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# **HUMANITARIAN LAW IN ARMED CONFLICT: THE THIRD DIPLOMATIC CONFERENCE**

**CHARLES L. CANTRELL\***

## **I. INTRODUCTION**

Two chapters of important statutory revisions were just completed in the continuing development of a body of humanitarian law governing conduct during warfare. The conclusion of the Third and Fourth Diplomatic Conferences of the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts marked the formal ending of a lengthy process initiated by the International Committee of the Red Cross to update the 1949 Geneva Conventions and integrate the principles and concepts of humanitarian law throughout the Conventions.

This article will deal with the developments which occurred at the Third Diplomatic Conference. All major articles adopted by the various working committees of the Conference have been included herein. Due to the obvious limitations of space and time, an extensive analysis of the adopted articles is not attempted. Rather, it is hoped that this article will provide the reader with a broad overview of the present state of the law in this area, and in particular, an appreciation of the many accomplishments of the third session of the Conference.

The article begins with a short section detailing the evolution and growth of humanitarian law in armed conflicts. Following this is a discussion of the Third Conference's accomplishments with regard to Protocols I and II. The examination of Protocol I, which involves noninternational armed conflicts, is separated into two different sections for clarification purposes. Within these two sections, various articles of the Protocols are grouped together in an attempt to summarize the important results in various areas of concern.

## **II. THE EVOLVEMENT OF HUMANITARIAN LAW**

The development and application of humanitarian law in

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the area of armed conflicts is a relatively modern phenomenon which has been precipitated by substantial changes in battle-field weapons, strategies and combatants.<sup>1</sup> Until the first Geneva Convention was promulgated in 1864,<sup>2</sup> the protection of war victims depended upon the existence of bilateral agreements entered into by belligerent commanders and upon the application of any customary international law which had developed through the practice of states.<sup>3</sup>

The Geneva Convention of 1864 was a significant achievement in the advancement of international humanitarian law. Its acceptance by the world's major powers marked the initial entry of law into the sphere of international armed conflicts.<sup>4</sup> Perhaps more importantly, it set forth certain rules of conduct which were proscribed by internationally recognized moral principles. However crude and incomplete were its provisions, the importance and sanctity of the individual were acknowledged for the first time in international law.

Soon after the landmark Convention of 1864, two parallel developments occurred which signaled the beginning of an international movement to refine the 1864 principles and apply

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1. For discussions pertaining to the protection of civilians, avoidance of nonmilitary targets and the use of controversial weapon systems, see *LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE* (P. Trooboff ed. 1975); *LEVIE, SOME MAJOR INADEQUACIES IN THE EXISTING LAW RELATING TO THE PROTECTION OF INDIVIDUALS DURING ARMED CONFLICT* (Working paper of the Fourteenth Hammarskjold Forum), reprinted in *WHEN BATTLE RAGES, HOW CAN LAW PROTECT?* 1 (J. Carey ed. 1971) [hereinafter cited as *LEVIE*]; T. WULFF, *CONVENTIONAL WEAPONS, THEIR DEPLOYMENT AND EFFECTS FROM A HUMANITARIAN ASPECT; RECOMMENDATIONS FOR THE MODERNIZATION OF INTERNATIONAL LAW* (M. Nygren trans. 1973) [hereinafter cited as *T. WULFF*].

2. Convention for the Amelioration of the Wounded in Armies in the Field, concluded Aug. 22, 1864, 22 Stat. 940, T.S. No. 377. This treaty was composed of only ten brief articles, but successfully provided for the protection of wounded and sick members of the armed forces and the immunity of ambulances, military hospitals and medical personnel from hostile acts.

3. J. PICTET, *GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD* 10 (1952) [hereinafter cited as *J. PICTET*].

4. *Id.* at 11. This was the first treaty codification of certain principles of conduct designed for the protection of the individual victims of war. It is generally considered that this treaty was the beginning of the formal evolutionary process of customary humanitarian law initiated in the seventeenth century by the scholar Grotius. H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* 366 (A. Campbell trans. 1901). The acceptance of the rudimentary Grotian principles of minimum destruction and protection of non-combatants as elements of the early customary international law of war has been commented upon in the following works: J. BOND, *THE RULES OF RIOT* 15-19 (1974) [hereinafter cited as *J. BOND*]; J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 13-18 (1973) [hereinafter cited as *J. STONE*].

humanitarian law to the methods and means of conducting hostilities. The St. Petersburg Declaration<sup>5</sup> expressed the principle that a proportionality test should exist which would balance the necessary military advantage sought with the resulting destruction done. In addition, it ambitiously forbade the use of a small exploding bullet which had recently been developed.<sup>6</sup> This individual-directed proportionality principle was aimed at disabling the greatest possible number of combatants without uselessly aggravating their suffering or rendering their deaths inevitable.<sup>7</sup> However, it is apparent that the abundance and use of antipersonnel weapons in modern arsenals indicate a consistent state practice that has disregarded this doctrine and has consequently prevented it from becoming part of the customary international law of war.<sup>8</sup>

The second notable event in 1868 was the convening of a diplomatic conference to revise the 1864 Convention and expand its principles to cover naval warfare.<sup>9</sup> Although the draft convention of 1868 was never ratified, abundant evidence exists that its principles were followed by some major powers in two wars occurring before the turn of the century.<sup>10</sup>

A subsequent attempt to codify the law of war on land was made in 1874 in Brussels.<sup>11</sup> The Brussels Convention was the first international agreement which sought to regulate the treatment of prisoners of war.<sup>12</sup> Although the Convention was never ratified, it served as an important model for subsequent international agreements which were patterned after its princi-

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5. The Declaration of St. Petersburg, Dec. 11, 1868, reproduced in *I THE LAW OF WAR* 192-93 (L. Friedman ed. 1972) [hereinafter cited as *I THE LAW OF WAR*].

6. "The contracting parties engage, . . . to renounce, in case of war among themselves, the employment, . . . of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances." *Id.* at 192.

7. *Id.* at 192-93.

8. Baxter, *Comments*, in *LAW AND RESPONSIBILITY IN WARFARE*, *supra* note 1, at 65. But see Harris, *Modern Weapons and the Law of Land Warfare*, 12 *MIL. L. WAR REV.* 7, 14 (1973). Selected sources which deal with the destructive capabilities of modern weapons are as follows: LEVIE, *supra* note 1, at 20; Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent with Legal Norms?*, 4 *DEN. J. INT'L L. & POL'Y* 229 (1974); T. WULFF, *supra* note 1.

