions where fighting is taking place. The terms "zones" and "zones and localities" are not defined. It is understood, however, that "zones" refer to a relatively large area of land and may include one or more "localities", which are specific places of limited area, generally containing buildings.

51. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict uses the terms "refuges" and "centres". "Refuges" are designed to shelter movable cultural property, whereas "centres" contain monuments and other immovable cultural property of very great importance. 21/

52. The various terms mentioned above would seem to have acquired a certain customary, if not definite, meaning. For the purpose of this study, those areas which would be used to shelter civilians will be referred to as civilian refuges or sanctuaries.

53. The establishment of civilian refuges or sanctuaries would have to fulfil certain essential conditions in order to achieve international acceptance. They might be designated by interested States, formally notified to the other members of the international community or to a representative organ of the international community and appropriately registered. Special markings and insignia would also be necessary for their identification. The operation of refuges or sanctuaries during hostilities should be subject to the strict observance of certain obligations. The observance of the conditions and obligations should be ensured by an effective and realistic system of control and verification which would have to be capable of being activated and put into effect in peacetime as well as in times of armed conflict.

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18/ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field of 12 August 1949 (United Nations, Treaty Series, vol. 75 (1950), No. 970), article 23.

19/ Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (United Nations, Treaty Series, vol. 75 (1950), No. 973), article 14.

20/ Ibid., article 15.

21/ The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1956 (United Nations, Treaty Series, vol. 249 (1956), No. 3511), article 8.



Persons eligible to be sheltered in the refuges or sanctuaries

54. Ideally, it would of course be desirable that those civilians taking no part in the hostilities and in no way contributing to the war effort should all be sheltered in sanctuaries. This, however, would not be possible in most cases due to limitation of accommodation and other circumstances. Priorities would, therefore, have to be established unless the solution of the persons to be sheltered is left by agreement to the States concerned under appropriate international supervision.

55. Firstly, wounded and sick civilians, aged persons, children under fifteen, expectant mothers and mothers of children under seven, might be given priority. Apart from these categories of persons, consideration should also be given to the possibility of sheltering as large a part of the civilian population as possible, whenever facilities, accommodations and circumstances permit. It is, of course, important that the civilians sheltered should be prevented from taking part in the fighting or in any way directly or indirectly contributing to the pursuit of the military operations. In the interest of preserving the exclusively humanitarian character of the institution of sanctuaries, and in order to insulate them as much as possible from the effects of military operations, this would be a requirement calling for special attention and full compliance. Stringent conditions would have to be applied to ensure that the sanctuaries would be used only for the purpose intended and would not be abused.

56. It should be noted in this connexion that all these categories of persons - including the civilian population in general - are already protected under international law, conventional or customary. As regards this subject special reference may be made to, inter alia, the Hague Regulations (e.g., articles 25 and 26) 22/ and the Fourth Geneva Convention (in particular, articles 13-34). 23/ The civilian sanctuaries would therefore be established to draw the attention of the belligerents to the presence in a given area of persons whom they are already obligated to respect, protect or refrain from injuring. In effect, refuges or sanctuaries might assist in facilitating the observance by the belligerents of the obligations incumbent upon them.

57. In addition to those categories of persons which have already been mentioned, it would be necessary to include in the refuges or sanctuaries the personnel entrusted with the organization, administration and supervision of the sanctuaries and with the care of the persons assembled therein. The number of such persons should not exceed the minimum required for the performance of such function.

Conditions and obligations to be observed in the establishment and operation of civilian refuges or sanctuaries

58. The establishment of civilian refuges or sanctuaries would have to meet certain strict conditions aimed at regulating the selection and designation of their location, the physical facilities with which they would be equipped and the

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22/ See A/7720, para. 90.

23/ Ibid., paras. 92-95.

environment in which they would be placed. Their functioning and operation would be subject to certain restrictions with respect, inter alia, to the movements and activities of the persons sheltered and personnel residing therein, and the use of communication facilities.

59. Paragraph 150 of the preliminary report has already set out some of the basic conditions: that their territorial location should not entail any strategic advantages and should not secure any potential military benefits, directly or indirectly for any of the parties to the conflict; that the sanctuaries would have to be completely disarmed and demilitarized, with the exception of the presence of police units solely entrusted with the maintenance of law and order; that they should not contain a large industrial or administrative establishment, should not be a centre of important means of communications and transport, and should be devoid of installations which may be put to military use.

60. Certain obligations would have to be observed in the actual operation of sanctuaries during hostilities. For example, the persons sheltered in such zones should not be allowed to perform, either within or without the sanctuaries, any work directly connected with military operations or the production of material required for the pursuit of the war effort. Permissible work might include agriculture, commercial business, arts and crafts, domestic services, public works and building operations which would have no military character and public utility services (e.g. water, health, postal, telegraphic and telephone services to be used solely by civilians). Furthermore, the party maintaining such refuges or sanctuaries should take all necessary measures to prohibit access thereto to all persons who, having no legitimate claim to the protection afforded by the refuges, have no right of residence or entry. Similarly, they should ensure that the movements of the persons sheltered and the personnel serving therein are confined within the sanctuaries, unless exceptions are justified by an emergency or other special circumstances.

61. One question which might affect the acceptability of the idea of establishing civilian refuges or sanctuaries in peacetime might relate to the difficulty of foreseeing the balance of military power and the strategic situation in which a State would find itself in the event of an outbreak of hostilities: it is conceivable that a particular location for a sanctuary which appeared feasible and suitable in peacetime might turn out in wartime to interfere with the effective conduct of military operations. It would be helpful, therefore, if measures could be devised to overcome such difficulties. One possibility might be to establish a number of sanctuaries, of which only some would be utilized during hostilities, the choice depending on the configuration of elements and events at the appropriate time.

#### Registration and recognition of sanctuaries

62. The system of registration under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 incorporates procedures which might be useful in considering the question of the registration and recognition of sanctuaries for civilians.

63. Under the Regulations annexed to the 1954 Convention, the Director-General of UNESCO maintains an "International Register of Cultural Property under Special Protection". Any party to the Convention may submit to the Director-General an application for the entry in the Register of certain refuges and centres containing monuments or other immovable cultural property situated within its territories. Such application must contain a description of the location of such property and certify that the property complies with the conditions laid down in article 8 of the Convention. 24/ The Director-General must then send without delay copies of the application for registration to each of the parties. Any party may, within four months, lodge by letter addressed to the Director-General an objection to registration stating the grounds of objection. If no objection within the time-limit has been received, the cultural property in question is entered in the Register. Under article 14.2 there are only two valid grounds for objection: (i) that the property is not cultural property; and (ii) that the property does not comply with the conditions laid down in article 8 of the Convention. If there is any objection, the Director-General immediately sends a copy of the letter of objection to all the parties. He may seek the advice of the International Committee on Monuments, Artistic and Historical Sites and Archaeological Excavations and any other competent organization or person. The Director-General or the party requesting registration may make whatever representations they deem necessary to the party that lodged the objection with a view to causing the objection to be withdrawn. In view of the fact that the party, after having made the application for registration in time of peace, might become involved in a conflict before the entry has been made, the Convention permits that the cultural property concerned be "provisionally entered" in the Register by the Director-General at once.

64. If the objection is not withdrawn within six months from the date of receipt of the letter of objection, the party applying for registration may request arbitration. 25/ The procedure is as follows: the party applying for registration appoints an arbitrator. The party or parties that objected to the application also appoint an arbitrator. These two arbitrators select a chief arbitrator from an international list of persons. 26/ If, however, these two arbitrators cannot agree on their choice, the President of the International Court of Justice would be asked to appoint a chief arbitrator who need not necessarily be chosen from the list. The decision of the arbitral tribunal is final and not subject to appeal.

65. Apart from this arbitration procedure, another recourse is also available. Under article 14, each of the parties to the Convention may decide that it does not wish to apply the arbitration procedure mentioned above. In such cases, the objection to an application for registration is submitted by the Director-General

24/ Article 13.1 of the Regulations: Article 8.1 of the Convention lays down the following conditions: (a) That the refuges or centres be situated at an adequate distance from any large industrial centres or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication; (b) That the refuges or centres not be used for military purposes.

25/ Article 14.7 of the Regulations.

26/ The list consists of all persons nominated by the parties as qualified to carry out the functions of Commissioner-General for Cultural Property. For the functions of the Commissioner-General, see para. 76, infra.

to all the parties to the Convention. The objection is confirmed only if the parties so decide by a two-thirds majority of the parties voting. As a rule, the voting is effected by correspondence under seal.

66. Unless an objection has been confirmed in accordance with the procedures described above, the Director-General shall enter the cultural property in the Register. 27/ The entries in the Register become effective thirty days after the dispatch of entry copies to all the parties to the Convention. 28/ Parties to the Convention undertake to ensure the immunity of cultural property under special protection from the time of entry in the International Register by refraining from any act of hostility directed against such property and from any use of such property or its surroundings for military purposes. 29/

67. The above survey of the relevant provisions of the Hague Convention would appear to give useful guidance to factors which would seem to be essential in the context of the question of registration and recognition of sanctuaries for civilians in time of armed conflict. There would be a need for an international register or refuges or sanctuaries. The register should be established generally in time of peace and maintained by an appropriate international institution. Provisions should however be made also to cover applications for inclusion in the Register made during hostilities. The sanctuaries entered in the Register would be respected and immune from the effects of hostilities. The Register should list and describe all the refuges and sanctuaries established by interested States in accordance with the conditions presented in an appropriate international instrument. The application for registration might be subject to objection by other States within a time-limit. Procedures for the settlement of disputes relating to applications under objection might be provided, for example, either by way of arbitration or a decision by vote possibly taken by correspondence of States taking part in the system. Provisional registration might be provided under appropriate conditions for sanctuaries, pending final agreement. The functions pertaining to registration might be performed by an international agency which might also be entrusted with the responsibility of overseeing the operation of the system of sanctuaries as a whole (see paragraph 82 below). Alternative methods might include assigning these functions to the Secretary-General of the United Nations or to any other international authority which might be deemed best suited for the purpose.

#### Markings and insignia

68. As already mentioned in paragraph 151 of the preliminary report, it would be desirable to use special markings and insignia, clearly visible and recognizable, for the purpose of indicating the limits of the sanctuaries and identifying the persons sheltered and the personnel serving therein.

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27/ Article 15.2 of the Regulations.

28/ Article 15.4 of the Regulations.

29/ Article 9 of the Convention.

69. The Draft Agreement relating to Hospital and Safety Zones and Localities annexed to the Fourth Geneva Convention requires that the zones be marked by means of oblique red bands on a white ground, placed on the buildings and outer precincts. Zones exclusively reserved for the wounded and sick may be marked by means of the Red Cross (Red Crescent, Red Lion and Sun) emblem on a white ground. The marking at night by means of appropriate illumination is optional.

70. Under the Hague Convention, cultural property may bear a distinctive emblem which takes the form of a shield per saltire blue and white. 30/ Conditions are laid down for the use of the distinctive emblem. 31/ During an armed conflict it is forbidden to use the distinctive emblem in any other cases or a sign resembling the distinctive emblem for any purpose whatsoever. 32/ Moreover, the placing of the distinctive emblem on any immovable cultural property must be accompanied by an authorization duly dated and signed by the competent authority of the High Contracting Party. 33/

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30/ Articles 6 and 16 of the Convention. It is a shield consisting of a royal blue square, one of the angles of which forms the point of the shield, and a royal blue triangle above the square, the space on either side being taken up a side triangle.

31/ Article 17. The distinctive emblem repeated three times may be used only as a means of identification of immovable property under special protection, the transport of cultural property, and improvised refuges. The distinctive emblem may also be used alone as a means of identification of cultural property not under special protection, persons responsible for the duties of control, the personnel engaged in protection of cultural property and the identity cards.

32/ Ibid.

33/ Ibid. The placing of the distinctive emblem and its degree of visibility is left to the discretion of the competent authorities of each High Contracting Party. The emblem may be displayed on flags or armlets, painted on an object or represented in any other appropriate form (article 20 of the Regulations). In the event of armed conflicts and in the case of transport of cultural property, the emblem must be placed on the vehicle of transport so as to be clearly visible. The emblem must be placed at a point visible from the ground at regular intervals sufficient to indicate clearly the perimeter of a centre containing monuments under special protection and at the entrance to other immovable cultural property under special protection (article 21 of the Regulations). Duly authorized personnel may wear an armlet bearing the distinctive emblem issued and stamped by the competent authorities (article 21 of the Regulations). Such persons must carry a special identification card bearing the distinctive emblem and the stamp of the competent authorities. The card bears at least the surname and first name, the date of birth, the title or rank, the function and the photo of the holder, as well as his signature or fingerprints, or both.

71. The civilian refuges or sanctuaries under present consideration would clearly have to bear certain markings. They might be marked by insignia placed on all the buildings as well as on the outer precincts of the zones. Appropriate means for the demarcation of the sanctuaries should also be installed and specially marked to ensure the delimitation and seclusion of the area involved. Appropriate illumination should be used so that the area could be clearly visible and identified in darkness. The markings should be clearly discernible from the air as well as from the ground. Persons sheltered and personnel serving in the sanctuaries should be given certified identification cards containing all necessary information about the holder so that they could be duly identified. In addition, personnel serving therein might wear special uniforms or armlets bearing the insignia.

72. The markings and insignia suggested above would also be applicable where transportation outside the sanctuaries is involved. The civilians being transported, the means of transport and the personnel transporting them would all be required to comply with the requirements of marking and insignia suggested. The identification cards mentioned earlier would be important in their case.

#### Control and verification

73. The system of control established by the 1954 Hague Convention for the Protection of Cultural Property again seems to provide indications which might prove useful in connexion with the question of devising procedures of control and verification for the system of sanctuaries.

74. The system of control under the 1954 Hague Convention is organized in the following manner: Immediately upon the outbreak of an armed conflict, each party to the conflict is to appoint a representative for cultural property; <sup>34/</sup> simultaneously, a Commissioner-General for Cultural Property is to be appointed. The Commissioner-General is chosen from an international list <sup>35/</sup> of persons, nominated by the parties to the Convention, by joint agreement between the party to which he will be accredited and the protecting powers acting on behalf of the opposing powers. <sup>36/</sup> If there are Protecting Powers, they are to appoint their delegates. The main functions of the delegates include taking notes of violations, investigation of the circumstances in which they occurred, making of representations locally to secure the cessation of violation and, if necessary, notifying the Commissioner-General of such violations. The delegates must also keep the Commissioner-General informed of their activities. <sup>37/</sup>

75. The functions of the Commissioner-General are important and many. He deals with all matters referred to him in connexion with the application of the Convention in conjunction with the representative of the party to which he is accredited and with the delegates concerned. <sup>38/</sup> With the agreement of the party

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<sup>34/</sup> See Regulations for the Execution of the Convention, article 2 (a).

<sup>35/</sup> Ibid. art. 4 (1).

<sup>36/</sup> Ibid. art. 4.

<sup>37/</sup> Ibid. art. 5.

<sup>38/</sup> Ibid. art. 6.

to which he is accredited, he may order an investigation or conduct one himself. He has the right to make any representations which he deems useful for the application of the Convention to the parties to the conflict or to their Protecting Powers. He draws up such reports as may be necessary for the application of the Convention and communicates them to the parties concerned. Copies of his report are also sent to the Director-General of UNESCO who may make use only of their technical contents. If there is no Protecting Power, the Commissioner-General is to exercise the functions of the Protecting Power. Whenever the Commissioner-General considers it necessary, he may propose an inspector of cultural property to be charged with a specific mission. The inspector is responsible only to the Commissioner-General. Whenever necessary, the service of experts may also be requested. The appointment of inspectors and experts is however subject to the approval of the party to which they will be accredited.

76. In a recent armed conflict, the Executive Board of UNESCO, envisaging the appointment of a Commissioner-General, adopted a resolution, 39/ *inter alia*, inviting the Director-General to make necessary arrangements 40/ to facilitate the exercise of the Commissioner-General's functions. On 24 October 1967, the Director-General announced the appointment of two Commissioners-General for Cultural Property, one for each of the Parties involved. The two Commissioners-General have drawn up reports on the application of the Convention, communicated them to the parties concerned, and sent copies to the Director-General of UNESCO.

77. Since in this conflict there was no Protecting Power, the Commissioners-General assumed full responsibilities; they also appointed inspectors and experts. While there were two Commissioners-General, the recommendations and complaints of the two sides to the conflict were transmitted to their respective Commissioners-General who then exchanged documents. This had the advantage of bringing all the documents exchanged between the parties to the knowledge of the two Commissioners-General. 41/ It may be mentioned that the Commissioners-General were given the privileges and the immunities granted to senior officials of the specialized agencies under the Convention on the Privileges and Immunities of Specialized Agencies and had the services and aid of the United Nations and UNESCO offices in the countries parties to the conflict, in particular as regards the necessary communications facilities. 42/

78. Under article 10 the Regulations for the Execution of the Convention, the remuneration and expense of the Commissioners-General for Cultural Property, inspectors and experts are met by the party to which they are accredited. Pursuant to paragraph 6 of a UNESCO decision, 43/ the Executive Board established

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39/ UNESCO, 77 EX/Decision 4.4.4.

40/ Such as the question of privileges and immunities and the use of the services and aid of the United Nations and UNESCO offices in that area.

41/ See UNESCO document 78 EX/5 of 16 May 1968, "Implementation of the Convention on the Protection of Cultural Property in the Event of Armed Conflict, Report by the Director-General", p. 3.

42/ *Ibid.*

43/ UNESCO, 77 EX/Decision 4.4.4.

a special fund which is supplied by contributions from the member States concerned and from UNESCO. In 1969, the fund totalled \$58,500. The purpose of the fund is to pay the salaries and expenses of the Commissioners-General in accordance with article 10 of the Regulations for the execution of the Convention and for ensuring action by UNESCO under article 23 of the Convention. 44/

79. In deriving from the above survey such concepts and procedures as might be useful and adaptable in connexion with the formulation of a scheme for supervising the operation of a system of sanctuaries for civilians, it should, of course, be borne in mind that the object of protection in that system differs substantially from cultural property and presents additional difficulties. These differences would have to be taken into account and reflected in whatever procedures of control might finally emerge.

80. The system of control and verification as regards civilian sanctuaries might be activated at the outbreak of an armed conflict and its operation would continue till the end of the hostilities. In peacetime, as suggested earlier, the system of registration and recognition would govern the establishment of the refuges or sanctuaries. The task of control and verification might be chiefly entrusted, for instance, to an Observer-General or a Commissioner-General who might be appointed upon the outbreak of an armed conflict by agreement between the parties, reached through the good offices of an appropriate international authority. The parties to the conflict would at the same time appoint their representative to maintain liaison with the Observer-General or Commissioner-General. In principle, the appointment of only one Observer-General or Commissioner-General for all the parties to the conflict should be the goal; but, failing that, the appointment of separate Observers-General or Commissioners-General should be envisaged. In this case, proper channels of communication between the Observers-General or the Commissioners-General should be established to facilitate the co-ordination of their activities.

81. The main functions of the Observer-General or Commissioner-General would be to ensure that the refuges or sanctuaries are maintained in compliance with the required conditions and obligations. 45/ For this purpose, the Observer-General or the Commissioner-General would be given at all times free access to the sanctuaries or refuges and might even reside there permanently. He would be given all facilities for inspection. It would also be his duty to ensure the observance of special markings and insignia and to supervise the transportation of persons eligible to be sheltered in the refuges or sanctuaries. He would have the right to order an investigation of any contravention of an obligation suspected or committed by appointing inspectors or experts when necessary or to conduct it himself; to make representations pertinent to the execution of his functions to the parties involved; and to draw up reports and communicate them to the parties concerned. Should he note any facts which he considers to be violations of the conditions or obligations required or of the objectives of the sanctuaries or

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44/ UNESCO document 78 EX/5, p. 2. Article 23 refers to technical assistance by UNESCO in organizing the protection of cultural property.

45/ For the suggested basic conditions and obligations relating to the maintenance of refuges or sanctuaries, see paragraphs 58 to 61 above.



refuges, he would at once draw the attention of the party concerned to these facts. He might be given the authority to fix a time-limit within which the matter should be rectified. If, when the time-limit has expired, the party has not complied with the warning, the protection and immunity of the sanctuary concerned might be lifted.

82. An appropriate international agency might have to perform functions as regards the administration of such a system. Such agency might be entrusted with, *inter alia*, the task of compiling a list of persons qualified and competent to undertake the functions of an Observer-General or a Commissioner-General. The agency might also be entrusted with the task of approaching at the outbreak of an armed conflict the parties to the conflict with a view to ensuring the appointment of the Observer-General or the Commissioner-General and seeing to it that the system of control and verification is put into effect. It would also assist the Observer-General or the Commissioner-General in carrying out his functions and in appointing inspectors and experts when needed. The agency would make the necessary arrangements for the Observer-General or the Commissioner-General, the inspectors and the experts with respect to their immunity and access to the area concerned, the question of their security, the right of communication, including the use of a special code whenever necessary, and the use of the facilities of offices. Most of these matters would have to be negotiated with the parties concerned, but some of the basic rules (e.g. the question of privileges and immunities) could be standardized.

Possible form of an agreement for the establishment of sanctuaries for civilians and procedures which might be followed in concluding it

83. Paragraph 148 of the preliminary report stated that it would appear that the question of zones of refuge or sanctuaries for civilians not participating in armed conflicts might deserve special study, with a view to envisaging the possible conclusion of an appropriate new international instrument. The present report has sought to give further impetus to the study of this question, and to that end has provided data and has drawn attention to patterns developed in somewhat analogous situations. The possibility would now appear to exist for a comprehensive analysis and study in depth of all aspects of the question of establishing refuges or sanctuaries for civilians by a group or committee of qualified experts which might be convened by the Assembly or Secretary-General and whose deliberations and tentative proposals might provide a working basis for the drafting of the instrument referred to above. Should this line of action appeal to the General Assembly, several alternatives might be considered.

84. As to form, the contemplated international instrument might assume the character of a Protocol additional to the Geneva Conventions of 1949 or it might be a separate international instrument.

85. The instrument in question might be concerned only with international conflicts but also might conceivably give States Parties the option of making its provisions applicable in conflicts not of an international character. In that event, the substantive protection and the machinery of supervision and implementation envisaged in the instrument would operate in conflicts of this latter type. Or it might be agreed that the instrument would apply in all armed conflicts, regardless of whether they would be international, internal or of the type which would combine elements of both categories.

86. With regard to the details of machinery of implementation which might be included in the contemplated new instrument, it might be helpful if it could be devised in such a way as to take into account such international arrangements for the supervision and control of the application of humanitarian rules in all armed conflicts as the international community might deem it necessary to initiate. In this regard, it may in the future become feasible to integrate the task of ensuring the application of the provisions of an instrument on civilian sanctuaries into the over-all framework of activities aiming at contributing international assistance as regards the implementation of humanitarian rules in all armed conflicts.

87. Concerning the method of the conclusion and adoption of the instrument suggested above, various avenues might be explored. It might be adopted by the General Assembly on the basis of drafts submitted by experts; it might be elaborated and adopted by a conference of States convened by the General Assembly; or it might be concluded by a conference of States Parties to the Geneva Conventions convened by an interested State.

V. PROTECTION OF COMBATANTS IN INTERNATIONAL  
ARMED CONFLICTS

88. With a view to facilitating the examination of this and the following chapters of this report, the existing substantive rules relating to the protection of combatants are reproduced and commented on in the following paragraphs.

A. Combatants entitled to protection

89. It may be recalled that the concept of combatants entitled to protection under international law is defined or referred to in several texts, in particular section I, chapter I, art. 1 of the Hague Regulations of 1907 <sup>46/</sup> as restated and supplemented in the Geneva Conventions of 1949 (art. 13 of Convention I, art. 13 of Convention II, art. 4 of Convention III), as follows:

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

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

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

(c) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

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

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<sup>46/</sup> This provision of the Hague Regulation uses the term "belligerents" and "army".

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

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

90. If a combatant is found to fulfil the conditions mentioned above, he is entitled in particular to the protection afforded by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), the Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces at Sea (Convention II), and the Convention relative to the Treatment of Prisoners of War (Convention III). <sup>47/</sup> Certain questions concerning the protection of prisoners of war are dealt with in the following chapter.

91. Combatants who are neither sick nor wounded, nor prisoners of war within the meaning of the Geneva Conventions come within the purview of article 23 (b), (c), (d) and (f) of the Hague Regulations of 1907 under which "It is especially forbidden:

"....

"(b) To kill or wound treacherously individuals belonging to the hostile nation or army;

"(c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

"(d) To declare that no quarter will be given;

....

"(f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

...."

92. Combatants as well as civilians are protected, further, in international law, against the use of certain weapons or technical means of warfare.

93. The concept of "enemy" contained in article 23 of the Hague Regulations, and in the very title of chapter I thereof, might possibly be interpreted as being broader in scope than the concept of privileged combatant or belligerent laid

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<sup>47/</sup> Certain additional categories of persons would also be entitled to be treated as prisoners of war under article 4 B of Geneva Convention III.

down in article I of these Regulations and restated and amplified in the Geneva Conventions (see paragraph 1 above). On the other hand, it might be argued that the word "enemy" is implicitly qualified by the opening article I of the Regulations which provides that "the laws, rights and duties of war" apply to persons who fulfil the four conditions mentioned above. However, article 23 (b) of the Hague Regulations, which protects all "individuals belonging to the hostile nation", is certainly much broader in scope than the definitions in article I of the Regulations and in the Geneva Conventions.

94. It may be considered also whether combatants who do not fulfil the conditions mentioned in paragraphs 89 and 91 above would benefit from Geneva Convention IV on the Protection of Civilians in Time of War. Article 4 of that instrument defines the protected persons as those who find themselves "in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals". As broad as this definition may appear, doubts may possibly be raised whether persons engaged in combat and over whom the State Party has no actual control may be regarded as within the purview of Geneva Convention IV when they fall into the hands of the opposing party. The further limitations laid down in article 5 of Convention IV should also be recalled.

95. Article 3, common to all Geneva Conventions, sets forth minimum guarantees for all persons "taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause", when the conflict is "not of an international character". This formulation is a broad one, as compared to article 4 of Geneva Convention III, since it does not require of the combatants fulfilment of any particular condition other than that of being hors de combat. The provision, however, excludes all cases of international conflicts, and such an interpretation appears to be explicitly or implicitly accepted in many instances. Nevertheless, one might perhaps raise the question at least de lege ferenda, whether the States Parties should not apply article 3, as a minimum, to combatants in international conflicts who do not meet the various conditions mentioned in paragraphs 89 and 91 above.

96. Reference should also be made to the general norms on human rights contained in United Nations and other international instruments mentioned in chapters II and III above, which, when in force, or when accepted as international norms would apply without qualification to all persons under the jurisdiction of the States concerned.