9. J. PICTET, *supra* note 3, at 15.

10. Note, 47 *INT'L L. DOCUMENTS* 1950-51, at 2 (1952).

11. Declaration of Brussels, Aug. 27, 1874, reproduced in *I THE LAW OF WAR*, *supra* note 5, at 194-203.

12. *Id.* arts. XXIII-XXXIII, at 198-200.

pal articles.<sup>13</sup>

The most important development that served to circumscribe the methods and means of conducting warfare was the Hague Convention of 1899,<sup>14</sup> which was later revised into a comprehensive treaty and annex of regulations that were finally published in 1907.<sup>15</sup> The Hague Convention of 1907 has continued to serve as the basic fabric of international law governing the conduct of hostilities until the present time.

An appreciation of the desire to modernize and supplement the Hague Convention was first evidenced shortly after World War I. At that time nations realized that aerial warfare had been omitted from coverage under existing international law. This concern ultimately resulted in the drafting of the Hague Rules of Air Warfare.<sup>16</sup> These rules have never been adopted, and the state practice in the last forty years clearly shows that very few customary rules of aerial warfare have emerged.<sup>17</sup>

The use of chemical and biological weapons in international conflict has largely been proscribed since the termination of World War I. It is altogether uncertain whether the true reason is the observance of a customary rule of international law or a fear that a reprisal in-kind would be too devastating on the attacker. The answer depends on whether the Geneva Gas Protocol of 1925<sup>18</sup> has assumed the status of a rule of customary

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13. J. STONE, *supra* note 4, at 547. In addition to codifying certain principles dealing with the treatment of prisoners of war, the Brussels Convention dealt with occupations by belligerent forces. I THE LAW OF WAR, *supra* note 5, arts. I-VIII, at 194-95; definitions of armed forces, *id.* arts. IX-XI, at 196; humanitarian restraints on combat methods, *id.* arts. XII-XIV, at 196-97; restraints on attacking civilian towns, *id.* arts. XV-XVIII, at 197; and treatment of spies, *id.* arts. XIX-XXII, at 197-98.

14. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403.

15. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as the Fourth Hague Convention of 1907].

16. Hague Rules of Air Warfare, Feb. 20, 1923, reproduced in I THE LAW OF WAR, *supra* note 5, at 437-49.

17. Professor Levie persuasively argues that Article 25 of the Regulations attached to the Fourth Hague Convention of 1907 prohibits certain aerial bombardment inasmuch as it forbids "attack of bombardment by whatever means" on undefended targets. LEVIE, *supra* note 1, at 21-29. While the travaux préparatoires indicated that this provision applied to aerial warfare, Professor Julius Stone considered that the restriction applied only when the attacker was in the combat zone and in a position to capture the target. J. STONE, *supra* note 4, at 621.

18. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65.

international law. Although there are views to the contrary,<sup>19</sup> the Protocol does not bind nonsignatories and has not attained the necessary voluntary observance to be classified as a part of customary international law.<sup>20</sup>

### III. THE MODERN GENEVA CONVENTIONS

In 1929 the world's major powers sought to reform and extend the principles of the 1906 Geneva Conventions.<sup>21</sup> Having witnessed the inadequacies of the 1906 Convention regarding the rights of medical personnel and the legal duties of the belligerents to observe these rights, the 1929 participants promulgated two expanded and modernized treaties on humanitarian law in armed conflicts.<sup>22</sup> These treaties served as the foundation of humanitarian law applicable in international warfare until the end of World War II.

The Nazi atrocities combined with the spector of atomic warfare served as the important impetuses in the movement to revise the 1929 Geneva Conventions. In a short three years an extensive program of development successfully culminated in the 1949 Geneva Conventions.<sup>23</sup>

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19. Professor Baxter states that lethal gases are banned by customary international law. Baxter & Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT'L L. 853, 853 (1970). Whether nonlethal agents are similarly banned by customary law is doubtful, but there seems to be a distinct trend to proscribe them. See J. BOND, *supra* note 4, at 94-95; XXth International Conference of the Red Cross, Vienna, Oct. 1965, Resolutions 28; XXIst International Conference of the Red Cross, Istanbul, Sept. 1969, Resolutions 14.

20. Lethal gases and agents could be subject to a customary rule banning a first strike, but numerous reservations have been taken to the 1925 Protocol and allow a reprisal through the use of these lethal agents. While an otherwise illegal act may be justified if made properly through a reprisal, the concomitant requirement of proportionality exposes the difficulty of legal analysis in this area. Taking into account the large number of nonsigning nations and existing chemical agent stockpiles, valid suspicions remain whether this Protocol has assumed the status of a customary rule. For two excellent analyses see Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 Wis. L. Rev. 375; J. STONE, *supra* note 4, at 553-57.

21. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, July 6, 1906, 35 Stat. 1885, T.S. No. 464.

22. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343.

23. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (proclaimed Aug. 30, 1955) [hereinafter cited as First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217,

In addition to being a detailed elaboration of the rights and duties of the belligerents in time of war, the Geneva Conventions of 1949 served to close many loopholes in humanitarian law which had allowed some nations to completely disregard the prior conventions. Application of the 1949 Geneva Conventions was extended to three situations where the prior law was silent: an undeclared state of war, partial occupation of territory without armed resistance, and a nonsigning state which voluntarily bound itself to the Conventions.<sup>24</sup>

The universal acceptance of these Conventions has been the single most important step in developing a core of substantive humanitarian law that would be accepted and applied by the majority of nations. Whether these Conventions would have met the test of a third international conflict is not known. The International Committee of the Red Cross (ICRC), however, recognized several of the Conventions' shortcomings in this changing age of warfare. Consequently, the ICRC began to prepare necessary revisions as early as 1953.<sup>25</sup>

In 1969, the International Red Cross Conference unanimously adopted a resolution which proposed that the ICRC draft a set of rules supplementing the existing 1949 Conventions. Pursuant to this resolution the ICRC convened two conferences of government experts in 1971 and 1972.<sup>26</sup> Prior to each of these conferences the ICRC met with its own panel of experts in an attempt to correct any major objections or errors in the draft rules. The result of these meetings was two draft

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T.I.A.S. No. 3363, 75 U.N.T.S. 85 (proclaimed Aug. 30, 1955) [hereinafter cited as Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (proclaimed Aug. 30, 1955) [hereinafter cited as Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (proclaimed Aug. 30, 1955) [hereinafter cited as Fourth Geneva Convention].

24. See Article 2 of the Geneva Conventions, *supra* note 23.

25. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. The ICRC completed these provisions but was unable to gain wide acceptance of the Rules. See XXth International Conference of the Red Cross, Vienna, Oct. 1965, Resolutions 21.