97. The observations mentioned above tend to confirm that the international provisions in force concerning the definition of protected combatants contain discrepancies, are not always precise enough and may lend themselves to difficulties of interpretation. Doubts have been entertained as to whether they cover certain categories of bona fide combatants who do not easily fulfil all the conditions laid down in those instruments. This raises the question of the status of guerrilla fighters and of other "irregular" combatants, a question which has become increasingly important during and after the Second World War and which is dealt with in chapters IX and X of this report.

98. In the light of those observations, it would appear that the relevant international provisions might usefully be studied further in order to ascertain

and clarify their meaning, to bring them better into harmony with each other and, whenever necessary and feasible, to broaden by agreed interpretation or reaffirmation their scope, to cover certain categories of combatants not protected under the present definitions.

## B. Rights and obligations of combatants

99. As was stated in paragraph 178 of the preliminary report, there seems to be no pressing need for revision of the Geneva Conventions on the protection of wounded, sick and ship-wrecked combatants. Some questions concerning the protection of prisoners of war will be dealt with in chapter VI below. The following paragraphs of the present chapter will deal with the protection of combatants in the field who are neither sick nor wounded, nor prisoners of war in the sense of the Geneva Conventions.

100. As regards combatants in the field, their destruction or incapacitation may be, of course, essential to the attainment of military objectives. However, article 22 of the Hague Regulations of 1907, repeated in General Assembly resolution 2444 (XXIII), stresses that the choice of means of injuring the enemy is not unlimited, and the problem arises of identifying and prohibiting those means which entail unnecessary suffering and shock the conscience of mankind. The relevant rules are contained essentially in article 23 (b), (c), (d) and (f) of the Hague Regulations of 1907, quoted in paragraph 91 above.

### (i) Prohibition to kill or wound the enemy "treacherously" (article 23 (b) and (f) of the Hague Regulations)

101. It has been pointed out, notably by experts of the International Committee of the Red Cross attending the twenty-first International Conference of the Red Cross in 1969, that it is often difficult to draw a distinction between what is "treachery" and what is a "ruse of war" which is admissible under article 24 of the Hague Regulations. The difficulty has certainly been increased by some modern methods of combat, essentially guerrilla warfare, which rely heavily on "ruses of war".

102. As was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use of the white flag and of the Red Cross emblem, contained in article 23 (f), should be strongly reaffirmed.

103. As regards the improper wearing of the military insignia and uniform of the enemy, also referred to in article 23 (f), the above-mentioned experts did not reach any definite conclusions. After the Second World War, it had been held in the case of Otto Skorzeny <sup>48/</sup> that the wearing of enemy uniform was not illicit when resorted to with a view to misleading the enemy prior to combat. This judgement appears to correspond to a custom in maritime warfare whereby the enemy flag may be flown before combat. This matter, among others, may call for further study with a view to formulating, if possible, a more precise rule.

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<sup>48/</sup> Law Reports of Trials of War Criminals, published by the United Nations War Crimes Commission, HMSO London 1949.

(ii) Prohibition to kill or wound an enemy who surrenders (article 23 (c) of the Hague Regulations)

104. Article 23 (c) of the Hague Regulations refers to an enemy "who, having laid down his arms, or having no longer means of defence, has surrendered at discretion". Literally, this provision might be interpreted as meaning: either that a combatant is deemed to surrender as soon as he lays down his arms or as soon as he has no longer any means of defence; or that intention to surrender must be expressed in addition to the loss or abandonment of weapons. In spite of various usages in this respect, no international instruments in force describe the ways in which a combatant may convey his intention to surrender.

105. Experts of the International Committee of the Red Cross felt that the rule laid down in article 23 (c) of the Hague Regulations was implicitly dealt with, in general terms, in article 4 of Geneva Convention III relative to the Protection of Prisoners of War. This article recognizes the status of prisoners of war, including the right to life (article 13), to the combatants fulfilling the conditions laid down therein, who "have fallen into the power of the enemy". It may be noted that, literally, this provision does not require a positive act of surrender. The term "fallen into the power of the enemy" replaced the word "captured" which appeared in the previous 1929 Convention, and was intended to convey a somewhat broader meaning. <sup>49/</sup> There may still be some doubts, however, whether the article becomes operative in all cases from the moment a disabled combatant is surrounded or otherwise within the range of the weapons of the enemy or whether it requires actual apprehension by the enemy. Furthermore, verification of the fulfilment of the conditions laid down in article 4 requires a minimum of time during which full entitlement to the status of prisoner of war may be in doubt. Further mention of these problems is made in chapter VI of this report concerning the protection of prisoners of war.

106. Considering the lack of precision in some respects of the above-mentioned articles, the preliminary report by the Secretary-General <sup>50/</sup> as well as the 1969 report of the Experts of the International Committee of the Red Cross <sup>51/</sup> suggested that an attempt be made to define in concrete terms how a combatant can clearly make known his intention to surrender. More precision in this respect may result in the saving of lives and ensuring a greater degree of protection to a wounded combatant. Particular attention was paid to the case of the airman in distress who lands by parachute to save his life and who should not be confused with those still engaged in hostilities, such as armed parachutists who land to attack.

107. Further to the suggestion mentioned in the preceding paragraph, one may consider elaborating or supplementing the existing rules on the basis of the following two principles:

(a) It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need

<sup>49/</sup> Commentary of the Geneva Conventions, vol. III, article 4, International Committee of the Red Cross, Geneva, 1960.

<sup>50/</sup> A/7720, para. 181.

<sup>51/</sup> XXIst International Conference of the Red Cross, document D.S. 4 a, b, e.

for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.

(b) In the case of a combatant who has still some weapons or whenever, as frequently happens, it cannot be ascertained whether he has weapons, an expression of surrender should be required. Rules should be formulated to define as precisely as possible how the intent to surrender may be clearly conveyed. Modern conditions, where combatants may be separated by great distances, should be taken into account; and modern means of communications (radio) should be used in addition to the traditional ones (white flag etc.). If a combatant is overpowered and his defeat appears imminent, he should be invited to surrender with a promise that he would enjoy thereafter all the applicable benefits of the laws and customs of war (see sub-section (iii) below).

(iii) Prohibition to declare that "no quarter will be given" (article 23 (d) of the Hague Regulations)

108. The opinion has been expressed, notably by the Experts of the International Committee of the Red Cross in 1969, that the wording of this rule was outdated and called for a reformulation. The rule expressed in article 23 (d) is nevertheless important, since one of its purposes is to avoid pushing the enemy into a desperate fight and thereby to shorten the period of actual combat. The rule contained in article 23 (d) of the Hague Regulations does not appear in specific terms in the Geneva Conventions.

109. The main shortcoming of article 23 (d) seems to be that it imposes only a negative obligation upon the States Parties. It may be considered desirable to strengthen this provision by a clause which would require positively a proclamation that the lives of the combatants would be protected, in accordance with the laws and customs of war, after surrender and/or capture.

110. It should be stressed that the reaffirmation of, or amendments to the rules mentioned above should be without prejudice to the right of the States Parties to punish, as permitted or imposed by international law, individuals who have violated the laws and customs of war. Such punishment should be inflicted, however, after a fair trial with all the guarantees required under international law.

111. The preceding review of the existing substantive rules concerning the protection of combatants, has brought out, inter alia, the following suggestions for a further elaboration or amendment to some of those rules:

(a) That the definition of protected combatants be clarified and, if possible, extended (see also chapter IX on guerrilla warfare);

(b) That the definition of inadmissible "treacherous" conduct between combatants be further elaborated, attention being paid, in particular, to the problem of improper wearing of the enemy uniform;



(c) That the prohibition of killing or wounding the disabled enemy (article 23 (c) of the Hague Regulations) be further elaborated and illustrative definitions be given of how a combatant could clearly make known his intention to surrender (see paragraph 107 above);

(d) That article 23 (d) of the Hague Regulations prohibiting declarations that "no quarter will be given" be reformulated and replaced by a rule imposing upon the States Parties the obligation "to proclaim that the disabled enemy will be protected under the laws and customs of war".

112. It may be stated that the application of the existing provisions for the protection of combatants, and of such revised or new provisions as might be adopted for that purpose, would be effectively assisted by the availability of international procedures intended to verify their implementation. It would also have to be recognized that the effectiveness of such procedures would be mitigated by the practical difficulties and complexity of the task of ensuring the observance of humanitarian rules in conditions of actual combat. Bearing in mind these considerations, the function of contributing to the extent possible in the application of the provisions referred to above might possibly be included in the terms of reference of such international agency as might be entrusted with facilitating, through appropriate supervision and control, the application of humanitarian rules in general. In this connexion, reference is made to the contents of chapter XI below.

113. The inference may be drawn from various parts of the preliminary report that the 1907 Hague Regulations would benefit from, and would be strengthened by their up-dating and adaptation to modern conditions and developments in the field of armed conflicts. It was stated in paragraph 180 of the preliminary report that some of the provisions of the Hague Regulations relating to combatants would "in any event need re-examination, followed by elaboration and reformulation in a wording better adapted to present conditions". As was stated in paragraph 35 above, the same observation would be valid as regards some of the provisions of the Hague Regulations affecting civilians. Support for the idea of effecting appropriate revisions in the Hague Regulations as a whole has been forthcoming from various competent sources including the experts consulted by the Secretary-General. Accordingly, if the usefulness and advisability of such an initiative commend themselves to the General Assembly, the task of revising, adapting and completing the Hague Regulations, in the light of the relevant provisions of the Geneva Conventions and other international instruments, after adequate preparation, might be undertaken by a conference convened by an interested Member State or by the General Assembly itself. The outcome might possibly be an additional Protocol to the Geneva Convention or an independent international instrument.

## VI. PROTECTION OF PRISONERS

114. Paragraphs 156 and 157 of the preliminary report of the Secretary-General referred to this question. They indicated that the provisions of Geneva Convention III of 12 August 1949 could generally be considered to be sound and when effectively applied as providing a reasonable degree of protection to persons made captive in the course of military hostilities. This observation referred to the categories of persons defined as prisoners of war in article 4 of the above-mentioned Geneva Convention within the framework of that Convention, i.e. as regards armed conflicts arising between two or more of the States parties to it, the provisions of article 3 being applicable in the case of armed conflicts not of an international character.

115. These limitations leave of course open the question of the applicability of the prisoner of war status to persons not falling within the categories listed in article 4 of Geneva Convention III. The situation of "guerillas" and that of fighters for self-determination in respect of which the General Assembly requested a special study will be dealt with below in chapters IX and X of this report. Certain questions referring to a better protection of prisoners or persons qualifying to the full protection extended by Convention III are, however, briefly mentioned here.

116. The question of eligibility to prisoner of war status may present special problems of determination of the applicability or not of article 4 of Geneva Convention III. This question is now unilaterally decided upon by the capturing power. It may be that if an international agency is entrusted with functions in relation to the protection of human rights in armed conflicts, it may usefully serve through such procedures as may be established, to advise and give guidance on the eligibility of individuals or groups of individuals to prisoner of war status.

117. The provisions of Geneva Convention III apply to the persons referred to in article 4 from the time they fall into the power of the enemy until their final release and repatriation. The previous section of this report drew attention to the importance of determining with greater precision the conditions of surrender of combatants, with the resulting obligation for the capturing combatant to spare life and avoid unnecessary injury. It should be made quite clear that under the Hague Regulations and general humanitarian law, a combatant cannot refuse to take prisoners when those opposing him clearly indicate their wish to abandon fighting and avail themselves of the prisoner status.

118. One of the complaints often heard in regard to captured persons is that the military authorities in whose hands they fall often have recourse to methods of interrogation before internment takes place that do not conform to the minimum requisites of humanitarian treatment and which sometimes involve the extortion of information through brutal methods and even torture. Prisoners of war when captured are often wounded or incapacitated by illness and exhaustion and are therefore in need of medical attention. It was suggested that one of the important rights of prisoners of war was that they should not be interrogated until they have been medically attended and were in a fit condition for interrogation.

Even when they were in a fit state, the interrogation should be carried out with due regard to humanitarian principles and without recourse to threats, force or torture.

119. Other basic rights of prisoners of war under interrogation would include the right, when possible, to some independent advice before interrogation; the right to keep silent, if the prisoner wishes to, without being subjected to any punitive or disciplinary measures for that reason; that no drugs, alcohol or similar agents should be administered to him in order to induce him to make a statement or confession. He should have the right not to be interrogated incessantly or for unduly long periods of time, and should have the right to food and rest during periods of questioning.

120. Articles 100 and 101 of Geneva Convention III are important as they relate to the conditions under which the penalty of death can be imposed on a prisoner of war and the manner in which such penalty may be executed. While these articles provide for certain safeguards in relation to the imposition and execution of the death penalty, it has been suggested that the power to impose sentence of death on a prisoner of war is a dangerous one in the hands of an enemy and that therefore the right to impose this extreme penalty so long as the conflict continues should be exercised with the greatest moderation and if possible prohibited altogether.

121. Questions such as the ones mentioned in the above paragraphs may be given consideration at the time additional Protocols are considered with respect to other matters relating to existing Geneva Conventions. At that time, attention may also be given in relation to Geneva Convention III to the Standard Minimum Rules for the Treatment of Prisoners, which were originally drawn up by the International Penal and Penitentiary Commission in 1933 and of which a revised text was adopted in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. <sup>52/</sup> The Standard Minimum Rules were approved in 1957 by the Economic and Social Council with a recommendation to Governments to give favourable consideration to their adoption and application. The Standard Minimum Rules are the subject of further examination at the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Kyoto, Japan, from 17 to 26 August 1970.

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<sup>52/</sup> United Nations publication, Sales No.: E.56.IV.4, annex I.

## VII. PROHIBITION AND LIMITATION OF CERTAIN METHODS AND MEANS OF WARFARE

122. Paragraph 185 of the preliminary report emphasized that since the inception of the United Nations, much of the activity of the Organization has been directed at the limitation and prohibition of methods and means of warfare, and that therefore the whole work of the United Nations in the field of disarmament may be considered relevant in giving effect to the objectives of General Assembly resolution 2444 (XXIII) on respect for human rights in armed conflicts. The preliminary report surveyed briefly the activities of the United Nations in the field in question, with particular reference to the resolutions of the General Assembly on the subject. 53/ Since the submission of the preliminary report, the General Assembly, at its twenty-fourth session, adopted certain resolutions reference to which is made here for the purpose of up-dating the survey contained in the preliminary report.

123. In General Assembly resolution 2602 E (XXIV) of 16 December 1969, on the question of general and complete disarmament, the Assembly, inter alia, declared the decade of the 1970s as a Disarmament Decade; called upon Governments to intensify without delay their concerted and concentrated efforts for effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament and the elimination of other weapons of mass destruction, and for a treaty on general and complete disarmament under strict and effective international control; requested the Conference of the Committee on Disarmament to resume its work as early as possible, bearing in mind that the ultimate goal is general and complete disarmament; and made other decisions concerning the tasks to be performed by the Conference of the Committee on Disarmament. In General Assembly resolution 2603 A (XXIV) of 16 December 1969, on the question of chemical and bacteriological (biological) weapons, the General Assembly, inter alia, declared as contrary to the generally recognized rules of international law as embodied in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, the use in international armed conflict of certain specified chemical and biological agents of warfare described in the resolution [(a) and (b) of the operative paragraph]. This resolution was adopted by a vote of 80 to 3, with 36 abstentions. In General Assembly resolution 2603 B (XXIV), section III, the Assembly took note, in operative paragraph 1, of the draft Convention on the Prohibition of the Development, Production and Stockpiling of Chemical and Bacteriological (Biological) Weapons and on the Destruction of such Weapons submitted to the General Assembly by the delegations of Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Mongolia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics and of the draft Convention for the Prohibition of Biological Methods of Warfare submitted to the Conference of the Committee on Disarmament by the United Kingdom of Great Britain and Northern Ireland, as well as other proposals. In operative paragraph 2, the Assembly requested the Conference of the Committee on Disarmament

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53/ A/7720, paras. 186-195.

to give urgent consideration to reaching agreement on the prohibitions and other measures referred to in the draft conventions mention in operative paragraph 1 of the resolution and other relevant proposals. In operative paragraph 3, the General Assembly requested the Conference of the Committee on Disarmament to submit a report on progress on all aspects of the problem of the elimination of chemical and bacteriological (biological) weapons to the General Assembly at its twenty-fifth session. The General Assembly also adopted resolution 2604 (XXIV) of 16 December 1969 on the urgent need for suspension of nuclear and thermonuclear tests and resolution 2605 (XXIV) of 16 December 1969 on the subject of the Conference of Non-Nuclear-Weapon States.

124. It is evident therefore that the results of the work being accomplished by the Conference of the Committee on Disarmament, which reports regularly to the General Assembly, would be intimately linked to the efforts to improve the situation with regard to the prohibition and limitation of the use of methods and means of warfare as they would affect civilians, prisoners and combatants and would consequently concern intimately the problem of protection of human rights in general.

125. Paragraph 196 of the preliminary report recalled that, in referring to the use of chemical and biological means of warfare, resolution XXIII of the International Conference on Human Rights (see paragraph 1 above) specifically mentioned "napalm bombing". In this connexion, it was suggested in paragraph 200 of the preliminary report that the legality or otherwise of the use of napalm would seem to be a question which would call for study and might be eventually resolved in an international document which would clarify the situation.

126. The idea of undertaking and pursuing the study referred to above received the support of a number of the experts consulted by the Secretary-General and of those of the International Committee of the Red Cross. In particular it was considered useful, as an initial step, to study the precise effects of the use of napalm on human beings and the living environment. If the General Assembly accepts the merit of that idea, it might consider requesting the Secretary-General to prepare, with the assistance of qualified consultant experts, a report on napalm weapons and the effects of their possible use. The preparation of this report might in general be patterned after the Secretary-General's report on the question of chemical and bacteriological (biological) weapons, 54/ to which reference was made in paragraph 192 of the preliminary report and which, in operative paragraphs 1 and 4 of its resolution 2603 B (XXIV), section II, the General Assembly welcomed as an authoritative statement on the subject and recommended to the Conference of the Committee on Disarmament as a basis for its further consideration of the elimination of chemical and bacteriological (biological) weapons. The contemplated report on the question of napalm which might be prepared by the Secretary-General could facilitate subsequent action by the United Nations with a view to curtailing or abolishing such uses of the weapons in question as might be established as inhumane.

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54/ United Nations publication, Sales No. E.68.IX.1.

## VIII. INTERNAL ARMED CONFLICTS

127. As was noted in the previous report by the Secretary-General 55/ the Hague Conventions of 1907, the Geneva Protocol of 1925 and - except for article 3 - the Geneva Conventions of 1949 relate only to international armed conflicts, i.e. those in which two or more States Parties to these international instruments are involved. Article 3, common to all Geneva Conventions of 1949, sets forth minimum rules to be applied in the case of "armed conflict not of an international character".

128. Questions concerning the protection of combatants and civilians in conflicts other than those defined as "international" have attracted considerable attention since 1949, in particular within the framework of the activities of the United Nations and of the International Committee of the Red Cross. Both resolution 2444 (XXIII) of the General Assembly and resolution XIII of the twenty-first International Conference of the Red Cross (Istanbul, September 1969) referred to the need for strengthening such protection "in all armed conflicts". The International Committee of the Red Cross has informed the Secretary-General that it decided to consult in 1970 several experts on those questions and to submit specific proposals to an International Conference of Governmental Experts in the spring of 1971.

### A. Substantive rules, and observations and suggestions thereon

129. For the clarity of exposition, it may be useful to recall in this chapter (1) what are the types of conflicts to which article 3 of the Geneva Conventions refers; (2) who are the persons protected and (3) what are the rights of such persons.

#### 1. Types of conflicts to which article 3 of the Geneva Conventions refers

##### (a) Meaning of the rule in force

130. Article 3 contains neither a general definition nor an illustrative list of examples of an armed conflict which is not of an international character. No proposed interpretative definition or list of examples has so far received definite acceptance at the international level. Taking into account various interpretations suggested since 1949, it seems possible to indicate at least some elements which have attracted a substantial amount of attention or approval.

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55/ A/7720, para. 163.

(i) Existence of a state of hostilities between opposing forces

131. It is not redundant to assert, as most experts' bodies concerned have done, that application of article 3 presupposes the existence of hostilities between opposing forces. In other words, it seems implicitly agreed that this provision is applicable only whenever hostile physical actions of a military character are carried out. This is a question of fact. Such hostile actions could be carried out between opposing forces even when negotiations are being conducted with a view to put the conflict to an end.

(ii) Employment of weapons

132. In its Commentary of the Geneva Conventions, the International Committee of the Red Cross stressed that there should be "armed forces" engaged in hostilities, and that the conflicts mentioned in article 3 should be those which "are in many respects similar to an international war".<sup>56/</sup> This was repeated in the tentative definition contained in the 1970 questionnaire which the International Committee of the Red Cross sent to various experts, stating that the forces envisaged should "have recourse to weapons". Several ICRC experts, in their preliminary replies to the questionnaire, wondered whether recourse to weapons should still be considered as an essential element of the notion of conflicts, since, in their view, armed revolution was practically impossible in most countries due to the power of the police and army. They felt that certain situations of internal disturbance and tensions involving large numbers of victims, even if only few persons are killed or wounded, should constitute "conflicts", at least in the sociological sense. While the latter considerations may be thoroughly studied de lege ferenda in any attempt to enlarge the scope of article 3, it may be admitted that this provision in its present text does require the existence of an "armed" conflict.

(iii) Collective character, minimum of organization, and various other factors

133. The tentative criteria of "collective character" and "minimum of organization" were suggested by a 1962 Committee of Experts of the International Committee of the Red Cross on assistance to the victims of internal armed conflicts and referred to by some of the 1970 experts in reply to the ICRC questionnaire. Similar criteria had been proposed at the 1949 Conference which prepared the Geneva Conventions. Although the Conference decided not to include any definition in article 3, it might be said that these questions were considered as significant by many participants to that Conference. The experts consulted by the International Committee of the Red Cross in 1970 examined the question in relation to guerillas, and some of them felt that the criterion of "collective character" might be vague and could unjustifiably exclude situations particularly occurring in the initial stages of conflicts.

134. As already indicated in paragraph 176 of the preliminary report, a Committee of Experts of the International Committee of the Red Cross in 1962 also felt that the following additional elements should be taken into account:

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<sup>56/</sup> Commentary of the Geneva Conventions, vol. III, International Committee of the Red Cross, Geneva, 1960, art.3, p.37.

the duration of the conflict, the number and leadership of rebel groups, their installation or action in parts of the territory, the degree of insecurity, the existence of victims and the means adopted by the Government to re-establish order. Although some of these criteria had been proposed at the 1949 Conference which prepared the Geneva Conventions, it is not certain that they were generally accepted in toto as determining the scope of present article 3.

(iv) Distinction between international and non-international conflicts

135. It should be recalled that article 2 of the Geneva Conventions is worded in rather broad terms, referring to any armed conflicts arising between two or more of the States Parties, even if the State of war is not recognized by one of them. The substitution of the more general expression "armed conflict" for "war" was deliberate. <sup>57/</sup> At the 1969 meetings of a Committee of Experts of the International Committee of the Red Cross, it was generally agreed that foreign military intervention, on the side of either party, could transform an internal conflict into an international one, calling for the application of the laws and customs of war. In their preliminary replies to the 1970 questionnaire of the Red Cross, some of the experts appeared to consider that this was true of purely military intervention, but not of political support, nor of economic and financial assistance save if the two latter forms of assistance constituted military assistance in disguise. Attention was drawn to the difficulty of assessing foreign intervention, many of the States involved tending to act through public or private entities as intermediaries.

136. It may be recalled that, at the 1949 Conference of Plenipotentiaries which prepared the Geneva Conventions, some proposals were made, <sup>58/</sup> but not retained, that due account should be taken of the fact that a conflict is included in the agenda of the Security Council or the General Assembly as constituting a threat to international peace, a breach of the peace or an act of aggression.

(b) Suggestions for further elaboration and amendments

(i) Possible extension of the scope of article 3

137. At the meetings of experts mentioned in the preceding section as well as on other occasions, it was recalled that in many instances the State concerned refused to agree to the applicability of article 3 by denying the existence of an armed conflict in terms of the Geneva Conventions. The experts expressed the view that article 3, as presently worded and generally interpreted, might be too narrow in its formulation.

138. Reference was made in the course of the consultation to a whole range of situations which may not come under a strict definition of "armed conflict" but which might nevertheless, after further study, justify application of minimal humanitarian standards.

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<sup>57/</sup> Ibid., p. 23.

<sup>58/</sup> Commentary, op.cit., p.42.



139. It may be recalled in this connexion that many of the situations covered by several United Nations pronouncements, e.g. the Universal Declaration of Human Rights, the Standard Minimum Rules for the Treatment of Prisoners approved by the Economic and Social Council, the International Covenant on Civil and Political Rights, especially the provisions thereof which cannot be suspended, would apply to such cases. 59/

140. If it is considered that further international provisions would be needed, the major problem would arise of delimiting very carefully the scope of such provisions. While many States might be strongly inclined to accept the applicability of internationally agreed general provisions relating to respect for human rights, few of them would be likely to accept submitting to international regulation (see section B below), as matters warranting the application of rules akin to the laws and customs of war, disturbances or tensions including occasional riots, occurring on their territories. Some very tentative suggestions are being mentioned, on that basis, in the following paragraphs.

141. Especially in the case of serious internal disturbances not involving the systematic use of war-like weapons (and which therefore may not be covered by the expression "armed conflict" as used in article 3), and perhaps also as regards conflicts envisaged under article 3, one might consider including in a protocol or a new convention criteria based on the nature, i.e. the causes and/or aims, of the disturbances. In its 1970 questionnaire addressed to its experts, the International Committee of the Red Cross tentatively defined "internal conflicts" as those occurring between "political forces". In their preliminary replies, some experts expressed reservations, pointing out that internal conflicts and disturbances may be related not only to political factors but also to many other factors including racial, economic, social, religious, ideological and tribal ones. This difference of opinion may be due to a certain confusion between the causes and the aims of the uprising. Perhaps it would be possible to formulate a definition covering any movement which, for racial, economic, social, religious, ideological or other (specified) reasons, aims at overthrowing the Government by the use of arms, changing the form or structure of the State by modifying the Constitution or basic laws of the State or part thereof.

142. Some of the experts suggested other criteria under which article 3 of the Geneva Conventions (or any protocol or convention expanding its scope) would be considered applicable, i.e. whenever a Government makes a declaration of emergency of the types mentioned in the International Covenant on Civil and Political Rights or in the European Convention on Human Rights.

143. Further criteria have been contemplated as regards internal disturbances not necessarily covered by present article 3, taking into account various suggestions which were generally more de lege ferenda than de lege lata: that the movement assumes a collective character, and a minimum of organization and

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59/ International Review of the Red Cross, February 1968. It may also be noted that, in 1967, the Medico-legal Commission of Monaco, at the suggestion of the International Commission of the Red Cross, adopted "Minimum Rules for the Treatment of Non-Delinquent Detainees".

discipline; that the disturbance or uprising be characterized by repeated hostile actions occurring over a period of time; and that there are a number of victims, either killed or detained under ordinary or emergency law.

144. The precise formulation of those criteria for extension of the guarantees of article 3 to cases not necessarily coming under the present terms of the article might prove to be a difficult task and as stated earlier, one practical solution to ensure protection of basic human rights might be to speed up as much as possible the ratification and coming into force of United Nations and regional instruments on human rights including in particular the International Covenants.

145. One suggestion of the 1970 ICRC experts was that an illustrative list of typical situations might be drawn up without an all-embracing definition being formulated. In this connexion, frequent references were made to the usefulness of entrusting to an international agency the function of determining or at least advising whether or not the provisions of article 3 are applicable to a given situation.

(ii) Elaboration of the distinction between international and internal conflicts

146. As was noted in paragraph 135 above, several experts felt that well-ascertained foreign military intervention transforms the struggle into an international conflict to which the laws and customs of war should apply. On the basis of that suggestion, it may be necessary to clarify the relevant elements of such an intervention.

147. Reference should be made to the opinion expressed, notably at the General Assembly in certain instances and by some Red Cross experts in 1969, that conflicts arising out of struggles for self-determination, and liberation from colonial and foreign rule should be regarded as international in character and concern, if not necessarily inter-state. This matter is dealt with in Chapter X of this report.

2. Persons protected in internal conflicts

148. Article 3 covers "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause". The main difficulty as regards the application of this clause appears to be to define the categories of persons who take no "active" part in the hostilities. The second phrase of the provision, after "including", appears to be illustrative and not exhaustive. It may also be noted that the word "active" is not synonymous with the word "direct". Especially in situations of internal conflicts, large numbers of persons, while not fighting or not belonging to the rebel groups, may be regarded by the Government as assisting such groups, by carrying arms or supplies, transmitting information, giving shelter to combatants, disseminating revolutionary propaganda or even simply expressing opinions in favour of the uprising.

149. Although the formulation of criteria in this respect is a delicate matter, it might be possible to arrive at a minimum definition stating that the following persons at least, in addition to those mentioned after the word "including", should be protected under article 3 as presently worded:

(a) Those whose conduct and activities have no relation whatsoever with the conduct of hostilities;

(b) Those who participate in the conflict or assist the uprising in any manner whenever such participation or assistance is given under duress. Such a criterion would seem to be consonant with the generally accepted meaning of the word "active" which, in criminal law, implies an expression of free will;

(c) Those who merely express opinions criticizing the Government or favouring the objectives of the uprising.

Extension of the scope of article 3 may be, further, contemplated to the effect that all persons who do not actually fight or who are not well-ascertained members of the armed forces, militias, volunteer corps or movements directly involved in the fight, should be protected under that article. All such suggestions should be thoroughly studied, paying close attention to the present-day practices of Governments and insurgents.

150. It has been frequently noted that, while article 3 provides that the wounded and sick should be collected and cared for, it fails to specify that the medical and relief personnel active in this connexion should be fully protected and enabled to carry out its duties. It may therefore be suggested that an additional provision be adopted, under which personnel such as that of the Red Cross carrying out medical and relief activities and displaying the appropriate emblem should be protected from killing and ill-treatment in all circumstances, and given the necessary facilities, whenever available, to perform their mission. Such a provision should also cover persons acting in an individual capacity solely for the purpose of giving medical aid and relief, provided their identity and whereabouts are made known to all participants to the conflict. Many other particular situations could arise, and the paramount consideration should be to ensure that the best care be given to the wounded and sick, as well - it should be added - to the homeless, starving and otherwise distressed persons. The ICRC has an invaluable experience in those matters and its co-operation should be fully sought in that respect. The contemplated provisions should also recognize the right of each party to the internal conflict to verify the bona fide character of medical and relief activities, and misuse of the Red Cross emblem or of insignia of other humanitarian organizations should be strictly forbidden.

### 3. Rights and obligations of persons involved in internal conflicts

151. As mentioned in the preliminary report by the Secretary-General 60/ and as was apparent again in the recent preliminary replies of the Red Cross experts,

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60/ A/7720, paras.174 and 175.

there seems to be wide agreement on the need for further provisions having the following purposes:

(a) To ensure complete protection to the wounded and sick and to medical and relief personnel (see also paragraph 150 above);

(b) To give to detained persons the right to receive and send family messages and to receive relief;

(c) To allow the free passage of essential foodstuff, clothing, and medical and hospital supplies for non-combatants, by analogy with article 23 of Geneva Convention IV.

152. There is also a substantial measure of agreement concerning the need to reaffirm or to set forth, in respect of internal conflicts, the principles embodied in the Hague Regulations (which, according to the Nuremberg judgment, have become customary law) and in other instruments concerning needlessly cruel or destructive weapons or methods of warfare against combatants as well as against non-combatants.

153. It has been pointed out, notably by the experts in their preliminary replies to the ICRC questionnaire, that the very nature of many internal conflicts, characterized by recourse to guerilla and counter-guerilla tactics, would make it difficult to apply in such conflicts certain rules of behaviour between combatants, for instance that of article 23 (b) of the Hague Regulations forbidding to kill or wound an enemy "treacherously". Yet, as pointed out in the previous report by the Secretary-General, 61/ it would be desirable to try to formulate certain minimum norms of conduct between combatants in internal conflicts, since the absence of such norms may expose the combatants who fight openly and fairly to the same repressive measures as those meted out to "treacherous" combatants.

154. The fundamental difference between article 3 and the other articles of Geneva Convention III is that the former allows the punishment, including capital punishment, of captured combatants for having espoused the cause of one party to the conflict, while the latter guarantees to prisoners of war immunity in that respect. Suggestions have been made by various experts that executions on that ground be suspended or deferred during the hostilities while an amnesty might be granted in appropriate cases to captured fighters at the end of the conflict. No general agreement was, however, reached on this matter. It seemed to several experts that it would be very difficult to persuade States to repeal or suspend the laws which, in many countries, make "armed rebellion", "treason" punishable by death.

155. It may be recalled in this connexion that the General Assembly, in resolution 2393 (XXIII) on capital punishment, took note of various reports and conclusions by Expert bodies according to which there exists in the world a trend towards a substantial reduction of the number of capital crimes as well as

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61/ A/7720, para.174.

a trend towards reduction of the number of executions. Furthermore, in at least one particular situation, that relating to southern Africa, by resolution 2394 (XXIII), the General Assembly condemned the recourse of certain specific Governments or illegal authorities to capital punishment as a means of checking the natural aspirations of the peoples to the full enjoyment of civil and political rights.

156. It is recalled once more that United Nations provisions, e.g. those of the Universal Declaration of Human Rights, the International Covenants and the Standard Minimum Rules for the Treatment of Prisoners, would be applicable to captured combatants and civilian detainees in non-international armed conflicts, besides the general provisions of article 3. Efforts should be pursued towards gradual assimilation of these persons to prisoners of war under Geneva Convention III and civilian detainees under Convention IV through the further elaboration of Special Minimum Rules for "political" or "non-delinquent" prisoners. These rules may be transformed in due course into binding conventions or protocols.

B. Implementation of the substantive rules concerning  
internal armed conflicts

157. It may be recalled that article 3 contains one clause concerning the procedures and machinery for ensuring its application: it is provided that an impartial humanitarian body such as the International Committee of the Red Cross may offer its services to the parties to the conflict.

158. It has been frequently pointed out, for instance in the 1969 special report of the International Committee of the Red Cross on internal armed conflicts and at the 1970 meetings of the Experts Consultants of the Secretary-General, that article 3 as presently worded leaves considerable latitude to the Governments concerned in determining whether a situation constitutes an armed conflict within the purview of this article, and in determining what persons should benefit therefrom as well as the extent of their rights. The International Committee of the Red Cross has offered its services in a number of situations of internal conflict or disturbance, and it has been able in fact to do humanitarian work in several instances; but, even in such cases, the Governments concerned and/or the other parties have not infrequently denied the applicability of article 3, claiming that only national law applied to those situations. In cases where the International Committee of the Red Cross was granted permission to act, whether or not the parties recognized the existence of an internal armed conflict under the Conventions, its activities were of a purely humanitarian and practical character. The International Committee of the Red Cross does not express officially any opinion as to whether a given situation reveals the characteristics of an internal armed conflict to which article 3 is applicable, nor does it act as a substitute for the Protecting Power under the provisions of the Geneva Convention applicable to international conflicts.

159. Taking this situation into account, the opinion has been expressed that some procedure and machinery should be contemplated for determining objectively whether a given situation comes within the purview of article 3. This problem is a complex and delicate one, since it concerns questions in which the States Parties

may well wish to preserve their discretionary powers. It should be stressed from the outset, as is already provided for in article 3, that the application of any such procedure would in no way affect the legal status of the parties to the conflict.

160. Among the suggestions recently made, in particular by some experts consulted by the Secretary-General, the following might be mentioned:

(a) That any given situation be regarded as coming under article 3 if the Government concerned makes an official proclamation of emergency along the lines of those provided in the International Covenant on Civil and Political Rights or in the European Convention on Human Rights;

(b) That the International Committee of the Red Cross be allowed to collect evidence with a view to expressing a considerable opinion as to whether article 3 is applicable;

(c) Alternatively - and considering that the International Committee of the Red Cross might not find it possible to do so - that some international body, already in existence or to be established for that purpose, and offering full guarantees of competence, independence and impartiality, be allowed to perform these functions.

161. It was tentatively suggested by some of the experts consulted by the Secretary-General in 1970 that such an international body might be established by the States Parties to the Geneva Conventions or by the United Nations. The view was expressed that a determination of the applicability of article 3 made by such a body would be likely to have a strong moral force, whether or not it were considered legally binding on the parties concerned.

162. Some suggestions have also been made concerning the control of the application of the rules contained in article 3 concerning the persons protected and the rights which they should enjoy, once the article has been declared applicable. Some of the Experts felt that the parties to a conflict should be bound to accept the offer of services of the International Committee of the Red Cross. An idea suggested at the twenty-first International Conference of the Red Cross (Istanbul, 1969) was that, immediately upon the outbreak of internal hostilities, each party to the conflict should appoint a humanitarian organization offering all guarantees of impartiality and efficacy to discharge, within the territory under its control, the duties incumbent on the Protecting Powers under the other provisions of the Geneva Conventions. The proposal also contained a clause under which nothing in the draft protocol would be interpreted as requiring any party to the conflict to afford to protected persons treatment more favourable than that granted to the civilian population in areas where no hostilities are taking place.

C. Procedures for bringing into effect the suggestions for further elaboration of, or amendments to, article 3 of the Geneva Conventions

163. Various views have been expressed concerning the procedures for bringing into effect suggestions such as those set out in the preceding paragraphs. It has been proposed, for instance, that resolutions or declarations be adopted, by the General Assembly or the International Conferences of the Red Cross, recommending to the parties to internal conflicts certain interpretations of article 3, or recommending that they apply to such situations, even unilaterally, all or part of the other provisions of the Geneva Conventions and of the relevant Hague Regulations. Some experts of the International Committee of the Red Cross in 1969 and 1970 have laid stress on the penultimate paragraph of article 3 under which the parties to internal conflicts should endeavour to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions. The suggestion has been made by some ICRC experts in 1969 that model agreements be drawn up and systematically offered to the parties, taking into account the specific features of each internal conflict. While agreeing that such an approach offered the advantage of flexibility, some of the experts consulted by the Secretary-General doubted whether many such optional agreements could in fact be concluded, especially at a time when the conflict has already erupted.

164. The view has been expressed especially by some ICRC experts in 1970, that the procedures suggested above might not be entirely adequate as regards the development of the law of internal conflicts. For this purpose, especially as regards such important changes as the limitation of capital punishment in periods of armed conflict and the establishment of a system of international determination of the applicability of minimum standards, it might appear preferable that, ultimately, all States Parties to the Geneva Conventions should be invited to ratify legally binding additional instruments of general application, expressing the aspirations of the international community, as distinct from, or in addition to, the conclusion of ad hoc agreements. Such additional provisions, in the form of a protocol or a separate additional convention, might be prepared by experts bodies, taking fully into account the practice of Governments and insurgents, and submitted to a Conference of the States Parties to the Geneva Conventions and the Hague Regulations and as may be appropriate to the General Assembly.

165. The preceding observations illustrate the present complexity of the problem of increasing the protection afforded to the various categories of persons who may be involved in internal armed conflicts. The review of the issues surrounding this question, such as the definition of an internal armed conflict subject to international regulations and the determination of the applicability of such a definition in specific cases, the effect of foreign intervention, the substantive content of the protection to be extended and the types of persons who are to benefit from such protection, indicates that further study is desirable. As stated earlier, pursuant to resolutions of the twenty-first International Conference of the Red Cross and within the framework of its co-operation with the Secretary-General, the International Committee of the Red Cross has undertaken a comprehensive study of the question of conflicts not

of an international character. Following consultation with various experts who were invited to reply to a questionnaire circulated in the early summer of 1970, the International Committee has compiled a preliminary report tentatively summarizing and analyzing the views of fifteen of those experts, 62/ which it has transmitted to the Secretary-General. Taking into account the opinion and views of the experts, the International Committee of the Red Cross intends to formulate, by the end of 1970, its own draft proposals for regulations concerning the problem and submit them to a Committee of Governmental Experts which the International Committee plans to convene in the spring of 1971. The Secretary-General has been advised that the composition of this Committee would be such as to ensure the representation of the principal legal and social systems of the world. It is possible that this Committee may be reconvened in the Autumn of 1971, if it is unable to complete its work at its first session. The results of the study pursued by the International Committee of the Red Cross will undoubtedly prove of great value in connexion with the consideration of the question of internal armed conflicts by the General Assembly. Accordingly, the General Assembly may wish to retain that question for future examination, pending receipt and submission, through the Secretary-General, of the conclusions of the relevant activities undertaken by the International Committee of the Red Cross.

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62/ Document D1153 of the International Committee of the Red Cross, July 1970.



## IX. GUERRILLA WARFARE

166. As was noted in the previous report by the Secretary-General, 63/ guerrilla warfare may be characterized as fighting by dispersed and mobile groups employing usually light arms, resorting to surprise attacks, and avoiding, as a rule, pitched battle. Secrecy or clandestinity is an important characteristic of guerrilla warfare. Guerrilla groups, whatever be their names or descriptions, are often - but not necessarily - units which do not belong to the regular armed forces of the parties to the conflicts. Problems concerning the status, rights and obligations of guerrillas were raised during the Second World War, since resistance movements against the Nazi occupants were not adequately covered by the Conventions then in force; and they have assumed increased importance since the end of that war, in view of frequent occurrences of guerrilla warfare in international, as well as in internal armed conflicts. In particular, the present struggles for self-determination and liberation from colonial and foreign rule often take this form (see chapter X below concerning this particular question). Problems concerning guerrilla warfare raise intricate issues as they do not easily fall within traditional strategic, political and legal criteria. At the present time, these matters are also the subject of studies by the International Committee of the Red Cross, which intends to submit proposals to a Committee of Governmental Experts in the spring of 1971. The following observations provide a further analysis of the relevant international provisions in relation to the question of guerrillas, which may be of assistance for a better understanding and future studies of the problem.

167. Guerrilla warfare occurs in international as well as - and, perhaps, more often nowadays - in internal armed conflicts. Problems concerning the status of guerrillas in internal conflicts, as well as questions concerning the distinction between internal and international conflicts, have been discussed in chapter VIII above relating to internal conflicts. The present chapter will therefore concern itself essentially with guerrilla warfare in international armed conflicts, although certain references to, and appropriate comparisons with, the Law of Internal Conflicts will be made.

### A. Substantive rules, and observations and suggestions thereon

#### 1. Conditions under which guerrillas in international conflicts are protected as privileged combatants, and extent of such protection

168. Articles 1 and 23 of the Hague Regulations of 1907, articles 13 of Geneva Conventions I and II for the protection of wounded and sick persons of the armed forces in the field and at sea, and article 4 of Geneva Convention III, relative to the treatment of prisoners of war are especially relevant. These provisions were quoted and analysed in chapter V above on the protection of combatants.

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63/ A/7720, paras. 158 and 159.

169. As was noted in paragraph 91 above, article 23(b), (c), (d) and (f) of the Hague Regulations, prohibiting "treacherous" behaviour between combatants and protecting those who surrender, refer to "the enemy". This broad term may be considered as covering any person who participates in the hostilities, including any guerrilla fighter. However, according to another interpretation, all the Hague Regulations should be regarded as being governed by article I which defines as "belligerents" members of the regular armed forces or of militias and volunteer corps (to which the Geneva Conventions added: "organized resistance movements") belonging to a party to the conflict and fulfilling other specific conditions as follows: that of being commanded by a person responsible for his subordinates; that of having a distinctive sign recognizable at a distance; that of carrying arms openly; and that of conducting their operations in accordance with the laws and customs of war.

170. Problems relating to the difficulty for guerrillas to fulfil all or some of those conditions will be dealt with in paragraph 174 et seq. below. The opinion has also been expressed that, even if they do meet these conditions, guerrillas arrested during a search made among the civilian population as well as those captured after carrying out a hostile act not amounting to an armed fight may not be protected under the Hague Regulations. It was said that such persons do not surrender during "hostilities" of the kind contemplated by the Regulations. In present conditions of guerrilla warfare, no clear distinction may be made between the actual zone of military operations and the rest of the territory: guerrilla fighters may be found practically anywhere. It is true that, if the Hague Regulations are found to be inapplicable, the guerrillas concerned may, under certain conditions, be covered by Geneva Convention IV on the Protection of Civilians in Time of War. It will be seen, however, in sub-section (2), that the application of this Convention may also give rise to serious difficulties.

171. In view of these uncertainties, it may appear desirable to reaffirm or develop a rule under which all persons who participate actively in conflicts of an international character, apprehended anywhere and under any circumstances, should be guaranteed at least a minimum of protection and in particular should not be killed or harmed at the time of surrender or capture.

172. The scope of article 23 (b) of the Hague Regulations, which prohibits the treacherous killing or wounding of individuals "belonging to the hostile nation or army", is undoubtedly wide. It would cover all guerrillas in any circumstances, provided in any event that they are nationals of the other party to the conflict. This rule gives however rise to great difficulties of interpretation as regards guerrilla warfare. Indeed, guerrilla and counter-guerrilla tactics rely heavily on "ruses of war" which are permissible under Article 24 of the Regulations, but which are difficult to distinguish from "treachery". Reference is made in this respect to the relevant paragraphs of chapter V on the Protection of Combatants. It was suggested that if a definition of "treacherous practices" is not feasible, at least an attempt might be made to draw up an illustrative list of inadmissible practices which could be revised as needed. Paragraphs 177 and 178 below deal particularly with the requirements of wearing a distinctive sign and carrying arms openly.

173. As regards the treatment of guerrilla fighters who are wounded, sick or captured, Geneva Conventions I, II and III do not refer in general terms to "the enemy". They make, expressly, the protection of those persons dependant upon the

fulfilment of the conditions recalled in paragraph 169 above. The crucial questions must therefore be considered whether, or to what extent, this category of combatants may meet these requirements.

174. According to the rules in force, guerrillas must be members of the armed forces, of "militias" or "volunteer corps", or of "organized resistance movements". This definition does not seem to cover guerrilla fighters who, without belonging to the regular armed forces, are in fact conscripted into movements or groups which cannot be regarded, strictly speaking, as "resistance" movements. "Resistance", in military terminology, normally means a reaction to armed attack or to military occupation. At least certain struggles for national liberation and self-determination may be described, from a military point of view (if not necessarily from a political one), as the taking of military initiative. It may therefore be suggested that the scope of the present rule should be made wider by clarifying and broadening the meaning of the word "resistance".

175. The second condition is that such movements should "belong to a Party to the conflict". According to the Commentary of the Geneva Conventions published by the International Committee of the Red Cross, guerrilla movements need not be expressly authorized by a Government to participate in the hostilities on its behalf; but at least a "de facto relationship" between them and a Government party to the conflict must be ascertained. It is sufficient, according to this Commentary, that "the operations be such as to indicate clearly for which side the movement is fighting", for instance that a Government party to the conflict delivers arms or supplies to the guerrillas. 64/ The difficulty, as noted by a number of experts, is that Governments, not infrequently, are unwilling to make apparent their support of irregular combatants. A possible approach to a solution might be to accept that combatants - including guerrillas - who, by their actions and public pronouncements, consistently support one of the parties to the conflict should be regarded as "belonging" to that party under the Conventions, provided there is sufficiently convincing evidence that the Government concerned supplies them regularly with arms, ammunitions or logistical equipment needed for their fight.

176. The Conventions require, further, that the movements be "organized" and be commanded "by a person responsible for his subordinates". The requirement of the existence of an individual commander may not be easy to meet in some guerrilla movements which operate under a collegial authority. Another difficulty derives from the fact that the structure of the guerrilla movement and of its command are very often closely guarded secrets, unknown to most of the fighters. Furthermore, it has been noted that the words "responsible for his subordinates" are not entirely clear. Consideration might be given to a clause which would refer to organized movements whose command is capable of ensuring generally the execution of its orders, including, as far as possible, respect of the laws and customs of war. This might express more clearly the main, and valid, purpose of the Convention.

177. According to the present rule, combatants should have "a fixed distinctive sign recognizable at a distance". This provision, in particular, is often regarded as being almost impossible for guerrillas to apply. Reference is made to the

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64/ Commentary of the Geneva Conventions, Vol. III, International Committee of the Red Cross, Geneva, 1960, p.57.

observations made earlier concerning the surprise tactics essential to this type of warfare. Some experts went as far as to suggest that the condition be removed and the concept of "openness" of the hostilities be thoroughly reviewed to take into account guerrilla warfare. They felt that the subsequent requirement of "carrying arms openly" was sufficient to distinguish fighters from civilians. The difficulty is that many operations related to the hostilities conducted by the guerrillas, such as the gathering of information, transmitting orders or recruiting adherents are carried out outside situations of actual combat, and without need for carrying or at least showing any weapon. If such guerrillas were not required to wear any distinctive sign, then nothing would distinguish them from the civilians or non-participants to the conflict. Possibly, a fixed distinctive sign recognizable at a distance should be worn, at least in all circumstances where concealment would directly jeopardize the lives or liberty of civilians.

178. The conditions of "carrying arms openly" has also been criticized as being vague and not taking into account certain needs of guerrilla warfare. On the basis of suggestions made by the World Veterans Federation and concurred in by various experts, it may be possible to elaborate a rule to provide that all members of militias, volunteer corps and other organized movements should carry arms in a way which is similar to that utilized by members of regular armed forces, when they are engaged in operations which can reasonably be expected to require the use of weapons. This would cover actual combat and operations preparatory, in a direct manner, to the combat (for instance, infiltration into enemy lines), but not ancillary activities such as information-gathering and propaganda among civilians.

179. The last condition set forth in the Conventions is that the combatants should "conduct their operations in accordance with the laws and customs of war". It is generally agreed that this provision refers to the respect of the laws and customs of war by the movement or corps as a whole, whether or not individual members fulfil this condition. In case of grave breaches of the Conventions by individual guerrillas, these guerrillas may, and should, of course, be punished, but after a trial giving all guarantees of due process and without losing the status of prisoner of war that they may have acquired. The question of the treatment of guerrillas who themselves have respected the laws and customs of war while the movement as a whole has indulged in practices inconsistent with these laws and customs may be a problem deserving special consideration.

180. While most experts stress the desirability of subjecting guerrillas as far as possible to the same obligations in regard to the respect for humanitarian conventions as those imposed on regular combatants, and some consider this condition as essential to ensure the protection of the guerrillas themselves, the opinion has been expressed that the restricted facilities of guerrilla movements and certain characteristics of guerrilla warfare may render it difficult to require from them full respect for all the laws and customs of war. As regards terrorism, which may be tentatively defined as the systematic use of violence to impress the population and create an atmosphere of insecurity for political aims, <sup>65/</sup> some of the ICRC experts felt that this was perhaps the only method of combat available to guerrillas at the beginning of their struggle and that an outright condemnation would lack realism. It is generally agreed, however, that indiscriminate acts of terrorism against the civilian population should not be condoned. It is further agreed that

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<sup>65/</sup> Paul Robert, Dictionnaire alphabétique et analogique de la langue française, Paris 1966.

all other forms of violence or ill-treatment against the civilian population should also be prohibited. As regards behaviour between combatants, which may include counter-guerrilla fighters, there appears to be no reason why guerrillas should not be fully required to respect the obligation to give quarter.

181. It has been pointed out that there may be a material impossibility for guerrilla movements, owing to their particular conditions of combat, to conform to all the provisions of Geneva Convention III on the Treatment of Prisoners of War. It should be stressed, however, that guerrillas should, and can, refrain from such practices as killing or torturing prisoners or from inflicting injuries affecting their health. When the guerrillas in international conflicts have no adequate facilities for holding prisoners (e.g. in regard to provision of food, lodging, medical supplies), they might hand over the prisoners to an allied or neutral State as authorized in Geneva Convention III. The guerrillas should and could afford full respect and freedom of action to medical and relief personnel. Appropriate provisions might be envisaged to the effect that the laws and customs of war should be fully applied save in exceptional and compelling circumstances due to lack of facilities or imperative military necessity; such circumstances might have to be notified to the parties to the conflict concerned, which may involve the International Committee of the Red Cross. However, it should be made clear that the humanitarian rules or principles referred to in this paragraph (protection of civilians, prohibition of certain weapons, the obligation to give quarter, respect for the life and physical integrity of prisoners of war, and respect for medical and relief personnel) may never be disregarded.

182. Guerrillas who do fulfil all the conditions mentioned earlier are at present protected under Geneva Conventions I, II and III. It is not the purpose of this chapter to review in detail the numerous elements of such protection. In particular, prisoners of war under Geneva Convention III enjoy many benefits. They may be prosecuted and even sentenced to death, particularly for war crimes, but not merely for having participated in the armed struggle. Convictions may be made only in accordance with the substantive and procedural guarantees set forth in articles 32-38, 99-103 and others of Geneva Convention III: non-retroactivity of penal law, identical penalties being applicable to the armed forces of the captor State, the principle non bis in idem, prohibition of improper means of interrogation, right to be informed of the law applicable and of the charges, right of defence, right of appeal etc.