26. For details of these conferences, see generally Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May-12 June, 1971*, 2 NETH. Y.B. INT'L L. 68 (1971); Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May-2 June, 1972*, 3 NETH. Y.B. INT'L L. 18 (1972).

protocols to the Geneva Conventions<sup>27</sup> first published by the ICRC in 1973.

The ICRC prepared these draft protocols to cover two different types of armed conflicts. Protocol I applies only in the case of international armed conflicts, while Protocol II applies to noninternational armed conflicts or civil wars. A separate protocol was required for noninternational armed conflicts because of a wide disagreement as to what level of insurgency would be required to bring those international humanitarian obligations into force.<sup>28</sup>

Soon after the two draft protocols and Commentary were published in 1973, the ICRC held the First Diplomatic Conference in February 1974. That Conference was plagued by political issues running the gamut from the definition of "unjust" wars to the proper classification of wars of national liberation. Predictably, the Conference accomplished little in the way of adopting important provisions of the draft rules.<sup>29</sup>

The Second Diplomatic Conference was held in February 1975, and was considered to be much more successful than the prior one. At the conclusion of this Conference, it was suspected that many agreements were reached with the expecta-

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27. These draft rules are explained in Draft Additional Protocols to the Geneva Conventions of August 12, 1949; Commentary (ICRC 1973) [hereinafter cited as Commentary]. See also Protection of Victims of International Armed Conflicts, Draft Protocol Additional to the Geneva Conventions of August 12, 1949 (Comité International de la Croix-Rouge D 1395 b, 1976) [hereinafter cited as Draft Protocol I]; Protection of Victims of Non-international Armed Conflicts, Draft Protocol Additional to the Geneva Conventions of August 12, 1949 (Comité International de la Croix-Rouge D 1388/1 b, 1976) [hereinafter cited as Draft Protocol II].

28. This dispute over the definition of what constitutes an "armed conflict not of an international character" can be traced back to the 1949 Geneva Conventions. J. PREUX, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 27-37 (J. Pictet ed. 1960) [hereinafter cited as J. PREUX]. See generally Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37 (1971).

29. For various views of the Conference's proceedings see Baxter, *Humanitarian Law or Humanitarian Politics?—The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1 (1975); Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of Eleventh Century*, 32 WASH. & LEE L. REV. 25 (1975); Bond, *Amended Article 1 of Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerilla*, 32 WASH. & LEE L. REV. 65 (1975); Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77 (1975); Kalshoven, *Reaffirmation and Development of International Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February-29 March, 1974*, 5 NETH. Y.B. INT'L L. 3 (1974).



tion that Protocol II would never come into force. This situation arose because Protocol II was amended to apply to those armed conflicts not within the purview of Protocol I and to exclude all "disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature" that do not constitute armed conflicts.<sup>30</sup> In order for Protocol II to come into force in the case of insurgency, additional requirements must be met which will, in all probability, preclude its application in the vast majority of internal conflicts.<sup>31</sup>

In summary, it appears that compromise was achieved in troublesome areas only at the expense of Protocol II having a wide scope of application. It would have been too optimistic, perhaps, to expect many of the unstable third world nations to guarantee humane treatment to insurgents, but this problem has nevertheless cast a pale over the entire effort.<sup>32</sup>

#### IV. THE THIRD DIPLOMATIC SESSION

The third session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts met in Geneva from April 21 to June 11, 1976. The adoption of forty-two articles in both protocols indicated a high degree of consensus. The remainder of this article is a summary of the accomplishments of these protocols and an attempt to offer some insight into the problems remaining to be solved at the fourth session.

##### A. *Protocol I — International Armed Conflicts*

##### Combat Restrictions

Issues of vital importance concerning the definitions of "combatants" and "armed forces" were resolved with the

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30. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Committee I, Draft Report, CDDH/I/284, Apr. 12, 1975, at 20.

31. *Id.* The additional requirements are set forth in Article 1 of Protocol II and are as follows: (a) the rebels must constitute a dissident armed force or be comprised of organized armed groups, (b) have a responsible command, (c) exercise such control over the territory of the state as to enable them to carry out sustained and concerted military actions, and (d) be able to implement the provisions of Protocol II.

32. The Second Diplomatic Conference has been reviewed in the following works: Cantrell, *Civilian Protection in Internal Armed Conflicts: The Second Diplomatic Conference*, 11 *TEX. INT'L L.J.* 305 (1976) [hereinafter cited as Cantrell]; Solf & Grandison, *International Humanitarian Law Applicable in Armed Conflict*, 10 *J. INT'L L. & ECON.* 567 (1975) [hereinafter cited as Solf & Grandison]; Suckow, *Conference on Humanitarian Law - Phase II*, 14 *REV. INT'L COMM'N JURISTS* 42 (1975).

adoption of Article 41.<sup>33</sup> This article will bring various groups such as mercenaries, guerillas and liberation soldiers under the provisions of the Protocol. In past wars, parties would sometimes deny responsibility for the actions of certain nonregular forces on the basis that only regular forces were under the restrictions of the Geneva Conventions. This article can be viewed as an attempt to make all individual participants in a conflict come under applicable international law regardless of their organization.

The provisions of Protocol I provide that all members of armed forces, except medical personnel and chaplains, are to be considered as combatants. Therefore, all personnel participating directly in the conflict will be accorded all appropriate privileges. It is further provided that if a party incorporates a paramilitary or law enforcement agency into its armed forces, a duty arises to notify the other parties of the incorporation.

A definition of "armed forces" is also provided in this article; it includes all groups and units which are under a command responsible to a particular party for the conduct of its subordinates. It is further required that all of these groups have an internal disciplinary system which enforces the rules of warfare.

Another major problem identified by the ICRC was the use of "perfidy" in armed conflicts. Perfidy is defined in Article 35 as "[a]cts inviting the confidence of an adversary that he is entitled to, or is obliged to accord protection under international law applicable in armed conflicts with intent to betray that confidence."<sup>34</sup> In other words, these are acts which falsely create a situation where the adversary feels obliged by applicable international law to abstain from any hostile acts. Four examples are specifically prohibited by the article: feigning of an intent to surrender or negotiate under a flag of truce; feigning incapacitation by wounds or sickness; feigning of civilian, noncombatant status; feigning of protected status by the use of neutral or United Nations signs, emblems or uniforms.

Two important qualifications exist with respect to perfidy. First, perfidy is not prohibited per se, but only when it is used to "kill, injure, or capture an adversary."<sup>35</sup> Secondly, the act

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33. Draft Protocol I, *supra* note 27, at 35.

34. *Id.* at 32.

35. *Id.*

must be performed with the "intent" to betray the confidence created. Therefore, feigning surrender in order to escape would not violate the article where it was not done to kill, injure or capture the adversary.

Ruses of war are specifically exempt from the prohibition of this article. These are acts performed to induce the enemy to act recklessly or to mislead him. However, they must not violate any rule of international law nor deceive the enemy into believing that the actor is protected under law. Examples of these permissible tactics are the uses of camouflage, traps, mock operations and misinformation.

The concept of "quarter" or abstaining from the practice of killing all of the survivors of a military attack was first codified in the law of war in 1907.<sup>36</sup> However, the ICRC was generally unsatisfied with the cursory protection afforded by the 1907 rule and proceeded to slightly expand its premise. The new rule which is embodied in Article 38 is as follows: "It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis."<sup>37</sup> This definition of "quarter" has two distinct advantages over the prior one. First, it prohibits the threat of conducting hostilities without quarter. Secondly, it clarifies the ambiguous Hague definition, and attempts to eliminate the possibilities of an adversary claiming an excused violation under either ignorance of the law or under circumstances which were claimed to be exigent.

In conjunction with the expanded concept of quarter, the ICRC also sought to increase the protection given to those combatants who are *hors de combat*. A person is deemed to be *hors de combat* if he is within the power of an adverse party or clearly expresses an intention to surrender. If a person has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself, he is also considered to be *hors de combat*. Finally, in any case where a person abstains from hostile acts and does not attempt to escape, he is also considered to be *hors de combat*.<sup>38</sup>

These provisions significantly expand the protection over the 1907 Hague Convention which protected only those who

36. Article 23(d) of the Annex to the Fourth Hague Convention of 1907, *supra* note 15, states: "it is especially forbidden [t]o declare that no quarter will be given. . . ."

37. Draft Protocol I, *supra* note 27, at 33.

38. *Id.* art. 38 bis, at 33.

laid down their arms, or surrendered when there was no longer a means of defense.<sup>39</sup> The overriding purpose is to prohibit the enemy rendered *hors de combat* from becoming the "object" of attack. Therefore, the article does not cover those cases where the protected status is violated when the object of attack is something else.<sup>40</sup>

Another portion of Article 38 bis<sup>41</sup> provides for the safe release of persons entitled to prisoner of war status where they are captured under "unusual conditions of combat," and cannot be evacuated under the provisions of the Third Geneva Convention.<sup>42</sup> This rule will have a substantial impact in the areas of guerrilla warfare and wars of national liberation. By definition, the operations of small and clandestine guerrilla units would qualify under the "unusual conditions" language. These types of forces have neither the procedure nor the inclination to safely evacuate prisoners pursuant to the Third Geneva Convention. Therefore, the restrictions contained in this article along with the prohibition against conducting hostilities without quarter, combine to serve as a strong restraint on the conduct of these operations.

Aircraft occupants who because of distress must parachute from their airplanes are extended a moderate amount of protection. There is a general prohibition against making them the object of an attack while descending unless they will land in territory under the control of their state or one of her allies.<sup>43</sup> In addition to the flat prohibition against firing at parachuting aircraft occupants when landing in enemy territory, a supplementary rule requires that they be given an opportunity to surrender when they land.<sup>44</sup> The only two exceptions to these rules are: (a) airborne troops who are not covered under the rules;<sup>45</sup> and (b) the opportunity to surrender need not be extended to those occupants who have landed and are "engaging

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39. Fourth Hague Convention of 1907, *supra* note 15, art. 23(c).

40. Thus, no special protection is given to those wounded or *hors de combat* while they remain commingled with the combatants. As a necessary concomitant, the segregation of those incapacitated and a resultant accidental injury to them is an unprotected occurrence under this article.

41. See note 38 *supra*.

42. For an analysis of these provisions of the Third Geneva Convention see J. PREUX, *supra* note 28, at 171-75.

43. Draft Protocol I, *supra* note 27, art. 39(1), at 34.

44. *Id.* art. 39(2).

45. *Id.* art. 39(3).

in a hostile act."<sup>46</sup>

Airborne troops had not previously been entitled to protection while descending, and the Conference refused to extend the necessary protection to those occupants parachuting to safety over territory under their state's control. This unadopted broad principle of protection, however, is currently afforded by the armed forces of the United States,<sup>47</sup> but the prevailing attitude at the Conference was that these highly trained individuals would only join their forces again to make subsequent attacks upon their adversaries.<sup>48</sup> Here, again, the practical aspects of waging war took priority over humanitarian considerations.

The subject of espionage is covered by Article 40.<sup>49</sup> The final rules that were adopted comprise a four-part article that adds little to the existing international law as defined under the 1907 Hague Convention.<sup>50</sup> In addition to reaffirming the well known principle that a member of the armed forces shall not be considered a spy if he is wearing a uniform while engaging in his clandestine activities, special protection is afforded to residents of an occupied territory. A member of the armed forces who gathers information for his side and who is also a resident of the territory occupied by an adverse party shall not be considered a spy unless he performs certain acts under "false pretenses" or "deliberately in a clandestine manner."<sup>51</sup>

With the adoption of these articles that limit combat methods and more carefully define the parameters of humanitarian law, the Committee completed its work in these areas. The only article which may be reconsidered is Article 39 which grants

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46. *Id.* art. 39(2). It should be noted that the American delegation argued for the proposition that all airmen descending by parachute from an aircraft in distress should be considered temporarily *hors de combat* and entitled to protection. The United States has further announced that it will support the reconsideration of this issue at the Fourth Session in expectation that the protection will be accorded to all regardless of where they will land. See Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Third Session 14 (1976) [hereinafter cited as Report of the United States Delegation].

47. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ch. 30 (1956).

48. Report of the United States Delegation, *supra* note 46, at 14.

49. Draft Protocol I, *supra* note 27, at 34.

50. Fourth Hague Convention of 1907, *supra* note 15, arts. 29-31.

51. Draft Protocol I, *supra* note 27, art. 40(3), at 34. An additional restriction is that the resident spy will lose his preferred status as a prisoner of war only if he is captured while he is engaging in espionage.

only a limited protection to aircraft occupants parachuting to safety in friendly territory.<sup>52</sup>

### Prisoners of War

At the conclusion of the Third Session of the Diplomatic Conference the issue of whether members of resistance movements and liberation fronts would be entitled to prisoner of war status remained unresolved. There seems to be a difficulty in developing a single standard for regular forces and guerrilla fighters that does not encourage uniformed soldiers to dress in civilian clothes.<sup>53</sup> The possibility of such encouragement exposed the fundamental problem of distinguishing civilians from civilian-clothed combatants. A preliminary working group study recommended that a person retain his combatant status when he cannot "distinguish himself and retain a chance of success so long" as "he carries his arms openly during each military engagement, and during such time as he is visible to the adversary."<sup>54</sup> This proposal of the working group will be the basis for the reconsideration of the issue at the fourth session.