## 2. Protection of guerrillas not regarded as privileged combatants in international conflicts

183. If guerrillas are found not to fulfil the conditions mentioned above, they may come, under certain conditions, within the purview of Geneva Convention IV on the Protection of Civilians in Time of War. In accordance with article 4, this Convention applies to all persons who find themselves "in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". The application to guerrillas of the provisions of Convention IV may, however, raise questions in relation to the distinction made in that Convention between "territory of a High Contracting Party", "occupied territory", etc.

134. Inasmuch as a guerrilla is covered by Geneva Convention IV, he benefits from the guarantees set forth in that instrument, notably to be treated with humanity, to enjoy respect for his person, honour, family rights etc., and to be given a fair trial (articles 5, third paragraph, and 27). Article 5, first and second paragraphs, however, allows certain derogations if the person concerned is suspected of carrying out activities prejudicial to the security of the State. Captured guerrillas would as a rule fall into that category. The death penalty may be imposed under Geneva Convention IV but only on certain grounds specified in article 63 (applicable in occupied territories) and only in accordance with certain guarantees (articles 64, 65, 68, 70-76). Since these grounds include intentional killing and sabotage, captured guerrillas may often incur a death sentence. A tentative suggestion made by experts of the International Committee of the Red Cross contemplated a provision under which captured guerrillas, not covered by Geneva Convention III, would not be sentenced to death merely for acts, such as killing the enemy in open fight, which may be reasonably expected of any combatant. Reference is made to similar suggestions contained in chapter VIII above on internal armed conflicts.

B. Implementation of the substantive rules concerning guerrillas in international conflicts

135. Reference is made to the suggestions in other chapters of this report concerning the need for strengthening the system of Protecting Powers and the establishment of an impartial international organ to verify the implementation of the rules, existing and contemplated, regarding the protection of combatants.

136. An effective and impartial implementation procedure is particularly needed as regards guerrillas, in view of the not infrequent tendency to deny these persons the status of privileged combatants on technical grounds and also in view of the apparent reluctance of some guerrilla movements to apply the laws and customs of war. Such implementation procedures would need to be defined in some detail, and possibly additional investigative authority should be given to Protecting Powers or to the organization concerned, since the ascertainment of facts and their qualification require close examination of many intricate circumstances. Many, if not most, cases involving guerrillas appear to be "borderline cases" under the Geneva Conventions. For instance, in order to express a considered opinion as to whether a guerrilla has fought openly with the necessary identification, or whether guerrilla movements have the facilities necessary to respect certain laws and customs of war, observers would need to obtain all available evidence, to interrogate prisoners and witnesses and to visit guerrillas in the field without hindrance. The suggestion of an expert, concerning the issuance of identity cards by the Government concerned would greatly facilitate the task of implementation, and a recommendation to that effect may be addressed to all States Parties to the Conventions. However, it may not appear likely that Governments would always be willing to reveal their involvement in that manner. The solution, should the States Parties be willing to accept it, would seem to be rather in the direction of granting larger and more specific investigative powers to the implementation body.

C. Guerrilla warfare in internal conflicts

137. It is recalled that this matter is presently covered by article 3, common to all Geneva Conventions, which has been dealt with in the chapter on internal armed conflicts.

188. Article 3, it has been noted, is broader than article 4 of Geneva Convention III in that the former does not make protection of combatants, including guerrillas, dependant upon fulfilment of the detailed conditions set forth in the latter provision.

189. On the other hand, the definitions contained in article 3 are imprecise, and it is evident that the guarantees afforded in its provisions are minimal. In particular, they would permit that a guerrilla captured in internal conflicts be sentenced to death for having espoused the causes of one of the parties to the conflict. This is in sharp contrast with the protection guaranteed to prisoners of war in international conflicts, as described earlier in this report.

190. Should more effective and impartial procedures be established for determining whether a situation is an "armed conflict" to which article 3 is applicable, it might be further contemplated that the authority concerned be also allowed to advise or determine whether guerrilla fighters, in given situations, should be covered under article 3.

#### D. Summary of suggestions and concluding observations

191. It may be useful to summarize here the main areas in which humanitarian rules applicable to guerrillas might be further studied with a view to their possible amendment or elucidation:

(a) That article 23 of the Hague Regulations be so construed or amended as to prohibit the killing or harming of all persons who participate actively in international conflicts, at the time of surrender or capture (see paragraphs 160-173 above, see also chapter V on the protection of combatants, paragraph 111);

(b) That the definition of privileged combatants in international conflicts, set forth in article 13 of Geneva Conventions I and II be construed or amended as follows:

- (i) A sufficient degree of relationship between the combatants including guerrillas, and a Government Party to the Convention would be established if the combatants, by their actions and public pronouncements, consistently support that Government and there is sufficiently convincing evidence that such Government supplies the combatants regularly with arms, ammunitions or logistical equipment (see paragraph 175 above);
- (ii) The High Command of the movement should be capable of ensuring generally the execution of its orders, including, as far as possible, respect for the laws and customs of war (see paragraph 176 above);
- (iii) A fixed distinctive sign recognizable at a distance should be worn, at least in all circumstances where concealment would directly jeopardize the lives or liberty of civilians (see paragraph 177 above);

(iv) Irregular combatants, including guerrillas, should carry arms in a way similar to that used by members of the regular armed forces, when they are engaged in operations which can reasonably be expected to require the use of weapons (see paragraph 178 above);

(v) The militias, corps or movements participating in the conflict should fully respect the laws and customs of war, save in exceptional and compelling circumstances due to lack of facilities or imperative military necessity, to be notified to all parties concerned; it being specified that the existing (and proposed) rules concerning the protection of civilians, the prohibition of the use of needlessly cruel or destructive weapons, the obligation to give quarter, respect for the lives and physical integrity of prisoners of war and respect for medical and relief personnel, should never be disregarded (see paragraph 180 above);

(c) That with a view to further protection of captured combatants, including guerrillas, who are not regarded as privileged combatants:

(i) A study should be made of the advisability and feasibility of applying Geneva Convention IV to such combatants wherever they are captured and held (see paragraph 183 above);

(ii) Consideration may be given to a provision under which such persons would not be sentenced to death merely for acts, such as killing their enemy in open fight, which may be reasonably expected of combatants and which are committed in accordance with the laws and customs of war (see paragraph 184 above);

(d) A study might be made of the possibilities of utilizing to a greater extent the system of Protecting Powers or that of substitute international organizations, giving all guarantees of impartiality to verify the implementation of the existing and suggested rules; possibly additional investigative facilities might be given to such Powers or organizations to enable them to perform their functions as regards the rights and obligations of guerrillas (see paragraph 186 above);

(e) As regards guerrilla warfare in internal armed conflicts, the suggestions in chapter VIII above relating to such conflicts may be considered, in particular those proposing the establishment of an objective procedure for determining the existence of an internal "armed conflict", of concern to the international community, a more extensive definition of "persons who do not participate actively in the hostilities", and the gradual elimination of capital punishment inflicted on combatants on the ground of having espoused the cause of either party to the conflict;

(f) In considering these and other specific suggestions for improving the protection of bona fide combatants, attention should be paid to the advisability of reducing or eliminating several apparent discrepancies between various relevant provisions (article 13 of Geneva Conventions I and II, article 4 of Geneva Convention III, Geneva Convention IV, and common article 3).



192. The procedures for giving effect to such suggestions may be of various kinds, according to whether the suggestions concern the clarification of the intended meaning of existing rules, or the development of the said rules beyond their actual wording or beyond the interpretation generally applied at present. In the first category, one might include, for instance, the suggested re-formulation concerning the ability of the commander to ensure the execution of his orders (see paragraph 191 (b) (ii) above). In such instances, acceptance might be given by the States Parties to recommendations adopted by a competent organization or conference of the States Parties themselves, the General Assembly or the International Conference of the Red Cross.

193. Suggestions of the latter category, i.e. which aim at developing or amending the existing rules, should preferably be formulated in protocols to the relevant conventions, adopted by a conference of the States Parties after preparation by competent bodies, including, where necessary, experts bodies, of the United Nations or the Red Cross. Following upon the suggestion made in paragraph 191 (f) above, the Conference of the States Parties might consider the advisability and feasibility of adopting a new, separate Convention (concerning, at least, international conflicts) re-grouping all the dispersed provisions concerning combatants with a view to ensuring them adequate protection in all circumstances.

194. The suggestions contained in the present chapter have been formulated on the basis of numerous studies made up to now by various bodies and views of experts. Many of these suggestions should be considered as being of a tentative character, in view of the fact that such experts' studies have led so far to only few definite conclusions. As noted in the introductory remarks in this chapter, the International Committee of the Red Cross intends to pursue its consultations and to submit its own proposals to a Committee of Governmental Experts in 1971. Taking this fact into account, the General Assembly might wish to postpone its detailed consideration of the delicate and intricate problem of guerrilla warfare until the Secretary-General reports on the latest developments, after consultation with the Red Cross Committee, in 1971.

X. PROTECTION OF CIVILIANS AND COMBATANTS IN CONFLICTS WHICH ARISE FROM THE STRUGGLES OF PEOPLES UNDER COLONIAL AND FOREIGN RULE FOR LIBERATION AND SELF-DETERMINATION

A. Resolutions of the General Assembly and of certain other United Nations organs referring to international conventions on armed conflicts in relation to civilians and combatants involved in struggles for liberation and self-determination

195. In operative paragraph 1 of resolution 2597 (XXIV), the General Assembly requested the Secretary-General, in continuing the study initiated under resolution 2444 (XXIII) to give "special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts".

196. Other Chapters of this report, in examining existing legal systems of protection of civilians and combatants in armed conflicts and possible measures for their future extension in order to ensure the better protection of persons involved in armed conflicts, are relevant to the examination of the problem to which the General Assembly drew special attention. The present Chapter, while trying to avoid repetition, endeavours to analyse the issues involved in greater detail, with a view to facilitating the action which the General Assembly may wish to take on this problem.

197. In the preliminary report of the Secretary-General attention was drawn in paragraph 164 to various pertinent resolutions adopted by the General Assembly at its twenty-third session, which followed the 1968 International Conference on Human Rights in Teheran. It referred specifically to resolution 2446 (XXIII) on "Measures to achieve the rapid and total elimination of all forms of racial discrimination in general and the policy of apartheid in particular", in which the General Assembly confirmed the views of the Teheran Conference, which recognized and vigorously supported the legitimacy of the struggle of peoples and patriotic liberation movements in Southern Africa and in colonial territories, in accordance with the relevant United Nations resolutions. The General Assembly also confirmed the decisions taken by the Conference to recognize the right of freedom fighters in southern Africa and in colonial territories to be treated when captured as prisoners of war under the Geneva Conventions of 1949.

198. The preliminary report also made reference to resolution 2383 (XXIII) of the General Assembly on the question of Southern Rhodesia in which the General Assembly, inter alia, "calls upon the United Kingdom, in view of the armed conflict prevailing in the Territory and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949"; to resolution 2395 (XXIII) on the question of

Territories under Portuguese administration in which the General Assembly inter alia "calls upon the Government of Portugal, in view of the armed conflict prevailing in the Territories and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949"; to resolution 2396 (XXIII) on the policies of apartheid of the Government of South Africa in which the Assembly, inter alia, "expresses its grave concern over the ruthless persecution of opponents of apartheid under arbitrary laws and the treatment of freedom fighters who are taken prisoner during the legitimate struggle for liberation, and condemns the Government of South Africa for its cruel, inhuman and degrading treatment of political prisoners; calls once again for the release of all persons imprisoned or restricted for their opposition to apartheid and appeals to all Governments, organizations and individuals to intensify their efforts in order to induce the Government of South Africa to release all such persons and to stop the persecution and ill-treatment of opponents of apartheid; and declares that such freedom fighters should be treated as prisoners of war under international law, particularly the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949".

199. At its twenty-fourth session, on the recommendation of the Special Political Committee, the General Assembly adopted resolution 2506 (XXIV) which inter alia "condemns the Government of South Africa for its refusal to comply with the resolutions of the General Assembly and the Security Council calling for an end to the oppression and persecution of all persons opposing the policies of apartheid", and "reiterates that freedom fighters who are taken prisoner in the course of their legitimate struggle for liberation should be extended humane treatment in accordance with the humanitarian principles laid down in the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949".

200. In resolution 2547 (XXIV) on Measures for effectively combating racial discrimination and the policies of apartheid and segregation in southern Africa the Assembly inter alia "further condemns the Government of Portugal for its inhuman and degrading treatment and torture of the political prisoners, detainees and captured freedom fighters in Angola, Mozambique, Guinea (Bissau) and Sao Tomé; calls upon the Government of the United Kingdom of Great Britain and Northern Ireland, the administering Power, to reconsider its deplorable refusal to intervene in Southern Rhodesia by force and restore the human rights and fundamental freedoms of the people of Zimbabwe and in this manner, inter alia, automatically ameliorate the conditions of political prisoners, detainees and captured freedom fighters in Southern Rhodesia, as well as to ensure the application of the relevant Geneva Conventions of 1949 to the situation prevailing in Southern Rhodesia; calls upon the Government of South Africa to observe the terms of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; further calls upon the Government of Portugal to observe the terms of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the Geneva Convention relative to the Treatment of Prisoners of War, both dated 12 August 1949; and urges immediate action by the United Nations Council for Namibia to bring about the application of the Standard Minimum Rules for the Treatment of Prisoners, of 30 August 1955, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the Geneva Convention relative to the Treatment of Prisoners of War, both dated 12 August 1949, in Namibia, a Territory under its direct responsibility".

201. In resolution 2508 (XXIV) on the question of Southern Rhodesia, the General Assembly inter alia "calls upon the Government of the United Kingdom, in view of the armed conflict in the Territory and the inhuman treatment of prisoners, to ensure the application to that situation of the Geneva Convention relative to the Treatment of Prisoners of War and of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, both dated 12 August 1949".

202. Resolution 237 (1967) of the Security Council relating to the area of conflict in the Middle East may also be recalled. The Council, considering the urgent need to spare the civil populations and the prisoners of the war in the area of conflict in the Middle East additional sufferings, considering that essential and inalienable human rights should be respected even during the vicissitudes of war; considering that all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 should be complied with by the parties involved in the conflict, called upon the Government of Israel to ensure the safety, welfare and security of the inhabitants of the areas where military operations have taken place and to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities. It recommended to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949 and requested the Secretary-General to follow the effective implementation of this resolution and to report to the Security Council.

203. References to the Geneva Conventions of 1949 in relation to territories occupied by Israel as a result of hostilities in the Middle East were also made in resolutions adopted by the International Conference on Human Rights in Teheran and by various United Nations organs. In resolution 2443 (XXIII) in particular, the General Assembly referred to the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and, having noted various provisions of resolution I on respect for and implementation of human rights in occupied territories, adopted by the International Conference on Human Rights on 7 May 1968, established a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories. In resolution 2546 (XXIV), the General Assembly referred once more to the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as well as to the provisions of the Universal Declaration of Human Rights and, inter alia, urgently called upon "the Government of Israel to desist forthwith from its reported repressive practices and policies towards the civilian population in the occupied territories and to comply with its obligations under the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the Universal Declaration of Human Rights and the relevant resolutions adopted by the various international organizations". In its resolution 6 (XXV), the Commission on Human Rights established a Special Working Group of Experts to investigate "allegations concerning Israel's violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War" in occupied territories. Having received the report of that Working Group, 66/ the Commission on Human Rights, by resolution 10 (XXVI), inter alia, "condemned Israel's refusal to apply

66/ E/CN.4/1016 and Add.1-5.

that Convention and its violations of the provisions of that Convention" and specified several kinds of such violations. On the request of the Commission the report of the Working Group and resolution 10 (XXVI) have been brought to the attention of the General Assembly, 67/ the Security Council and the Economic and Social Council.

B. Some issues relating to the applicability of the existing rules of international law

204. The above-mentioned pronouncements undoubtedly indicate the wish of the General Assembly that practical means should be found to afford greater protection than at present - possibly by the extension of the applicable humanitarian rules - to combatants as well as civilians involved in struggles of peoples under colonial and foreign rule for liberation and self-determination. The request that the Secretary-General pay special attention to this problem within the framework of this report confirms this view. For the purpose of this study, it may be useful to review the existing legal situation and add certain observations to those made previously in this report.

1. Legal qualification of the conflict

205. The existing rules of international law concerning armed conflicts have been reviewed in the previous report by the Secretary-General (A/7720) as well as in the preceding chapters of this report. It is recalled that the conventions in force (mainly the Hague Regulations of 1907, the Geneva Protocol of 1925 and the four Geneva Conventions of 1949) lay down two different sets of rules: specific rules applicable to international armed conflicts on the one hand, and only limited principles of a general character for armed conflicts which are not of an international character, on the other hand.

206. The basic condition common to both sets of rules is that there should be a situation of "armed conflict". These terms are not defined in the relevant conventions, and, as was pointed out in the chapter VIII on internal armed conflicts, the establishment of general criteria for determining what is an "armed conflict" to which international humanitarian norms are applicable, has not proved to be easy. Some experts, it may be recalled, went as far as to suggest that this term could be construed as meaning all hostilities (that is, violent behaviour) carried out with weapons and involving a certain number of combatants assembled for a common purpose (collective character) with a minimum or organization. The suggested attempts at defining armed conflicts for the purpose of the application of the international humanitarian instruments tended, however, in most cases, to exclude situations of "internal disturbance" or

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67/ Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816), chapter XXIII, resolution 10 (XXVI).

"internal tensions". Yet, struggles for self-determination or for liberation from colonial or foreign rule have in a number of instances been described, at least in their initial stages, as such situations. The practical importance of the distinction may diminish when general human rights norms especially those of the International Covenants, are fully in force. However, in present circumstances, the determination of what constitutes an "armed conflict" governed by international humanitarian norms has a considerable impact on the subject under consideration.

207. It may nevertheless be said that a large number of situations involving struggles for self-determination and liberation from colonial and foreign rule may come, at least, within the purview of article 3 of all Geneva Conventions concerning "conflicts which are not of an international character". One of the main problems, as indicated previously in the report may be to devise impartial procedures which may help in determining with a sufficient degree of objectivity whether such situations constitute armed conflicts to which article 3 should apply. Even if such determination is made with reference to specific conflicts, it may be noted that the protection afforded by article 3 does not fulfil the wishes frequently expressed by the General Assembly that special consideration be given to freedom fighters, in particular that capital punishment should not be applied if they fight in conformity with the laws and customs of war, and that treatment as prisoners of war should be extended to them in other respects.

208. International armed conflicts are referred to in article 2, common to all Geneva Conventions as all cases of armed conflicts "which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". The Conventions also apply to all cases of occupation of the territory of a High Contracting Party even if the said occupation meets with no armed resistance. In other words, two or more States (entities recognized as subjects of classical international law) Parties to the Conventions should in fact be actively involved in the hostilities. This condition may possibly be regarded as fulfilled in some struggles for liberation from colonial or foreign rule, where it can be ascertained that the freedom fighters are, on a permanent basis, under the authority of, or militarily supported by, a State Party to the Conventions. This is not the case, however, as regards many - perhaps most - of the liberation movements. In the latter cases, it may be contended that such movements aspire at becoming States, that the conflict may be potentially an international one, but that the conditions laid down in article 2 of the Geneva Conventions are not, strictly speaking, fulfilled.

209. The conflict may gradually come to be regarded as an international one when the liberation movement is formally recognized as belligerent by States. As a rule, such recognition would be granted only if the liberation movement shows that it exercises effective authority over a certain part of the territory involved in the conflict. Some experts have pointed out that, in modern struggles for self-determination and liberation from colonial and foreign rule, characterized by guerrilla warfare, this condition is not easily fulfilled. They have suggested rather a criterion of effective control and allegiance of populations. Even if this more flexible criterion were accepted, its application would probably give rise to much controversy. It may be added that deducing the international character of a conflict primarily from recognition of the liberation movement as a belligerent has the disadvantage of relying decisively upon the discretion of third parties.

210. Some experts of the International Committee of the Red Cross, as well as some experts directly consulted by the Secretary-General, have suggested that the international character of armed struggle for self-determination and liberation from colonial and foreign rule may be ascertained from a series of basic instruments and pronouncements of the United Nations concerning self-determination of peoples. They point out in particular that the concept of self-determination of peoples is enshrined in article 1 and other provisions of the United Nations Charter and considered as "a right" in the International Covenants on Human Rights. The Declaration on the Granting of Independence to Colonial Countries and Peoples proclaimed by the General Assembly in resolution 1514 (XV) provides, inter alia, that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation; that all peoples have the right to self-determination; and that all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely the right to complete independence, and that the integrity of their national territory shall be respected. These experts further refer to other resolutions of the General Assembly such as resolution 2465 (XXIII) mentioned earlier, which reaffirm the legitimacy of the struggle of the colonial peoples to exercise their right to self-determination and independence, and urge all States in particular to give the necessary moral, political and material support to the peoples of those territories in their legitimate struggle to achieve freedom and independence. Some experts have also referred to the draft Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, <sup>68/</sup> prepared by a Committee representative of the membership of the United Nations and which will be submitted to the General Assembly at its twenty-fifth session and which states, inter alia, that "every State has the duty to refrain from any forcible action which deprived peoples ... of their right to self-determination and freedom and independence" and that "in their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations".

211. It may also be recalled that some resolutions of United Nations organs on specific situations, concerning in particular southern Africa, condemn certain States for giving military assistance to colonial or racist regimes. <sup>69/</sup> According to the suggestions of certain experts, such factors may also render a conflict international in character.

212. Whether or not, as various experts tentatively suggest, the above-mentioned pronouncements of the General Assembly and other United Nations organs are sufficient to render conflicts "international" (that is, inter-State) in the sense of the Geneva Conventions, or whether they merely stress a strong concern

<sup>68/</sup> A/AC.125/DC.31.

<sup>69/</sup> See, for instance, General Assembly resolution 2507 (XXIV), para. 7, and General Assembly resolution 2508 (XXIV), para. 4.

of the international community for adequate measures of protection for combatants and civilians involved in such conflicts is a basic and difficult question which the General Assembly itself and the States Parties to the Conventions might wish to consider.

## 2. Conditions for privileged belligerency

213. It should be recalled that, in order to benefit from the protection granted to so-called privileged combatants in international conflicts, freedom-fighters have at present to fulfil the conditions laid down in article 1 of the Hague Regulations, article 13 of Geneva Conventions I and II, and article 4 of Geneva Convention III. As was noted earlier, these conditions are still geared to the military assumptions of traditional warfare. They may not easily be fulfilled by most freedom-fighters who, in view of the great disparity in strength between the colonial armies and the liberation movements, have to resort to guerilla methods. Reference is made to chapter IX above on guerilla warfare, where this problem is dealt with in greater detail and certain suggestions for elaboration for amendments of the rules are made. The observations made in these parts of the report apply to those guerillas who fight for self-determination or liberation from colonial and foreign rule, inasmuch as the conflict may be regarded as international.

214. According to some experts, the applicability of certain conditions for privileged belligerency to freedom-fighters may involve issues peculiar to this category of combatants. These experts felt, in particular, that the question of ascertaining the relationship between these fighters and a Party to the conflict might be solved if it were accepted that the Declaration of the Granting of Independence to Colonial Countries and Peoples and the proposed Declaration on Friendly Relations implicitly recognized a distinct international personality to liberation movements.

215. It has been noted by some experts that, in accordance with article 2, third paragraph, common to all Geneva Conventions, in case of armed conflict between two "Powers", one of which is a Party and another which is not a Party to the Conventions, these instruments would apply if the non-Party declared unilaterally its willingness to abide by them. This clause would permit the application of the Geneva Conventions in any conflict involving a fight for self-determination, provided the word "Power" were interpreted as including liberation movements. These experts recognize however that it is not usually interpreted in that manner in practice. It may be recalled in this respect that, in 1961, the Provisional Government of the Algerian Republic sent to the depository Government (the Swiss Federal Government) its instruments of accession to the Geneva Conventions; the Swiss Federal Government circulated the instruments to other Parties in its capacity as depository, but as itself a Party to the Conventions objected to the accession of Algeria at that stage, that is, before attaining independence.



3. Applicability of Geneva Convention IV and other relevant humanitarian instruments to freedom-fighters not regarded as civilians and privileged combatants

216. Geneva Convention IV is applicable to all persons, not protected under Geneva Conventions I, II or III, who have fallen into the power of a State Party of which they are not nationals. This provision would cover, under certain conditions, civilians as well as combatants, including freedom-fighters, not considered as privileged belligerents.

217. It may be said that in wars of liberation, more than in other situations, the civilian populations tend to suffer great hardships and are therefore in need of a special degree of humanitarian protection. In view of the disparity of strength between the freedom-fighters and the armies which oppose them, the former have often no alternative but to pursue their activities in hiding, in close contact with the civilian population which is in sympathy with their purposes. The colonial or foreign ruler may counter these tactics by treating civilians in general as potential enemies or by trying to cut off freedom-fighters from the civilian population. In either case, great sufferings may be experienced by civilians and cases of mass arrests, taking of hostages, torture, internment, summary executions, mass reprisals such as destruction of houses and villages, or forcible transfers into concentration camps have been reported.

218. As stated earlier, however, Geneva Convention IV, the main international instrument covering these matters, suffers from certain basic deficiencies. The first is that it covers the civilian populations only when they fall into the power of the enemy while the greatest dangers to which civilian populations may be exposed arise from attacks by the enemy in areas not under its control. This latter situation is still only governed by the Hague Regulations, which may be considered in this respect as largely out of date, especially as regards indiscriminate attacks against civilians, by bombing or otherwise, which sometimes constitute one of the main types of action resorted to by a Government to oppose freedom movements.

219. The other deficiencies of Geneva Convention IV derive from its two requirements concerning nationality and the occupation of the territory by the enemy State (see especially articles 5, 35-46, and 47-48) which most of the time cannot be fulfilled in the context of liberation wars.

C. Rights and obligations of combatants and civilians in conflicts arising from the struggles for self-determination and liberation from colonial or foreign rule, under existing humanitarian rules

220. The United Nations declarations and resolutions mentioned in section A above proclaim or recommend that many rights be granted to combatants and civilians in such conflicts, including, expressly or by implication, immunity from prosecution, imprisonment or capital punishment for participation in the conflict, in accordance with the laws and customs of war, the enjoyment in other instances by captured freedom-fighters of treatment as prisoners of war, and the enjoyment by civilians of the various guarantees set forth in Geneva Convention IV and other relevant instruments.

221. In fact, as noted with regret by the above-mentioned resolutions, and as pointed out by various United Nations organs of investigation, 70/ these rights or beneficial treatments are frequently not granted. Freedom-fighters are punished, often sentenced to death, for their participation, direct or indirect, in the conflict if they are not shot, sometimes after cruel treatment has been meted out to them immediately after their apprehension. Civilians suffer from indiscriminate attacks, mass reprisals or collective punishment, and from the use of needlessly cruel or destructive weapons; and they are detained or deported on slight suspicion of supporting the freedom movement or simply as a strategic measure to cut them off from combatants.