Another closely related problem also left unresolved at the close of the third session was the status of mercenaries. The Nigerian delegation submitted a proposal that would deny prisoner of war status to mercenaries.<sup>55</sup> "Mercenary" was defined as one "not a member of the armed forces of a Party to the conflict who is specially recruited abroad and . . . motivated . . . essentially for monetary payment, reward, or other private gain."<sup>56</sup>

While no final draft article was approved, several problem areas were identified. Among the more important was whether "instructors" should be included in this category, or whether the term "mercenaries" should only apply to those engaged in actual fighting.<sup>57</sup> Other important questions arose regarding the quantum of proof necessary to demonstrate a person's motivation for private gain and the definition of "essentially for . . . private gain."<sup>58</sup> Perhaps the most formidable theoretical

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52. See text accompanying note 43 *supra*.

53. Draft Report Addendum, Committee III, CCDH/III/361/add. 2, at 1 (1976).

54. *Id.* at 2-3.

55. Draft Report Addendum, Committee III, CDDH/III/361/add. 1, at 1 (1976).

56. *Id.*

57. *Id.* at 2.

58. *Id.*

dispute is whether a party to the conflict may grant nationality status or military rank to mercenaries and thereby bypass the loss of prisoner of war status provisions.

In the midst of all of this disagreement over the questions of guerrilla fighters and mercenaries, the Conference surprisingly managed to approve Article 42 bis.<sup>59</sup> These provisions create a presumption in favor of a captured combatant by stating that he shall be entitled to prisoner of war status if he claims such status, appears entitled to it, or if the party on which he depends claims such status on his behalf.<sup>60</sup> This presumption continues until a competent tribunal finally determines his true status.<sup>61</sup> If such person does not qualify as a prisoner of war, he will nevertheless be entitled to numerous fundamental guarantees which include protection from physical violence and moral coercion.<sup>62</sup>

Article 42 bis was the sole article regarding prisoners of war that was adopted at the session. However, there appears to be a sufficient consensus of opinion that the major areas of dispute are settled. Only the technical definition of "mercenary" and certain minor issues remain to be solved. It is expected that the prisoner of war provisions will be substantially completed by the close of the fourth session.

### Medical Transportation

The finishing touches were put on the broad plan of protection given to medical transports under Protocol I with the adoption of Article 24.<sup>63</sup> These rules extend the protective coverage given to mobile medical units to medical ships and craft not specifically included under the Protocol or Geneva Conventions. There exists a requirement that the craft be identifiable by any party.<sup>64</sup> Therefore, any craft claiming protection under

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59. Draft Protocol I, *supra* note 27, at 36.

60. *Id.*

61. "Competent tribunal" does not mean "military tribunal." This interpretation was expressly rejected in the Third Geneva Convention. Competent tribunal therefore means any appropriate judicial or administrative court or tribunal. *See* J. PRÉUX, *supra* note 28, at 77; Report of the United States Delegation, *supra* note 46, at 15.

62. Paragraph 3 of Article 42 bis guarantees protection to all those not entitled to prisoner of war status under Article 65. This latter article remains unadopted, but will, in all probability, be adopted at the Fourth Session. For a complete list of the safeguards of Article 65, *see* Draft Protocol I, *supra* note 27, at 54.

63. Draft Protocol I, *supra* note 27, at 23.

64. *Id.*

this provision must be marked in a manner consistent to the general rules of the Geneva Conventions.<sup>65</sup> The overriding principle of the entire article is to protect those ships and craft temporarily pressed into emergency service.

The prospect of allowing medical flights to pass over the territory of an adverse party during a conflict raises a very real danger to ground personnel. Any such medical flight could be equipped to transmit vital intelligence data or even execute an attack. Simply stated, the problem was to provide sufficient protection for these flights while securing adequate safeguards for the opposing ground forces. Article 31 addresses this issue and provides that when medical aircraft fly over land or water either under the control of an adverse party or under no party's control, the aircraft may be ordered to land for inspection.<sup>66</sup>

If the aircraft lands on the ground, a full inspection is presumably allowed. If the landing is on water an expeditious inspection must be undertaken.<sup>67</sup> If the aircraft is found to be in violation of any restrictions, it may be seized by the adverse party.<sup>68</sup>

Medical aircraft, in lieu of an agreement, are forbidden by Article 32 to fly over the territory of a neutral state or over a state that is not a party to the conflict.<sup>69</sup> In the event of a navigational error or an emergency, the aircraft must identify itself and comply with any forthcoming orders to land for inspection.<sup>70</sup> There is a duty on the part of the territorial state to apply their restrictions in an equal manner to all parties to the conflict.<sup>71</sup> In the event of a discovered violation, a duty exists to detain the occupants consistent with a strict doctrine of neutrality.<sup>72</sup>

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65. See The Second Geneva Convention, *supra* note 23, art. 42-43.

66. Draft Protocol I, *supra* note 27, at 28.

67. *Id.* art. 31(2). In this regard, recourse should be made to Article 29 which forbids the use of medical aircraft to gain military advantage, transmit intelligence data, possess a large degree of armament, or search for the wounded, sick and the shipwrecked. *Id.* at 26-27.

68. *Id.* art. 31(4), at 28. The subsequent use of the seized aircraft is limited to medical purposes for all aircraft which are designated "permanent" medical aircraft. These are defined as "those which are assigned for an indeterminate period to medical transportation." *Id.* art. 21(b), at 22.

69. *Id.* art. 32, at 29.

70. *Id.* art. 32(2).

71. *Id.* art. 32(5), at 30.

72. *Id.* art. 32(4), at 29-30.



### Technical Annex

The basis of a technical and comprehensive foundation of rules regarding the identification and recognition of medical and civil defense personnel was established by the approval of fourteen articles of the Technical Annex.<sup>73</sup> The Annex proposes a broad scheme of increased communication and signal methods in order to update the present visual recognition method. This project was deemed to be an absolute necessity because the sophistication of modern weaponry often precludes visual sighting in advance of attack.

The most important parts of the Technical Annex are contained in Chapter III and set forth the various distinctive signals that will become available.<sup>74</sup> The use of these signals is optional, but if adopted by the parties, their use is restricted only to medical purposes.<sup>75</sup> A flashing blue light was the signal adopted for the identification of medical aircraft.<sup>76</sup> Additional means of signaling such as a distinct radio message<sup>77</sup> and a secondary surveillance radar system<sup>78</sup> are provided in subsequent articles. The final decision regarding the allocation of the radio signals is reserved for the judgment of the International Telecommunication Union.

Resolutions were adopted at the conference which requested the International Civil Aviation Organization,<sup>79</sup> Intergovernmental Maritime Consultative Organization<sup>80</sup> and International Telecommunication Union<sup>81</sup> establish the necessary procedures for implementing the provisions of the Technical Annex relating to distinctive signals. Once these procedures are established, the comprehensive scheme envisioned by the drafters will be completed and constitute a much needed addition to this area.<sup>82</sup>

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73. Annex, Regulations Concerning the Identification, Recognition and Marking of Medical Personnel, Units of Transports and Civil Defence Personnel, Equipment of Transports, Draft Protocol I, *supra* note 27, at 68-75.

74. *Id.* at 73-74.

75. *Id.* art. 5, at 73.

76. *Id.* art. 6.

77. *Id.* art. 7.

78. *Id.* art. 8, at 74.

79. Report of the United States Delegation, *supra* note 46, at 112.

80. *Id.* at 114.

81. *Id.* at 116.

82. Article 18 bis provides a mechanism for periodic review of the Technical Annex. This update procedure grants the ICRC the option of convening a conference of experts

## Information of the Victims of a Conflict and Remains of Deceased

Due largely to initiative shown by the United States, a unique and important section dealing with those persons missing in action was adopted during the third session. Undoubtedly, the United States experience in Vietnam was the impetus for this drive. The language of Article 20 bis expresses the purpose of the new section as follows: "The activities . . . shall be mainly prompted by the right of families to know the fate of their relatives."<sup>83</sup> The United States delegation enthusiastically approved this wording, and predicted that it would establish a new human right in international law.<sup>84</sup>

The Protocol establishes a duty on behalf of each party to the conflict to search for all persons reported missing by an adverse party.<sup>85</sup> This search must be carried out as soon as the circumstances permit and not later than the cessation of active hostilities.<sup>86</sup> The gathering of this information will be required for all those who have been detained for more than two weeks, or who died while in detention,<sup>87</sup> and will be controlled by requirements mandating compliance with the applicable provisions of the Fourth Geneva Convention.<sup>88</sup> The pertinent information will be transmitted to the adverse party by either the Protecting Power, Central Tracing Agency of the ICRC, or the national Red Cross Societies.<sup>89</sup>

Another article dealing with the treatment of persons in the power of a party to the conflict discloses a similar humanitarian attitude regarding the rights of families. This provision requires participating parties to facilitate the reunion of dispersed families, and especially to encourage the efforts of any humanitarian organizations engaged in these tasks.<sup>90</sup> The combination of these two articles recognizes the importance of imparting information to families separated during a war. As

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every four years, or whenever the ICRC believes the Annex would benefit from such a review. Draft Protocol I, *supra* note 27, at 17.

83. *Id.* at 19.

84. Report of the United States Delegation, *supra* note 46, at 8.

85. Draft Protocol I, *supra* note 27, art. 20 ter, at 19.

86. *Id.* art. 20 ter (1).

87. *Id.* art. 20 ter (2).

88. Fourth Geneva Convention, *supra* note 23, art. 138.

89. Draft Protocol I, *supra* note 27, art. 20 ter (3), at 19.

90. *Id.* art. 64 bis, at 53.

such, it represents an innovation of humanitarian law in this area.

Closely related to the issue of accounting for persons missing in action is the respect and maintenance of grave sites for those who are not nationals of the state in which they die. This apparently simple problem soon changed into a two-sided political issue with the United States on one side and the German Democratic Republic and the Soviet Union on the other. The United States was successful in convincing its opponents to delete a provision which exempted "war criminals" from the article regulating gravesites. The final wording, however, allows the host state to "regulate the practical arrangements" for visits to the graves.<sup>91</sup>

Rules were adopted which require that gravesites be respected, maintained and marked pursuant to the applicable procedures embodied in the Fourth Geneva Convention.<sup>92</sup> As soon as relations between the parties permit, agreements must be concluded which will facilitate access to and maintenance of the gravesites, as well as facilitate the possible return of the remains of the deceased upon proper request.<sup>93</sup>

### Grave Breaches

An issue of fundamental importance was settled with the adoption of Article 74 concerning the repression of grave breaches.<sup>94</sup> This article extends the penal sanctions of the four Geneva Conventions to draft Protocol I.<sup>95</sup> Under this system each contracting party has three essential obligations: first, to enact legislation providing for penal sanctions for persons committing grave breaches; second, to search for persons alleged to have committed grave breaches; and third, to either try these persons in their own courts, or to deliver them to another contracting party for trial.<sup>96</sup> Therefore, "grave breaches" are those violations of the Conventions or Protocol considered to be universal crimes and which are properly punishable by any contracting party to the Convention.

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91. Report of the United States Delegation, *supra* note 46, at 8.

92. Draft Protocol I, *supra* note 27, art. 20 quater, at 20.

93. *Id.* art. 20 quater (2).

94. *Id.* at 60.

95. See arts. 49-52; 50-53; 129-32; 146-49 of the Geneva Conventions, *supra* note 23.

96. Commentary, *supra* note 27, at 94.

Article 74 incorporates those acts deemed to be grave breaches under the four Geneva Conventions<sup>97</sup> and, in addition, defines the following acts under Protocol I as grave breaches:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects with the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects, . . . ;<sup>98</sup>

(c) launching an attack against works or installations containing dangerous forces with the knowledge that such attack will cause excessive [losses] . . . ;<sup>99</sup>

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack with the knowledge that he is *hors de combat*;

(f) the perfidious use of the Red Cross . . . signs . . . [and emblems].<sup>100</sup>

The overriding issue with respect to the new grave breaches was which guidelines could be established to distinguish properly between incidental and intentional violations. The United States delegation was extremely concerned with any rules that would incorporate subjective factors into the determination of whether incidental harm was "disproportionate" in relation to the military advantage sought.<sup>101</sup>

To a large measure, this problem has been remedied with the incorporation of language requiring that a grave breach constitute a "wilful violation." Additional restrictions placed on combat violations require that the target must have been the "object of attack"; or the attack must have been executed "with the knowledge" that the resultant excessive losses would be suffered.<sup>102</sup> This does not comprise a precise set of criminal statutes, but should be sufficient to ensure proof of a high degree of *mens rea* for combat violations.

Additional grave breaches were added to Article 74 because

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97. Draft Protocol I, *supra* note 27, art. 74(2), at 60.

98. *Id.* art. 50(2)(a)(iii), at 44 interprets this to mean loss or damage "which would be excessive in relation to the concrete and direct military advantage anticipated."