222. The reasons invoked for not granting in such conflicts the rights or beneficial treatment mentioned above are, partly, that the conditions for regarding the conflict as international or for recognizing the status of privileged belligerency (see sections B(1) and (2) above) are not deemed to be fulfilled. As was pointed out earlier in the Chapter IX on guerrilla warfare, freedom fighters who are not regarded as privileged combatants may come within the purview of Geneva Convention IV on civilians (provided the conflict is international, and keeping in mind the qualifications mentioned in paragraph 183 above), but their rights under that Convention are far less extensive than under Geneva Convention III on Prisoners of War. In particular, such combatants may be deprived of many rights in the interests of State security (article 5) and they may be sentenced to death for acts such as deliberate killing, which may have been performed in open fight.

223. Some struggles for self-determination or liberation from colonial or foreign rule may be considered by the Government concerned as internal armed conflicts within the meaning of article 3 common to all Geneva Conventions. As was noted in chapter VIII above, the rights granted under this article to persons who do not participate actively in the conflict do not expressly include many rights provided for in the provisions concerning international conflicts such as: the right for captured combatants to be treated as prisoners of war; the obligation to give quarter to surrendering enemies; the right not to be subjected to needlessly cruel or destructive means of warfare; 71/ the right for the civilian population to receive foodstuffs and supplies in spite of blockades; and the protection for medical and relief personnel.

D. Suggestions as to methods for improving the conditions of persons involved in struggles for self-determination and liberation from colonial or foreign rule

224. The above observations indicate some of the complex issues which arise out of the application of existing international Conventions to persons who in present-day conditions are involved as combatants or civilians in struggles for

70/ See in particular E/CN.4/950, E/CN.4/984 and Add.1-19, E/CN.4/1016 and Add.1-5, E/CN.4/1020 and Add.1-3.

71/ This right might be, however, considered as deriving implicitly from the prohibition of cruel or inhuman treatment, in article 3.

liberation and self-determination of peoples under colonial or foreign rule. There are no texts specifically applicable to such categories of persons; interpretations are possible which may exclude these persons in many cases from the applicability of existing provisions, while it is apparent that the conditions in which the struggles are conducted have caused, and are causing, a considerable degree of suffering, both among civilians and combatants deserving the full concern of the international community.

225. The General Assembly is on record as wishing to extend as rapidly as possible to civilians and combatants involved in the struggles mentioned above the maximum degree of humanitarian treatment, inspired as it undoubtedly is, in particular, by the fact that these struggles are in pursuance of the fulfilment of one of the Charter's purposes: that of achieving the self-determination of peoples.

226. Under these circumstances, the conclusion would appear to be that if additional action to that already taken by the General Assembly in the resolutions mentioned at the beginning of this chapter is considered to be appropriate, special provisions should be formulated and adopted, in addition to provisions of a general character which would be specifically applicable to combatants and civilians involved in the conflicts under consideration, and relating to such matters as internal or international conflicts or guerilla warfare. The adoption of a Protocol to the existing Conventions or a new separate Convention, if such a Protocol or Convention received the ratification of the States most directly concerned, would give, to the provisions so adopted, the greatest legal force. As it has been observed, some of the Governments most immediately involved may not be willing to ratify such an international instrument for fear in particular of curtailing their freedom of action in defence of what they would consider "State security".

227. The alternative procedure which the General Assembly may therefore wish to consider is that of formulating, at least as a further step to resolutions already adopted, a new resolution which would express its interest and concern for the treatment to be received by the persons involved and define with some degree of precision to state authorities, liberation movements and individual combatants, the minimum standards of respect for human rights to be complied with in times of armed conflicts constituting struggles for liberation and self-determination.

228. In connexion with such a resolution, the question may arise whether it should contain a definition of what constitutes a "conflict arising out of the struggles for self-determination and liberation from colonial or foreign rule". The elaboration of such a definition might be envisaged on the basis of the existing United Nations body of declarations, resolutions and reports by specialized organs, including the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. This might prove, however, a difficult and lengthy undertaking. The Assembly might wish, therefore, alternatively to renounce or postpone the attempt at formulating a general definition and decide instead to proceed pragmatically by referring in general terms to the situations as described in paragraph 1 of resolution 2597 (XXIV). The adoption of a "general resolution" on the conflicts as described would not preclude, of course, the adoption of subsequent resolutions by which the General Assembly would indicate that the norms contained in the general resolution would in its view be applicable to certain specific cases.

229. Several experts suggested that the General Assembly might declare or recommend that Member Governments and liberation movements should pledge to apply to wars of national liberation which are not at present clearly recognized as "international conflicts" the essential rules (which might be extended along the lines suggested earlier in this report) now applicable to international conflicts. Such a declaration or recommendation would be made without distinction based on the legal qualification of the conflicts (whether internal or international) and without any implication or effect as to the legal status of the parties to the conflicts. The declaration or recommendation might be based on the principles already enunciated in resolutions 2444 (XXIII) and 2597 (XXIV), that the human rights of all persons should be fully protected in "all armed conflicts", and on the further consideration that the struggles under discussion are eminently in harmony with one of the purposes of the United Nations, i.e. the achievement of self-determination of peoples.

230. Another question which might have to be considered is whether the resolution of the General Assembly should contain provisions concerning the definition or description of the persons to be protected. The term "combatant", or "civilian", may be considered to be sufficiently precise for the purpose of a resolution. On the other hand, greater precision may be conducive to ensuring a firmer basis for protection, in particular by providing a clearer distinction between combatants and civilians. Consideration might therefore be given, on the lines mentioned in chapter IX on guerrilla warfare, to specifying that combatants would be protected if:

(a) They belong to or participate in the conflict upon instructions from regular armed forces, militia, volunteer corps or organized movements involved in struggles of peoples against colonial or foreign rule;

(b) They wear a distinctive sign recognizable at a distance, at least in all situations where concealment would directly jeopardize the lives or liberty of civilians;

(c) They carry arms in situations where the use of weapons is reasonably expected (i.e. in actual combat and in actions immediately preparatory to actual combat), in a manner similar to that used by members of the regular armed forces;

(d) Their command is capable of generally ensuring the execution of its orders, including those relating to respect for the laws and customs of war in accordance with the condition which follows:

(i) The armed force command, corps or movement, as a whole, respects the rules defined in the resolution, save in exceptional and compelling circumstances, to be notified to all concerned, which are due to lack of facilities or imperative military necessity, it being specified that relevant rules mentioned in the chapter IX on guerrilla warfare, including the prohibition to kill or harm prisoners (except as regards executions, after due process, for war crimes), may never be disregarded.

231. Such criteria as listed above, which may be necessary to distinguish combatants from civilians and thus to ensure a better respect for the laws and customs

of war, would appear to take adequately into account the particular conditions of combat of freedom fighters. The existing condition of "belonging to a Party to the Conflict" might be retained if it is understood, however, that the word "Party" would not refer exclusively to States. Indeed, as was mentioned earlier, in wars of liberation the link between the freedom movement and States either does not exist or is often difficult to ascertain. The word "Party" should be understood to mean, inter alia, the freedom movement itself.

232. The rights of combatants in conflicts for liberation and self-determination which may be listed in the resolution or dealt with by reference to existing conventions would include, in an appropriate formulation, that of not being killed or harmed treacherously during combat and to be given quarter upon surrender or capture (the Hague rules), that of being adequately cared for if wounded or sick (the essential rules of Geneva Conventions I and II), and that of receiving, if captured, the treatment granted to prisoners of war under Geneva Convention III. The latter right would include that of not being punished and, in particular, not being sentenced to death solely on the grounds of participating in the conflict.

233. As regards the combatants in struggles against colonial or foreign rule who may not have complied, deliberately, with the conditions set forth in paragraph 230 above, the General Assembly may wish to provide that they should benefit in any event of the respect for the norms of United Nations instruments on human rights or at least of the rights now enumerated in article 3, common to all Geneva Conventions. The problem of ensuring adequate punishment for war crimes should however not be disregarded.

234. As regards provisions which may be included in a General Assembly resolution respecting the protection of civilians involved in conflicts arising from struggles against colonial or foreign rule, a definition of civilians for the purpose of determining the extent of protection may be needed. As noted earlier in this report, it is a frequent characteristic of such struggles that the freedom movement emanates from the masses and relies heavily on support by civilians. Hence the reported tendency of the colonial or foreign ruler to treat many civilians as potential enemies. On the lines of the observations contained in the chapter IX above on guerrilla warfare the suggestion may be examined that "civilians" should include all persons who do not use weapons on behalf of either party to the conflict, as well as all persons who do not support any of the parties by deliberate actions such as sabotage, spying or recruiting activities, or by making propaganda upon instruction of or in liaison with either party to the conflict, the main element being to stress the intentional and deliberate character of the actions characterizing "participation in the conflict", and to protect as civilians, in particular, those who may only have family or social links with freedom-fighters and those who spontaneously express opinions (as distinct from directed propaganda and from public and specific incitement to violence) favourable to one party to the conflict. A definition of protected civilians should not contain any of the limitations concerning nationality and geographical situation which restrict the scope of Geneva Convention IV and which make that instrument often inapplicable to struggles for national liberation.

235. Civilians, as understood above, who may be involved in struggles against colonial or foreign rule, regardless of the legal qualification of the conflict as internal or international, should be granted the rights referred to in the

United Nations instruments on human rights and the essential rights recognized in the Hague Regulations and in Geneva Convention IV, including the right to be treated in all circumstances with humanity, the right to be protected from torture and ill-treatment, the right to be protected against collective punishment, reprisals, pillage; the right not to be taken as hostages; the right to a fair trial and the prohibition of the retroactive application of penal law; and the right to fair and human treatment during internment. The acts prohibited under article 3 of the Geneva Conventions should be fully taken into account in any listing of rights of civilians involved in struggles for liberation and self-determination which may be elaborated by the General Assembly. Civilians - as well as combatants - should be fully protected against the use of needlessly cruel or destructive weapons; in particular, indiscriminate bombing or other attacks, including terroristic practices, affecting civilians, should be prohibited.

236. In its resolution, the General Assembly may, further, attempt to formulate certain recommendations concerning the assistance which third parties may be requested to give to freedom-fighters who have fled into the territories of other States for fear of persecution by the colonial or foreign ruler, and to their families. This would be consonant with previous General Assembly pronouncements inviting Member States to support the freedom-fighters.

237. The General Assembly resolution may further specify that all parties concerned should give all possible facilities to the International Committee of the Red Cross and other international humanitarian organizations in the performance, in wars of liberation, of the humanitarian tasks referred to in the Geneva Conventions or otherwise called for on human grounds.

XI. INTERNATIONAL ASSISTANCE IN, AND SUPERVISION OF, THE APPLICATION  
OF HUMANITARIAN RULES RELATING TO ARMED CONFLICTS

238. Paragraphs 202-227 of the preliminary report were devoted to the subject of the role of organs of the international community in the task of ensuring compliance with international instruments relating to armed conflicts. After stating that, as in other fields of international law, the proper application of international agreements concerning the protection of human rights in armed conflicts depended to a large extent on the goodwill and good faith of the parties (paragraph 202), the preliminary report reviewed certain factors, such as reciprocity, fear of reprisals and possible sanctions, which may influence the observance of internationally agreed rules in the psychological atmosphere and the stresses resulting from war or armed hostilities. The preliminary report further suggested that it would appear that the role of the international community should be directed principally towards finding means of prevailing on parties to armed conflicts to observe internationally agreed standards and of providing assistance to the parties in so doing (paragraph 203).

239. The characteristics of the institution of the protecting Powers, the traditional method of introducing a degree of international protection as regards the application of international agreements in times of war, was briefly analysed in the preliminary report. In touching upon that institution, the preliminary report alluded to its historical origins, the functions assigned to it within the framework of the 1829 and 1949 Geneva Conventions, and its shortcomings which were confirmed by the experiences gathered during the Second World War and subsequent armed conflicts.

240. The preliminary report formulated some ideas which might contribute towards improving the functioning of that institution (paragraphs 216-220). For instance, it was suggested that, instead of having as their duty merely to safeguard the interests of the parties to the conflict, more modern concepts would probably require that Protecting Powers, or any organization which might act as a substitute for them, should be considered not only as agents or representatives of the respective belligerents, but also as the agents of the international community which would express through them in a concrete manner its concern for the respect for certain basic human rights. Other considerations were also put forward regarding ways by which the effectiveness of the institution might be conceivably enhanced.

241. The preliminary report dwelt on the question of providing for alternatives or substitutes for the Protecting Powers. In this connexion, reference was made to common article 10 of the Geneva Conventions (article 11 in Convention IV), by virtue of which the duties incumbent upon the Protecting Powers may, or, subject to certain requirements set out in the article, must be entrusted to an organization which offers all guarantees of impartiality and efficacy. In other words, a substitute for the Protecting Power may be opted for by the parties, and in certain cases, such a substitute is mandatory. Reference was also made in the preliminary report to the provision of paragraph 3 of common article 10 (article 11 in Convention IV) whereby, if

protection through the appointment of a substitute cannot be arranged, the Detaining Powers shall request or shall accept, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by the Protecting Power under the Convention concerned. Thus, as was noted in paragraph 212 of the preliminary report, the system of the Geneva Conventions may be summed up by stating that, while the primary responsibility for the application of the Conventions rests with the parties themselves, a Protecting Power or a substitute organization should be available to co-operate with the parties and to supervise the application of the Conventions; should this latter not prove possible, a humanitarian organization, such as the International Committee of the Red Cross, should be enabled in all cases to perform the humanitarian functions envisaged in the Conventions.

242. Paragraph 214 of the preliminary report provided examples and illustrations of the important humanitarian activities carried out by the International Committee of the Red Cross under the Geneva Conventions, and emphasized that such activities have amply proved their worth and value. There is general agreement that such undertakings deserve full and active support from all those who are in a position to extend assistance.

243. It may be useful to revert briefly to the problem of the willingness and capacity of the International Committee of the Red Cross to consent to act as a substitute for a Protecting Power under the Geneva Conventions or to interpret broadly its role as a quasi-substitute so as to realize the full potential of that role by assuming additional functions which might exceed the strictly humanitarian confines to which it adheres at present and more closely relate its action to the responsibilities which would have devolved on the Protecting Powers. In this connexion, paragraph 215 of the preliminary report referred to restrictions and limitations to which the International Committee of the Red Cross is admittedly subject due to its traditions, purpose and character. In general, the assertion would appear warranted that the difficulty for the International Committee of the Red Cross to place itself in a position of acting as an over-all substitute or quasi-substitute for the Protecting Power is based on the understanding that the role of the Protecting Power embraces more than assistance in the execution of the Conventions in specific instances covers also diplomatic and political functions which may be incompatible with the purposes and the nature of the International Committee and which may require resources and facilities exceeding the International Committee's capacity and possibilities. The experience of the International Committee of the Red Cross seems to have led it to prefer to rely on the concept of the right of initiative, on the basis of which the Committee acts in a variety of situations with discretion, dispatch, efficiency and often with very satisfactory results. To put it succinctly, as stated by experts, the role of conciliator or mediator in specific instances would appear to be more congenial to the International Committee of the Red Cross than that of a representative of the belligerents or of the international community in the generality of cases or that of supervisor.

244. In the light of considerations such as the above, the tentative conclusion arrived at in paragraph 215 of the preliminary report might be reiterated here, namely, that while the International Committee of the Red Cross and certain other organizations play a most useful role, there is a



need for measures to improve and strengthen the present system of international assistance and supervision to parties to armed conflicts in their observance of humanitarian norms of international law. These measures should be regarded as complementary to what already exists rather than competitive.

245. The machinery designed to facilitate and ensure the application of the norms of the Geneva Conventions and other humanitarian instruments relevant to armed conflicts should be enriched and perfected by widening in particular the effective choices of the parties so that supervisory assistance should never fail to assert itself for lack of acceptable alternatives. In pursuing the goal of designing more far-reaching implementation procedures and of expanding their scope, the possibilities should be increased of having organizations assume the functions of the Protecting Powers; intergovernmental organizations might play an appropriate role in this respect. In particular, the establishment of a new organ or agency might be envisaged which would possess the legal right to offer its services in case there is a vacuum. As stressed in paragraph 216 of the preliminary report, the coexistence of the International Committee of the Red Cross and of the contemplated system of supervisory protection and relief by intergovernmental organizations should not lead to duplication or competition, but should rather facilitate accommodation to different situations, in which either the International Committee of the Red Cross or the proposed organization, or a combination of intergovernmental and non-governmental organizations working together, would be more acceptable to the parties to a specific conflict and, consequently, more effective in accomplishing their mission.

246. The involvement of the United Nations, as the world-wide international organization constituting the most authentic and comprehensive expression of the international community, in the endeavour to oversee and ensure the observance and application, in all armed conflicts, of accepted humanitarian rules and standards would appear to be eminently justified. Already, fact-finding functions relating to the application of the provisions of some of the Geneva Conventions have been included in the terms of reference of ad hoc bodies established by the General Assembly and the Commission on Human Rights with the approval of the Economic and Social Council. 72/ Conditions may now be ripe to encourage consideration of the idea of gradually moving away from the ad hoc approach, which might be viewed as somewhat precarious and liable to inspire a lesser degree of confidence, towards setting up, on a durable standing basis, an agency of implementation under the aegis of the United Nations. An absolute prerequisite for the establishment and success of such an agency would be that its character would be exclusively and strictly humanitarian; it would have to be scrupulously non-political and it should strive to offer all guarantees of impartiality, efficiency and rectitude.

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72/ The bodies referred to in the text above are the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, established by General Assembly resolution 2443 (XXIII) of 19 December 1968, and the Special Working Group of Experts established by Commission on Human rights resolution 6 (XXV) of 4 March 1969; a further mandate was given the Group by Commission on Human Rights resolution 10 (XXVI) of 23 March 1970.

247. As regards the functions which may be entrusted to the organ or agency referred to above, several possibilities come to mind. In addition to being called upon to assist in, and contribute to, the application not only of the existing rules of the Geneva Conventions but also the norms set by human rights instruments of the United Nations, the observance of which is of paramount concern of the Organization, the contemplated agency might be charged with tasks which might emerge from the eventual adoption of new or adapted rules or procedures, some of which were explored in the present report. For instance, the new organ might participate in determining whether the criteria in force in connexion with the granting of prisoner of war status are met in a given situation; it might be empowered to evaluate the elements which would help to provide an answer to the question of whether or not an internal armed conflict exists in terms of article 3 of the Conventions or any elaboration thereof or whether or not a person or group of persons would qualify under the relevant international instruments to the protection granted to "combatants" or persons in territories under occupation. Another branch of the functions of the proposed organ might relate to the aspects of the system of sanctuaries for civilians referred to elsewhere in this report involving international administration, verification and control. Thus, these functions could be made to relate either to the designation and registration of sanctuaries for civilians or to the control and verification of their operation, or both. The co-ordination and execution of relief activities, in appropriate cases, particularly for the benefit of civilian victims of armed conflicts, might be another function which could be possibly assigned to the new organ.

248. The method of the establishment of the new United Nations organ or agency of implementation would take into account certain considerations such as the desirability of ensuring for the new institution a degree of autonomy sufficient to enable it to act independently and impartially; the choice between the difficulties and delays inherent in pursuing procedures leading to the adoption of an international convention, on the one hand, and the need of endowing the institution with the authority of a constitutive document which would be legally precise and capable of being viewed as binding, on the other. A suitable method might be to conceive of the new agency as an "autonomous organization" established and functioning within the United Nations. <sup>73/</sup> The General Assembly might then consider the adoption of a statute, carefully elaborated, which would govern all details of the operation of the proposed new agency. Following the adoption of the statute by the General Assembly, the Assembly would establish the organ, which would be required to report to the General Assembly under conditions and safeguards which would be consistent with the essential requirement of the impartial performance of its humanitarian functions. In this connexion, useful

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<sup>73/</sup> The concept of an autonomous organization is incorporated in operative paragraph 1 of General Assembly resolution 2089 (XX) of 20 December 1965, by which the General Assembly decided to establish the United Nations Organization for Industrial Development. This concept would be applicable to such agencies as the United Nations Children's Fund, the United Nations High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

indications might be derived from recalling the procedure employed with regard to the establishment and functioning of another organ of the General Assembly which may be credited with important humanitarian accomplishments in its field of competence, the Office of the United Nations High Commissioner for Refugees. <sup>74/</sup> The organizational structure of the contemplated new organ or agency may provide for the appointment of an executive head working in co-operation with, or under the guidance of, a committee of highly qualified personalities of international renown and unquestioned integrity serving in their international capacity who would adequately represent the major legal and social systems of the world.

249. As an alternative to the establishment of a permanent organ charged with the implementation of humanitarian rules, or pending the eventual establishment of such an organ, consideration might be given to making more frequent use of certain types of ad hoc machinery which, as stated earlier, have been occasionally resorted to by the Organization. On the pattern of methods followed under The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, "Commissioners-General" or other entities might be appointed or set up under United Nations auspices upon the eruption of an armed conflict with the agreement of the parties thereto. A General Assembly resolution might outline the procedures leading to the appointment of Commissioners-General or similar ad hoc machinery the services of which Member States which might become involved in an armed conflict would agree or undertake to employ. The substantive rules which the ad hoc machinery would seek to assist in enforcing would include such humanitarian instruments as would be binding upon the parties to the conflict; they might also include the norms derived from the general human rights instruments of the United Nations.

250. Another possibility might be that machinery for the application of the Geneva Conventions might be devised and set up outside the United Nations by the parties to these Conventions. Such a solution would probably entail the adoption of a protocol to the Conventions or of some other international instrument effecting the necessary amendments or additions to the Geneva Conventions. The initiative for the elaboration of an international agreement to that effect might be taken by an interested State or interested States parties to the Conventions. Should an organ of implementation be established within the system and framework of the Geneva Conventions, there would undoubtedly be opportunities for co-operation between that organ and the United Nations in the common endeavour to strengthen respect for human rights in all armed conflicts.

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<sup>74/</sup> The Statute governing the operation of the Office of the High Commissioner for Refugees was approved by the General Assembly in resolution 423 (V) of 14 December 1950. On the subject of the establishment of the Office, see also General Assembly resolution 319 (IV) of 3 December 1949. Subsequent resolutions of the General Assembly have continued the Office for further specified periods.

XII. BETTER APPLICATION AND REAFFIRMATION OF HUMANITARIAN  
INTERNATIONAL CONVENTIONS AND RULES

Publicity, dissemination and teaching

251. The preliminary report stressed that the wide dissemination of international instruments of a humanitarian character and of the corresponding rules and regulations adopted at the national level as well as education in these matters at all appropriate levels of instruction, would appear to be a particularly significant measure to ensure their better application. It was said in particular that compilations and indexes of relevant texts and explanatory pamphlets, handbooks and textbooks suitable for the groups concerned, and worded in simple and clear language, would be especially useful (paragraph 118). There is little further to be said at this stage regarding the part of the preliminary report devoted to this subject.

252. With regard to the possibilities which might be offered by the United Nations programme of advisory services in the field of human rights, which permits the organization of seminars (see paragraph 121 of the preliminary report), the provision of expert assistance might deserve special attention. It would appear that a number of States lack the resources to carry out adequate programmes of educating their military personnel in the principles and rules of the humanitarian instruments applicable to armed conflicts. Experts whom States might request under the programme of advisory services could assist in drafting texts suited to the requirements of the recipient country, summaries of the Geneva Conventions and field manuals for use by the armed forces, and in preparing all types of appropriate training materials.

253. The suggestion was made that a bibliography of existing field manuals and other relevant publications might be compiled and circulated, which would facilitate the task of making effective use of the available literature on the subject and of adding to that literature.

254. It would be desirable if the subject of humanitarian law were to be included, as a topic for study and consideration, in the programmes of publications, training programmes and other relevant activities conducted under the auspices of the United Nations Educational, Scientific and Cultural Organization, the United Nations Institute for Training and Research and private international or national organizations working in the field of education and research in the name of peace. Universities and other institutions of higher learning, in particular, might consider adjusting their curricula to remedy possible lacunae concerning the teaching of the law of armed conflicts.

255. An idea which may merit consideration would relate to the possibility of requesting Member States to report on the state of instruction of their armed forces in the humanitarian rules applicable to armed conflicts. In the context of such reports, States might be encouraged to mention any difficulties which they might have encountered in their efforts to provide

instruction. This information might supply the basis for extending international assistance to minimize or eliminate such difficulties.

256. At the national level, it was suggested that States might agree to require that knowledge of the humanitarian rules applicable to armed conflicts be imparted to their military personnel more intensively than at present and that it be made a prerequisite for promotion to the various ranks of the armed services.

#### Reservations

257. The question of the effect of reservations to the humanitarian conventions, alluded to in paragraph 116 of the preliminary report, has continued to attract the attention of experts, including those consulted by the Secretary-General in the Spring of 1970. It was thought that the experience which has accumulated in the decades which have elapsed since the adoption of the 1949 Geneva Conventions might induce the States concerned to re-examine the continuing validity of the reasons which had initially led them to enter reservations.

#### Appeals to observe international instruments

258. Further to the observations made on this subject in paragraph 129 of the preliminary report, the General Assembly may wish to invite the Secretary-General, on a standing basis, to issue at the outbreak of an armed conflict, whenever he considers such action to be appropriate, appeals to parties to the conflict to respect humanitarian rules. Such appeals might refer to the applicable humanitarian instruments including United Nations norms.

### XIII. CONCLUDING OBSERVATIONS

259. As stated in the introduction, the present report constitutes a continuation of, and a supplement to, the preliminary report, which was submitted to the General Assembly at its twenty-fourth session. In preparing the present report, the Secretary-General took into account the desire expressed by the General Assembly in the fifth preambular paragraph of its resolution 2597 (XXIV) that the study should be continued with a view to including further data and developments, thus facilitating the presentation of concrete recommendations for the full protection of civilians, prisoners and combatants in all armed conflict and for the prohibition and limitation of the use of certain methods and means of warfare. Accordingly, the present report endeavours to provide new elements which might assist in further elucidating the issues discussed in the preliminary report and to formulate suggestions relating to various courses of action which might be considered in pursuance of the effort to achieve the objectives of General Assembly resolutions 2444 (XXIII) and 2597 (XXIV), as regards protection in all armed conflicts of the various categories of persons involved therein.

260. Chapter II sets out the general observations and guidelines of the report, explaining briefly how the report is conceived and summarizing certain propositions, the general acceptance of which has been confirmed by the work on the study undertaken so far, and from which the present report proceeds in elaborating on certain questions not previously dealt with in detail, and exploring possible solutions.