99. *Id.*

100. Draft Protocol I, *supra* note 27, art. 74(3), at 61.

101. See generally Solf & Grandison, *supra* note 32, at 589.

102. Report of the United States Delegation, *supra* note 46, at 4-5.

of intense political pressure by some states.<sup>103</sup> Included are such offenses as transferring persons in an occupied territory in contravention of the Fourth Geneva Convention,<sup>104</sup> unjustifiable delay in repatriation of prisoners of war or civilians, practices of apartheid and other inhuman practices based on racial discrimination, making historic or cultural objects the object of attack when there is no justification, and depriving a protected person of a fair trial.<sup>105</sup> These noncombat grave breaches are limited in the same general manner as all other grave breaches in that the particular conduct must be committed wilfully and in violation of the Protocol or Conventions.<sup>106</sup> Therefore, the apartheid breach is limited because the constitutive acts must also be in violation of some other article of the Conventions or Protocol.

In conjunction with the repression of grave breaches, the text of an article dealing with breaches resulting from a failure to act was adopted. A separate article was thought necessary to establish this principle because many national penal systems do not define the failure to act as a criminal offense.<sup>107</sup> Regardless of the problems that will be raised in certain states, the article requires the contracting parties to repress all grave breaches, and suppress all other breaches resulting from a failure to act when under a duty to act.<sup>108</sup>

This same article also deals with the problem of a superior's liability for failing to prevent a subordinate's breach. This rule establishes responsibility if the superior knew or had information from which he should have known that the subordinate was committing or going to commit a breach, and the superior did not take all feasible measures to prevent it.<sup>109</sup> This apparently omits the "Yamashita" requirement which states that the superior must have the power to prevent the breach.<sup>110</sup> Instead, a type of exhaustion of remedies doctrine is now required of the superior. Making this rule consistent with the differing military regulations of various states would probably be an

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103. *Id.*

104. Fourth Geneva Convention, *supra* note 23, art. 49.

105. Draft Protocol I, *supra* note 27, art. 74(4), at 61-62.

106. *Id.* at 61.

107. Commentary, *supra* note 27, at 96.

108. Draft Protocol I, *supra* note 27, art. 76, at 62.

109. *Id.*

110. Commentary, *supra* note 27, at 96.

impossible task. Therefore, the ICRC opted for this wide ranging proposition which ignores specific command chain rules and their peculiarities.

*B. Protocol II — Noninternational Armed Conflicts*  
Combat Restrictions

The central issue in the question of whether certain combat restrictions should be placed on the conduct of hostilities in an internal conflict was not the possible effectiveness of such rules, but rather the attitude of a majority of the Third World nations. It has been apparent that these governments have refused to alter their position that the scope of applicability of Protocol II should be limited. Their main reason was that they desired to retain their sovereign prerogative to deal with rebels as traitors and to punish them accordingly.<sup>111</sup> Essentially, it came down to the proposition of whether Protocol II was going to have any provisions curtailing combat actions.<sup>112</sup>

Fortunately, the third session was responsible for adopting the first articles circumscribing the actual conduct of hostilities in an internal armed conflict. In general, the regulations are identical to their counterparts in Protocol I.

The general theme, expressed in Article 20, states that the methods and means of combat are not unlimited.<sup>113</sup> This article proscribed the employment of any means or methods which would cause superfluous injury or unnecessary suffering.<sup>114</sup>

Regulations were adopted which incorporated the principles of quarter,<sup>115</sup> safeguarding an enemy *hors de combat*,<sup>116</sup> and

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111. See generally J. BOND, *supra* note 4, at 58-61.

112. At present, only Article Three common to all four of the Geneva Conventions of 1949 applies to internal armed conflicts. See note 3 *supra*. This provision guarantees only the minimum degree of humanitarian treatment for civilians and offers no assistance to rebels or insurgents. See O. UHLER, *GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 25-44* (J. Pictet ed. 1958) for a useful background on Article Three.

113. Draft Protocol II, *supra* note 27, at 18.

114. *Id.* The corresponding Article 33 in Draft Protocol I contains a prohibition against means or methods which could cause widespread, long-term, and severe damage to the natural environment. Draft Protocol I, *supra* note 27, at 31. An identical regulation is found in Article 28 bis of Draft Protocol II. Draft Protocol II, *supra* note 27, at 22. See also Cantrell, *supra* note 32, at 326.

115. Draft Protocol II, *supra* note 27, art. 22, at 19. See discussion of text at note 36 *supra*.

116. Draft Protocol II, *supra* note 27, art. 22 bis, at 19. This version omits the third paragraph of Article 38 bis in Draft Protocol I which deals with releasing those detained when safe evacuation is impossible. Draft Protocol I, *supra* note 27, at 33.

prohibiting the improper use of recognized signs.<sup>117</sup> The adoption of these articles indicate that Protocol II will contain the first international restrictions which are applicable to situations which heretofore have been governed by domestic law.

### Penal Prosecutions

Certain criminal procedural guarantees were adopted for the benefit of those accused of committing an offense during a noninternational armed conflict. These regulations bind both the government and insurgent groups when conducting criminal proceedings.

The general thrust of the requirements is that all accused persons are entitled to be tried before a tribunal which offers "the essential guarantees of independence and impartiality."<sup>118</sup> A minimum of procedural safeguards is then listed, including:

- (a) assuring prompt notice to the accused of the charges, and the rights and means of a defense;
- (b) limiting criminal responsibility to that of the individual and not incorporating the theory of collective responsibility;
- (c) establishing no criminal responsibility for acts consistent with the principle of *nullum crimen sine lege*;
- (d) establishing the presumption of innocence for the accused;
- (e) guaranteeing the right to be present at one's trial;
- (f) affirming the prohibition against self-incrimination;<sup>119</sup>
- (g) assuring the accused that he would be advised of the appropriate appeal procedures and time limits.<sup>120</sup>

These guarantees are a combination of the most important procedural rights to be found in the Third and Fourth Geneva Conventions, and comprise the essential minimum guarantees of a fair trial.

In addition to setting forth the various procedural rights of an accused, Article 10 also limits the application of the death penalty. It is forbidden to "pronounce" a sentence of death on

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117. Draft Protocol II, *supra* note 27, art. 23, at 19.

118. *Id.* art. 10(2), at 8.

119. *Id.* at 8-9.

120. *Id.* art. 10(3), at 9.

persons who were below the age of eighteen at the time of the commission of the offense, and it also is forbidden to "carry out" the death penalty on pregnant women and mothers of young children.<sup>121</sup>

Another important limitation on the use of the death penalty is a built-in mitigating factor for those who respect and obey the regulations of Protocol II. This mitigation principle applies to those persons who are prosecuted only for having taken part in the hostilities. The court is under a duty to consider the accused's respect for the rules of Protocol II when it decides upon the appropriate sentence.<sup>122</sup> This provision was clearly inserted to encourage combatants to respect all of the rules of Protocol II.

The death penalty is also forbidden with respect to those who are prosecuted for merely taking part in the hostilities. In no case can it be carried out until the end of the hostilities.<sup>123</sup> This flat prohibition combined with the mitigating principle of respect supplements the ICRC goal of encouraging a general grant of amnesty after the cessation of hostilities.<sup>124</sup>

### Execution of Protocol II

Four articles comprising the entire section dealing with the observance of the Protocol during armed conflict were adopted in the third session. The observance of the entire Protocol would consist of many separate actions taken by a state, including the dissemination of the regulations to civilian and military authorities; the establishment of a medical service; and the policing of the regulations during a conflict. Because of the various techniques which could be employed by different states in this regard, a general duty of observance was established: "Each Party to the conflict shall take the necessary measures to ensure observance of this Protocol by its military and civilian agents and persons subject to its control."<sup>125</sup>

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121. *Id.* art. 10(4). The prohibition against pronouncing the sentence of death is based upon the Fourth Geneva Convention, *supra* note 23, art. 68. However, the prohibition against carrying out the sentence against pregnant women and mothers of young children protects the child (born or unborn) and does not protect the woman. See Commentary, *supra* note 27, at 142.

122. Draft Protocol II, *supra* note 27, art. 10(5), at 9.

123. *Id.*

124. Article 10(7) states, "At the end of hostilities, the authorities in power shall endeavor to grant amnesty to as many as possible of those who had participated in the armed conflict." *Id.*

125. *Id.* at 28.



Closely associated with the general duty of ensuring observance is the requirement that the Protocol's rules be disseminated among the populace. Article 37<sup>126</sup> mandates that during peacetime the High Contracting Parties will disseminate the Protocol as widely as possible.<sup>127</sup> When an armed conflict breaks out, both the present government and insurgent group must take appropriate measures to disseminate the Protocol among their "military and civilian agents and persons subject to their control."<sup>128</sup>

The drafters included a method of achieving supplementary protection in internal armed conflicts through the use of special agreements. Because Protocol II offers only fundamental protection, the ICRC has always encouraged the parties to incorporate the wider scheme of humanitarian law applicable in international armed conflicts.<sup>129</sup> This provision allows the parties to bring all or part of the 1949 Geneva Convention and Protocol I into force by means of concluding agreements or mutual declarations between themselves.<sup>130</sup>

The final article concerning the execution of Protocol II allows each party on option to request the services of the International Committee of the Red Cross.<sup>131</sup> This optional provision affirms the traditional role of the ICRC in this area,<sup>132</sup> but regrettably omits the original draft's encouragement to the parties to request assistance from any impartial body that could provide assistance.<sup>133</sup> Overall, however, this deletion cannot be considered as crucial to the entire framework of this section. The fundamental responsibility for ensuring observance of the

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126. *Id.*

127. There was a preliminary objection to peacetime dissemination of the Protocol because it might encourage insurrection. Fortunately, the ICRC drafters prevailed in the debate, and the rule remained in the article. See Commentary, *supra* note 27, at 169.

128. Draft Protocol II, *supra* note 27, art. 37(2), at 28.

129. This provision was based on common Article 3 of the Geneva Conventions, *supra* note 23, which states, "The Parties to the conflict should further endeavour (sic) to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."

130. Draft Protocol II, *supra* note 27, art. 38, at 28. The original ICRC plan also included the proposition that a single party could make a unilateral declaration as to the wider scheme of protection, but this proposal failed to gain the necessary support. See Commentary, *supra* note 27, at 170.

131. Draft Protocol II, *supra* note 27, art. 39, at 28.

132. This initiative is set forth in common Article 3(2) of the four Geneva Conventions, *supra* note 23.

133. Commentary, *supra* note 27, at 170.

Protocol shall always remain the primary duty of the parties to the internal armed conflict. Moreover, the application of humanitarian law in internal hostilities will be governed by the parties' motivations and desires. Realizing this proposition, the regulations requiring dissemination of the Protocol to both sides can be seen as the key achievement of the third session of the conference and constitute the greatest cause for optimism in this area.

## V. CONCLUSION

The adoption of forty-two articles at the third session of the Diplomatic Conference is an indication that the various delegations have toned down the political rhetoric that was present in the earlier sessions. Strong political differences between blocs did (and still do) remain, but their presence was accepted in a compromising manner which allowed substantial progress to be made in both protocols. This compromising spirit has generated an optimistic outlook that the three main committees and working groups will conclude the forthcoming discussion session on time. Perhaps more importantly, the texts which were adopted at the fourth session will have undergone the process of preliminary adoption in an atmosphere of reason and compromise. This will undoubtedly assure that the final adoption of the plenary will be accomplished with a minimum of political interference which could ultimately delay the protocols' final approval.

The position of the Third World bloc nations has remained the same since the fundamental issue over the status of wars of liberation was settled by elevating them to the category of international armed conflicts. Protocol I will now cover these conflicts, and give them a *prima facie* legitimacy. The Third World bloc has considered this elevation of liberation conflicts to substantially reduce the scope and importance of Protocol II and civil conflicts. Satisfied with this major victory, the Third World nations view Protocol II so narrowly as to make it meaningless. Therefore, the subsequent acceptance and use of Protocol II in the Third World area cannot be realistically expected. This is especially disappointing in light of the fact that the majority of liberation wars will undoubtedly be fought in the Third World.

Some observers have privately stated that the narrowed scope of Protocol II will probably allow the majority of develop-

ing states to formally sign the document. If this is true, then Protocol II's application will have a narrow scope, but its protection will at least technically be extended to a few types of armed conflicts within its perimeter.<sup>134</sup> This occurrence could be viewed as a small victory by optimistic observers. However, the drafters' ideals of expanding humanitarian protection to all civil armed conflicts has fallen woefully short.

At the time of this writing the Fourth Session has concluded, and the Conference will meet in plenary session at some future time to formally adopt the texts of the Protocols. The formal signing of the Protocols will supplement the existing 1949 Geneva Conventions and form an updated and improved text of humanitarian law in armed conflicts. With the exception of the disappointments of Protocol II and its probable nonuse, the achievements of the sessions will undoubtedly be viewed as historic events in the chronicle of humanitarian law.

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134. Specifically, rebels could maintain a type of sporadic control over territory, instead of having a continuous control, and thus arguably be entitled to the protection of Protocol II. See Draft Protocol II, *supra* note 27, art. 1, at 2-3.