261. Chapter III focuses on the subject of the protection of human rights as they relate to armed conflicts derived from the general international instruments on human rights adopted under the auspices of the United Nations, and in this connexion reviews the salient points of a more detailed study on that subject which is contained in annex I. The chapter concludes by referring to the beneficial effect, particularly on respect for human rights in armed conflicts, of the early entry into force of the International Covenant on Civil and Political Rights and by suggesting that the General Assembly might wish to take this important consideration into account in connexion with resolutions which it might adopt with regard to the ratification of the Covenants or to the respect for human rights in armed conflict.

262. Chapter IV is devoted to the protection of civilians. The chapter states, inter alia, that the cause of the protection of civilians might be enhanced if the General Assembly would consider the usefulness of including as part of an appropriate resolution a call to all authorities involved in armed conflicts of all types, to do their utmost to ensure that civilians are removed from, or kept out of, areas where conditions would be likely to place them in jeopardy or to expose them to the hazards of warfare; it also outlines certain elements which may be taken into consideration in formulating standard minimum rules for the protection of civilians. The chapter further deals in detail with the establishment of refuges or sanctuaries for the protection of civilians. In this connexion, it is stated that the possibility would now

appear to exist for a comprehensive analysis and study in depth of all aspects of that question by a group or committee of qualified experts which might be convened by the General Assembly or the Secretary-General, and whose deliberations and tentative proposals might provide a working basis for the drafting of an appropriate international instrument. Several alternatives relating to the form of the contemplated international instrument, its scope and substantive contents, as well as to the methods by which it might be concluded and adopted, are considered.

263. Chapter V concerns the protection of combatants in international armed conflicts. The chapter contains several specific suggestions for a revision of the existing rules with a view to expanding and increasing the protection afforded to combatants. In this regard, it is stated that, if the usefulness and advisability of such an initiative commend themselves to the General Assembly, the task of revising, adapting and completing the Hague Regulations relating to the protection of combatants, in the light of the relevant provisions of the Geneva Conventions and other international instruments, after adequate preparation, might be undertaken by a conference, convened by an interested State or by the General Assembly itself. The outcome might possibly be an additional Protocol to the relevant Geneva Convention or an independent international instrument.

264. Chapter VI deals with the protection of prisoners. The chapter touches on some questions with regard to which an amelioration would appear desirable and states that such questions may be examined at the time additional Protocols are considered with respect to other matters relating to the existing Geneva Conventions. At that time, attention may also be given in relation to the Third Geneva Convention to the Standard Minimum Rules for the Treatment of Prisoners which were approved in 1957 by the Economic and Social Council.

265. Chapter VII, which deals with the prohibition and limitation of certain methods and means of warfare, refers, inter alia, to the usefulness of studying, as an initial step, the precise effects of the use of napalm on human beings and the living environment. If the General Assembly accepts the merit of that idea, it might consider requesting the Secretary-General to prepare, with the assistance of qualified consultant experts, a report on napalm weapons and the effect of their possible use. The contemplated report could facilitate subsequent action by the United Nations aimed at curtailing or abolishing such uses of the weapons in question as might be established as inhuman.

266. Chapter VIII treats of the subject of internal armed conflicts. The chapter contains detailed observations which illustrate the present complexity of the problem of increasing the protection afforded to various categories of persons who may be involved in internal armed conflicts. The chapter concludes by stating that, inasmuch as the International Committee of the Red Cross, in pursuance of resolutions of the ICRC and within the framework of its co-operation with the Secretary-General, is undertaking a comprehensive study of the question of internal armed conflicts, the General Assembly may wish to retain that question for future examination, pending receipt and submission, through the Secretary-General, of the conclusions of the relevant activities carried out by the International Committee of the Red Cross.

267. Chapter IX analyses further the intricate issues arising from the point of view of humanitarian concerns, out of much wider resort to methods of guerrilla or "irregular" warfare, in particular as regards conflicts regarded as international. Some of the difficulties of applying the present system of protection to those participating in such types of armed conflict are brought out with a view to authorizing possible courses of action. Attention is also drawn to studies pursued on this subject by the International Committee of the Red Cross.

268. Chapter X on protection of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination, a subject to which the Secretary-General was requested to give special attention, recalls the General Assembly pronouncements on this question in relation to the Geneva Conventions made so far, analyses in greater detail the existing legal situation, refers to some experts' views thereon, and suggests that the General Assembly may wish to consider adopting a resolution relating specifically to such combatants, which would indicate minimum standards of protection from which they should never be deprived.

269. Chapter XI is devoted to the question of international assistance in, and supervision of, the application of humanitarian rules relating to armed conflicts. After referring to certain deficiencies of the system of implementation of the Geneva Conventions through international co-operation, and to the role of the International Committee of the Red Cross under that system and in practice, the chapter reiterates the tentative conclusions of the preliminary report, namely, that while the International Committee of the Red Cross and certain other organizations play a most useful role, there would be a need for measures to improve and render more effective the present system of supervision and assistance to parties to armed conflicts in their observation of humanitarian norms of international law. These measures, based on what is already in existence, should be complementary and not competitive. The chapter stresses that the machinery designed to facilitate and ensure the application of the norms of the Geneva Conventions and other humanitarian instruments relevant to armed conflicts should be enriched and perfected by widening in particular the effective choices of the parties, so that supervisory assistance should never fail to assert itself for lack of acceptable alternatives. The contemplated system of supervisory protection and relief by intergovernmental organizations should not lead to duplication or competition, but should rather contribute to accommodation to different situations. The chapter further gives reasons why the involvement of the United Nations in the endeavour to oversee and ensure the observation and application, in all armed conflicts, of the norms of humanitarian rules and standards would appear to be justified. After remarking that fact-finding functions relating to the application of the provisions of some of the Geneva Conventions have been included in the terms of reference of ad hoc bodies established by United Nations organs, the chapter states that conditions may now be ripe to encourage consideration of the advisability of setting up, on a durable standing basis, an agency of implementation under the aegis of the United Nations. A prerequisite for the establishment and success of such an agency would be that its character would be exclusively and strictly humanitarian; it would have to be scrupulously non-political and it should strive to offer all guarantees of impartiality, efficiency and rectitude. The chapter makes suggestions and devises alternatives as regards



the functions which may be entrusted to the organ or agency in question, and the method of its establishment. As alternatives to the establishment of a permanent United Nations organ, or pending the eventual establishment of such an organ, the chapter suggests that consideration might be given to making more frequent use of certain types of ad hoc machinery on the basis of those resorted to under the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, or to exploring the possibility of establishing machinery for the application of the Geneva Conventions which would be devised and set up outside the United Nations by the parties to these Conventions.

270. Chapter XII concerns the better application and the reaffirmation of humanitarian international Conventions and rules. The chapter refers to publicity, dissemination and teaching and to the issuance of appropriate appeals by the Secretary-General as means for the achievement of the objectives reflected in the title of the chapter and makes some new suggestions thereon. The chapter also refers to the question of reservations to existing humanitarian conventions.

## ANNEX I

### GENERAL NORMS CONCERNING RESPECT FOR HUMAN RIGHTS IN THEIR APPLICABILITY TO ARMED CONFLICTS

1. In chapters I and III of his preliminary report which were entitled "Respect for human rights in armed conflicts in the context of United Nations purposes of action in the field of human rights" and "Observations on some aspects of the Geneva Conventions of 1949 in their relation to United Nations instruments in the field of human rights", the Secretary-General examined the question of the relationship between the general norms concerning respect for human rights as set out in the United Nations Charter, the Universal Declaration of Human Rights and other international instruments in the human rights field, in particular the International Covenants on Human Rights on the one hand and the body of law constituted by the humanitarian conventions regulating armed conflicts on the other. 1/ In the course of the consideration of the Secretary-General's Report the wish was expressed that a more detailed study of this problem should be undertaken. 2/
2. Accordingly, the present chapter presents a study which goes somewhat more into details than the preliminary report and also takes into account certain developments which have taken place since the circulation of that report. The study which follows takes as its starting point the relevant provisions of the United Nations International Bill of Rights, particularly of the International Covenant on Civil and Political Rights, with emphasis on those of its provisions from which derogations are not permitted in time of public emergency.
3. It was stated in the earlier report that the human rights provisions of the Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights apply both in times of peace and in times of war and armed conflicts. 3/ This proposition is further supported by the fact that two regional Conventions on human rights which have been concluded among substantial groups of States Members of the United Nations and of the specialized agencies also contain provisions authorizing certain measures of derogation in emergency situations. This is the case as regards the European Convention for the Protection

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1/ See A/7720, paras. 23-30 and 70-108.

2/ This wish was also expressed in the course of the consideration of the Secretary-General's report at the twenty-sixth session of the Commission on Human Rights Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4815), para. 95 (b).

3/ A/7720, paras. 23-31.

of Human Rights and Fundamental Freedoms of 4 November 1950 <sup>4/</sup> and as regards the American Convention on Human Rights (Pact of San José, Costa Rica, of 22 November 1969). <sup>5/</sup> The two regional instruments speak expressly of derogations in time of war. As is indicated elsewhere in the present report, there are certain differences between the provisions authorizing derogations from the International Covenant on Civil and Political Rights, from the European Convention and from the American Convention. All these instruments proceed, however, from the basic rule that their provisions must be respected also in emergency situations. Derogations which they permit in such situations are of a limited character.

4. The Universal Declaration of Human Rights, the two International Covenants and the Optional Protocol to the Covenant on Civil and Political Rights are meant to constitute the International Bill of Rights. While it is beyond doubt that the provisions of the two Covenants and the Optional Protocol contain legal provisions which will be binding on the parties to these instruments once these instruments come into force, the status of the Universal Declaration of Human Rights is somewhat more ambiguous. Particularly in the first years after its adoption it was claimed by some, on the basis of statements made in the course of the elaboration of the Declaration, that the Universal Declaration sets forth moral, but not legal obligations of the members of the international community. However, in the course of the years, the Universal Declaration acquired an authority of growing importance, so that the International Conference on Human Rights, held at Teheran, in 1968, could state in the Proclamation of Teheran that "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community". <sup>6/</sup>

5. It appears to follow that respect for the rights set forth in the Universal Declaration of Human Rights in times of peace, as well as in times of armed conflict, constitutes now an important commitment of States, including States involved in an armed conflict. The provisions of the International Covenants on Human Rights are not yet formally binding on States; however, they also are, even in this transitional stage, instruments of high authority as they were adopted by unanimous votes of 105 and 106 participating Member States, respectively, at the twenty-first session of the General Assembly. At its twenty-second session, the General Assembly, by a unanimous vote, called for the acceleration of the process of ratification of the human rights Covenants by all eligible States. As of 15 July 1970, the Covenant on Economic, Social and Cultural Rights has been signed by forty-seven States and ratified or acceded to by eight States; the Covenant on Civil and Political Rights has been signed by forty-six States and ratified or acceded to by eight States; and the Optional

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<sup>4/</sup> United Nations Yearbook on Human Rights for 1950 (United Nations publication, Sales No.: E.52.XIV.1) pp.418 et seq.; and United Nations Treaty Series, vol. 213 (1955), No. 2889, p. 221.

<sup>5/</sup> Organization of American States, Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 1969, OAS Official Records OEA/Ser.K/XVI/1/1, Doc. 65, Rev.1.

<sup>6/</sup> Final Act of the International Conference on Human Rights (United Nations publication, Sales No.: E.68.XIV.2), chapter II, Proclamation of Teheran, operative para. 2.

Protocol to the International Covenant on Civil and Political Rights has been signed by seventeen States and ratified by four States. 7/ The European Convention on Human Rights has been in force since 1953; it is now in force among fifteen (until recently sixteen) States. The American Convention on Human Rights was opened for signature and ratification at a conference attended by nineteen States, 8/ and will enter into force when ratified or acceded to by eleven States.

The provisions from which no derogation may be made in time of public emergency. Comparison of the derogations provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and of the American Convention on Human Rights.

6. An examination of the provisions which permit States Parties to take measures derogating from their obligations under the International Covenant on Civil and Political Rights and under the two regional Conventions, particularly the study of the lists of those provisions from which no derogations may be made even in time of public emergency, is of crucial importance for the evaluation of the potential bearing these instruments have, or will have, on respect for human rights in armed conflicts. While, as already stated, the human rights instruments of the United Nations, particularly the International Bill of Rights and in the present context particularly the International Covenant on Civil and Political Rights, are the basis and the starting point for the present analysis, it may be useful to present not only the law as laid down in the Covenant, but also to bear in mind the two regional Conventions.

7. Article 4 of the Covenant on Civil and Political Rights, article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights each consist of three paragraphs. The first paragraph provides that in certain circumstances certain derogations are permissible. The second paragraph lists provisions from which no derogations may be made. The third paragraph contains the procedural steps which each contracting party is to take when it avails itself of the right of derogation. It is proposed to examine here only the first and second paragraphs of the relevant articles of the three instruments. Their text is given in paragraphs 8 and 15 below.

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7/ In regard to States which have signed the Covenants and other treaties in the field of human rights, it might be appropriate to refer to article 18 of the Vienna Convention on the Law of Treaties ("obligation not to defeat the object and purpose of a treaty prior to its entry into force") under which a State will be obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty, until it shall have made its intention clear not to become a party to it. The Vienna Convention on the Law of Treaties is the most recent and most authoritative statement on the Law of Treaties. It was adopted on 22 May 1969 and opened for signature on 23 May 1969, by the United Nations Conference on the Law of Treaties. It is not yet in force. As of 22 July 1970 it had been signed by forty-seven States.

8/ Final Act of the Inter-American Conference on Human Rights, San José, Costa Rica, November 1969. OAS Official Records, OEA/Ser.K/XVI/1.1. Doc.70 Rev.1. For reference, see Review of International Commission of Jurists, No. 5, March 1970.

8. Paragraph 1 of article 4 of the Covenant reads as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Paragraph 1 of article 15 of the European Convention reads as follows:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Paragraph 1 of article 27 of the American Convention reads as follows:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

It should be noted that article 27 of the American Convention is part of chapter IV entitled "Suspension of guarantees, interpretation, and application" and that article 27 itself has the title "Suspension of guarantees".

9. The general condition for the exercise of the right of a State to avail itself of the derogations provision is, under the Covenant, that there is a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". (The corresponding phrase in article 15 of the European Convention is "In time of war or other public emergency threatening the life of the nation". In the American Convention, the phrase reads: "In time of war, public danger, or other emergency that threatens the independence or security of a State Party".) In regard to this basic phrase, the main difference between the Covenant, on the one hand, and the two regional instruments, on the other, consists in the fact already referred to that the two regional instruments expressly speak of "time of war", while an express reference to war has been intentionally avoided in the Covenant.

10. As was stated in paragraph 26 of the preliminary report (A/7720), earlier drafts of the present article 4 of the Covenant mentioned the time of war as one of the conditions authorizing derogations from the obligations of the parties. In the proceedings of the United Nations Commission on Human Rights, it was recognized that one of the most important public emergencies was the outbreak of war. It was felt, however, that the Covenant, as a United Nations instrument,

should not envisage even by implication the possibility of war, and for this reason the express reference to war was omitted from the text of the draft Covenant at the sixth session of the Commission on Human Rights in 1950. Subsequent proposals to reinstate an express reference to war were not accepted by the United Nations Commission on Human Rights. 9/ The omission of the reference to war, or, for that matter, to armed conflict, in the Covenant has created a problem of interpretation in connexion with the right to life, which will be examined in paragraphs 20 et seq. below.

11. Article 4, paragraph 1, of the Covenant makes it a further condition for the applicability of the article that the public emergency "is officially proclaimed". The regional instruments do not contain an express provision to this effect.

12. All three instruments permit measures of derogation only "to the extent strictly required by the exigencies of the situation". The American Convention contains also the words "and for the period of time [strictly required . . .]".

13. All three instruments provide that the measures taken must not be inconsistent with the State's other obligations under international law.

14. The Covenant further provides that the measures must "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". The American Convention contains the same provision, which does not include, however, the word "solely". The European Convention does not provide for a corresponding limitation on the right of derogation.

15. Paragraphs 2 of article 4 of the Covenant, of article 15 of the European Convention and of article 27 of the American Convention, list the articles from which no derogation may be made. The relevant provisions read as follows:

Paragraph 2 of article 4 of the Covenant:

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Paragraph 2 of article 15 of the European Convention:

(2) No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Paragraph 2 of article 27 of the American Convention:

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

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9/ For references, see foot-notes 9 to 13 of A/7720.

The seven articles referred to in paragraph 2 of article 4 of  
the Covenant from which no derogation may be made

16. Article 6 of the Covenant provides, inter alia, that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment and the subjection of persons without their free consent to medical or scientific experimentation.

Article 8, paragraphs 1 and 2, prohibits slavery, the slave-trade and servitude.

Article 11 prohibits imprisonment merely on the ground of inability to fulfil a contractual obligation.

Article 15 prohibits retroactive criminal legislation.

Article 16 provides that everyone shall have the right to recognition everywhere as a person before the law.

Article 18 provides, inter alia, that everyone shall have the right to freedom of thought, conscience and religion, including the right to manifest his religion, and prohibits coercion which would impair the freedom to have or to adopt a religion or belief of one's choice.

Provisions from which no derogation is permitted  
under the American Convention

17. It will be noted that the American Convention prohibits derogations from all those provisions in regard to which the Covenant prohibits derogation but that in certain respects it goes beyond the limitations of the right of derogation set forth in the Covenant.

Article 3 of the American Convention on the right to juridical personality corresponds roughly to article 16 of the Covenant.

Article 4 of the American Convention on the right to life corresponds to article 6 of the Covenant, but differs from it in certain respects. Thus it provides that life is protected in general from the moment of conception. It does not contain the reference to the Genocide Convention which is contained in article 6, paragraph 2 of the Covenant. It prohibits the re-establishment of the death penalty in States that have abolished it and provides that in no case shall capital punishment be inflicted for political offences or related common crimes. The American Convention prohibits the infliction of capital punishment, not only as the Covenant does on persons who at the time the crime was committed were below 18 years of age, but also on persons over seventy years of age.

Article 5 of the American Convention is entitled "Right to humane treatment" and corresponds to articles 7 and 10 of the Covenant. It contains provisions which are not contained or expressed in the Covenant, such as the express provision of paragraph 3 that punishment shall not be extended to any person other than the criminal. A difference between the Covenant and the American Convention further consists in the fact that while article 7 of the Covenant prohibiting torture etc. is listed under those provisions from which derogation is not permitted, article 10 of the Covenant on the treatment of imprisoned persons with humanity and with respect for the inherent dignity of the human person is not listed among those from which derogations are not permitted.

Article 6 of the American Convention on freedom from slavery corresponds to article 8 of the Covenant. It also prohibits traffic in women. While under the Covenant only the first two paragraphs of article 8 which deal with slavery, the slave trade and servitude cannot be derogated from, the American Convention excludes the whole of its article 6 from the right of derogation, thus prohibiting also forced or compulsory labour in times of war, public danger or other emergency.

Article 9 of the American Convention on freedom from ex post facto laws corresponds to article 15 of the Covenant but differs from it in several respects, in particular, by not containing the proviso of article 15, paragraph 2 of the Covenant according to which nothing in the article shall prejudice the trial and punishment of any person for any act or omission which at the time when it was committed was criminal according to the general principles of law recognized by the community of nations. The American Convention refers in general to "the applicable law".

Article 12 of the American Convention on freedom of conscience and religion corresponds to article 18 of the Covenant.

Article 17 of the American Convention on the rights of the family corresponds to article 23 of the Covenant, which in the Covenant is not listed among those from which derogations are not admissible.

Article 18 of the American Convention - the right to a name - has a counterpart in the Covenant in so far as under article 24 (2) every child shall have a name.

Article 19 of the American Convention (Rights of the Child) corresponds to article 24 of the Covenant, which, however, like article 23 is not among those from which derogations are not admissible.

Article 20 of the American Convention (right to nationality) has no direct counterpart in the Covenant. The latter (art. 24, paragraph 3) provides however, that every child has the right to acquire a nationality; this provision is not among those from which the Covenant does not permit derogations.



Article 23 of the American Convention, the right to participate in government, corresponds to article 25 of the Covenant. There are important differences between the two provisions. The Covenant does not list article 25 among those from which derogations are not permitted.

The American Convention further prohibits the suspension of judicial guarantees essential for the protection of the rights from which derogations are not permitted, a provision to which there is no counterpart in the Covenant.

The provisions from which no derogation is permitted  
under the European Convention

18. Article 2 of the European Convention deals with the right to life. It corresponds to article 6 of the Covenant. There are certain differences between articles 6 of the Covenant and article 2 of the European Convention. Thus the European Convention does not expressly restrict capital punishment to the "most serious crimes". The European Convention lists certain cases in which deprivation of life is not to be regarded as inflicted in contravention of the article, while the Covenant and the American Convention provide that no one shall be deprived of his life "arbitrarily".

Article 3 of the European Convention prohibits torture and inhuman or degrading treatment or punishment and corresponds to article 7 of the Covenant.

Article 4, paragraph 1, of the European Convention prohibits slavery and servitude and corresponds to article 8, paragraphs 1 and 2, of the Covenant.

Article 7 of the European Convention, prohibiting retroactive criminal legislation, corresponds to article 15 of the Covenant.

19. As distinct from the Covenant, the European Convention does not prohibit or does not prohibit expressly derogations from the following provisions:

(a) The prohibition of medical or scientific experiments without free consent (article 7 of the Covenant). This case may, however, be considered covered by article 3 of the European Convention, prohibiting inhuman treatment from which article no derogation is permitted;

(b) The prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (article 11 of the Covenant);

(c) The right of everyone to recognition everywhere as a person before the law (article 16 of the Covenant); and

(d) The right to freedom of thought, conscience and religion including the right to manifest one's religion or beliefs (article 18 of the Covenant).

The problem of the right to life in armed conflicts

20. In regard to the provision of article 15 (2) of the European Convention which is to the effect that no derogation from article 2 (right to life) shall be made "except in respect of deaths resulting from lawful acts of war" reference is made to paragraphs 27 to 29 of the preliminary report and in particular to the statement which was made by one delegation when article 4 was considered in the Third Committee, drawing attention to a difficulty which article 4 in connexion with article 6 of the Covenant presented. <sup>10/</sup> If the words "public emergency" should be interpreted as including a state of war, it was, in the view of that delegation, not possible to state that there should be no derogation from article 6, which protected everyone's right to life. Attention was drawn in this connexion in the Third Committee to the stipulation of article 15, paragraph 2, of the European Convention, quoted in paragraph 16 above, that there should be no derogation from the article on the right to life, except in respect of deaths resulting from lawful acts of war. The record does not disclose any other observation having been made on this question in the course of the consideration of article 4 of the Covenant. It was said in paragraph 29 of the preliminary report that the correct solution to this problem needed no examination for the purposes of that report, although the Assembly might wish to devote attention to the matter at an appropriate time. In the following paragraphs some observations on this problem are now submitted.

The problem of deaths resulting "from lawful acts of war"  
under the International Covenant on Civil and Political  
Rights

(a) Observations on the legislative history of article 3 of the Universal Declaration of Human Rights

21. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and the security of person. The necessity for providing for a guarantee of the right to life was explained by the French representative on the Commission on Human Rights, M. René Cassin, whose draft became the basis of the provision as eventually adopted, in the course of the first session of the Commission in the following terms: "The problem is not as elementary as it appears to be. In 1933, when Germany began to violate these very principles, all the nations of the world asked themselves whether they have the right to intervene in order to assure respect for these principles and to save humanity and they did not intervene. It is for this reason that I believe it to be of fundamental importance to affirm the right of human beings to exist." <sup>11/</sup>

22. In the course of the proceedings in the Commission, the Economic and Social Council and the Third Committee of the General Assembly, the question of the application of the provision concerning the right to life contained in article 3

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<sup>10/</sup> A/C.3/SR.1260, para. 7.

<sup>11/</sup> E/CN.4/SR.13.

of the Universal Declaration of Human Rights in time of war or armed conflict does not appear to have been considered in any detail. However, the preparatory work indicates that delegations proceeded from the following two basic assumptions: (1) that the provision of what eventually became article 3 is meant to be respected - albeit with some modifications - in time of armed conflict as well as in time of peace and (2) that the right to life as understood by the authors of the Universal Declaration of Human Rights is not absolute.

23. In regard to the first point it is of interest that a delegation proposed in the Third Committee an amendment to draft article 3 providing, inter alia, that "the death penalty should be abolished in time of peace". 12/ The amendment gave rise to discussion in several meetings of the Third Committee and was rejected by 21 votes to 9 with 18 abstentions. 13/ Some of the votes against the amendment and some of the abstentions were due to the fact that in the view of the delegations concerned the amendment dealt with a subject for which the Declaration was not the proper place or that the amendment went too far; in the view of others the amendment did not go far enough, that is, by not calling for the abolition of capital punishment also in war time. 14/

24. In regard to the second of the basic assumptions referred to above, that is, that the right to life as formulated in article 3 is not absolute, it is to be pointed out that the question whether the Declaration should set forth the wish of the United Nations that capital punishment should be abolished was considered in detail with the result that a majority decided against the provision contemplating the abolition of capital punishment in time of peace. The proceedings show that the taking of life pursuant to the sentence of a competent court arrived at after due process of law was, at least by the majority, considered at that time as not inconsistent with the principle of the protection of the right to life. The conclusion appears, therefore, to be justified that loss of life due to what in pre-United Nations days were considered "lawful acts of war" is also not to be considered as infringing the provision of article 3 of the Declaration.

(b) Observations on the legislative history of article 6 (1) of the Covenant on Civil and Political Rights

Proceedings in the Drafting Committee

25. While in the course of the consideration of the Universal Declaration of Human Rights the question of the relationship between the right to life and emergency situations, particularly situations of armed conflict, received only scant attention, in the course of the drafting of what now is article 6 of the International Covenant on Civil and Political Rights, the subject was considered on several occasions on both the Commission on Human Rights and General Assembly

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12/ Official Records of the General Assembly, Third Session, Part I, Annexes to the summary records of meetings of the Third Committee, document A/C.3/265, p.14.

13/ A/C.3/SR.107, p.185.

14/ A/C.3/SR.102-107.

levels. When the Drafting Committee on the International Bill of Human Rights considered the provision on the right to life, it proposed the following text:

Article 5

"No one shall be deprived of his life save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law". 15/

Together with this text, the Drafting Committee decided to forward to the Commission on Human Rights a list of possible additional limitations. Those relevant for the present study are listed below:

"1. Suppression of rebellion or riots  
Deprivation of life by the military or state officers in a national emergency;

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"11. Killing by officers of the law in a local emergency;

"12. Killing by a member of the military in time of war."

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15/ See E/CN.4/95, annex B; also reprinted in the report of the Commission on Human Rights on its third session (Official Records of the Economic and Social Council, Seventh Session, Supplement No. 2 (E/800)).

Proceedings in the Commission on Human Rights

26. The text of the right to life article which was drafted at the fifth session of the Commission on Human Rights (1949) did not refer to the problem of respect for the right to life in situations of emergency, armed conflict or war. 16/ However, at the sixth session of the Commission on Human Rights (1950) the following paragraph was included as paragraph 2 in draft article 3 dealing with the right to life:

"To take life shall be a crime, save in the execution of a sentence of a court, or in self-defence, or in the case of enforcement measures authorized by the Charter."

It will be noted that "enforcement measures authorized by the Charter" were clearly considered by the authors of this draft the only admissible and, from the point of view of the United Nations, conceivable use of armed force. 17/ No change was made in this draft at the seventh session of the Commission on Human Rights (1951), in the report of which the text of article 3, including its second paragraph quoted above, appears in the same wording as in the report of the previous (sixth) session. 18/

27. However, at the eighth session of the Commission on Human Rights in 1952, a fundamental change in the formulation of the right was adopted. The attitude of the majority of representatives at the eighth session was that the most effective formulation of the right to life would be reached by a simple but categorical affirmation that no one should be arbitrarily deprived of his life and that everyone's right to life should be protected by law. A minority expressed the opinion that the Commission should maintain the principle that no one should be deprived of his life in any circumstances. The minority held that the Commission should not recognize any circumstances in which the taking of life might seem to be condoned. For that reason the minority raised objections to the wording of paragraph 2 of the draft of the sixth session which contained exceptions in case of capital punishment, self-defence or enforcement measures authorized by the Charter. Other delegations proposed that the Commission should specify in general terms but with as much precision as possible circumstances in which the taking of life would not be deemed a violation of the right enunciated in paragraph one of the draft article. Because in the Covenant on Civil and

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16/ Report of the fifth session of the Commission on Human Rights (Official Records of the Economic and Social Council, Ninth session, Supplement No. 10 (E/1371)), annex I, art. 5; E/CN.4/SR.90, 91, 93 and 94.

17/ Report of the sixth session of the Commission on Human Rights (Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5 (E/1681)), annex I, art. 3.

18/ Report of the seventh session of the Commission on Human Rights (Official Records of the Economic and Social Council, Thirteenth Session, Supplement No. 9 (E/1992)), annex I, art. 3.

Political Rights no question of the progressive implementation of the rights declared therein would arise, it was considered desirable by some delegations that the Commission should define with as much precision as possible the exact content of the right and the extent of the limitations thereto. Among the circumstances that were listed by these delegations there were, apart from the instances already mentioned in paragraph two, which included enforcement measures authorized by the Charter, inter alia the following: action lawfully taken for the purpose of quelling a riot or insurrection; defence of property or the State; circumstances of grave civil commotion. The view that the circumstances permitting the deprivation of life should be listed and defined was rejected by the Commission by ten votes to five with three abstentions and a joint amendment was adopted reading "No one shall be arbitrarily deprived of his life". This text was adopted by a vote of 12 to 4, with 2 abstentions and became the first sentence of paragraph one of article 5 of the draft adopted at the eighth session. 19/

28. At the ninth and tenth sessions of the Commission on Human Rights in 1953 and 1954, no change in the text of the right to life article was made and the text as adopted at the eighth session appears in the reports of the ninth and tenth sessions as article 6. 20/ Thus it was the text of the article relating to right to life, adopted by the Commission on Human Rights at its eighth session in 1952, which was submitted through the Economic and Social Council to the General Assembly as draft article 6 of the draft Covenant as annexed to the report of the tenth session.

Proceedings in the General Assembly (Third Committee)

29. Draft article 6 was considered by the Third Committee of the General Assembly at its twelfth session in 1957. The text was revised in several respects. The sentence "Every human being has the inherent right to life" was added at the beginning of the first paragraph of article 6. The order of the sentences contained in the Commission's draft namely "No one shall be arbitrarily deprived of his life" and "Everyone's right to life shall be protected by law" was reversed. For the present purpose it is most relevant that no change was made in the provision that "No one shall be arbitrarily deprived of his life". Article 6 as revised by the Third Committee at the twelfth session of the General Assembly and retained without change in the Covenant as adopted at the twenty-first session makes it abundantly clear that the right to life is not absolute as paragraphs 2 to 6 of article 6 deal in considerable detail with the question of capital punishment. 21/

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19/ Report of the eighth session of the Commission on Human Rights (Official Records of the Economic and Social Council, Fourteenth Session, Supplement No. 4 (E/2256)), paras. 167, 168 and annex I-B, art. 5.

20/ Report of the ninth session of the Commission on Human Rights (Official Records of the Economic and Social Council, Sixteenth Session, Supplement No. 8 (E/2447)); Report of the tenth session of the Commission on Human Rights; ibid., Eighteenth Session, Supplement No. 7 (E/2573), annex I-B, art. 6 (in both cases).

21/ Official Records of the General Assembly Twelfth Session, Annexes, agenda item 33, document A/3764 and Add.1, paras. 85-121.

30. In the proceedings of the Third Committee which took place at its 809th to 821st meetings, the question of the application of the article in time of armed conflict was not given extended attention as the bulk of the proceedings was devoted to the questions of the death penalty and of abortion. However, certain statements were made in the course of the proceedings which throw some light on the ideas which underlay the provision as adopted by the Third Committee in regard to its application in times of public emergency. It was pointed out by a representative at the 810th meeting of the Third Committee that in the case of measures for safeguarding State security, for example, it should be borne in mind that such measures were generally speaking quite exceptional and were not necessarily prejudicial to the principles stated (in the draft article). If the sentence "No one shall be arbitrarily deprived of his life" were retained, any decision to deprive an individual of his life which was not taken by a competent court could be subject to investigation with a view to determining whether or not provisions of the Covenant had been violated. 22/ At the 811th meeting a representative pointed out, while commenting on the word "arbitrarily", that in the modern world rebellions and even wars occurred. 23/ Another representative stated in the 813th meeting the following: "Besides being intentional an arbitrary act was also subject to no control and was performed at the absolute discretion of the perpetrator. Any one who arbitrarily deprived another of life arrogated to himself the right to kill; this was not the case of a judge, a soldier or a citizen carrying out his duty as provided by law since in none of those cases did the ultimate responsibility rest with the individuals concerned." 24/ (Emphasis added). In commenting on the term "arbitrarily" and on an amendment to the article which would have introduced into the draft Covenant the provision of article 2, para. 2 of the European Convention on Human Rights a representative pointed out that in the latter there were serious omissions in that no provision was made in regard inter alia, of the possibility of death resulting from lawful acts of war and from the defence of property. 25/

31. In the course of the consideration of both the Declaration and the Covenant by the various organs the term "arbitrarily" in paragraph 1 of article 6 was objected to as vague. Some members of the Commission on Human Rights and of the Third Committee held that it meant "illegally", while others interpreted it to mean "unjustly", and still others understood it to mean both. It was said that the word "arbitrarily" should be taken to mean "fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause based on law; not governed by any fixed rule or standard." 26/ For the purpose of arriving at an opinion on the question whether the taking of life by what in the old terminology was called a "lawful act of war" violates article 6 of the Covenant it is not necessary to decide whether "arbitrarily" meant "illegally" or whether it meant "unjustly". Even under the narrower and by no means generally accepted interpretation of the word

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22/ A/C.3/SR.810, para. 18.

23/ A/C.3/SR.811, para. 21.

24/ A/C.3/SR.813, para. 42.

25/ 814th meeting, para. 33.

26/ Official Records of the General Assembly, Twelfth Session, Annexes, a.i. 33, document A/3764 and Add.1, para. 114.

"arbitrarily" which equates "arbitrarily" with "illegally", an "act of war" performed in the course of an armed conflict causing loss of life, which is not violative of internationally recognized laws and customs of war would not be "arbitrary" and therefore not prohibited by article 6 of the Covenant. This reasoning leads to the same practical result as the "understanding" expressed by a delegation at the 1260th meeting of the Third Committee. 27/

Comparison between Article 4 of the Covenant and the  
Geneva Conventions (general)

32. From the summary and the by no means exhaustive analysis of the provisions of article 4 of the International Covenant on Civil and Political Rights and the corresponding provisions of article 15 of the European Convention on Human Rights and of article 27 of the American Convention on Human Rights given above, it appears that these provisions provide a basic and substantial minimum of guarantees of the respect for human rights in emergency situations including situations of armed conflict and war. These guarantees differ from those set forth in the Geneva Conventions of 12 August 1949 by the fact that they apply always and everywhere and that they can be invoked irrespective of whether there exists a war, declared or undeclared, or any other armed conflict, again irrespective of whether this armed conflict meets or does not meet certain qualifications of general international law. The guarantees of article 4, paragraph 2, of the Covenant would apply, of course, also in armed conflicts not of an international character and even though such armed conflict is not recognized by one or more of the Parties to come under the provisions of common article 3 of the four Geneva Conventions. In other words, for the application of those provisions of the Covenant from which no derogations may be made the question of the definition of an "armed conflict" and its delimitation from other situations of international or internal conflicts, is irrelevant.

33. Article 4, paragraph 2, of the Covenant protects pursuant to article 2, paragraph 2, all individuals within the territory and subject to the jurisdiction of a State Party without distinction of any kind. For the applicability of article 4, paragraph 2, the nationality of the individual or group of individuals is irrelevant. This constitutes an important difference from the majority of the provisions of Geneva Convention IV which protects persons who find themselves in the hands of a Party to the conflict or Occupying Power of which they are not nationals (art. 4, first paragraph of Geneva Convention IV). Nationals of a State which is not bound by Convention IV are not protected by it. Nor are nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are (art. 4, second paragraph of Convention IV). Some of the provisions of Geneva Convention IV, those of its Part II (General protection of populations against certain consequences of war) cover, however, the whole populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion (art. 13). Their scope of application is comparable to that of the Covenant.

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27/ See A/7720, para. 28 and para. 21 above.



34. There is, also a basic difference between the scope of application of the Covenant and of Geneva Convention III. While the Covenant protects all individuals within a State's territory and subject to its jurisdiction, Geneva Convention III protects only certain categories of combatants as defined in its article 4.

Comparison between Article 4 of the International Covenant on  
Civil and Political Rights and common article 3 of the Geneva  
Conventions

35. As far as the substance is concerned, a comparison between the minimum standards set forth in common article 3 of the Geneva Conventions for conflicts not of an international character and article 4, paras. 1 and 2 of the Covenant leads to the following observations.

36. The provision of article 4, para. 1 of the Covenant that derogation must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin" has its counterpart in common article 3, para. 1 of the Geneva Conventions which prohibits "any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". While the phraseology is in some respects slightly different there does not seem to be a difference of substance between the two formulae.

37. The provisions of articles 6 (right to life) and 7 (prohibition of torture, cruel, inhuman or degrading treatment or punishment and of medical experimentation without free consent) of the Covenant from which no derogation is permitted have their counterpart in sub-paragraphs (a) and (c) of common article 3 (1) of the Geneva Conventions. These prohibit violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, torture, outrages upon personal dignity, in particular humiliating and degrading treatment.

38. The prohibition of slavery, the slave trade and servitude under article 8, paras. 1 and 2 of the Covenant has no express counterpart in common article 3. It may be said, however, that slavery, the slave trade and servitude amount to an outrage upon personal dignity and to humiliating and degrading treatment and are therefore covered by item (c) of common article 3 (1).

39. A provision corresponding to article 11 of the Covenant prohibiting imprisonment merely on the ground of inability to fulfil a contractual obligation is not contained among the minimum guarantees of common article 3. Nor does common article 3 prohibit, as article 15 of the Covenant does, the application during conflicts not of an international character the enactment and application of retroactive criminal law. The prohibition of retroactive penal legislation finds however its application in Geneva Conventions III (article 99) and IV (articles 67 and 126) in cases of declared war or any other armed conflict between High Contracting Parties and in cases of occupation.

40. The minimum standards of common article 3 do not provide for the right of everyone to recognition everywhere as a person before the law which is set

forth in article 16 of the Covenant. A provision to this effect is, however, part of the law applicable in international armed conflicts under Geneva Convention III (article 14) and Geneva Convention IV (article 80)./

41. The minimum standards of common article 3 do not guarantee as regards conflicts not of an international character the right to freedom of thought, conscience and religion as set forth in article 18 of the Covenant; the article does not contain in particular the prohibition of article 18, para. 2 that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice and the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. 28/

42. On the other hand, common article 3 of the Geneva Conventions prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. The Covenant on Civil and Political Rights provides, of course, detailed guarantees in the determination of criminal charges in its article 14. Article 14 is, however, not among those provisions from which derogation is prohibited under article 4, para. 2. 29/

43. Common article 3 of the Geneva Conventions prohibits the taking of hostages. While the taking of hostages is incompatible with article 9 of the Covenant which guarantees to everybody the right to liberty and security, it must be pointed out that article 9 is not one of the provisions of the Covenant from which no derogations may be made. The taking of hostages may also be considered to amount to cruel, inhuman or degrading treatment. In that case it comes under article 7 of the Covenant from which derogations are not permitted. The shooting of hostages is, of course, prohibited by article 6 of the Covenant (right to life) which may not be derogated from.

44. Common article 3 of the Geneva Conventions further contains two provisions which are not to be found in the International Covenant on Civil and Political Rights or any other United Nations or regional human rights instrument. These

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28/ It may be added that some of the rights which must not be suspended under the American Convention on Human Rights and which are not listed in article 4, para. 2, of the Covenant, are also not included among the minimum standards set forth in common article 3. This applies to the rights of the family under article 17 of the American Convention, the rights of the child under its article 19, and to the right to participate in government under article 23. Among the provisions of the American Convention which are not enshrined either in article 4, para. 2, of the Covenant or in common article 3 of the Geneva Convention is also the right to a nationality, a right which might be of importance in times of civil conflict.

29/ Nor does the American Convention list its article 8 (right to a fair trial) among those provisions the suspension of which is not authorized in time of war, public danger or other emergency.

are the provisions that the wounded and sick should be collected and cared for and that an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. As regards the services of international governmental organs under the Charter of the United Nations, under the Covenant on Civil and Political Rights and under the Optional Protocol thereto reference is made to the observations that will be found in paragraphs 69 to 73 below.

Comparison between article 4 of the International Covenant on Civil and Political Rights and the provisions listed there, on the one hand, and the provisions of the Geneva Conventions applicable in declared wars, other international armed conflicts and cases of occupation

45. In the preceding paragraphs 34 to 44, an attempt has been made to make a comparative analysis of those provisions which under common article 3 of the Geneva Conventions apply in conflicts not of an international character and the provisions of the International Covenant on Civil and Political Rights from which derogations are not permitted and which therefore apply - in regard to States parties - in all cases including the situation contemplated in common article 3. In the paragraphs which follow a similar comparison will be made between the law applicable under the Covenant, on the one hand, and the provisions of the Geneva Conventions as a whole which are intended to apply to all cases of declared war or of any other armed conflict which may arise between two or more of the parties to the Geneva Conventions even if the state of war is not recognized by one of them, and to all cases of partial or total occupation of the territory of a party to the Geneva Conventions even if the occupation meets with no armed resistance. An examination of this question was undertaken in chapter III entitled "Observations on some aspects of the Geneva Conventions of 1949 in their relation to United Nations instruments in the field of human rights" of the Secretary-General's preliminary report A/7720, paragraphs 70 to 103. The following observations are submitted in elaboration of what was said in that report.

46. While there does not exist any institution of mankind which is as violative of the inherent right to life and its protection as a war or other armed conflict, article 6 of the Covenant applies also in time of armed conflict, and the Covenant does not permit derogations from it. Its text, corroborated by its legislative history, demonstrates that article 6 of the Covenant would not guarantee the right to life as an absolute right without exceptions. Its examination in paragraphs 26 to 32 above has led to the conclusion that to the extent that in present international law "lawful acts of war" are recognized, such lawful acts are deemed not to be prohibited by article 6 of the Covenant if they do not violate internationally recognized laws and customs of war. However, even if this far-reaching exception is read into article 6 of the Covenant and even if death resulting from "lawful acts of war" or "lawful acts of armed conflict" are not considered "arbitrary" deprivations of life, article 6, nevertheless, contains a number of very important humanitarian provisions protecting human rights against acts other than "lawful acts of war".

47. Among these provisions are the following: The rule that the death penalty may be imposed only in accordance with the law in force at the time of the commission of the crime and only pursuant to a final judgement rendered by a competent court. The law under which sentence of death is imposed must not be contrary to the provisions of the Covenant nor to the Convention on the Prevention and Punishment of the Crime of Genocide, (article 6 (2)). Anyone sentenced to death has under article 6, paragraph 4, the right to seek pardon or commutation of the sentence. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women (article 6, paragraph 6).

48. Geneva Convention III (relative to the treatment of prisoners of war) provides in article 100, paragraph 1, that prisoners of war and the Protecting Powers shall be informed, as soon as possible, of the offences which are punishable by death sentence under the laws of the Detaining Power. Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend (paragraph 2). A further provision for the protection of an accused prisoner of war is contained in paragraph 3 of article 100, under which the death sentence cannot be pronounced on a prisoner of war unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is under its power as a result of circumstances independent of his own will. These are safeguards additional to those set forth in the Covenant.

49. In connexion with the provision of article 6, paragraph 4, of the Covenant under which anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, the provision of article 101 of Geneva Convention III is of importance; it provides that a death sentence pronounced on a prisoner of war shall not be executed before the expiration of a period of at least six months from the date when the Protecting Power receives a notification of the findings and of the sentence. To the extent the institution of a protecting Power is operative, a prisoner of war sentenced to death has this additional chance that his life will be spared. For the corresponding provision of article 75 of Geneva Convention IV, see below paragraph 55.

50. The provision of article 6, paragraph 5 of the Covenant, according to which sentence of death shall not be imposed for crimes committed by persons below eighteen years of age, does not have a counterpart among the provisions of Geneva Convention III, so that in this respect the Covenant grants additional protection to a prisoner of war found guilty of a crime which he committed when he was below eighteen years of age.

51. Geneva Convention IV (relative to the protection of civilian persons in time of war) provides, in line with the Covenant and distinct from Geneva Convention III, that in any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence (article 68, para. 4). It should be noted that when the Third Committee of the General Assembly, at its twelfth session, was drafting what became paragraph 5 of article 6, a number of alternatives were before it defining the persons who should not be subjected to capital punishment. The alternatives were: "children and young persons"; "minors"; "juveniles" and "persons below eighteen

years of age". In support of the choice of the words "persons below eighteen years of age", it was pointed out by the representative of Finland that these words were used in the Geneva Convention relative to the protection of civilian persons in time of war. 30/ The Third Committee voted in favour of this formulation by 21 votes to 19, with 28 abstentions. 31/

52. Geneva Convention IV contains a series of limitations on the imposition of capital punishment in addition to that referred to in the preceding paragraph. Under article 68, paragraph 2, of Geneva Convention IV, the penal provisions promulgated by the Occupying Power may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons. Moreover, the proviso is added that the death penalty can be imposed only if the offences concerned were punishable by death under the law of the occupied territory in force before the occupation began. It should be noted that reservations have been made to this latter provision by a number of States Parties to Geneva Convention IV.

53. The prohibition contained in article 6, paragraph 5, of the Covenant that sentence of death shall not be carried out on pregnant women has no counterpart in Geneva Conventions III and IV.

54. Geneva Convention IV, like Convention III, provides that the death penalty must not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power he is not bound to it by any duty of allegiance (article 68).

55. Geneva Convention IV provides in article 75, paragraph 1, that in no case shall persons condemned to death be deprived of the right of petition for pardon or reprieve. This provision corresponds to article 6, paragraph 4, of the Covenant. Convention III does not contain an analogous rule. 32/

56. Geneva Convention IV also contains a provision similar to article 101 of Geneva Convention III referred to in paragraph 49 above to the effect that no death sentence shall be carried out before the expiration of a period of at least six months from the date of receipt by the Protecting Power of the notification of the final judgement confirming such death sentence, or of an order denying pardon or reprieve. However, under Convention IV the six months period of suspension of the death sentence may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to

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30/ A/C.3/SR.819, para. 10.

31/ A/C.3/SR.820, paras. 19-25.

32/ The American Convention contains the additional safeguard that capital punishment shall not be imposed while such a petition (for amnesty, pardon or commutation of sentence) is pending before the competent authority (article 4, paragraph 6).

make representations to the competent occupying authorities in respect of such death sentence (article 75, paragraphs 2 and 3). 33/

57. Article 7 of the Covenant provides that no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment; in particular, no one shall be subjected without his free consent to medical experimentation. 34/

58. The provisions of the Geneva Conventions relating to this subject are article 13 of Geneva Convention III and article 32 of Geneva Convention IV. Under the former, prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public cruelty. Measures of reprisal against prisoners of war are prohibited.

59. In article 32 of Convention IV the parties specifically agreed that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by military or civilian agents. Reprisals against protected persons and their property are prohibited under article 33 of Convention IV.

60. The prohibition of slavery, the slave trade and servitude set forth in article 8, paragraphs 1 and 2, of the Covenant is not expressed in these terms in Geneva Conventions III and IV. Article 49 of Geneva Convention III provides that the Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account the age, sex, rank and physical aptitude, and with a view particularly to maintaining them in a good state of physical and mental health. Non-commissioned officers and officers have a privileged status in this regard. Article 50 of Geneva Convention III lists the classes of work which prisoners of war may be compelled to do, the stress being on the exclusion of work which has a military character and purpose. Convention III also regulates working conditions (article 51) and provides that unless he be a volunteer no

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33/ In view of one of the principal purposes pursued by the General Assembly by its resolutions 2444 (XXIII) and 2597 (XXIV), attention must be drawn in this connexion to article 4, paragraph 4, of the American Convention, to which neither the Covenant nor Geneva Conventions III and IV contain a counterpart, which provides that in no case shall capital punishment be inflicted for political offences or related common crimes.

34/ The corresponding article of the American Convention (article 5, paragraph 1) is introduced by the provision that every person has the right to have his physical, mental or moral integrity respected.

prisoner of war may be employed in labour which may be of an unhealthy or dangerous nature. No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Powers own forces (article 52). Geneva Convention III also regulates the duration of labour (article 53) and provides in particular that prisoners of war shall be paid a fair working rate of pay by the detaining authorities (articles 54 and 62). Prisoners of war must not be compelled to do work of military character or purpose, and the compelling of a prisoner of war to serve in the forces of the hostile Power is a grave breach of Convention III (articles 130 and 50).

61. Geneva Convention IV provides in regard to occupied territories that the Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. It may not compel protected persons to work unless they are over eighteen years of age and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Workers shall be paid a fair wage (article 51). As far as civilian internees are concerned, the Detaining Power shall not employ them as workers unless they so desire (article 95 of Convention IV).

62. The prohibition of article 11 of the Covenant that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation may not be of great practical importance in situations of armed conflict or military occupation. It is, however, applicable in the territories of parties to the Covenant, although Geneva Conventions III and IV do not contain a provision to the same effect.

63. The prohibition of retroactive penal legislation contained in article 15 of the Covenant finds its counterpart in Geneva Convention III (article 99) and Convention IV (article 67). No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the act was committed (article 99, paragraph 1). The reference to prohibition by International Law in article 99 corresponds to the phrase "the general principles of law recognized by the community of nations" which is used in paragraph 2 of article 15 of the Covenant and in paragraph 2 of article 7 of the European Convention. The provision of article 15, paragraph 1, that no heavier penalty shall be imposed than the one that was applicable at the time when the criminal offence was committed is not spelled out in article 99 of Geneva Convention III; it may be assumed, however, that it is implied in it.

64. Article 67 of Geneva Convention IV provides that in occupied territories the courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into account the fact that the accused is not a national of the Occupying Power.

65. Article 16 of the Covenant provides that everyone shall have the right to recognition everywhere as a person before the law. <sup>35/</sup> Article 14, paragraph 3, of Geneva Convention III is to the effect that prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires. Similarly, article 80 of Geneva Convention IV is to the effect that internees shall retain their full civil capacity and shall exercise such attendant rights as may be compatible with their status.

66. Article 18 of the Covenant deals with the right to freedom of thought, conscience and religion. The subject-matter of the article has received extensive detailed regulation in Geneva Conventions III and IV. Chapter IV of Convention III is devoted to, among others, religious activities of prisoners of war. Article 34 provides that prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate premises shall be provided where religious services may be held. Geneva Convention III contains special provisions on chaplains who fall into the hands of the enemy Power and prisoners of war who are ministers of religion without having officiated as chaplains of their own forces (articles 35 and 36).

67. Article 58 of Geneva Convention IV provides that the Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities. Article 86 of Convention IV is to the effect that the Detaining Power shall place at the disposal of interned persons of whatever denomination premises suitable for the holding of their religious services. Internees, like prisoners of war, shall enjoy complete latitude in the exercise of their religious duties (article 93 of Convention IV).

68. The provision of article 18, paragraph 2, of the Covenant that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice does not appear in these or similar words in Geneva Conventions III and IV. Article 31 of Geneva Convention IV contains, however, a general provision prohibiting coercion. It provides that no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties. This provision is of sufficient generality to prohibit also actions which would violate article 18, paragraph 2, of the Covenant. <sup>36/</sup>

#### The Question of International Machinery

69. Under the Charter of the United Nations the Organization has the authority to establish the international organs required for the purpose, inter alia, of

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<sup>35/</sup> The American Convention contains a similar provision in its article 3.

<sup>36/</sup> The corresponding provision of Geneva Convention III (article 17, paragraph 4) concentrates on protecting a prisoner of war from coercion to secure information from him.



promoting and encouraging respect for human rights and fundamental freedoms for all and for fulfilling the pledge of all Members to take joint and separate action in co-operation with the Organization for the achievement, inter alia, of universal respect for and observance of human rights and fundamental freedoms for all. The United Nations has in recent years established ad hoc organs to deal with the questions of the protection of human rights in armed conflicts.

70. By resolution 2443 (XXIII), the General Assembly decided to establish a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories. 37/ At its twenty-fifth session in February-March 1969, the Commission on Human Rights decided to establish a Special Working Group of Experts with the mandate to investigate allegations concerning Israel's violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in the territories occupied by Israel as a result of hostilities in the Middle East; and to receive communications, to hear witnesses, and use such modalities of procedure as it may deem necessary. 38/

71. The International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant provide for international machinery. 39/ The Human Rights Committee to be established under the Covenant may receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant, provided both States have recognized this competence of the Committee. The Optional Protocol to the Covenant which provides for the right of individuals to submit communications might, together with the Covenant, also make available a useful procedure for settling questions of human rights in armed conflicts. Here again the procedures are involved and time consuming, but this will not prevent them from playing a useful role in matters of human rights in armed conflicts as soon as the relevant instruments enter into force.

72. History shows that measures of discrimination, particularly of racial discrimination, have a very high incidence in times of both international and internal armed conflicts. The International Convention on the Elimination of All Forms of Racial Discrimination (in force since 1969; at present among 41 States) is, like the other human rights instruments established under United Nations auspices, applicable in time of peace as well as in times of armed conflict. It does not contain provisions permitting derogation in times of emergency. States Parties are under the obligation to assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and State institutions against acts of racial discrimination (article 6

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37/ Reference to the Special Committee is also made in General Assembly resolution 2546 (XXIV).

38/ Official Records of the Economic and Social Council, Forty-sixth Session (E/4621), ch. XVIII, resolution 6 (XXV).

39/ Articles 41 et seq. of the Covenant; articles 1 et seq. of the Protocol.

of the Convention). This obligation (arg. "within their jurisdiction") would apply also in occupied territories vis-à-vis the occupying authorities. The international machinery established under the Convention can also be called upon to assist in securing respect for human rights in armed conflicts.

73. The international procedural and organizational arrangements for the scrutiny and application of the Geneva Convention of 1949 were described in paragraphs 202 to 227 of the preliminary report (A/7720). They were further discussed in chapter X of this report.

#### Concluding observations

74. When the parties to the Fourth Hague Convention of 1899 and to the Fourth Hague Convention of 1907 agreed upon these Conventions and on the annexed "Regulations respecting the laws and customs of war on land", they affirmed that they were animated by the desire to serve, even in the extreme case of armed conflicts, the interest of humanity and the ever progressive needs of civilization. The preamble to the Conventions also stated that the Contracting Parties did not intend that unforeseen cases should in the default of written agreement be left to the arbitrary opinion of military commanders. The preamble to the Conventions of both 1899 and 1907 further contains the so-called Martens clause, reading as follows:

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience." 40/

The main proposition of the Martens clause, which was repeated in the denunciation clauses of the four Geneva Conventions of 1949 remains as important now as it was at the turn of the century. However, it may be observed that, particularly since the coming into force of the Charter of the United Nations, the relevant principles of the law of nations have been elaborated and expanded in breadth as well as in depth, and there is in particular in existence a comprehensive body of international law represented mainly by the International Bill of Rights and by other universal and regional human rights instruments which apply, as has been demonstrated above, in time of peace as well as, with certain permissible derogations, in time of armed conflicts and independently of technical difficulties which have often impeded the effective application of the humanitarian conventions.

75. The difference between the situation in 1899 and 1907 on the one hand and the situation in 1970 on the other is that while the authors of the Hague Conventions were in a position to refer only to general principles of the law of nations of which they stated that they supplemented the written law laid down at the Hague, at present there exists, side by side with the Hague and Geneva Conventions, a system of concrete and detailed norms of positive international

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40/ See A/7720, para. 45.

law which consists of the International Covenants on Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide <sup>41/</sup> and many others. As has been shown, this body of law complements in several respects the law of the humanitarian conventions, while the humanitarian conventions in their turn complement the body of law consisting of the United Nations, and, for that matter, the regional, human rights instruments as far as their application in times of conflict is concerned. The principles of the law of nations to which the Martens clause referred have also been developed and expanded in the seven decades of the twentieth century, e.g., through the practice of States, particularly the judicial practice of the years following upon the Second World War such as the London Charter and the judgement of the International Military Tribunal which sat at Nuremberg, the basic instrument and the judgement of the International Military Tribunal for the Far East (Tokyo), a great number of national and occupational statutes and court decisions, and their follow-up in the work of the United Nations.

76. The International Covenant on Civil and Political Rights, in particular, will, as soon as it enters into force, complement the Hague and Geneva Conventions in several respects, filling in gaps which these Conventions contain and avoiding restrictions and technical limitations for which they provide. The following examples of the Covenant complementing the Geneva Conventions have been pointed to earlier in this annex.

77. The provisions of the Covenant listed in its article 4 (2) are meant to apply at all times and everywhere and can be invoked irrespective of whether there exists an armed conflict and whether such armed conflict meets certain qualifications set forth in the Hague and Geneva Conventions. The provisions listed in paragraph 2 of article 4 of the Covenant apply to all individuals within the territory and subject to the jurisdiction of a State Party without distinction. The nationality of the individuals or groups of individuals concerned is not relevant. The Covenant peremptorily prohibits retroactive penal legislation and this prohibition applies also in situations of armed conflict not of an international character. The Covenant guarantees the right to freedom of thought, conscience and religion as set forth in article 18 and thereby complements common article 3 of the Geneva Convention.

78. Common article 3 of the Geneva Conventions, on the other hand, complements the Covenant in so far as it provides, inter alia, for judicial guarantees which must not be suspended in periods of armed conflict. It expressly prohibits the taking of hostages.

79. From the facts compiled in the present annex, it appears to be clear that the human rights instruments concluded under the auspices of the United Nations and other international human rights conventions may have a great bearing on the protection of human rights in armed conflicts of all types, including such as arise from the struggle of peoples under colonial and foreign rule for liberation and self-determination. <sup>42/</sup> In particular, the coming into force of the

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<sup>41/</sup> In that Convention, the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law (see A/7720, para. 30).

<sup>42/</sup> General Assembly resolution 2597 (XXIV), para. 1.

International Covenant on Civil and Political Rights will be a landmark in the development and strengthening of the law of human rights including also, human rights in armed conflicts. Wide ratification of and accession to the human rights instruments and, in particular, to the International Covenant on Civil and Political Rights appears, therefore, to be one of the most desirable measures which the international community as a whole and each of its members can take towards the guarantee of human rights in armed conflicts. The universal and regional human rights instruments, on the one hand, and the Geneva and Hague Conventions, on the other, supplement each other, and only the wide adherence to and strict application of both sets of provisions will contribute to the achievement of the aim which the General Assembly has expressed in its resolutions 2444 (XXIII) and 2597 (XXIV).

ANNEX II

EXTRACTS FROM REPORT OF COMMISSION ON HUMAN RIGHTS

Human rights in armed conflicts<sup>1/</sup>

1. The Commission considered agenda item 17 at its 1060th, 1061st and 1062nd meetings, held on 5 and 6 March 1970.
2. In its resolution XXIII, the International Conference on Human Rights held in Teheran from 22 April to 13 May 1968, had affirmed that basic humanitarian principles must prevail even during periods of armed conflict and invited the Secretary-General to study steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts, as well as the need for additional humanitarian international conventions or the revision of existing conventions and the prohibition and limitation of the use of certain methods and means of warfare. This resolution was considered at its twenty-third session by the General Assembly, which adopted resolution 2444 (XXIII), affirming the provisions of resolution XXIII of the International Conference on Human Rights and inviting the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to carry out the study referred to in that resolution.
3. In compliance with General Assembly resolution 2444 (XXIII), the Secretary-General prepared an interim report (A/7720), which was submitted to the General Assembly for consideration at its twenty-fourth session.
4. The General Assembly adopted resolution 2597 (XXIV), in which it noted that it had not had sufficient time to examine the item at its twenty-fourth session; requested the Secretary-General to continue the study initiated by resolution 2444 (XXIII), in consultation and co-operation with the International Committee of the Red Cross; decided to transmit the report of the Secretary-General to the Commission on Human Rights and to the Economic and Social Council for their comments to be submitted to the General Assembly at its twenty-fifth session; and invited the Secretary-General to prepare a further report on the subject for the consideration of the General Assembly at its twenty-fifth session.
5. The item was introduced by the Director of the Division of Human Rights, who recalled that the Secretary-General's report was of a preliminary character and referred to the documentary part of the report, as well as to some of the problems in which further studies might prove fruitful in the light of the consensus expressed by the International Conference on Human Rights and the General Assembly.

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1/ Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5, chapter VI, paras. 87-99.

6. During the discussion in the Commission, most representatives who spoke emphasized that their comments were of a tentative nature as in many cases their Governments had not finished their study of the Secretary-General's report.

7. A number of representatives expressed the view that emphasis should be placed on finding methods of enforcing and implementing existing instruments that were reliable and had been ratified by a great number of States, rather than on their revision. The consensus was expressed that, if new rules of war were to be considered, the Commission and the United Nations should not appear as legalizing resort to force.

8. A number of representatives, however, pointed to certain inadequacies of the Hague and Geneva Conventions; some of them felt that those Conventions required extension to make them applicable to every type of armed conflict; that they contained many ambiguities; that in some respects they were incomplete and inconsistent; and that they required bringing up to date in the light of new developments and methods of warfare and technological advances.

9. Special attention was directed to the following points:

(a) The right of adopting means designed to injure the enemy was not unlimited. There could be no attacks on civilians as such and a distinction must be made at all times between persons taking part in hostilities and members of the civilian population, so that the latter might be spared as much as possible.

(b) A more detailed study of the relevant instruments concerning human rights in armed conflicts in their relationship to the general norms of respect for human rights as set out in the United Nations Charter, the Universal Declaration of Human Rights and other international instruments might be useful. In this respect many members emphasized that general humanitarian norms of conduct generally recognized in United Nations instruments applied even in time of armed conflict irrespective of other legal instruments or the type or phase of the conflict.

(c) Certain rights so recognized permitted of no derogation, and an attempt might be made to adjust the derogation clauses of the Geneva Conventions to conform with article 4 of the International Covenant on Civil and Political Rights.

(d) Consideration might be given to the possibility of elaborating a set of standard minimum rules for the protection of human rights in armed conflicts.

(e) Weapons of mass destruction and chemical and biological warfare should be prohibited. Several speakers added that this prohibition should also apply to napalm.

(f) International protection should be extended to persons engaged in wars of national liberation. Extending such protection was, in the view of several representatives, not necessarily a new trend but a duty imposed by international law. Participants in a war that was not international in nature should, if captured, receive the same treatment as prisoners of war, provided they themselves observed generally accepted humanitarian norms. That proviso was, in the view of some representatives, important, as a distinction must be drawn between genuine freedom-fighters and subversive or criminal elements.

(h) Article 4 of the fourth Geneva Convention needed extension to include inter alia: refugees, medical personnel, and Red Cross and United Nations officials on a humanitarian mission.

(i) Further consideration should be given to respect, in times of armed conflict, for social rights and religious freedoms.

(j) There was a need to invite the assistance and co-operation of other international bodies and agencies as well as Governments and to encourage such bodies, agencies and Governments in their efforts to solve the problem of respect for human rights in armed conflicts, including the calling of an international conference.

(k) There was also a need to plan, co-ordinate and possibly regulate relief work in all disaster areas in collaboration with other agencies, especially the International Committee of the Red Cross, with a view to making such relief action more effective.

(l) Methods of control and supervision and fact-finding operations must be perfected, with particular emphasis on the impartiality of any body responsible for such operations.

(m) The possibility should be considered of granting financial assistance to bodies directly concerned with the problem, especially the International Committee of the Red Cross. Opinions on this point, however, were divided.

(n) The organizations concerned should study additional methods of publicizing the rules relating to human rights in armed conflicts by the dissemination of information, the holding of seminars and the extension of educational methods.

10. Several representatives praised the work of the International Committee of the Red Cross and emphasized the need to continue and extend co-operation with that body and especially the need for it to retain its reputation for impartiality. Some speakers referred to the resolutions, in particular resolution XIII, adopted at the twenty-first International Conference of the Red Cross, held in Istanbul in 1969.

11. It was suggested that emphasis should be placed on affirming the existence of a criminal responsibility for wars of aggression and inhuman acts in time of armed conflict. Some representatives felt that that problem might be worthy of a study in depth focusing on measures to be taken for the prevention of wars.

12. Some speakers stressed the importance of protecting the human rights of minorities, which were often denied in times of armed conflict on grounds of race, religion or ethnic origin.

13. At the end of its debate, the Commission requested the Secretary-General to transmit the observations of the members of the Commission on the report of the Secretary-General to the Economic and Social Council and to the General Assembly.

ANNEX III

REPLIES RECEIVED BY THE SECRETARY-GENERAL FROM MEMBER STATES  
REGARDING THE PREPARATION OF THE STUDY REQUESTED IN PARAGRAPH 2  
OF GENERAL ASSEMBLY RESOLUTION 2444 (XXIII) 1/

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1/ Replies received after 20 November 1969. Earlier replies were reproduced in the preliminary report issued as document A/7720.



BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Original: Russian]  
2 March 1970

1. The best and most effective way of protecting human rights would be completely to eliminate wars, and the possibility of their occurring, from the life of mankind. The adoption by the United Nations of the proposals made by the Soviet Union at the twenty-fourth session of the General Assembly on the question of the strengthening of international security would be an important step toward the achievement of this lofty purpose.
2. The imperialist Powers are still retaining in the arsenals of their policy wars and armed intervention in the affairs of other States; they are crushing by force of arms the national liberation movement of the peoples who are under colonial and foreign domination.
3. The criminal war waged by the United States and its allies against the Viet-Nameese people is continuing at the present time, the consequences of Israel's aggression against the Arab countries have not been eliminated, the crimes of the Portugese colonialists against the national liberation movements in Angola, Mozambique and Guinea (Bissau) have not ceased, and the white racists are still committing outrages against the indigenous population of southern Africa.
4. In the course of the aggressive wars and armed conflicts for which the imperialist States are responsible not only are elementary human rights violated but frequently a policy bordering on genocide is carried out: whole centres of population, together with their peaceful inhabitants, are annihilated, and such means of mass destruction as chemical weapons are used. Frequent instances of the violation of human rights in armed conflicts are the barbarous ways in which the civilian population, prisoners of war and the wounded are treated and the senseless destruction of peaceful towns, villages and dwellings, buildings serving the purposes of science, art and religion, and other civilian targets.
5. In these circumstances the need for all States without exception to abide, in any armed conflict, by the existing international conventions defining and limiting the means, ways and methods of waging war assumes particular importance. Among these conventions are: The Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions of 1949. The Byelorussian SSR recognizes itself to be a Party, having acceded to or ratified the above-mentioned international agreements.
6. Resolutely condemning violations of human rights in armed conflicts, the Byelorussian SSR calls upon all States which are not Parties to those instruments to accede to them and to the other international agreements which limit the means, ways and methods of waging war, and urges the further development of international legal standards ensuring respect for human rights in armed conflicts. In particular, the early conclusion of a convention on the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and on the destruction of such weapons would be a contribution to the effort to attain that goal. It will be recalled that a proposal for the

conclusion of such a convention was submitted at the twenty-fourth session of the United Nations General Assembly by a group of socialist countries, including the Byelorussian SSR.

UNION OF SOVIET SOCIALIST REPUBLICS

Original: Russian  
30 December 1969

At the present time when there is a heightening of international tension and a growing threat to world peace arising from the armed conflicts which are taking place in various parts of the world, causing incalculable misery and suffering, the struggle to safeguard fundamental human rights and ensure the observance of the provisions of the Geneva Conventions of 1949 for the protection of war victims becomes particularly urgent and important.

The Geneva Conventions of 1949 are instruments which guarantee legal protection for the wounded, the sick, prisoners of war and civilian persons. They oblige the Parties to the Conventions to apply the basic principles of these Conventions in time of conflict.

In particular, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War prohibits cruel treatment of the peaceful population of the enemy State, outrages upon personal dignity, humiliating and degrading treatment, torture, mutilation, and any other forms of violence.

Supervision of the implementation by belligerent States of the Geneva Conventions and consideration of complaints concerning violations of the Conventions are tasks incumbent on the International Committee of the Red Cross.

The twentieth anniversary of the signing of the Geneva Conventions, which was celebrated in 1969, lays upon all the signatory States a special responsibility for the observance of the basic principles and provisions of the Conventions.

It is apparent that some imperialist States are grossly and systematically violating the humanitarian principles of the Red Cross and the human rights declared by the United Nations and the Geneva Conventions for the protection of war victims to which they themselves are parties.

For a number of years the United States has been waging an undeclared but cruel and barbarous war in the territory of Viet-Nam. Thousands of miles from the American continent, half a million soldiers, by order of the ruling circles in the United States, are killing Viet-Nameese men, women, children and old people, trying to bring to its knees a heroic people which is fighting a holy war for its freedom and independence. Disregarding morality and the elementary standards of international law, the United States has mercilessly bombed and shelled towns and villages of the Democratic Republic of Viet-Nam and has destroyed bridges and dams, hospitals and schools, sowing death among the peaceful inhabitants.

In South Viet-Nam the United States war machine and the troops of its satellites have been and are using poisonous substances and napalm, white phosphorus

and pellet bombs; they are carrying out a "scorched earth" policy, subjecting the territory of Viet-Nam to savage bombings, destroying the lives of many thousands of completely innocent people.

The use of asphyxiating, poisonous and tear gases and other gases of a similar nature, and of bacteriological methods of warfare, was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.

In another part of the world, in the Middle East, Israel has committed brazen aggression against the Arab peoples. In the occupied territories human rights are being violated and the Israeli occupiers are driving hundreds of thousands of Arabs from their native soil by force of arms. Thousands of women, children and old people have been left without shelter and means of subsistence. For the purpose of crushing the resistance of the Arabs, the aggressors from Israel are continuing to use napalm, which is forbidden by international law.

The criminal, inhuman acts of the imperialist States are a shameful violation of international law, and also of the resolutions of the International Conferences of the Red Cross, in which all the countries that signed the Geneva Conventions participate, including the United States and Israel.

The twenty-first International Conference of the Red Cross, which was held at Istanbul from 6 to 13 September 1969, adopted a resolution entitled "The Red Cross as a Factor in World Peace", which was based on a Soviet draft resolution. Reaffirming that the Red Cross is always faithful to its traditional commitments for the benefit of all mankind, the Conference again called on all Governments to respect fundamental human rights.

Noting with satisfaction resolution 2444 (XXIII) of the United Nations General Assembly adopted on 19 December 1968, the Conference requested the leaders of the International Red Cross to maintain constant and close contact with the United Nations in respect of activities on behalf of peace and human rights.

The International Committee of the Red Cross should take more specific and effective steps to strengthen supervision of the implementation of the Geneva Conventions and the resolutions and decisions of the International Conferences of the Red Cross relating to the protection of human rights in armed conflicts.

Taking an active part in the work of the international organizations of the Red Cross, the Soviet Red Cross, together with the national organizations in the socialist, the developing and other peace-loving countries, is persistently striving to ensure that the International Red Cross does not confine itself to adopting resolutions but becomes a real force in the struggle for the life and health of human beings and for the genuine safeguarding of fundamental freedoms and human rights throughout the world.

## YUGOSLAVIA

Original: French  
24 August 1970

1. The Government of the Socialist Federal Republic of Yugoslavia transmits herewith its comments on the question of the protection of human rights in armed conflicts. This reply is only a brief survey of certain aspects of the problem. The Government of the Socialist Federal Republic of Yugoslavia reserves the right to submit more detailed observations at a later stage.
2. The Government of the Socialist Federal Republic of Yugoslavia attaches great importance to the protection of fundamental human rights in armed conflicts. As a consequence of aggression, violation of the principles prohibiting the use of force, and denial of the right of self-determination of peoples under colonial or foreign rule, armed conflicts characterized by serious and systematic mass violations of fundamental human rights break out in various parts of the world. The inhabitants of certain territories and the freedom-fighters undergo the most extreme suffering, so that there can be no question that the international instruments designed to protect fundamental human rights are applicable. Such is the case in Viet-Nam, the Near East, South Africa and other areas, and it is accordingly necessary to take vigorous steps to put an end to this situation and effectively guarantee fundamental rights.
3. The Government of the Socialist Federal Republic of Yugoslavia regards efforts aimed at ensuring the protection of human rights in armed conflicts as one aspect of the efforts undertaken to secure lasting peace in the world. Thus it fully supports the action taken within the framework of the United Nations to find a solution for this question.

## II

4. The Socialist Federal Republic of Yugoslavia has accepted certain obligations deriving from international treaties in this field. Yugoslavia is bound by the Hague Conventions; it has ratified the Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the international Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Geneva Conventions for the protection of war victims, of 12 August 1949; various treaties relating to disarmament - the Treaty Banning Nuclear-Weapon Tests in the Atmosphere, in Outer Space and Under Water of 10 October 1963, the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 and other international instruments which directly or indirectly protect human rights in armed conflicts.
5. Yugoslavia is taking steps to ensure the application of the above-mentioned Conventions, particularly the Geneva Conventions of 1949. Accordingly, the Penal Code of Yugoslavia devotes an entire chapter (chapter XI) to crimes against humanity and international law, which contains detailed provisions concerning the penalties for serious violations of the Geneva Conventions and other agreements.
6. Yugoslavia is likewise giving attention to measures to disseminate the Geneva Conventions among the members of its armed forces and the population as a whole in

co-operation with the Yugoslav Red Cross. In accordance with resolution XXI of the twentieth International Conference of the Red Cross, held in 1965, the Yugoslav Government submitted to the International Committee of the Red Cross a report on measures for the dissemination of the Geneva Conventions. The report was reproduced in a document published by the International Committee of the Red Cross in April 1969 (document D.S.3/lb, p. 115) on the occasion of the twenty-first International Conference.

7. In addition to its activities within the framework of the United Nations, Yugoslavia co-operates in efforts undertaken by other organizations to strengthen the protection of victims of war. The Government and Red Cross of Yugoslavia participate in the activities of the International Committee of the Red Cross in connexion with problems relating to the protection of victims of war. The Yugoslav Government and various organizations in Yugoslavia also take part in the activities of inter-governmental organizations - such as the International Committee of Military Medicine and Pharmacy - and non-governmental organizations dealing with the above-mentioned problems.

### III

8. During the war of national liberation against the **fascist aggressors** and occupying forces from 1941 to 1945 the peoples of Yugoslavia evolved a concept of **defence of the people against the aggressor which was occupying the country** and trying to maintain its power by the systematic perpetration of crimes on a mass scale and the violation of fundamental human rights protected under international law. During that struggle for the protection of fundamental human rights, the troops of the national liberation army and partisan detachments observed the generally accepted fundamental humanitarian rules concerning the protection of victims of war. On the basis of the experience of the national war of liberation, the concept has developed in Yugoslavia of general defence by the people against the invader who violates the fundamental rules of international law. In accordance with that concept, developed in detail in the National Defence Act of 11 February 1969, the members of Yugoslavia's armed forces are required to respect at all times and in all circumstances the rules of international law on the protection of victims of war, i.e. the rules which ensure respect for and protection of fundamental human rights in armed conflicts.

### IV

9. The study prepared by the Secretary-General in accordance with General Assembly resolution 2444 (XXIII) (A/7720) contains valuable material and information and will doubtless contribute to future United Nations studies on this problem. As provided in General Assembly resolution 2597 (XXIV), the study will be continued and questions which have not received adequate attention will be explored further and methods of solving the problem will be indicated. This reply will set forth certain views which may be useful for the purpose of the study.

### V

10. Certain general instruments relating to the protection of human rights - the Human Rights Covenants, the Convention on the Prevention and Punishment of the Crime of Genocide, and the International Convention on the Elimination of All Forms of Racial Discrimination - regional instruments such as the European Convention on

Human Rights, and a number of declarations and resolutions of the United Nations General Assembly and other international bodies set forth the basic principles governing the protection of human rights in times both of peace and of war. Nevertheless, in the armed conflicts which occur throughout the world, inadequate use is made of these international instruments as a means of protecting the fundamental rights of victims of war. In the future, it will be necessary to use them and to rely on them when taking steps to protect human rights in time of war.

11. Paragraph 2 of General Assembly Resolution 2444 (XXIII) indicates two lines to be followed in this study: (a) steps which could be taken to secure the better application of existing instruments relative to the protection of human rights in all armed conflicts, and (b) the conclusion of additional international instruments. In the view of the Yugoslav Government, action should be taken along both these lines. There are many possibilities for ensuring the strict application of existing instruments; if they were respected, the protection of human rights would be greatly strengthened. Nevertheless, the incompleteness of those instruments, the development of new methods of warfare, and the existence of new rules of international law concerning such matters as self-determination and decolonization, racial discrimination, and the protection of human rights in general make it necessary to prepare additional international instruments or to complete the existing ones. Such instruments would modernize the system of rules of international law governing the protection of human rights in armed conflicts and bring them into line with present requirements. One reason why human rights are not adequately protected is that existing instruments are outmoded and imperfect.

12. The General Assembly resolution of 1953 reflects the views of the international community concerning weapons of mass destruction. Those views, as set forth in the resolution in question, should be incorporated into international instruments in order to secure the prohibition of the use of such weapons. The great danger of a war in which these weapons would be used looms constantly over mankind. The United Nations should therefore take decisive action in this matter; by doing so it would make an important contribution to the peace and security of mankind.

13. Many General Assembly resolutions, including resolution 2597 (XXIV), paragraph 1, call for the extension of the protection afforded by international humanitarian **conventions** to freedom-fighters and civilians among peoples fighting against colonialism and foreign rule for liberation and self-determination. That demand should be met and all States should be committed, in the appropriate manner and by legal means, to ensure that protection.

14. When reviewing the 1949 Geneva Conventions with a view to amending them, particular attention should be paid to measures to ensure the application of these Conventions in armed conflicts of all kinds. Consequently it is necessary inter alia to define the meaning of the term "armed conflict" as used in the Conventions. It is also important to enlarge the scope of the protection of victims of internal conflicts and to ensure the protection of fundamental human rights in such conflicts more fully than they are now protected under article 3 of the Convention.

15. Among the questions which should be more adequately regulated is that of the adoption of rules to eliminate obstacles to humanitarian relief action, since such action is of great importance for all victims of war. In that respect,

resolution XXVI adopted by the twenty-first International Conference of the Red Cross in 1969 could serve as a guide for the codification of principles and rules.

16. Attention shall likewise be given to various measures to ensure the application of existing and future international conventions. Of particular importance is the need to apply the sanctions laid down by the Conventions more effectively, to modify and complete this system, to regulate the question of reprisals, and so forth.

17. Legal measures other than international conventions, such as declarations and resolutions, can be used to improve the protection of human rights with a view to the gradual adoption of specific principles and criteria.

18. With regard to the methods of work of the United Nations in this field, the Yugoslav Government feels that co-operation with the International Red Cross and other organizations dealing with problems relating to the protection of human rights in armed conflicts would be very useful, for such co-ordination of activities and co-operation, particularly in the study phase, may be expected to yield positive results.

19. The Government of Yugoslavia will continue to study the problem and will state its position when this item is under consideration at the twenty-fifth session of the General Assembly. It awaits with great interest the report of the Secretary-General on this question, particularly the chapter dealing with recommendations and conclusions.